



National Cooperative Highway Research Program
Selected Studies in Transportation Law

Volume 8
**Transportation Law and
Government Relations**

TRANSPORTATION RESEARCH BOARD
OF THE NATIONAL ACADEMIES

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**Selected Studies
in
Transportation Law**

Volume 8

**TRANSPORTATION LAW
and
GOVERNMENT RELATIONS**

Larry W. Thomas, Esquire
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Transportation Research Board

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and
GOVERNMENT RELATIONS**

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National Cooperative Highway Research Program

Transportation Research Board
The National Academies
Washington, DC

2007

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ISBN 0-309-06755-3

Library of Congress Central No. 2002105952

National Cooperative Highway Research Program

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SECTION 1

CIVIL RIGHTS AND TRANSPORTATION AGENCIES

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A. INTRODUCTION

The first subsection of this report addresses recent cases decided by the Supreme Court and lower courts on the questions of the constitutionality and requirements of affirmative action programs for disadvantaged business enterprises in public contracting. More recent case law and regulations have superseded much of a prior report on the same subject.¹

The second subsection addresses whether there are actionable rights arising under disparate impact regulations prohibiting discrimination, for example, in the “siting” of highway projects. The section in effect updates an earlier article regarding civil rights issues arising out of the location of transportation projects.²

The third and fourth subsections address whether transportation departments may be sued for alleged civil rights violations under 42 U.S.C. § 1983 or under federal civil rights laws prohibiting discrimination based on age, disability, race, or gender. The two sections update an earlier article on the impact of § 1983 on highway departments, personnel, and officials.³

The fifth subsection deals with First Amendment issues affecting transportation departments such as the claims of certain groups to participate in Adopt-a-Highway programs or to have their logos on state license plates.

B. AFFIRMATIVE ACTION, PUBLIC CONTRACTING, AND TRANSPORTATION DEPARTMENTS

1. Cases and Developments Pre- and Post-*Adarand v. Pena* (*Adarand III*) (1995)

This section discusses the constitutional, statutory, and regulatory framework of affirmative action with respect to public contracting and transportation departments. Subsection A.1 provides a brief overview of significant cases prior to the Supreme Court’s decision in *Adarand v. Pena* (*Adarand III*).⁴ The constitutional and statutory elements are discussed in subsection A.2 in light of *Adarand III*. Subsection A.3 discusses the regulations promulgated by the United States Department of Transportation (U.S. DOT) in 1999.

¹ ORRIN FINCH, MINORITY AND DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS IN PUBLIC CONTRACTING (National Cooperative Highway Research Program (NCHRP), Research Results Digest No. 146, 1985, and supplement, Legal Research Digest No. 25, 1992), hereinafter the “Finch Report.”

² ANDREW BAIDA, CIVIL RIGHTS IN TRANSPORTATION PROJECTS (NCHRP, Legal Research Digest No. 48, 2003).

³ DWIGHT H. MERRIAM & LUTHER PROPST, IMPACT OF 42 U.S.C. § 1983 (CIVIL RIGHTS ACT) ON HIGHWAY DEPARTMENTS, PERSONNEL & OFFICIALS (NCHRP, Legal Research Digest No. 11, 1990).

⁴ *Adarand Constructors, Inc. v. Pena* (*Adarand III*), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

a. Cases and Developments Pre-*Adarand III*

This subsection of the report addresses recent case law and federal regulations concerning the constitutionality of the use of race-based classifications for minority business enterprises, as well as business enterprises owned by women.⁵ Although earlier regulations and cases referred to the affected groups by several acronyms, in this report they are referred to as Disadvantaged Business Enterprises (DBEs). DBE is the acronym for the federal program; however, many state and local governments continue to use the Minority Business Enterprises (MBE), Women’s Business Enterprises (WBE), and Female Business Enterprises (FBE) acronyms to describe their programs.

As discussed in the earlier report by Orrin Finch on this subject, federal law mandating contract provisions for nondiscrimination have a common origin in President Roosevelt’s 1941 Executive Order 11246. An Executive Order, issued September 24, 1965, by President Johnson expanded the 1941 edict to apply to all federally assisted construction contracts. In 1971, in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*⁶ the United States Court of Appeals for the Third Circuit held that the President had the authority to impose fair employment conditions incidental to the power to contract. The court held that the “Philadelphia Plan” was validly “designed to remedy the perceived evil that minority tradesmen [had] not been included in the labor pool available for the performance of construction projects in which the federal government [had] a cost and performance interest.”⁷ The decision set the pattern in many ways for the development of various plans and programs under executive authority to correct for racial imbalances in employment and in business enterprises.

Section 8(a) of the Small Business Act of 1953⁸ (SBA), as amended in 1978, authorized the Small Business Administration to contract directly with small businesses and developed a set-aside program for socially or economically disadvantaged small businesses. In 1980, the United States Supreme Court in *Fullilove v. Klutznick*⁹ (overruled in 1995 by *Adarand III*¹⁰ where inconsistent with *Adarand III*) suggested that such programs would pass constitutional muster. The Court upheld a federally mandated 10 percent set-aside program for minority-owned businesses under the Public Works Employment Act of 1977. Six justices voted to

⁵ The Finch Report, *supra* note 1, discusses at some length the historical origins of affirmative action in regard to public contracting.

⁶ 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854, 92 S. Ct. 98, 30 L. Ed. 2d 95 (1971).

⁷ *Id.* at 177.

⁸ 15 U.S.C. § 637(a) (Supp. III 1979).

⁹ 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

¹⁰ *Adarand III*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

affirm the MBE provision of the Public Works Employment Act of 1977, Section 103(f)(2).¹¹

There was disagreement among the justices regarding the standard of review to be applied. Chief Justice Burger, joined by Justices White and Powell, stated that,

any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.... This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*, 438 U.S. 265 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either “test” articulated in the several *Bakke* opinions.¹²

However, Justice Powell also authored an opinion, one considered to be the controlling opinion, in which he argued that there needed to be a greater emphasis than that placed by the Chief Justice on the standard of review to be applied and that, “[U]nder this Court’s established doctrine, a racial classification is suspect and subject to strict judicial scrutiny.”¹³

In 1989, in *Richmond v. J.A. Croson Co.*¹⁴ the Supreme Court struck down a municipal plan requiring prime contractors to whom the city awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises.¹⁵ In *Croson*, a clear majority of the Court agreed that the plan had two defects, one being the failure to make specific findings on the market to be addressed by the remedy and the other being the failure to limit the scope of the remedy because of having only generalized findings of discrimination.¹⁶ The Richmond Plan also did not consider “race-neutral means” to increase minority business participation in city contract-

ing, and the 30 percent quota was not narrowly tailored.¹⁷

The *Croson* Court dealt with the proper standard of review to be applied to state and local minority set-aside provisions under the Equal Protection Clause of the Fourteenth Amendment.¹⁸ In *Croson*, the city had adopted a 5-year plan in 1983¹⁹ requiring that non-MBE contractors awarded a contract by the city were to subcontract at least 30 percent of the dollar amount of the contract to one or more MBEs. An MBE was defined as a business enterprise that was owned and controlled at least 51 percent by a minority. Minorities were defined as all “[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.”²⁰ The city stated that the plan was remedial in nature and was for the purpose of increasing participation by MBEs in public contracts.²¹ The plan, which permitted a waiver of the 30 percent set-aside requirement in exceptional circumstances, set forth procedures for contracts let by the city under the terms of the plan.²² Statistics presented at a public hearing prior to the plan’s adoption indicated that, although 50 percent of the city was African American, only 0.67 percent of the city’s prime contracts had been awarded to MBEs between 1978 and 1983.²³ Prime contractors attending the hearing had virtually no MBEs within their “membership.”²⁴ However, there was no direct evidence of racial discrimination in public contracting by the city or its prime contractors.²⁵

¹⁷ *Id.*

¹⁸ *Croson*, 488 U.S. at 477. After the Supreme Court’s 1980 ruling in *Fullilove*, holding that a federal race-based Affirmative Action Plan (AAP) did not violate the Constitution, some lower courts began to apply a similar standard of review to state and local AAPs. *Croson*, 488 U.S. at 477. In 1986, two terms before the Court’s opinion in *Croson*, the Court addressed the constitutionality of a local race-based AAP in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986). Similarly, some lower courts had applied the constitutional standard of review articulated in *Wygant* in deciding the constitutionality of state and local programs that had similar quota requirements. Thereafter, in *Croson* the Court addressed the applicability of *Wygant* to the minority set-aside program implemented by the City of Richmond. *Croson*, 488 U.S. at 477.

¹⁹ The Court noted that the case was not moot even though the ordinance had expired because if the refusal to award the contract to the appellee violated the Constitution, then the appellee would be entitled to damages. *Id.* at 478, n.1 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8–9, 98 S. Ct. 1554, 1559–60, 56 L. Ed. 2d 30, 38–39 (1978).

²⁰ *Id.* at 477–78.

²¹ *Id.* at 478.

²² *Id.* at 479.

²³ *Id.* at 479–80.

²⁴ *Id.* at 480.

²⁵ *Id.*

¹¹ In *Fullilove* the MBE provision required that

[e]xcept to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term ‘minority business enterprise’ means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Fullilove, 448 U.S. at 454.

¹² *Id.* at 491.

¹³ *Id.* at 507.

¹⁴ 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

¹⁵ *Id.* See also discussion of *Croson* in *Adarand Constructors v. Slater (Adarand VI)*; 228 F.3d 1147, 1163 (10th Cir. 2000).

¹⁶ *Id.*

To meet the 30 percent set-aside requirement when bidding on the project, Croson determined that a minority contractor would have to supply the product for the contract that amounted to 75 percent of the total contract price. After contacting several MBEs, one MBE expressed interest but failed to submit a bid. Croson then petitioned the city for a waiver of the 30 percent set-aside requirement. On learning of Croson's petition, the one MBE that had expressed an interest submitted a bid that was 7 percent more than the price of the product in Croson's bid. Croson requested either a waiver of the 30 percent set-aside requirement or an increase in the contract price to accommodate the MBE's price. The city ultimately denied the request for a waiver or for an increase in the contract price.²⁶

Both the District Court and the Fourth Circuit applied the *Fullilove*²⁷ and *Bakke*²⁸ standard of review. Both courts deferred to the city's decision, which was based on the Supreme Court's decision in *Fullilove* giving deference to Congress's findings of past discrimination.²⁹ The Court reversed and remanded the case in light of the Court's decision in *Wygant v. Jackson Board of Education*.³⁰

The Fourth Circuit's decision on remand was that the affirmative action plan was unconstitutional.³¹ The appellate court held that the plan violated both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment mainly because of a lack of particularized evidence of prior discrimination by the city.³² In affirming the Fourth Circuit's decision on remand, the Supreme Court ruled that the evidence offered in support of the city's plan amounted only to a "generalized assertion" of past discrimination.³³

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.³⁴

Although the city had relied on *Fullilove* and the federal plan that was ruled to be constitutional in that

case, the Court observed that in *Fullilove* the Congress had exercised its power under Section 5 of the Fourteenth Amendment in finding discrimination at the national level. The Court emphasized that a state or locality may implement remedial measures too but only if the state or locality presents particular evidence of discrimination.³⁵ The Court held that the city could not support a compelling interest for its race-based plan because of the deficiency in the city's evidence.³⁶ An analysis of whether the city's plan was narrowly tailored was nearly impossible as the plan had not been linked to discrimination.³⁷ Moreover, the Court observed that the city had not considered race-neutral means to effectuate the ends sought and ruled that the 30 percent quota lacked sound reasoning.³⁸

The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.... None of [the district court's] "findings," singly or together, provide the city of Richmond with a "strong basis in evidence for its conclusion that remedial action was necessary."³⁹

[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.⁴⁰

Thus, the Court rejected the claim that the program was narrowly tailored to remedy the effects of prior discrimination.⁴¹

After *Croson* the question of whether a federal affirmative action plan was subject to the same standard of strict scrutiny was not answered until the Supreme Court's decision in *Adarand III*.⁴² However, prior to *Adarand III*, in 1990 in *Metro Broadcasting, Inc. v. Federal Communications Commission*,⁴³ which was overruled by *Adarand III* as discussed below, the Supreme Court held that:

Benign race[-]conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.... Our decision last Term in *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), concerning a minority set-aside program adopted by a municipality, does not prescribe the level of scrutiny to be applied to a be-

²⁶ *Id.* at 481–83.

²⁷ 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

²⁸ 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

²⁹ *Croson*, 488 U.S. at 484.

³⁰ 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986); *cert. granted, judgment vacated, and case remanded* in *J. A. Croson Co. v. Richmond*, 478 U.S. 1016, 106 S. Ct. 3326, 92 L. Ed. 2d 733 (1986).

³¹ *Croson*, 488 U.S. at 485.

³² *Id.*

³³ *Id.* at 498 (citing *Wygant*, 476 U.S. 267, 275 (1986)).

³⁴ *Id.* at 499.

³⁵ *Id.* at 504.

³⁶ *Id.* at 505–06 (additionally noting that absolutely no evidence was presented of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons). *Id.* at 506.

³⁷ *Id.* at 507.

³⁸ *Id.* at 500, 507.

³⁹ *Id.* at 499, 500 (citation omitted).

⁴⁰ *Id.* at 507.

⁴¹ *Id.* at 507–08.

⁴² *Adarand III*, 515 U.S. at 222.

⁴³ 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990).

nign racial classification employed by Congress [citations omitted].⁴⁴

Although in *Metro Broadcasting* the Court found that the Federal Communications Commission's program based on awarding licenses and benefits to minority owners did not serve as a remedy for past discrimination, it did find that the race-based program served an important governmental interest in promoting broadcast diversity. Applying the constitutional test of intermediate scrutiny, the Court held that this was an important governmental objective and that the policies were substantially related to an important governmental interest, thus passing a constitutional challenge.⁴⁵

In sum, as one appellate court would declare later, "[t]he Supreme Court's declarations in the affirmative action area are characterized by plurality and split decisions and by the overruling of precedent. This fractured prism complicates the task of lower courts in both identifying and applying an appropriate form of equal protection review."⁴⁶

b. Adarand III and Strict Scrutiny

The Supreme Court's decision in *Adarand III* and its progeny illustrate how the legal landscape has changed since the last report on this subject, beginning with the standard of review that must now be applied to affirmative action programs. In brief, however, the Supreme Court has created three standards of review (rational basis, intermediate scrutiny, and strict scrutiny) for use in equal protection analysis concerning whether a particular law permissibly or impermissibly infringes upon a person's constitutional rights. The standard of review to apply depends on whether a party belongs to a discrete and insular group. The Court in *Adarand III* reversed the use of the test of intermediate scrutiny and held that in matters involving race-based classifications, the standard of review is one of strict scrutiny. Under the strict scrutiny test a race-based affirmative action program must use narrowly tailored means that are substantially related to a compelling governmental interest. In the area of gender classification relevant to WBEs, the case law currently continues to apply an intermediate standard of scrutiny.

At issue in the *Adarand* cases were Sections 8(a) and 8(d) and 502 of the SBA as amended.⁴⁷ The regulations promulgated pursuant to the above statutes are "com-

plex, cumbersome, and changing..."⁴⁸ Indeed, the regulations were changed in the course of the *Adarand* cases. There are seven *Adarand* decisions; the issues and dispositions in the seven cases are summarized in Table 1 following the discussion of *Adarand*.

What gave rise to the *Adarand* cases was that in 1989 the Central Federal Lands Highway Division (CFLHD), a part of the U.S. DOT, awarded a prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company (CMGC). After being awarded the contract, CMGC solicited bids from subcontractors for a guardrail-portion of the contract and awarded the bid to the Gonzales Construction Company (Gonzales). Gonzales was certified as a small business that was controlled by socially and economically disadvantaged individuals.⁴⁹ CMGC awarded the subcontract to Gonzales over the low bidder, *Adarand*, which challenged the outcome in the courts.⁵⁰

The terms of the prime contract provided that CMGC would receive additional compensation if it hired a subcontractor certified as a disadvantaged small business. Federal law at the time required a Subcontractor Compensation Clause (SCC) in most federal agency contracts similar to the one used in the *Adarand* case. The law required the clause to state that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act."⁵¹

In *Adarand III* the Supreme Court readdressed the issue of the constitutionality of a federal affirmative action plan for only the third time.⁵² Overruling *Metro Broadcasting*,⁵³ the Court vacated and remanded in *Adarand III*, holding that for all racial classifications, the courts must apply strict scrutiny. The Court also overruled *Fullilove* to the extent that the *Fullilove* decision suggests that a standard of review less than strict scrutiny may be applied to programs based on racial classifications. The Supreme Court left the question to the lower courts of whether there was a compelling governmental interest for the program and whether the

⁴⁴ *Id.* at 564–65.

⁴⁵ *Id.* at 566–69.

⁴⁶ *Adarand VII*, 228 F.3d at 1161.

⁴⁷ 15 U.S.C. §§ 637(a)(d), 644(g); § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132, 145 (1987); § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914, 1919–21 (1991); and § 1101(b) of the Transportation Equity Act for the 21st Century of 1998 (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, 113–15 (1998).

⁴⁸ *Adarand VII*, 228 F.3d at 1160.

⁴⁹ Certification may occur under the Small Business Act's § 8(a) or (d) program or by a state under the DOT regulations.

⁵⁰ *Adarand III*, 515 U.S. at 205.

⁵¹ *Id.*; see also 15 U.S.C. § 687(d)(2), (3).

⁵² *Adarand III*, 515 U.S. at 256; see *Metro Broadcasting, Inc. v. Fed. Communications Comm'n*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990) (upholding federally mandated program awarding new radio and television licenses to minority controlled firms) and *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) (upholding constitutionality of federal affirmative action plan requiring at least 10 percent of federal funds for local public works be used to procure services or supplies from minority business enterprises).

⁵³ *Metro Broadcasting*, 497 U.S. 547.

means employed were narrowly tailored to achieve that interest.⁵⁴

Following the Supreme Court's remand in *Adarand III*, the district court in *Adarand IV*⁵⁵ stated that, contrary to the Court's pronouncement that the application of strict scrutiny is not "fatal in fact" to an affirmative action program, the district court could not envisage a race-based classification that was narrowly tailored.⁵⁶ Thus, the district court granted the plaintiff highway construction company's motion for summary judgment, which had sought declaratory and permanent injunctive relief because the SCC was not sufficiently narrowly tailored to pass strict scrutiny. Although recognizing that its further finding on whether there was a compelling governmental interest was *obiter dicta*,⁵⁷ the district court did find that the

Requisite particularized findings of discrimination to support a compelling governmental interest for Congress' action in implementing the SCCs under a strict scrutiny standard of review would include findings of discriminatory barriers facing DBEs in federal construction contracting nationwide, rather than in a single state, whether such barriers were as a result of intentional acts of the federal government or "passive complicity in the acts of discrimination by the private sector...." Such a standard, while acknowledging the Court's requirement that there be findings of discrimination in the specific industry where alleged discrimination is sought to be remedied, ...takes into account Congress' responsibility to address nation-wide problems with nation-wide legislation.⁵⁸

The Tenth Circuit in *Adarand V*, because Colorado had modified its DBE regulations (see table on page 1-9), vacated the District Court's judgment and remanded it with instructions to dismiss.⁵⁹ In *Adarand VI*, the Supreme Court held that the case against the federal government was still viable and reversed and remanded.⁶⁰

In *Adarand VII* the Tenth Circuit reversed the judgment of the District Court and held that the SCC program and the DBE certification program as *currently* structured did pass constitutional muster, but as the programs were structured in 1997 they did not.⁶¹ Although the SCC program was no longer in use in federal highway construction procurement contracts, the Tenth Circuit decided not to ignore intervening changes in the statutory and regulatory framework since the *Adarand IV* decision.⁶²

The Tenth Circuit in *Adarand VII* noted that the only significant change in regard to the transportation appropriations statutes was the addition of both Section 1003(b) of the Intermodal Surface Transportation Efficiency Act (ISTEA), 105 Stat. 1920-22, and Section 1101(b)(6) of the Transportation Equity Act for the 21st Century (TEA-21), 112 Stat. 114-15, requiring the Comptroller General to conduct a study and report to Congress regarding several aspects of the DBE program.⁶³ Moreover, the court noted that the regulations implementing affirmative action programs of the Surface Transportation and Uniform Relocation Assistance Act (STURAA), ISTEA, and TEA-21 had undergone the most substantial change of any of the regulations, particularly to meet the narrow tailoring requirement established by *Adarand III*.⁶⁴

Six main changes occurred between the old and new regulations in regard to implementation, which may be briefly described as follows: (1) presumption of economic disadvantage is automatically rebutted for an individual with a net worth above \$750,000, without a requirement of further proceedings;⁶⁵ (2) quotas are explicitly prohibited in allocating subcontracts to DBEs and set-asides are limited to extreme circumstances;⁶⁶ (3) DBE participation goals cannot be made in a specific area until extensive requirements have been met;⁶⁷ (4) race-neutral means must be employed wherever possible in order to meet the highest feasible portion of the overall DBE participation goals;⁶⁸ (5) individuals not presumed socially disadvantaged may prove their status by a preponderance of the evidence, and recipients must make certain that DBEs are not saturated in one particular type of work so as to preclude non-DBE firms from participating;⁶⁹ and (6) recipients may seek waivers and exemptions to ensure that the programs are not applied more broadly than permissible.⁷⁰

In *Adarand VII* the Tenth Circuit held that the government had demonstrated a "strong basis in evidence" supporting "its articulated, constitutionally valid, compelling interest"⁷¹ that *Adarand* had not rebutted.

⁶³ *Id.* at 1192.

⁶⁴ *Id.* at 1193, citing *Participation by Disadvantaged Business Enterprises in Department of Transportation Programs*, 64 Fed. Reg. 5096 (1999). "The current regulations, which apply to any federal highway funds authorized under ISTEA or TEA-21, see 49 C.F.R. § 26.3(a) (2000), are at 49 C.F.R. pt. 26;" see also 64 Fed. Reg. at 5101-03 (discussing the narrowly tailored requirement in relation to the new regulations).

