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ROSS D. NETHERTON†

INTERGOVERNMENTAL RELATIONS UNDER
THE FEDERAL-AID HIGHWAY PROGRAM

Whenever the appearance and life of contemporary urban America is discussed, transportation receives a major share of the credit for what people cite as good and bad features of this scene. The twentieth century's striking advance in transportation technology has injected the pervading presence of the automobile, the highway, and the parking lot into well-nigh every aspect of the personal and public life of the city dweller and his governmental representatives. Automotive transportation has given urban America both an unprecedented source of strength, and, at the same time, a challenge so severe that some observers now doubt that our major cities ever can provide enough money, enough space, and enough clean air to accommodate it in the style to which it has become accustomed in the past decade.

This proposition is readily accepted in the abstract by both readers and writers; having stated it, most writers on the subject attempt to give it a sense of urgency by citing some statistical measurement of a particular aspect of urban life not ordinarily thought of. Thus, in one of the first speeches which Alan Boyd made on the subject of urban transportation after his appointment as the country's first Secretary of Transportation, he challenged his audience with the revelation that slightly more than 50 per cent of the total land space in Los Angeles is used for streets, highways and parking facilities.¹ The

† Counsel for Legal Research, Highway Research Board.

1. Address by Hon. Alan S. Boyd, Secretary of Transportation, at National Conference on Construction Contracts, sponsored by American Society of Civil Engineers, Washington, D.C., May 26, 1967.

Secretary made his point, for, at least in the mind of this listener, there was thereafter no further doubt that the construction of streets and highways and the handling of traffic thereon affected urban growth and urban life in an overriding degree.

There is, unfortunately, no ready counterpart statistic that can be used here to open a discussion of the impact that half a century of Federal aid in highway construction has had on intergovernmental relations in the United States. The amount of money which Federal highway programs spend in urban areas (over \$2,100,000,000 in 1965),² the number of miles of streets and highways built, or the number of vehicle miles traveled in the urban complex do not convey the full impact of this activity on urban governmental processes. The evidence of changes which are taking place in these processes is more subtle, and often is revealed most clearly only when an historical perspective is used. Such an approach in the present instance may, therefore, be not only practical, but appropriate in a commemorative sense, for the year just passed was the 50th anniversary of the first Federal-aid highway act, and the 10th anniversary of the accelerated program commended under the Federal-Aid Highway Act of 1956 to bring to a completion the National System of Interstate and Defense Highways, sometimes called the greatest public works program in the history of of the world.

I. HIGHWAYS AS AN INTERGOVERNMENTAL RESPONSIBILITY

The first decades of our political life as a republic saw our first experiments with toll financing and the corporate form of management in roadbuilding. During the first toll road boom—roughly from the opening of the Lancaster Turnpike in 1792 until the coming of the canals and railroads in the 1830's—about 8,000 miles of turnpikes were built, representing public and private investments exceeding \$15 million. This was a remarkable achievement of both engineering and finance for so young a nation.³

A second period of turnpike activity occurred in the 1840's, and included our brief experiment with plank roads within and around our cities, which were then just beginning a century of steady growth.

2. U.S. Dep't. of Transportation, *HIGHWAY STATISTICS/1965*, 83 (Table SF-11) (1967).

3. Brief histories of American roadbuilding may be found in *HIGHWAYS IN OUR NATIONAL LIFE*, (J. Labatut and W. Lane eds. 1950); *HIGHWAY RESEARCH BOARD, THE LAW OF TURNPIKES AND TOLL BRIDGES*, (1965); *DEARING, AMERICAN HIGHWAY POLICY* (1941).

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This period interrupted for one brief decade a period of fifty years—from the 1830's to the 1880's—which has been called the "dark ages" of American highway history.

The years from 1880 to 1916 represented one of the most fertile eras in the evolution of our modern national and state policies regarding transportation. It is a period now remembered for many famous and colorful names: "The League of American Wheelmen," dedicated to promoting the interests of bicyclists and urging hard-surfaced road development; "The Good Roads Movement," with its Liberty Bell emblem, calling on the nation to "get the farmer out of the mud;" rural free delivery of mail; "The Glidden Tours," in which the capabilities of the automobile caught the fancy of the American public; and many others. This period of energetic and imaginative activity was a fitting curtain raiser for the most important event of this period—the enactment by Congress of the Federal Aid Road Act of 1916.⁴

In signing this legislation, President Woodrow Wilson ended the era in which roadbuilding was considered the responsibility of towns and counties or turnpike companies, and maintenance was done by neighbors "working out" their road taxes. With his signature, he inaugurated the policy that highways were a concern of the nation and the states as well as the local governments. From this time onward, highway programs in the United States became intergovernmental in character. From this time on, a major factor in the legislative framework of these programs and in the success of their administration was the degree to which sound and efficient cooperation was achieved between the national, state, and local components of the program.

