NCHRP
National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

February 1995 Number 32

Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: IA Planning and Administration, IC Transportation Law, VI Public Transit

Federalism and the Intermodal Surface Transportation Efficiency Act of 1991

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Ross D. Netherton. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

This paper will be published in a future addendum to *Selected Studies in Highway Law* (SSHL). Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the 4-volume set is for sale through the Transportation Research Board ($185.00).

APPLICATIONS

American federalism—the relationship between the federal and the state and local governments—has survived because it has been able to accommodate changes in the nation's needs, goals, and public policies. In the field of surface transportation, this ability has been tested severely over the past 20 years as a result of major advances in technology, rearrangement of demographic patterns, socio-economic changes, and shifts in public policy. In surviving the impact of these trends, the federal-state relationship through which surface transportation systems have been developed in the twentieth century has itself undergone major changes. This process entered its latest and present phase with enactment of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA).

This report should give state officials, particularly legislators, highway administrators, attorneys, planners, and financial officials, a better understanding of the federal-state relationship, how federalism has changed over the years, and how federalism and ISTEA affect their respective highway programs.

CONTENTS

Federalism and the Intermodal Surface Transportation Efficiency Act of 1991

by Ross D. Netherton

Attorney at Law
Falls Church, VA

HISTORICAL PERSPECTIVE

Dual Federalism and Cooperative Federalism

Federalism is a concept for structuring government so that matters of national or general concern are dealt with by a component with central control, and matters of lesser or particular concern are dealt with by components at local or regional levels. At each level these components have the legal and political power to effectively carry out their responsibilities within the territorial jurisdictions assigned to them. As national needs and circumstances change, this concept of federalism makes it possible to adjust the division of responsibilities and allocation of powers between the states and national government to deal with these changes. Historically, this form of federalism made it possible for the United States to expand to continental dimensions without sacrificing the principles and objectives for which independence was sought.

American federalism has been described as moving from dual federalism to cooperative federalism. The essential principles of dual federalism are as follows:

1. The national government is one of enumerated powers, which are set forth in the U. S. Constitution.
2. The purposes the national government may promote are correspondingly limited to what is necessary and proper to exercise those enumerated powers.
3. Within its scope, the national government is competent to act directly on individuals and need not depend on the states to carry out its decisions or programs.
4. Within their respective spheres, the national and state governments are "sovereign" and therefore "equal."
5. Where differences arise in the working relationship between state and national governments, a method is needed to resolve those differences and restore effective and harmonious government.[1]

Dual federalism so defined implied that, for the most part, the national and state governments would function independently as parallel self-sufficient sovereignties.

Situations in which actions of the state and national governments were inconsistent with each other arose early in the federal system's history and led to Supreme Court decisions that commenced the evolution toward cooperative federalism. In these decisions, identified with the Court under Chief Justice John Marshall (1801–1835) and Justice Joseph Story (1811–1845), the enumerated powers of the national government were interpreted broadly in conjunction with the "necessary and proper clause" and "supremacy clause" of the Constitution. Although Marshall's critics charged that he was making the national government one of indefinite powers at the expense of the states,[2] such a trend was not reflected in the cases dealing with regulating interstate commerce in the nineteenth century. Among the cases involving the Commerce Clause, which came to the Supreme Court prior to 1900, the overwhelming proportion arose out of state regulations. The doctrine that evolved from them defined the limits of the states' power but did not become a new source of national power.[3]

A doctrine of dual federalism based on maintaining exclusive spheres of competence, however, ran counter to the rising popular demand that national attention be focused on, and remedies be found for, nationwide problems. In addition, it appeared to ignore the accepted view that the framers of the Constitution intended to create a national government of independent powers extending to all resources and objects within its enumerated sphere. Thus, Marshall's interpretation of the constitutional allocation of power became the basis for enactment of the Interstate Commerce Act in 1887 and the Sherman Anti-Trust Act in 1890, while state responsibility for regulation of the great part of commercial, industrial, and agricultural activity continued until the 1930s. At the same time, industrialization, corporate commerce in marketplaces that crossed state lines, continental communication and transportation networks, world markets for agriculture, and mobilization for a world war all presented problems beyond the reach of state governments. The idea of a federal system with flexibility to permit responsibility to shift from the state to the national level in response to changing needs and conditions began to be taken more seriously.[4]

Building on this premise, by the 1940s a view had evolved that offered cooperative federalism as an alternative to the coexistence of dual federalism.[5]

Two other factors contributed to this reappraisal of federalism. One was the Supreme Court's gradual recognition that the effort to define an area of state governmental functions that were beyond the reach of Congress had not succeeded through textual construction of the Constitution or examination of its legislative history.[6]

The second factor was a growing state and local interest in fostering intergovernmental cooperation and a belief that the efforts of all levels of government were needed to meet the nation's most pervasive and urgent needs.

Cooperative Federalism as a Framework for Change

The premises underlying cooperative federalism may be summed up as follows:

1. The Constitution and the national political processes contemplate a federal system that is cooperative.
2. The division of responsibilities between the states and the federal government in this system has not been finalized and may never be, so at any point in history the roles of the governments at all levels are determined by pragmatic consideration of needs and means.
3. Needs are determined by political processes, and means are determined by realistic evaluations of respective governmental ability and willingness to meet needs as they arise.

In this process, the long-term trend has favored concentration of responsibility at the national level.[7]

Where dual federalism emphasizes maintaining the separate powers and programs of state and national governments, cooperative federalism seeks to produce a blended program in which federal funding is used to aid state and local action. In this way, state and local governments are put in a position to meet socioeconomic needs that are most important to them. In turn, Congress will be able to achieve its goals indirectly through state and local action.[8]

Prior to the 1960s, this rationale was generally borne out in practice. Typical federal-aid programs promoted the general welfare, but did not involve ancillary

promotion of extraneous national purposes. Rather, they were carried on to help states and local governments accomplish their own objectives in fields of activity, which by law, custom, comity, or tradition were acknowledged to be state and local responsibilities. Thus, in the case of federal highway aid, it was the states that set the goal of "getting the farmer out of the mud" through improved rural road networks.[9] States and local bodies decided where, when, and how their roads would be built. Federal oversight was chiefly to ensure that funded work was carried out efficiently and economically. In the process, federal influence also worked to improve standards of design and construction and preserve the system's engineering integrity by preventing deviation as a result of local political pressure.

Not even the landmark expansion of the federal-aid highway program in 1956—which involved construction of the National System of Interstate and Defense Highways, the establishment of pay-as-you-go financing provided by user-beneficiaries through a Highway Trust Fund, and the designation of urban highway systems—disturbed the program's basic emphasis on state policy and programs.

In the 1960s, cooperative federalism entered a new phase, with dramatic increases in national programs directly addressing activities that previously had been the responsibility of state and local governments—namely, education and manpower training, local and regional economic development, law enforcement, health services, and environmental quality. In the field of surface transportation, grants of federal-aid funds for highways, mass transit, and highway traffic safety were made conditional on the recipient's compliance with national standards and regulations laid down by Congress and the Administration for achieving the goals of other nontransportation programs. Federal programs occasionally experienced major delays while waiting for states to pass compliance laws, and administrative oversight of federal-aid projects became more costly because of negotiations over compliance.[10]

Caught between the demands of strong congressional and executive leadership and resistance to changing state, local, and private practices, Congress sometimes did not speak authoritatively on where it intended the federal system to be balanced. To state and local governments, however, it sometimes seemed that their role had become that of convenient administrative agents to carry out national policies and programs.[11]

Noting these trends, some commentators have suggested that cooperative federalism is evolving into a system of "interactive federalism," characterized by an informal give-and-take relationship in which state and federal roles are shaped by the circumstances of the case and are the result of negotiated compromises.[12]

The Dynamics of Interactive Federalism

An interactive process should be capable of producing pragmatic solutions without coercing the sovereignty of either party. But in specific cases, states complain that they cannot negotiate as equals with federal grant agencies, and their theoretical option of declining to accept conditional federal grants simply is not practical.[13] This is especially true where states commit themselves to long-term investments at certain levels, as in the case of surface transportation systems.

Historically, the Supreme Court has served as arbiter of the constitutional boundary between state and federal responsibilities. Its record, however, is mixed. In dealing with charges that federal grant conditions are coercive, the Court has failed to offer a workable test. And in dealing with federal preemption of state and local regulatory responsibilities, courts have treated it as an exercise in statutory construction without serious reference to constitutional implications. Moreover, the courts have not addressed the growing trend of preemption by federal administrative agencies acting under rulemaking authority delegated to them by Congress to implement federal programs. Nor have rules been developed for determining the extent of "implied preemption" resulting from administrative agency action.[14]

To date, the search for a "law of federalism" has not produced any durable formula for cooperation. In 1976 the Supreme Court ruled in *National League of Cities v. Usery* that Congress could not preempt or regulate those functions that are "essential to separate and independent existence" of states and that provide "services...the States have traditionally afforded their citizens."[15] But federal courts never applied the rationale of *National League of Cities* to congressional action under its constitutional spending power, and after 9 years, the Court reversed that decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[16]

In *Garcia*, the Court appeared to give up trying to say specifically what substantive functions are essential to separate and independent existence of states and declared that "[s]tate sovereign interests...are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[17] Although the decision in *Garcia* did not entirely rule out the possibility of substantive limits on Congress' constitutional authority under the Commerce Clause, it encouraged speculation as to how procedural techniques might achieve an enforceable balance of power.[18]

Federalism Since *Garcia*

Interest in procedural safeguards for federalism predated *Garcia*, and in that decision the Supreme Court reached back to commentaries in the 1950s that asserted that "the actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority."[19] This premise has its advocates,[20] but it also has critics who warn that protection of the states' institutional interests ultimately depends on how they are recognized and accommodated in Congress. If state institutional interests are not effectively represented in Congress, then the decision in *Garcia* leaves state autonomy seriously weakened.[21] Moreover, political principles sometimes must yield to economic constraints. Where states simply cannot afford to resist prerequisites to federal aid, recourse to political confrontation is not a realistic alternative to compliance.[22]

Congress in the 1980s continued its trend to intercede in a wide range of problems that attracted nationwide notice and concern or that were perceived to be inadequately dealt with by state and local efforts.[23] This willingness to expand the scope of national responsibilities was illustrated in several surface transportation authorization bills enacted during that decade.[24]

In the executive branch, the Reagan Administration took office in 1981 espousing a policy of reducing "big government" and restoring the effectiveness of state government in a system of revived dual federalism. Under presidential authority, several steps were taken to address the balance of federal and state functions, such as requiring assessment of the impact on federalism of proposed rulemaking actions and establishing uniform regulations for administration of federal grant programs.[25] Implementation of these and similar measures focused

more attention on the administrative process and the need for national standards, federal regulations, and executive agency guidelines to be drafted with greater sensitivity to the problems encountered when complying with them. Such improvements were appreciated by state and local government officials and the citizens who were directly affected by regulatory or paperwork aspects of grant-in-aid programs, but they could not reach the central source of growth of the national government's role in the federal system, which resided in Congress's own orientation to the federal system.

The impetus for a further attempt to reconcile post-New Deal trends in the growth of national responsibilities with some enforceable legal limitations on that trend within the federal system came from the Supreme Court itself in 1992. The case providing this opportunity was *New York v. United States*.[26] Here, a divided court upheld the constitutionality of congressional authorization for states to deny access to or impose surcharges on the use of their low-level radioactive waste disposal sites, but it ruled that Congress could not require states either to regulate waste disposal according to federal instructions or to accept ownership of the waste in question and be responsible for its disposal and liability. Characterizing this as "commandeering" the state government to take action that Congress itself had no constitutional power to take, the court declared that "a choice between two unconstitutionally conceived regulatory techniques is no choice at all."[27] It stated its new "law of federalism" this way:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript State government as its agent.[28]

In this latest statement, the Court appears willing to resume at least a limited role of umpiring the results of continued congressional replacement of state and local responsibility in areas traditionally handled by the latter. It believes the duty of the umpire is to be concerned with protection of the integrity of the states' independence of judgment and governmental processes, rather than preserving any particular substantive functions exclusively for state and local action.[29] Although it heavily discounts the conclusion of *Garcia* that political processes can be relied upon exclusively to keep the federal system healthy, it accepts the fact that the national government was created and continues to survive because the Constitution is a political document, as well as a source of legal rights and duties.

FEDERALISM UNDER THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT

Reorientation of National Surface Transportation Policy and Program Objectives

Interstate and Post-Interstate Programs Compared

When hearings on reauthorization of the federal surface transportation program commenced in 1990, the themes of the anticipated changes became sharply focused. The goal of the program that was carried on from 1956 to 1990 had been stated as a clear engineering mission: construct the Interstate System and bring the other federal-aid road system up to standards for efficiency, economy, safety, and design excellence, and do it within a funding period of 34 years.[30]

The Federal-aid Highway Act of 1956 reflected this orientation in its two-level administrative structure for planning, design, land acquisition, and construction of the highway modernization program that it established. Funding the program with fixed formulas encouraged state-by-state concentration on these four elements of the total highway system and provided an atmosphere of stability for the long-term commitment of federal and state matching funds.[31]

Congressional hearings during 1990 and 1991 recognized that the highway program from 1956 to 1990 had made it possible to build a remarkable system of highway facilities, but that expansion of this infrastructure had not made the American transportation system efficient enough to sustain the nation's position as a competitor in global markets.[32]

The Senate Committee concluded:

> The plain fact is that traffic congestion has grown during this period of massive highway construction....[E]ven if we had greater resources than we do, adding to highway capacity does not any longer seem a promising road to increased highway efficiency. In city after city we heard of horrendous congestion problems. Yet this was a problem the Interstate System was meant to resolve.[33]

Objectives and Structure Redefined

Accordingly, congressional strategy for its post-interstate program focused on the efficiency of the surface transportation system as a whole and called for utilizing all the surface transportation modes in an integrated intermodal system. Programs that previously had developed airports and arterial highway networks with no special attention to efficient access between the two would, in the future, be directed to work together to plan airports and highway facilities and coordinate their design and construction.[34]

The objective of increasing the efficiency of an intermodal transportation system was linked to the larger goal of increasing the country's national economic productivity and its competitiveness in the world marketplace. As a planning strategy, surface transportation facilities were made subject to marketplace pricing and competition among the modes of transportation and among projects within each mode. Transportation planners who in the past had been accused of treating public facilities as if they were "free"—that they could be used with no significant cost to the community—were told to adopt new premises that ensured a full accounting of the costs and benefits of projects.