⁶⁵ *Adarand VII*, 228 F.3d at 1193, citing 49 C.F.R. § 26.67(b)(1) (2000). See 13 C.F.R. § 124.104 (2000) (conforming Small Business Act recertification of economic disadvantage with 49 C.F.R. § 26.67(b)(1) (2000)).

⁶⁶ *Id.*, citing 49 C.F.R. § 26.43(a)-(b).

⁶⁷ *Id.*, citing 49 C.F.R. § 26.45.

⁶⁸ *Id.*, citing 49 C.F.R. § 26.51(a)-(b), (f).

⁶⁹ *Id.*, citing 49 C.F.R. §§ 26.61(d), 26.67(d), 26.33(a).

⁷⁰ *Id.*, citing 49 C.F.R. § 26.15.

⁷¹ *Id.* at 1174-75.

⁵⁴ *Adarand III*, 515 U.S. 237-38.

⁵⁵ *Adarand Constructors v. Pena (Adarand IV)*, 965 F. Supp. 1556 (D. Colo. 1997).

⁵⁶ *Id.* at 1580.

⁵⁷ *Id.* at 1570.

⁵⁸ *Id.* at 1573.

⁵⁹ *Adarand Constructors v. Slater (Adarand V)*, 169 F.3d 1292 (10th Cir. 1999).

⁶⁰ *Adarand Constructors v. Slater (Adarand VI)*, 528 U.S. 216, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000).

⁶¹ *Adarand VII*, 228 F.3d 1147.

⁶² *Id.* at 1159, 1188.

Moreover, the court agreed that “Congress ha[d] a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies.”⁷² The court held that the evidence of the existence of discriminatory barriers was supported by “ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears.”⁷³ Adarand failed to meet its burden of demonstrating that the affirmative action program was unconstitutional.⁷⁴ The court held that the revised law was sufficiently narrowly tailored and, thus, constitutional. Although the 1996 SCC was insufficiently narrowly tailored, the SCC was no longer used in direct federal procurements; its defects had been “remedied” by TEA-21 and the revised regulations that relate to the Federal-aid program.⁷⁵

Thereafter, the Supreme Court granted *certiorari* to decide whether the court misapplied the strict scrutiny standard. However, the Court dismissed the writ as improvidently granted on the basis that the contractor had shifted its challenge from the regulations to the statutes and regulations that pertained to direct procurement for highway construction on federal lands. Moreover, the Court dismissed the writ because the appeals court had not considered whether the various race-based programs applicable to direct federal contracting could satisfy strict scrutiny, and because the petition for *certiorari* nowhere disputed the circuit court's explicit holding that the contractor lacked standing to challenge the very provisions it asked the court to review.⁷⁶

⁷² *Id.* at 1176.

⁷³ *Id.* at 1174.

⁷⁴ *Id.* at 1176.

⁷⁵ *Id.* at 1179, 1186–87; see also 49 C.F.R. § 26.51, *et seq.*

⁷⁶ *Adarand VI*, 534 U.S. 103.

TABLE 1

Adarand v. Pena in the District Court in Colorado, the 10th Circuit, and the U.S. Supreme Court:
Summary of Issues, Holdings, and Dispositions

Citation	Issue(s) Presented	Holding(s)	Disposition
<p>Adarand I</p> <p><i>Adarand Constructors, Inc. v. Skinner</i>, 790 F. Supp. 240 (D. Colo. 1992).</p>	<p>(1) Whether the federal Disadvantaged Business Enterprise (DBE) program promulgated under federal highway funding provisions of the Surface Transportation Assistance Act of 1982 (STAA) and Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), administered by the Central Federal Lands Highway Division (CFLHD), violated the U.S. Constitution or the privileges and immunities guaranteed by 42 U.S.C. §§ 1983 and (2000(d)).</p> <p>(2) Whether the DBE, STAA, and STURAA, served legitimate governmental interests and, if so, whether they are narrowly tailored to achieve those interests.</p>	<p>(1) Distinguishing the Supreme Court's decisions in <i>Croson</i> from <i>Fullilove</i> and <i>Metro Broadcasting</i>, the district court did not require specific findings of past discrimination to justify the race-conscious measures promulgated by Congress, as required for states and local government entities under <i>Croson</i>. Instead, the court noted that Justice O'Connor stated in <i>Croson</i> that Congress may identify and redress the effects of society-wide discrimination without specific findings of discrimination. As a result, the district court concluded that the appropriate standard of review was intermediate scrutiny, not strict scrutiny.</p> <p>(2) The district court found the program served appropriate governmental objectives and that the program was narrowly tailored to achieve those interests because it operated in a flexible manner, and it had minimum impact on non-DBEs.</p>	<p>Acknowledging that Congress had authorized the DBE, STAA, and STURAA programs, the district court held that each program required a review only under intermediate scrutiny analysis and that each program passed that level of constitutional review.</p> <p>As a result, the district court granted the defendants' motion for summary judgment and dismissed the plaintiff's claims and actions with prejudice.</p> <p>Adarand appealed the district court's decision to the Tenth Circuit Court of Appeals.</p>
<p>Adarand II</p> <p><i>Adarand Constructors, Inc. v. Pena</i>, 16 F.3d 1537 (10th Cir. Colo. 1994).</p>	<p>(1) Whether the appropriate standard of review was that found in <i>Fullilove</i> rather than in <i>Croson</i>.</p> <p>(2) Whether CFLHD must make specific findings of past discrimination, as required in <i>Croson</i>, to justify its reliance on the DBE</p>	<p>(1) The Tenth Circuit agreed that the Supreme Court's decision in <i>Fullilove</i> provided the proper standard of review for the instant case because CFLHD simply applied a federal command pursuant to the SBA.</p> <p>(2) The Tenth Circuit did not find any support of any kind that would require a</p>	<p>The court of appeals affirmed the district court's judgment, but on different grounds.</p> <p>Adarand filed a writ of <i>certiorari</i> and the Supreme Court granted <i>certiorari</i>.</p>

	<p>program, which furnished the necessary criteria for the federal agency's implementation of a race-conscious subcontracting clause (the SCC program).</p> <p>(3) Whether § 502 of the Small Business Act (SBA)*, 15 U.S.C. § 644(g), which provides the statutory authorization for the challenged SCC program, is constitutional, considering that the Act delegated the authority to federal agencies to develop minority-participation goals and the means for achieving those goals.</p> <p>(4) Whether SBA § 502 served legitimate governmental interests and, if so, whether they are narrowly tailored to achieve those interests.</p> <p>* Adarand erroneously asserted and the district court mistakenly determined that the challenged program was authorized by the STAA and its successor, STURAA.</p>	<p>separate independent finding by a federal agency to justify the use of a race-conscious program implemented pursuant to federal requirements.</p> <p>Accordingly, the Tenth Circuit held that CFLHD was not required to make specific findings of past discrimination.</p> <p>(3) The Tenth Circuit held that CFLHD did not need to make specific findings of past discrimination in order to pass constitutional review because Congress permissibly had delegated the precise goals to CFLHD after Congress made its nationwide finding.</p> <p>(4) The Tenth Circuit found the program served appropriate governmental objectives and that the program was narrowly tailored to achieve those interests because it operated in a flexible manner and had minimum impact on non-DBEs.</p>	
<p>Adarand III</p> <p><i>Adarand Constructors, Inc. v. Peña</i>, 515 U.S. 200 (1995).</p>	<p>(1) Whether the appropriate standard of review to be applied for the race-conscious SBA program was intermediate scrutiny.</p>	<p>(1) The Supreme Court held that all racial classifications imposed by the federal or state governments are to be analyzed under strict scrutiny, overruling the Court's decision in <i>Metro Broadcasting</i>. Therefore, only narrowly tailored measures that further compelling governmental interests are constitutional.</p>	<p>The Supreme Court vacated the lower court's judgment and remanded the case for further consideration based on the principles enunciated in the majority opinion.</p>
<p>Adarand IV</p>	<p>(1) Whether the race-conscious SCC program</p>	<p>(1)(a) In considering whether the SCC program</p>	<p>The district court granted Adarand's mo-</p>

<p><i>Adarand Constructors, Inc. v. Pena</i>, 965 F. Supp. 1556 (D. Colo. 1997).</p>	<p>violated the Constitution, as well as the Civil Rights Act of 1964, 42 U.S.C. § 2000d, under the standard of strict scrutiny.</p>	<p>survived the first prong of strict scrutiny, the district court noted that although the congruency principle discussed in <i>Adarand III</i> placed the same standard of review on federal and states' use of racial classifications, the breadth of Congress's power under § 5 of the Fourteenth Amendment may require less exacting justifications for such use.</p> <p>* Here, the district court held that Congress's nationwide finding of discriminatory barriers facing DBEs in federal contracts was sufficient and that regional and state specific findings were unnecessary. The district court held that the governmental objectives were compelling.</p> <p>(1)(b) However, the district court did not find the program to be narrowly tailored. Thus, the court concluded that the SCC program violated the Constitution and the Civil Rights Act of 1964. The district court relied on the five factors discussed in <i>Paradise</i> and concluded that the statutes and regulations implicated in the SCC program did not provide reasonable assurances that the application of racial criteria would be limited to accomplishing the remedial objectives of Congress.</p> <p>*The Supreme Court in <i>Adarand III</i> did not address the question of how much congressional deference is due to a congressionally mandated race-conscious program.</p>	<p>tion for summary judgment and enjoined the defendants from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program.</p> <p>Adarand appealed.</p>
<p>Adarand V <i>Adarand</i></p>	<p>(1) Whether the SCC program was sufficiently narrowly tailored to</p>	<p>(1) After <i>Adarand IV</i>, Colorado modified its DBE regulations and eliminated</p>	<p>The Tenth Circuit vacated the district court's judgment and remanded</p>

<p><i>Constructors, Inc. v. Slater</i>, 169 F.3d 1292 (10th Cir. Colo. 1999).</p>	<p>serve a compelling governmental interest as to survive strict scrutiny.</p>	<p>the presumption of social and economic disadvantage for racial and ethnic minorities, and conditioned the social disadvantage-status solely on the applicant’s certification that the applicant is socially disadvantaged. More notably, Adarand became certified as a socially disadvantaged DBE.</p> <p>Because of the change in circumstances that invoked a procedural issue, the court held the matter to be moot.</p>	<p>it with instruction to dismiss.</p> <p>Adarand petitioned for a writ of certiorari.</p>
<p>Adarand VI</p> <p><i>Adarand Constructors, Inc. v. Slater</i>, 528 U.S. 216 (2000).</p>	<p>(1) Whether Colorado’s modification of its DBE regulations and Adarand’s subsequent certification under those provisions mooted the case.</p>	<p>(1) The court held the Colorado Department of Highways/Transportation (CDOT) did not result in acceptance of the certification by the federal government under its separate regulations. Therefore, Adarand’s claim against the federal government was still viable.</p>	<p>The Supreme Court reversed and remanded.</p>
<p>Adarand VII</p> <p><i>Adarand Constructors, Inc. v. Slater</i>, 228 F.3d 1147 (10th Cir. Colo. 2000).</p>	<p>(1) Whether the SCC program served a compelling governmental interest.</p> <p>(2) Whether the SCC program was sufficiently narrowly tailored to serve a compelling governmental interest so as to survive strict scrutiny.</p>	<p>(1) The Tenth Circuit affirmed the district court’s finding of a compelling governmental interest.</p> <p>(2) The Tenth Circuit again looked at the factors pronounced by the Court in <i>Paradise</i> and at additional, narrow-tailoring factors. Significant changes had taken place with regard to the SCC program and DBE program since the 1997 trial court decision. After determining which provisions of the statutes were at issue and their scope, the court held that the current programs were narrowly tailored to serve a compelling governmental interest.</p>	<p>The Tenth Circuit reversed the judgment of the district court. Adarand petitioned for a writ of certiorari that the Court initially granted. <i>See Adarand Constructors, Inc. v. Mineta</i>, 532 U.S. 941 (2001). However, the Court subsequently dismissed the writ as improvidently granted because it would require review of issues decided by the Tenth Circuit but not included in the <i>writ of certiorari</i>. <i>See Adarand Constructors, Inc. v. Mineta</i>, 534 U.S. 103 (2001).</p>

As the Supreme Court in *Fullilove* had stated, “Congress may employ racial or ethnic classifica-

tions in exercising its Spending or other legislative powers only if those classifications do not violate

the equal protection component” as now construed by the Court to be a part also of the Due Process Clause of the Fifth Amendment.⁷⁷ However, “the burden rests with the Government to demonstrate that Congress had a strong basis in evidence to create this remedial program.”⁷⁸ Since the Court’s decision in *Adarand III*, the strict scrutiny test must be applied to “smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool” and to “ensure[] that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”⁷⁹

c. TEA-21, SAFETEA-LU, and the U.S. DOT DBE Regulations (1999)

More recently and post-*Adarand III*, and similar to Section 105(f) of the Surface Transportation Act of 1982 (STAA), Section 1101(b) of TEA-21⁸⁰ required that at least 10 percent of funds be made available for any program under titles I, III, and V of the Act to benefit DBEs.⁸¹ After September 30, 2003, there were numerous extensions of TEA-21.⁸² Meanwhile, in 1999 the U.S. DOT promulgated regulations regarding requirements that were applicable to DBEs.⁸³ In addition to the regulations, discussed below, there is official guidance at a Web site maintained by the Office of Small Disadvantaged Business Utilization and the Minority Re-

source Center.⁸⁴ The site provides information on services and programs available to small businesses in the transportation sector, including DBEs and WBES.⁸⁵

In 2005 Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).⁸⁶ SAFETEA-LU reauthorized the DBE program through fiscal year (FY) 2009 with relatively minor changes,⁸⁷ such as the increase in the limit on gross receipts for eligible small businesses to \$19.57 million.⁸⁸ The DBE program requirements also now apply to expenditures under the Highway Safety Research and Development Program.

However, SAFETEA-LU has three additional sections pertaining to race and DBE programs. First, the Act created a grant program to encourage states to enact measures that would prohibit and discourage racial profiling by providing funding for such measures. Under this section, the Act awards grants to any state that implements one of two measures. The first measure requires a state to enact and enforce laws that prohibit racial profiling in the enforcement of state laws that regulate the use of federal funds for highways. The second measure requires a state to maintain and allow public inspection of statistical information on the race and ethnicity of any driver and any passenger(s) for each motor vehicle-stop made by law enforcement on any Federal-aid highway or to provide adequate assurances that the state is complying with the first measure.⁸⁹

Second, in Section 1920 Congress made certain findings on transportation and investment in the

⁷⁷ *Rothe Dev. Co. v. United States Dep’t of Defense (Rothe IV)*, 324 F. Supp. 2d 840, 843 (W.D. Tex. 2004), citing *Fullilove*, 448 U.S. at 480, 100 S. Ct. at 2758, 65 L. Ed. 2d at 902 (1980).

⁷⁸ *Id.* at 842.

⁷⁹ *Id.* at 848, quoting *Crosan*, 488 U.S. at 493, 109 S. Ct. at 721, 102 L. Ed. 2d at 881–82.

⁸⁰ Pub. L. No. 105–178, 112 Stat. 107 (1998).

⁸¹ See 49 C.F.R. § 26.3 (stating that the provision applies to titles I, II, V), but see 49 C.F.R. § 26.41 (stating that not less than 10 percent of funds be expended on DBEs but 10 percent “requirement” is an aspirational goal and not a requirement).

⁸² On July 30, 2005, President Bush signed a 12th extension (H.R. 3512, Pub. L. No. 109-42) that was to expire on August 14, 2005; see FHWA Reauthorization of TEA-21, available at <http://www.fhwa.dot.gov/reauthorization/extension.htm>, showing all renewals prior to July 30, 2005.

⁸³ See U.S. DOT, Disadvantaged Business Enterprise, <http://www.dotcr.ost.dot.gov/asp/dbe.asp> (site discusses enactment of TEA-21 and authorized DBE programs and that the DOT’s DBE regulations are found in 49 C.F.R. pts. 23, 26, published in 1999).

⁸⁴ Office of Small and Disadvantaged Business Utilization, www.osdbu.dot.gov.

⁸⁵ See also U.S. Department of Transportation, Federal Highway Administration, Program Administration, Administration of Engineering and Design Related Services Contracts, available at www.fhwa.dot.gov/programadmin/172qa.htm; <http://knowledge.fhwa.dot.gov/cops/dbex.nsf/home>; and <http://osdbu.dot.gov/documents/pdf/dbe/dbe/pdf.64> Fed. Reg. 5096 (Feb. 2, 1999) (to be codified at 49 C.F.R. pts. 23, 26).

⁸⁶ Pub. L. No. 109-59, 112 Stat. 1144 (2005).

⁸⁷ See SAFETEA-LU, Pub. L. No. 109-59, § 1101(b), 112 Stat. 113 (2005) (codified at 23 U.S.C. § 101 (2006)); compare to TEA-21, Pub. L. No. 105-178, § 1101(b), 112 Stat. 1156 (1998) (codified at 23 U.S.C. § 101 (1998)). TEA-21 included a provision requiring the Comptroller General to conduct a review of the DBE program and provide a report to Congress. SAFETEA-LU does not impose such a requirement.

⁸⁸ SAFETEA-LU, Pub. L. No. 109-59, § 1101(b)(1)(a), 119 Stat. 1156 (2005) (codified at 23 U.S.C. § 101 (2006)).

⁸⁹ *Id.* § 1906.

local workforce, including a finding that transportation projects can offer young people, including economically disadvantaged young people, an opportunity to gain productive employment.⁹⁰ Congress stated that it was the

sense of Congress that Federal transportation projects should facilitate and encourage the collaboration between interested persons, including Federal, State, and local governments, community colleges, apprentice programs, local high schools, and other community-based organizations that have an interest in improving the job skills of low-income individuals, to help leverage scarce training and community resources and to help ensure local participation in the building of transportation projects.⁹¹

Third, SAFETEA-LU requires the Secretary, acting through the Minority Resource Center, to provide assistance in obtaining bid, payment, and performance bonds by DBEs pursuant to 49 U.S.C. § 332(b)(4). Congress appropriated such sums as necessary to carry out the activities under this subsection.⁹²

U.S. DOT also has revised and updated the airport concession rules applicable to DBEs as authorized by 49 U.S.C. § 47101(e), which are found in the Code of Federal Regulations (C.F.R.) at 49 C.F.R., Part 23, effective as of April 21, 2005.⁹³ Although similar to the U.S. DOT-assisted contracts and concession rules found in 49 C.F.R., Part 26, that are applicable to DBEs, the Airport Concession DBEs (ACDBEs) rules are based on a different statute altogether. Although the former TEA-21 and 49 U.S.C. § 47101(e) apply to different kinds of businesses and business relationships and

differ in method, the laws maintain the same DBE-objective. Unlike U.S. DOT-assisted contracts, for example, ACDBEs may specialize in car rentals or restaurants located in or around airport facilities and may be subject to standards for business size as determined by the Secretary. Because the two DBE programs were regulated by separate statutes, the Supreme Court's decision in *Adarand III*, requiring that strict scrutiny be applied to DBEs under 49 C.F.R., Part 26, indirectly raised constitutional concerns for ACDBEs under 49 C.F.R., Part 23.⁹⁴ The 2005 revision of the ACDBE regulations addressed this concern.

Unlike Part 26-businesses seeking DBE certification, which requires strict adherence to SBA size standards and a cap on average gross receipts, Part 23 permits flexibility for setting size standards in the discretion of the Secretary.⁹⁵ Although Part 23 permits an average \$30 million cap, compared to the \$17.42 million cap (now \$19.57 million under SAFETEA-LU) in Part 26 on average gross annual receipts, subject to periodic adjustments for inflation, guidelines for size-standards for ACDBEs under Part 23 are still being considered.⁹⁶

The former TEA-21 and regulations pursuant thereto did "not establish a nationwide DBE program centrally administered by the U.S. DOT. Rather, the regulations delegate to each State that accepts federal transportation funds the responsibility for implementing a DBE program that comports with TEA-21."⁹⁷ As discussed in subsection A.4, *infra*, the courts have upheld the DBE regulations issued by U.S. DOT in 1999.⁹⁸ (As stated, SAFETEA-LU maintained the DBE program found in TEA-21 nearly in whole and contains three additional sections pertaining to DBE programs.)

However, the courts also have had to address how to handle cases in which new regulations were promulgated in the midst of pending challenges to affirmative action requirements. For example, as

⁹⁰ *Id.* § 1920 (2005). As references to the U.S.C. or United States Statutes were not available as of this time, please see the United States Code Classification Tables, available at <http://uscode.house.gov/classification/tables.shtml>.

⁹¹ SAFETEA-LU, Pub. L. No. 109-59, § 1920 (2005).

⁹² *Id.* § 1951, 112 Stat. 1514 (2005) (codified at 40 U.S.C. § 332 (2006)).

⁹³ *Participation by Disadvantaged Business Enterprises in Airport Concessions*, 70 Fed. Reg. 14496 (Mar. 22, 2005), available at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-5530.pdf>; *Participation by Disadvantaged Business Enterprises in Airport Concessions*, 70 Fed. Reg. 14520 (Mar. 22, 2005), available at <http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-5529.pdf>. DOT issued pt. 23 in 1992 and amended it in 1999. See 57 Fed. Reg. 18410 (April 30, 1992); 64 Fed. Reg. 5126 (Feb. 2, 1999). The recent revisions were in response to three proposed rules in 1993, 1997, and 2000. See 58 Fed. Reg. 52050 (Oct. 8, 1993); 62 Fed. Reg. 24548 (May 30, 1997); 65 Fed. Reg. 54454 (Sept. 8, 2000).

⁹⁴ *Participation by Disadvantaged Business Enterprises in Airport Concessions*, 70 Fed. Reg. at 14496 (Mar. 22, 2005).

⁹⁵ *Id.*

⁹⁶ *Id.* at 14520 (Mar. 22, 2005).

⁹⁷ *Western States Paving Co. v. Washington State*, 407 F.3d 983, 989 (9th Cir. 2005).