Federal-state cooperation, however, demanded development of new techniques. In its first years Federal aid for roadbuilding did not entirely escape becoming a partisan political issue. The need to mount a major effort in roadbuilding was, to be sure, accepted as an incontestable fact. In 1921, President Harding, in a special message to Congress, spoke of the motor car as having "become an indispensable instrument of our political, social and industrial life." He called for a "new era in highway construction, the outlay for which runs far into hundreds of millions of dollars." However, he went on to declare:

The Federal government can place no inhibition on the expen-

4. Act of July 11, 1916, ch. 241, 39 Stat. 355. For background on this legislation, *see also*, H. R. Doc. No. 1510, 63d Cong., 3d Sess. (1915).

diture in the several States; but, since Congress has embarked upon a policy of assisting the states in highway improvement, wisely, I believe, it can assert a wholly becoming influence in shaping policy.

With the principle of Federal participation acceptably established, probably never to be abandoned, it is important to exert Federal influence in development of comprehensive plans looking to the promotion of commerce, and apply our expenditures in the surest way to guarantee a public return for money expended.

Large Federal outlay demands a federal voice in the program of expenditure. Congress cannot justify a mere gift from the federal purse to the several states, to be prorated among counties for road betterment. Such a course will invite abuses which it were better to guard against in the beginning.

The laws governing Federal aid should be amended and strengthened. The federal agency of administration should be elevated to the importance and vested with the authority comparable to the work before it. And Congress ought to prescribe conditions and Federal appropriations which will necessitate a competent program of uniformity which will justify the Federal outlay.

I know of nothing more shocking than the millions of Federal funds wasted in improving highways, wasted because there is no policy of maintenance. The neglect is not universal, but it is very near it. There is nothing the Congress can do more effectively to end this shocking waste than condition all Federal aid on provisions for maintenance. Highways, no matter how generous the outlay for construction, cannot be maintained without patrol and constant repair. Such conditions insisted upon in the grant of Federal aid will safeguard the public which pays and guard the Federal government against political abuses, which tend to defeat the very purpose for which we authorize Federal expenditure.⁵

II. THE FIRST RESULTS OF INTERGOVERNMENTAL COOPERATION

One of the first tangible results of the Federal-aid program was the creation of highway departments in each of the states. It was through these agencies that the Federal aid was administered at the state level. Federal-aid highways have always been and are today state-built and state-operated highways.

The years between World Wars I and II saw a great deal of progress in highway design and construction; slightly more than a million miles of hard-surfaced highways were constructed during this period.

5. 18 MESSAGES AND PAPERS OF THE PRESIDENTS 8941-2 (J. Richardson ed. 1897).

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Also, these years saw substantial progress in perfecting techniques of administration for the program of Federal aid which, during these years, totalled more than \$3 billion of federal funds. In the states this period saw the development of new sources of revenue drawn from excises on motor fuel and vehicle registration fees to finance highways either on a pay-as-you-go basis, or through bonds issued against pledged revenue; almost \$5 billion for highways was supplied from state and local funds.

Therefore, among the tangible benefits of this first 25 years of the Federal-aid highway program were:

1. regular provision of funds needed for highway development, construction, and maintenance, with gradual elimination of "political roads" and "pork barrel" spending;
2. establishment of continuing state highway programs, staffed by professional engineers and administrators, and the creation of state highway systems with uniform criteria for route location and standards for design and construction;
3. commencement of systematic highway research, and the practice of making planning surveys of highway traffic needs before making decisions on route location and design;
4. adoption of uniform plans, specifications, and procedures for planning, construction, maintenance, and administration; and
5. general stimulation of public thinking about highway transportation in terms of its economic basis and benefits.

Equally significant for future highway programs was the appearance in this period of various governmental, scientific, and professional organizations working for improvement of highway transportation. Notable among this group were the U. S. Bureau of Public Roads, the American Association of State Highway Officials, the National Society of Professional Engineers, and the Highway Research Board.