In the process of inaugurating the post-interstate program, Congress did not speak directly to what implications this change held for federalism. But Congress's new definition of the objectives of the Intermodal Surface Transportation Efficiency Act (ISTEA) may be significant when viewed in the philosophical context of federalism noted earlier. Whereas previous federal-aid highway programs, going all the way back to the 1920s, had been conceived principally, if not entirely, in light of engineering and land acquisition problems, the post-interstate program could not be reduced to engineering specifications or appraisal principles.[35]

By designating intermodality and flexibility as key features of ISTEA, Congress left no doubt that the post-interstate program also intended to turn away from the earlier reliance on categorical formulas. The congressional report stated:

> [O]ne of the most important things this legislation can do is give state and local officials the flexibility to make the crucial decisions on how their funds should be used. They will have the ability to choose the best transportation solution without the artificial constraints of funding categories....
>
> However, flexibility has its limits, and a system in which each state has complete flexibility to use its funds for any purpose is no system at all. Rather than removing all

national focus from the program and permitting balkanization among the states, the Committee believes that the right balance between these competing concerns is to have a national focus in the bill in order to most effectively advance the national goals of integrating the nation and moving goods and people in interstate and foreign commerce, while providing states sufficient flexibility to meet their unique problems.[36]

As to achieving an intermodal transportation system, the report declared:

> It is essential that the short-sighted policy of maintaining separate and disconnected transportation components be replaced with a cooperative, coordinated national intermodal system using all available resources in both the public and private sectors.
>
> Intermodality simply means using just such a coordinated, flexible network of diverse but complementary forms of transportation to move people and goods in the most energy-efficient manner.... [It] must include all forms of transportation—highways, mass transit, inland waterways, and rail—in a unified, connected manner that uses the most efficient form of transportation at all times.[37]

Seen in the perspective of federalism, the goals announced by Congress for the nation's surface transportation system in the post-interstate program involved continued reliance on cooperative federalism and, indeed, the expansion and refinement of that system through use of conditional grants in aid to the states.

Cooperative Federalism and Conditional Grants

The Power to Prescribe

In ISTEA, Congress carried over into the post-interstate program the policy of using conditional grants to state and local public agencies concerned with highways and mass transit. Originally justified by the logic that oversight was necessary to ensure that federal funds were used in accordance with the purposes and terms specified by Congress, the practice of placing conditions on the eligibility for and use of federal-aid funding came to be used for other purposes in the federal-aid highway acts and federal transit assistance acts.

Since the 1960s, this technique of conditional grants has been used to actively promote various other activities Congress chose to carry out indirectly through delegation of rulemaking authority to federal administrative agencies or through inducing state and local governments to take the regulatory actions needed. The resulting body of federal rules, standards, guidelines, and procedures grew to be voluminous, but generally it did not cause controversies over states' roles or states' rights prior to the 1960s. This may be because these layers of law allow political changes to be introduced without seeming to harm federal-state relationships and because state and local officials are compensated for federal intrusions into their traditional authority with fiscal assistance and federal assumption of responsibility for decisions that may be too painful for local and state authorities to make.

As long as the Federal Highway Administrator's determination of noncompliance was not arbitrary or capricious, this arrangement appeared to be an effective framework for cooperative federalism. In fact, during its first half century the federal-aid highway program earned a reputation as a leading example of harmonious and successful cooperation.[38] Instances of state-federal confrontation were rare and generally arose from causes outside the highway program—for example, when state authority to obligate apportioned federal-aid funds was withheld as a means of controlling inflation. In that instance, it was held that the U.S. Department of Transportation and the Office of Management and Budget acted improperly because their reasons were remote and unrelated to the highway act.[39]

Conditional Grants and Coercion

When federal standards and policies regarding highway program features have required states to enter into controversial fields or change longstanding state law and local practice, cooperative federalism has sometimes become strained. So when Congress enacted national standards in the 1960s for control of outdoor advertising adjacent to interstate and federal-aid primary highway systems and required states to enact their own conforming laws, Vermont challenged the legislation on the grounds that the traditional roles of state and local governments in regulating land use were being overridden simply to enforce nationwide uniformity, regardless of how well existing state law achieved national program goals. The court denied that this statutory requirement violated the Tenth Amendment.[40] It applied a two-step test to the case: (1) Is the challenged measure reasonably related to a legitimately national end? and (2) Does the challenged measure coerce the state into participating in the federal scheme, or does it merely induce the state to act? As to the national character of the act, there was no serious dispute, and on the matter of coercion, the Court felt that the loss of 10 percent of a state's federal-aid funds "when considered in relation to the state's entire allocation of Federal highway aid...[did not] irresistibly compel a state under threat of economic catastrophe to embrace the federal plan."[41]

Coercion was also charged when the state of Nevada challenged a congressional mandate to bring the state vehicle speed limit law into conformity with a national 55 mile per hour (mph) limit as a precondition to receiving federal-aid highway funds. Alleging that failure to comply would result in withholding approximately 95 percent of Nevada's highway funds, the state argued that it had no real choice but to comply and hence the national speed limit violated the "coercion limitation on Congress's constitutional spending power."[42] The court ruled otherwise, but avoided dealing with the point squarely by concluding that it could find no satisfactory definition of "coercion." It pointed out that in *Garcia v. San Antonio Metropolitan Transit Authority*, the protection of states from coercive federal grant conditions depended more on the national political process than on judicial judgment.[43] But in passing, the Court noted that congressional spending powers were broad enough to allow it to impose a national maximum speed limit if it wished to do so. The Court stated:

> [W]e hold that (1) if Congress has the authority under an enumerated power (other than the Spending Power) to compel the States through direct regulation to change its practices, then it may also achieve that result through the more gentle commands of the Spending Power, and (2) in this case Congress could have relied on its authority under the Commerce Clause to establish a national speed limit.[44]

In *Nevada v. Skinner*, the Ninth Circuit Court relied heavily on the Supreme Court's decision 2 years earlier in *South Dakota v. Dole*, where a precondition to receiving federal highway aid was that the state must enact legislation prohibiting purchase or possession of intoxicating liquor by anyone under 21 years of age. South Dakota challenged the constitutionality of this condition, declaring that according to the Twenty-first Amendment to the Constitution, Congress had no power to regulate the sale or use of intoxicating beverages.[45] Surely, the state argued, this is an example of the "independent bar" referred to in *Garcia* as limiting the reach of the spending power. The court disagreed. Although Congress

might be precluded from directly regulating the age limit for drinking, it could choose to promote its policy indirectly. The power of Congress to authorize expenditure of public money for public purposes, it explained, "is not limited by the direct grants of legislative power in the Constitution. Thus, objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[46]

The court went on to declare that conditional grants are nonetheless subject to four general limitations:

1. They must be used in pursuit of the "general welfare."
2. The condition must be described unambiguously.[47]
3. Conditions must be related to federal interest in particular national projects or programs.[48]
4. Other constitutional provisions must not provide "an independent bar" to the conditional grant of federal funds.[49]

The nature of the independent bar referred to in the court's fourth limitation was not explained beyond what the Supreme Court had said in *South Dakota v. Dole*, namely, that "the power may not be used to induce the State to engage in activities that would themselves be unconstitutional."[50] Subsequently, however, one example was identified when Congress directed that a federally owned airport should be transferred to a regional authority on the condition that the regional authority perform an act that violated the constitutional separation of powers doctrine.[51]

Within the U. S. Supreme Court there continues to be concern over the effects of conditional grants on the vitality of federalism. The ruling and the reasoning in *South Dakota v. Dole* have been criticized as a misreading of the earlier decisions in *U. S. v. Butler*[52] and *Steward Machine Company v. Davis*,[53] but the Supreme Court has chosen not to clarify *South Dakota v. Dole*. In the Court's most recent opportunity to explain the criteria of coercion, in *New York v. United States*, the conditional assistance requirements in the case were tested by reference to whether the residents of the state retained the ultimate decision as to whether or not the state would comply with the condition.[54]

The courts' persistence in describing conditional federal aid as a form of contract that parties are free to accept or reject may be unrealistic because, in practice, the state and Congress do not bargain as equals[55] and because Congress has no intention of offering a choice that might jeopardize full implementation of its national program or achievement of its national objectives. The contract analogy leaves certain questions unanswered: If a state accepts federal aid to engage in a 10-year highway rebuilding program, adds its own money to the program, and commences work, is the state obliged to comply with any condition Congress may decide to impose on that grant at any time in the future? Are the terms of their federal-aid "contract" set at the time of initial acceptance so as to prevail until the contemplated work is completed? Where Congress has constitutional power to regulate a subject directly, should it be forced to use that power (and take responsibility for its use) in preference to imposing that regulatory responsibility on state or local government through a conditional grant?[56]

Other aspects of the effects of conditional grants on federal-state relations have been left unsettled by the courts. When Congress imposes conditions on state eligibility for federal aid, is an inquiry as to the legitimacy of those conditions satisfied simply upon determining that presumptive power to make conditional grants exists? Or should the inquiry be carried far enough to see to what extent the particular condition actually contributes to the program for which it is imposed, and to what extent its connection is only nominal?[57]

Use of Conditional Grants in ISTEA

Managing Change

During its century of development, the Federal-Aid Highway Program has evolved through three major stages. The first federal-aid program, carried out through the Office of Road Inquiry from 1893 to 1916, focused on collecting and disseminating scientific, engineering, and economic information about good roads and roadbuilding. This was followed by a change in federal and state roles as experience showed that federal aid was ineffective if funds were dispersed among unconnected sections of local roads.

After 1916, federal aid was allocated to specific road systems, and the federal function included project reviews to ensure compliance with congressional requirements. In this period (1916–1956) and the interstate system construction period (1956–1990) that followed the program, a two-tiered federal-state relationship was retained. During the interstate building period, the highway program was expanded, and assistance for mass transit and highway traffic safety was added. As the interrelations between transportation and other national interests came to be recognized, congressional objectives in these related fields were incorporated into the transportation assistance program (e.g., urban planning, 23 U.S.C. 134; land acquisition and relocation assistance, 42 U.S.C. 4621–4655; mitigation of congestion and improvement of air quality, 23 U.S.C. 149.)

By the 1990s the surface transportation program had accepted these additional objectives and had made structural and procedural adjustments to deal with the objectives at the state and federal levels without serious delay or disruption of roadbuilding in any state.

Use of conditional grants also had political advantages. As Congress sought state implementation of national policies and goals, it remained insulated from the public who, on the face of things, was being regulated by state authority. And at the state level, departments of transportation could counter opposition from governors, legislators, local officials, and the public by pointing out that failure to comply with federal requirements could jeopardize the state's share of federal funding.[58]

Conditional grants, however, had limits in the matter of dissolving stalemates. One commentator, based on experience in President Lyndon Johnson's "Great Society,"[59] has observed:

> The basic dilemma...is how to achieve goals and objectives that are established by the national government, through the action of other governments, state and local, that are legally independent and politically may be even hostile. Those state and local governments are subject to no federal discipline except through the granting or denial of federal aid. And that is not very useful, because to deny the funds is in effect to veto the national objective itself. Coercive measures, like court action in the case of civil rights or enforcement procedures under water pollution control legislation, are limited in their applicability. For the most part, the federal government must depend on the competence, and the motivation, of government officials whom it can influence or induce but cannot directly control. This has always been the dilemma of the federal system, but it is a dilemma many times intensified in the 1960s by the centralization of objective-setting. The country—and that means especially the federal government—must learn how to manage a federal system far more complex than it has known before.[60]

Management Systems

In restructuring the federal-aid highway program, ISTEA significantly shifted the rules relating to project approval and supervision. Certification acceptance replaced federal project approval in many programs and reflected a general feeling that state departments of transportation had developed the capacity and experience to ensure their design, construction, and maintenance met applicable federal standards.

To strengthen this increased reliance on state and local responsibility, ISTEA required states to establish and implement management systems in six aspects of their transportation program:[61]

- Pavement on federal-aid highways
- Bridges on and off federal-aid highways
- Highway safety
- Traffic congestion
- Public transportation facilities and equipment
- Intermodal transportation facilities and systems

ISTEA stipulated that guidelines from the Secretary of Transportation and federal regulations be developed within 1 year for use by states in designing their own management systems. ISTEA authorizes the Secretary of Transportation, after 1995, to withhold up to 10 percent of the federal highway and transit funds for any state that fails to implement the foregoing management systems during the preceding year.[62] In applicable areas, the management systems must be developed in cooperation with metropolitan planning organizations (MPOs) and the statewide transportation improvement program (STIP) for the state.[63]

Insisting that states adopt management systems for the six program elements listed in the statute was an attempt to ensure that states would move uniformly into those areas and especially into the three areas that warranted special efforts and coordination among transportation modes and agencies, namely, traffic congestion, public transportation, and intermodal transportation systems.