⁹⁸ *Participation by Disadvantaged Business Enterprises in Dep't of Transp. Financial Assistance Programs*, 49 C.F.R. pt. 26, § 26.1, *et seq.*; 64 Fed. Reg. 5126 (Feb. 2, 1999), as amended at 64 Fed. Reg. 34570 (June 28, 1999); 65 Fed. Reg. 68951 (Nov. 15, 2000); 68 Fed. Reg. 35553 (June 16, 2003). (The statutory authorities for the above regulations are 23 U.S.C. § 324; 41 U.S.C. § 2000d, *et seq.*; 49 U.S.C. §§ 1615, 47107, 47113, and 47123; see Pub. L. No. 105-178, § 1101(b), 112 Stat. 107, 113.)

seen, the *Adarand* case had such a long history that, by the time *Adarand VII* was before the Tenth Circuit, there had been “intervening changes” in the applicable statutes and regulations. Nevertheless, the Tenth Circuit held that it was permissible for the court to consider the new law so as not “to shirk our responsibility to strictly scrutinize the real-world legal regime against which *Adarand* seeks prospective relief,”⁹⁹ as well as to consider “the statutory and regulatory framework in its prior stages as well.”¹⁰⁰ As the court noted, “STURAA, ISTEAA, and TEA-21, the transportation appropriation statutes at issue in this case, incorporate the presumption of disadvantage from SBA § 8(d).”¹⁰¹

As set forth in the 1999 U.S. DOT regulations, the DBE program has several objectives, including the assurance that there is “nondiscrimination in the award and administration of DOT-assisted contracts in the Department’s highway, transit, and airport financial assistance programs.”¹⁰² The requirements of the DBE program apply to “[a]ll FHWA recipients receiving funds authorized by a statute to which this part applies...”¹⁰³ Discriminatory actions that are forbidden include actions that exclude “any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.”¹⁰⁴ The regulations are intended “[t]o create a level playing field on which DBEs can compete fairly for

DOT-assisted contracts”¹⁰⁵ and “[t]o ensure that the Department’s DBE program is narrowly tailored in accordance with applicable law...”¹⁰⁶

In brief, although the regulations should be consulted for the particulars, socially and economically disadvantaged individuals who qualify for the DBE program include “any individual who is a citizen (or lawfully admitted permanent resident) of the United States” and is an “individual who a [r]ecipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.”¹⁰⁷ A “[r]ecipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.”¹⁰⁸ Individuals rebuttably presumed to be socially and economically disadvantaged include Black Americans, Hispanic Americans, those of Portuguese culture or origin, Native Americans, Asian-Pacific Americans, subcontinent Asian Americans, women, and “[a]ny additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.”¹⁰⁹ A firm not presumed to be a DBE may apply for DBE certification.¹¹⁰ There are various requirements that must be met, but to be eligible “a firm must be at least 51 percent owned by socially and economically disadvantaged individuals,”¹¹¹ and ownership “must be real, substantial, and continuing, [and] going beyond *pro forma* ownership of the firm...”¹¹²

Under present law, the Congress presumes that firms that are more likely to be economically disadvantaged are firms owned by minorities or women,¹¹³ however, unlike earlier affirmative action programs, the current “program...takes race into consideration as only one factor.”¹¹⁴ Although certain groups are presumed to be DBEs, “the current regulations are designed to increase the participation of non-minority DBEs” in that nonminorities that are not presumed to be socially disadvantaged are allowed to prove by a preponderance of the evidence their right to participate in the DBE program.¹¹⁵

⁹⁹ *Adarand VII*, 228 F.3d at 1158.

¹⁰⁰ *Id.* at 1159 (stating that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” (internal citations omitted)). The court considered the prior law even though “the manager of the Federal Lands Program indicate[d] that the SCC is no longer in use in federal highway construction contracts.” *Id.* at 1159 n.4.

¹⁰¹ *Id.* at 1160.

¹⁰² 49 C.F.R. § 26.21(a)(1). *See also* § 26.3(a)(1) through (3). A recipient under the DBE program includes any recipients of Federal-aid highway funds pursuant to certain federal laws, federal transit funds, and airport funds.

¹⁰³ 49 C.F.R. § 26.21(a)(1). *See* § 26.21(a)(2) and (3), respectively, regarding FTA recipients (certain assistance exceeding \$250,000; excluding transit vehicle purchases) and FAA recipients (certain grants exceeding \$250,000).

¹⁰⁴ *Id.* § 26.7(a). Subsec. (b) states that a recipient “must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.”

¹⁰⁵ *Id.* § 26.1(b).

¹⁰⁶ *Id.* § 26.1(c). *See also* § 26.1(d) through (g) for other stated objectives.

¹⁰⁷ *Id.* § 26.5(1).

¹⁰⁸ *Id.* § 26.5.

¹⁰⁹ *Id.* § 26.5(2).

¹¹⁰ *Id.* §§ 26.61, 26.65, and 26.67.

¹¹¹ *Id.* § 26.69(b).

¹¹² *Id.* § 26.69(c). *See also* § 26.71.

¹¹³ *Rothe IV*, 324 F. Supp. 2d at 857.

¹¹⁴ *Id.*

¹¹⁵ *Adarand VII*, 228 F.3d at 1183.

Section 26.5 of the 1999 regulations also defines “race-conscious” and “race-neutral” measures under the program: A “[r]ace-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.”¹¹⁶ A “[r]ace-neutral measure or program is one that is, or can be, used to assist all small businesses.... [R]ace-neutral includes gender-neutrality.”¹¹⁷ A recipient of federal funds must use race-neutral means before resorting to race-conscious means to remedy discrimination.

[A recipient] must meet the maximum feasible portion of [its] overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).¹¹⁸

Race-neutral means include: “[a]rranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses;”¹¹⁹ “[p]roviding assistance in overcoming limitations such as inability to obtain bonding or financing;”¹²⁰ “technical assistance and other services;”¹²¹ and otherwise as specified in the regulations. The recipient “must establish contract goals to meet any portion of [its] overall goal [it does] not project being able to meet using race-neutral means.”¹²²

Thus, current law “employs a race-based rebuttable presumption to define the use of race-conscious remedial measures....”¹²³ Assuming that a compelling interest has been demonstrated for a “race-conscious” approach, the law must be narrowly tailored. Although rigid numerical quotas are not narrowly tailored and are not permissible, it is not impermissible for Congress to require “innocent persons” to share some of the burden in eradicating racial discrimination by “cur[ing] the effects of prior discrimination.”¹²⁴

¹¹⁶ 49 C.F.R. § 26.5.

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 26.51(a).

¹¹⁹ *Id.* § 26.51(b)(1).

¹²⁰ *Id.* § 26.51(b)(2).

¹²¹ *Id.* § 26.51(b)(3).

¹²² *Id.* § 26.51(d).

¹²³ Northern Contracting v. Ill. Dep’t of Transp., No. 00C451115, 2004, U.S. Dist. LEXIS 3226, *86 (N.D. Ill. 2004).

¹²⁴ *Adarand VII*, 228 F.3d at 1177, quoting *Wygant*, 476 U.S. at 280–81, 106 S. Ct. at 1850, 90 L. Ed. 2d at 273

Under current federal law, a state must set a DBE utilization goal that reflects its “determination of the level of DBE participation [that] would be expected absent the effects of discrimination.”¹²⁵ The goal is “undifferentiated” in that it must encompass all minority groups.¹²⁶ Part C of the regulations addresses the role of the “statutory 10 percent goal” in the DBE program. As the regulations provide,

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs’ opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.¹²⁷

Although there are several steps in the process of setting the recipient’s DBE program goal, Section 26.5 provides, *inter alia*, that the recipient’s

overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient’s] DOT-assisted contracts (hereafter, the “relative availability of DBEs”). The goal must reflect [the recipient’s] determination of the level of DBE participation [it] would expect absent the effects of discrimination. [The recipient] cannot simply rely on either the 10 percent national goal, [the recipient’s] previous overall goal or past DBE participation rates in [its] program without reference to the relative availability of DBEs in [the recipient’s] market.

As Section 26.43 states, a recipient “is not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.”¹²⁸ Furthermore, a recipient “may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, [a recipient] may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.”¹²⁹

(Powell, J.) (*quoting Fullilove*, 448 U.S. at 484, 100 S. Ct. at 2779, 65 L. Ed. 2d at 929 (plurality)).

¹²⁵ *Western States*, 407 F.3d at 989.

¹²⁶ *Id.* at 990, *citing* 49 C.F.R. § 26.45(h).

¹²⁷ 49 C.F.R. § 26.41(a), (b), and (c).

¹²⁸ *Id.* § 26.43(a).

¹²⁹ *Id.* § 26.43(b). For the required steps in the goal-setting process, *see id.* § 26.45(c), (d), (e), (f), and (g).

Prior law had given rise to ill-defined goals upon which remedial measures were based.¹³⁰ However, as one court has observed, under current law

[T]he process by which recipients of federal transportation funding set aspirational goals is now much more rigorous. The current regulation instructs each recipient that its "overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts" and must make "reference to the relative availability of DBEs in [the recipient's] market." 49 C.F.R. § 26.45(b) (2000). In addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." *Id.* § 26.45(c). Such evidence may include census data and valid disparity studies. *See id.* § 26.45(c)(1)-(3). After examining this evidence, the recipient must adjust its DBE participation goal by examining the capacity of DBEs to perform needed work, disparity studies, and other evidence. *See id.* § 26.45(d). When submitting a goal, the recipient must include a description of the methodology and evidence used. *See id.* § 26.45(f)(3).¹³¹

Important provisions regarding contract goals appear in § 26.51(e) and (f). For example,

(1) [A recipient] may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) [A recipient is] not required to set a contract goal on every DOT-assisted contract. [A recipient is] not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal....

Furthermore,

[t]o ensure that [the recipient's] DBE program continues to be narrowly tailored to overcome the effects of discrimination, [the recipient] must adjust [its] use of contract goals as follows:

(1) If [the recipient's] approved projection under paragraph (c) of this section estimates that [it] can meet [its] entire overall goal for a given year through race-neutral means, [the recipient] must implement [its] program without setting contract goals during that year....

(2) If, during the course of any year in which [the recipient is] using contract goals, [it] determine[s] that [it] will exceed [its] overall goal, [the recipient] must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract

goals does not result in exceeding the overall goal. If [the recipient] determine[s] that [it] will fall short of [its] overall goal, then [the recipient] must make appropriate modifications in [its] use of race-neutral and/or race-conscious measures to allow [it] to meet the overall goal.¹³²

When a recipient has established a DBE contract-goal, it must

award the contract only to a bidder/offeror who makes good faith efforts to meet it. [The recipient] must determine that a bidder/offeror has made good faith efforts if the bidder/offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so....¹³³

Importantly, as provided in the 1999 regulations,

(a) [A recipient] cannot be penalized, or treated by the Department as being in noncompliance with this rule, because [the recipient's] DBE participation falls short of [its] overall goal, unless [the recipient has] failed to administer [its] program in good faith.

(b) If [the recipient does] not have an approved DBE program or overall goal, or if [it] fail[s] to implement [its] program in good faith, [the recipient is] in non-compliance with this part.¹³⁴

Various requirements exist for recipients; for example, under § 26.27, recipients "must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in [a recipient's] community and make reasonable efforts to use these institutions. [A recipient] must also encourage prime contractors to use such institutions." Under § 26.33, recipients must take steps "to address overconcentration of DBEs in certain types of work," such as

the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. [A recipient] may also consider varying [its] use of contract goals, to the extent consistent with § 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

Notwithstanding the DBE program's requirements, recipients are allowed to apply for an exemption from any provision of Part A.¹³⁵ As for

¹³⁰ *Adarand VII*, 228 F.3d at 1182 ("[T]he government failed to carry its evidentiary burden in the district court insofar as the use of the 1996 SCC was based on an ill-defined 12-15% goal apparently adopted by the Federal Highway Administration" under the law prior to the new regulations promulgated in 1999.) *Id.*

¹³¹ *Id.* at 1182 (emphasis supplied).

¹³² 49 C.F.R. § 26.51(f)(1) and (2).

¹³³ *Id.* § 26.53(a).

¹³⁴ *Id.* § 26.47(a) and (b).

¹³⁵ *Id.* § 26.15(a).

Parts B or C, a recipient may “apply for a waiver of any provisions...including but not limited to, any provisions regarding administrative requirements.”¹³⁶

d. Decisions Upholding U.S. DOT’s 1999 DBE Regulations

As discussed below, decisions upholding TEA-21 and the U.S. DOT’s 1999 regulations include *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*,¹³⁷ *Northern Contracting, Inc. v. State of Illinois*,¹³⁸ and *Western States Paving Co. v. Washington State Department of Transportation*.¹³⁹ (In *Western States Paving Co.*, the court did hold that the federal DBE program was not facially unconstitutional but that the State of Washington’s implementation of its program was unconstitutional “as applied.”) The foregoing cases are discussed also in subsections C.1 to C.4, *infra*, and elsewhere in the report.

In *Sherbrooke*, the court rejected the claimant’s argument that in enacting TEA-21, “Congress had no ‘hard evidence’ of widespread intentional race discrimination in the contracting industry....”¹⁴⁰ Moreover, *Sherbrooke Turf, Inc.*, and *Gross Seed Company* “failed to present affirmative evidence that no remedial action was necessary [on the theory that] minority owned small businesses enjoy nondiscriminatory access to and participate in highway contracts.”¹⁴¹ The court held that there was a strong basis in the evidence to support Congress’s conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand VII*.¹⁴² As discussed later in the report, the court rejected an argument that the state transportation agencies, in this instance Minnesota and Nebraska, had to “independently satisfy the compelling interest aspect of strict scrutiny review.”¹⁴³

In *Northern Contracting*,¹⁴⁴ *Northern Contracting*, which was owned 100 percent by a white male, regularly bid on subcontracts for Federal-aid highway prime contracts awarded to the Illinois Department of Transportation (IDOT). *Northern Con-*

tracting, specializing in fencing, guardrail, and handrail construction, alleged that “several contracts for which it submitted the lowest bid were awarded to subcontractors owned by racial minorities and/or women.”¹⁴⁵ The plaintiff challenged “the constitutionality of provisions of federal and state laws designed to guarantee the award of a portion of highway subcontracts to disadvantaged business enterprises....”¹⁴⁶ The court granted the federal defendants’ motion for summary judgment but denied the state defendants’ and plaintiffs’ motions for summary judgment.

The court held that federal officials had identified a compelling governmental interest for enacting TEA-21, that the statute and regulations were narrowly tailored, and that the state officials did not need to establish a distinct compelling interest for implementing the federal program. Issues of fact remained, however, *inter alia*, regarding whether the state employed race- and gender-conscious goals in awarding prime contracts and regarding the state’s zero-goal experimental program, the relative number and dollar amounts of subcontracts awarded to DBEs, and the number, type, investigation, and resolution of oral and written complaints of discrimination. On September 8, 2005, the court upheld the State of Illinois’s implementation of its program.¹⁴⁷

In *Western States Paving Co. v. Washington State Department of Transportation*,¹⁴⁸ *Western States*, a company owned by a white male, was an asphalt and paving contractor based in Vancouver, Washington. To comply with TEA-21, the State of Washington had “mandated that the city obtain 14% minority participation on the project” on which the plaintiff submitted a bid. Prime Contractors rejected *Western States*’ bids, in one case choosing a bid that was \$100,000 less than that of the minority-owned firm that was selected.¹⁴⁹ The Ninth Circuit addressed whether TEA-21 was facially unconstitutional and whether it was unconstitutional as applied in the State of Washington.

Western States argued that TEA-21’s “minority preference program” was a violation of equal protection under the Fifth and Fourteenth Amend-

¹³⁶ *Id.* § 26.15(b).

¹³⁷ 345 F.3d 964 (8th Cir. 2003). See also the companion case to *Sherbrooke Turf, Inc.*, *Gross Seed v. Nebraska*, 345 F.3d 964 (8th Cir. 2003) (complaint dismissed challenging TEA-21 and U.S. DOT regulations).

¹³⁸ 2004 U.S. Dist. LEXIS 3226, at *2.

¹³⁹ 407 F.3d 983, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005).

¹⁴⁰ *Sherbrooke Turf*, 345 F.3d at 969–70.

¹⁴¹ *Id.* at 970.

¹⁴² *Adarand VII*, 228 F.3d at 1167–76.

¹⁴³ *Sherbrooke Turf*, 345 F.3d at 970.

¹⁴⁴ 2004 U.S. Dist. LEXIS 3226, at *2.

¹⁴⁵ *Id.* at *3.

¹⁴⁶ *Id.* at *2. Specifically, *Northern* sought a “declaration that the federal statutory provisions, federal implementing regulations, and state statute authorizing the Illinois DBE program, as well as the Illinois program itself, are unlawful and unconstitutional.” *Id.* at **2–3.

¹⁴⁷ *Northern Contracting v. State of Illinois*, No. 00C4515, 2005 U.S. Dist. LEXIS 19868 (N.D. Ill. Sept. 8, 2005).

¹⁴⁸ 407 F.3d 983 (9th Cir. 2005).

¹⁴⁹ *Western States*, 407 F.3d at 987.

ments to the U.S. Constitution.”¹⁵⁰ The district court held that TEA-21’s minority preference program was both constitutional on its face and as applied. The district court concluded that the State of Washington did not have “to demonstrate that its minority preference program independently satisfied strict scrutiny.”¹⁵¹ As to the “as applied” constitutional ruling, the Ninth Circuit reversed. In short, without any evidence of discrimination, the court remanded the case “to the district court with instructions to enter summary judgment in favor of Western States on its as-applied challenge.”¹⁵²

Besides the *Adarand* case (*see* discussion, *supra*, of *Adarand VII*), the effect of changes in the law is illustrated also by the district court’s decision (on remand) in *Rothe Development Corp. v. United States Department of Defense*¹⁵³ or “*Rothe IV*.” (Although the case does not involve the U.S. DOT’s DBE program, the case addresses a number of relevant issues discussed in this subsection and elsewhere in the report.) Although in June 2005 in *Rothe V*, the Federal Circuit affirmed in part and reversed in part certain rulings by the district court,¹⁵⁴ the district court’s analysis, nevertheless, is instructive.

Rothe was a Texas corporation, owned by a white female. The contract in question was for computer operations and maintenance services for the Base Telecommunications System and Network Control Center at Columbus Air Force Base, Mississippi. Because the government increased Rothe’s bid by 10 percent, International Computers & Telecommunications (ICT) was the company awarded the contract.¹⁵⁵ At issue in *Rothe* was the constitutionality of Section 1207 of the National Defense Authorization Act of 1987. In the Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals.¹⁵⁶ To achieve that goal, Congress authorized the Department of Defense to adjust bids submitted by non-socially and -economically disadvantaged firms upwards by 10 percent (the “price evaluation adjustment program” or “PEA” program).¹⁵⁷ ICT met the requirements for being a socially and economically disadvantaged business

and also qualified for a bid after the Department adjusted Rothe’s lowest bid.¹⁵⁸ At issue was whether the 5-percent goal and the 10-percent preferential increase violated the Equal Protection Clause because both features relied in part “on race-conscious classifications.”¹⁵⁹

In *Rothe I*, in April 1999, the district court granted summary judgment for the government.¹⁶⁰ After the Fifth Circuit in *Rothe II* transferred the case to the Federal Circuit,¹⁶¹ the Federal Circuit reversed the district court.¹⁶² The Federal Circuit held that “the district court failed to analyze the constitutionality of the 1207 program under the strict scrutiny analysis required by the Supreme Court in *Croson* and *Adarand*...and [that the district court] relied on post-reauthorization evidence to determine the constitutionality of the 1207 program as re-authorized.”¹⁶³

In its 2005 decision, because Rothe sought prospective and declaratory relief, the district court in *Rothe IV* “address[ed] both the 1992 reauthorization as well as the 2003 reauthorization.”¹⁶⁴ As for the program that was reauthorized in 1992 and applied in 1998, it was held to be unconstitutional “because of the lack of statistical evidence of discrimination against Asian Americans in this particular industry.”¹⁶⁵ In *Rothe*, similar to *Adarand IV*, because the government provided ample evidence demonstrating that in this case the Defense Department was acting as a passive participant in present-day discrimination, the court found that Congress had a strong basis to believe that a race-based remedy was necessary in 2003. In *Rothe IV*, the district court held that the 5 percent and 10 percent features of the program as reauthorized in 1992 and applied in 1998 were *unconstitutional*. However, the court held that both features as *reauthorized* in 2003 were *constitutional*.

The court held that “this type of statistical evidence is more than ample to support Congress’s finding that a discreet remedy encouraging 5% of Defense dollars [for] SDBs [small disadvantaged businesses] [is] constitutional.”¹⁶⁶ Moreover, “this

¹⁵⁰ *Id.* at 987.

¹⁵¹ *Id.* at 988.

¹⁵² *Id.* at 1003.

¹⁵³ 324 F. Supp. 2d 840 (W.D. Tex. 2004).

¹⁵⁴ *Rothe Dev. Corp. v. United States Dep’t of Defense (Rothe V)*, 413 F.3d 1327 (Fed. Cir. 2005).

¹⁵⁵ *Rothe IV*, 324 F. Supp. 2d at 842–43.

¹⁵⁶ 10 U.S.C. § 2323.

¹⁵⁷ *Rothe IV*, 324 F. Supp. 2d at 841, *citing* 10 U.S.C. § 2323(e)(3).

¹⁵⁸ *Id.* at 842.

¹⁵⁹ *Id.*

¹⁶⁰ *Rothe Dev. Corp. v. United States Dep’t of Defense (Rothe I)*, 49 F. Supp. 2d 937 (W. D. Tex. 1999).

¹⁶¹ *Rothe Dev. Corp. v. United States Dep’t of Defense (Rothe II)*, 194 F.3d 622 (5th Cir. 1999).

¹⁶² *Rothe Dev. Corp. v. United States Dep’t of Defense (Rothe III)*, 262 F.3d 1306 (Fed. Cir. 2001) (vacating and remanding *Rothe I*).

¹⁶³ *Rothe IV*, 324 F. Supp. 2d at 844 (citation omitted).

¹⁶⁴ *Id.* at 845.

¹⁶⁵ *Id.* at 853–54.