III. POST-WORLD WAR II HIGHWAY NEEDS

After World War II, road building was resumed under forced draft because of the critical need to replace many thousands of miles of functionally obsolete arterial roads, and to add new mileage to meet the demands of the unprecedented growth of automotive travel. Most striking, perhaps, was the growth of urban area highway needs, leading to mounting pressure for extensions of the Federal-aid primary

and secondary systems *within urban areas*. Provision for regular support of the Federal-aid urban extensions had existed since 1944, but appropriations for this category of roads were limited by statute to 25 per cent of the total for the so-called "A-B-C" systems.⁶

After World War II, also, it was recognized that the long-planned system of interregional trunk highways could no longer be postponed. In 1944, Congress established the National System of Interstate Highways, directing that it be located to meet the strategic needs of national defense, the growth trends of population and economic activity, and that it connect as many of the state capitals and major cities as possible.

Realization of the goal implicit in these plans, to modernize the nation's highway systems, demanded measures of massive proportions. These measures were enacted by Congress in the Federal-Aid Highway Act of 1956.

The wisdom of Congress in accepting this massive roadbuilding challenge as it did has never been questioned. Inevitably, however, experience revealed problems which were not foreseen, or at least not provided for. Thus, in 1962, a provision was added to assure that Federally assisted highway projects in urban areas were derived from a comprehensive transportation-planning process.⁷ And in 1962, again in response to a need centered in the cities, provisions were adopted for assistance in the relocation of persons and businesses displaced by highway construction.⁸ In 1958 and 1965, protection of the highway by planned development and control of roadside areas was incorporated into the Federal-aid program.⁹ In 1966, provisions were added to encourage state programs of traffic safety.¹⁰

Today, looking ahead to completion of the Interstate System, the United States, its people, and its industry can be proud of the transportation progress that has been made under the roadbuilding program that has rightly been called the greatest public works project

6. A legislative history of the codification of Federal highway laws in 1958 is contained in H. R. Rep. No. 1938, 85th Cong., 2d Sess. (1958). As to the creation of the system of Federal-aid highways in urban areas, *see* §§ 103, 104. As to the formula for apportionment of aid among the several systems, *see, e.g.*, Act of Sept. 7, 1950, Pub. L. No. 81-769, 64 Stat. 785.

7. 23 U.S.C. § 134 (1964).

8. 23 U.S.C. § 133 (1964).

9. Act of April 16, 1958, Pub. L. No. 85-381, 72 Stat. 89; 23 U.S.C. § 131 (Supp. II, 1966).

10. 23 U.S.C. § 135 (Supp. I, 1965), *amended* and expanded by 23 U.S.C. § 401-4 (Supp. II, 1966).

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in the history of the world. And, viewed as an engineering achievement, this pride no doubt is justified. Additionally, the Federal-aid highway program represents a significant achievement in transportation planning and land acquisition, and a truly remarkable accomplishment in the mobilization of resources through cooperation of government and private industry. But the full historical perspective is not complete without considering the Federal-aid highway program as it has affected the structure and organization of governmental responsibilities, and the coordination of the performance of governmental functions carried on at several levels of government. In short, it calls for a view of the Federal-aid highway program as it has affected intergovernmental relations within our unique American federal system.

IV. FEDERAL-AID AND FEDERALISM: THE CRITICAL POINTS OF PRESSURE

Reduced to its essential concept, the Federal-aid highway program is one in which the Federal government offers grants-in-aid to assist the states in planning and constructing highway systems which, by conforming to agreed standards for location, design, and construction, serve the national as well as the local interest. In this program the Federal government deals with the states. It looks to the states to administer the program, and, adhering to the policy originating in 1921, the supervisory role of the Federal administrative agency has been limited to seeing that the standards prescribed by Congress to authorize Federal financial participation are met by the states.

This differs somewhat from the notion that the form of federalism which is best suited to our present circumstances should be a three-tiered structure, based on a recognition that

the federal government has the financial and technical resources, the state has the necessary political jurisdiction over the total urban area and its hinterlands . . . and the local government has the machinery for creating political policies which in this day of big-ness are still mindful of the human needs.¹¹

It suggests the question: Can the type of federalism which has characterized the highway program in its first fifty years continue to serve as the best structure for the nation's present and future needs? The comments that follow consider this question in the light of two elements of the Federal-aid highway program, namely: the policy that

11. Remarks of Prof. Doebele, quoted in O'Harrow and Noble, *Organization of Intergovernmental Relations*, in HIGHWAY RESEARCH BOARD, HIGHWAY RESEARCH RECORD 78—"FRONTIERS OF RESEARCH IN HIGHWAY LAW" 20 (1965).

the Federal government and the states are the principal parties in the program; and the requirement that Federal grants-in-aid funds must be spent only in accordance with Federal standards.