This case clearly illustrates how conditional grants are used to carry out measures that Congress feels are needed to ensure its program objectives are achieved. Requirements of this type have never been seriously challenged as unwarranted intrusions into matters that are and ought to be entirely of state concern. Under the criteria used in *South Dakota v. Dole* to determine the acceptability of conditional grants, ISTEA's requirement for management systems appears unobjectionable. Moreover, considered as a measure that will add to the states' ability to make full use of the flexible funding and public-private cooperative features of the law, it may well strengthen state and local autonomy in relation to the federal government.

Metropolitan Planning Organizations

As early as 1962, Congress recognized that urbanized areas had special transportation planning needs that could be best met by a system integrating all available modes. The Federal-aid Highway Act of 1962 required that highway projects in areas with populations more than 50,000 must be initiated through a continuing, cooperative, and comprehensive transportation planning process—the "3-C Process."[64] Implementation of this requirement was not aggressively promoted because Congress merely authorized the Secretary of Transportation to "cooperate" with state and local governments in urban transportation planning. Prior to the 1980s little federal guidance was given to state transportation departments on these matters. Between the Surface Transportation and Uniform Relocation Assistance Act of 1987 and ISTEA in 1991, however, a series of task forces, conferences, and studies led to recognition that more effective intermodal transportation planning must be done in metropolitan areas throughout the United States.[65]

Planning requirements in ISTEA expanded the urban transportation planning process to include a broader range of local agency and public participation and to ensure that projects selected for the area's transportation program were initiated and approved by the MPO, as well as the state department of transportation.[66] The federal role in enforcement was also revised in keeping with the trend toward greater state and local autonomy in planning and decision making. "Certification acceptance" became the regular procedure for all appropriated programs except interstate projects.

The metropolitan planning processes introduced in ISTEA utilized the competence and experience that had been developed by community organizations of all types in the innovative atmosphere of President Kennedy's New Frontier and President Johnson's Great Society.[67] At the same time, Congress sought to avoid some of the mistakes made in the 1960s and attempted to achieve an advantageous balance. Thus, the congressional committee report included the following statement:

> The intermodal planning process emphasizes the central role of the states in administering this Federal program. It also accommodates the special needs and expertise of the Nation's urbanized areas. Of particular importance, the process demonstrates flexibility in accommodating the different needs and circumstances existing among the states.[68]

Whether this characterization of congressional intent will be confirmed by experience remains to be seen. ISTEA's introduction of new participants, not all of whom are transportation entities, involves the risk that it may not be possible to achieve consensus among these participants on goals, priorities, and trade-offs, or consensus may be achievable only by compromising engineering or administrative standards.

Dissenting views in recent court decisions have been critical of conditional grants that use national programs to address local needs.[69] Commentators also have been critical of the apparent ease with which community concerns that are not promptly met by state or local government are brought to Congress by local interest groups and accepted there for inclusion in national programs.[70] Under the Supreme Court's ruling in *South Dakota v. Dole*, it may be asked whether ISTEA particularizes the planning process and the resulting product too much.

Little guidance is given by courts on the question of which objectives are national and which are local, but the ruling of the Ninth Circuit in *Stop H-3 Association v. Dole*[71] may be pertinent. A Federal-aid Highway Act exempted a Hawaiian highway construction project from otherwise applicable environmental impact assessment requirements in the Department of Transportation Act.[72] Plaintiff argued that exemption from application of Section 4(f) exceeded Congress's constitutional spending power because it imposed a condition that serviced a local purpose only, rather than the general welfare. The highway in question was entirely on one of the Hawaiian islands and was regarded administratively as having local rather than national importance. The Court held, however, that, for purposes of the conditional grant, the highway had national importance since it was part of the interstate system that Congress had declared was important to complete. The court answered plaintiff's constitutional issue by noting the Su-

preme Court's explanation in *Buckley v. Valeo*[73] that it is a mistake to treat the General Welfare Clause as a limitation on the power of Congress. "It is rather a grant of power the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause....It is for Congress to decide which expenditures will promote the general welfare."[74]

Grant conditions must be expressed unambiguously by Congress. The metropolitan area transportation planning processes that are required by ISTEA are charged with "development of transportation systems embracing various modes of transportation in a manner which will efficiently maximize mobility of people and goods within and through urbanized areas and minimize transportation-related fuel consumption and air pollution."[75] In some states this is a new and novel requirement, and the legislative history of ISTEA describes the substance of this condition only in general terms. Most of the congressional directive is procedural, except for a list of 15 general needs that should be considered in developing plans and programs for the states and MPOs. Whether ISTEA, combined with the implementing regulations issued pursuant to the statute,[76] offers the necessary unambiguous guidance to the states and MPOs is a question that will very likely continue to be the subject of analytical comment.[77]

Statewide Planning

Prior to ISTEA, statewide transportation planning was carried out largely at each state's initiative, with federal-aid funding provided for eligible planning activities. In ISTEA, Congress for the first time formally required states to have a comprehensive statewide transportation planning process as a condition of receiving federal-aid funding for highway and transit projects. This process is required to be multimodal (including pedestrian and bicycle facilities) and capable of integration into a statewide intermodal transportation system utilizing all modes of transportation. Also, STIPs must be coordinated with the state's metropolitan area planning and Clean Air Act implementation efforts. A list of 20 factors to be considered when preparing both the long-range state transportation plans and the shorter term STIPs is set forth in the statute.[78]

By converting the statewide planning process from a discretionary feature to a mandatory condition of eligibility for federal funding, did Congress go beyond the scope of its constitutional power to spend for the general welfare or its power to regulate interstate commerce? Essentially the same analysis can be made of the statewide plan requirement that was made regarding the metropolitan area planning requirement. And essentially the same conclusion seems warranted under the legislative precedents of the federal-aid highway and surface transportation acts. But the same general caveat also applies. The statutory guidance provided by Congress lists for consideration some extremely open-ended factors. In view of the fact that ISTEA opens up its planning processes to the active participation of a greater range of diverse local interests than before, it may be asked whether use of such general objectives will encourage local interests to settle by litigation some policy issues that were not settled in the planning process.

Clean Air Act Requirements

The Clean Air Act of 1970 (CAA)[79] was one of several major pieces of environmental legislation utilizing conditional grants to achieve congressional goals through programs of state and local governments. The CAA set ambitious goals for achieving National Ambient Air Quality Standards (NAAQS), with the expectation that the goals would be implemented by actions of private industry, the public, and state and local government to reduce the level of various pollutants in the air (chiefly ozone, carbon monoxide, and small particulate matter). State highway and public transportation agencies were given a central role in these efforts because of their ability to influence the volume of highway traffic and the problems of highway congestion. However, both the 1970 legislation and subsequent amendments in 1977 lacked provisions for effective enforcement of the federal standards, and in the decade that followed, the overall improvement of air quality was spotty.

Congress strengthened the law significantly in the Clean Air Act Amendments of 1990 (CAAA)[80] by making the achievement of air quality standards a condition of federal aid for highway and mass transit projects. Specifically, the CAAA (1) established criteria for attaining and maintaining NAAQS levels; (2) required nonattainment areas to reduce pollutant levels and meet applicable NAAQS within certain time frames; (3) required that transportation plans, programs, and projects attain air quality standards set forth in their state implementation plans (SIPs); and (4) authorized the Environmental Protection Agency (EPA) to penalize a state for failing to achieve clean air goals, by withholding federal-aid highway and transit funds as long as noncompliance continued.

The new arrangement set forth in the combined provisions of CAAA and ISTEA presented a more complex task. The CAA of 1970 looked exclusively to the states to implement it; local government had no direct role, and the transportation planning process was not specifically required to achieve air quality objectives. Efforts in 1977 and 1982 to induce stronger and more systematic implementation of this law through penalties for noncompliance were not consistently carried out.

In the CAAA, Congress sought to achieve more effective results by requiring direct participation of MPOs and by broadening the scope of the process to statewide and metropolitan regional proportions. But potentially more far-reaching was the CAAA's linkage of the design and approval of regional transportation plans to actual reduction of pollution levels from mobile sources. SIPs set substantial caps on permissible levels of emissions from mobile sources in nonattainment areas and required regional transportation plans for achieving these goals by specified dates.[81] The architects of ISTEA were convinced that meaningful reduction of emissions could only be achieved by reducing single-occupant motor vehicle use.[82]

For this purpose a number of transportation control measures (TCMs) were identified in the 1990 amendments.[83] Provisions of the legislation governing SIP development required states to "consider measures specified in section 108(f) and choose from among and implement such measures as necessary to demonstrate attainment."[84] Similar provisions in the 1977 amendments already had been interpreted by EPA as requiring adoption of *all* reasonably available measures by a state unless it was shown that "reasonable further progress and attainment of the NAAQS are assured" and use of "all reasonably available control measures would not result in attainment any faster."[85]

This raises a question as to how the roles of state, local, and federal agencies may have to be restructured as the congressional clean air objectives are implemented in state and regional transportation planning processes.

In the absence of specific discussion of this matter by Congress, some insight may be gained from experience with enforcement litigation under the CAA and its amendments prior to 1990. Judicial interpretation of the act emphasizes the pri-

mary responsibility of the states to develop and adopt implementation plans and to take measures that conform to federal standards and have federal approval.[86] The federal role, on the other hand, does not go so far as to preempt control of the design of air pollution sources.[87] States may adopt and enforce emission measures that are stricter than the federal standards,[88] and federal agencies reviewing SIPs are expected to allow states substantial latitude in their implementation strategies.[89] States may not be penalized because of the impact of a nonattaining neighboring state.[90]

Much of the litigation that shaped this doctrine is in the form of citizen suits challenging the failure of states to move more rapidly or positively to achieve federally mandated air quality goals. In these cases, requirements such as the statutory mandate to "adopt all reasonably available control measures" have sometimes involved difficult issues of fact, as well as problems of statutory construction. The willingness of the federal courts to intervene in defining the roles of federal, state, and local components of the federal system was demonstrated in *Delaney v. EPA*,[91] where the Ninth Circuit reversed EPA approval of a state SIP for arguable failure to show the use of "all reasonably available control measures" as required by EPA guidelines applicable at that time. The decision added weight to the statutory requirement and to its literal application in metropolitan transportation planning. Subsequent ratification of the Ninth Circuit's interpretation of EPA's guidelines was included in the congressional legislative history of the 1990 CAAA, but EPA has deemed itself not bound by guidelines in existence when the *Delaney* case was decided.[92]

The efficacy of relying on the federal clean air agencies and the federal courts to redefine the structure of federalism in the nation's surface transportation program may be questioned on practical grounds. Certain difficulties are apparent: The congressional purpose here cannot be reduced to a set of specifications in the way that an engineering problem can be. The intended end product under ISTEA is a planning process or plan that will achieve a certain air quality through measures that are customized to local circumstances. State and local officials may well feel coerced by the air quality rules despite the fact that the form of cooperative federalism is maintained throughout the process.

In a planning process established and charged in this way, compromises based on political, social, economic, and environmental factors will be both essential and inevitable. At the state and local levels, where progress in reducing emissions from mobile sources will determine whether federal-aid funds continue to go into nonattainment areas, acceptable performance is not likely to turn on legal issues (which courts may resolve) or a technical one (which administrative agencies handle well). It generally will be a problem that must be resolved by political processes and practical compromise in the forums of MPOs or statewide planning offices. Just as hard cases often make bad law, so badly drawn laws and regulations make their implementation harder to achieve.

Federal Preemption: A Frame of Reference

Congressional Preemption: Express and Implied

Legal doctrine regarding federal preemption of state and local regulation has focused on determining when and to what extent Congress intends its legislative action to establish exclusive federal regulatory power over or within a specified subject or activity. Federal preemption may also occur where, for any reason, a state law is determined to be in actual and irreconcilable conflict with a federal statute. In both such instances, the Supremacy Clause of the U.S. Constitution[93] establishes a relationship that has been applied by the U.S. Supreme Court since its decision in *Gibbons v. Ogden*.[94]

Questions of whether federal preemption occurs generally have been approached as problems of statutory construction. Rules of statutory construction, however, may offer limited help where state law is preempted, not because of its conflict with something Congress has done, but because of the negative implications of what Congress might have done, but did not do, when it had the chance. For example, where Congress is acknowledged to have constitutional power to regulate interstate and foreign commerce, what consequences flow from Congress choosing to leave part of its power unused or "dormant"?

