The Law of Intergovernmental Relations: IVHS Opportunities and Constraints

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Executive Summary

According to the most recent census figures, there are more than 22,000 cities and counties in the United States. Each of these general purpose units of government may, under a variety of state constitutional, statutory, and home rule charter provisions, be empowered to exercise regulatory powers over Intelligent Vehicle Highway Systems (IVHS) technologies. The transaction costs associated with regulating IVHS technologies would include: 1) "search and information costs" to discover the extent to which local governments are currently empowered to or preempted from exercising regulatory authority; 2) "bargaining and decision costs" in creating a regulatory scheme; and 3) "policing and enforcement costs" associated with implementing the regulatory scheme. Similar transactions costs would be incurred should local governments decide to provide or produce IVHS services.

A model state statute clarifying: 1) the appropriate role for local governments as regulators of IVHS services; and 2) the rules of the game for local governments which choose to provide or produce IVHS services could significantly reduce the substantial transaction costs which will predictably occur under existing laws. In addition to the objective of minimizing search and information, bargaining and decision, and policing and

enforcement costs, that model statute should address the question of whether there is any reason to make government other than neutral toward the form which IVHS technologies should assume. That is, consideration should be given to a statutory regime which would create a level playing field on which different emerging IVHS technologies and their providers can compete.

ABSTRACT

State, regional, and local government units perform two roles in the transportation sector: 1) regulator and 2) service-provider. Both are impacted by the emergence of the cluster of IVHS technologies.

With respect to the regulatory function, the first question that must be addressed is that of empowerment — does the entity have the authority to regulate? The second question is that of preemption — has the entity's regulatory authority been modified or taken away?

With respect to the service-provision function, the basic question that must be addressed is that of empowerment — does the entity have the authority to provide the service either on its own or in collaboration with other units of government?

To answer these questions, this paper will survey the current statutory and constitutional provisions as well as pertinent court decisions.

The final part of the paper will discuss four different legal frameworks for dealing with the problems of intergovernmental conflict and coordination generated by IVHS technologies.

I. STATE, REGIONAL AND LOCAL GOVERNMENT REGULATION OF IVHS TECHNOLOGIES: THE AUTHORITY TO REGULATE AND TO PREEMPT

Intelligent Vehicle Highway Systems (IVHS) refers to a bundle of emerging technologies which affect the use and management of highways and streets.[1]

The relationship between any new technology and state and local government can take many forms. The cable television industry furnishes a good illustration of the mix of state and local government responses to an emerging technology. In some jurisdictions, cable transmission is treated as a public utility, a monopoly service provider subject to relatively stringent local franchising requirements including rate regulation. In New York, local regulatory powers are subject to a degree of supervision and control by a state agency. In some places, the public sector itself

1. *See generally Anne Yablonski, Working Paper on IVHS User Services and Functions* (Mitre Corp.: McLean, Virginia) Contract No. DTFH61-91-0027 (1992).

provides cable television services. In others, local or state regulators prescribe minimum standards for competing private sector cable service providers.

State, regional, and local governments have the potential to perform two significant roles in relation to emerging IVHS technologies: 1) as regulator; and 2) as service provider.

For example, a state government might exercise its regulatory authority to require that all private sector emergency vehicles be equipped with a device which can change traffic signals to green. A local government might create a licensing scheme which requires that all private sector providers of traveler information services be adequately insured and operated by persons of "good moral character."[2] With respect to service provision, a county might decide to install road sensors at major intersections to facilitate traffic management.[3] Or a state agency, like the New Jersey Turnpike Authority, might broadcast periodic bulletins concerning weather and traffic conditions over a radio frequency.

This paper will provide an analytic overview of key state law issues that are likely to arise in the implementation of IVHS technologies. Legal specialists in the field of intergovernmental relations share a common set of tacit understandings about the key legal questions which arise when new technologies are created. Highway program specialists have had little professional incentive to familiarize themselves with these concepts. That lack of familiarity is due to the fact that states responded to federal spending incentives for highway construction by "providing broad legislative or constitutional authorization for actions taken by state highway departments to meet federal-aid highway program incentives."[4] The purpose of this paper is to bridge that knowledge gap by presenting an overview of basic legal concepts in the field of intergovernmental relations such as Home Rule; Dillon's rule of interpretation; Express and Implied Preemption; the Public Purpose Doctrine; and Intergovernmental Collaboration.

A distinction must first be made between the authority of the several states and their political subdivisions. States are "sovereign"[5] and possess "plenary powers simply by virtue of their original sovereignty; they retain

2. C. SANDS, M. LIBONATI, and J. MARTINEZ, LOCAL GOVERNMENT LAW § 15.31 (1981) [Hereinafter cited as LOCAL GOVERNMENT LAW].

3. Steven Slater, *County on Road to High-Tech Traffic Control*, MONTGOMERY J., Sept. 14, 1993 at A1.

4. Wells, et al., *The Federal-State Relationship in the Federal Aid Highway Program*, in FOUR SELECTED STUDIES IN HIGHWAY LAW 2005 (L. Thomas and J. Vance, eds.).

5. Coyle v. Smith, 221 U.S. 559, 574 (1911).

all the powers it is possible for government to have except insofar as these powers have either been delegated to the federal government, or have been limited by the *state* constitution."[6]

The principle of state sovereignty means that the states have "supreme" authority to shape their relationship with their political subdivisions "unrestrained by any provision of the Constitution of the United States."[7] By contrast, the nature and extent of policy-making authority conferred on political subdivisions rests in the absolute discretion of each State. For example, a state legislature would be free, as far as the Federal constitution is concerned, to forbid local government from playing either a regulatory or a service provision role with respect to IVHS technologies.

Accordingly, any constraints on the sovereign power of the state legislature to determine the regulatory and service provision activities of its political subdivisions derive from the state constitution. The next section of this paper focuses on the extent to which state constitutional provisions have modified the general principle of state dominance and local government subordination.