¹⁶⁶ *Id.* at 857.

type of generalized statistical evidence documenting the wide disparity in public contracting dollars and SDBs shows pervasive discrimination affecting all minority groups.¹⁶⁷ Furthermore, “[t]his five percent goal cannot be considered a quota because there are no penalties involved if the Department of Defense does not meet the goal.”¹⁶⁸

In *Rothe V* the Federal Circuit affirmed in part and reversed in part and remanded the district court’s decision in *Rothe IV*.¹⁶⁹ In this appeal only the issues of the present reauthorization and of the alleged facial constitutionality of Section 1207 were before the court. The court ruled that the government had failed to show that the PEA program would remain suspended in the future.¹⁷⁰ Moreover, the suspension of the PEA program neither mooted Rothe’s claim nor deprived Rothe of standing to bring the action initially.¹⁷¹ Also, Rothe’s claim was ripe because “the issue whether section 1207, as reauthorized in 2002, is facially unconstitutional is a purely legal issue that is neither abstract nor hypothetical.”¹⁷²

In *Rothe V* the Federal Circuit reversed and remanded the case, however, because on the prior remand the district court had been instructed “to include an analysis of section 1207 ‘at present’....”¹⁷³ However, in a series of discovery rulings, the district court “narrowed the issues on remand to exclude the evaluation of the present reauthorization of section 1207.”¹⁷⁴ The Federal Circuit remanded, rather than direct a summary judgment in Rothe’s favor, because in the district court “the government was not on notice that it was required to come forward with all of its evidence” on the issues of the reauthorization and facial constitutionality of Section 1207.¹⁷⁵

Finally, it may be noted that as of this writing the case of *Enterprise Flasher, Co. v. Mineta*,¹⁷⁶ now pending in the Delaware district court, challenges Delaware’s administration of the DBE program.

¹⁶⁷ *Id.* (citation omitted).

¹⁶⁸ *Id.* at 858 (citation omitted).

¹⁶⁹ *Rothe V*, 413 F.3d 1327 (Fed. Cir. 2005).

¹⁷⁰ *Id.* at 1333.

¹⁷¹ *Id.* at 1335. “At the time Rothe filed suit, the price-evaluation adjustment was in full force. The mere passage of the mechanism by which the suspension could be implemented does not demonstrate that Rothe’s claimed injury was so ‘conjectural or hypothetical’ that it lacked standing.” *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1335–36.

¹⁷⁵ *Id.* at 1336.

¹⁷⁶ Civil Action No. 03-CV-198-GMS.

Although it has been held that the DBE provisions of TEA-21 and the 1999 U.S. DOT regulations are constitutional,¹⁷⁷ there are still issues that may generate challenges to a DBE program. For example, “a future plaintiff could offer additional evidence sufficient to raise a genuine issue of material fact as to whether the government has met its evidentiary burden.”¹⁷⁸ Moreover, in “*Adarand VII*, the court did not evaluate the state’s DBE program.”¹⁷⁹

2. State and Local Affirmative Action Programs

In *Concrete Works of Colorado, Inc. v. City and County of Denver*,¹⁸⁰ the Tenth Circuit held that the defendant could use its spending powers to remedy private discrimination if it identified that discrimination with particularity as required by the Fourteenth Amendment.¹⁸¹ In *Concrete Works*, Concrete Works of Colorado, Inc., challenged the constitutionality of an affirmative action ordinance enacted by the City and County of Denver. Although Denver had enacted the first version of the law in 1990 and had enacted versions twice since then, the essential elements remained unchanged. In a case with a long history, the appellate court reversed the district court’s order enjoining Denver from enforcing the law.

In reviewing Denver’s evidence, including disparity studies, the appellate court rejected various attacks on the studies. The appellate court held that “evidence of market place data can be used to

¹⁷⁷ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226 at *87 (citation omitted).

¹⁷⁸ *Id.* at *87.

¹⁷⁹ *Id.* at **87–88 (citation omitted).

¹⁸⁰ 321 F.3d 950 (10th Cir. 2003). The 10th Circuit decision was criticized in *Hershell Gill Consulting Eng’rs v. Miami-Dade County, Fla.*, 333 F. Supp. 2d 1305, 1325 (S.D. Fla. 2004):

I have considered the Tenth Circuit’s decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), which the County says supports the constitutionality of the MWBE programs in the A&E sector. I do not, however, find *Concrete Works* persuasive. First, in the Tenth Circuit one who challenges an affirmative action program retains the ultimate burden of proving the program’s unconstitutionality, and this allocation of the burden of proof conflicts with Eleventh Circuit precedent. *Compare Concrete Works*, 321 F.3d at 959, with *Johnson*, 263 F.3d at 1244. Second, I believe the Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari. *See Concrete Works of Colorado, Inc. v. City and County of Colorado*, 540 U.S. 1027, 157 L. Ed. 2d 449, 124 S. Ct. 556, 557–60 (2003) (Scalia, J., dissenting from the denial of certiorari).

¹⁸¹ *Concrete Works*, 321 F.3d at 958.

support a compelling interest....”¹⁸² It was proper for Denver to “demonstrate that it is a passive participant in a system of racial exclusion practiced by elements of the local construction industry by compiling evidence of marketplace discrimination and then linking its spending powers to the private discrimination.”¹⁸³ For instance, “evidence of discriminatory barriers to the formation of businesses by minorities and women” in the industry “shows a ‘strong link’ between a government’s ‘disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹⁸⁴

However, the appellate court ruled that the district court did properly consider Denver’s “business formation studies[] and the studies measuring marketplace discrimination.”¹⁸⁵ The appellate court rejected attacks on the evidence that the “disparities shown in the studies may be attributable to firm size and experience rather than discrimination”;¹⁸⁶ that the studies did not control for “firm specialization”;¹⁸⁷ or that the studies were unreliable because they were “not a measure of only those firms *actually* bidding on City construction projects,”¹⁸⁸ as well as rejected other attacks on the sufficiency of the studies. After acknowledging that the record contained “extensive evidence” of Denver’s compelling interest in the remediation of discrimination against both MBEs and WBEs,¹⁸⁹ the court, finding the plan to be narrowly tailored, upheld the constitutionality of the Denver plan and reversed and remanded the case with instructions to enter judgment for Denver.¹⁹⁰

However, the courts have ruled that other affirmative action programs are unconstitutional. For example, in *Builders Association of Greater Chicago v. County of Cook*¹⁹¹ the court, finding that there was no evidence that the prime contractors on the county’s projects were discriminating against minorities and that such pre-enactment evidence of discrimination was unknown to the county, the county was not entitled to take remedial action. The county failed to establish the premise for a racial remedy, which in any event went further than was necessary to eliminate the

evil against which it was directed. Upholding these findings of fact, the Seventh Circuit affirmed the district court’s judgment, ruling that the county’s program was unconstitutional.¹⁹²

In *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*¹⁹³ six trade associations whose members regularly performed work for the county challenged “three substantially identical affirmative action programs administered by Dade County” that were enacted between 1982 and 1994 for Black Business Enterprises, Hispanic Business Enterprises, and WBEs¹⁹⁴ with participation goals of 15 percent, 19 percent, and 11 percent, respectively, for each group.¹⁹⁵ Any contract over \$25,000 funded in part by the county required that every reasonable effort be made to achieve the goal, including set-asides, subcontractor goals, project goals, bid preferences, and selection factors.¹⁹⁶ The goals of each contract were reviewed by the county and could be appealed to the county manager; each year the county commission had to decide whether to renew the affirmative action program.¹⁹⁷

In applying strict scrutiny, the district court found that the affirmative action plan did not meet the “strong basis in evidence” requirement in reference to the Black and Hispanic businesses, nor could the court find that the affirmative action program was narrowly tailored to serve the government’s compelling interest.¹⁹⁸ Likewise, the court found that in reference to the women’s businesses there was a lack of probative evidence to support the county’s rationale for implementing a gender preference and that the gender-based affirmative action plan was not substantially related to an important government interest.¹⁹⁹

The appellate court affirmed the district court’s ruling that the programs violated the Equal Protection Clause.²⁰⁰ The appellate court, moreover, held that, even if it were assumed that the county had demonstrated a strong basis in evidence supporting a compelling reason for an affirmative action program, the county’s affirmative action programs for Blacks and Hispanics were not narrowly tailored because the county had implemented race- or ethnicity-conscious measures without even considering

¹⁸² *Id.* at 976.

¹⁸³ *Id.* (internal quotation marks omitted; citation omitted).

¹⁸⁴ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167–68.

¹⁸⁵ *Id.* at 979.

¹⁸⁶ *Id.* at 980.

¹⁸⁷ *Id.* at 982.

¹⁸⁸ *Id.* at 983.

¹⁸⁹ *Id.* at 990.

¹⁹⁰ *Id.* at 983.

¹⁹¹ 256 F.3d 642 (7th Cir. 2001).

¹⁹² *Id.* at 647–48.

¹⁹³ *Eng’g Contractors Ass’n of South Fla. v. Metro. Dade County*, 122 F.3d 895, 900–01 (11th Cir. 1997).

¹⁹⁴ *Eng’g Contractors*, 122 F.3d at 900.

¹⁹⁵ *Id.* at 900–01.

¹⁹⁶ *Id.* at 901.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 902.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 929.

or trying alternatives or neutral measures.²⁰¹ On the other hand, the county's gender-conscious program was sufficiently flexible, but the county failed "to present sufficient probative evidence of discrimination against women in the relevant parts of the local construction industry."²⁰² Failing to find clear error by the district court, the appellate court affirmed the judgment.²⁰³

In *Association for Fairness in Business, Inc. v. State of New Jersey*,²⁰⁴ a preliminary injunction was granted and denied in part in an action challenging the minority set-aside provisions of the New Jersey Casino Control Act that provided that each casino licensee shall have a goal of expending 15 percent of the dollar value of its contracts for goods and services with MBEs and WBEs. The court ruled, *inter alia*, that

[i]n this case, the State of New Jersey and the New Jersey Casino Control Commission have not made a showing of discrimination that would support a finding that New Jersey has a compelling interest in applying a set-aside program to contracts for goods and services in the casino industry. First, there is little evidence that the creation of the set-aside program in this case was predicated on findings of race-based or gender-based discrimination in the casino industry. There is no evidence, for example, that the New Jersey Legislature adopted the set-aside program on the basis of any such findings.²⁰⁵

Enjoining the statute's provisions that concerned implementation of the program, the court granted the Plaintiff's motion for preliminary injunction.²⁰⁶

3. Issues Arising in Connection With Challenges to DBE Requirements

a. Preliminary or Procedural Issues

Recent cases have addressed preliminary or procedural issues having to do with whether the claimant challenging a DBE program has standing and whether events have occurred in the interim that have rendered all or part of the case moot.

Standing.—As for whether the plaintiff has standing to challenge an affirmative action program,

[t]he Supreme Court has set forth three requirements that constitute the "irreducible constitutional minimum" of standing.... First, a plaintiff must

demonstrate an "injury in fact" that is "concrete," "distinct and palpable," and "actual or imminent." Second, a plaintiff must establish causation—a "fairly traceable" connection between the alleged injury in fact and the alleged conduct of the defendant. Third, a plaintiff must show redressability, that is, a "substantial likelihood that the requested relief will remedy the alleged injury in fact."²⁰⁷

In *Northern Contracting*, the court observed that "no uniform picture emerges from the case law regarding standing doctrine in cases involving governmental race or gender-based set-aside programs."²⁰⁸ Nevertheless, the court held that the plaintiff had standing where the

[p]laintiff bid on federal-aid IDOT highway contracts in the past, will continue to bid on such projects in the future, and suffered competitive harm (however minimal) when three subcontracts in the past three years for which Plaintiff submitted the lowest bid were nevertheless awarded to DBEs pursuant to the federal and state DBE programs.²⁰⁹

In *Engineering Contractors*, one of the principal issues in the case was also the one of standing. While affirming the district court's finding that the county's evidence of past discrimination was insufficient and ruling that the challenged enactments were unconstitutional, the Eleventh Circuit, however, agreed that the association had standing, as their members regularly performed work for the county.

By stipulation, the plaintiffs' members are competing with MWBEs for County construction contracts, and because of the MWBE programs they do not compete on an equal basis. When the government loads the dice that way, the Supreme Court says that anyone in the game has standing to raise a constitutional challenge. "The injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on an equal footing...." "To establish standing, therefore, a party challenging a set-aside program...need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." We are satisfied that the plaintiffs have standing....²¹⁰

Although recognizing that at least two courts had held that the plaintiff had not demonstrated causation or redressability resulting from TEA-21 and implementation of the regulations and thus lacked

²⁰¹ *Id.* at 926–27.

²⁰² *Id.* at 929.

²⁰³ *Id.*

²⁰⁴ 82 F. Supp. 2d 353 (2000).

²⁰⁵ *Association for Fairness in Bus.*, 82 F. Supp. 2d at 359.

²⁰⁶ *Id.* at 364.

²⁰⁷ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226 at **71–72, quoting *McCannell v. Fed. Election Comm'n*, United States, 540 U.S. 93, 124 S. Ct. 619, 707, 157 L. Ed. 2d 491 (2003).

²⁰⁸ *Id.* at *83.

²⁰⁹ *Id.* at **84–85.

²¹⁰ *Eng'g Contractors*, 122 F.3d at 906 (internal citations omitted).

standing,²¹¹ the *Northern Contracting* court concluded that in most of the cases in this area the claimants were held to have standing.²¹²

In *Rothe V* the Federal Circuit held that the government's suspension of the PEA program did not deprive Rothe of standing to bring the case initially; "while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter...."²¹³

Mootness.—Where a provision of an affirmative action program is challenged, the government may announce that the program feature is no longer in use. The question has arisen whether the government's change in policy after the initiation of a constitutional challenge has the effect of mooting the claimant's case.

In *Rothe IV*, as noted, at issue was a preferential price increase or PEA. Although the government had not used the provision since 1998, the district court ruled that "the possibility that the program could be reimplemented in the future confirms that the issue presented remains a live controversy."²¹⁴ The court stated that "a case does not become moot simply because the challenged conduct has temporarily ceased."²¹⁵ In *Rothe V*, the Federal Circuit affirmed the district court's ruling that the suspension of the price-evaluation adjustment component of Section 1207 did not moot Rothe's claim, in part "[b]ecause the continued viability of the suspension depends on the continued fulfillment of the five percent goal[;] this fact tends to undermine the government's proof that the price-evaluation adjustment will remain suspended."²¹⁶

On the other hand, the Federal Circuit affirmed the district court's ruling that part of Rothe's case was moot because the Defense Department (after Rothe's unsuccessful bid for an award of the 1998 contract at issue) had "resolicited bids and awarded [a] new contract without the PEA program to an

entirely different entity."²¹⁷ The Federal Circuit stated that a claim may be moot where the contract at issue was directed to the provision of services "over a specific time period that has now passed."²¹⁸

b. Evidence Required to Satisfy the Compelling Interest Requirement

Burden of Proof of Discrimination.—As held in *Adarand III*, when a governmental program relies on racial classifications, the program must satisfy the test of strict scrutiny. The program in fact must satisfy a two-prong test: it "must serve a compelling governmental interest, and [it] must be narrowly tailored to further that interest."²¹⁹ Both prongs and the sub-issues arising under each are discussed in this and the next section of the report.

First, when racial classifications are present in public contracting, the court "must determine whether the government's articulated goal in enacting the race-based measures...is appropriately considered a 'compelling interest'...."²²⁰ Second, the court must elucidate the standards required for evaluating the government's evidence of a compelling interest.²²¹ Third, the court must decide whether the government's interest is sufficiently strong to meet the government's initial burden of demonstrating that there is a compelling interest.²²² Finally, the court must decide whether the party challenging the program has met its "ultimate burden of rebutting the government's evidence...."²²³

When enacting a DBE program Congress may consider evidence of discrimination in society at large with respect to public contracting, because the reach of Congress is "nationwide."²²⁴ The validity of the evidence considered by Congress is entitled to some deference, but the congressional decision to implement a program is subject to judicial scrutiny.²²⁵ As seen, since the passage of TEA-21 and the promulgation of the U.S. DOT DBE regulations in 1999, several courts have considered the issue of the sufficiency of the evidence considered by Congress. The courts have "conclude[d] that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its dis-

²¹¹ *Klaver Constr. Co. v. Kan. Dep't of Transp.*, 211 F. Supp. 2d 1296 (D. Kan. 2002); *Interstate Traffic Control v. Beverage*, 101 F. Supp. 2d 445 (S.D. W. Va. 2000).

²¹² See *Northeastern Fla. Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993); *Adarand III*, 515 U.S. 200, *Sherbrooke Turf*, 345 F.3d 964; *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993); and *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997).

²¹³ *Rothe V*, 413 F.3d at 1334 (citation omitted).

²¹⁴ *Rothe IV*, 324 F. Supp. 2d at 848.

²¹⁵ *Id.* (citations omitted).

²¹⁶ *Rothe V*, 413 F.3d at 1333 (Fed. Cir. 2005).

²¹⁷ *Rothe IV*, 324 F. Supp. 2d at 845.

²¹⁸ *Rothe V*, 413 F.3d at 1332.

²¹⁹ *Adarand VII*, 228 F.3d at 1164 (citation omitted).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 1165.

²²⁵ *Rothe IV*, 324 F. Supp. 2d at 853, see also the cite to *Rothe III*, 262 F.3d at 1322 n.[14].

bursements.²²⁶ Congress, thus, unlike the states, may “redress the effects of society-wide discrimination....”²²⁷

Nevertheless, generalized congressional statements regarding racial discrimination are not enough “to demonstrate a strong basis in the evidence” but “must be considered when determining Congress’s intent.”²²⁸ When Congress reauthorized the DBE program in 2003²²⁹ there were “more than fifty documents and thirty congressional hearings on minority-owned businesses prepared in response to the Supreme Court’s *Adarand* decision” that were entitled to some deference and constituted valid evidence.²³⁰ Moreover, Congress may rely on earlier, pre-enactment evidence, such as “[n]umbers and statistics from 1990, 1996, and 1998 [which were] still relevant to Congress’ decision-making in 2003.”²³¹ Congress also may “extrapolate findings of private discrimination to support a finding of unconstitutional discrimination in the public sector;” the reason is that such evidence “support[s] a congressional finding that the government acts as a passive participant in discrimination.”²³²

Even so, the question is “how much evidence is necessary in order for Congress to use this power [to] create a nationwide program.”²³³ It is not necessary that Congress make specific findings in regard to discrimination against specific minority groups. Congress need not, for example, review the evidence or lack thereof of discrimination specifically against “Korean-Americans, because the DBE in question was owned by a member of that particular ethnic group,” nor must Congress have evidence specifically of discrimination in the “computer maintenance and repair services in the defense industry,” as was argued unsuccessfully in the *Rothe* case.²³⁴ That is, “Congress need only look to broad categories to provide information on the prevalence of discrimination.”²³⁵ For instance, in *Rothe IV* the court stated that *Rothe*’s argument that “a particular sub-class should not be presumed socially and economically disadvantaged narrows the inquiry too much for Congress.”²³⁶

²²⁶ *Adarand VII*, 228 F.3d at 1165, citing *Croson*, 488 U.S. at 492 (O’Connor, J.).

²²⁷ *Id.*, quoting *Croson*, 488 U.S. at 490.

²²⁸ *Rothe IV*, 324 F. Supp. 2d at 851.

²²⁹ The program was reauthorized in 1998 with TEA-21; the 1999 regulations were amended in 2003.

²³⁰ *Rothe IV*, 324 F. Supp. 2d at 856.

²³¹ *Id.*

²³² *Id.* at 850.

²³³ *Id.* at 846.

²³⁴ *Id.* at 847, citing *Fullilove*, 448 U.S. at 515–16 n.14.

²³⁵ *Id.* at 847.

²³⁶ *Id.* at 860.

Requirement of a “Strong Basis in Evidence.”—The question of whether the government demonstrated a strong basis in evidence is a question of law that is reviewed *de novo* on appeal; the “[u]nderlying factual findings [are] reviewed for clear error.”²³⁷ For the government to fulfill the requirement that there must be a compelling interest for a program, there must be “identified discrimination;” there must be specific “evidence of past or present discrimination.”²³⁸ There must be “a strong basis in evidence to conclude that remedial action was necessary....”²³⁹ As the court explained in *Concrete Works*, the government “must identify the past or present discrimination ‘with some specificity.’ Second, it must also demonstrate that a ‘strong basis in evidence’ supports its conclusion that remedial action is necessary.”²⁴⁰

With respect to TEA-21 and the 1999 regulations, the courts in *Adarand VII*, *Sherbrooke Turf*, *Northern Contracting*, and *Western States Paving* concluded “that Congress ‘had spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.’”²⁴¹ Thus, “Congress had a ‘strong basis in evidence’ to conclude that the DBE program was necessary to redress private discrimination in federally-assisted highway subcontracting.”²⁴² Strong evidence is that “‘approaching a *prima facie* case of a constitutional or statutory violation,’ *not* irrefutable or definitive proof of discrimination.”²⁴³ The government’s burden can be met “without conclusively proving the existence of past or present racial discrimination.”²⁴⁴ In *Western States*, the Ninth Circuit held that with respect to public contracting, the federal government had demonstrated “a compelling basis for classifying individuals according to race....”²⁴⁵ Moreover, the State of Washington did not have to “demonstrate an independent compelling interest for its DBE program.”²⁴⁶ With respect to Denver’s affirmative action program, although Denver submitted evi-

²³⁷ *Concrete Works*, 321 F.3d at 958 (citation omitted).

²³⁸ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at *89, quoting *Shaw v. Hunt*, 517 U.S. 899, 909–10, 116 S. Ct. 1894, 1902–03, 135 L. Ed. 2d 207, 221–22 (1996).

²³⁹ *Id.* at *90, quoting *Shaw v. Hunt*, 517 U.S. at 909–10.

²⁴⁰ *Concrete Works*, 321 F.3d at 958, citing *Shaw*, 517 U.S. at 909.

²⁴¹ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at *100, quoting *Sherbrooke Turf*, 345 F.3d at 969–70.

²⁴² *Id.* at *121.