Commentators have been cautious about analyzing preemption issues in rigid categories, but have described three types of preemption situations.[95] "Express preemption" has been recognized where Congress specifically states its intent to supersede state regulation of a given activity. "Implied preemption" has been recognized where the intent of Congress to preclude state regulation of an activity can reasonably be inferred from the structure or objectives of a federal law or from "external" considerations. "Conflict preemption" has been recognized where Congress has not necessarily intended to exclude state regulation, but where a particular state law or action conflicts directly with the terms of a federal law or is an obstacle to accomplishing a federal purpose. Any given set of facts may involve more than one of these categories. For example, congressional intent to preempt an activity may be clearly expressed, but the scope of the preemption may have to be found by implication. Or, analysis of a conflict preemption situation may involve determination of the extent of an implied preemption.[96]

Express preemption, which purports to leave room for state law to perform a complementary function in a regulatory scheme, frequently has created special problems. Such cases demand close analysis to determine the state's "supplementary" role, or to delineate congressional intent regarding responsibility for implementing regulatory standards.[97] The inadequacy of federal resources compared to the magnitude of the enforcement problem may result in federal dependence on state and local authority to implement federal programs. For example, certain federal air and water pollution control laws make states initially responsible (with federal oversight and back-up enforcement) for achieving federal standards.[98]

Determining legislative intent and identifying conflicts between state and federal law may involve subtle distinctions. Even where state action does not take a form that is expressly prohibited by law, it may be regarded as preempted if it is incompatible with the objectives of the federal law so as to discourage or impede activity Congress seeks to foster, or vice versa.[99] Preemption based on this form of conflict is easiest to apply where the legislative objectives are narrowly defined. Preemption is most difficult to sustain where the national objectives are stated in broad or abstract terms. Where, for example, the intent of Congress was to encourage national conformity in standards for vehicle design in order to promote transportation safety and efficiency, a requirement to use specific national standards regarding vehicle design was held to preempt more restrictive state standards.[100] On the other hand, where the basis for preemption had to be implied in the inconsistency of state law with a general or abstract national goal—such as "establishing an equitable process for determining terms and conditions of employment"—the courts understandably had to look behind the statutory language for guidance.[101]

Regulatory Preemption

Problems of defining the fields of regulatory activity that are preempted may be complicated by congressional delegation of regulatory authority to administrative agencies. Preemption because of conflict with administrative regulations has become a pervasive issue in programs where administrative agencies are given wide discretion to decide, through their rulemaking process, how best to carry out broad statutory mandates.[102]

The rule that federal agency regulations supersede irreconcilable state law was decided in *United States v. Shimer* in 1961.[103] Less clear, however, is the question of whether a federal administrative agency can lawfully preempt or exclusively occupy a field of activity simply because Congress establishes the agency to advance its interest in that field.[104] Prior to 1985 the rule was as follows:

> Absent explicit preemptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject," or because "the object sought to be obtained by the federal law and character of obligations imposed by it may reveal the same purpose."[105]

In 1985, the U.S. Supreme Court had an opportunity to refine the doctrine on regulatory preemption in *Hillsborough County v. Automated Medical Laboratories*.[106] Here the Food and Drug Administration (FDA) claimed that its regulations implicitly occupied the field of regulating blood plasma centers and blood donation procedures so as to preempt county ordinances regulating blood plasma facilities that supplemented those promulgated by FDA. The Supreme Court held that the local ordinances were not implicitly preempted either by passage of the Public Health Act or FDA's subsequent promulgation of regulations. "[M]erely because the federal regulations were sufficiently comprehensive to meet the need identified by Congress," the court declared, "did not mean that states and localities were barred from identifying additional needs or imposing further requirements in the field."

Explaining further, it said:

> We are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their more specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption wherever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.[107]

The Court offered guidance in determining where "dominant federal interests" should be recognized. Citing *Hines v. Davidowitz*,[108] it emphasized the contrast between this field of activity and the regulation of health and safety matters, which primarily and historically have been matters of local concern.

As to the argument that local ordinances must be regarded as preempted where they conflict with the federal scheme or legislative goal, the Court warned that evidence of an obstacle to a federal goal must show a serious threat to the national interest and not be speculative. In *Hillsborough County,* the evidence did not support federal preemption.

The decision in *Hillsborough County* helped to anchor a doctrine that had been criticized for seeming to drift. Critics of this doctrine had deplored the Court's apparent willingness to accept preemption in the absence of clear expression of congressional intent largely on inference from abstract possibilities that the existence of federal and state regulations side-by-side might somehow interfere with achievement of federal legislative objectives.[109]

Commentators concerned about the continued vitality of federalism have tended to view developments in regulatory preemption doctrine in the context of *Garcia v. San Antonio Metropolitan Transit Authority*,[110] and they have expressed fear that the "political safeguards" that operate between the states and Congress do not function with the same effectiveness between the states and federal administrative agencies.[111] Suggestions for reducing the threat of regulatory preemption to state and local autonomy have urged development of administrative rulemaking procedures that give state and local government larger roles in formulating regulations affecting their interests.[112]

In the long view, such criticism, together with decisions like *Hillsborough County*, may lead to sharpening the way that legislative intentions are expressed by Congress and applied by federal agencies, making it easier to have accurate statutory construction. The decision in *Hillsborough County* may turn out to be the forerunner of others that shift back to Congress political accountability for the condition of federalism and for responsiveness to state and local interests.

Preemption Issues Under ISTEA

Commercial Carrier and Motor Vehicle Operations

Federal regulation of interstate surface transportation has a long history, beginning with U.S. Supreme Court decisions in 1824 that initially legitimized federal preemption through interpretation of the Commerce Power and the Supremacy Clause.[113] From the earliest cases involving state interference with federally licensed interstate shipping, the field of federal regulation has been expanded to touch a broad range of transport activities. Following creation of the Interstate Commerce Commission to administer certification of interstate carriers, the fields covered by federal regulations grew to include rules dealing with qualifications of commercial motor carrier drivers and specifications for their vehicles, equipment, routes, and operating practices. Although these federal regulations preempted state requirements that were inconsistent with them, Congress made it clear that it did not intend to occupy the field of motor carrier operations exclusively.[114] Room was reserved for continued state regulation that supplemented the federal rules, and in 1982, a role was created for states in enforcing federal rules, regulations, standards, and orders applicable to commercial motor vehicle safety.

Parallel to this steady extension of direct federal regulation of commercial motor carriers, Congress expanded its influence over other aspects of highway traffic operations through conditional grant programs. Truck size and weight limits on federal-aid highways were introduced in the federal-aid highway acts of the 1950s and 1960s. In 1966 Congress extended its regulatory influence into the field of highway traffic safety by enacting the National Traffic and Motor Vehicle Safety Act. This legislation established a conditional grant program calling for each state, among other things, to "have a highway safety program approved by the Secretary [of Transportation], designed to reduce accidents and deaths, injuries, and property damage resulting from them...[which] shall be in accordance with uniform national standards...."[115] Prior to enactment of ISTEA, for a period of 40 years, Congress had recognized a national interest in the operation of motor vehicles and sought to bring it into the scope of federal control. A rationale for the

particular mixture of preemption and conditional grants was not offered by Congress in the legislative history of this aspect of carrier law.

When it enacted ISTEA, Congress addressed several matters that had previously been the subject of preemption, strengthening existing regulations in some cases and adding new responsibilities in other areas, as the following indicates:

- *Licensing of commercial drivers*—ISTEA directs that federal standards be issued to establish a "one-license system" for commercial driver licenses and to prevent the practice of carrying multiple licenses, which hinders licensing authorities in dealing with driving offenses and unqualified drivers.[116]
- *Vehicle length limits*—ISTEA restricts the operation of longer combination vehicles and commercial motor carrier combinations with two or more cargo-carrying units to the types of vehicles in actual lawful operation prior to June 1991. It also freezes the weights, routes, and operating conditions of such vehicles as of June 1991.[117]
- *Registration of commercial vehicles and taxation of motor fuel*—ISTEA adds two new restrictions on the scope of state action. After 1996 no state can limit the operation within its borders of any commercial vehicle that is registered in a state that participates in the international registration plan, nor can a state enforce a fuel-use tax on commercial vehicles registered in another state unless such tax is in accordance with the International Fuel Tax Agreement.[118]

Congressional intentions regarding the extent that state regulatory action affecting these subjects could be permitted without becoming an "unreasonable burden on interstate commerce" were indicated in the legislation and legislative history.[119]

ISTEA provisions relating to extension of the National Maximum Speed Limit Compliance Program,[120] on the other hand, are not so easily classified. National speed limits were first established in 1973 when fuel shortages led the public to accept temporary imposition of a 55 mph speed limit nationwide.[121] The fuel conservation and traffic safety benefits that resulted induced Congress to continue the speed limit, but at a 65 mph level.[122] The problem in treating extension of the national maximum speed limit as preemption of a regulatory matter that heretofore had been a state responsibility is that from 1973 to 1991 Congress directed that compliance with the national limit was a condition of federal approval of state highway projects funded by federal aid.[123] The regulatory action that directly controlled the use of motor fuel was taken entirely by the state acting to implement the conditions of a federal grant that the state had voluntarily accepted. Although there seems to be no doubt about the intention and expectation of Congress that its action would bring the speed limit laws of all states into conformity with national policy, the technical and formal features of a preemption are missing.

The legislative history does not explain why Congress chose to pursue its goal of uniform speed limits through a conditional grant rather than preemption. A national speed limit would seem to be well within the scope of Congress's constitutional power to regulate interstate commerce, and so a proper matter for preemption. In practical terms, however, use of state and local law enforcement agencies would be necessary to implement the congressional objective.

The same may be said about ISTEA's provisions for achieving congressional goals in the use of seat belts and motorcycle helmets[124] and in directing the Secretary of Transportation to review, revise, and promulgate certain of the national standards for vehicle design and equipment authorized by the National Traffic and Motor Vehicle Safety Act of 1966.[125] And similarly, in the reauthorization of the Motor Carrier Safety Assistance Program (MCSAP),[126] conditional grants were used to obtain state enforcement of federal regulations on that subject. Under MCSAP, as enacted in 1982,[127] states agree to adopt and be responsible for enforcing federal rules, regulations, standards, and orders applicable to commercial motor carrier vehicle safety or compatible state rules as approved by the Secretary of Transportation. In ISTEA, Congress added participation to the MCSAP eligibility conditions, by requiring states to agree to compile and supply data for federal safety surveys and to work toward nationwide uniform fines in their enforcement programs.[128]

Socioeconomic and Environmental Programs

Utilization of surface transportation assistance programs to promote national socioeconomic and environmental policies became accepted legislative practice in the 1960s and 1970s. Many of the federal programs that were implemented by state action under conditional federal grants were of a regulatory nature and might have been carried out directly by federal preemption.[129] Examples include the Davis-Bacon Act (wage rates in highway construction),[130] various civil rights acts (discrimination and equal employment opportunity),[131] the Americans with Disabilities Act,[132] the National Environmental Policy Act,[133] and the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970.[134]

ISTEA continued applying these laws to the federal-aid program for surface transportation, although it relieved the Secretary of Transportation of some of his responsibility for direct oversight of the states' implementation activity. The essential obligation of the states to conform their own practice to the applicable federal law and procedure, however, remained unchanged.[135]

The most far-reaching of the conditional grant requirements in ISTEA are those that relate to implementation of the CAAA, by which the EPA Administrator, with concurrence of the Secretary of Transportation, is authorized to withhold federal-aid funds as an enforcement tool to achieve uniform attainment of the NAAQS. Whether this requirement falls outside the boundaries of legislative relevancy should be considered. And, even if relevancy is conceded, it should also be considered whether, despite its form as a conditional grant, this requirement is really in the nature of a preemption and would be better administered as such.

Cooperation or Co-optation

Increased use of federal preemption and conditional grants in ways that call for state and local governments to implement congressional policies and national programs may appear to move federal functions away from the concept of cooperative federalism and approach a form of co-optation. In co-optation, state and local governments are figuratively absorbed or assimilated into integrated national programs designed by Congress and administered by federal executive agencies. An example of such a combination of preemption and conditional grants for achievement of congressional purposes is the preemptive promulgation of federal motor carrier safety standards and regulations, the enforcement of which is carried out by state agencies at federal expense. As this arrangement was carried over into ISTEA in 1991, federal payment of the enforcement expenses was made subject to state adoption of a schedule of fines for MCSAP violations that conformed to federal rules.[136]

Critics may charge that the continued growth of this use of preemption and conditional grants, no matter how effective in its record of implementation, weakens the structure of federalism in the transportation system and distorts the di-

vision of power, responsibilities, and functions of the federal-state relationship.[137] Whatever the long-term effect of such trends, however, they appear to be consistent with the rationale of the U.S. Supreme Court in *New York v. United States*,[138] which made a significant distinction between the states as sovereignties and the states as political entities consisting of public officials, executive and judicial, administering and enforcing laws enacted by their legislatures. In the Court's view, Congress may not compromise the state legislature so as to compel it to enact a law contrary to its collective interest and judgment. Yet Congress may exercise its own constitutional powers so as to induce enactment of a state law complying with congressional purposes and then "commandeer" the state's executive and judicial bureaucracy to implement that law.[139] Such a distinction, the Court noted, was well known to our nation's founders and accepted by them as essential to the success of the federal system envisioned in the Constitution.[140]

Practical and political considerations may suggest that the balance between federal and state responsibilities lies somewhat short of the point that the Supreme Court's recent rulings may allow. One commentator said this about the impact of ISTEA on federalism:

> "Cooperative federalism" may take varied forms. If it means that Congress may co-opt state institutions and personnel to achieve the enforcement of federally-mandated rules, then resentment by both state officials and the public would be likely. And, as in the case of federal efforts to require state enforcement of certain parts of the clean air legislation, serious constitutional issues might arise. Inducing cooperation of the states through conditional funds may avoid political and perhaps even constitutional difficulties, provided that the consent is indeed voluntary and not coerced by threats to withhold large sums of badly needed money....
>
> [A]lthough conditional grant funding of the states may in some circumstances constitute a serious threat to their autonomy, there are situations in which it can offer a technique for enlisting state cooperation in the exercise of a legitimate federal program with a minimum amount of abrasiveness and a minimum number of complaints that Congress is subverting our federal system.[141]

FEDERALISM ISSUES IN THE IMPLEMENTATION OF ISTEA

Implementation Prognosis: Goals, Objectives, and Strategies

The central theme of ISTEA's legislative history is that the national transportation program must be reoriented from building a highway system that accommodates an estimated level of vehicle miles traveled—a target that regularly has been revised upward—to developing a system in which all modes of surface transportation function together in a coordinated, flexible, complementary way to move goods and people in the most energy-efficient manner.[142] A similar reorientation was prescribed for the mass transit assistance program.

As perceived by Congress, the problem was not so much technological as political and managerial. Accordingly, ISTEA's realignment of the planning and decision-making process became essential to achieving the congressional goal. The strategy for achieving this realignment involved dispersing responsibility for transportation planning and program development decisions so that state highway agencies henceforth would be only one of several elements acting jointly to perform these functions. Grouped into MPOs, these bodies would represent state and local government, regional agencies, other modes of transportation, and various public and private community interests.