A. State Constitutional Questions

State constitutional provisions speak directly to the allocation of authority between a state and its political subdivision.[8] Political subdivisions may possess *autonomy* from the state legislature in two different ways.[9] First, the state constitution may afford political subdivisions the *power of initiative*, that is, the power to initiate legislative action in the absence of statutory authorization from the state legislature. For example, in jurisdictions, affording local governments the *power of initiative*, a local government would be authorized to regulate private sector providers of IVHS services even in the absence of state enabling legislation. Second, the state constitution may afford political subdivisions the *power of immunity*, that is, freedom from state legislative control. For example, in jurisdictions affording local governments the *power of immunity*, a state statute authorizing private sector IVHS providers to install road sensors on local streets and ways without the consent of the affected local

6. Frank P. Grad, The States' Capacity to Respond to Urban Problems: The State Constitution in The States and the Urban Crisis 29 (1970) (emphasis supplied).

7. Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907); Local Government Law, *supra* note 2 at § 3.01.

8. *See generally* U.S. Advisory Comm'n on Intergovernmental Relations; Local Government Autonomy (1993).

9. Gordon L. Clark, Judges and the Cities (1988); Clark, *A Theory of Local Autonomy*, 74 Annals of the Association of American Geographers 195 (1984); Sho Sato and Arvo van Alstyne, State and Local Government Law 136 (2d Rev. 1977); Local Government Law, *supra* note 2, at § 4.07.

government might be unconstitutional. With the distinction between the *power of initiative* and the *power of immunity* in mind, we can now turn to an examination of those categories of state constitutional provisions which are most salient to the issue of which level of government is authorized to regulate IVHS technologies.

1. Home Rule

From a legal standpoint, home rule is an imprecise term. For example, the Advisory Commission Intergovernmental Relations (A.C.I.R.) reports that cities are granted "home rule authority" in 37 state constitutions and counties are granted such authority in 23 states.[10] The label "home rule" does not tell us whether the pertinent state constitutional provision conveys the *power of initiative*, the *power of immunity*, or both. Indeed, a state constitutional provision labeled by the A.C.I.R. as granting "home rule authority" may convey neither the *power of initiative* nor the *power of immunity*. For example, the Connecticut Constitution's Home Rule Article provides:

> The general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities, and boroughs relative to the powers, organization and form of government of such political subdivisions.[11]

It is clear that political subdivisions in Connecticut both require statutory authorization from the legislature before exercising any regulatory junction and have no immunity from the reach of general laws.

Further, the term "home rule" does not unambiguously indicate the scope of *initiative* or *immunity* granted by the pertinent state constitutional provision.

The A.C.I.R. defines local discretionary authority as:

> the power of a local government to conduct its own affairs — including specifically the power to determine its own organization, the functions it performs, its taxing and borrowing authority, and the numbers and employment conditions of its personnel.[12]

Of the four dimensions of local government discretionary authority — 1) structural; 2) functional; 3) fiscal; and 4) personnel — we will concern ourselves primarily with functional autonomy for reasons which will be discussed in the next section of the paper.

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10. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 21-22 (1993).

11. Conn. Const. art X, § 1.

12. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, MEASURING LOCAL DISCRETIONARY AUTHORITY 1 (1981).

Our discussion will focus on the extent to which state constitutional provisions furnish political subdivisions with powers of *functional initiative* over IVHS technologies and whether such provisions yield them *functional immunity* from state control in the exercise of their regulatory jurisdiction.

a. Power of Initiative

Home rule provisions in state constitutions do not usually give clean answers even to seemingly easy questions about the scope of home rule authority. The discussion in this section of the paper may be heavy going for the non-specialist. Bringing out the details of the power of home rule is useful for several reasons: 1) to illustrate the diversity of state responses to the question of how authority should be allocated between the state and its political subdivisions; 2) to indicate the search and information costs which must be incurred on a state by state basis in answering questions about the scope of local government autonomy; 3) to provide the non-specialist with an analytic yardstick for evaluating the quality and thoroughness of the work product of legal staff and consultants; and 4) to indicate the complexity of legal problems encountered when state rather than federal law controls emerging technologies.

The contemporary constitutions of sixteen states contain terms like "municipal affairs", "municipal matters" and "powers of local self-government" to convey the scope of discretion afforded home rule cities or counties.[13]

Qualifying adjectives like "local" or "municipal" do not unambiguously indicate whether a home rule entity can exercise regulatory jurisdiction over a private sector provider of IVHS technologies. Illustratively, a home rule city's power to enact a rent control ordinance was struck down in Florida[14] but sustained in California.[15] Nonetheless, the clear trend of decision is toward judicial recognition of the expansive scope of regulatory powers of home rule entities.[16] For example, "powers of local self-government" in Ohio authorized a home rule city to barricade and close

13. CAL. CONST. art. XI, § 5; COLO. CONST. art. XX, § 6; FLA. CONST. art. VIII, § 1(g) (counties have all powers of local self-government), art. VIII, § 2(b) (cities); ILL. CONST. art. VII, § 6(a); IOWA CONST. art. III, § 38A (cities) and § 39A (counties); KAN. CONST. art. 12, § 5(b); LA. CONST. art. VI, § 5(E); ME. CONST. art. VIII, Part Second § 1; MICH. CONST. art. VII, § 2; OHIO CONST. art. XVIII, § 3; OR. CONST. art. VI, § 10; R.I. CONST. art. XIII, § 1; W. VA. CONST. art. VI, § 39(a); WIS. CONST. art. XI, § 3(i); and WYO. CONST. art. 13, § 1(b).

14. City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972).

15. Fisher v. City of Berkeley, 693 P. 2d 261 (Cal. 1984).

16. LOCAL GOVERNMENT LAW, *supra* note 2, at § 4.10.

streets to control the volume and burden of traffic.[17] This case has obvious implications with respect to whether a technology which impacts on traffic usage patterns on city streets can be regulated or even prohibited.

On the other hand, a limited construction may be placed on terms like "local" and "municipal" such that home rule regulatory jurisdiction might not extend to state or interstate highways located within its boundaries.[18]

The constitutions of four states have language that convey power over matters concerning "property, affairs or government."[19] Six states have constitutions that employ the term "its own government" to delineate the scope of local initiative.[20] As in the case of texts using arguably broader terms such as "municipal affairs" or "local self government", the scope of regulatory autonomy afforded will be subject to the vagaries of judicial interpretation in these states.

The Oregon and Texas Constitutions grant eligible cities comprehensive power to formulate the contents of their home rule charters, limited only by the preemptive powers of the legislature.[21] This highlights the general point that regulation of IVHS technologies may be permissible under state law but barred because a particular provision of the home rule charter disables the home rule entity from such regulation. That is, in entities having a charter, the scope of regulatory authority is defined by each charter and may vary considerably from city to city within a state.