V. THE BALANCE OF POWER IN POLICY-MAKING AND ADMINISTRATION

When roadbuilding in the United States was a local responsibility, roads were generally built by amateurs rather than by professional engineers. They were not deliberately planned to integrate neighborhoods into communities, communities into regions, and regions into states. The concept of *highway systems* was introduced by the Federal-aid highway program, and this concept forced the states and their political subdivisions to think in terms of state-wide networks of roads.

In building these systems, the state became the more influential member of this state-local partnership. Several factors contributed to this. Control of the actual expenditure of Federal-aid funds for highway building was at the state level. As highway construction became more costly, especially in urban areas, local governments found it more difficult to raise the funds necessary to undertake independent programs. Also, as highway systems became more complicated, most local governments found they did not have and could not build up a corps of professionals who could carry on the planning, design, construction, maintenance and administration demanded. All these factors operated to shift the center of policy-making and administrative control to the state level.

As a consequence, intergovernmental relations were developed with the objective of facilitating *state policy* and *state administrative procedures* through the governmental machinery of its political subdivisions—the counties and municipalities. Local needs were assigned priorities according to their importance in the overall statewide program as that program was conceived by the state legislature and state highway department.

Good reasons for this arrangement existed at the time the Federal-aid highway program began. It centralized and simplified the task of the Federal agency administering the Federal-aid law. Also, at a time when roadbuilding needs were centered mainly in rural areas, it was the way most likely to develop sound state-wide road systems—the Federal-aid primary and secondary systems—and, after 1944, the Interstate System.

But over the period of fifty years circumstances changed, and the

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steady concentration of population and traffic in urban areas became a factor of basic importance in national life and the nation's transportation. State legislatures and state highway departments in the 1940's—often rurally oriented in their outlook, and faced with a backlog of work to maintain and expand intercity and interregional highway links—did not respond in sufficient measure to urban transportation needs. In the Federal-aid program, Congress recognized the growing need for highway construction by gradually increasing the total amounts of its biennial authorizations during the 1940's and early 1950's. But the apportionment among the primary, secondary, and urban extensions remained unchanged, and the dollar total for the urban areas fell progressively further behind their mounting needs.¹²

Therefore, during the late 1950's, there was heard with increasing frequency the call for establishment of a "Federal-Aid Urban Highway System,"¹³ separate from the Federal-aid primary and secondary systems. The cities' position did not call for separation of their streets and highways from the states' central administration or construction program, but did emphasize that financial support was essential for a greater effort in developing urban area transportation facilities; this meant increasing the share of Federal-aid allocated for the cities. At the same time, in the states there were calls for statutory earmarking of the motor vehicle license fees for urban highway programs directly in proportion to the cities' share of the states' total vehicle registration.¹⁴

To some extent, political realism accounted for the cities' decision to stay within the framework of the states' existing highway programs and to direct the main thrust of their effort to securing more funding and more flexibility for the states to channel this aid into urban areas. However, realism regarding the overriding need for integrated transportation system planning was also a factor in the cities' decision not to try to "go it alone." The impact of the predicted growth of urban transportation needs was dramatized in various ways, and in 1962, was presented to Congress as follows:

12. After 1944, when urban extensions of the Federal-aid systems were specifically provided for in the "A-B-C systems" authorizations, the urban share was designated as 25 per cent of the total, and by the mid-1950's the dollar amount of this share was \$175 million annually. Act of May 6, 1954, Pub. L. No. 83-350, 68 Stat. 70.

13. See, e.g., *Hearings on H. R. 10495, H. R. 10651 Before the Subcomm. on Roads of the House Comm. on Public Works*, 86th Cong., 2d Sess. 42, 46 (1960).

14. *Id.* at 47.