The potential importance of this reorientation has been suggested as follows:

> ISTEA provides local MPOs with a stronger position on transportation decisions than they ever had before. This precipitates a more equal relationship between state transportation planners and local officials. Given the diversity of local officials' interests and the generation of strong diverse interest groups at the local level, a completely new environment for transportation decisions between state and local authorities may result.[143]

A more general prognosis of the prospects of ISTEA's new approach was offered shortly after enactment of the law in a conference sponsored by federal transportation agencies. In its findings, the conference observed the following:

> The promise of ISTEA is dependent on achieving a broad commitment to realistic, achievable results. The multiple factors that must be considered in adopting state and regional transportation plans expand their scope to embody a vision for improved quality of life. States and MPOs must expand public participation to involve the full range of community interests, to educate and be educated, if this new scope of planning is to be meaningful....
>
> The advantages to be derived from ISTEA's flexible funding depend on decisions made cooperatively by state and local officials. This shared delegation of responsibility challenges new partnerships to transcend the barriers that separate existing power centers. In particular, close state department of transportation-MPO cooperative relationships and joint planning processes are imperative. Inclusion of the Environmental Protection Agency (EPA) as an active partner, without compromising its regulatory function, is critical to successfully blending air quality and transportation planning into a single integrated function. Real risk of decision gridlock confronts those choosing to ignore the mutual veto powers emanating from ISTEA and the Clean Air Act—creating pressure for emerging partnership roles to be reconciled quickly.[144]

As to the federal role in this new alignment for transportation planning, the conference observed: "Federal guidance should be general and flexible; federal agencies should support local initiatives undertaken in advance of regulation and encourage experimentation."[145]

And it concluded:

> Many hard choices will have to be made in many regions to resolve the conflicts between mobility and environmental objectives. The time has passed when these hard choices were imposed from on high (at the federal level). When they were, faith in government fell and government failed. Value judgments on the hard choices must now be made locally, and local participation—civic involvement—can breed confidence in government....If the only remedy for democracy is more democracy, ISTEA is on the right track. It has legislated more democracy, more power away from Washington and away from state capitals to MPOs charged with involving private citizens and local groups in local decision making. Hopefully this will make people decide to close the gap between their ideals and what their government decides in urban transportation. We hope to restore faith in government, even if an excess of democracy risks a few mistakes.[146]

This cautiously optimistic prognosis for decentralizing and opening up the processes of transportation planning and program development stands in contrast to the likelihood of any major change in the congressional approach to implementing federal transportation assistance. Throughout ISTEA, Congress has continued to use a combination of preemption and conditional grants to promote a national agenda of its own choosing, as noted earlier. In this respect ISTEA as a whole appears to be a continuation of the trend toward centralization of strategic control that occurred during the 1970s and 1980s.[147] Assessing the effects of this trend on federalism, the Advisory Commission on Intergovernmental Relations has been less optimistic about the changes occurring in the past 2 decades, assert-

ing: "These changes, when combined with some key standpat political attitudes and practices, have produced neither a dual nor cooperative federalism but an increasingly dysfunctional form of federalism."[148]

Implementation Assessments

Administrative Rulemaking

ISTEA contained 16 provisions directing the Secretary of Transportation to implement the statute with regulatory action or authorizing the Secretary to take such action on the occurrence of certain factual findings or if it was determined that certain program benefits would result.

By some expectations, progress in formulating and publishing regulations for ISTEA was slow during the first 2 years after passage of the act. This should be kept in historical perspective, however, because shortly after enactment of the statute a moratorium on regulatory actions went into effect, freezing new federal regulatory activity until the existing body of regulations could be reviewed and evaluated as to their necessity and impact on the public and private sectors.[149] In the case of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), this review took the better part of 1992 to complete. When Congress mandated regulatory action in ISTEA, formal rulemaking procedures had to be followed. When a subject involved both highway and transit programs, these formalities had to provide for coordination and joint publication by the two agencies working through an interagency task force. The process was open, using public meetings and dockets of written comments to obtain insight on rulemaking issues and options.

The first final regulations for a major feature of ISTEA were published jointly by FHWA and FTA in October 1993, governing development of transportation plans and programs for urbanized areas and statewide plans.[150] These rules replaced the interim guidance published in April 1992 and January 1993.

Concerns about the possible impacts of this regulation on federalism were addressed in the regulation's "Federalism Assessment" pursuant to an executive order issued by President Reagan in 1987.[151] Applied to ISTEA, it was certified that the rules implementing the provisions of ISTEA regarding metropolitan area and statewide planning "do not have sufficient Federalism implications to warrant a full Federalism Assessment under the principles and criteria" applicable.[152] The certification was supported by a finding that the rules recognized the roles of state and local governments in implementing the metropolitan and statewide planning provisions of ISTEA, including increased discretionary authority allocated to them under the act.

A similar finding was made in compliance with the Regulatory Flexibility Act,[153] which addressed the effect of the rules on small entities, such as local governments and businesses. Noting that the new metropolitan and statewide planning requirements were dictated substantially by the provisions of ISTEA and CAAA, the declaration also pointed out that no comments had been submitted on their economic consequences.[154]

These reflect what is likely to be the consensus of federal procedures for official review and evaluation of the administrative action implementing ISTEA. Administrative agencies appear to be safe from criticism as long as their regulations can be shown to be necessary to carrying out a congressional mandate. The agency can satisfy its obligation to preserve federalism by limiting regulatory preemption to "the minimum level necessary to achieve the objective of the statute."[155]

What will result from this executive policy—part of the Reagan initiative to reduce regulatory burdens—on the federalism of the surface transportation program is not certain.[156] The "Fundamental Federalism Principles" set forth in the executive order read like a restatement of the doctrine of dual federalism, or at least to the pre-*Garcia* constitutional interpretation, and so may be difficult to apply. More to the point, however, it is one thing to see that regulatory agencies do not overstep the authority delegated to them by Congress, but it is another thing to have any limiting impact on the tendency of Congress to create new national programs or expand existing ones by means of preemption and conditional grants.

The Administration's initial steps to implement ISTEA have been taken with professional competence, in accordance with the required legal procedures and as promptly as was reasonable under the circumstances. The first regulations promulgated under ISTEA met the objective of making state and local participation more effective. The resourcefulness of FHWA and FTA in issuing interim guidance while formal rulemaking continued also aided intergovernmental relations as implementation got under way. Against this background, Congress scheduled oversight hearings in the spring of 1993.

Congressional Oversight Hearings

The House of Representatives Committee on Public Works and Transportation conducted oversight hearings in April and May 1993 to ascertain how well ISTEA was working and whether modifications were necessary for its implementation. Opening statements from committee members indicated that the aspects of the law that might be expected to receive the most attention were the increased flexibility for states and MPOs to fund projects under Surface Transportation Program (STP) grants; expansion of transit facilities for both urban and rural areas; integrated planning; and increased sensitivity to the environmental impacts of transportation projects.[157]

Witnesses' testimony bore out the accuracy of these expectations. Both public-sector and private-sector organizations noted that flexible funding had not been used as much as expected, but they differed as to the cause.[158] Some municipal witnesses blamed state transportation agencies for ignoring local program priorities and competing for STP funds instead of planning cooperatively.[159] Corrective suggestions ranged from having Congress reiterate its intention on flexible funding to earmarking municipal project funds so they could not be vetoed by state departments of transportation. FHWA witnesses, however, suggested that the record of flexible funding was simply due to "start-up problems" in the complex field of transportation planning, and they felt sure that over the life of ISTEA all localities would receive their fair share of funds.[160] Other testimony noted that most states had highway projects already scheduled under allocations predating ISTEA, that state gas taxes often are constitutionally dedicated to highway programs, and that "old habits die hard."[161]

Testimony on flexible funding also prompted comment on the progress of the MPOs. Public officials emphasized that membership appointments needed to concentrate on achieving a truly representative mix of members and that "old attitudes had to change."[162] They identified practical and technical problems, such as securing guidance from federal authorities, obtaining and analyzing planning data on the factors listed in ISTEA, dealing with obligational controls, and estab-

lishing local and regional cooperation. Recurring throughout the hearings was testimony on the overriding importance of full funding as a key to reducing competition among the transportation modes and the states and local agencies.[163] The feeling about ISTEA's new approach to transportation planning was summed up by the National Association of Regional Councils in this way:

> You're creating a whole set of new organizations here that are empowered in a way that they've never been empowered and asking them to create their own democratic process. I don't know whether it can be done or not. I think it can, but I have no assurance.[164]

Incorporation of the CAA requirements into the metropolitan area and statewide planning processes created concern that states and localities were being asked to do too much too fast. It was noted that 35 states already had received notices of intent to impose penalties because of noncompliance with air quality standards, and it was suggested that unless deadlines for compliance with EPA standards were extended, wholesale penalization of the states would bring the transportation assistance program to a halt.[165]

Questions were also raised about the efficacy of mandates for state revocation of driver's licenses from persons convicted of drug violations and to enforce a national speed limit and laws requiring use of seat belts and motorcycle helmets.[166] Testimony was divided on whether this matter should be a federal or a state responsibility. In contrast, industry testimony on the results of federal preemption of state laws on vehicle length limits and various motor carrier safety regulations expressed appreciation and stressed the advantages of uniformity in the motor carrier field.[167]

Concern over the use of conditional grants was expressed in testimony that "[p]rior to the enactment of ISTEA there were 14–15 mandates, with which failure to comply resulted in a penalty of 5–10 percent of highway apportionment." With the passage of ISTEA "...that number...[appeared to be] doubled overnight."[168] This was reflected by another witness who urged Congress to refrain from this approach "in the interest of maintaining a true State-Federal relationship," and who concluded:

> If a requirement imposed upon States is truly a grant condition, then States are willing to take steps to comply. But I have to tell you that the proliferation of Federal mandates is pushing States to the saturation point.[169]

Stating somewhat the same concern, the State of Florida testified:

> The federal role of policy and decision-making with respect to environmental protection, safety, energy policy and other areas of national concern is not questioned. However, while ISTEA provides for delegation of program oversight to the states, the lack of modifications to the implementing policies and regulations has not allowed states to enjoy the full benefits intended under this legislation.[170]

ISTEA in the Context of Federalism

The purpose of the 1993 congressional oversight hearings was not primarily to examine the current state of the federal system, but the hearing record contains evidence that is pertinent to this question. One theme of the testimony highlights ISTEA's apparent contradictions. State witnesses appreciated the act's emphasis on flexibility, but said:

> ...[A]t the same time that ISTEA tries to be flexible, also it tries to put all States basically in the same box of uniformity in what we have to comply with....Now, all the States are not uniform in the manner in which they operate.....On the conformity issues we've treated small States like large States....We don't have the resources that many of the large States do to go along with the conformity issue. It becomes a tremendous burden.[171]

Municipal officials welcomed the increased authority of local governments to direct federal funds into local intermodal projects, but noted that:

> ...[U]nfortunately that decentralizing goal is far from being met. ISTEA requires metropolitan planning organizations to cooperate and reach a consensus on projects selected for federal funding. However, because these organizations are made up of local and state transportation agencies who have competing interests, some of the flexibility that is a hallmark of the new bill has been lost in battles between...local highway and transit interests...and state agencies...over scarce federal funds.[172]

Commentators on federalism have attributed some of this problem of consistency in grant programs to congressional willingness to be used for dealing with problems that, in the past, would have been a wholly local or state concern.[173] Evidence that this tendency is continuing in ISTEA was seen in testimony from private industry groups urging reorientation of program policies to their advantage or expressing appreciation for federal preemption of state laws reflecting local differences.[174]

The central theme of shifting much of the initiative, oversight, and operation of the surface transportation program to state and local government was recognized by witnesses, but almost instinctively they questioned whether ISTEA would be able to restore the regime of cooperative federalism that had characterized the federal-aid highway program up to the 1960s. An American Association of State Highway and Transportation Officials witness addressed this aspect of ISTEA as follows:

> There is a great need for decentralization of decision-making and project approval wherever feasible. This will promote efficiency, responsiveness and innovation. There is also a need to redirect oversight of the program to techniques that are less resource intensive and time consuming, such as the use of certifications and sampling, while still ensuring proper expenditure of funds.
>
> Unfortunately, recent federal actions continue to emphasize centralization and control, albeit at the state level. This certainly appears to be contrary to the original intent of ISTEA....STP program funding should be block granted to the states as originally contemplated and...the overall federal transportation partnership with state and local governments [should] be restructured and changes to the existing program made to more efficiently use federal funds.[175]

This view fits the interpretation of trends in federalism that has been advanced in a report of the Advisory Commission on Intergovernmental Relations on the federal role in the federal system. Charging that over the past decade the trend has been to substitute a process of decentralization for a genuine practice of federalism, it stated:

> [T]he proper model of a federal system is a matrix of governments serving larger and smaller areas, with the federal government...serving the largest area, but with no greater legitimacy outside the sphere of its principal responsibility than the other governments serving small areas in the spheres of their principal responsibility. It is most emphatically not a power pyramid consisting of higher and lower levels, with the federal government on top and the states and localities tiered below it....[But] the operative ideology today begins with the pyramid model and leads to the effort to substitute decentralization for federalism....What it has meant is that Presidents and Con-

gress...used decentralization in an effort to keep the political "goods" for themselves and pass the tough problems on to the states and localities.'[78]

Which way will ISTEA push the evolution of federalism in the surface transportation program? It is too soon to answer—only the extreme possibilities are clear. One possibility contemplates further centralization of the program through an increased use of preemption and conditional grants, an increase in the "hard cases" that make "bad law," and an attitude of competition in which there are "winners" and "losers." The other possibility contemplates achievement of a more genuine cooperative federalism, with progress toward development of the capacity at state, local, and regional levels to plan, organize, and manage intermodal transportation systems, and emergence of the political will to produce such a system. Because American federalism is a political process, as well as a legal concept, that process must inevitably strongly influence how closely the surface transportation system under ISTEA will reflect one or the other of these extremes.