In nine states, the local government unit is broadly empowered to "exercise any power or perform any function" not denied by the charter, state law, or the state constitution.[22] In these states, home rule entities unambiguously have regulatory power.

Nonspecialists may be surprised to learn that it is rare for home-rule provisions of state constitutions to be interpreted to give home-rule units additional power either to tax or to borrow.[23] That is why the bulk of the discussion in this section of the paper has emphasized *functional autonomy*. The fiscal powers of both home-rule and non-home rule entities are generally subject to the strictures of Dillon's rule of interpretation (see section I.B.1. for further discussion).

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17. City of Cleveland v. City of Shaker Heights, 507 N.E.2d 323, 325 (Ohio 1987).

18. *Cf.* Crain Enterprises Inc. v. Mound City, 544 N.E.2d 1329, 1333-34 (Ill. App. Ct. 1989).

19. GA. CONST. art. IX, § II, para. I(a); MICH. CONST. art. VII, § 22; N.Y. CONST. art. IX, § 2(c)(i); R.I. CONST. art. XIII, § 2.

20. MD. CONST. art. XI-A, § 1; NEB. CONST. art. XI, § 2; NEV. CONST. art. VIII, § 8; OKLA. CONST. art. XVIII, § (3)(a); UTAH CONST. art. XI, § 5; WASH. CONST. art. XI, § 10.

21. OR. CONST. art. XI, § 2; TEX. CONST. art. 11, § 5.

22. ALASKA CONST. art. X, § 11; CONN. CONST. art. X, § 1; MASS. CONST. art. II, § 6 (amended 1990); MO. CONST. art. VI, § 19(a); MONT. CONST. art. XI, § 6; N.H. CONST. pt. I, art. 39; N.M. CONST. art. X, § 6; PA. CONST. art. IX, § 2; S.D. CONST. art. IX, § 2.

23. LOCAL GOVERNMENT LAW, *supra* note 2, at § 4.10; § 23.02; § 25.01.

b. Power of Immunity

In states that confer home rule over "municipal affairs,"[24] a correlative immunity from state legislative interference may attach to matters which fall within the home rule entity's exclusive legislative jurisdiction.

For example, the California Constitution provides that "city charters adopted pursuant to this Constitution . . . . with respect to municipal affairs shall *supersede all laws inconsistent therewith.*"[25]

Thus, in California, charter cities are sovereign over "municipal affairs."[26] In jurisdictions like California, a state law limiting the regulatory power of home rule cities raises a state constitutional law issue.

The test that has emerged in the case law is that the home rule entity is sovereign only with respect to "municipal" as distinguished from "statewide" matters.[27] At first blush, this constitutional division of powers between home rule units and the state would seem to present a significant barrier to any state law interfering with the exercise of local regulatory jurisdiction. However, the trend of modern case law is almost uniformly deferential toward the state legislature's statutory determination that a regulatory matter is of statewide concern.[28]

The general rule that, in a conflict between the state and a home rule unit's regulatory jurisdiction, the state wins, must be qualified. That rule generally applies when the statute in question expressly preempts a home rule unit's regulatory jurisdiction. That is because, even in states which do not, like California, purport to immunize a home rule unit from state legislation trenching on "municipal" or "local" matters, many state constitutional grants of home rule authority are consciously phrased to exclude the application of implied preemption to home rule entities.

The Montana Constitution says that "a local government unit adopting a self-government charter may exercise any power *not prohibited* by this constitution, law, or charter."[29] The Illinois Constitution states that:

> Home rule units may exercise and perform concurrently with the state any power or function of a home rule unit to *the extent that the General Assembly does not by law specifically limit the concurrent exercise or specifically declare the States' exercise to be exclusive.*[30]

24. *See supra* note 13.

25. CAL. CONST. art. XI, § 5(a).

26. California Fed. Sav. & Loan Ass'n v. City of Los Angeles, 812 P.2d 916 (Cal. 1991).

27. LOCAL GOVERNMENT LAW, *supra* note 2, at § 4.08.

28. *Id.*

29. MONT. CONST. art. XI, § 6 (emphasis supplied).

30. ILL. CONST. art. VII, § 6(i) (emphasis supplied).

In other states, pertinent constitutional language invites the judiciary to establish a doctrine of preemption along the lines indicated by the language employed. Thus, in Iowa, "municipal corporations are granted home rule power and authority, *not inconsistent with* the laws of the general assembly, to determine their local affairs and government."[31] Washington's constitution states, "any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are *not in conflict with* general laws."[32] In assessing the degree of the asserted conflict between a state and a local regulatory regime, a home rule unit may benefit from the presumption that state and local regulatory jurisdictions are concurrent.[33]

2. *Control Over Streets and Ways*

Some forms of IVHS technologies may require the installation of transmission or control devices on local streets and ways. In several states, state legislative power over streets and ways is limited by a state constitutional provision.[34] In Michigan, local government units exercise both powers of regulatory initiative and of immunity from state control over their streets and ways.[35] In other states, local authorities must consent before streets can be used by the private sector.[36] Localities enjoy immunity but not the power of regulatory initiative under this type of constitutional provision.

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31. IOWA CONST. art. 3, § 38A (emphasis supplied).

32. WASH. CONST. art. XI, § 11 (emphasis supplied).

33. Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist., 777 P. 2d 157 (Cal. 1989).

34. LOCAL GOVERNMENT LAW, *supra* note 2, at § 3.18.

35. MICH. CONST. art. VII, § 29. The Michigan Constitution provides: [N]o person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

36. ALA. CONST. art. XII, § 220; S.C. CONST. art VIII, § 15; VA. CONST. art. VII, § 8. Thus, South Carolina Constitution provides: [C]onsent of local governing body to certain laws required. No law shall be Passed by the General Assembly granting the right to construct and operate in a public street or on public property or other railway, telegraph, telephone or electric plant, or to erect water, sewer or gas works for public use, or to lay mains for any purpose, or to use the streets for any other such facility, without first obtaining the consent of the governing body of the municipality in control of the street or public places proposed to be occupied for any such or like purpose; nor shall any law be passed by the General Assembly granting the right to construct and operate in a public street or on public property a street or other railway, or to erect waterworks for public use, or to lay water or sewer mains for any purpose, or to use the

B. State Statutory Questions

In most states, political subdivisions are empowered to regulate and to perform regulatory functions by statutory grants of power.[37] Statute law is the basis for local regulatory authority even for home rule units in the majority of states.[38] How to interpret grants of power from the state legislature to its political subdivisions is therefore a significant legal issue.