Nearly one-half of the Nation's motor travel now occurs on city routes that account for only 10 per cent of the total highway mileage. This urban travel will more than double over the next two decades, while rural highway travel will increase about 30 per cent. By 1980, about 60 per cent of the anticipated 1,277 billion yearly vehicle miles of travel will be within urban area limits. . . .¹⁵

Viewing the problem thus, it seemed to all that the best approach was to keep the state highway programs' structure intact, but within that structure to strive for better integration of urban highway needs and for allocation of a greater share of the Federal financial aid to the urban highway systems. To the cities, it seemed a logical conclusion that this must be accompanied by provisions giving them a greater voice in the planning and decision-making process of the highway program.

Congress was in no mood to make any major move in this direction in 1960, however, and offered the excuse that it needed time to study the estimate of total highway needs due to be submitted the following year. The House Public Works Committee spoke vaguely about trying to "find new sources of revenue and perhaps broaden the base" of the taxes financing highways.¹⁶ In 1962, Congress seemed no more ready to seriously consider altering the financial formula for highway aid in favor of the urban areas, but it did take two steps designed to strengthen the program where pressures were most acute in the Federal-Aid Highway Act of 1962. One provision authorized Federal participation in assistance for the relocation of persons and businesses displaced by highway construction; the other dealt with the vexatious problem of selecting locations for urban arterial expressways and the reconstruction of urban streets and highways. The 1962 Act also provided that after July 1, 1965, Federal highway aid would be conditioned upon the states' showing that their route proposals in urban areas were based on a "continuing comprehensive transportation planning process carried on cooperatively by States and local communities" in conformance with the objective of the law. This objective was stated as "the development of long-range highway plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due

15. *Hearings on H. R. 9725, H. R. 9848, H. R. 11199 Before Subcomm. on Roads of the House Comm. on Public Works, 87th Cong., 2d Sess.* 162 (1962).

16. 1960 *Hearings*, *supra* note 13, at 45.

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consideration to their probable effect on the future development of urban areas. . . ."¹⁷

These steps were followed in 1966 by Congressional recognition of the need for local participation in another aspect of the highway program which demanded Federal assistance, namely, highway safety. Hearings on the Highway Safety Act of 1966 brought strong representations from city and county representatives regarding the need for assurance that they would have an effective role in deciding how state-wide programs for improving highway safety would be made up and administered. Congress was impressed, stating in its report that "increased local participation is an essential component" of the states' highway safety programs.¹⁸ It provided that approval of state programs would be given only where the state allocated at least 40 per cent of its federal assistance funds, to be spent by its political subdivisions on programs developed by the subdivisions in accordance with the state and national standards.¹⁹

Thus, the measures which Congress has taken since 1962 to meet the urban areas' specific transportation needs through the mechanism of the Federal-aid highway program have all been carried on through the historic structure of this program in which the Federal government and the states are the principal parties. Instances where specific urban needs have received specific attention have been arranged so that the state governments interpret and implement national policy regarding the urban situation. The decision to retain this structure where highway aid is involved stands in contrast to the Congressional decisions to deal directly with the urban areas in such cases as the urban renewal programs and the Urban Mass Transportation Act of 1964.²⁰

It is too early to say whether this decision was wise or even to speculate about the form of federalism that will develop as a result in the field of highway transportation programs. It is apparent, however, that the traditional two-tiered federal system of the highway program must give way to a new form; and rather than emerging as a clearly

17. 23 U.S.C. § 134 (1964). For purposes of this act, "urban areas" were defined as areas of more than 50,000 population. Census data indicated approximately 250 such areas in the United States.

18. H. R. Rep. No. 1700, 89th Cong., 2d Sess. 21 (1966).

19. 23 U.S.C. § 402 (b) (Supp. II, 1966).

20. 49. U.S.C. § 1601-11 (1964). *See, also*, discussion of this legislation in Abend, *Federal Aid To Municipal Transportation: Salvation or Pandora's Box*, 26 *FED. B. J.* 265 (1966).

defined three-tiered structure, it seems more likely to be a "mix" created for accomplishing specialized tasks. Those who have watched the intergovernmental structures created to carry on comprehensive transportation planning since 1965, have seen them include elements from the entire range of the state's political subdivisions and various special instrumentalities, such as turnpike and toll bridge authorities. Presumably a "mix" of comparable variety will develop in the structure created for carrying on the states' highway safety programs.

In these combinations of governmental units it is clear that there will be wide disparities between the actual power of the elements based on their ability to be financially independent. The state, for example, can speak with confidence since it controls both money and technical resources. The special purpose authority has its own sources of strength based on its access to bond financing and the separate legal status derived from its basic legislation. Local governments, long ago limited to inadequate sources of revenue by federal and state pre-emption of tax sources, may feel their chief strength lies in a certain nuisance value that they can bring to the bargaining table.

