

Florida State University Journal of Land Use and Environmental Law

Volume 15
Number 2 *Spring 2000*

Article 2

April 2018

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Recommended Citation

Rylander, Jason C. (2018) "The Emerging Federal Role in Growth Management," *Florida State University Journal of Land Use and Environmental Law*: Vol. 15 : No. 2 , Article 2.

Available at: <https://ir.law.fsu.edu/jluel/vol15/iss2/2>

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Cover Page Footnote

The author wishes to thank Professor Lynda Butler and Elizabeth Evans for valuable comments on an earlier draft of this article.

THE EMERGING FEDERAL ROLE IN GROWTH MANAGEMENT

JASON C. RYLANDER*

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I. INTRODUCTION

On January 11, 1999, Vice President Al Gore proposed a bold new federal initiative to build "more livable communities."¹ Targeted at the suburbs, where fifty percent of the nation's population now resides,² the Clinton-Gore Livability Agenda (the Livability Agenda) for the twenty-first century includes more than \$10 billion in incentive programs for localities to preserve green space, ease traffic congestion, and pursue regional growth management strategies.³ Specifically, the Clinton administration is proposing \$700 million in new tax credits for state and local bonds to preserve open space and redevelop abandoned brownfields, \$6.1 billion in grants for public transportation programs, and \$1.6 billion

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1. Al Gore, Remarks as Prepared for Delivery by Vice President Al Gore Livability Announcement (Jan. 11, 1999) <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1999/1/12/6.text.2>>.

2. See Alison Mitchell, *Two Parties Prepare for Biggest Battle Yet in Fight for Suburbs*, N.Y. TIMES, May 4, 1999, at A1.

3. See Gore, *supra* note 1.

for state and local efforts to reduce air pollution and traffic congestion.⁴

The Livability Agenda is the latest recognition that urban sprawl has become an important national issue. Spurred on by federal subsidies, development has transformed the American landscape. Metropolitan areas across the country have expanded at rates far exceeding population growth.⁵ Fire and flood disasters increase as people infringe in ever-greater numbers on sensitive natural areas.⁶ Green spaces are fragmented. Runoff from roads, parking lots, lawns, and farmland carry a toxic soup of pollution into the nation's ground and surface water.⁷ As development surges out beyond the beltways, center cities suffer economic blight, and society is further segmented along race and class lines.⁸ Productivity lost to time spent in traffic is measured in millions of dollars.⁹ Aldo Leopold perhaps put it best: "[t]hat land yields a cultural harvest is a fact long known, but latterly often forgotten."¹⁰

For many communities, the Livability Agenda's promise of federal assistance is welcome. Nine states have enacted state-wide growth management plans, and many more localities have enacted plans to curb sprawl and promote smarter growth.¹¹ In 1998 alone, nearly 200 state and local governments approved ballot initiatives related to controlling suburban development.¹² The majority of the Livability Agenda proposals rely on federal dollars to encourage state and local governments to take additional similar actions.¹³

4. See *id.*

5. See, e.g., LAND USE IN AMERICA 85-94 (Henry L. Diamond & Patrick F. Noonan eds., 1996); Kenneth T. Jackson, *America's Rush to Suburbia*, N.Y. TIMES, June 9, 1996, at E15.

6. See LAND USE IN AMERICA, *supra* note 5, at 1-3.

7. See *id.* at 3; see also William K. Reilly, *Across the Barricades*, in LAND USE IN AMERICA, *supra* note 5, at 187, 195-96.

8. See, e.g., LAND USE IN AMERICA, *supra* note 5, at 1; J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2286 (1997) (book review).

9. See Jason Rylander, *The Crawl of Sprawl: The Northeast's Biggest Environmental Problem?*, AMC OUTDOORS, Oct. 1997, at 16.

10. ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE at ix (Oxford Univ. Press 1987) (1949).

11. See, e.g., LAND USE IN AMERICA, *supra* note 5, at 26-27; Matthew W. Ward et al., *National Incentives for Smart Growth Communities*, 13 NAT. RES. & ENV. 325 (1998). As of 1995, statewide growth management plans were enacted in Florida, Georgia, Maine, Maryland, New Jersey, Oregon, Rhode Island, Vermont, and Washington. See LAND USE IN AMERICA, *supra* note 5, at 26-27. Other states have enacted programs to protect specific regions such as Cape Cod, Massachusetts, the Lake Tahoe Basin of California and Nevada, and the Adirondacks of New York. See *id.*

12. See *Sprawl Brawl*, REASON ONLINE (Apr. 8, 1999) <<http://www.reasonmag.com/bisprawl.html>>.

13. See *Clinton-Gore Livability Agenda: Building Livable Communities for the 21st Century* (Jan. 11, 1999) <<http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/>>

The Livability Agenda raises fundamental questions, however, about the nature and function of the federal government in addressing problems such as sprawl and "livability." The Vice-President's own comments illustrate the ambiguities that accompany federal incursions in the field of planning:

Of course, the federal government's role should never be that of beauty commissar. It is not appropriate for us to get into the business of local land use planning. But it is our job to work with states, such as Governor Glendening's Maryland, to support their remarkable smart growth efforts. It is our job to amplify citizens' voices, and make it easier for communities to get their hands on the tools they need to build the way they want. It is our job to keep learning from community successes, and do what we can to support them.¹⁴

Such comments do little to explain on what the federal government can constitutionally achieve in land use planning. Even less meat can be pulled off these rhetorical bones when it comes to defining the role of the federal government in curbing sprawl and promoting sustainability.

Increasingly, America's politicians are at odds with themselves over how to satisfy the public's competing demands for jobs, housing, economic development, transportation, environmental quality, farmland, open space, wildlife, and recreation. Growth fuels prosperity, but less apparent are its attendant social, economic, and environmental costs. The rise of sprawl as a political issue suggests that the public is beginning to realize what it has lost to the uncompromising engine of progress.

The proposed federal intervention in growth management should be welcome news to environmentalists, but modern interpretations of the United States Constitution's commerce and takings clauses may constrain direct federal involvement.¹⁵ Indeed, Constitutional provisions are increasingly being invoked to attack environmental regulation.¹⁶ Nevertheless, the federal government

1999/1/11/14.text.1>

14. Gore, *supra* note 1.

15. *See, e.g.,* Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

16. For recent discussions of takings challenges, *see, for example,* JOHN ECHEVERRIA, LET THE PEOPLE JUDGE (1995); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights,*

retains ample authority to act in this arena through conditional and incentive spending programs. The Livability Agenda is but the latest and most prominent example of how federal fiscal policy can be used to achieve lasting impacts on regional growth.

This Article explores the potential of federal fiscal initiatives to impact growth management in the states. Part II outlines how growth trends impact society and the environment. The existing federal role in land use policy is discussed in Part III. Part IV analyzes the Constitutional bases for federal action in growth management, including recent federalist jurisprudence. Finally, Part V highlights how some federal programs are already making a difference in this arena and discusses the importance of the Constitution's Spending Clause in fostering federal economic incentive programs designed to achieve a more sustainable society.