²⁴³ *Concrete Works*, 321 F.3d at 971, quoting *Croson*, 488 U.S. at 500.

²⁴⁴ *Id.* at 958, citing *Concrete Works II*, 36 F.3d at 1522.

²⁴⁵ *Western States*, 407 F.3d at 993.

²⁴⁶ *Id.* at 997.

dence of discrimination against each group included in the ordinances, Denver did not have “to show that each group suffered equally from discrimination.”²⁴⁷ Instead, “Denver’s only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination.”²⁴⁸

Not all government defendants are able to meet the compelling interest requirement. For example, in *Builders Association of Greater Chicago v. County of Cook*²⁴⁹ the Seventh Circuit held that there was no evidence that the prime contractors on the county’s projects were discriminating against minorities. The county failed to establish the premise for a racial remedy and the remedy went further than was necessary to eliminate the evil against which it was directed.

Similarly, in *Association for Fairness in Business, Inc. v. State of New Jersey*²⁵⁰ a federal district court in New Jersey granted a preliminary injunction in an action challenging the minority set-aside provisions of the New Jersey Casino Control Act. The Act provided that each casino licensee would have a goal of expending 15 percent of the dollar value of its contracts for goods and services with MBEs and WBEs. The State of New Jersey and the New Jersey Casino Control Commission were unable to make “a showing of discrimination that would support a finding that New Jersey has a compelling interest in applying a set-aside program to contracts for goods and services in the casino industry.”²⁵¹

Evidence Required for a Race-Conscious Versus a Gender-Conscious DBE Program.—Under the 1999 DBE regulations applicable to recipients of federal aid for highway, transit, and airport projects, the regulations are applicable both to minorities and women. However, the evidence needed to support a compelling interest for the establishment of a race- or ethnicity-based program in contrast to a gender-based program is different. For a race- or ethnicity-based program, “‘there must be a strong basis in evidence’ to support the conclusion that remedial action is necessary.”²⁵² However, the evidence required is something less for a gender-conscious program. It appears that the most that can be said now of the evidence required is that it must be “probative evidence” that is also “sufficient.”²⁵³ Al-

though such language may be imprecise and “beg the question,” apparently the standard to be applied will have to “draw meaning from an evolving body of case law.”²⁵⁴

Requirement of Statistical Evidence of Discrimination.—As seen, Congress had to have “a strong basis in evidence” before enacting a “race-based remedial program.”²⁵⁵ Since the Supreme Court’s decisions in *Adarand III* and in *Shaw v. Hunt*,²⁵⁶ Congress has had “a burden to statistically document the need for a race-based program.”²⁵⁷

Decisional law, as well as the U.S. DOT’s 1999 DBE regulations, specifically authorizes the use of disparity studies. In *Adarand VII*, the court considered local disparity studies undertaken by state and local governments “to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting.”²⁵⁸ Although such studies were not conclusive that “the number of minority DBEs would be significantly higher but for such barriers,” the court reasoned that “[t]he disparity between minority DBE availability and market utilization in the subcontracting industry raises an inference that the various discriminatory factors the government cites have created that disparity.”²⁵⁹

Although disparity and availability studies are beyond the scope of the report, one source states that “[d]isparity is the difference between capacity and utilization. In an ideal environment, capacity and utilization would be identical and the disparity measure would be zero. For the purposes of disparity study, a disparity measure of less than zero (a negative number) suggests underutilization of MBE or WBE firms, and a disparity measure of greater than zero suggests over utilization.”²⁶⁰ As for an availability study, it is “an analysis of the market of qualified MBE/WBE businesses that are available in a given geographical location to do the work involved. The analysis should be based on

²⁵⁴ *Id.* at 910.

²⁵⁵ *Rothe IV*, 324 F. Supp. 2d at 842. Where a program is reauthorized, “the Court can examine evidence available to Congress prior to the 2003 reauthorization because an enactment and a reauthorization are equivalent.” *Id.* at 849 (citation omitted).

²⁵⁶ 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996).

²⁵⁷ *Rothe IV*, 324 F. Supp. 2d at 850.

²⁵⁸ *Adarand VII*, 228 F.3d at 1172.

²⁵⁹ *Id.* at 1173–74.

²⁶⁰ MINORITY AND WOMEN BUSINESS ENTERPRISES DIVISION OF INDIANA DEPARTMENT OF ADMINISTRATION, STATISTICAL ANALYSIS OF UTILIZATION STUDY FOR STATE OF INDIANA CONTRACTS BETWEEN JANUARY 1, 2004, AND APRIL 15, 2005 (2005), available at <http://www.in.gov/idoa/minority/pdf/study.pdf>.

²⁴⁷ *Concrete Works*, 321 F.3d at 971.

²⁴⁸ *Id.*

²⁴⁹ 256 F.3d 642 (7th Cir. 2001).

²⁵⁰ 82 F. Supp. 2d 353 (D. N.J. 2000).

²⁵¹ *Id.* at 359.

²⁵² *Eng’g Contractors*, 122 F.3d at 906, quoting *Ensley Branch, NAACP*, 31 F.3d 1548, 1566 (11th Cir. 1994).

²⁵³ *Id.* at 909.

those qualified MBE/WBE firms that are available to do the work in the given arena or field that you need for your project.²⁶¹

Several cases since 1995 have dealt with whether an affirmative action program was supported by a strong basis in the evidence of past or current discrimination. In *Concrete Works, supra*, the court found that “59 statistical studies from across the nation succinctly demonstrate[d] that Congress was reacting with a strong basis in the evidence.”²⁶² The evidence “conclusively demonstrate[d] that Asian-Americans, as well as other minorities, were not competing at a national level because of discrimination.”²⁶³ In another case involving promotions, a statistical model demonstrated that “past promotions of African-Americans and Hispanics to detective were...substantially below” what they should have been in the absence of discrimination.²⁶⁴

In *Concrete Works* the court reviewed statistical evidence from as early as 1989. In 1997 the City had retained a company “to conduct a study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City....”²⁶⁵ The court noted that the resulting “study used a more sophisticated method to calculate availability than the earlier studies....”²⁶⁶ Thereafter, Denver “reduced the annual goals to 10% for both MBEs and WBEs and eliminated a provision which previously allowed M/WBEs to count their own work toward their project goals.”²⁶⁷

The appellate court held that:

Denver may rely on "empirical evidence that demonstrates 'a significant statistical disparity between the number of qualified minority contractors...and the number of such contractors actually engaged by the locality or the locality's prime contractors...." Denver may supplement the statistical evidence with anecdotal evidence of public and private discrimination.... Denver, however, clearly may take measures to remedy its own discrimination or even to prevent itself from acting as a "passive participant in a sys-

²⁶¹ MICHAEL B. COOK, ET AL., U.S. ENVIRONMENTAL PROTECTION AGENCY, APPLICATION OF MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE REQUIREMENTS IN THE CLEAN WATER AND DRINKING WATER STATE REVOLVING FUND PROGRAMS (1998), available at <http://www.epa.gov/owm/cwfinance/cwsrf/enhance/DocFiles/srf99-03.pdf>.

²⁶² *Rothe IV*, 324 F. Supp. 2d at 859.

²⁶³ *Id.*

²⁶⁴ *Majeske*, 218 F.3d 816, 820 (7th Cir. 2000).

²⁶⁵ *Concrete Works*, 321 F.3d at 966.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 969 (citation omitted).

tem of racial exclusion practiced by elements of the local construction industry....” Thus, Denver may establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination....²⁶⁸

The appellate court held that “[t]he record contains extensive evidence” that Denver’s ordinances “were necessary to remediate discrimination against both MBEs and WBEs.”²⁶⁹ Thus, the City had a *compelling* interest in remedying race discrimination in the construction industry, and it had an *important* government interest in remedying gender discrimination in the construction industry.²⁷⁰

In the district court’s 2005 opinion in *Northern Contracting*, in which the court upheld IDOT’s DBE program, the court reviewed IDOT’s evidence in detail. The court noted that

[i]n setting its overall goal for the FY 2005 Plan, IDOT followed the two-step process set forth in 49 C.F.R. pt. 26: (1) calculation of a base figure for the relative availability of DBEs and (2) consideration of a possible adjustment to the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination.²⁷¹

As discussed in the court’s opinion, under the 1999 regulations a recipient “may calculate its base estimate of DBE availability using one of five methods.” Previously, IDOT had used a bidders’ list to make its calculations, but for the 2005 plan

IDOT commissioned [National Economic Research Associates, Inc., a Chicago-based consulting firm, (“NERA”)] to conduct a custom census to determine whether a more accurate means of determining the relative availability of DBEs might be available....

In developing its own methodology, NERA relied on 49 C.F.R. § 26.45(c)(5), which authorizes a Recipient to utilize alternative methods (beyond those specifically identified in the Regulations) to determine[] the relative availability of DBEs, so long as the alternative methodology is “based on demonstrable evidence of local market conditions and... designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in [the Recipient’s] market.”²⁷²

²⁶⁸ *Id.* at 958 (internal citations omitted).

²⁶⁹ *Id.* at 990.

²⁷⁰ *Id.* at 994 (emphasis supplied).

²⁷¹ *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868, at *20.

²⁷² *Id.* at **21–22. IDOT also considered other evidence, including a separate DBE study that NERA had done for the Northeast Illinois Regional Commuter Railroad Corporation, the “Metra Study.” See *id.* at *29.

In approving the approach taken by IDOT and its consultant, the court reviewed NERA's six-step analysis used "to determine the baseline level of DBE availability."²⁷³

Statistical studies of discrimination have been attacked on various grounds. However, in *Engineering Contractors Association of South Florida, Inc.*, *supra*, the plaintiffs' principal objection to the county's evidence was that the disparities had a neutral explanation—the size of the firms. The appellate court agreed with the district court that the anecdotal evidence and the statistical evidence together were still an insufficient evidentiary foundation.²⁷⁴ Without statistical evidence "anecdotal evidence is not enough to sustain a race-based remedial program."²⁷⁵ Because of the lack of evidence to support the program, the court affirmed the district court's decision, finding the program to be unconstitutional.²⁷⁶ Likewise, in *Association for Fairness in Business, Inc.*,²⁷⁷ there was "little evidence that the creation of the set-aside program in this case was predicated on findings of race-based or gender-based discrimination in the casino industry."²⁷⁸

c. Factors Applicable to the Narrow Tailoring Requirement

Summary of Factors Applied by the Courts.—Assuming that a compelling interest has been demonstrated for a "race-conscious" approach, the government may use race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry by allowing tax dollars 'to finance the evil of private prejudice.'²⁷⁹ However, the law must be narrowly tailored. Rigid numerical quotas are not permitted precisely because they are not narrowly tailored.

²⁷³ *Id.* at *65 *et seq.*

²⁷⁴ *Eng'g Contractors*, 122 F.3d at 926.

²⁷⁵ *Rothe IV*, 324 F. Supp. 2d at 851. In *Eng'g Contractors*, most of the county's statistical evidence was post-enactment evidence or evidence collected after the program was enacted. Such evidence is admissible; however, the risk is that the "program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market." *Eng'g Contractors*, 122 F.3d at 912.

²⁷⁶ *Eng'g Contractors*, 122 F.3d at 929.

²⁷⁷ 82 F. Supp. 2d 353 (2000).

²⁷⁸ *Id.* at 359.

²⁷⁹ *Adarand VII*, 228 F.3d at 1164, *citing Concrete Works*, 36 F.3d at 1519 (10th Cir. 1994), (*quoting Croson*, 488 U.S. at 492, 102 S. Ct. at 721, 102 L. Ed. 2d at 881) (some internal quotation marks omitted).

There appear to be four to six factors the courts commonly consider in deciding whether the law is narrowly tailored:

- (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship of the stated numerical goals to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the over[-]inclusiveness or under[-]inclusiveness of the racial classification.²⁸⁰

In *Dallas Fire Fighters Association* the Fifth Circuit only addressed the question of whether the race-conscious promotions were constitutional, not the affirmative action policies as a whole.²⁸¹ The court acknowledged that

[i]n analyzing race conscious remedial measures we essentially are guided by four factors: (1) necessity for the relief and efficacy of alternative remedies; (2) flexibility and duration of the relief; (3) relationship of the numerical goals to the relevant labor market; and (4) impact of the relief on the rights of third parties.²⁸²

Race-Neutral Means.—Narrow tailoring means that a program "discriminates against whites as little as possible consistent with effective remediation."²⁸³ Reliance first on race-neutral means is important in demonstrating that an affirmative action program for public contracting is narrowly tailored. Since *Adarand* the government must show that it adequately considered "race neutral alternative remedies" prior to the implementation of a plan with its race-based presumptions of disadvantage.²⁸⁴ Thus, the Tenth Circuit has emphasized that the U.S. DOT's "current, revised regulations instruct recipients that 'you must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participa-

²⁸⁰ *Rothe IV*, 324 F. Supp. 2d at 847, *citing Rothe III*, 262 F.3d at 1331 (*citing* United States v. Paradise, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987)); *Croson*, 488 U.S. at 506, 109 S. Ct. at 728, 102 L. Ed. 2d at 890; and *Adarand III*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

²⁸¹ *Dallas Fire Fighters Ass'n*, 150 F.3d 438, 440 (5th Cir. 1998).

²⁸² *Id.* at 441.

²⁸³ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226 (2004), at *123, *quoting* Majeske v. City of Chicago, 218 F.3d 816, 820 (7th Cir. 2000).

²⁸⁴ *Adarand VII*, 228 F.3d at 1178 (involving 15 U.S.C. § 644(g) and the SCC). The court stated that the government "fail[ed] to address whether the FLHP considered either measures short of a race conscious subsidy to prime contractors or a more refined means of assessing subcontractors' eligibility for race conscious programs prior to promulgating the regulations implementing the SCC."

tion.”²⁸⁵ As has been noted, “[t]he current regulations also outline several race-neutral means available to program recipients including helping [DBEs to] overcome bonding and financing obstacles, providing technical assistance, and establishing programs to assist start-up firms, as well as other methods.”²⁸⁶

In *Northern Contracting*, *supra*, the court rejected claims that the federal DBE program was not narrowly tailored, noting, *inter alia*, that “the [r]egulations place strong emphasis on ‘the use of race-neutral means to increase minority business participation’²⁸⁷ and ‘prohibit the use of quotas and severely limit the use of set asides.’²⁸⁸ As for the race-conscious aspects of the program, the court held “that the federal DBE scheme is appropriately limited to last no longer than necessary,”²⁸⁹ “recipients may obtain waivers or exemptions from any requirement;”²⁹⁰ and “[r]ecipients are not required to set a contract goal on every U.S. DOT-assisted contract.”²⁹¹ The court noted that

[i]f a [r]ecipient projects it will not be able to meet its overall goal using only race-neutral means, it must establish contract goals to the extent that such goals will achieve the overall goal. A [r]ecipient may use

²⁸⁵ *Id.* at 1178–79, citing 49 C.F.R. § 26.51(a),(f) (2000) (Noting that “if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures..., and enumerate a list of race-neutral measures....”, citing *id.* § 26.51(b) (2000)).

²⁸⁶ *Id.* at 1194, citing 49 C.F.R. § 26.51(b). See *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at **18–19.

Race neutral DBE participation includes a DBE’s being awarded (1) a prime contract through customary competitive procurement procedures, (2) a subcontract on a prime contract that does not carry a DBE goal, and (3) a subcontract on a prime contract that does carry a DBE goal but where the prime contractor did not consider its DBE status in making the award (e.g., where a prime contractor uses a strict low bid system to award subcontracts). *Id.* Race-neutral means include providing assistance in overcoming limitations such as inability to obtain bonding or financing by simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing. 49 C.F.R. § 26.51(b). Contract goals are considered race-conscious measures. 64 Fed. Reg. at 5112.

²⁸⁷ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at *127, quoting *Sherbooke Turf*, 345 F.3d at 972 (quoting *Adarand III*, 515 U.S. at 237–38).

²⁸⁸ *Id.* at *128, citing *Adarand III*, 515 U.S. at 237–38 (citing *Crosen*, 488 U.S. at 496 (plurality opinion)).

²⁸⁹ *Id.* at **129–30.

²⁹⁰ *Id.* at *130, citing 49 C.F.R. § 26.15(b).

²⁹¹ *Id.*, citing 49 C.F.R. § 26.51(e)(2).

contract goals only on those U.S. DOT-assisted contracts that have subcontracting possibilities.²⁹²

In its 2004 opinion, the district court in *Northern Contracting* dismissed the case against the federal defendants but found that there was an issue of fact as to whether the IDOT program was narrowly tailored. In an opinion in 2005, the district court upheld the IDOT DBE program. In regard to race-neutral means, the court stated that “IDOT’s fiscal year 2005 plan contains a number of race- and gender-neutral measures designed to achieve the maximum feasible portion of its overall DBE utilization goal without resort to race- or gender-conscious measures.”²⁹³ IDOT’s measures, *inter alia*, included “encourag[ing] participation in IDOT-contracted work on the part of small businesses, whether or not they qualify as DBEs.”²⁹⁴

Program Flexibility.—Another factor the courts consider is the program’s flexibility. The 1999 DBE regulations have been held to satisfy that test. It is important that the program’s goals are not rigid and that a recipient is not actually required to meet them but “merely that the [recipient] make a good faith effort to do so....”²⁹⁵ Even so, in *Adarand VII*, the court found that the 1996 SCC program, as well as the present version of the regulations, met the *flexibility* test.²⁹⁶

²⁹² *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at **19–20 (citations omitted). Because of the Federal Circuit’s ruling in *Rothe III*, 262 F.3d 1306 (Fed. Cir. 2001), the district court had only to consider the “(1) efficacy of race neutral alternatives; (2) the evidence detailing the relationship between the stated numerical goal of five percent and the relevant market; and (3) the over- and under-inclusiveness of the program.” See *Rothe IV*, 324 F. Supp. 2d at 847.

²⁹³ *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868, at *44–45.

²⁹⁴ *Id.* at *45.

²⁹⁵ *Adarand VII*, 228 F.3d at 1193.

²⁹⁶ *Id.* at 1180–81.

The 1996 SCC program, providing a subsidy for the use of DBEs, is certainly more flexible than the set-asides considered in either *Fullilove* or *Crosen* because the program is not mandatory. It does not require the use of DBEs in subcontracting against the will of the prime contractor.... Moreover, the 1996 SCC program incorporates an additional element of flexibility—“the availability of waiver,”—because any prime contractor is free not to take advantage of the clause and will never be required to make a “gratuitous” choice of subcontractors.... With regard to flexibility, the 1996 program passes muster under a narrow-tailoring analysis.

Nothing has changed in this regard from 1996 until the present that would militate [against] the contrary conclusion. On the contrary, the present version of the regulations [has] increased the flexibility of the government’s

In the 2005 *Northern Contracting* decision regarding whether the IDOT DBE program was narrowly tailored, the district court stated that “IDOT’s DBE program also retains significant flexibility through the use of contract-by-contract goal setting.... IDOT sets individual contract goals only after considering the nature of the work involved, the geographic area, and the availability of DBEs in that area.”²⁹⁷

Under- or Over-Inclusiveness.—The program must be assessed for “under or over-inclusiveness of the DBE classification.”²⁹⁸ That is, “we must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush.”²⁹⁹ However, in analyzing whether the DBE program is narrowly tailored, it is not necessary to “inquire into [the extent of] discrimination against each particular minority racial or ethnic group.”³⁰⁰ A program must be evaluated regarding its “consideration of the use of race-neutral means’ and whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.”³⁰¹

For a classification to be narrowly tailored, it does not have to include minority individuals who have themselves suffered discrimination, as well as “all non-minority individuals who have suffered disadvantage as well.”³⁰² If that “degree of precise fit” were required the test would “render strict scrutiny ‘fatal in fact,’” an unacceptable outcome given the Supreme Court’s declaration that the application of the strict scrutiny test is *not* fatal in fact.³⁰³ As the *Rothe IV* court stated, Congress directed the affirmative action program at issue in that case “specifically at individuals affected by

discrimination” with regulations designed “to identify and eliminate individuals who were not disadvantaged and should no longer qualify.”³⁰⁴ Finally, the DBE program is not over-inclusive based on a now-discredited argument that the “[r]egulations ‘require[] states to presume literally everyone in America is socially and economically disadvantaged except white males.”³⁰⁵

Duration of the DBE Program.—The revised regulations, together with the congressional debate over whether to continue the DBE program by enacting TEA-21, demonstrate that the program’s duration is limited so that it does not last any “longer than the discriminatory effects [they are] designed to eliminate.”³⁰⁶

Burden on Third Parties.—TEA-21 and now, presumably, SAFETEA-LU, and the 1999 regulations satisfy the next factor—the burden on third parties—in part because limitations have been incorporated so that “the subsidy is capped in such a way to circumscribe the financial incentive to hire DBEs; after a fairly low threshold the incentive for the prime contractor to hire further DBEs disappears.”³⁰⁷

Numerical Proportionality.—Next, courts have considered the factor of numerical proportionality—“whether the aspirational goals of 5% in the SBA and 10% participation contained in STURAA, ISTEA, and TEA-21 are proportionate only if they correspond to an actual finding as to the number of

DBE programs: An express waiver provision has been added to the current regulations.

Id. (internal citations omitted).

²⁹⁷ *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868, at *90.

²⁹⁸ *Adarand VII*, 228 F.3d at 1177.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 1186.

³⁰¹ *Id.* at 1177, quoting *Adarand III*, 515 U.S. at 237–38. The appellate court directed its analysis to

Adarand III’s specific questions on remand, and the foregoing narrow-tailoring factors...: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness.

Id. at 1177–78.

³⁰² *Id.* at 1186 (internal citations omitted).

³⁰³ *Id.* (internal citations omitted).

³⁰⁴ *Rothe IV*, 324 F. Supp. 2d at 858–59, citing *Fullilove*, 448 U.S. at 487. The *Rothe IV* court noted various features of the program that demonstrated that it was not overreaching and specifically targeted individuals affected by discrimination.