ENDNOTES

[1] Corwin, *The Passing of Dual Federalism*, 36 VA L. REV. 1, 4 (1950), Nell, *The Restoration of American Federalism*, 21 STETSON L. REV. 483, 490 (1992).

[2] Corwin, *supra* note 1, at 7.

[3] CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, Doc. No. 170, 82d Cong., 2d Sess. (1952), 118; W. BENNETT, AMERICAN THEORIES OF FEDERALISM (1964), 198–99.

[4] BENNETT, *supra*. note 3, 198–203; H. LAZAR, THE AMERICAN POLITICAL SYSTEM IN TRANSITION (1967), 136–37.

[5] W. GRAVES, AMERICAN INTERGOVERNMENTAL RELATIONS: THEIR ORIGIN, HISTORICAL DEVELOPMENT AND CURRENT STATUS (1964), 818–20.

[6] E.g., U.S. v. Butler, 297 U.S. 1 (1936), holding the Agricultural Adjustment Act of 1933 unconstitutional as dealing with a subject reserved to the states, and declaring that without judicial protection of the states' reserved powers "the spending power would become an instrument for total submission of the governmental powers reserved to the states." *Id.* at 75. *Butler* was implicitly overruled in Stewart Machine Co. v. Davis, 301 U.S. 548 (1937). *See also* Helvering v. Davis, 301 U.S. 619 (1936) and Cover, *Federalism and Administrative Structure*, 92 YALE L.J. 1342 (1983).

[7] GRAVES, *supra* note 5, at 822. *See also*, Nell, *supra* note 1, at 491.

[8] Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 957–58; Comment, Breakdown of the Political Safeguards of Federalism: A Response to Garcia v. San Antonio Metropolitan Transit Auth., 3 JOUR. LAW & POLITICS 749, 762–63 (1987). "Federalism may also be analyzed in terms of economic efficiency, and the optimal form of government has been described as a federal system in which [e]ach level of government, rather than attempting to perform all the functions of the public sector, does what it can do best. The central government presumably accepts responsibility for stabilizing the economy, for achieving the most equitable distribution of income, and for providing certain public goods that influence significantly the welfare of all members of society. Complementing these operations, subcentral governments can supply those public goods and services that are of primary interest only to residents of their respective jurisdictions." W. OATES, FISCAL FEDERALISM (1972), 13. *See also* Odom, *The Tenth Amendment After* Garcia*: Process-Based Procedural Protections*, 135 U.PA. L. REV. 1657 (1987).

[9] J. SUNDQUIST, MAKING FEDERALISM WORK (1969), 3; LAZAR, *supra* note 4, at 138–39.

[10] Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1137 (1987). *See also*: BRENNAN, OUTDOOR ADVERTISING CONTROL UNDER THE HIGHWAY BEAUTIFICATION ACT OF 1965, FINAL REPORT, NCHRP PROJECT 20-6, STUDY 54 (1979), 6–9.

[11] Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

[12] Redish, *Supreme Court Review of State Court Federal Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

[13] State of Nevada v. Skinner, 884 F.2d 445 (9th Cir., 1989).

[14] Chapin, *Harmonizing Federal Preemption Doctrine With* Garcia's *Cession of State and Local Interests to the Political Process*, 23 URBAN LAWYER 45 (1991), Heineman and Phillips, *Federal Preemption: A Comment on Regulatory Preemption After Hillsborough County*, 18 URBAN LAWYER 589 (1986).

[15] 426 U.S. 833 at 840, 851 (1976).

[16] 469 U.S. 528 (1984).

[17] 469 U.S. at 552.

[18] Odom, *supra* note 8.

[19] Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544 (1954).

[20] Field, Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985).

[21] TRIBE, AMERICAN CONSTITUTIONAL LAW, (2d ed., 1988) 315.

[22] Chapin, *Harmonizing Federal Preemption Doctrine With* Garcia's *Cession of State and Local Interests to the Political Process*, 23 URB. LAW. 45 (1991). *See also*: Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977). Freilich and Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. LAW. 215–47 (1994). Interview with Camron Hosek, Asst. Atty. Gen., South Dakota (July 22, 1993).

[23] Transportation program assistance ran a parallel course to general urban programs. President Lyndon Johnson's War on Poverty greatly increased direct federal intervention in urban socioeconomic problems. President Richard Nixon's New Federalism attempted to decentralize this system and make it more flexible with block grants and general revenue sharing, but the attempt to reduce the number of conditions on federal aid was hampered by "congressional federalism," which insisted on assuming responsibility for the individual's well-being and became known as the "bailor-out-of-last resort." President Jimmy Carter's New Partnership for urban areas aimed at creating cooperation between governments, neighborhoods and private-sector and voluntary organizations, to be implemented ultimately by federal regulations. Thomas, *National-Local Relations and the City's Dilemma* in ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES, No. 509 (May 1990), 109–10.

[24] *See, e.g.*, in 1982, provisions relating to vending machines in highway rest areas, equal employment opportunity practices and supportive services, national speed limits, alcohol traffic safety programs, and establishment of a National Drivers Register. 1982 U.S. Code, CONGR. & ADMIN. NEWS 3648, 3655, 3667–71. In 1984, the Uniform Minimum Drinking Age Act. Pub.L. 98-363 (98 STAT 435). In 1987, disadvantaged business enterprise assistance, Indian employment and contracting practices, and admissibility of state highway construction data into evidence in tort claim litigation. 1987 U.S. Code, CONGR. & ADMIN. NEWS 82, 91–92.

[25] Exec. Order No. 12612, 52 Fed. Reg. 41685 (Oct. 30, 1987); Exec. Order No. 12291, 46 Fed. Reg. 13193 (Feb. 17, 1991).

[26] 112 S.Ct. 2408 (1992), 120 L. Ed. 2d 120.

[27] *Id.* at 2428. Regarding effect of state constitutional and statutory consent to federal aid programs, see Wells, Rogers, and Oliver, *The Federal-State Relationship in the Federal-Aid Highway Program* in SELECTED STUDIES IN HIGHWAY LAW 4, 1997–2007 (Transportation Research Board, 1967).

[28] 112 S.Ct. at 2429.

[29] Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 681–89 (1993).

[30] 23 U.S.C. 101(b), Pub. L. No. 85-767, (Aug. 27, 1958) 72 STAT 887.

[31] 23 U.S.C. 103, 104.

[32] *See, e.g.*, testimony of National Association of Regional Councils, American Association of State Highway Transportation Officials, Mayors of St. Louis, Mo., and Carbondale, Ill., in *Reauthorization of Surface Trans-*

portation Programs: Hearings Before Subcommittee on Surface Transportation. House Committee on Public Works and Transportation, 102d Cong., 1st Sess., (Comm. Doc. 102-108), 29, 35–36 (Mar. 1, 1991).

[33] *Surface Transportation Efficiency Act of 1991*, hearings before Senate Committee on Environment and Public Works, 102d Cong., 1st Sess., S. Rep. 102–71, 4 (June 4, 1991).

[34] *Id.* at 8–10. *Also* House Committee on Public Works and Transportation, H. Rep. 102-171, *Intermodal Surface Transportation Efficiency Act of 1991*, Jul. 26, 1991, 7.

[35] *Id.* at 4–5.

[36] *Id.* at 6.

[37] *Id.* at 7.

[38] Kincaid, *From Cooperative to Coercive Federalism* in ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES, No. 509 (May 1990), 139–52.

[39] State of Nebraska, Dept. of Roads v. Tiemann, 510 F.2d 446 (8th Cir., 1975), Federal Highway Administration refusal to approve state tourist attraction signs. *See also*: State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir., 1973); South Dakota v. Volpe, 353 F.Supp. 335 (D.S.D., 1973).

[40] South Dakota v. Volpe, 353 F.Supp. 335 (D.S.D., 1973) holding that secretary's determination of noncompliance was based on sufficient administrative record and so was not arbitrary.

[41] Vermont v. Brinegar, 379 F.Supp. 606, 617 (D.Vt., 1974).

[42] State of Nevada v. Skinner, 884 F.2d 445 (9th Cir., 1989). *See also* South Dakota v. Dole, 483 U.S. 203 (1987).

[43] 469 U.S. 528 (1984).

[44] 884 F.2d at 448–49. *Compare*: Adolph v. Federal Emergency Management Agency, 854 F.2d 732 (5th Cir., 1988) and Tilden v. Richardson, 403 U.S. 672 (1971).

[45] § 2 of the 21st Amendment provides: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquor in violation of the laws thereof is hereby prohibited."

[46] 483 U.S. at 207. *See also* Clarke v. U.S., 915 F.2d 699 (D.C. Cir., 1990), alleging 2d Amendment bar.

[47] Penhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).

[48] Stop H-3 Association v. Dole, 870 F.2d 1419 (9th Cir., 1989) as to road's national significance.

[49] 483 U.S. at 207–08.

[50] 483 U.S. at 210.

[51] Citizens for Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airport Auth., 917 F.2d 48, 55 (D.C. Cir., 1990), noting that Congress's powers under the Property Clause (Const., Art. IV, § 3, d. 2.), are as broad as those under the Spending Clause (Const., art. I, § 8, d. 1.1), but distinguishing the case from South Dakota v. Dole, 483 U.S. 203 (1987).

[52] 297 U.S. 1 (1936).

[53] 301 U.S. 548 (1937).

[54] 112 S.Ct. 2408 (1992), 2424. *See*: McCoy and Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 117. *See also*: Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U. L. REV. 293 (1975); Rosenthal, *supra* note 10. Note, *The Coercion Test and Conditional Federal Grants to the States*, 40 VAND. L. REV. 1159 (1987); Madden, *Terms and Conditions of Federal Grants*, 18 URB. LAW. 551 (1986).

[55] *See* Counsel v. Dow, 849 F.2d 731 (2d Cir., 1988) and Del A v. Edwards, 855 F.2d 1148 (5th Cir., 1988), attempting to build on the holding in Penhurst St. Sch. and Hospital v. Halderman, 451 U.S. 1 (1981) that "contracts" under the spending power must involve state acceptance of the terms voluntarily and knowingly. *See also*: McFarlane, *State Highway Programs Versus the Spending Power of Congress* in SELECTED STUDIES IN HIGHWAY LAW 4, 2018-N1 (Dec. 1982).

[56] Note, *The Coercion Test and Conditional Federal Grants to the States*, 40 VAND. L. REV. 1159, 1175 (1987).

[57] Rosenthal, *supra* note 10, at 1134–35. *See also* Justice O'Connor's dissent in South Dakota v. Dole, 483 U.S. 203, 216 (1986), advocating internal restrictions on the spending power as follows: "Congress has the power to spend for the general welfare; it has the power to legislate only for delegated purposes....The difference turns on whether the requirement specifies in some way how the money should be spent so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements that go beyond specifying how the money shall be spent. A requirement that is not such a specification is not a condition but a regulation which is valid only if it falls within one of Congress' delegated regulatory powers."

[58] McCoy and Friedman, *supra* note 54, at 125.

[59] Sundquist and Davis, *supra* note 9, at 12, state: "...[T]he Congress has affirmed in statute after statute that community problems are national problems,...and that therefore there need be no limitations upon the extension of federal responsibility except those imposed by the fiscal and administrative circumstances that prevail at any given time. The climax and symbol of that philosophy was President Johnson's concept of the Great Society, enunciated in 1964. The Great Society was, by definition, one society; the phrase was singular, not plural. The Great Society was to be designed by national leadership and achieved on a national scale. The means were to be local (or state and local) programs, locally initiated and carried out, but brought into being and made possible by national leadership and national assistance. The President had a name, too, for this structure of intergovernmental relations—'creative federalism.'"

[60] *Id* at 12–13.

[61] Pub. L. No. 102-240, § 1034 (Dec. 18, 1991).

[62] *Id.* (105 Stat. 1977).

[63] Pub. L. No. 102-240, § 1024, 1025 (105 Stat., 1960-1961, 1963-1965) (Dec. 18, 1991).

[64] 23 U.S.C., § 134 (1988 ed.), added in Pub. L. No. 87-866 (Oct. 23, 1962), 76 Stat. 1148, subsequently expanded in Pub. L. No. 91-605 (Dec. 31, 1970), 84 Stat. 1713 and Pub. L. No. 95-599 (Nov. 6, 1976), 92 Stat. 2723–24.

[65] E. WEINER, URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: AN HISTORICAL OVERVIEW (DOT-T-93-02, Nov. 1992), 213–40.

[66] Pub. L. No. 102-240, § 1024 (Dec. 18, 1991), 105 Stat. 1955.

The possibility of competition and conflict between state and local transportation priorities in the development of metropolitan area and statewide plans was recognized and commented on early in the Congressional Oversight Hearings, *infra* note 157, at 22–23.

[67] Sundquist and Davis, *supra* note 9, at 261. *See also*: R. MARTIN, THE CITIES AND THE FEDERAL SYSTEM (1965), 77.

[68] H.R. Rep. No. 102-171(I), 102d Cong., 1st Sess., July 26, 1991, U.S.C. CONG & ADMIN. NEWS, 1991, vol. 3 at 1540.

[69] *See* views of Justices O'Connor and Brennan in South Dakota v. Dole, 483 U.S. 203 at 212–18 (1987).