II. SPRAWL IN AMERICA

"To get away. Away from what? In the long run, away from themselves."¹⁷ D.H. Lawrence's words on the American need to escape are apt in the land use context. Americans are a mobile people, a "frontier society"¹⁸ that until recently viewed its land without limit. American cities swelled with hopeful migrants in the nineteenth and early twentieth centuries; however, droves of people have fled cities for the periphery since the 1950s.¹⁹ By 1970, for the first time, more people lived in suburbs than in cities and rural areas combined.²⁰ The impact on urban America has been astounding. Of the twenty-five largest cities in 1950, eighteen have lost population.²¹ For example, "[t]he population of Chicago proper has dropped 25

and the New Takings Legislation, 53 WASH. & LEE L. REV. 265 (1996); Marianne Lavelle, *The 'Property Rights' Revolt: Environmentalists Fret as States Pass Reagan-Style Takings Laws*, NAT'L L.J., May 10, 1993, at 34. For challenges based on Commerce Clause or Tenth Amendment grounds, see Jonathan Adler, *The Green Aspects of Printz: The Revival of Federalism and its Implications for Environmental Law*, 6 GEO. MASON L. REV. 573, 633 (1998); see also David A. Linehan, *Endangered Regulation: Why the Commerce Clause May No Longer Be Suitable Habitat for Endangered Species and Wetlands Regulation*, 2 TEX. REV. L. & POL. 365 (1998) (arguing that provisions in the Endangered Species Act and Clean Water Act would not survive a Constitutional challenge after *Lopez*).

17. ROBERT D. KAPLAN, AN EMPIRE WILDERNESS 352 (1998) (quoting D. H. LAWRENCE, STUDIES IN CLASSIC AMERICAN LITERATURE (1964)).

18. *Id.* at 44.

19. See, e.g., Jackson, *supra* note 5; LAND USE IN AMERICA, *supra* note 5, at 1; John Turner & Jason Rylander, *Land Use: The Forgotten Agenda*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 60 (Marian R. Chertow & Daniel C. Esty eds., 1997).

20. See Jackson, *supra* note 5.

21. See *id.*

percent, Baltimore 28 percent, Philadelphia 29 percent, Washington 32 percent, [and] Cleveland 43 percent."²²

While urban cores declined, populations surged along these city beltways, creating doughnut-like patterns of growth.²³ Between 1970 and 1990, Cleveland's population declined 8 percent, yet its metropolitan area increased by one-third.²⁴ Urban sprawl is even worse in growing cities. In the past thirty years, Los Angeles's population grew by 45 percent, but its metropolitan area sprawled nearly 300 percent, covering an area the size of Connecticut.²⁵ Similarly, Chicago's population rebounded four percent, and its urban area grew 46 percent.²⁶ Finally, Atlanta, believed to have the worst urban sprawl problem in the country, loses 70 acres of open space per day to development.²⁷

The American population expands by roughly 2.2 million people each year, and if current trends continue, 80 percent of these people will settle in edge cities located on the urban fringe.²⁸ Coastal areas, the South, and the inter-mountain West face particularly acute growth challenges.²⁹ Further, with rapid advances in information technology, it is projected that even more people will seek out remote areas in which to live and work.³⁰

Myopic local planning contributes to the problem, as suburban jurisdictions compete ferociously for businesses and development. Municipalities lure businesses through tax breaks, infrastructure improvements, and other guarantees, while the accompanying costs of increased congestion and pollution are frequently borne by neighboring towns.³¹ The task of bringing new business to the area requires changes in living and transportation patterns. As jobs shift further from the central cities, people find they can live even further outside the metropolitan area and still

22. Kenneth T. Jackson, *100 Years of Being Really Big*, N.Y. TIMES, Dec. 28, 1997, at OP-ED.

23. See, e.g., Turner & Rylander, *supra* note 19, at 62; LAND USE IN AMERICA, *supra* note 5, at 88.

24. See LAND USE IN AMERICA, *supra* note 5, at 88.

25. See *id.*

26. See Turner & Rylander, *supra* note 19, at 62.

27. See Alec Zacaroli, *Air Pollution: Urban Sprawl Presents Growing Threat to Cities; Atlanta Leads Pack, Group Says*, NAT'L ENV'T DAILY (BNA) at A-1 (Sept. 10, 1998).

28. See LAND USE IN AMERICA, *supra* note 5, at 85-87.

29. See *id.* at 87-91.

30. See *id.* at 95.

31. This phenomenon, the so-called "race to the bottom" has been discussed in numerous articles. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1951 n.186 (1995); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

have a reasonable commute to work. Those individuals left behind in the older core cities, increasingly members of minority groups, face diminished job prospects, crumbling neighborhoods and economic disparity.³² Social stratification by race and class is a serious and often overlooked consequence of sprawl.³³

Further, overlapping governmental entities, while pursuing worthwhile goals, can contribute to regional fragmentation and distress. Suburban growth has caused a proliferation of municipal jurisdictions.³⁴ "In 1990, 48.5 million people, almost one-third of all U.S. urban residents, were scattered among 18,219 municipal units of fewer than 25,000 inhabitants."³⁵ Local laws regulating everything from land use to liquor sales vary widely among these political subdivisions.³⁶ In addition to the municipal corporation, some 3,041 counties checker the nation's landscape, along with more than 28,588 "special districts," whose power it is to provide services such as sewage treatment, water quality, and mass transit.³⁷ "The aggregate result in most U.S. metropolitan areas is a political geography of byzantine complexity."³⁸ The resulting land use governance structure is not only complex, it is also remarkably inadequate to cope with the myriad land use and environmental issues these governments must face.

III. THE EXISTING FEDERAL ROLE IN LAND USE POLICY

Although environmental policies are traditionally debated at the federal and state level, "[i]t is almost a maxim that all land use is a local matter."³⁹ That this maxim retains credibility is surprising in light of the pervasive federal influence in the arena. As this Part will show, historically, the federal government has played a much greater role in the shaping of land use policy than is commonly understood.

Today, land use regulation is increasingly centralized and local governments are no longer the predominant regulatory entity.

32. See Baker, *supra* note 31, at 1951 (admitting that this race-to-the-bottom problem often justifies federal regulation).

33. See Byrne, *supra* note 8, at 2286. For more detailed discussions of how land use impacts racial issues, see, e.g., CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996); DAVID L. KIRP ET AL., *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995).

34. See RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* 135 (1996).

35. *Id.*

36. See *id.* at 137.

37. See *id.* at 145-46.

38. *Id.* at 142.

39. Ward, *supra* note 11, at 325.

Regional, state, and federal agencies have an increased presence in land use restrictions.⁴⁰ Contrary to assertions of states' rights advocates, the federal government has long been involved in the land regulatory arena. As historian Patricia Limerick notes, "from 1789 to 1834 Congress passed a total of 375 land laws—laws adjusting the size of lots for sale, shifting the price per acre, altering the requirements for cash payments or adding the option of credit, and granting rights of preemption in specific regions."⁴¹ Expansion was a national goal.