For example, an SDB can only participate in the program for a period of nine years. 13 C.F.R. § 124.2. In addition, the Small Business Administration has placed net worth caps on individuals participating in the program. 13 C.F.R. § 124.104(c)(2). By placing a cap on individuals that can participate, the program targets individuals “whose ability to compete” is no longer impaired. 13 C.F.R. § 124.104. In addition, the presumption of social disability can be overcome with credible evidence. 13 C.F.R. § 124.103(c). Likewise, an interested party may protest the disadvantaged status of an apparently successful SDB. 13 C.F.R. § 124.1017. Thus, these waiver provisions further support the Court’s conclusion that Congress specifically and narrowly tailored this remedy to its perceived compelling interest.

Id. at 859.

³⁰⁵ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at *136.

³⁰⁶ *Adarand VII*, 228 F.3d at 1177, quoting *Adarand III*, 515 U.S. at 237–38.

³⁰⁷ *Id.* at 1183.

existing minority-owned businesses.”³⁰⁸ The Supreme Court in *Croson* had found that it was “completely unrealistic” that “minorities will choose a particular trade in lockstep proportion to their representation in the local population.”³⁰⁹ The Tenth Circuit in *Adarand* found that the record of past discrimination supported “the government’s contention that the 5% and 10% goals incorporated in the statutes at issue here, unlike the set asides in both *Fullilove* and *Croson*, are merely aspirational and not mandatory.”³¹⁰ In *Northern Contracting* the court rejected the contention “that the federal DBE program lacks numerical proportionality, *i.e.*, that the goal-setting mechanism is not ‘reasonably tied to’ the number of DBEs that are ‘qualified, willing, and able’ to work.”³¹¹

d. Evidence Required to Satisfy the Narrow Tailoring Requirement

This subsection discusses the type and quality of evidence needed to satisfy strict scrutiny as illustrated by two recent cases in which both courts accepted the federal DBE program as a compelling governmental interest. The courts recognized also that the federal program delegated to the states the actual administration of the program. Thus, the courts’ scrutiny also focused on whether the two states’ DBE programs were narrowly tailored to further the federal government’s compelling interest. Although Congress’s findings were sufficient evidence to meet the compelling interest prong of strict scrutiny, the courts required the states to support their application of a DBE program through evidence sufficient to justify the need for the federal DBE program in each state.

In 2005 in *Western States* the Ninth Circuit addressed whether TEA-21 violated the Equal Protection Clause on its face or as applied by the State of Washington.³¹² This statute contained race preferences in the distribution of federally funded transportation contracts. Under TEA-21 federal funds were provided to the Washington State Department of Transportation (WSDOT). Use of these funds required compliance with a minority utilization provision as discussed below. WSDOT determined that its projects had to obtain 14 percent minority participation to comply with this provision. The

WSDOT rejected a bid submitted by Western States for one project and accepted a higher bid by a minority-owned firm.³¹³

The TEA-21 provision in question stated that “except to the extent that the Secretary [of U.S. DOT] determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.”³¹⁴ The U.S. DOT’s regulations, *supra*, state that the purpose of the preference program is to create a level playing field. As seen, the regulations define a DBE and permit a rebuttable presumption of social and economic disadvantage based on race.³¹⁵ Although the level of DBE-participation is determined by the state, the statute seeks an aspirational goal of 10 percent.³¹⁶ In determining the level of DBE-utilization under the regulations, the states are required to apply a two-step process. First, the state must determine the availability of DBEs within the state and may compare it to the availability of non-DBEs. Second, this figure may be adjusted upwards or downwards when compared to non-DBE firms available in the state based on the capacity of DBEs to perform work and based on statistical or anecdotal evidence of discrimination against DBEs obtained from statistical disparity studies, discrimination in the bonding and financing industries, and the present effect of past discrimination. The process results in the state’s DBE-utilization goal for the fiscal year.³¹⁷

In *Western States* the Ninth Circuit emphasized that Congress did not have to put forth evidence that minorities suffer discrimination in every single contract.³¹⁸ The Court held that

[i]n light of the substantial body of statistical and anecdotal material considered at the time of TEA-21’s enactment, Congress had a strong basis in evidence for concluding that—in at least some parts of the country—discrimination within the transporta-

³⁰⁸ *Id.* at 1181.

³⁰⁹ *Id.*, quoting *Croson*, 488 U.S. at 507 (citing *Sheet Metal Workers*, 478 U.S. 421, 494 (1986) (O’Conner, J., concurring in part and dissenting in part)).

³¹⁰ *Id.*

³¹¹ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at **131–32. See also *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868 (upholding IDOT DBE program as being narrowly tailored).

³¹² *Western States*, 407 F.3d at 987.

³¹³ *Id.*

³¹⁴ TEA-21, Pub. L. No. 105-178 § 1101(b)(1), 112 Stat. at 113; see also 49 C.F.R. pt. 26 (1999) (setting forth the specifics of the minority preference program as promulgated by the U.S. DOT).

³¹⁵ See *Western States*, 407 F.3d at 988–89; see also 49 C.F.R. §§ 26.1(b), 26.5, 26.67(b), (d).

³¹⁶ See *Western States*, 407 F.3d at 989; see also 49 C.F.R. § 26.41(b)–(c).

³¹⁷ See *Western States*, 407 F.3d at 989; see also 49 C.F.R. § 26.45(b)–(f).

³¹⁸ *Western States*, 407 F.3d at 992.

tion contracting industry hinders minorities' ability to compete for federally funded contracts.³¹⁹

Western States argued that WSDOT offered no evidence of discrimination in Washington at all. WSDOT responded by stating that it did not need to establish independently that its application of TEA-21 passed this prong of strict scrutiny. Although the court agreed with WSDOT, the court next inquired into the constitutionality of WSDOT's application of the provision.³²⁰

In determining whether WSDOT's application was narrowly tailored, the court required additional evidence to justify WSDOT's application of the plan. In ascertaining the state's DBE utilization goal under the regulations, WSDOT did not adjust its DBE utilization figure either for discrimination in the bonding and financing industry or past or present effects of discrimination because of a lack of supporting statistical or anecdotal evidence of such discrimination. Accordingly, the court held that WSDOT's application of the DBE program violated equal protection because WSDOT's application of the program was not narrowly tailored to further Congress's remedial objective.³²¹

In *Northern Contracting, supra*, in 2004 the district court had earlier upheld the federal DBE provisions and dismissed the federal defendants but had noted that an inquiry into the state's application of the state's DBE program was needed to determine whether it was narrowly tailored for purposes of strict scrutiny.³²² Because *Northern Contracting* sought prospective relief only the court analyzed the constitutionality of only the most recent IDOT DBE program (2005) to determine whether the program was narrowly tailored.³²³ The court explained that

IDOT is, however, required to demonstrate that its implementation of the federal DBE program is narrowly tailored to serve the federal program's compelling interest. Specifically, to be narrowly tailored, "a national program must be limited to those parts of the country where its race-based measures are demonstrably needed." The federal DBE program delegates this tailoring function to the state; thus, IDOT must demonstrate, as part of the narrowly tailored prong, that there is a demonstrable need for the implementation of the federal DBE program within its jurisdiction.³²⁴

In ascertaining the state's DBE utilization goal as required under the federal provision, IDOT considered whether DBE availability was artificially low due to or but for past discrimination. IDOT commissioned a study to address this possibility and also considered an independent study, testimony from three esteemed expert witnesses, comparison analyses from DBE and non-DBE program regions, a report on the consequences of having no goals at all, and the effect of prior IDOT DBE utilization, as well as testimony from public hearings. All of these sources supported the conclusion that past discrimination did artificially lower the availability of DBEs.³²⁵ Accordingly, the evidence supported the use of the DBE program within IDOT's jurisdiction. The plan was flexible in its application and had race neutral requirements. After considering the evidence proffered by IDOT and its application of the program, the district court held that the program was narrowly tailored as applied.³²⁶

e. Whether States Are Required to Make a Separate Showing to Satisfy Strict Scrutiny

The discussion in the previous subsections has touched on the issue of whether a state is required to make a separate showing to satisfy strict scrutiny, an issue addressed by the Eighth Circuit in *Sherbrooke Turf*.³²⁷ It has been held that a state does not have to establish the compelling-interest prong independently of Congress's finding of a compelling interest, but the state must prove that its DBE program is narrowly tailored.

In *Sherbrooke Turf*, the court held, first, that Congress had a strong basis in the evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand VII*.³²⁸ The court rejected the argument that in enacting TEA-21 the "Congress had no 'hard evidence' of widespread intentional race discrimination in the contracting industry...."³²⁹ Moreover, *Sherbrooke Turf* and *Gross Seed* "failed to present affirmative evidence that no remedial action was necessary because minority[-]owned small businesses enjoy non-discriminatory access to and participation in highway contracts."³³⁰

Second, the Minnesota Department of Transportation (MnDOT) and Nebraska Department of Roads (NDOR) did not have to satisfy independently "the compelling interest aspect of strict scru-

³¹⁹ *Id.* at 993.

³²⁰ *Id.* at 995–98.

³²¹ *Id.* at 999–1002.

³²² See *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868, at **3–4.

³²³ *Id.* at **18–19.

³²⁴ *Id.* at **61 (citations omitted).

³²⁵ *Id.* at **27–42.

³²⁶ *Id.* at **86–92.

³²⁷ *Sherbrooke Turf*, 345 F.3d 964 (8th Cir. 2003).

³²⁸ *Adarand VII*, 228 F.3d at 1165.

³²⁹ *Sherbrooke Turf*, 345 F.3d at 969.

³³⁰ *Id.* at 970.

tiny review.”³³¹ The court noted that under prior law (when the 10 percent federal set-aside was more mandatory and *Fullilove*, not strict scrutiny, applied) the Seventh Circuit had held that a contractor could not challenge a grantee state for “merely complying with federal law.”³³² Thus, the *Sherbrooke* court rejected the plaintiffs’ argument that the states had to prove independently that there was a compelling interest for the program because of discrimination:

*[i]f Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation. Thus, we reject appellants’ contention that their facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State’s implementation becomes critically relevant to a reviewing court’s strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis.*³³³

Although Congress did not need to have “strong evidence of race discrimination in construction contracting in *Minnesota and Nebraska*,” the court agreed that, with respect to the issue of whether a program was *narrowly tailored*, “a national program must be limited to those parts of the country where its race-based measures are demonstrably needed.”³³⁴ Thus, although a state DOT may not need to make a separate showing to satisfy the compelling-interest prong of the strict scrutiny test, the state would have to show that the program was narrowly tailored.³³⁵

Sherbrooke and *Gross Seed* argued that the Minnesota and Nebraska DBE programs were not narrowly tailored.³³⁶ However, both states had commissioned studies of their highway contracting markets before adopting overall goals for DBE participation for federally assisted highway projects in FY 2001. With *Sherbrooke Turf* and *Gross Seed* unable to offer better data the court ruled that both programs were narrowly tailored.³³⁷ Similarly, the

Ninth Circuit has ruled that “to the extent the federal government delegates this tailoring function, a State’s implementation becomes critically relevant to a reviewing court’s strict scrutiny.”³³⁸ The court discussed how in the *Sherbrooke Turf* case it was shown that “[b]oth Minnesota and Nebraska had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local markets....”³³⁹

In contrast, in the *Western States* case, there was no evidence, statistical or otherwise, of discrimination in the state’s transportation contracting industry.³⁴⁰ Under the law, however, “each of the principal minority groups [that were] benefited by Washington’s DBE program...must have suffered discrimination in the state.”³⁴¹ In *Western States*, the court reviewed how WSDOT had arrived at its final DBE utilization goal of 14 percent, but the department “did not make any adjustment to its base figure to reflect the effects of past or present discrimination because it lacked any statistical studies evidencing such discrimination.”³⁴² The court pointed out various problems with the government’s evidence. For example, the “disparity between the proportion of DBE performance on contracts that include[d] affirmative action components and those without such provisions does not provide any evidence of discrimination against DBEs.”³⁴³ Other evidence was “oversimplified,” because it did “not account for factors that may affect the relative capacity of DBEs to undertake contracting work.”³⁴⁴ Finally, there was no anecdotal evidence of discrimination in the industry.³⁴⁵

In its 2005 decision in *Northern Contracting, supra*, the district court held that IDOT’s DBE pro-

[F]ollowing promulgation of the current DOT regulations, MnDOT commissioned National Economic Research Associates (NERA) to study the highway contracting market in Minnesota. NERA first determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in the highway construction market. See 49 C.F.R. § 26.45(c) (Step 1). Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, NERA next estimated that the number of participating minority[-]owned businesses would be 34 percent higher in a race-neutral market. Therefore, NERA adjusted its DBE availability figure from 11.4 to 11.6 percent. See 49 C.F.R. § 26.45(c) (Step 1). Based on Nora’s study, MnDOT adopted an overall goal of 11.6 percent DBE participation for federally assisted highway projects in fiscal year 2001. Id.

³³⁸ *Western States*, 407 F.3d at 997, quoting *Sherbrooke Turf*, 345 F.3d at 971.

³³⁹ *Id.* at 997.

³⁴⁰ *Id.* at 998–99.

³⁴¹ *Id.* at 999.

³⁴² *Id.* at 999.

³⁴³ *Id.* at 1000.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 999.

³³¹ *Id.*

³³² *Id.* (citations omitted).

³³³ *Id.* at 970–71 (emphasis supplied).

³³⁴ *Id.* at 971.

³³⁵ *Id.*

³³⁶ *Id.* at 973.

³³⁷ *See id.* For example, in Minnesota:

gram was narrowly tailored to achieve the federal government's compelling interest, which the court had upheld earlier when dismissing the claim of Northern Contracting against the federal defendants.³⁴⁶

In sum, a recipient state "need not establish a distinct compelling interest before implementing the federal DBE program."³⁴⁷ However, "a [r]ecipient's implementation of the federal DBE program must be analyzed under the narrow tailoring analysis...."³⁴⁸

4. Relationship of Federal DBE Requirements to State Constitutional Provisions

At least one case has addressed the issue of the relationship of the federal DBE requirements under 10 C.F.R. § 1040, *et seq.* (1998 Equal Business Opportunity Program) and a state constitutional provision prohibiting governmental affirmative action except in a narrow instance.

In *C&C Construction, Inc. v. Sacramento Municipal Utility District*,³⁴⁹ the Sacramento Municipal Utility District (SMUD) appealed a summary judgment in favor of the plaintiff contractor for declaratory and injunctive relief. The contractor alleged that the district's affirmative action program violated Article 1, Section 31(a) of the California Constitution, an amendment resulting from a voter initiative. SMUD conceded that its affirmative action program discriminated in favor of minorities but argued that the program fell within the exception of California Constitution Article I, Section 31(e) for measures required to maintain eligibility for the receipt of federal funds. The trial court found that SMUD had failed to produce evidence of express federal contractual conditions, laws, or regulations that made approval of federal funds contingent upon race-based discrimination.

C&C challenged SMUD's 1998 affirmative action program on the basis that it violated Section 31 of the California Constitution, an amendment adopted as Proposition 209 in 1996 as the California Civil Rights Initiative. Article 31(a) provides: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The court noted that it had been held that "a municipal contracting scheme that requires preferential treatment on the

basis of race or gender violates this provision."³⁵⁰ However, an exception stated that "[n]othing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State."³⁵¹

The Superior Court of Sacramento County had ruled in favor of C&C's complaint for declaratory and injunctive relief, because the program violated the California Constitution Article 1, Section § 3(a). The appellate court affirmed. At issue was whether SMUD had offered substantial evidence that its race-based program was necessary to maintain federal funding. Although SMUD had conducted disparity studies, it had actually done so "to assess [] whether the requisite factual conditions existed within SMUD's geographic market area to justify remedial discrimination in the form of race-based affirmative action program."³⁵² The studies did not assess race-neutral methods. The appellate court noted that "[s]ection 31 is similar to, but not synonymous with, the equal protection clause of the federal Constitution. Under equal protection principles, state actions that rely upon suspect classifications must be tested under strict scrutiny to determine whether there is a compelling governmental interest."³⁵³ However, "[s]ection 31 allows no compelling interest exception."³⁵⁴ As seen, the only exception is for the use of race-based governmental action to maintain eligibility for federal funds.

C&C's complaint alleged "that SMUD's affirmative action program violate[d] section 31 because it [gave] preferential treatment to contractors on the basis of race."³⁵⁵ SMUD was unable to show that its affirmative action program was required as a condition to maintaining eligibility for federal funds. The court reviewed various federal laws, including those pertaining to the U.S. DOT. In every case, the court found no federal law that required SMUD to use race-based measures. For example, under the applicable regulations, the U.S. DOT does not require race-based affirmative action, even though it allows such action.³⁵⁶

The court held that "the governmental agency must have substantial evidence that it will lose federal funding if it does not use race-based meas-

³⁴⁶ *Northern Contracting*, 2005 U.S. Dist. LEXIS 19868.

³⁴⁷ *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at *138.

³⁴⁸ *Id.* at *139.

³⁴⁹ 18 Cal. Rptr. 3d 715, 122 Cal. App. 4th 284 (Cal. App., 3d Dist. 2004).

³⁵⁰ *C&C Construction*, 18 Cal. Rptr. 3d at 718, *citing* *Hi-Voltage Wire Works v. City of San Jose*, 24 Cal. 4th 537, 565, 101 Cal. Rptr. 2d 653, 12 P.3d 1068 (2000).

³⁵¹ CAL. CONST. art. I, § 31(e).

³⁵² *C&C Construction*, 18 Cal. Rptr. 3d at 718.

³⁵³ *Id.* at 719.

³⁵⁴ *Id.* (citation omitted).

³⁵⁵ *Id.* at 722.

³⁵⁶ *Id.* at 730-31, *citing* 49 C.F.R. § 21.5(b)(7) (2003).

ures and must narrowly tailor those measures to minimize race-based discrimination.”³⁵⁷ SMUD, however, did not “study whether race-neutral programs would suffice,” nor did SMUD prove that there were any federal laws concerning the distribution of federal money to the states that required race-based measures.³⁵⁸ The court stated that “the disparity studies were designed to determine whether the Supreme Court decision in *Croson* permitted race-based affirmative action....”³⁵⁹ However, “SMUD cannot impose race-based affirmative action unless it can establish that it cannot remediate past discrimination with race-neutral measures. The California Constitution requires the state agency to comply with *both* the federal laws and regulations *and* section 31, subdivision (a), if possible.”³⁶⁰

In sum, to discriminate based on race a state entity had to have substantial evidence that it would lose federal funding if it did not use race-based measures. Moreover, such measures had to be narrowly tailored to minimize race-based discrimination. In *C&C Construction, Inc.* the court held that the definition of “discrimination” in Section 8315 of the California Government Code was ineffective. The court reviewed the federal regulations that required affirmative action to remediate past discrimination and noted that affirmative action could be either race-based or race-neutral; SMUD could not impose race-based affirmative action without a showing that race-neutral measures were inadequate.

The court affirmed the lower court’s judgment and issuance of a permanent injunction in favor of the contractor on its complaint alleging that the district’s affirmative action program violated Article 31(a) of the California Constitution.³⁶¹

5. Affirmative Action in Hiring and Promotions

Although not involving affirmative action in public contracting, there are recent cases in which the issue was affirmative action in hiring and pro-

motions. For example, in *Majeske v. City of Chicago*³⁶² the Chicago Police Department had “developed a plan to increase the number of minorities promoted to detective” by dividing the candidates into three groups of white, African American, and Hispanic members.³⁶³ The candidates that scored in the top 17 percent of each group took the written test for promotion.³⁶⁴ The court accepted the city’s “persuasive statistical evidence” of past discrimination.³⁶⁵ There was persuasive statistical data and anecdotal evidence that adequately established past discrimination by the defendant; remedying such discrimination was a compelling governmental interest that justified the defendant’s affirmative action plan; and the city’s plan on promotions was narrowly tailored. The court affirmed the district court’s ruling and upheld the city’s affirmative action plan as being constitutional.³⁶⁶

Similarly, in *Dallas Fire Fighters Association v. City of Dallas, Texas* the Fifth Circuit considered a case dealing with affirmative action policies that permitted race- and gender-based out-of-rank promotions and a fire chief’s appointment of an African American under the policy.³⁶⁷ The fire department’s promotional system dealt with several factors: examination scores at each level of rank, conduct issues, and race and gender considerations.³⁶⁸ Race and gender factored into the promotional process in an attempt to increase minority and female representation in the fire department over nonminority, male firefighters, even though this group scored higher than females or minority candidates.³⁶⁹ The claimants protested the race- and gender-based promotions, while a fourth group protested the promotion of an African American to deputy chief in 1990.³⁷⁰ The district court granted summary judgment in favor of the Dallas firefighters, finding both constitutional and statutory violations.³⁷¹

The Fifth Circuit held that the race-based, out-of-rank plan violated the Equal Protection Clause of the Fourteenth Amendment because it lacked sufficient findings of “egregious and pervasive discrimination or resistance to affirmative action.”³⁷² The level of discrimination did not rise to one that showed a compelling governmental interest of

³⁵⁷ *Id.* at 723.

³⁵⁸ *Id.* at 724, 732.

³⁵⁹ *Id.* at 732.

³⁶⁰ *Id.* at 733.

³⁶¹ *Id.* at 727. The court stated that

[I]n California, the People are sovereign, whose power may be exercised by initiative.... By adopting section 31, the People have determined, by implication, that special measures are not only unnecessary to ensure human rights and fundamental freedoms in California, but inimical to those principles. Therefore, “special measures,” in the form of exceptions to the plain meaning of “discrimination,” are not permitted in California, even under the Convention. Certainly, SMUD does not have the authority to determine otherwise, contrary to the sovereign’s will.

Id. (internal citations omitted).

³⁶² 218 F.3d 816 (7th Cir. 2000).

³⁶³ *Majeske*, 218 F.3d at 818.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 820.

³⁶⁶ *Id.* at 826.

³⁶⁷ *Dallas Fire Fighters Ass’n v. City of Dallas, Tex.*, 150 F.3d 438, 438 (5th Cir. 1998).