[70] Sundquist and Davis, *supra* note 9, at 11; Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally-Aided Highway Construction*, 122 U. PA. L. REV. 1 (1973) 6–12.

[71] 870 F.2d 1419 (9th Cir., 1989).

[72] 49 U.S.C., § 1653(f) (1990).

[73] 424 U.S. 1 (1976).

[74] 424 U.S. at 90.

[75] Pub. L. No. 102-240, § 1024(a) (Dec. 18, 1991), 105 Stat. 1955.

[76] 58 Fed. Reg. 58040, Oct. 28, 1993, codified as 23 C.F.R. Pt. 450; 49 C.F.R. Pt. 613.

[77] Mashaw, *supra* note 70, at 58–59, observing in 1973 that:

"...the substitution of a generalized and systems-analytic planning process for the present system of decision-making does not appear imminent. Indeed, it is doubtful that there exist appropriate techniques by which the transportation planner might derive an optimum transportation system. Techniques employed in the development of hardware or limited man-machine systems have less capacity to adapt to areas where the system's environment is complex and fluctuating, goals are either disputable or highly abstract, system boundaries are difficult to draw, and casual relationships are not established."

[78] Pub. L. No. 102-240, § 1025 (Dec. 18, 1991), 105 Stat. 1963, codified as 23 U.S.C. § 135(c).

[79] 42 U.S.C. § 7410; Clean Air Act, § 110.

[80] Pub. L. No. 101-549 (Nov. 15, 1990), 104 Stat. 2399.

[81] Where air quality goals were integrated into regional transportation plans and statewide plans, the obligation to achieve target levels of pollution was imposed on stationary and mobile sources together. Thus, if control measures in the transportation planning process were not sufficient, controls on stationary sources must be increased to make up the difference in performance. As to some enforcement problems associated with SIPs, *see* Melnick and Willis, *Watching the Candy Store: EPA Overfiling of Local Air Pollution Variances*, 20 ECOL. L. Q. 207, 211–18 (1993).

[82] Yuhnke, *Clean Air in Our Times? The Amendments to Reform Transportation Planning in the Clean Air Amendments of 1990*, paper presented at Transportation Research Board Workshop on Transportation Law (Jul. 23, 1991).

[83] § 108(f)(1), listing increased use of public transit, high occupancy traffic lanes, employer-based transportation management plans, trip-reduction ordinances, promotion of high-occupancy and shared-ride services, metropolitan area pedestrian and nonmotorized zones, and bicycle and pedestrian facilities. Pub. L. No. 101-549 (Nov. 15, 1990); 104 Stat. 2465.

[84] Yuhnke, *supra* note 82, at 7.

[85] 44 Fed. Reg. 20375, Apr. 4, 1979.

[86] Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir., 1976); People of State of California *ex rel.* State Air Resources Board v. Department of the Navy, 431 F.Supp. 1271 (N.D. Cal. 1977).

[87] Clean Air Coordinating Comm. v. Roth-Adams Fuel Co., 465 F.2d 323 (7th Cir., 1972), *cert. denied* 410 U.S. 959; Wuillamey v. Werblin, 364 F.Supp. 237 (D.N.J., 1973), construction of state-authorized sports center that might possibly be found to fail to meet air quality standards in the future.

[88] Union Electric Co. v. EPA, 515 F.2d 206 (8th Cir., 1975), *aff'd* 427 U.S. 246.

[89] Ohio Environmental Council v. United States, etc., 593 F.2d 24 (6th Cir., 1979).

[90] State of Connecticut v. EPA, 696 F.2d 147 (2d Cir., 1982).

[91] 898 F.2d 687 (9th Cir., 1990).

[92] Yuhnke, *supra* note 82, at 8, *cf.* State Implementation Plans, General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13,498, 13,561 (Apr. 16, 1992).

[93] U.S. Constitution, art. II, cl. 2: "The Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to be Contrary Notwithstanding."

[94] 22 U.S. (9 Wheat.) 1 (1824). For a century following Chief Justice Marshall's death (1835), however, the court struggled with the problem of reconciling the logic of the Supremacy Clause with the argument that the Tenth Amendment withdrew various internal police matters from the reach of Congress. The latter theory was adopted in *The License Cases*, 46 U.S. (5 How) 504 (1847), and put the Supreme Court in the position of determining the respective fields for federal and state action. This view was, in effect, repudiated by decisions since the New Deal Era, leading to *Garcia v. San Antonio Metropolitan Transit Authority* in 1985.

[95] TRIBE, *supra* note 21, at 481 n. 14.

As to preemption's use in resolving federal-state-local conflicts, it has been observed that "...[T]he preemption doctrine, as it had evolved, allocates the power between the federal government and the states by determining when an act by the federal government preempts state and local action on the same subject.

The preemption doctrine is used by the courts as a method of analysis and used by those appealing to the courts and to the legislatures as a political doctrine....[P]reemption can be viewed essentially as a political doctrine because when the decision-making power is divided between federal and state governments, either the local and state approach to an issue will prevail in a specific case. As a result, the preemption doctrine has become an established and fashionable political tool to be employed on an issue-by-issue basis by virtually every interest group in America." (Project: *The Role of Preemption in Administrative Law*, 45 ADMIN. L. REV. 107, 115 (1993).

[96] These categories have been structured and referred to in various ways by the courts. *See, e.g.*: Pacific Gas & Elec. Co. v. State Energy Resource Conservation & Dev. Comm'n., 461 U.S. 190 (1982); California Coastal Comm'n. v. Granite Rock So., 480 U.S. 572 (1987); Int'l. Paper Co. v. Ouellette, 479 U.S. 481 (1987); California Fed. Sav. & Loan Assoc. v. Guerra, 479 U.S. 272 (1987); Massachusetts Medical Soc'y v. Dukakis, 815 F.2d 790 (1st Cir., 1987), *cert. denied* 108 S.Ct. 299 (1987).

[97] TRIBE, *supra* note 21, at 491–95.

[98] Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977), 1200–02.

Under the CAA, states are responsible for adopting SIPs and transportation control programs (TCPs) to control pollution sources to the extent needed to attain federal standards. Failure to develop and adopt satisfactory SIPs and TCPs expose state officials to federal enforcement orders and civil and criminal penalties. As to constitutional questions raised in such situations, *see, e.g.*, Maryland v. EPA, 530 F.2d

215 (4th Cir., 1975), *vacated and remanded*, 97 S.Ct. 1635 (1977).

[99] *E.g.*, Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), where a city ordinance prohibiting aircraft from taking off or landing at a local airport at night was held in conflict with the purpose of the Federal Aeronautics Act to ensure safe and efficient use of air space. *See also* Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 106–07 (1988).

[100] Ray v. Atl. Richfield Co., 435 U.S. 151 (1978), noting, however, that the more restrictive state design standards were not preempted because the state provision for use of escorts to accompany vehicles not complying with national standards avoided conflict with the federal law's narrow objective of encouraging national uniform standards and served the general objective of promoting transportation safety and efficiency.

[101] *E.g.*, Silkwood v. Kerr-Magee Corp., 464 U.S. 238 (1984), where state legislation enacted to assist claims for tort damages for victims of nuclear radiation was held not to be preempted despite action of Congress in occupying the field of nuclear safety regulation, which was alleged to be the basis for the tort claims. *See also*: Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

[102] Heineman and Phillips, *Federal Preemption: A Comment on Regulatory Preemption After* Hillsborough County, 18 URB. LAW. 589 (1986).

[103] 367 U.S. 374 (1961).

[104] Fidelity Fed. Sav. & Loan Assoc. v. De La Cuesta, 458 U.S. 141 (1982), stating: "Federal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." 488 U.S. at 153–54. *See also*: Capital Cable, Inc. v. Crisp, 467 U.S. 691 (1984), holding that a state law prohibiting advertisement of alcoholic beverages is preempted by Federal Communications Commission regulations requiring television transmission to be carried in full, including commercial messages.

[105] Fidelity Fed. Sav. & Loan Assoc. v. De La Cuesta, 458 U.S. 141, 153 (1982), *citing* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Administrative rulings may also be challenged for going beyond the scope of rulemaking authority delegated when preemption occurred. This issue was raised in U.S. v. Fleet Carriers Corp., 901 F.2d 1550 (11th Cir., 1990), *cert. denied*, 498 U.S. 1046 (1991); 821 F.Supp. 707 (S.D. Ga., 1993), where EPA regulations for liability for cost of cleaning up toxic waste under the Comprehensive Environmental Response, Compensation and Liability Act appeared to reinterpret the statute so as to limit application of the statute's Security Interest Exemption. *See also* Comment, *The Final Rule on Lender Liability: Is It Truly a Safe Harbor for Senders?* 41 U. KAN. L. REV. 809 (1993).

[106] 471 U.S. 707 (1985).

[107] 471 U.S. at 716–17.

[108] 312 U.S. 52 (1941).

[109] Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1985), where Justice Rehnquist, dissenting, declared: "[T]he entire body of this court's labor law preemption doctrine has been built on a series of implications as to Congressional intent in the face of Congressional silence, so that we now have an elaborate preemption doctrine traceable not to any expression of Congress, but only to statements of this Court in its previous opinions of what Congress must have intended." 475 U.S. at 623. *See also* Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 637 (1973), holding that FAA regulations preempted a local ordinance restricting night operations at a local airport. In a 5–4 decision, dissenters challenged the conclusion that federal control of aircraft noise "pervaded" and implicitly pre-empted the aircraft noise problem so that independent local action might hamper achievement of congressional objectives. *And see* Fidelity Fed. Sav. & Loan Assoc. v. De La Cuesta, 458 U.S. 141, 171–75 (1982).

[110] 469 U.S. 528 (1985).

[111] Chapin, *supra* note 22, elaborates on this point by citing the trend of members of Congress to be financed by national constituencies and interests and to be gradually separated from the constituencies in their political home districts, with resulting loss of loyalty to that home constituency. He notes, also, that regulatory preemption removes legislators from being directly accountable for the impacts of federal control or the necessity of being responsive to state and local interests in their districts, and shifts these responsibilities to federal agencies that are not accountable to states or localities in any political process, 23 URB. LAW. at 50–52, 56.

[112] Heineman and Phillips, *supra* note 102; Wolfson, *supra* note 99; Comment, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); Rotunda, *Sheathing the Sword of Federal Preemption*, 5 CONST. COMMENTARY 311 (1988); TRIBE, *supra* note 21 at § 6-25 to 6-29, (at 479–511); Farber, *State Regulation and the Dormant Commerce Clause*, (1986) 3 CONST. COMMENTARY 395; Chapin, *supra* note 22.

[113] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (U.S., 1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[114] 49 App. U.S.C. Ann. 2505. 2509(b), (d), (f). *See* 1984 U.S.C., CONGR. & ADMIN. NEWS 4769, 4798–99.

[115] Pub. L. No. 89-564, Title I, § 101, Sept. 9, 1966, 80 Stat. 731, codified as 23 U.S.C. 402, directing the Secretary of Transportation to formulate procedures for states to obtain approval of plans to enforce federal rules and compatible state rules that, in the Secretary's judgment, promote congressional objectives in such enforcement and satisfy other statutory requirements. For legislative history, see 1966 U.S.C. CONG. AND ADMIN. NEWS, 2741.

[116] The Commercial Motor Vehicle Safety Act of 1986 directed the Secretary of Transportation to promulgate standards for a Commercial Drivers License Program. 49 U.S.C. § 2705, Pub. L. No. 102-240 (Dec. 18, 1991), [hereinafter ISTEA] § 4005 directs the Interstate Commerce Commission to amend the standards to provide for a "one-license system." (105 Stat. 2147).

[117] ISTEA, § 1023, 4006.

[118] ISTEA, § 4008.

[119] ISTEA, § 4005, "Registration of Motor Carriers by a State," appears to be for the purpose of codifying the current interpretation of constitutional limits on state regulation of interstate commercial traffic. *See*: Castle v. Hayes Freight Lines, Inc., 348 U.S. 61 (1954); Ray v. Atl. Richfield Co., 435 U.S. 151 (1978); Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

[120] ISTEA, § 1029, specifying a 65-mph speed limit on highways outside urbanized areas that meet certain design standards. 23 U.S.C. § 154.

[121] Pub. L. No. 93-643, § 114(a) (Jan. 4, 1975), 88 Stat. 2286.

[122] 1974 U.S.C. CONG. & ADMIN. NEWS 8019, quoting H.Rep. 93-1567, 93d Cong., 2d Sess.

[123] 23 U.S.C. § 106, 154.

[124] ISTEA, § 1031, adding new § 153 to U.S.C.

[125] *E.g.*, ISTEA, § 2507, relating to brake performance for passenger cars.

[126] ISTEA, § 4002.

[127] Pub. L. No. 97-424 (Jan. 6, 1982), 96 Stat. 2155, codified as 49 U.S.C. § 2302.

[128] ISTEA, § 4002.

[129] *Citing* Hodel v. Virginia Surface Mining and Recl. Assn., Inc., 452 U.S. 264 (1981), the U.S. Supreme Court in New York v. United States, 112 S.Ct. 2408 (1992) stated: "Where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation....This arrangement, which has been termed 'a program of cooperative federalism,' is replicated in numerous federal statutory schemes." 112 S.Ct. 2424.

[130] 23 U.S.C. § 113 (1988).

[131] 23 U.S.C. § 140 (1988 od.).

[132] 42 U.S.C. § 12101 (1993 Suppl.).

[133] 42 U.S.C. § 4321.

[134] 42 U.S.C. § 4601.

[135] Pub. L. No. 101-549 (Nov. 15, 1990), 104 Stat. 2399.

[136] ISTEA, § 4001.

[137] McFarlane, *supra* note 55; McCoy and Friedman, *supra* note 54; Rosenthal, *supra* note 10.