In the West, federal policies made possible much of the private land development in place today.⁴² By 1944, billions of federal dollars had already been spent to harness waterways for hydropower and irrigation in seventeen Western states.⁴³ "Since then, the Bureau of Reclamation has built 254 diversion dams, 348 reservoirs, 1,460 miles of pipeline, and 54,535 miles of canals and drains" all of which deliver more than 10 trillion gallons of water to support farming, industry, and plumbing for some 30 million people.⁴⁴

The federal government's profound impact on development extended far beyond settling the frontier.⁴⁵ Franklin Roosevelt's New Deal programs dramatically expanded the federal role in regional development, and its most visible legacy, the Tennessee Valley Authority (TVA), remains an internationally significant experiment in governmental planning.⁴⁶ Created by Congress in 1933, the TVA was a public corporation designed to focus federal aid on an impoverished Tennessee River basin region.⁴⁷ The TVA's dams harnessed the river for power, recreation, navigation, and flood control, and the project also spawned "pioneering programs in soil erosion management, reforestation, economic development, and improvement of housing, medical care, schools, and recreation."⁴⁸ Another New Deal program, the Resettlement Administration, experimented "with the planning and construction of small

40. See Frank J. Popper, *Understanding American Land Use Regulation Since 1970*, 54 J. AM. PLAN. ASS'N 291 (1988).

41. PATRICIA N. LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987).

42. See BILL BRADLEY, *TIME PRESENT, TIME PAST* 224 (1996).

43. See *id.*

44. *Id.*

45. See Turner & Rylander, *supra* note 19, at 67. See generally PLATT, *supra* note 34, at 369-469; JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE*, 90-108 (1993).

46. See Platt, *supra* note 34, at 394-95.

47. See *id.*

48. *Id.*

'greenbelt' towns modeled on Ebenezer Howard's Garden City concept."⁴⁹ On the rural front, the Soil Conservation Service (SCS), created in 1935, became the prototype for programs providing federal technical assistance through non-federal agencies.⁵⁰ Designed to address a soil erosion crisis, SCS continues to have a significant impact in improving private land use practices.⁵¹

Additional federal involvement came with passage of Section 701 of the Housing Act of 1954.⁵² The provision authorized "'planning grants to state, metropolitan, and other regional planning agencies . . . to encourage comprehensive planning, including transportation planning, for states, cities, counties, metropolitan areas and urban regions, and the establishment and development of the organizational units needed therefor."⁵³ Section 204 of the Housing Act called for states to create regional planning agencies or councils of governments within each metropolitan area to coordinate requests for federal assistance under several dozen programs.⁵⁴ By the time the program ended in 1981, more than \$1 billion had been allocated to local planning initiatives.⁵⁵ Supplementing this effort was the Housing Act of 1959, which provided incentives for the development of comprehensive plans across state, regional, and interstate levels.⁵⁶ This program established a precedent for "federal support of nonfederal planning at various scales that would later characterize the Coastal Zone Management Program and other federal initiatives of the 1970s."⁵⁷

Federal planning programs continued to proliferate at a steady pace. By 1979, thirty-nine distinct federal programs financially supported or required regional planning.⁵⁸ At that time, "regional planning organizations . . . served about 99 percent of the counties in the nation with about three-fourths of their budgets provided by the federal government."⁵⁹ For many of these programs, however, funding was cut dramatically during the Reagan

49. PLATT, *supra* note 34, at 395 (noting that only three such towns were completed, in Maryland, Ohio, and Wisconsin). See generally EBENEZER HOWARD, GARDEN CITIES OF TOMORROW (1965).

50. See PLATT, *supra* note 34, at 395.

51. See *id.*

52. See *id.* at 359.

53. *Id.* (quoting Section 701).

54. See *id.* at 360.

55. See PLATT, *supra* note 34, at 359.

56. See *id.*

57. *Id.* at 359-60.

58. See *id.* at 360.

59. *Id.* at 361.

administration, and the work of such entities has declined accordingly.⁶⁰

Despite the scope and success of these various federal programs, they pale in comparison to the federal government's transportation infrastructure and home mortgage policies, which both transformed metropolitan America and changed the face of the nation's landscape. Federal transportation policies, designed almost exclusively to accommodate the automobile, greatly exacerbated sprawl.⁶¹ The first federal foray into subsidizing auto use came in 1916 with passage of the Federal Road Act, a \$75 million program to improve post roads and encourage states to create their own highway departments.⁶² The second Federal Road Act in 1921 began the task of linking 200,000 miles of state highways into a national network.⁶³ By 1925, funding for a numbered highway system topped \$1 billion per year.⁶⁴

The heyday of the 1920s gave way to the Depression, and with the crashing economy went the construction industry; home construction fell by 95 percent, and repairs and renovations all but ceased.⁶⁵ Bankruptcies soared, and by 1933, one-half the home mortgages in the nation were in default.⁶⁶ At Roosevelt's behest, Congress created the Federal Housing Administration (FHA) to spark a new building boom.⁶⁷ With the FHA underwriting the mortgages, lenders could lower interest rates and extend terms from the standard ten years to twenty or even thirty-year payment plans.⁶⁸ The average down payment dropped from between 30 to 50 percent down to 10 percent.⁶⁹ Undoubtedly, the FHA "radically transformed home ownership in America."⁷⁰ Veterans Administration (VA) programs also played a major role, enabling many GIs returning from World War II to purchase a suburban house with no money down.⁷¹

60. *See id.*

61. *See, e.g.,* KUNSTLER, *supra* note 45, at 90; Turner & Rylander, *supra* note 19, at 64.

62. *See* KUNSTLER, *supra* note 45, at 90.

63. *See id.*

64. *See id.* Throughout the 1920s and 1930s, thousands of miles of trolley lines were torn up or paved over to accommodate the car. *See* Turner & Rylander, *supra* note 19, at 64.

65. *See* KUNSTLER, *supra* note 45, at 102.

66. *See, e.g.,* KENNETH JACKSON, CRABGRASS FRONTIER 193 (1985); KUNSTLER, *supra* note 45, at 102.

67. *See* KUNSTLER, *supra* note 45, at 102.

68. *See id.*

69. *See id.*

70. *Id.*

71. *See id.* at 104.