1. The Interpretation of Enabling Legislation

The standard for interpreting grants of powers to political subdivisions is known as Dillon's rule. The rule was formulated by Judge Dillon in a leading case as follows:

> In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in *express words;* second, those *necessarily implied* or *necessarily incident* to the powers expressly granted; third, those absolutely *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation — against the existence of the power.[39]

Dillon's rule has been cited in thousands of cases in every jurisdiction over the past 125 years as calling for a relatively strict construction of grants of power to political subdivisions.[40] And, where Dillon's rule is followed, it represents a constraint on a political subdivision's capacity to regulate.

Dillon's rule has, however, been eroded in many states by 1) broad constitutional grants of functional authority to home rule units; 2) broad statutory grants of functional authority to other political subdivisions; 3) constitutional and statutory rules of construction requiring courts to liberally interpret grants of powers to political subdivisions; and 4) judicial repudiation of the rule.[41] Even so, Dillon's rule injects a degree of uncertainty when local regulatory authority is asserted over new technologies.

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streets for any facility other than telephone, telegraph, gas and electric, without first obtaining the consent of the governing body of the county or the consolidated political subdivision in control of the streets or public places proposed to be occupied for any such or like purpose.

37. Local Government Law, *supra* note 2, at §§ 14.01, 14.02.

38. U.S. Advisory Comm'n On Intergovernmental Relations, *supra* note 8.

39. Merriam v. Moody's Executor, 25 Iowa 163, 170 (1868) (emphasis supplied).

40. Eugene McQuillin, The Law of Municipal Corporations §§10.18a-10.25 (3d rev. ed. 1988).

41. Richard Briffault, *Our Localism*, 90 Colum. L. Rev. 1, 6-18 (1990); Local Government Law, *supra* note 2, §§13.01-13.08; State v. Hutchinson, 624 P.2d 1116 at 1126-27 (Utah 1980); W. Valente and D. McCarthy, Jr., Local Government Law 62-64 (4th rev. ed. 1992).

2. Express and Implied Regulatory Preemption

The law of preemption comes into play after it has been determined that a political subdivision is empowered to exercise regulatory authority. The preemption question is this: to what extent are a political subdivision's regulatory powers "limited, in dealing with a particular subject, by the existence of state statutes relating to the same subject?"[42]

The answer to this question is significantly affected in many states by whether or not the political subdivision has home rule status.

With respect to home rule entities, we can simply summarize the previous discussion in section I.A.1.b. In states which confer powers of immunity on home rule entities, express preemption issues are of constitutional magnitude turning on whether the matter to be regulated is of statewide or merely municipal concern. In other states, the legislature is free to preempt local regulatory schemes but the text of the constitution may provide a decision rule concerning the extent of the conflict necessary to preempt, e.g. "not inconsistent with" or "not prohibited by" state law.[43]

With respect to non-home rule entities, the legislature is sovereign and thus free to preempt a political subdivision's regulatory authority either expressly or by implication.

Express preemption is not problematic where no state constitutional provision confers a power of immunity on political subdivisions.

Implied preemption, by contrast, has developed through case by case adjudications in the several states.[44] Only the broadest outlines of implied preemption doctrine can be sketched here.[45]

Professor Briffault has concisely identified the two "basic strands in contemporary preemption doctrine":

> The first focuses on whether the state and local governments have issued conflicting commands. The second . . . focuses not on conflict per se but on whether, given the fact of state regulation, any local enactment on the same subject — even one substantively consistent with the terms of the state law — would be inconsistent with the fact of state lawmaking in the area.[46]

The most frequently cited formulation of the conflict strand is as follows:

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42. SATO AND ALSTYNE, *supra* note 9.

43. MONT. CONST. art. XI, § 6 (emphasis supplied); ILL. CONST. art. VII, § 6(i) (emphasis supplied); IOWA CONST. art. III, § 40 (emphasis supplied).

44. LOCAL GOVERNMENT LAW, *supra* note 2, at §14.04.

45. *See generally* U.S. ADVISORY COMM'N. ON INTERGOVERNMENTAL RELATIONS FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY (1992).

46. Richard Briffault, *Taking Home Rule Seriously: The Case of Campaign Finance Reform*, 57 PROC. OF THE ACAD. OF POL. SCI. 34, 39 (1989).

> . . . in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits or permits an act which the statute prohibits . . .[47]

The difficulty with this test is that it fails to give any weight to the fact that two valid statutory schemes are in conflict one empowering political subdivisions, the other empowering the state. Further, it is merely a verbal test giving no weight to whether the political subdivision's regulations conflict with the policies or operations of the state regulator.

The second strand, known as preemption by occupation of the field, looks to: 1) whether the subject matter of the regulation reflects a "need for uniformity"; 2) whether the comprehensiveness or pervasiveness of the state regulatory scheme "precludes coexistence" with local regulations; and 3) whether the local regulatory scheme represents an "obstacle to the accomplishment and execution of the full purposes and objectives" of the state scheme.[48]

Another dimension of complexity is added when the asserted conflict occurs between various political subdivisions.[49] For example, both a city and county might seek to impose different regulatory standards on a private-sector provider of IVHS services. The legal standards for resolving these horizontal implied preemption problems are even more fluid and uncertain that those governing vertical implied preemption questions. One authoritative source has identified seven different approaches in the case law for answering the question: to what extent are a political subdivision's regulatory powers limited, in dealing with a particular subject, by the existence of enactments of other political subdivisions relating to the same subject?[50] The lack of judicial consistency in providing predictable answers to this question is well illustrated by two Pennsylvania cases. In a case involving a conflict between a special district created by a cooperative agreement and one of the general purpose units which it served, the Pennsylvania Supreme Court held that the special purpose district was required to comply with the general purpose unit's zoning regulations because "the objectives of zoning regulation are *more comprehensive than*

47. 37 AM. JUR., *Municipal Corporations*, § 165 at 790, cited in Miller v. Fabius Township Board, 114 N.W.2d 205 (Mich. 1962).