Can a structure which is in reality a mix rather than a layered pattern have any real hope of carrying on an orderly intergovernmental decision-making process under these conditions? Since the decision has been made to try, one should probably take an optimistic view of the prospect. And, in reality, there are grounds for optimism. For one thing, it has been suggested that to some extent the gap which has existed between the states and the cities may shortly be narrowed as a result of reapportionments in the state legislatures.²¹ Also, some observers suggest that part of the problem is psychological, insofar as the American tradition of the 18th and 19th centuries was oriented on the value of rural rather than urban life; and spokesmen for urban areas have continued to react defensively to a supposed bias which today is no longer as real as it once was.²² Finally, if the current measures which have been taken to increase the voice of the urban areas in the highway program's decision-making process turn out indeed to suffer from an imbalance of real power among the parties, there

21. See, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, GOVERNMENTAL STRUCTURE, ORGANIZATION AND PLANNING IN METROPOLITAN AREAS, (Comm. Print for House Comm. on Government Operations, 87th Cong., 1st Sess. 8-9, 1961).

22. Testimony of Sen. Joseph Clark in *Hearings on the Federal Role in Urban Affairs Before Subcomm. on Executive Reorganization of Senate Comm. on Government Operations*, 89th Cong., 2d Sess. 4-5 (1966).

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are ways of correcting the balance. For example, it has been suggested that the Federal government might well return to the local governments some of the revenue necessary to finance services which can best be administered at the local level.²³ The chance of evolving a new basis for intergovernmental cooperation which will permit the Federal-aid highway program to deal successfully with the urban areas' transportation problems within the traditional structure of this program depends, therefore, on all parties yielding some of their original premises concerning these problems and their ability to solve them, or leave them for someone else to solve. Many signs indicate that the willingness to do this is spreading. The question is whether, once willing, the elements of this new mixture of governments can learn fast enough to relieve the pressures that have risen in urban areas and can develop a transportation system which will support the type of urban-metropolitan communities that Americans have begun to build.

VI. THE TECHNIQUES OF IMPLEMENTING FEDERAL STANDARDS

In addition to observing the effects that urban transportation demands have had on the structure of intergovernmental relations in the Federal-aid highway program, it is revealing to look at the evolution that has occurred in the techniques for administering the grant-in-aid concept in this setting. Both the Federal government and the states show evidence of change.

In its basic elements, the techniques of the Federal-aid highway law have retained their original form. The law authorizes appropriate Federal agencies to approve financial participation in construction projects initiated by the states, provided such projects meet standards prescribed in the Federal statutes or in administrative regulations of the Federal Highway Administration acting under delegated authority. State matching of the Federal funds granted for any project has always been one of the basic requirements of the highway program. Currently, the highway law calls for 50:50 Federal-State matching for "A-B-C" projects, and 90:10 Federal-State matching for Interstate System mileage. From the 1920's onward, the need for revenue to match Federal grants has been a problem of increasing importance in state finance.

The states' response to this increasing need for matching funds has been to seek new sources of revenue for this purpose and to guarantee

23. *Id.* at 7-8.

that this revenue will be used for highways by enactment of so-called "anti-diversion" amendments to the state constitutions. Twenty-eight states now have such constitutional provisions;²⁴ the remainder have, by statute, resolution or custom, adhered to the policy that revenue from state taxes on motor fuels and lubricants, vehicle registration fees, and similar related taxes on highway users may be used only for the state's highway program.

The effect of this practice has been to separate the funds for highways from the state's general funds and so to limit the extent of general state or local legislative control over highway construction through the program's pursestrings. This policy was encouraged by passage of the Hayden-Cartwright amendment to the Federal-aid highway law in 1934, a provision which remains in the law at the present time as an expression of national policy favoring linkage of highway-user revenue to highway improvements.²⁵

For many years the states' needs to match Federal grants for highway construction were adequately met from these highway-user revenues. More than that, this anti-diversion policy guaranteed state highway departments a regular source of revenue, which enabled them to undertake programs of long-range plans and state-wide scope. It made possible the development of professional staffs which upgraded the services the states provided in their own programs and which improved the services rendered to the local governments. It also made it easier for the highway user to see what he was getting for his tax dollars and thus accept the continuation or increase of these taxes.