Such federal government assistance made the American dream of single-family home-ownership easier to achieve. In the decade following World War II, FHA and VA programs financed nearly half the houses built in the United States.⁷² The programs subsidized the flailing construction industry and improved the stock of domestic housing; however, these federally-backed mortgages were only available for new single-family homes.⁷³ The FHA did not provide loans to repair, remodel, or renovate older houses in the cities, which might have provided affordable urban housing for growing minority and immigrant populations.⁷⁴ The FHA in effect drew a line around whole neighborhoods refusing to assist anyone who wanted to build in those areas.⁷⁵ This process, called "red-lining," further contributed to the decline of central cities, the outward migration of the middle class, and the social and economic isolation of minorities.⁷⁶ When viewed together with changes in federal tax law that made mortgage interest deductible, what emerges is a pattern of tremendous federal subsidies for suburban development.⁷⁷

The 1950s expansion confronted an infrastructure system ill-equipped to handle additional growth.⁷⁸ Thus in 1956, Congress approved the Interstate Highway Act, which authorized construction of more than 41,000 miles of new expressways.⁷⁹ The federal government provided ninety percent of the funds, while the states funded the remaining ten percent.⁸⁰ Predictably, development followed the roads. The new roadways opened thousands of acres of previously isolated land on the urban fringe to development.⁸¹ "Business and suburban development flocked to the off-ramps of the new roads, but such growth came at the expense of cities and open space. The implicit connection between transportation infrastructure and land use regulations was rarely made, and today, existing development patterns reflect that disconnect."⁸²

72. See Turner & Rylander, *supra* note 19, at 64-65.

73. See *id.* at 65.

74. See *id.*; see also KUNSTLER, *supra* note 45, at 102-03.

75. See KUNSTLER, *supra* note 45, at 102.

76. See *id.*

77. See *id.* at 105.

78. See *id.* at 106.

79. See Turner & Rylander, *supra* note 19, at 64.

80. See KUNSTLER, *supra* note 45, at 107.

81. See Turner & Rylander, *supra* note 19, at 64; see also KUNSTLER, *supra* note 45, at 107.

82. Turner & Rylander, *supra* note 19, at 64.

The numerous federal development incentive programs described above illustrate the federal government's power to affect private local land use decisions. Suburban sprawl is not merely the amalgam of the choices of individual actors in a free market system; rather, "[t]he American Dream of a cottage on its own sacred plot of earth" essentially became "the *only* economically rational choice."⁸³ As one scholar has observed:

While technically [these programs] did not violate the doctrine that land use is a nonfederal concern, they demonstrated the immense capability of the federal government to indirectly influence--through spending, tax incentives, and technical guidelines--the use of private land. FHA regulations literally specified suburban single-family homes as the approved style of housing to be constructed with its assistance. Tying strings to federal benefits was thus a means of exerting federal influence over the form of urban development in the 1950s, whether or not so recognized at the time.⁸⁴

The federal government's involvement in land use, while schizophrenic, has been sweeping and pervasive. As a result, it may take federal involvement to significantly modify current land use policies in order to achieve more sustainable land use patterns.

IV. THE FEDERAL GOVERNMENT'S INCREASING PRESENCE IN GROWTH MANAGEMENT

Renewed interest in federalism and the Tenth Amendment⁸⁵ has led some to ponder whether this post-Rooseveltian expansion of federal power into the local land use arena might be brought to a halt.⁸⁶ One common argument against further expanding federal involvement in growth management is that such issues are best left to states and localities. A plethora of articles opposing and

83. *Id.* at 105.

84. PLATT, *supra* note 34, at 395-96.

85. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

86. See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213 (1998); Adler, *supra* note 16, at 633.

defending federalism exists.⁸⁷ Potential benefits of a federal system include: enhanced opportunities for political participation,⁸⁸ a possible check on abuses of government power,⁸⁹ greater accountability for decision-makers,⁹⁰ opportunities for policy innovation and experimentation,⁹¹ and maximization of choice through local competition and "citizens' rights of exit."⁹² Adherents of "localism"⁹³ naturally believe that state and local governments are the best protectors of these values, but this theory does not always hold true.⁹⁴

For two decades, enactment of federal environmental laws was justified by the very failures of state and local governments to address growing pollution problems.⁹⁵ Many states were not economically, politically, or institutionally capable of creating and managing their own pollution control regimes.⁹⁶ Arguably, state and local governments may be more easily captured by local industry pressures, casting doubt on the theory that local control is more democratic.⁹⁷ The likely possibility that pollution may be spread over multiple governmental entities demonstrates a need for uniform standards.⁹⁸ Further, even though federal environmental laws often

87. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); Jackson, *supra* note 86, at 2180; H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

88. See Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994); see also Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419 (1994).

89. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power.").

90. See *Federalism, Political Accountability, and the Spending Clause*, *supra* note 88, at 1419. But see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) ("State 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.").

91. See, e.g., Jackson, *supra* note 86, at 2213; SHAPIRO, *supra* note 87. But cf. Susan Rose-Ackerman, *Risk Taking and Re-election: Does Federalism Promote Innovation?* 9 LEGAL STUD. 593, 593-94 (1980) (arguing that politicians' desire to be re-elected may hinder their willingness to experiment).

92. Jackson, *supra* note 86, at 2213 (noting that many scholars are skeptical of this view).

93. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

94. See Jackson, *supra* note 86, at 2215 (suggesting that some interests, such as civil rights, are best protected by federal action).

95. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1142 (1995).

96. See James P. Lester, *A New Federalism? Environmental Policy in the States in ENVIRONMENTAL POLICY IN THE 1990S* 61 (Norman J. Vig & Michael E. Kraft eds., 1990).

97. See *id.*

98. See *id.*

require state participation, they generally have been designed with federalism in mind to avoid preemption of state law.⁹⁹

Like the earlier New Deal programs, sweeping environmental laws have altered the meaning of federalism and significantly increased the federal government's role.¹⁰⁰ In addition to the dozens of direct regulatory programs enacted since the 1960s, scores of additional fiscal programs impacting land use and the environment have been adopted. "In the past quarter century alone, federal grants to States and localities have grown from \$7 billion to \$96 billion" and "now account for about one-fifth of state and local government expenditures."¹⁰¹ Although the precise lines of authority may always be hotly debated, federal presence in environmental and land use regulation is pervasive.

Though the clock of federal expansion ticks on, its pendulum does indeed swing back and forth. Acknowledging that recent court decisions may signal a swing in favor of state control can be conceded without undermining this Article's central thesis.¹⁰² Moreover, the area where federal intrusion is most pervasive—grants and incentives—remains wholly permissible under current spending clause jurisprudence. Opportunities for federal initiatives in growth management and land use thus remain significant.

A. Recent Jurisprudence

Since the famous case of *Wickard v. Filburn*,¹⁰³ the federal government has had virtually unlimited authority to regulate under the Commerce Clause.¹⁰⁴ Even a tangential relationship to interstate commerce seems to suffice.¹⁰⁵ The United States Supreme Court decision *United States v. Lopez*¹⁰⁶ startled many legal scholars because it was the first case in nearly sixty years to strike down a federal law for exceeding Congress's power to regulate under the Commerce

99. See Percival, *supra* note 95, at 1142.

100. See PLATT, *supra* note 34, at 402.

101. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-53 (1985).

102. The cases most often cited as proof of federalism's resurgence—*United States v. Lopez*, 514 U.S. 549 (1995) and *Printz v. United States*, 521 U.S. 898 (1997)—are limited in precedential value and scope. These cases shall be considered in turn. See *infra* notes 103 - 130 and accompanying text.