48. Overlook Terrace Management Corp. v. West New York Rent Central Bd., 366 A.2d 321 (N.J. 1976). For a thorough and useful treatment of related issues under federal law, *see Project: The Role of Preemption in Administrative Law*, 45 ADMIN. L. REV. 107-224 (1993).

49. LOCAL GOVERNMENT LAW, *supra* note 2, § 5.02; § 5.09; § 5.11.

50. These decisions rules are: 1) the eminent domain rule; 2) the superior policy rule; 3) the superior power rule; 4) the legislative intent rule; 5) the superior entity rule; 6) the most inclusive power rule; 7) a balancing test. D. MANKELKER, D. NETSCH, P. SALSICH, JR., AND J. WEGNER, STATE AND LOCAL GOVERNMENT LAW IN A FEDERAL SYSTEM 168 (3d ed. 1990).

the objectives" of the special purpose district.[51] In a later case involving a conflict between a special purpose unit and a general purpose unit, the same court held that a school district was not bound by the zoning code of the general purpose unit because the zoning authority was general whereas the power to locate a school was specific.[52]

The vagary and variety of state court decisions under either vertical or horizontal implied preemption doctrine means that considerable transaction costs will be incurred in determining the scope of political subdivision regulatory authority over IVHS technologies unless the issue is expressly addressed and resolved by state legislatures.

II. State, Regional, and Local Government Provision of IVHS Technologies

The key concept in this section of the study is the distinction between the "provision" and the "production" of public goods and services.

Provision "refers to decisions that determine what public goods and services will be made available to a community."[53] For example, a county might decide that IVHS technologies should be used to facilitate traffic management at congested intersections.

Production "refers to how those goods and services will be made available."[54] For example, once a county has decided that IVHS technologies should be provided to alleviate traffic congestion problems, the county is faced with the decision as to how that service should be produced.

A political subdivision can arrange for the production of IVHS services in two ways: 1) it can operate its own IVHS service; or 2) it can make arrangements for another governmental unit or private sector entity to deliver the service. The legal question canvassed in this section is the extent of authority afforded political subdivisions to either provide or produce IVHS services.

A. State Constitutional Questions

The capacity of political subdivisions to expand the scope of public services to include IVHS raises two questions: 1) are they empowered to do so; and 2) if so, are they otherwise restrained from doing so by the state constitution? The bulk of reported decisions challenging a political

51. Wilkinsburgh-Penn Joint Water Auth. v. Borough of Churchill, 207 A. 2d 905 (Penn. 1965) (emphasis supplied).

52. Appeal of Radnor Township Sch. Auth., 252 A.2d 597 (Penn. 1969).

53. U.S. Advisory Commission on Intergovernmental Relations, the Organization of Local Public Economies 1 (1987).

54. *Id.*

subdivision's capacity to expand the scope of public services it provides have to do with the latter "public purpose" issue rather with the former "empowerment" issue.

1. Home Rule

As discussed in section I.A.1., home rule provisions can be roughly divided into those which contain a limiting qualifier, e.g., "local" or "municipal," and those which are more broadly phrased, e.g., "exercise any power or perform any function."

California and Ohio are two states in which the state constitution contains the "local" or "municipal" language. Home rule cities in those states are equity partners in a shopping center and have owned a minor league baseball franchise.[55] In addition to this anecdotal information, Professor Ellickson summarized such scanty case law as exists as follows: "[c]ities now rarely lose lawsuits that challenge their power to engage in business activities that deviate from the public utility paradigm."[56]

In Oklahoma and Arizona, municipal corporations are constitutionally empowered to "engage in any business or enterprise" that may be engaged in by the private sector.[57]

2. The Public Purpose Doctrine

The public purpose doctrine sprawls across several areas of public law including the power to borrow, the power to spend, the power to tax, and the power to take by eminent domain.[58] The doctrine commits state courts to reviewing the actions of state and local government units to appraise whether the challenged undertaking primarily benefits the public rather than the private sector.[59] However, the public purpose doctrine "is generally construed so as not to forbid a wide range of trading and entrepreneurial pursuits by localities."[60]

3. Fiscal Limits

Even if a local government is empowered to provide IVHS services, its power to borrow and finance the capital construction costs necessary to do so may be subject to constitutionally mandated debt limits.[61] Debt

55. G. FRUG, LOCAL GOVERNMENT LAW 797 (1988).

56. Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U.PA. L. REV. 1519, 1568-1571 (1982). *See* MCQUILLIN, *supra* note 40, § 10.31.

57. ARIZ. CONST. art. XIII, § 5; OKLA. CONST. art. XVIII, § 6.

58. LOCAL GOVERNMENT LAW, *supra* note 2, at § 21.03; § 23.05; § 25.06; § 26.03.

59. *Id.* at § 25.06.

60. *Id.* at § 18.06. *See generally* MCQUILLIN, *supra* note 40, Ch. 36 (3d rev. ed 1979).

61. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 38-41 (1993).

limits can greatly affect the authority of local government units either to self-finance or to enter into interlocal cooperative agreements. For example, an agreement by Fairfax County and Falls Church, Virginia to fund operating deficits incurred by the Washington Metropolitan Area Transit Authority was held to incur debt within the meaning of the Virginia constitution.[62] That decision compelled a significant restructuring of the language of the agreement.[63]

Similarly, in some states, constitutional limitations on taxing and spending may constrain state and local expenditures.[64] The California expenditure limit provision was amended by voters to exempt transportation — related projects.[65]

B. State Statutory Questions

Five different forms of statutory authorization to engage in IVHS service production and provision activities can be distinguished: 1) the power to supply a IVHS services for a political subdivision's own use; 2) the power to supply IVHS services to the residents of the political subdivision; 3) the power to supply IVHS services extraterritorially; 4) the power to sell IVHS services exclusively by creating a monopoly; and 5) the power to own the means of producing IVHS services.[66]

1. The Interpretation of Enabling Legislation

As was indicated in section I.B.1., a crucial distinction exists between those states which follow Dillon's rule and those which do not. It is difficult to generalize because within a particular state some political subdivisions will benefit from a rule of liberal interpretation, such as home rule units, while others are subject to Dillon's rule. Illustratively, the Illinois constitution provides as follows: "counties and municipalities which are not home rule units shall have only the powers granted to them by law . . ."[67]

Where Dillon's rule obtains, it is possible that a political subdivision might have the authority to provide IVHS services for its own use, but not for the use of non-residents. The reader is referred to the previous section for the possible range of differentiation concerning service provision and production activities.

