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Unfunded Mandates and State Constitutions: Lessons from Florida

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STATE CONSTITUTIONS CAN AFFECT FISCAL

policy either by acting as fiscal restraints that limit the scope of government or by imposing fiscal pressures that expand or place demands on government.¹ One way in which constitutions place restraints on state governments is by limiting state mandates on local governments.

Mandates can take many forms (one analyst identified 15 different types of state mandates),² but we focus here on unfunded mandates by which the state government requires local governments to take specific actions (e.g., create a new government program) without associated state funding. Over a quarter of the states place some constitutional limits on mandates, and most provisions were enacted in the 1980s and 1990s.³ In this piece, we use Florida's experience to discuss why rules limiting mandates are so difficult to implement.

BACKGROUND ON MANDATE RULES

There has been little systematic work on the effectiveness of mandate rules, in part because it is so difficult to accurately measure the costs associated with mandates. One analyst writes that “the impact of mandates cannot be quantified definitively,” and notes that studies “have avoided the fool’s errand of trying to estimate total mandate costs.”⁴ Of course, governments that have mandate rules *do* need to construct such estimates for specific mandates to determine whether or not they are appropriately funded. We will return to this issue later.

It would seem straightforward to limit unfunded mandates, but as David Primo notes in his work on state constitutional reform, rule designers need to pay careful attention to important details.⁵ One 1994 survey of state and local officials “produced mixed results” in terms of how respondents assessed “the

degree of protection offered to local governments against mandating and the adequacy of mandate reimbursement provisions.”⁶ Two states classified by one researcher in the 1990s as having “successful” reimbursement programs, California and Massachusetts, are telling examples.⁷ In Massachusetts, the legislature has sometimes reduced state aid to localities to free up money to reimburse local governments for state-imposed mandates.⁸ And in California, the state has issued what are called “disclaimers,” exempting itself from having to reimburse local governments for certain mandates, leading one budget official to call the reimbursement mechanism “totally inadequate.”⁹ For instance, consider the “crimes and infractions” disclaimer, intended for state legislation “defining a new crime or changing an existing definition of a crime.”¹⁰ According to one report by California county governments, this disclaimer has been invoked in situations where state legislation creating a mandate had an incidental law enforcement component (e.g., a new government program for which a compliance failure may be subject to criminal sanction).¹¹ That these states are considered success stories suggests the limitations of mandate rules.

FLORIDA’S CONSTITUTIONAL AMENDMENT LIMITING UNFUNDED MANDATES

Florida’s constitutional mandate provision further illustrates these limitations. In 1990, voters in Florida approved an amendment to the state constitution that reads, “No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds.”¹² Although this rule seemingly limits the actions of the state government, looks can be deceiving. First, counties and municipalities are not the only forms of local government; Florida also has “special districts” and “school districts.” Second, “general laws” are not the only laws that can be written—though they are more common than “special laws.” Third, the amendment continues:

[Mandates on local governments to spend funds shall not be binding] unless the legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989, that can be used to generate the amount of funds estimated to be sufficient to fund such expenditure by a simple majority vote of the governing body of such county or municipality; the law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or the law is either required to comply with a federal requirement or required for eligibility for a federal entitlement, which federal requirement specifically contemplates actions by counties or municipalities for compliance.¹³

In other words, the state legislature can impose a mandate on local governments if a two-thirds majority agrees that the law “fulfills an important state interest” (raising the question of why the state would enact a law that didn’t fulfill an important state interest). In fact, guidance for legislative drafters notes that the “most effective means of doing this would be in the insertion of a provision into the bill.”¹⁴ Alternatively, the state can impose an unfunded mandate on a local government if it gives the local government permission to institute taxes to pay for that mandate. Or, it can impose a funded mandate based on cost estimates that turn out to be inaccurate (essentially leaving part of it unfunded). A later subpart of the amendment also excludes several types of laws, including criminal laws and laws having “insignificant fiscal impact,” from the unfunded mandates requirement.¹⁵

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ANALYSIS

The Florida amendment is poorly designed, since it does not prevent unfunded mandates in several scenarios. In addition, the amendment is vague, since it neglects to define “insignificant fiscal impacts” and relies on estimates of a mandate’s cost without specifying how those estimates are to be arrived at. Finally, clause (e) states, “The legislature may enact laws to assist in the implementation and enforcement of this section.”¹⁶ Despite multiple attempts, the legislature has never passed any such laws, though it did create internal guidelines for evaluating whether legislation met the requirements of the amendment.¹⁷

Primo has written, “Constitutions can elevate the status of a rule or can give it relative permanence compared to a statute, but they will not magically transform poorly designed rules into effective rules.”¹⁸ The Florida amendment is a case in point. It contains imprecise language, no clear metric for determining mandate costs, delegation to the legislature on implementation, and opportunities for what Eileen Norcross calls “fiscal evasion,”¹⁹ especially through permissible exemptions.