103. 317 U.S. 111 (1942) (holding that growing wheat for on-farm consumption affected interstate commerce by decreasing, however slightly, the overall demand for wheat).

104. See William Funk, *The Lopez Report*, 23 ADMIN. & REG. L. NEWS 1 (1998).

105. See *id.*

106. 514 U.S. 549 (1995) (striking down the Gun Free Schools Act of 1990, which criminalized possession of a firearm within 1,000 feet of a school).

Clause.¹⁰⁷ As one commentator noted, "observers had generally come to believe that . . . while there might be a theoretical limit on Congress's power, there was no practical limit. *Lopez* proved that observation false."¹⁰⁸

Naturally, the question following *Lopez* was whether other laws might fail to survive the Court's heightened Commerce Clause scrutiny. Was this the beginning of a conservative check on federal power,¹⁰⁹ or was it, as some have said about *Lucas v. South Carolina Coastal Council*,¹¹⁰ "a decision full of sound and fury signifying nothing?"¹¹¹ The first clue came when Congress enacted the Gun-Free Schools Act of 1994, a modified version of the Act that the *Lopez* Court struck down, which denies federal financial assistance, under the Elementary and Secondary Education Act of 1965, to school districts that do not enact mandatory expulsion policies for students who bring firearms to school.¹¹² Faced with the possible loss of federal funds, states rushed to comply by enacting comparable legislation.¹¹³ Congressional intent was satisfied despite *Lopez*.¹¹⁴ Additionally, commentators who support a diminished role for the federal government in environmental protection cite *Printz v. United States*¹¹⁵ and *New York v. United States*¹¹⁶ for the proposition that the Court has begun restricting the power of Congress over state and local governments.¹¹⁷ In reality, these cases merely proscribe one tool of regulation, Congress's ability to commandeer state governments and officials to regulate on its behalf.¹¹⁸

In *New York*, the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments, which required states in certain circumstances to take title and assume liability for waste

107. See, e.g., *Baker*, *supra* note 31, at 1911; *Funk*, *supra* note 104, at 1.

108. *Funk*, *supra* note 104, at 1.

109. See *Linehan*, *supra* note 16, at 413.

110. 505 U.S. 1003 (1992) (requiring compensation for regulatory takings).

111. Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439 (1993).

112. See 20 U.S.C. § 3351 (1994).

113. See Mary Pat Daviet, *Police Officers in Public Schools: What Are The Rules?* 27 COLO. LAW. 79 (Nov. 1998).

114. Federal courts of appeal have cited *Lopez* more than 400 times and reviewed *Lopez*-based challenges to some forty federal laws. See *Funk*, *supra* note 104, at 14. As of June 1998, however, the case played a role in striking down only three federal actions, and all were essentially criminal cases. See *id.*

115. 521 U.S. 898 (1997).

116. 505 U.S. 144 (1992).

117. See *Adler*, *supra* note 16, at 586.

118. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 824 (1998).

generated within its borders.¹¹⁹ The essence of the *New York* holding is that the federal government cannot force the states to adopt or administer a federal regulatory program.¹²⁰ Importantly, Justice O'Connor's opinion let stand another provision of the act that established fiscal incentives in the form of subsidies and waste disposal surcharges.¹²¹ While Congress may not directly commandeer state legislative processes, it can employ other means to achieve its goals. "The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes."¹²²

The *New York* Court thus endorsed two primary means through which a national land use strategy could be enacted. By reaffirming *South Dakota v. Dole*,¹²³ the Court upheld the government's right to attach conditions to federal funds. Moreover, it reaffirmed the "cooperative federalism" model of many modern environmental laws. Congress can give states a choice of "regulating that activity according to federal standards or having state law pre-empted by federal regulation."¹²⁴ In addition, the *Printz* decision struck down a portion of the Brady Act, which in pertinent part required local officials to perform background checks on would-be

119. See Pub. L. No. 99-240, 99 Stat. 1842 (1985) (codified at 42 U.S.C. §§ 2021-21b (1994)).

120. See *New York*, 505 U.S. at 188.

121. See Adler, *supra* note 16, at 586.

122. *New York*, 505 U.S. at 188. By allowing state and local governments to refuse to enact and administer a national program even if the federal government provides funding, *New York* makes states the master of their regulatory processes. In other words, *New York* gives nonfederal governments something to sell, the right to hold out for a higher price. See Hills, *supra* note 118, at 856.

123. 483 U.S. 203 (1987) (conditioning receipt of federal funds upon states' adoption of a minimum drinking age). Justice O'Connor's endorsement of the *Dole* principle is interesting in light of her dissent in that case, but it is indicative of the widespread acceptance of spending clause conditions. "First under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.' Such conditions must . . . bear some relationship to the purpose of the federal spending, otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *New York*, 505 U.S. at 167 (citations omitted).

124. *New York*, 505 U.S. at 167 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). Conditioned funds play a role in the Clean Air Act Amendments of 1990, the Transportation Equity Act for the 21st Century (TEA-21), and the new Clinton-Gore Livability Agenda. See *Clinton-Gore*, *supra* note 13. Cooperative federalist models, which regulate more directly, are evidenced by the Clean Air Act again and by the Coastal Zone Management Act. See 42 U.S.C. § 7401 (1999); 16 U.S.C. §§ 1451-65 (1997).

gun purchasers.¹²⁵ *Printz* merely extends *New York's* rule against conscripting state legislatures to include state officials.¹²⁶

Printz and *New York* established a doctrine of state autonomy that "costlessly promotes federalism by distributing power to nonfederal governments without impeding any useful national programs."¹²⁷ By entitling state and local governments to withhold their services from the federal government, *Printz* and *New York* "enhance the bargaining position of such governments and allow them to extract a degree of discretion or revenue for the implementation of federal law that such governments would otherwise lack."¹²⁸ Taken together, *Printz*, *New York*, and *Lopez* suggest the Court may view new federal incursions into state affairs with a higher level of scrutiny; this has obvious implications for a national growth management strategy. Viewed separately, the cases are of limited importance to planners because, as many commentators have noted, the Spending Clause offers Congress a constitutionally-valid means of achieving its desired ends.¹²⁹ The Court's approach pays deference to state autonomy while preserving the federal government's ability to enlist state assistance in achieving public interest goals.

[T]his grant of power to state and local governments is essentially costless, because the national government easily can use its spending power to reclaim the power granted to non federal governments . . . to assist the national government.

...

[T]he national government has no need to commandeer state or local governments' regulatory processes, because Congress easily can purchase those

125. See *Printz v. United States*, 521 U.S. 898 (1997); see also Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921-25 (1994)).

126. See *Printz*, 521 U.S. at 898 (1997). Justice Scalia's majority opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. Justices Stevens, Breyer, Ginsburg, and Souter dissented. Souter's dissent is noteworthy because he joined the majority in *New York* yet nonetheless found the background check at issue here permissible. This illustrates further the narrow scope of these rulings.