³⁶⁸ *Dallas Fire Fighters Ass’n*, 150 F.3d at 440.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.* at 441.

remedying the present effects of past discrimination.³⁷³ The court noted that Dallas pointed to several features of the promotional plan that weighed in favor of its constitutionality, *e.g.*, (1) only qualified individuals are promoted; (2) the Dallas Fire Department uses banding of test scores to ensure that the beneficiaries of the out-of-rank promotions are equally qualified to those whom they pass over; (3) the affirmative action plan under which the promotions are made lasts only 5 years; (4) the affirmative action promotions to a rank will cease when the manifest imbalance in the rank is eliminated; and (5) only 50 percent of annual promotions to a rank may be made under the affirmative action plan.³⁷⁴

The court responded by stating that “they are not enough to overcome the minimal record evidence of discrimination that is sufficient to support only the use of less intrusive alternative remedies.”³⁷⁵ Additionally, the court held that the gender-based, out-of-rank promotions violated the Equal Protection Clause because the evidentiary burden for evidence of gender discrimination at the fire department or in the industry itself was not met. Even though the appellate court applied the less exacting standard of intermediate scrutiny to gender-based discrimination, the court could not find that the promotions were substantially related to an important governmental interest as required under the standard.³⁷⁶

On the other hand, the appointment of an African American to deputy chief was not based on the affirmative action policies but was merely one factor in the consideration and was permissible under Title VII.³⁷⁷ The validity of the appointment depended on whether it was “justified by a manifest imbalance in a traditionally segregated job category and whether the appointment unnecessarily trampled the rights of nonminorities or created an absolute bar to their advancement.”³⁷⁸ The court found there was a lack of evidence to establish that claim, finding that the African American was appointed for more reasons than just his race and that no rights of nonminorities were barred absolutely or were unnecessarily trampled.³⁷⁹

6. The University of Michigan Cases

Although not involving DBE programs, two cases involving the University of Michigan's affirmative action plans must be noted as they are the Su-

preme Court's most recent rulings on the subject. The Supreme Court held to the view of the plurality opinion in *Bakke* that diversity is a compelling governmental interest for the purposes of the strict scrutiny analysis. Although the Court avoided limiting diversity solely to education, there is no indication as yet that diversity is a permissible compelling governmental interest in the realm of public contracting.

In *Grutter v. Bollinger*³⁸⁰ the Michigan Law School denied admission to Grutter, a well-qualified, white female. Grutter alleged that the law school discriminated against her through its admission policy, which considered race as one of many factors in the application process.³⁸¹ As it stands, quotas are impermissible, yet a holistic assessment of applicants for the purpose of diversity is permissible. In *Grutter* the Court considered voluminous evidence on the benefits derived from having diversity. Michigan Law School based its affirmative action policy on Justice Powell's opinion in *Bakke*, which permitted race consideration if race were only one of many elements used for ascertaining the compelling state interest of attaining a diverse student body. According to the Court, diversity attaches itself in a unique way to the educational process.

In *Grutter* the law school's alleged objective was to obtain the educational benefits that are derived from a diverse student body. The objective was not to ameliorate past discrimination or societal discrimination. In brief, the plan sought to obtain a critical mass of minority students; the law school's application process considered “soft variables,” and these variables included the applicant's undergraduate institution's quality and the race of the applicant or other types of diversity, such as life experience and socioeconomic background. The plan placed substantial weight on these latter considerations in the admissions process in attempting to attain a critical mass of minority students.³⁸²

The Court has found diversity to be a compelling governmental interest, fulfilling one of the prongs for the strict scrutiny analysis; nevertheless, the means for attaining that interest must be narrowly tailored. Michigan Law School did not set a number of minority students sought by the law school.³⁸³ The school's goal was to achieve a critical mass by recruiting minority applicants who, based on the “fixed” requirements, would not have been considered for admission.

³⁷³ *Id.*

³⁷⁴ *Id.* at 441 n.13.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 442.

³⁷⁷ *Id.* at 442–43.

³⁷⁸ *Id.* at 442, *citing* *Johnson v. Transp. Agency*, 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987).

³⁷⁹ *Id.* at 442–43.

³⁸⁰ 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003).

³⁸¹ *Id.* at 316–17.

³⁸² *Id.* at 319.

³⁸³ *Id.* at 318–19.

The Court also considered the context and relevant differences of the affirmative action plan, principles derived from *Gomillion v. Lightfoot*³⁸⁴ and *Adarand III*,³⁸⁵ respectively. As for relevant differences, the Court in *Adarand III* had stated:

Justice Stevens concurs in our view that courts should take a skeptical view of all governmental racial classifications. He also allows that “nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account.” What he fails to recognize is that strict scrutiny *does* take “relevant differences” into account—indeed, that is its fundamental purpose.... [T]o the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not.... And Justice Stevens himself has already explained in his dissent in *Fullilove* why “good intentions” alone are not enough to sustain a supposedly “benign” racial classification....³⁸⁶

In *Grutter*, by taking into account the context and relevant differences of the school's policies, the majority opinion effectively limited the application of its decision more or less to education. However, the Court's reasoning may provide insight into the constitutionality of affirmative action when diversity is believed to be a compelling government interest and indicate acceptable means by which a plan may be narrowly tailored to achieve this interest. The law school claimed race-neutral alternatives would have a detrimental effect on the ability of the school to have a diverse student body.³⁸⁷ The Court did not require exhaustion of race-neutral alternatives to be in accordance with narrow tailoring. Cautioning about the use of race-based preferences, the Court again required that affirmative action plans must not unduly burden individuals who are not a part of the favored racial group.³⁸⁸ The Court recognized that the Fourteenth Amendment's objective was to bring an end to any type of discrimination based on race and created a sunset provision of 25 years.³⁸⁹ In light of individualistic review of applicants, supported by significant research attesting to the educational benefits of a diverse student body, the Court found that the policy did not violate the Equal Protection Clause.³⁹⁰ The Court relied on evidence from numerous businesses such as 3M and GM, as well as from high-ranking retired military officers and from civilian

leaders. In dissent, Chief Justice Rehnquist argued that the law school's program was merely a guise for racial balancing.³⁹¹

In *Gratz v. Bollinger*³⁹² Gratz and Hamacher were denied admission to the University of Michigan's undergraduate program even though both were qualified for acceptance. The Court held, in a six to three decision with five separate opinions, that the university's undergraduate admission policies violated the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981 in that the university's use of race was not narrowly tailored in its pursuit of diversity.³⁹³

In *Gratz*, the university used a point system, awarding an applicant up to a maximum of 150 points based on several predictable categories. However, there was one category called “miscellaneous” that automatically awarded 20 points based upon the applicant's membership in an under-represented minority-status group or socioeconomically disadvantaged group; attendance at a high school with a predominantly under-represented minority population; or under-representation in the unit to which the student was applying.³⁹⁴ The Admissions Review Committee could flag an application if it did not pass the initial screening but showed promise.³⁹⁵

The Court did not question the legitimacy of the university's interest. Rather, the Court questioned whether the means were narrowly tailored to achieve the interest in attaining educational diversity.³⁹⁶ The Court stated that “the result of the automatic distribution of 20 points is that the University would never consider student A's individual background, experiences, and characteristics to assess his individual ‘potential contribution to diversity....’ Instead, every applicant like student A would simply be admitted.”³⁹⁷ The applicants must be placed on the same footing for consideration, but this does not mean according them the same weight.³⁹⁸

With the uncertainty of *Bakke* and Justice Powell's concurring opinion on the legitimacy of diversity as a compelling governmental interest, in *Grutter* and *Gratz* the Court again faced the issue of affirmative action plans in higher education.³⁹⁹ In

³⁸⁴ 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).

³⁸⁵ 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

³⁸⁶ *Id.* at 228–29.

³⁸⁷ *Grutter*, 539 U.S. at 339.

³⁸⁸ *Id.* at 341.

³⁸⁹ *Id.* at 323.

³⁹⁰ *Id.* at 343–44.

³⁹¹ *Id.* at 378.

³⁹² 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003).

³⁹³ *Id.* at 275–76.

³⁹⁴ *Id.* at 255.

³⁹⁵ *Id.* at 256–57.

³⁹⁶ *Id.* at 271.

³⁹⁷ *See id.* at 273.

³⁹⁸ *Id.* at 294.

³⁹⁹ *See Grutter v. Bollinger*, 539 U.S. 306; *see also Gratz v. Bollinger*, 539 U.S. 244.

all three cases, *Bakke*, *Grutter*, and *Gratz*, the appellants provided evidence of the benefits of diversity to support the use of race in admissions. In *Grutter* the Court addressed the issue of whether diversity is a compelling governmental interest, which had previously divided the circuits.⁴⁰⁰ Because of the large amount of evidence submitted by the appellant and third parties, the Court deferred to the appellant and accepted its conclusion that diversity was a compelling governmental interest while still applying the legal standard of strict scrutiny.⁴⁰¹

Bakke arguably provided clear insight concerning the answer to the above question, but the Court's jurisprudence did not provide much insight concerning how to *demonstrate* the need for diversity and the *benefits* that are derived from diversity. In *Grutter* the appellant primarily met its evidentiary burden through expert testimony and reports. The university explained the need and importance of diversity but, arguably more importantly, explained the limited use for which race was employed in achieving diversity.⁴⁰² Additionally, numerous higher education institutions, major American businesses, high-ranking retired officers, and civilian leaders of the United States military submitted *amici curiae* briefs in support of the benefits that flow from diversity, stating that the "skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."⁴⁰³

⁴⁰⁰ *Grutter*, 539 U.S. at 322 (stating the question as one "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities"); compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest); *Smith v. University of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (holding that diversity is a compelling state interest).

⁴⁰¹ *Grutter*, 539 U.S. at 328 (holding that diversity is a compelling governmental interest and deferring to the educational judgment of the Law School as fact, with its conclusion substantiated by third parties *amici*).

⁴⁰² For example, the Court noted that the program did not restrict the types of diversity, define diversity solely in terms of racial and ethnic status, treat the competition among all students for admissions insensitively, act as a quota, operate as a percentage, or act as a remedial scheme. See *generally id.* at 328.

⁴⁰³ *Id.* at 330–31 (stating that the Court recently acknowledged the "overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society.")

Although not involving a federal or state DBE program as discussed in this report, the *Grutter* and *Gratz* cases as of this writing are nevertheless the latest decisions of the Supreme Court on the matter of affirmative action.

C. LAWS PROHIBITING DISCRIMINATION IN TRANSPORTATION PROJECTS

1. Statutory and Regulatory Framework

a. Title VI, Section 601 of the Civil Rights Act of 1964

Civil rights issues arise when public transportation officials plan highways and related projects that are alleged to affect minority or ethnic groups on a discriminatory basis. The primary law is Title VI of the Civil Rights Act of 1964. Section 601 of the Act provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁴⁰⁴

The Supreme Court has interpreted Section 601 as proscribing only "intentional" discrimination.⁴⁰⁵ In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*⁴⁰⁶ the district court stated that "[i]n order to state a claim upon which relief can be granted under either 601 of Title VI or the Equal Protection Clause of the Fourteenth Amendment and § 1983, a party must allege that he or she was the target of purposeful, invidious discrimination."⁴⁰⁷ In *Alexander v. Sandoval*⁴⁰⁸ the Supreme Court held that, first, "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"⁴⁰⁹ and "[s]econd, it is similarly beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination."⁴¹⁰

As one article explains,

[t]he Court has stated that "the reach of Title VI's protection extends no further than the Fourteenth Amendment." To succeed, the plaintiffs must demonstrate that they were the target of purposeful or in-

⁴⁰⁴ 42 U.S.C. § 2000d.

⁴⁰⁵ *Alexander v. Choate*, 469 U.S. 287, 293, 105 S. Ct. 712, 716, L. Ed. 2d 661, 667 (1985).

⁴⁰⁶ 254 F. Supp. 2d 486, 495 (D. N.J. 2003).

⁴⁰⁷ *South Camden Citizens in Action*, 254 F. Supp. 2d at 495.

⁴⁰⁸ 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

⁴⁰⁹ *Id.* at 279–80 (citation omitted).

⁴¹⁰ *Id.* at 280 (citations omitted).

vidious discrimination. *It is not enough that the law has a disproportionately adverse effect upon a racial minority; rather, to be unconstitutional under the Equal Protection Clause, the disproportionate adverse impact must be traced to a discriminatory purpose....*

"[D]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." In fact, when the disproportionate impact is essentially an unavoidable consequence of a legitimate legislative policy, the "inference simply fails to ripen into proof." *Thus, allegations of disparate impact alone provide an insufficient basis for relief under either section 601 of Title VI or 1983.*⁴¹¹

In an earlier case, *Alexander v. Choate*,⁴¹² involving Section 504 of the Rehabilitation Act of 1973, the Supreme Court ruled that the section only prohibited intentional discrimination, not discrimination of the disparate impact variety. In *Choate*, the state had reduced the number of annual days of inpatient hospital care covered by the state Medicaid program. The petitioners alleged that both the 14-day limitation and in fact any limitation on inpatient coverage would disparately affect the handicapped. The petitioners alleged a violation of Section 504 of the Rehabilitation Act of 1973.⁴¹³ Section 504 provides that "[n]o otherwise qualified handicapped individual...shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁴¹⁴ Although the reduction had more impact on the handicapped, the Court agreed with the State of Tennessee that Section 504 reaches only purposeful discrimination.

In *Choate*, the Court noted that in *Guardians Association v. Civil Service Commission of New York City*,⁴¹⁵ the Court

confronted the question whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, ...the

Court held that *Title VI itself directly reached only instances of intentional discrimination.*⁴¹⁶

The Court in *Choate* also said that in the case of discrimination against the handicapped, the discrimination is usually the result "not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."⁴¹⁷

On the other hand, the *Choate* Court, noting that courts of appeals had held under some circumstances that Section 504 reaches disparate impact legislation, stated that the Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."⁴¹⁸ The Court, however, rejected the respondents' disparate impact claims, observing that in *Southeastern Community College v. Davis*,⁴¹⁹ the Court had stated "that § 504 does not impose an 'affirmative-action obligation on all recipients of federal funds."⁴²⁰

In sum, Section 601 of Title VI may be invoked only in instances of intentional discrimination.

b. Disparate Impact Regulations Under Title VI, Section 602

Title VI, Section 602 provides in pertinent part that

[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity...is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.⁴²¹

Under Title VI of the Civil Rights Act of 1964,⁴²² as well as Title VII of the Civil Rights Act of 1968⁴²³ and other statutes and regulations, the U.S. DOT promulgated rules to effectuate Title VI⁴²⁴ and provided guidelines for the Federal Highway Administration's (FHWA) Title VI compliance program and review of that program relative to the Federal-aid highway program.⁴²⁵ However, as discussed in

⁴¹¹ Amy Luria, *Constitutionally-Based Environmental Justice Suits and Their Likely Negative Environmental and Economic Impact*, 7 U. PA. J. CONST. L. 591, 601–02 (2004) (citations omitted; emphasis supplied).

⁴¹² 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).

⁴¹³ 29 U.S.C. § 794.

⁴¹⁴ See *Choate*, 469 U.S. at 290, citing 29 U.S.C. § 794.

⁴¹⁵ 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983).

⁴¹⁶ *Choate*, 469 U.S. at 292–93 (emphasis supplied).

⁴¹⁷ *Id.* at 295.

⁴¹⁸ *Id.* at 299.

⁴¹⁹ *Id.* at 300; see also *id.* at 297.

⁴²⁰ *Id.* at 300 n.20 (citation omitted).

⁴²¹ 42 U.S.C. § 2000d-1.

⁴²² *Id.* § 2000d – 2000d-4.

⁴²³ *Id.* §§ 3601–3619, 4601–4655; 23 U.S.C. §§ 109(h), 324.

⁴²⁴ 49 C.F.R. pt. 21.

⁴²⁵ 23 C.F.R. § 200.1, *et seq.* Title VI requirements for 23 U.S.C. § 402 are covered under a joint FHWA/NHTSA

the next section, the Supreme Court has held that no private right of action exists to enforce the disparate impact regulations and policies.⁴²⁶ Nonetheless, transportation officials need to be aware of other civil rights–related laws and regulations that are implicated by their decisions regarding projects and planning. The regulations issued pursuant to Section 602 of Title VI are implicated when “a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification.”⁴²⁷

The U.S. DOT is obligated “to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest....”⁴²⁸ Federal regulations achieve these goals by requiring state transportation agencies to give “state assurances” of being in compliance with Title VI when federal assistance is sought with respect to proposed highway projects.⁴²⁹ Compliance is accomplished by requiring state highway agencies to engage in a number of other “state actions,” including the establishment and staffing of a responsible civil rights unit.⁴³⁰

Part 21 of Title 49 of the C.F.R. gives effect to Title VI in that “no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Transportation.”⁴³¹ Part 200 of Title 23 of the C.F.R. establishes a Title VI compliance program and a review procedure for it, thereby seeking to effectuate the purpose of 49 C.F.R. Part 21.

agreement. *See* 23 C.F.R. § 200.3. 23 C.F.R. pt. 200 seeks additionally to ensure compliance with 49 C.F.R. pt. 21 and related statutes and regulations. *See* 23 C.F.R. § 200.7. In addition, the Uniform Relocation Assistance and Real Property Acquisition Policies Act “establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance....” 42 U.S.C. § 4621(b).

⁴²⁶ *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

⁴²⁷ *See* U.S. DEPT OF TRANSP., COMPLAINTS INVESTIGATIONS REFERENCE NOTEBOOK FOR CIVIL RIGHTS PERSONNEL, <http://www.fhwa.dot.gov/download/module3.pdf>.

⁴²⁸ 23 U.S.C. § 109(h).

⁴²⁹ *Id.* § 200.9(a).

⁴³⁰ *Id.* § 200.9(b)(1).

⁴³¹ 49 C.F.R. § 21.1, *quoting* 42 U.S.C. § 2000d (Title VI).

U.S. DOT regulations are representative of how departments and agencies of the federal executive branch have given effect to federal law on disparate impact. U.S. DOT regulations provide that participants in such programs

may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin.⁴³²

The regulations also state that,

[i]n determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding persons from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.⁴³³

Although 49 C.F.R. § 21.19 provides for judicial review pursuant to the limitations of Title VI, as discussed in the next section, the Supreme Court has held that disparate impact regulations promulgated pursuant to Title VI do not give rise to a private right of action. Thus, the sole remedy available to individuals alleging that there has been a disparate impact exists under the regulations and procedures described in part C hereafter.

c. Requirements Under Executive Order 12898 (1994)

As seen, § 2000d-1 may operate as a sword against intentional discrimination but not against disproportionate or adverse impact.⁴³⁴

On February 11, 1994, President Clinton issued Executive Order 12898 entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.⁴³⁵ The Order seeks to identify and address “disproportionately high and adverse human health or environmental effects of [federal agency] programs, policies, and activities on minority populations and low-income populations.”⁴³⁶ The Order created an interagency working group, which includes the head of the U.S. DOT.⁴³⁷ The Order, moreover, required each federal

⁴³² *Id.* § 21.5(b)(2).

⁴³³ *Id.* § 21.5(b)(3) (emphasis added).

⁴³⁴ *See Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

⁴³⁵ Exec. Order No. 12898, Fed. Reg., vol. 59, no. 32 (Feb. 11, 1994).

⁴³⁶ *Id.* § 1-101.

⁴³⁷ *Id.* § 1-102.

agency to implement an agency strategy that would at a minimum

- (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations;
- (2) ensure greater public participation;
- (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and
- (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations.⁴³⁸

The effect of the Order is to require federal agencies to approach and combat directly disproportionate and adverse effects to human health by their programs, policies, and activities on minority and low-income populations. The Order results in internal agency reflection that is reviewed by other agencies and the U.S. Environmental Protection Agency.⁴³⁹ The Order does not create a private right of action and is intended solely to improve the internal management of the executive branch.⁴⁴⁰

Section 2-2 of the Order uses language similar to that found in 42 U.S.C. § 2000d, stating that

[e]ach Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under[] such[] programs, policies, and activities[] because of their race, [c]olor, or national origin.⁴⁴¹

2. No Private Right of Action Under Disparate Impact Regulations

Although the Supreme Court on several occasions has addressed the scope of Title VI during the last 20 years,⁴⁴² the Court did not decide until 2001 whether under Title VI there was a private right of

⁴³⁸ *Id.* § 1-103.

⁴³⁹ *See id.* § 1-102.

⁴⁴⁰ *Id.* § 6-609.

⁴⁴¹ Compare Exec. Order No. 12898, § 2-2 with 42 U.S.C. § 2000d (stating “[no] person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

⁴⁴² *See Choate*, 469 U.S. at 293; *Guardians Ass’n v. Civil Service Comm’r of N.Y. City*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979); *Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

action to enforce the disparate impact regulations promulgated under Title VI.⁴⁴³ There is no private right of action.

In *Alexander v. Sandoval*,⁴⁴⁴ the issue was “whether private individuals may sue to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964.”^{444a} The plaintiff had claimed that Alabama’s English-only driver’s license examination violated disparate impact regulations. The Court declared that it was not addressing whether the regulations were “authorized by § 602 [of Title VI], or whether the courts below were correct to hold that the English-only policy had the effect of discriminating on the basis of national origin...”⁴⁴⁵ Rather, the Court agreed to review “only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation.”⁴⁴⁶

First, the Court held “that § 601 prohibits only intentional discrimination.”⁴⁴⁷ Second, the Court explained that “[i]t is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.”⁴⁴⁸ Declaring that such a right must come, if at all, from the independent force of Section 602, the Court held that “we assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations” but held that this section does not confer a private right to enforce the regulations.⁴⁴⁹

The Court stated that Congress, as opposed to executive branch agencies, must create private

⁴⁴³ *See, e.g., Julia B. Latham, Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631 (2000); Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155 (2000); Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787 (1999); and Gilbert Paul Carrasco, “Public Wrongs, Private Rights: Private Attorneys General for Civil Rights”, 9 VILL. ENVTL. L.J. 321 (1998).

⁴⁴⁴ 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

^{444a} *Id.* at 278.

⁴⁴⁵ *Id.* at 278.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 280, citing *Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978), *Guardians Ass’n*, 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983), and *Choate*, 469 U.S. 287, 293, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).

⁴⁴⁸ *Sandoval*, 532 U.S. at 285–86 (citation omitted).