However, the anti-diversion policy of the Federal-aid law and the states' law has certain negative implications which as yet have never been fully tested or even explored. These arise because the earmarking of revenue always suggests that such revenue should be regarded as the *exclusive source* of support for the program which it finances.

24. Alabama, Arizona, California, Colorado, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia, Wyoming.

25. 23 U.S.C. § 126 (a) (1964), provides that "Federal aid for highway construction shall be extended only to those states that use at least the amounts provided by law on June 18, 1934, for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith . . ."

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So long as this source is adequate there is no difficulty. But as pressure to match Federal aid increases, states are finding that these earmarked highway-user funds are not adequate. State legislatures then face a difficult choice. Shall general funds be used to supplement highway user revenue? Or, if general funds are not available, and if additional funds cannot be obtained through higher taxes, shall the states seek greater Federal participation, with the possibility that this may be accompanied by greater Federal specification of standards?

It has been clear for some time that the accelerated program of highway modernization based on the Federal-Aid Highway Act of 1956 will eventually cost much more than was originally estimated. In part this is due to the fact that a program of such size, extending over such a substantial period of time during which the nation is enjoying prosperity, is bound to experience increased costs. It is also due in part to the fact that in 1956 this highway program was viewed mainly as an engineering problem. It is now coming to be understood in terms of its social and economic impact, and the needs revealed by this understanding are reflected in the later additions to the program to deal with comprehensive planning, relocation assistance, highway beautification, and traffic safety.

All of these new facets of the highway program have cost more money, and state governments have found it increasingly difficult to raise their share of the matching funds for Federal-aid using traditional formulas. Accordingly, Federal funding has provided most or all of the money needed for these aspects of the highway program which arise from the economic and sociological effects of road construction. And, as Congress has moved to provide these funds, it has also begun to change its methods of securing state implementation of national policies. Significantly, the beautification and safety amendments mark the first time since the Hayden-Cartwright Act of 1934 that Congress has provided that penalties, in the form of reductions in the amount of a state's allotment of funds, will be imposed on states which do not implement the national policy or standards.

The dilemma which this new technique presents to the states is illustrated by the Highway Beautification Act of 1965 where, in connection with control of roadside advertising and junkyards, Congress required that state programs provide compensation to landowners and operators of signs or junkyards when existing structures not conforming with the national standards or state controls were forced to move. This compensation requirement reversed the national policy on con-

trol of billboards which had been promulgated in the 1958 Federal aid law; the former policy gave the states their choice as to whether they would rely on police power or eminent domain to establish roadside controls. States establishing control programs which met national standards received an increase in their share of Federal aid. Following passage of the 1958 law, about half of the states enacted legislation to implement the national standards for control of roadside billboards, and in all but two instances these states elected to base their control programs on regulatory powers rather than by purchase or eminent domain.²⁶

The 1965 reversal of national policy on control of roadside advertising, coupled with the declaration that non-complying states would be penalized by a 10 per cent reduction in their allotments of Federal-aid funds for highway construction, raised serious questions in a number of states as to how to reconcile this new policy with existing state law.²⁷ While many prepared to draft new legislation which would conform to the new policy of compensating billboard owners and junkyard operators for requiring them to move, a few openly spoke of standing with their current police power approach to the problem and accepting the penalty of a 10 per cent reduction in Federal aid as the lesser of the two evils.

Such a situation as this can hardly be viewed as a step toward advancement of the "partnership" character often used in describing federal-state relations in the highway program. Yet this dilemma is repeated in connection with Federal efforts to promote traffic safety in the Highway Safety Act of 1966, which also utilizes the penalty technique. To comply with the national standards, some of which call for achieving state-wide and nation-wide uniformity on matters where diversity has existed for almost 50 years, the states face the necessity of enacting new laws and extensively renovating their motor vehicle administration. Major problems exist in the coordination of intergovernmental relationships here, for presently the functions which must be coordinated are diffused among various agencies, some state and others local, some executive and some judicial, and some functions are carried on in municipalities with constitutional home

26. A comparative analysis of this legislation is contained in R. NETHERTON & M. MARKHAM, *ROADSIDE DEVELOPMENT AND BEAUTIFICATION: LEGAL AUTHORITY AND METHODS*, PART 2, at 142-46 (Highway Research Board, 1966).