127. *Hills*, *supra* note 118, at 856 (emphasis in original).

128. *Id.* at 943.

129. See *id.*; see also *Baker*, *supra* note 31, at 1914 ("prevailing Spending Clause doctrine appears to vitiate much of the import of *Lopez* and any progeny it may have"); *Adler*, *supra* note 16, at 617 ("[I]nsofar as Congress' spending power is not subject to constitutional constraints, it threatens to swallow whole the state sovereignty protected by *Printz*.").

processes through its spending powers supplemented with its power of conditional preemption.¹³⁰

Just how much power Congress retains to impact state and local affairs under the current doctrine becomes clear after a review of Spending Clause jurisprudence.

B. *The Spending Clause*

Article I, Section 8 of the Constitution gives Congress the broad power to "provide for the common Defense and general Welfare of the United States."¹³¹ As the Court held in *United States v. Butler*, Congress's prerogative "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."¹³² General welfare is a broad term, and the Court has held that it "should defer substantially to the judgment of Congress"¹³³ in determining what issues fall within its scope. Indeed the Court further queried "whether 'general welfare' is a judicially enforceable restriction at all."¹³⁴ In *Oklahoma v. United States Civil Service Commission*,¹³⁵ the Court rejected a challenge to a condition on federal highway grants, observing that the Tenth Amendment "has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.'"¹³⁶ The state's remedy, which in fact it exercised, was to choose "the 'simple expedient' of not yielding to what [it] . . . urges is federal coercion."¹³⁷

Spending Clause jurisprudence was barren for forty years until *South Dakota v. Dole*, which reaffirmed that "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."¹³⁸ In *Dole*, the Court upheld

130. Hills, *supra* note 118, at 857.

131. U.S. CONST. art. I § 8, cl. 1.

132. *United States v. Butler*, 297 U.S. 1, 66 (1935).

133. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

134. *Id.* at 207 n.2 (citing *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976) (per curiam)).

135. 330 U.S. 127 (1947).

136. *Id.* at 143 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

137. *Id.* at 143-44.

138. *Dole*, 483 U.S. at 207 (citing *United States v. Butler*, 297 U.S. 1, 65-66 (1936) (citations omitted)). Ironically, the *Dole* opinion was written by Justice Rehnquist, the author of *Lopez*, and generally an advocate of states' rights.

a federal statute that withheld a portion of highway funds unless states limited the sale and possession of alcohol to people twenty-one years of age or older.¹³⁹ Such legislation was "within constitutional bounds even if Congress may not regulate drinking ages directly."¹⁴⁰

Occasionally, the Court has expressed reservations about the scope of the spending power, prompting some to suggest that the Court may one day restrict its use.¹⁴¹ Noting that "[t]he spending power is of course not unlimited . . . but is instead subject to several general restrictions articulated in our cases," the *Dole* Court outlined a four-part test governing conditional spending.¹⁴² First, Congressional spending power must be in pursuit of "the general welfare."¹⁴³ Second, if Congress ties the receipt of federal funds to certain conditions, it must do so clearly and unambiguously.¹⁴⁴ Third, these conditions must be related to the federal interests sought in the program.¹⁴⁵ Finally, conditional funding must comply with other constitutional limitations.¹⁴⁶

Applying the test to the facts, the *Dole* Court quickly disposed of the first three requirements, finding that the drinking age served the general welfare, was clearly articulated, and related to the national interest in highway safety.¹⁴⁷ The Court declined to address whether conditions less closely related to the purpose of the expenditure would fall within the bounds of the spending power.¹⁴⁸ As one commentator noted, the court gave none of the four restrictions much "bite."¹⁴⁹

139. *See id.* at 205.

140. *Id.* at 206. Even today it is unclear whether Congressional regulation of drinking ages was Constitutional in light of the Twenty-First Amendment. *See Baker, supra* note 31, at 1929 n.84. Without that amendment, however, regulation of drinking ages to prevent so-called "blood-borders," where underage drinkers travel across state lines to buy alcohol, would likely pass muster under the Commerce Clause.

141. *See, e.g., Baker, supra* note 31, at 1916; *Adler, supra* note 16, at 625. For example, while acknowledging the scope of the Spending Power, the *Butler* Court nonetheless struck down the legislation at issue there as violative of the Tenth Amendment. *See United States v. Butler*, 297 U.S. 1, 68 (1936); *see also Baker, supra* note 31, at 1927 ("In *Butler*, the Court thus acknowledged, and sought to disable, the potential of the Spending Clause to 'nullify all constitutional limitations upon [congressional] power.'").

142. *Dole*, 483 U.S. at 207.

143. *Id.* ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.").

144. *See id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

145. *See id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

146. *See id.* at 208.

147. *See Dole*, 483 U.S. at 208-09.

148. *See id.* at 209 n.3.

149. *Baker, supra* note 31, at 1929.

In light of the Tenth Amendment, the final test could have been problematic to the argument that Congress should use the Spending Clause to condition the use of funds related to growth management, but the Court held the "independent constitutional bar" language was not a "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."¹⁵⁰ The Court did note, however, that there might be "some circumstances [where] the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"¹⁵¹ Losing five percent of federal highway funds was a "relatively mild encouragement" that fell below that level of coercion.¹⁵² As Justice Cardozo noted, determining when an inducement rises to the level of coercion depends on facts and degree.¹⁵³ Often, Congress sets the incentive at "just the 'right' level . . . and, accordingly, no state tends very long to resist."¹⁵⁴

C. Conditional Federal Spending

Many forms of conditional grant systems exist, but their essence is simple: Congress provides funds to the states on the condition that they use the money to achieve federal priorities.¹⁵⁵ One commentator has described a two-step grant process of origination and bargaining.¹⁵⁶ The origination stage concerns the drafting and enactment of grant legislation, a process that involves considerable lobbying by nonfederal governments and their representative coalitions, as well as rival states and public interest groups.¹⁵⁷ The bargaining stage occurs when individual states decide whether to participate in the program and accept the

150. *Dole*, 483 U.S. at 210 ("[W]e think that the language in our earlier opinions stands for the unexceptional proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional.").