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62. Board of Supervisors v. Massey, 169 S.E.2d 556 (Va. 1969).

63. Board of Supervisors v. Massey, 173 S.E.2d 869 (Va. 1970).

64. *E.g.*, Cal. Const. art XIII, B; Mo. Const. art X, § 22.

65. Cal. Const. art XIII, B, § 9(d) and (e). *See Generally* Joseph R. Grodin, et al, The California State Constitution 262 (1993).

66. *Id.*

67. Ill. Const. art. VII, § 7.

2. Interlocal Conflict in IVHS Service Production and Provision

This section builds upon the discussion of preemption in section I.B.2. Vertical and horizontal implied preemption problems will predictably occur should local government exercise their authority to engage in IVHS service production and provision.[68] For example, a county might attempt to establish a monopoly over the provision of IVHS services over the objection of municipalities located within the county. Or the county might assert a general regulatory authority over municipal service providers. Absent an overriding statutory scheme which addresses these preemption questions, the same blooming, buzzing confusion of case by case decisions sketched in section I.B.2. can be anticipated.

C. The Authority to Engage in Intergovernmental Collaboration to Provide IVHS Services

Intergovernmental cooperation can assume several forms:

1) A contractual agreement — that is one locality hires another local government to provide the service to its citizens, similar to the local government contracting with a private firm;
2) Two or more local governments jointly perform the service, provide support facilities or operate a public faculty; or
3) A service is run by a jointly created separate organization which aids all jurisdictions party to the agreement.[69]

Forty-two states have enabling legislation or a constitutional provision authorizing cooperative intergovernmental service agreements.[70]

Two categories of enabling legislation are recognized in the literature: 1) a "mutuality of powers" provision limiting collaborative arrangements to the exercise of powers possessed by *each* contracting entity; and 2) a "power of one unit" provision which permits all contracting entities to exercise a power as long as one party to the agreement possesses that power.[71]

68. Local Government Law, *supra* note 2, at §§ 5.10-5.11.

69. Advisory Commission on Intergovernmental Relations, State and Local Roles in the Federal System 327 (1982).

70. *See* Advisory Commission on Intergovernmental Relations *supra* note 61, at 26-27.

71. Advisory Commission on Intergovernmental Relations, Intergovernmental Service Arrangements for Delivering Local Public Services 9 (1985).

1. State Constitutional Provisions Bearing on Intergovernmental Collaboration

The New York Constitution contains a "mutuality of powers" type provision. In that jurisdiction all local governments have the power, as authorized by the legislature, "to provide cooperatively, jointly or by contract any facility, service, activity or undertaking which each local government has the power to provide separately."[72]

That text may be contrasted with Pennsylvania's "power of one unit" type which authorizes all local government units to "contract or otherwise associate among themselves . . . to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or ordinance."[73] The Illinois provision broadens the gambit of potential collaborators to include the state, other states and their political subdivisions, the Federal government, and the private sector.[74] The provision further authorizes participating units to "use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities."[75]

The implications of these constitutional provisions for intergovernmental collaboration concerning the production and provision of IVHS services are as follows. In New York, each government unit must show that it is empowered to enter into every detail of the agreement. For example, a home rule unit with a broad grant of *functional autonomy* could create its own IVHS system. But, if a non-home rule unit wanted to participate in that system, the non-home rule unit would have to show express statutory authority to do so. In Pennsylvania, any unit of government could collaborate with a home rule unit for the provision of IVHS services unless prohibited from so doing by law or ordinance. Thus, any collaborating unit would have as much functional autonomy as the most broadly empowered unit in the deal. However, the Pennsylvania provision does not confer any additional fiscal authority on the collaborating entities. Each collaborating entity in Pennsylvania would continue to be constrained by existing limitations on its power to tax or to borrow. Only the Illinois provision speaks to the practical issue of *fiscal* as well as *functional autonomy*.

In some states, a constitutional provision authorizing interlocal agreements may be necessary. Some states adhere to the delegation doctrine, according to which the state legislature is prohibited from delegat-

72. N.Y. CONST. art. IX, § 1 (c).

73. ILL. CONST. art. VII, § 10 (a).

74. *Id.*

75. *Id.*

ing its sovereign legislative powers to political subdivisions.[76] In Kansas, for example, general purpose units of government may only exercise legislative powers as to "matters of local concern."[77]

2. *State Statutory Provisions Bearing on Intergovernmental Collaboration*

As indicated in the previous section, state enabling legislation can be categorized as following either the "mutuality of powers" or the "power of one unit" models.[78] The "power of one unit" approach has the effect of eroding Dillon's rule. Where the "mutuality of powers" approach prevails, the overriding legal problem is to find a statutory basis for each aspect of the collaborative arrangement.

From the legal point of view, there are four significant risks within interlocal collaboration. The first has to do with lack of judicial familiarity with the significance of the distinction between the "mutuality of powers" and the "powers of one unit" approaches.[79] In a leading case, the Iowa Supreme Court interpreted a model statute incorporating the "powers of one unit" approach as permitting a metropolitan agency created by several local governments to do only what each "cooperating unit" already had the power to do.[80]

The second risk has to do with Dillon's rule of strict construction of grants of power in the context of interlocal collaboration agreements. The Washington Public Power Supply System (W.P.P.S.S.) entered into an interlocal and interstate agreement with municipalities and public utility districts in three states for the construction of nuclear generating plants to supply power to the collaborating local government entities. The Supreme Courts of two of the three states involved in the transaction held a 2.25 billion dollar bond issue invalid because the collaborating local entities did not have the express power to assent to one clause in the revenue bond indenture.[81] The implications of the W.P.P.S.S. case for IVHS project financing are obvious.

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76. Howard L. McBain, *The Delegation of Legislative Powers to Cities*, 32 POL. SCI. Q. 276, 391 (1917); LOCAL GOVERNMENT LAW, *supra* note 2, at § 2.06.