27. See, for example, testimony of Rep. Thomas Pelly in *Hearings on H. R. 7797 Before Subcomm. on Roads of the House Comm. on Public Works*, 90th Cong., 1st Sess. 23-80 (1967).

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rule status or under the direction of state officials whose constitutional status leaves them responsible to the electorate rather than to the governor.²⁸

Development of the economy and society of the United States along dimensions which are continent-wide has been possible only because the nation has a transportation system and technology to sustain them on this scale. The cost of building and maintaining this system is beyond the means of the states acting individually, and the system can become a working reality only if massive aid from the national treasury is provided. Once begun, this aid becomes essential for completion of the construction phase and perhaps will become necessary for the phases of maintenance, reconstruction, and future expansion. Realistically, no state is in a position to decline federal grants-in-aid if the conditions attached thereto are not to its liking or are deemed oppressive. Thus, successful continuation of the highway program as a federal-state partnership calls for making careful judgments as to how far Congress can safely use its tremendous power over the financial future of highway transportation to induce the states to assume responsibilities and undertake activities which they might not normally assume at all on their own or might not see fit to assume at the time. The consequences of a wrong decision on these matters are sharpened when the technique of the carrot is supplemented by the technique of the stick.

VII SUMMARY

A study of the impact which the Federal-aid highway program has had on the evolution of the American federal system provides an unusually good opportunity to watch the workings of this system. Half a century of experience is sufficient time for changes to emerge and become distinct, and the subject is sufficiently important and the resources involved are sufficiently great to make the changes significant. The chief remaining question is whether the federal system is a process in which clearly defined roles can ever be assigned to the levels of government, and then, whether each level can ever be left to function in its own sphere.

It has been said that political scientists have generally abandoned the search for any neatly layered structure in favor of a series of vary-

28. Some of these are suggested by the legislative history of the act. H. R. REP. No. 1700, *supra* note 18; S. REP. No. 1302, 89th Cong., 2d Sess. (1966). Others may be visualized from noting the standards promulgated for state programs. H. R. Doc. No. 138, 90th Cong., 1st Sess. (1967).

ing combinations of elements specifically suited to given tasks.²⁹ It is possible that such a pragmatic approach is best, and is, in reality, the approach taken by the public whose preference is determined according to which level of governmental control will return the greatest administrative economies and efficiencies. In this connection, lack of responsiveness on the part of the states has frequently been cited as the cause of expansion of federal programs and the assumption of the initiative by federal policy. Such suggestions have been heard regarding the recent history of the Federal-aid highway program.

There is more at stake in the highway program, however, than merely getting on with the job of road construction. And, just as the nation is coming to recognize that highway networks have important effects on the economic and social structure of the community, so it must see that the manner in which the Federal-aid highway program has been carried on is having important effects on the structure and vitality of federalism in American government. The indicators that have been discussed here suggest a trend that is contrary to the recommendation of the President's Commission on Intergovernmental Relations in 1955 that there should be "a reduction in the extent and degree of Federal supervision accompanying highway grants-in-aid."³⁰ This judgment was made, however, on the eve of the vastly expanded and accelerated highway modernization program which was commenced a year later under the Federal-Aid Highway Act of 1956. It would therefore seem high time to reexamine this judgment in the light of the past decade's experience and render a new judgment based on the evidence which it reveals.

29. Mushkin and Adams, *Emerging Patterns of Federalism*, 19 NAT'L TAX J. 244 (1966).

30. REPORT OF THE PRESIDENT'S COMMISSION ON INTERGOVERNMENTAL RELATIONS 219 (1955). The Report furthermore states: "Federal agencies should diminish controls over the State highway planning, design, and construction. Over the years, the Bureau of Public Roads has made a notable contribution to highway improvement in this country through technical leadership and the stimulation and coordination of State activity in this field. However, in the light of the maturity and competence of most State highway departments, it appears to the Commission that the Bureau of Public Roads could relax much of its close supervision of State highway work." *Id.* at 220.

Later in the same report, however, the Commission noted that "although . . . [it] favors relaxation of Federal supervision, it believes that the National Government should continue to prescribe minimum standards for the construction of Federally-aided highways. Moreover, where interstate highway connections are involved, the Bureau of Public Roads should continue to exercise strong guidance." *Id.*

An interesting contrast appears when this discussion on the highway program is compared with the Commission's comments on the growth of National-local grant programs for housing and urban renewal. *Id.* at 225-30.