151. *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

152. *Id.*

153. See *Federalism, Political Accountability, and the Spending Clause*, *supra* note 88, at 1431 (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

154. William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 HARV. J.L. & PUB. POL'Y 303, 320 (1993).

155. See *Hills*, *supra* note 118, at 859.

156. See *id.* at 860.

157. See *id.* at 860 ("In response to such pressures, Congress may impose various substantive conditions on both the federal grant money and preexisting state funds to ensure the federal grant is spent for specified classes of beneficiaries or specified federal purposes. Congress may also demand that state agencies responsible for spending the federal revenue comply with various structural or procedural requirements").

conditions in exchange for money.¹⁵⁸ Even in cases where the funding formula is specified, states and localities bargain with federal agencies over the meaning and enforcement of the conditions.¹⁵⁹ Members of Congress often intervene on behalf of nonfederal governments in the application and enforcement processes to achieve favorable treatment for their constituencies.¹⁶⁰

Conditional grants-in-aid, therefore, resemble fee-for-service contracts under which the national government provides nonsource revenue resembling "fees" in return for state-provided services. Assuming that the state and local governments possess the . . . entitlement, each nonfederal government can independently decide whether to proffer the requested services for the tendered "price."¹⁶¹

Some argue that this independence is illusory because states have little choice but to accept the funds and conditions;¹⁶² however, this dim view of state choice lacks empirical support.¹⁶³ Commentators cite widespread state participation in conditional spending programs as evidence of the programs' coercive effect,¹⁶⁴ but this proves nothing. "[S]tate and local willingness to sell services might mean only that Congress has made a correct estimate of the nonfederal governments' opportunity costs of providing the requested services."¹⁶⁵

State governments will usually decline conditional grants when opportunity costs exceed the benefits of compliance.¹⁶⁶ For example, Arizona initially declined to participate in Medicare because the costs of providing health care to Native Americans

158. *See id.* at 861.

159. *See id.*

160. *See id.*

161. *Id.*

162. *See, e.g., Baker, supra* note 31, at 191; Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1989 SUP. CT. REV. 85, 100-01; Van Alstyne, *supra* note 154, *passim*.

163. *See Hills, supra* note 118, at 862.

164. *See McCoy & Friedman, supra* note 162, at 119-20.

165. Hills, *supra* note 118, at 862. (noting that since "Congress designs the grant package with input from nonfederal governments and their organizations, such as the National League of Cities and the National Governors' Association . . . it should not be surprising that, when Congress actually offers the grant, nonfederal governments accept it. One might as well argue that one coerces storeowners by buying their products because, when one presents the requested price for a product, the sales clerk invariably hands over the product.").

166. *See id.* at 862-63.

exceeded the benefit.¹⁶⁷ Also, more than half the states declined federal funding under the Occupational Safety and Health Act of 1970.¹⁶⁸ States may consider some federal conditions on funding to be meddlesome and manipulative; however:

overblown statements about the "coerciveness" of federal grant conditions require a more careful analysis of what is meant by "coercion." There does not seem to be any *a priori* reason to believe that state and local governments are any more coerced by such conditions than any other federal contractor who is required to provide services in return for payment of federal monies.¹⁶⁹

Whatever the policy arguments, the Court's current position is that conditional spending programs do not violate the Tenth Amendment provided states have some opportunity to "opt out" of the program.¹⁷⁰ Indeed, what few cases exist on the subject offer states a simple choice: take the conditions or forego the money.¹⁷¹ Therefore, it will take more than rhetoric to make the case that grants are inherently coercive.

The Supreme Court has never held unconstitutional a conditional grant to state or local governments.¹⁷² In fact, as one observer notes, "if political realities protect the states against the extreme cases of federal interference, judicial intervention may not be necessary."¹⁷³ Although it may be possible to hypothesize a coercive federal grant, the fact that none have yet met the Court's disfavor indicates its reluctance to intervene.

167. *Id.*

168. *See id.* at 863.

169. *Id.* at 864.

170. *See* Kristian D. Whitten, *Conditional Federal Spending and the States "Free Exercise" of the Tenth Amendment*, 21 CAMPBELL L. REV. 5, 25 (1998).

171. *See, e.g.,* *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947); *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923).

172. *See* Albert J. Rosenthal, *Conditional Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

173. *Id.* at 1163. The Supreme Court's position also seems to be that judicial interpretation is unnecessary. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-55 (1985).

V. NATIONAL INCENTIVES FOR SMARTER GROWTH

Given the litany of federal programs that have contributed to poor land use, one might wonder why we should look to the federal government for solutions. It is precisely because of the historic federal role in land use, however, that federal solutions are needed. What was done once can be done again, but this time with the knowledge that comes from a century of experience and advancement in ecological understanding. The present task is to identify how national policies may be tailored within the bounds of the law to serve a new agenda. For too long, the nation has served development; now, development must serve the nation.

Smart growth is development intended to serve economy, environment and community. Smart growth is characterized by inclusive decision-making, locational decisions and site designs for development that minimize environmental and fiscal impacts, long-term strategic local and regional land use planning, and the use of regulatory and market incentives to promote more livable communities and minimize the impacts of sprawl.¹⁷⁴

The federal government should not and probably could not attempt a national zoning regime; many important decisions must be made at the local level. No scheme can hope to succeed without the creative input and support of local people.¹⁷⁵ Federal and state governments, nonetheless, can play a critical role as facilitators of community planning by providing technical assistance, guidelines, and funding.¹⁷⁶ In this way, Congress can foster and reward smart growth initiatives and, over time, shift incentives away from sprawl development.¹⁷⁷ Although smart growth initiatives at the federal level are still in their infancy, some worthy first steps have been taken in this direction.¹⁷⁸

The federal government is playing a significant role in facilitating dialogue on growth management. Established in 1993, the President's Council on Sustainable Development (PCSD) has

174. Ward, *supra* note 11, at 326.

175. See Turner & Rylander, *supra* note 19, at 67.

176. See *id.*

177. See Ward, *supra* note 11, at 326.

178. See *id.*

been conducting a national conversation on sprawl issues.¹⁷⁹ The PCSD's most recent report, *Sustainable America*, recommended a policy "to manage the geographical growth of existing communities and siting of new ones to decrease sprawl, conserve open space, respect nature's carrying capacity and provide protection from natural hazards."¹⁸⁰ Working with the National Association of Counties and the U.S. Conference of Mayors, PCSD created the Joint Center for Sustainable Communities, which encourages cooperation between municipalities on regional growth issues.¹⁸¹

The "Smart Growth Network" of the Environmental Protection Agency (EPA) is bringing planners, government officials, developers, and activists together to promote responsible land use.¹⁸² Through its Sustainable Development Challenge Grant program, the EPA awarded \$5 million dollars in 1998 to local governments working on regional governance and metropolitan transportation issues.¹⁸³ The EPA is also funding brownfield redevelopment projects, providing more than 120 grants of \$200,000 each to help localities build partnerships and test new redevelopment techniques.¹⁸⁴ Combined with its Brownfields Action Agenda, which alters the Superfund liability scheme to promote urban redevelopment, the EPA has helped focus attention on the problem of wasted urban land and encourage private developers to reclaim abandoned industrial property.¹⁸⁵

Cooperation between federal, state, and local governments is difficult, but there are some models for integrating policies to improve land use. The Coastal Zone Management Act (CZMA) provides federal funding and guidelines for states to develop coastal management plans tailored to fit their specific needs.¹⁸⁶ Subsequent federal programs must comply with the approved state plans.¹⁸⁷ Although the states were skeptical at first, nearly all of the thirty-five

179. See The President's Council on Sustainable Development, *Sustainable America: A New Consensus for the Prosperity, Opportunity and a Healthy Environment for the Future* (Feb. 8, 2000) <http://www.whitehouse.gov/PCSD/Publications/TF_Reports/amer-top.html>.