[138] 112 S.Ct. 2408 (1992).

[139] *Id.* at 2430–31.

[140] *Id. See also*: Prakash, *supra* note 11, at 2033–35; Powell, *supra* note 29, at 652–65.

[141] Rosenthal, *supra* note 10, at 1136–37.

[142] Bauman, *Issues in the Creation and Operation of Public-Private Partnerships*, paper presented at Transportation Research Board Workshop on Transportation Law (Jul. 23, 1991); Kunde and Bertsch, *Partnership and Development: ISTEA and CAAA—Breakthrough or Mire?* in MOVING URBAN AMERICA, conference proceedings, May 1992 (Transportation Research Board, Special Report 237, 1993) 114; CONFERENCE SUMMARY, MOVING URBAN AMERICA (Transportation Research Board Special Report 237, 1993), 12; H.R. Rep. 102-171(I), Jul. 26, 1991, 102d Cong., 1st Sess., at 7; S. Rep. 102-71, June 4, 1991, 102d Cong., 1st Sess., at 4–9.

[143] Kunde and Bertsch, *supra* note 142, at 117.

[144] *Moving Urban America*, proceedings of conference sponsored by U.S. Department of Transportation, Federal Transit Administration, and Federal Highway Administration (May 1992), at 15–16.

[145] *Id.* at 16.

[146] *Id.* at 13.

[147] Zimmerman, *Regulating Intergovernmental Relations in the 1990s* IN ANNALS AM. ACAD. OF POL. & SOC. SCI., No. 509 (May 1990), at 49, states: "American federalism since 1974 has been characterized by a greater centralization of decision-making in many functional areas"; and Kincaid, *supra* note 38, at 148 adds: "Overall federalism became less cooperative during the 1970s and 1980s....More than 50 percent of the preemptive statutes enacted since 1789 were enacted during two decades—the 1970s and 1980s—representing 10 percent of the 200 year history of the federal republic."

[148] ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE FEDERAL ROLE IN THE FEDERAL SYSTEM: DYNAMICS OF GROWTH, 45 (1980) [hereinafter ADVISORY COMMISSION].

[149] Interview with Tom Holian, Deputy Assistant Chief Counsel, FHWA (Dec. 13, 1993).

[150] 58 Fed. Reg. 58040, Oct. 28, 1993, effective Nov. 29, 1993.

[151] Exec. Order No. 12612, 52 Fed. Reg. 41685 (1987).

[152] 58 Fed. Reg. 58063, Oct. 28, 1993, to be codified in 23 C.F.R. Pt. 450 and 49 C.F.R. Pt. 613.

[153] Pub. L. No. 96-354 (Sept. 19, 1980), 94 Stat. 1164, codified as 5 U.S.C. 601–612.

[154] 58 Fed. Reg. 58063 (Oct. 28, 1993).

[155] Exec. Order No. 12612, 52 Fed. Reg. 41685, § 4 (Oct. 26, 1987).

[156] *See* Zimmerman, *supra* note 147, at 48, 56.

Exec. Order No. 12612, 52 Fed. Reg. 41685 (Oct. 26, 1987) should be read with Exec. Order No. 12372, Jul. 14, 1982, 47 Fed. Reg. 30959 (Jul. 16, 1982) Intergovernmental Review of Federal Programs, and amended Apr. 8, 1983, (48 Fed. Reg. 15887), and implementation regulations for Intergovernmental Review of Department of Transportation Programs and Activities. 49 C.F.R., Pt. 17.1-17.13. Also relevant is 49 C.F.R., Pt. 18, § 18.1-18.52, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments. These executive orders encourage standardization and simplification of recordkeeping, reporting, monitoring, enforcing, processing, and reducing paperwork in federal-state program administration and seek to reduce administrative burdens on state and local governments. Also, they purport to ensure there will be consultation on the state and local effects of proposed federal actions and encourage accommodation of state conditions and interests. The regulation, however, specifies that it is an internal management tool and not intended to create any right or benefit enforceable at law against the U.S. Department of Transportation or its officials. 49 C.F.R., § 17.1(c) (Oct. 1, 1993, ed.).

[157] *Implementation of the Intermodal Surface Transportation Efficiency Act of 1991: Hearings before the Subcommittee on Surface Transportation, Committee on Public Works and Transportation, House of Representatives*, 103d Cong., 1st Sess., April 1993, No. 103-15, 1–20 [hereinafter Oversight Hearings].

[158] Oversight Hearings, 25, 203–04, 235, 256. Construction industry witnesses (AGC; ARTBA) also noted the low level of use, but warned that heavier use might reduce funds available for highway facilities, 247.

[159] *Id.* at 22–25 (Nat'l Conference of State Legislatures), 235 (New York City; Nat'l Conference of Mayors).

[160] *Id.* at 203 (FHWA).

[161] *Id.* at 256 (STPP).

[162] *Id.* at 22–23, where Nat'l Conference of State Legislatures stated: "We have found that in order to fully embrace the ideals of ISTEA, we are having to change the mindset of the players from one of 'winners and losers.' It is clear that in a successful, integrated state transportation plan, modes should not compete but complement each other."

[163] *Id.* at 211, 213, 225 (AASHTO); 235 (Conference of Mayors).

[164] *Id.* at 59, testimony of Robert Kochanowski.

[165] *Id.* at 507–08.

[166] *Id.* at 24.

[167] *Id.* at 284–85 (Am. Bus. Ass'n).

[168] *Id.* at 24 (Nat'l Conference of State Legislatures).

[169] *Id.* at 23.

[170] *Id.* at 320.

[171] *Id.* at 27–28 (Nat'l Conference of State Legislatures).

[172] *Id.* at 235 (New York City).

[173] ADVISORY COMMISSION, *supra* note 148, at 47–48.

[174] Oversight Hearings, *supra* note 157, at 273, 284–85.

[175] *Id.* at 320–21.

[176] ADVISORY COMMISSION, *supra* note 148, at 84–85.

SELECTED RESEARCH BIBLIOGRAPHY

Treatises

W. BENNETT, AMERICAN THEORIES OF FEDERALISM (University of Alabama Press, 1964).

W. CAPPALI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS, (Callaghan, 1982, 1991 Supplement) 3 vols.

W. Kurylo, *A Study of the Federal-aid Highway Program With Special Emphasis on its Major Budgetary and Planning Aspects*, Dissertation, American University, Washington 1959.

J. SUNDQUIST, MAKING FEDERALISM WORK (Brookings, 1969).

L. TRIBE, AMERICAN CONSTITUTIONAL LAW (Foundation Press, 2d edition, 1988).

W. McFarlane, *State Highway Programs Versus the Spending Powers of Congress, in* SELECTED STUDIES IN HIGHWAY LAW "Intergovernmental Relations," Vol. 4, 2018-N1 to 2018-N30 (Transportation Research Board, 1982).

D. Well, N. Rogers, D. Oliver, *The Federal-State Relationship in the Federal-Aid Highway Program, in* SELECTED STUDIES IN HIGHWAY LAW "Intergovernmental Relations," Vol. 4, 1967–2017 (Transportation Research Board, 1988).

Hearings, Reports, Proceedings

Reauthorization of the Post-Interstate Surface Transportation Program: Hearings before H.R. Committee on Public Works and Transportation, Report 101-82, 101st Cong., 2d Sess. (Mar., Jul., Sept. 1990).

Reauthorization of Surface Transportation Programs: Hearings before H.R. Committee on Public Works and Transportation, Report 102-8, 102d Cong., 1st Sess. (Mar., Apr. 1991).

Implementation of the Intermodal Surface Transportation Efficiency Act of 1991: Hearings before H.R. Committee on Public Works and Transportation, Report 103-15, 103d Cong., 1st Sess. (Apr., May 1993).

H.R. Rep. No. 102-171(I), *Intermodal Surface Transportation Efficiency Act of 1991: Hearings before Committee on Public Works and Transportation*, 102d Cong., 1st Sess. (Jul. 26, 1991).

S. Rep. No. 102-71, *Surface Transportation Efficiency Act of 1991: Committee on Environment and Public Works*, 102d Cong., 1st Sess. (June 4, 1991).

Exec. Order No. 12612, *Federalism Considerations in Policy Formulation and Implications* (Oct. 26, 1987).

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY AND ISSUES, 1993.

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH, HEARINGS ON THE FEDERAL ROLE (Report A-87, October 1980).

Federal Highway Administration, *Exploring Key Issues in Public-Private Partnerships for Highway Development*, SEARCHING FOR SOLUTIONS, No. 2 (June 1992).

E. WEINER, URBAN TRANSPORTATION PLANNING IN THE U.S.: AN HISTORICAL PERSPECTIVE (Report DOT-T-93-02, Nov. 1992).

MOVING URBAN AMERICA, TRANSPORTATION RESEARCH BOARD SPECIAL REPORT 237 (1992).

Public/Private Ventures in Transportation, CONFERENCE PROCEEDINGS (American Road and Transportation Builders Association, 1990).

Periodical Literature

B. Casino, Federal Grants in Aid Evolution, Crisis and Future. 20 URB. LAW. 25–71 (1988).

R. Chapin, *Harmonizing Federal Preemption Doctrine with* Garcia's *Cession of State and Local Interests to the Political Process*, 23 URB. LAW. 45–61 (1991).

C. Cooper, *The Demise of Federalism*, 20 URB. LAW. 239–83 (1988).

E. Corwin, *The Passing of Dual Federalism*, 36 VA. LAW REV. 1–23 (1950).

Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U. L. REV. 293–330 (1975).

Comment, *State Autonomy After* Garcia: *Will the Political Process Protect States' Interests?* 71 IA. LAW REV. 1527–51 (1986).

Comment, *The Surface Transportation Assistance Act: Federalism's Last Stand?* 11 VT. LAW REV. 203–32 (1986).

M. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. LAW REV. 84–118 (1985).

Freilich and Richardson, *Returning to a General Theory of Federalism: Framing a New Tenth Amendment United States Supreme Court Case*, 26 URB. LAW. 215–47 (1994).

R. Freilich, et al., *Federalism in Transition: The Emergence of New State and Local Strategies in the Face of the Vanishing Tenth Amendment*, 20 URB. LAW. 863–969 (1988).

B. Heineman, D. Phillips, Federal Preemption: *A Comment on Regulatory Preemption After* Hillsborough County, 18 URB. LAW. 589–606 (1986).

E. Herschler, *Federalism: A State Perspective*, 1986 DET. C. L. REV. 1131–36 (1986).

E. Hickok, Jr., *Federalism's Future Before the U.S. Supreme Court*, ANNALS AM. ACAD.POL. & SOC. SCI., No. 509, (May 1990) 73–93.

A. E. Dick Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. LAW REV. 789–97 (1985).

L. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. LAW REV. 847–97 (1979).

J. Kincaid, *From Cooperative to Coercive Federalism*, ANNALS AM. ACAD. POL. AND SOC. SCI., No. 590, (May 1990) 139–52.

D. Kniec, E. Diamond, *New Federalism Is Not Enough: The Privatization of Non-Public Goods*, 7 HARV. J. L. & PUB. POL'Y. 321–94 (1984).

B. LaPierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577–665 (1985).

C. Lee, *The Political Safeguards of Federalism? Congressional Response to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301–40 (1988).

T. Madden, *Terms and Conditions of Federal Grants*, 18 URB. LAW. 551–66 (1986).

J. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally-Aided Highway Construction*, 122 U. PA. L. REV. 1–96 (1973).

T. McCoy, B. Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. C. REV. 85–127.

W. McFarlane, *The State/Federal Relationship: Balancing Powers*, Transportation Research Board

Workshop on Transportation Law, Aug. 1978.

R. Nell, *The Restoration of American Federalism*, 21 STETSON L. REV. 490–91 (1992).

Note, *The Coercion Test and Conditional Federal Grants to the States*, 40 VAND. L. REV. 1159–95 (1987).

T. Odom, *The Tenth Amendment After* Garcia*: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657–94 (1987).

J. Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

S. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

Project, *The Role of Preemption in Administrative Law*, 45 ADMIN. L. REV. 107–224 (1993)

A. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103–64 (1987).

D. Skover, *Phoenix Rising and Federalism Analysis*, 13 HASTINGS CONST. L. Q. 271–304 (1986).

R. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L. J. 1196–1272 (1977).

R. Thomas, *National-Local Relations and the City's Dilemma*, ANN. AM. ACAD. POL. & SOC. SCI., No. 509, (May 1990) 106–17.

L. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065–1104 (1977).

W. VanAlstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709–33 (1985).

H. Wechsler, *The Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543–60 (1954).

C. Wise, R. O'Leary, *Is Federalism Dead or Alive in the Supreme Court? Implications for Public Administrators*, 52 PUB. ADMIN. REV. 559–72 (1992).

J. Zimmerman, *Federal Preemption of State and Local Governmental Activities*, 13 STETSON L. REV. 25–51 (1989).

J. Zimmerman, *Regulating Intergovernmental Relations in the 1990s*, ANN. AM. ACAD. POL. & SOC. SCI., No. 509, (May 1990) 48–59.

ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Committee SP20-6. The Committee is chaired by Delbert W. Johnson, Office of the Attorney General of Washington. Members are: Watson C. Arnold, Austin, Texas (formerly with Texas Office of the Attorney General); Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Kingsley T. Hoegstedt, Carmel, California; Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Office of the Governor, Commonwealth of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Marilyn Newman, Boston, Massachusetts; Lynn B. Obernyer, Colorado Department of Law; Jean G. Rogers, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; and Richard L. Tiemeyer, Missouri Highway and Transportation Commission. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP staff.

TRANSPORTATION RESEARCH BOARD
National Research Council
2101 Constitution Avenue, N.W.
Washington, DC 20418