77. Cogswell v. Sherman County, 710 P. 2d 1331 (Kan. 1985).

78. 77 *See generally* LOCAL GOVERNMENT LAW, *supra* note 2, at § 6.04; § 18.11.

79. *See* DANIEL R. MANDELKER, ET AL, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 172-82 (3d ed. 1990).

80. Goreham v. Des Moines Metro. Area Solid Waste Agency, 179 N.W. 2d 449, 455 (Iowa 1970).

81. Chemical Bank v. Washington Pub. Power Supply Sys., 666 P.2d 329 (Wash. 1983); Asson v. City of Burley, 670 P. 2d 839 (Idaho 1989); De Fazio v. Washington Pub. Power Supply Sys., 679 P.2d 1316 (Or. 1984) (broad construction of local home rule authority).

The third risk has to do with the effect of debt limitations on the fiscal capacity of each governmental unit seeking to collaborate. Under the law of a particular state, counties, cities, and regional authorities may have different debt limits imposed by constitution or statue. Further, certain provisions in an intergovernmental cooperative agreement may incur debt within the meaning of controlling constitutional or statutory law, thus creating a significant obstacle to interlocal or interstate agreements (*See* section II.A.3.).

The fourth risk stems from federal rather than the state law. An agreement which involves collaboration across state boundaries may be subject to the requirements of the Compact Clause of the U.S. Constitution. The Compact Clause provides that:

> No state shall, without the consent of Congress . . . enter into any agreement or compact with another state . . .[82]

The Compact Clause is not interpreted literally such that congressional consent is required for every interstate agreement.[83] The Compact Clause only reaches interstate agreements which tend to "increase the political powers of the contractant States or to encroach upon the just supremacy of the United States."[84] Whether or not interstate agreements affecting transportation facilities are exempt from congressional scrutiny under this test, it is common to submit them for congressional approval in order to avoid potential problems as well as to immunize the deal from an attack based on the Commerce Clause.[85]

A state statute authorizing intergovernmental agreements has been held to be a matter of "statewide concern" in California so as to override the effect of a home rule city charter.[86]

III. Models of Intergovernmental Relations and IVHS

Little has been written about federalism in the specific context of highway systems. Most of the articles dealing with intergovernmental relations issues in the leading research treatise on highway law are devoted to compliance with federally mandated standards and procedures so as to qualify for federal funds.[87]

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82. U.S. Const. art. I, § 10 cl. 3.

83. Virginia v. Tennessee, 148 U.S. 503, 518 (1893).

84. J. Killian, ed., The Constitution of the United States 435 (1987); United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

85. F. Zimmerman and M. Wendell, The Law and Use of Interstate Compacts (1961); Intake Water Co. v. Yellowstone River Compact Comm'n, 590 F. Supp. 293 (D. Mont. 1983).

86. City of Oakland v. Williams, 103 P.2d 168 (Cal. 1940).

87. *See generally* L. Thomas and J. Vance, eds., Four Selected Studies in Highway Law ch. 9.

As a result, legal analysis has tended to focus on top-down models which may be less appropriate and effective in the context of IVHS technologies than they have been in the content of highway construction.[88]

A. The Centralization Model — Federal Preemption and Regulation of State, Regional, and Local Government Regulatory and Service Provision Activity

In a recent comprehensive survey of Federal statutes preempting state and local authority, there is no mention of The Federal Aid Road Act of 1916 or its successor legislation.[89] Yet a 1967 summary of intergovernmental relations under those programs speaks of increased "federal controls which sharply circumscribe state authority" and of "federal dominance in the cooperative relationship."[90] This discrepancy can be explained by the fact that a high degree of uniformity in the highway program was achieved not with the stick of preemption, but with the carrot of federal spending. The state response is measured by a panoply of state statutes and even constitutional provisions[91] which have the effect of "providing broad legislative or constitutional authorization for actions taken by state highway departments to meet federal-aid highway program requirements."[92] Congress' broad power to use the spending power to induce states to adhere to federally formulated policies was sustained by the Supreme Court in a case challenging a statute directing the Secretary of Transportation to withhold a percentage of federal highway funds from states which permit persons under 21 to purchase or possess alcoholic beverages in public.[93]

Congress is free under the Commerce Clause to regulate highway policy directly. However, the Tenth Amendment prohibits it from interfering with a state government's regulation of commerce.[94]

88. *But see* Jerry Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. Pa. L. Rev. 1 (1973).

89. *See* Advisory Commission on Intergovernmental Relations, *supra* note 44 at 54-56.

90. *See* Wells, et al., *supra* note 4, at 1996.

91. *Id.* at 1998-2005 (collecting state laws).

92. *Id.* at 2005.

93. South Dakota v. Dole, 483 U.S. 203 (1987).

94. *Compare* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) with New York v. United States, 112 S.Ct. 2408 (1992).

Although comprehensive authority exists under the United States Constitution to achieve a high degree of centralization and uniformity with respect to highway policy, the recent Intermodal Surface Transportation Act of 1991 reflects some concern that centralizing tendencies in highway programs have gone too far.[95]

States have asserted a similar degree of control over the regulatory and service-provision activities of local government in the highway field through a mixture of preemptive statutes and state spending policies.[96] For example, the regulatory preemption of the Uniform Motor Vehicle Code precludes local governments from enforcing any ordinance on a matter covered by the Code "unless expressly authorized."[97] Under the Code, local governments are confined to "reasonable exercise of their police powers" over "streets or highways within their physical boundaries."[98] Fiscal dependence of local government on state spending produces a high level of *de jure* centralization in Maryland and Iowa.[99] In Florida, local initiatives in the provision of highway services must conform to state-wide and regional growth management planning norms.[100] California requires centralized approval over engineering work on all projects on the state highway system even when funded by a local option sales tax.[101]

B. The Federalism Model — State Preemption of Regional and Local Government Regulatory and Service Provision Activity

The federalism model refers to the attempt in some state constitutions to constitutionalize division of power by reserving "powers of local-self-government" or over "municipal affairs" to political subdivisions.

As the discussion of this subject in section I.A.1.b. indicated, resolution of the state constitutional law question turns on whether IVHS technologies are viewed by courts as matters of "statewide" concern.

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95. *See generally* R. Netherton, *Federalism in the Surface Transportation Program* (National Cooperative Highway Research Program paper, forthcoming 1994); Robert Jay Dilger, *ISTEA: A New Direction for Transportation Policy*, 22 Publius 67, 67-78 (1992).