180. *Id.* (noting that "[t]he federal government should redirect federal policies that encourage low-density sprawl to foster investment in existing communities. It should encourage shifts in transportation spending toward transit, highway maintenance and repair, and expansion of transit options rather than new highway or beltway construction.").

181. See Ward, *supra* note 11, at 327.

182. See *id.*

183. See *id.*

184. See *id.*

185. See *id.*

186. See Coastal Zone Management Act of 1972, 156 U.S.C. §§ 1451-65 (1997).

187. See *id.* § 1456(c).

eligible states eventually signed on, while the breadth and scope of their respective plans vary.¹⁸⁸ The Coastal Barriers Resources Act "avoids regulatory mandates but offers powerful disincentives by denying federal funds for roads, sewer plants, water systems, and flood insurance to developments that locate in sensitive coastal areas."¹⁸⁹ Provisions in the Clean Air Act and Clean Water Act could also be tailored to foster better local growth patterns.¹⁹⁰

Highway projects dominate congressional spending, as evidenced by the more than \$200 billion in federal funds appropriated each year.¹⁹¹ Mass transit is inefficient only because the entire American transportation system has been designed to accommodate the car.¹⁹² Breaking with the past, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), set out "to develop a National Intermodal Transportation System that is economically efficient, environmentally sound, provides the foundation for the United States to compete in the global economy, and will move individuals and property in an energy efficient way."¹⁹³ ISTEA provided the first explicit link between transportation planning and local environmental and recreational needs, supplying funds for greenways, bike trails, and regional planning.¹⁹⁴ ISTEA's successor, the Transportation Equity Act for the Twenty-first Century (TEA-21), builds upon the innovative provisions of ISTEA and provides flexibility for localities to shift highway monies to congestion abatement projects, including growth management and alternative transportation.¹⁹⁵

Additionally, Congress has other tools at its disposal to influence the land use decision-making process. Federal tax policies could be aimed at reducing traffic, emissions, and the development of sensitive areas.¹⁹⁶ Also, economic development incentives targeted at inner cities provide another tool for encouraging in-fill development and reuse of urban land.¹⁹⁷

188. For an excellent discussion of CZMA, see TIMOTHY BEATLEY ET AL., AN INTRODUCTION TO COASTAL ZONE MANAGEMENT (1994).

189. Turner & Rylander, *supra* note 19, at 68.

190. See Ward, *supra* note 11, at 327-28.

191. See *id.* at 328.

192. See, e.g., Turner & Rylander, *supra* note 19, at 64; KUNSTLER, *supra* note 45, at 90.

193. 49 U.S.C. § 5501(a) (1997).

194. See Turner & Rylander, *supra* note 19, at 68.

195. See Ward, *supra* note 11, at 327-28.

196. See *id.* at 329.

197. See *id.* Examples of federal economic development incentives include: the Empowerment Zones and Enterprise Communities Program, administered by the Department of Housing and Urban Development; the HUBZones program, administered by the Small

These options offer a few examples of new and innovative federal programs that could help stem the tide of sprawl, but these efforts would still be outweighed by existing funding streams that exacerbate sprawl.¹⁹⁸ Nonetheless, they are critical first steps that suggest a possible path toward a coordinated pro-active federal role in growth management. The Livability Agenda is yet another initiative aimed at increasing the federal role in growth management.

VI. CONCLUSION

The Livability Agenda, while far from comprehensive, is the most sweeping smart growth initiative ever proposed at the federal level.¹⁹⁹ Notably, the Livability Agenda provides that:

The way we build and develop determines whether economic growth comes at the expense of community and family life, or enhances it. Now, we have seen a new vision of how to build and plan better -- so that a strong economy energizes the strong neighborhoods that support strong families. By helping communities pursue smarter growth, we can build an America for our children that is not just better off -- but better.²⁰⁰

A harbinger of things to come, the Livability Agenda represents a cresting wave of political activism rising up from communities across the country to reclaim towns and cities from the uniformity of sprawl.

It remains to be seen, however, if the Livability Agenda marks the starting point for federal involvement in shaping America's growth patterns or a dénouement with no lasting currency. Almost daily, however, the national press focuses on the impacts of sprawl. Land use concerns resonate in communities across the country, and with this new livability initiative, sprawl may now become a federal issue.

As Congress looks to fashion environmental laws that meet the challenges of this new century, land use will play a prominent role. Progress in water quality now depends on stemming non-point

Business Administration; and the Location Efficient Mortgage program, launched jointly in 1998 by EPA and Fannie Mae, the federal mortgage lending company. *See id.*

198. *See Ward, supra* note 11, at 327.

199. *See id.*

200. *Gore, supra* note 1.

source pollution, the extent of which is determined by land use patterns. Likewise, further improvements in air quality will depend on reducing congestion, vehicle miles traveled, and fostering transit-oriented development patterns. Protection of parks and wildlife habitats also depends on reducing land fragmentation caused by sprawl. All these factors point to the burgeoning national interest in the way people use land in their communities.

Forging a comprehensive, effective, and community-sensitive federal land use policy will not be easy, but many tools and models now exist to guide development of a national land use agenda. The states have tried and tested numerous growth management schemes. Consequently, more is now known about the promises and pitfalls of such designs than in the early 1970s when a national land use program was first proposed. Despite the rhetoric of the new "federalist revival," the Supreme Court has imposed only modest limitations on the government's ability to regulate in the national interest. The Court's recent cases pay homage to founding principles while retaining modern flexibility. Direct federal growth management legislation would likely pass constitutional muster, especially if the statute created a voluntary, state-implemented, federally-funded regime similar to the Coastal Zone Management Act. Furthermore, the Spending Clause permits Congress to condition funds and establish block grants to achieve aims that would be impermissible if mandated directly.

In constructing a new land use agenda, Congress must be mindful of federalist concerns, but the national political process protects states in both the design and implementation stages of federal policy. States retain considerable bargaining power in deciding whether and how to accept conditions on federal funds. Moreover, since states are likely to be participants in whatever regulatory structure develops, any development agenda must be prepared with state input and the participants must reach politically viable agreements.

For good and ill, federal initiatives have long impacted land use. Perhaps the greatest obstacle to an effective federal land use program are the scores of existing programs, often conflicting in nature, that impact land use decision-making. Too many disconnected policies and overlapping jurisdictions have created a system without accountability. An audit of all federal programs that impact land use — including housing and transportation policies, environmental laws, economic development programs, and tax laws — is long overdue. With the information gleaned from such an

accounting, Congress could eliminate programs that contribute to inefficient land use and better coordinate useful programs to fit a national growth management strategy.

The goals for federal growth management are taking shape, as are the tools and many of the program models. The Livability Agenda and the vision outlined in the PCSD's report, *Sustainable America*, are excellent starts. The time has come to coordinate these efforts in a concerted, regionally-sensitive program to make the best use of land — America's scarcest and most important resource.