For instance, when determining whether the “similarly situated” exemption applies, 1991 legislative guidance states, “The determination of similarly situated should be independent of a local government’s status as a local government. However, if only cities and counties are affected by the issue, this exception does not apply. If, on the other hand, by the nature of the issue in the bill being analyzed, only local governments (all local governments, not just cities and counties) could be affected and these are treated similarly,

the exception is met.”²⁰ In other words, if a mandate is imposed on cities, counties, *and* other local governments equitably, then the state can impose all the unfunded mandates it wants.

Despite these flaws, has the Florida rule been effective? Based on our review of the literature, Florida’s is the only state mandate provision that has been studied using econometric techniques, specifically a synthetic control method.²¹ A synthetic control method compares the experience of Florida with a composite of other states that are similar to Florida except that they were not exposed to a particular treatment (in this case, a change in unfunded mandate rules). Although directly measuring mandate costs is still impossible for the reasons described earlier, analyzing aggregate expenditures is still relevant. According to this analysis, mandate reform in Florida led the state to shoulder more spending on its own, rather than shift costs to localities, and the costs it did shift were imposed on special districts not covered by the amendment. The paper is limited by its focus on aggregate spending, but it reinforces the idea that while the amendment may have placed some constraints on state officials, it ultimately had many loopholes that limited its effectiveness.

In describing the situation regarding mandates on counties in Florida, the Florida Association of Counties and Florida Association of County Attorneys state, “Although [the unfunded mandates amendment] was considered a win amongst many local government officials, there were many exemptions and exclusions that allow for the continuance of cost-shifting legislation by the state. Even [now], counties remain particularly susceptible to mandate legislation.”²² And, at a conference of Colorado county

commissioners, it was reported that Florida county officials say that “it is too easy for the legislature to declare ‘an important state interest’ and appropriate a reduced amount to cover cost estimates at the time of passage. In addition, securing a 2/3 vote is not difficult.”²³

POLICY IMPLICATIONS

What lessons can other states draw from Florida’s experience? To be sure, the spirit of mandate rules is sensible, since the rules strive to prevent legislators from imposing new spending without having to account for how that spending will be paid for. While it may be the case that Florida is better off fiscally because the amendment imposed at least some constraints on unfunded mandate behavior, its benefits have been limited by measurement issues, implementation details left to state government officials who had incentives to underestimate costs, and exemptions for some types of local governments and local government functions. The lesson here—one that has been a theme in Primo’s work on budget rules—is that details matter.

NOTES

1. Some examples and/or concepts in this paper were first presented in David M. Primo, “State Constitutions and Fiscal Policy” (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2016).
2. Joseph F. Zimmerman, *State-Local Governmental Interactions* (Albany, NY: State University of New York Press, 2012), 79–81.
3. The two most comprehensive reviews of state constitutional limits in this area are Justin M. Ross, “Unfunded Mandates and Fiscal Structure: Empirical Evidence from a Synthetic Control Model,” (working paper, 2016); Zimmerman, “State-Mandated Local Government Expenditure Distortions,” chap. 4 in *State-Local Governmental Interactions*.
4. Janet Kelly, “Unfunded Mandates: The View from the States,” *Public Administration Review* 54, no. 4 (1994), 405.
5. Primo, “State Constitutions and Fiscal Policy.”
6. Joseph F. Zimmerman, *State-Local Relations: A Partnership Approach*, 2nd ed. (Westport, CT: Praeger, 1995), 100.
7. Janet M. Kelly, “Mandate Reimbursement Measures in the States,” *American Review of Public Administration* 24, no. 4 (1994).
8. Kelly, “Mandate Reimbursement Measures in the States.”
9. Zimmerman, *State-Local Relations*, quoted at 101.
10. Cal. Const. art. XIII B, § 6.
11. Zimmerman, *State-Local Relations*, 101.
12. Fl. Const. art. VII, § 18(a).
13. Fl. Const. art. VII, § 18(a).
14. Florida Legislative Committee on Intergovernmental Relations (LCIR), *2009 Intergovernmental Impact Report*, 2010, Appendix 2. For other LCIR reports, see State Library and Archives of Florida, Florida Public Documents Collection, “Intergovernmental Impact Report: Mandates and Measures Affecting Local Government Fiscal Capacity,” accessed November 9, 2017, <http://edocs.dlis.state.fl.us/fldocs/leg/lcir/mandates/index.htm>.
15. Fl. Const. art. VII, § 18(d).
16. Fl. Const. art. VII, § 18(e).
17. Florida LCIR, *2009 Intergovernmental Impact Report*.
18. David M. Primo, “Making Budget Rules Work” (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2014), 21.
19. Eileen Norcross, “Fiscal Evasion in State Budgeting” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, 2010).
20. Florida LCIR, *2009 Intergovernmental Impact Report*, Appendix 2.
21. Ross, “Unfunded Mandates and Fiscal Structure.”
22. Florida Association of Counties and Florida Association of County Attorneys, *Mandates on Counties in Florida*, 2016.
23. “Unfunded Mandates Overview,” (agenda, Ten-County Budget Conference 2009, Breckenridge, CO, September 24, 2009).

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