96. R. Allen Hays, *State-Local Relations in Policy Implementation: The Case of Highway Transportation in Iowa*, 18 Publius 79 (1988); Advisory Commission on Intergovernmental Relations, Devolution of Federal Aid Highway Programs: Cases in State-Local Relations and Issues in State Law (1988). (Hereinafter cited as Devolution.)

97. *E.g.*, Pa. Code § 6101.

98. *E.g.*, Pa. Code § 6109(a). The Pennsylvania Code includes an enumeration of twenty categories of motor vehicle regulation which are presumed to be reasonable exercises of a local government's police powers.

99. Hays, *supra* note 96.

100. Robyne S. Turner, *Intergovernmental Growth Management: A Partnership Framework for State-Local Relations*, 20 Publius 79, 91-92 (1990); Devolution, *supra* note 96, at 21-22.

101. Devolution, *supra* note 96, at 16.

Another constitutional barrier, discussed in section I.A.2., occurs in states which grant local government a right to veto any proposed interference with local streets and ways.

Legal restraints on the ability of states to centralize decision-making in the highway field are not as important as those which have emerged as a matter of state policy. Kansas has created a road system which "appears to proceed along two autonomous tracks: the [state] highway system is developed almost exclusively by the state, and the [local] highway system is developed almost exclusively by county and city officials."[102] Whether this dual sovereignty scheme would prove workable in the context of IVHS technologies is an open question since project selection in that state is based on neutral criteria of need and the state highway policy is focused on preservation of the existing system rather than new projects.[103] In Illinois, local governments are afforded the right "to select and program projects without state interference."[104] In California and Florida, political subdivisions may finance new road projects through local taxes on the sale of motor vehicle fuels.[105]

C. The Consultative Model

Transportation specialists are familiar with formal requirements for consultation and cooperation between state and local officials which are part of the federal-aid highway program.[106]

State highway departments have employed a range of formal and informal consultative strategies with local officials concerning state highway programs.[107] These strategies range from notification and consultation to active involvement in the planning process.[108] The body of experience gathered from formal and informal consultative mechanisms can be drawn on in the context of IVHS technologies. However, the administrative model for making investment decisions has been criticized because of a tendency to ignore market-based solutions to transportation policy problems.[109]

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102. Devolution, *supra* note 96 at 32.

103. *Id.*

104. *Id* at 27.

105. *Id.* at 14, 19.

106. 23 U.S.C. § 103(d), § 128, § 134(a) (1988); 42 U.S.C. § 4231(b)-(c), § 4332 (2)(C) (1988).

107. Devolution, *supra* note 96, at 21.

108. John Kincaid, *State-Local Attitudes on Relations in Highway Policy*, 43 Transp. Q. 153, 166 (1989).

109. Mashaw, *supra* note 88, at 70-71.

Consequently, a market-based model for the production and provision of IVHS services may be preferable to ISTEA's beefed-up requirements for local government involvement in the surface transportation decision-making process.

D. The Coordination Without Hierarchy Model — Providing A Legal Framework For Bargaining And Negotiation Among National, State, Regional, And Local Governments

Recent research indicates the prevalence of both formal and informal modes for collaboration between and among public sector service providers.[110] A recent influential study of regional transportation systems calls this the "coordination without hierarchy" approach.[111] From a legal point of view, the formal rules which would facilitate the provision and production of IVHS services through collaborative activity by a variety of public sector entities are already largely in place.[112] However, a model state statutory scheme which directly focused upon IVHS technologies as well as other aspects of system wide and project planning, funding, design, operations, and management for highways could considerably reduce the transaction costs and uncertainties attending a transition from the centralization and federalism models toward one more congruent with the policy objectives sought in the Intermodal and Surface Transportation Efficiency Act of 1991. Although legal issues arising out of private sector involvement are beyond the scope of this paper, private sector involvement in the production of IVHS services reinforces the desirability of providing a clear and perspicuous legal infrastructure specifically adapted to public-private sector collaboration.[113]

IV. Conclusion

According to the most recent census figures, there are more than 22,000 cities and counties in the United States.[114] Each of these general purpose units of government may, under a variety of state constitutional, statutory, and home rule charter provisions, be empowered to exercise

110. *See generally* Advisory Commission on Intergovernmental Relations, Metropolitan Organization: The St. Louis Case (1988); Advisory Commission on Intergovernmental Relations, Metropolitan Organization: The Allegheny County Case (1982).

111. Donald Chisholm, Coordination Without Hierarchy (1989).

112. *See supra* text accompanying notes 69-71.

113. *See generally* Advisory Commission on Intergovernmental Relations, *supra* note 53; Robert M. Stern, Urban Alternatives: Public and Private Markets in the Provision of Local Services (1990).

114. Bureau of the Census, U.S. Dept. of Comm., Government Organization, 1992 Census of Governments, Preliminary Report, at 4 (1993).

regulatory power over IVHS technologies. The transaction costs associated with regulating IVHS technologies would include: 1) "search and information costs" to discover the extent to which local governments are currently empowered to or preempted from exercising regulatory authority; 2) "bargaining and decision costs" in creating a regulatory scheme; and 3) "policing and enforcement costs" associated with implementing the regulatory scheme.[115] Similar transaction costs would be incurred should local governments decide to provide or produce IVHS services. The long-standing intergovernmental muddle over cable television should serve as a warning to all those involved with emerging technologies.

A model state statute clarifying: 1) the appropriate role for local governments as regulators of IVHS services; and 2) the rules of the game for local governments which choose to provide or produce IVHS services could significantly reduce the substantial transaction costs which predictably occur under existing laws. In addition to the objective of minimizing search and information, bargaining and decision, and policing and enforcement costs, that model statute should address the question of whether there is any reason to make government anything other than neutral toward the form which IVHS technologies should assume. That is, consideration should be given to a statutory regime which would create a level playing field on which different emerging IVHS technologies and their providers can compete.[116]

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115. Carl J. Dahlman, *The Problem of Externality,* 22 J.L. & ECON. 148 (1979); R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 6 (1988).

116. This paper was prepared under FHWA Contract DTFH61-93-C-00087. The views expressed in this paper do not necessarily reflect the views of the U.S. Department of Transportation.