⁴⁴⁹ *Id.* at 286.

rights of action to enforce federal law.⁴⁵⁰ A statute that focuses on the person regulated instead of on the individuals to be protected does not imply an intent to confer rights on any particular classes of persons. In this case, “the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI’s protection,” because the section “focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.”⁴⁵¹ The Court pointed out that Section 602 authorizes agencies to enforce the regulations by terminating funding or “any other means authorized by law,”⁴⁵² but that a private right of action does not exist to enforce disparate impact regulations promulgated under Title VI. The authority given to issue regulations indicated not the intent of Congress to sanction a right of action under the regulations but rather the opposite,⁴⁵³ “[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.”⁴⁵⁴

In 2002, in *Gonzaga University v. Doe*,⁴⁵⁵ in a case involving the improper or unauthorized release of personal information under the Family Educational Rights and Privacy Act of 1974 (FERPA),⁴⁵⁶ the Court held that “the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. § 1983.”⁴⁵⁷ Under FERPA, federal funds to a university “may be terminated only if the Secretary determines that a recipient institution ‘is failing to comply substantially with any requirement of [FERPA]....’”⁴⁵⁸ According to the Court, however, the statutory regime does not “confer [] upon any student enrolled at a covered school or institution a federal right, enforceable in suits for damages under § 1983, not to have ‘education records’ disclosed to unauthorized persons without the student’s express written consent.”⁴⁵⁹ The Court stated it had “never” held “that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights.”⁴⁶⁰

The Court continued and stated emphatically that it “now reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”⁴⁶¹ The statute, not the regulations, must have “rights-creating language” before a claim may be pursued under § 1983 that “‘by itself does not protect anyone against anything.’”⁴⁶² The Court emphasized that under FERPA the Congress authorized the Secretary of Education to handle violations of the Act.⁴⁶³

Recent cases decided by courts of appeals have followed the *Sandoval* and *Gonzaga* decisions. In *South Camden Citizens in Action*, the Third Circuit held that “a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.”⁴⁶⁴ The court rejected the contrary view of the Sixth Circuit in *Loschivo v. City of Dearborn* and held that “the EPA’s disparate impact regulations cannot create a federal right enforceable through section 1983.”⁴⁶⁵ It may be noted that Justice O’Connor, on behalf of four Justices in *Wright v. City of Roanoke Redevelopment and Housing Authority*, had stated that the question of “whether administrative regulations alone could create such a right” is “a troubling issue.”⁴⁶⁶

In 2003, in *Save Our Valley v. Sound Transit (Central Puget Sound Regional Transit Authority)*,⁴⁶⁷ the plaintiff, a community advocacy group, challenged the defendant Regional Transit Authority’s plan to build a light-rail line through the community. The plaintiff argued that the project would “cause disproportionate adverse impacts to minority residents.”⁴⁶⁸ The plaintiff alleged that the proposed line “violated a Department of Transportation ‘disparate impact’ regulation—promulgated pursuant to Title VI of the Civil Rights Act of 1964....”⁴⁶⁹ The court noted that the department’s disparate impact regulations go further than the statute they implement, “proscribing activities that

⁴⁵⁰ *Id.* at 289.

⁴⁵¹ *Id.* (citation omitted).

⁴⁵² *Id.*, quoting 42 U.S.C. § 2000d-1.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 293 (Stevens, Souter, Ginsburg, & Breyer, JJ., dissenting).

⁴⁵⁵ 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

⁴⁵⁶ 20 U.S.C. § 1232(g).

⁴⁵⁷ *Gonzaga Univ.*, 536 U.S. at 276.

⁴⁵⁸ *Id.* at 279, citing 20 U.S.C. §§ 1234c(a), 1232g(f).

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 283.

⁴⁶² *Id.* at 285, quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979).

⁴⁶³ *Id.* at 289.

⁴⁶⁴ 274 F.3d 771, 790 (2001).

⁴⁶⁵ *Id.* at 788.

⁴⁶⁶ *Id.* at 781, quoting *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 437, 107 S. Ct. 766, 777–78, 93 L. Ed. 2d 781, 797 (1987) (O’Connor, J., dissenting) (emphasis in original) (*Wright superseded by statute* as stated in *McDowell v. Philadelphia Housing Auth.*, 2005 U.S. App. LEXIS 19711 (3d Cir. 2005)).

⁴⁶⁷ 335 F.3d 932 (9th Cir. 2003).

⁴⁶⁸ *Id.* at 934.

⁴⁶⁹ *Id.* at 935.

have disparate effects on racial groups, even though such activities are permissible under § 601.⁴⁷⁰

The Ninth Circuit ruled that violations of rights, not violations of laws, gave rise to § 1983 actions; that plaintiffs suing under § 1983 must demonstrate that a statute, not a regulation, conferred an individual right; and that the paramount consideration was to determine whether Congress intended to create the particular federal right sought to be enforced. The Ninth Circuit stated:

Section 1983 creates a cause of action against any person who, acting under color of state law, abridges “rights, privileges, or immunities secured by the Constitution and laws” of the United States.... The Supreme Court has held that only violations of rights, not laws, give rise to § 1983 actions.... This makes sense because § 1983 merely provides a mechanism for enforcing individual rights “secured” elsewhere, i.e., rights independently “secured by the Constitution and laws” of the United States. “One cannot go into court and claim a ‘violation of § 1983’—for § 1983 by itself does not protect anyone against anything....”

The Third, Fourth, and Eleventh Circuits have held that an agency regulation cannot create an individual federal right enforceable through § 1983....

Since only Congress can create implied rights of action (as the Court held in *Sandoval*), the Court's Gonzaga holding suggests that only Congress can create rights enforceable through § 1983.⁴⁷¹

In addition, the Ninth Circuit, with respect to the disparate-impact regulation at issue in that case, held that the plaintiff “cannot enforce the disparate-impact regulation. Even if a regulation in general *could* create an individual federal right enforceable through § 1983, it is plain that the...regulation at issue here does not create such a right.... Congress in § 602 did not authorize federal agencies to create new rights.”⁴⁷² Thus, “[t]he disparate-impact regulation cannot create a new right; it can only ‘effectuate’ a right already created by § 601. And § 601 does not create the right that SOV [Save Our Valley] seeks to enforce, the right to be free from racially discriminating effects.”⁴⁷³

In 2004, in *Bonano v. East Caribbean Airline Corporation*,⁴⁷⁴ the plaintiff had contracted with the defendants for air transportation and related travel services. When the airlines defaulted on the contract, the plaintiff sued, alleging, *inter alia*, violations of the Federal Aviation Act and regulations

thereunder.⁴⁷⁵ The district court based its determination that an implied private right of action existed primarily on 14 C.F.R. § 380.4.

However, based on the text of the Act, the First Circuit held that no private right of action existed. The appellate court determined that the Act was regulatory in nature, and private rights of action were rarely implied where a statute's core function was to furnish directives to a federal agency. The court ruled that there was no private right of action and hence no basis for jurisdiction.

We begin with the obvious: Congress, with a single exception (not applicable here, but discussed *infra*), has not explicitly provided for private enforcement of the Act. Consequently, if a private right of action exists, it must be implied. In recent years, the Supreme Court has clarified the principles that must be used to determine the existence *vel non* of an implied private right of action.... Those clarifying decisions necessarily guide our analysis.

A private right of action, like substantive federal law itself, must be created by Congress.... The judiciary's task is to interpret the statute that Congress has enacted in order to determine what the statute reveals about Congress's intentions.⁴⁷⁶

As discussed below, § 1983 does not itself create any substantive rights but provides a civil remedy for the deprivation of federal statutory or constitutional rights. Admittedly, “[t]here is virtually no limit on the types of causes of action allowable under the Act.”⁴⁷⁷ However, to seek such relief, “a plaintiff must assert the violation of a federal right, not merely a violation of federal law.”⁴⁷⁸ Furthermore, “[t]he fact that Congress included in section 602 so detailed an enforcement scheme strongly suggests that it did not intend to permit, in the alternative, private lawsuits to enforce section 602.”⁴⁷⁹ Finally, the Supreme Court held in *Seminole Tribe of Florida v. Florida*⁴⁸⁰ that no relief under § 1983 was available under the *Ex parte Young* doctrine “where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right....”⁴⁸¹

⁴⁷⁵ *Id.* at 83, citing 14 C.F.R. §§ 380.12, 380.32(f) & (k), 380.34.

⁴⁷⁶ *Id.* at 83–84 (citations omitted).

⁴⁷⁷ *Rossiter v. Benoit*, 152 Cal. Rptr. 65, 88 Cal. App. 3d 706 (1979) (claimant sued for mental distress for an arrest for public drunkenness).

⁴⁷⁸ *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569, 582 (1997) (emphasis in original) (citation omitted).

⁴⁷⁹ *Lambert*, *supra* note 443, at 1246.

⁴⁸⁰ 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

⁴⁸¹ *Id.* at 74. Moreover, “[e]ven before *Seminole*, it was clear that no § 1983 claim (based on a federal constitu-

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 939 (citations omitted).

⁴⁷² *Id.* at 944.

⁴⁷³ *Id.*

⁴⁷⁴ 365 F.3d 81 (1st Cir. 2004).

3. Administrative Enforcement Procedures

The regulations list the types of discrimination prohibited by any recipient through any program for which federal financial assistance is provided by the U.S. DOT.⁴⁸² As a precondition to receiving federal financial assistance, a recipient must provide assurances to the U.S. DOT that it will comply with the requirements.⁴⁸³ The Secretary of the U.S. DOT must seek the cooperation of a recipient and provide guidance to it in its attempt to comply voluntarily with the regulations.⁴⁸⁴

The disparate impact regulations generally identify two ways in which the disparate impact policies are enforced. First, federal financial assistance may be refused if an applicant “fails or refuses to furnish an assurance required under [49 C.F.R.] § 21.7 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section....”⁴⁸⁵ Section 21.13 of the Department’s regulations identifies the procedures that apply when the Department seeks to terminate financial assistance or to refuse to grant or to continue such assistance. A hearing, which occurs before either the Secretary or a hearing examiner, must precede any adverse action taken against an applicant or recipient of federal funds.⁴⁸⁶

As stated, under Title VI and regulations thereto the states must give certain assurances to the U.S. DOT. Moreover, as set forth in U.S. DOT Order 1050.2, the states are required to take affirmative action to correct any violations found by the FHWA within a reasonable time period not to exceed 90 days⁴⁸⁷ and to have an adequately staffed civil rights unit and designated coordinator.⁴⁸⁸ When there is a review under the regulations, if a report notes violations and makes recommendations, an FHWA Divisional Administrator, who oversees the state’s administration of the Federal-aid program and other federal requirements, must forward the report to the state highway agency for corrective action.⁴⁸⁹ After a meeting with the state no later

tional violation or an “and laws” claim based on violation of a federal statute) lies in any forum against a state in its own name.” HAROLD S. LEWIS & ELIZABETH J. NORMAN, *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* § 10.35 (2d ed. 2004), at 630 (hereinafter “LEWIS & NORMAN”), citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989).

⁴⁸² 49 C.F.R. §§ 21.3, 21.5.

⁴⁸³ *Id.* § 21.7.

⁴⁸⁴ *Id.* § 21.9.

⁴⁸⁵ *Id.* § 21.13(b).

⁴⁸⁶ *Id.* § 21.15(d).

⁴⁸⁷ 23 C.F.R. § 200.9(a)(1-4).

⁴⁸⁸ *Id.* § 200.9(b)(1-15).

⁴⁸⁹ *Id.* § 200.11(a).

than 30 days after receipt of the report, the state is allowed a reasonable time, not to exceed 90 days, for voluntary corrective action.⁴⁹⁰ FHWA provides assistance with respect to the state’s attempt to comply voluntarily. If the state fails to comply, then the division administrator recommends that the state be found in noncompliance and that the Office of Civil Rights make an additional determination.⁴⁹¹ The foregoing actions are reviewed by the Secretary of the U.S. DOT for final determination and appropriate action in accordance with Title 49 of the C.F.R.⁴⁹²

In training material disseminated by the U.S. DOT, the Department has summarized the substance of the procedure.

In a disparate impact case, the focus of the investigation concerns the consequences of the recipient’s practices, rather than the recipient’s intent. To establish liability under disparate impact, the investigating agency must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on a group protected by Title VI. If the evidence establishes a prima facie case, the investigating agency must then determine whether the recipient can articulate a substantial legitimate justification for the challenged practice. To prove a substantial legitimate justification, the recipient must show that the challenged policy was necessary to meeting a goal that was legitimate, important, and integral to the recipient’s mission.

If the recipient can make such a showing, the inquiry must focus on whether there are any equally effective alternative practices that would result in less adverse impact or whether the justification proffered by the recipient is actually a pretext for discrimination.

If a substantial legitimate justification is identified, the third stage of the disparate impact analysis is the complainant’s demonstration of a less discriminatory alternative.⁴⁹³

A decision is then issued, followed by recommendations for compliance if a violation of Title VI is found likely to exist.

The second way in which the disparate impact policies are enforced is when a complaint alleging a violation of the policies is filed with the funding agency.⁴⁹⁴ U.S. DOT’s regulations provide that “[a]ny person who believes himself or any specific class of persons to be subjected to discrimination

⁴⁹⁰ *Id.* § 200.11(b-c).

⁴⁹¹ *Id.* § 200.11(e-f).

⁴⁹² *Id.* § 200.11(f).

⁴⁹³ U.S. DEP’T OF TRANSP., COMPLAINTS INVESTIGATIONS REFERENCE NOTEBOOK FOR CIVIL RIGHTS PERSONNEL, <http://www.fhwa.dot.gov/download/module3.pdf>.

⁴⁹⁴ 49 C.F.R. § 21.11(b). See generally U.S. DOT Order 1000.12, at V-1-V-10 (Jan. 19, 1977).

prohibited by this part may by himself or by a representative file with the Secretary [of the Department of Transportation] a written complaint.⁴⁹⁵ The Secretary must investigate a complaint by an allegedly injured party or by his or her representative within 180 days after the alleged discrimination complaint is filed.⁴⁹⁶ If the investigation results in a finding of noncompliance, then the Secretary must inform the recipient of funds and attempt to resolve the matter informally.⁴⁹⁷ “If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means,” then the state’s noncompliance may result in the cessation of federal financial assistance and a recommendation to the Department of Justice.⁴⁹⁸ The U.S. Department of Justice may enforce any rights the United States has under any federal law, any applicable proceeding pursuant to any state or local law, and any other means necessary against the recipient.⁴⁹⁹ Not only may there be a hearing,⁵⁰⁰ but also judicial review is permitted for action taken pursuant to Title VI, Section 602.⁵⁰¹

In summary, although private suits may be brought under Title VI and § 1983 for intentional discrimination, the Supreme Court has eliminated Title VI and its implementing regulations as the means by which private redress may be sought for government action alleged to have a disparate impact on minority groups. The sole remedy for a claim of disparate impact caused by a project is as provided under the above regulations.

D. CLAIMS UNDER 42 U.S.C. § 1983

1. Constitutional and Statutory Framework

Section 1983 is based on the constitutional authority of Congress to enforce the Fourteenth Amendment. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Section 1983 is a powerful lure for potential plaintiffs because in addition to injunctive and declaratory relief, the courts may award money damages and attorney’s fees. States have immunity under the Eleventh Amendment; thus, states and their agencies are not amenable to suit under § 1983.⁵⁰² State personnel may be sued only when not acting in their official capacity.⁵⁰³ Moreover, not all state personnel may be sued, because § 1983 only applies to persons acting under color of state law.⁵⁰⁴ Section 1983 does not apply to parties acting under color of federal law.⁵⁰⁵ An individual state defendant may be held “liable” for injunctive relief.⁵⁰⁶

Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere.⁵⁰⁷ Section 1983 does not create a cause of action in and of itself. Rather, the plaintiff must prove that he or she was

⁵⁰² *Coger v. Connecticut*, 309 F. Supp. 2d 274, 281 (D. Conn. 2004); *Cummings v. Vernon*, No. 95-35460 1996 U.S. App. LEXIS 11051 (April 11, 1996); *Fidtler v. Pa. Dep’t of Corr.*, 55 Fed. Appx. 33 (3d Cir. 2002).

⁵⁰³ *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (dismissing a suit where an action was brought against a state official in his official capacity); *Printz v. United States*, 521 U.S. 898, 930–31, 117 S. Ct. 2365, 2382, 138 L. Ed. 2d 914, 941–42 (1997) (stating that a suit against a state official in his or her official capacity is a suit against the state); *Hafer v. Melo*, 502 U.S. 21, 22, 112 S. Ct. 358, 360, 116 L. Ed. 2d 301, 308 (1991) (stating that a suit against an official in his or her official capacity is outside the class of persons subject to liability under § 1983).

⁵⁰⁴ *See West v. Atkins*, 487 U.S. 42, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988) (holding that state employees act under color of state law when acting in their official capacities or when they exercise their responsibilities pursuant to state law).

⁵⁰⁵ *Jarno v. Lewis*, 256 F. Supp. 2d 499, 502 (E.D. Va. 2003) (citations omitted).

⁵⁰⁶ *See Will*, 491 U.S. at 71 n.10 (stating that a state official sued in his or her official capacity for injunctive relief would be a person under § 1983 because such actions for prospective relief are not treated as actions against the state), *citing Kentucky v. Graham*, 473 U.S. at 167 n.14 and *Ex parte Young*, 209 U.S. 123, 159–60 (1908); *but see National Private Truck Council v. Okla. Tax Comm’n*, 515 U.S. 582, 588 n.5, 115 S. Ct. 2351 n.5, 132 L. Ed. 2d 509 n.5 (1995) (noting that injunctive or declaratory relief is not authorized under a § 1983 claim dealing with taxes where there is an adequate remedy at law).

⁵⁰⁷ *Mosely v. Yaletsko*, 275 F. Supp. 2d 608, 612 (E.D. Pa.) (Section 1983 itself does not create a cause of action but rather provides redress for violations of constitutional provisions and federal laws).

⁴⁹⁵ 49 C.F.R. § 21.11(b).

⁴⁹⁶ *Id.* § 21.11(a–c).

⁴⁹⁷ *Id.* § 21.11(d).

⁴⁹⁸ *Id.* § 21.13(a).

⁴⁹⁹ *Id.* § 21.13(a).

⁵⁰⁰ *Id.* § 21.15.

⁵⁰¹ *Id.* § 21.19; *see* Title VI § 603 (outlining judicial review available for actions taken pursuant to § 602).

deprived of a right secured by the United States Constitution or the laws of the United States and that the deprivation of his or her right was caused by someone acting under color of state law.⁵⁰⁸ Thus, a § 1983 claim requires that the plaintiff establish that there has been a deprivation of some right, privilege, or immunity secured by either the United States Constitution or by a federal statute.⁵⁰⁹ As discussed later, not all federal statutes, however, may be enforced through § 1983 actions.

With respect to disparate impact and § 1983, the Supreme Court does not support such a claim under that section. As one author states, “[t]he Supreme Court has held that claims under 42 U.S.C.A. Section 1981 require a showing of intent rather than disparate impact,” citing *General Building Contractors Association*.⁵¹⁰ Also citing *General Building Contractors Association*, the Court in *Gratz v. Bollinger*⁵¹¹ stated that “purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981.”

As discussed below, neither a state transportation department nor its officers sued in their official capacities are amenable to suit under § 1983. Moreover, government officials who are sued also

⁵⁰⁸ *Hale v. Vance*, 267 F. Supp. 2d 725 (S.D. Ohio 2003); *Davis v. Olin*, 886 F. Supp. 804 (D. Kan. 1995).

⁵⁰⁹ *Maine v. Thiboutot*, 448 U.S. 1, 5, 100 S. Ct. 2502, 2503, 65 L. Ed. 2d 555, 559 (1980).

⁵¹⁰ Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 622 n.43 (2004), citing *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 102 S. Ct. 3141, 3150, 73 L. Ed. 2d 835, 849 (1982). As the Court explained in *General Bldg. Contractors Ass'n*, 458 U.S. at 389–90, 102 S. Ct. at 3150, 73 L. Ed. 2d at 849 (some citations omitted):

[T]he 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself....

With respect to the latter, official action will not be held unconstitutional solely because it results in a racially disproportionate impact.... [Even] if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.... See *Washington v. Davis*, 426 U.S. 229 (1976)....

We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination.

⁵¹¹ 539 U.S. at 276 n.23 (emphasis supplied).

may have absolute or qualified immunity for § 1983 claims. Next, the report discusses some of the elements of a § 1983 action regardless of whether there is immunity. Because there is a dearth of § 1983 cases specifically against state transportation departments and their officials, the principles stated herein are derived from cases against municipal and other government agencies and officials who are amenable to suit under § 1983. In some limited situations, private companies or individuals may be subject to suit under § 1983 because they have acquired the status or condition of a state actor. The final sections of the report discuss remedies and attorney's fees incident to § 1983 litigation.

2. Meaning of “Persons” Under § 1983

a. “Persons” Under § 1983 and Sovereign Immunity

Under § 1983 “every person” is potentially liable. Although municipalities are persons under § 1983,⁵¹² a state or state agency is not a person under § 1983⁵¹³ and cannot be sued under § 1983 in a state or federal court;⁵¹⁴ nor is a state official sued in his or her official capacity a person under § 1983.⁵¹⁵ Although § 1983 does not restrict a state's Eleventh Amendment immunity,⁵¹⁶ there are two exceptions. First, a state may be sued where Congress enacts legislation pursuant to Section 5 of the Fourteenth Amendment unequivocally expressing its intent to abrogate the states' Eleventh Amendment immunity.⁵¹⁷ Second, a state may consent to suit in federal court.⁵¹⁸

⁵¹² *Monell v. N.Y. City Dep't of Social Services*, 436 U.S. 658, 688–90, 98 S. Ct. 2018, 2034–35, 56 L. Ed. 2d 611, 634–35 (1978).

⁵¹³ A state transportation department is not a person subject to suit under § 1983. *Vickroy v. Wis. Dep't of Transp.*, 73 Fed. Appx. 172, 173 (7th Cir. 2003); *Jimenez v. New Jersey*, 245 F. Supp. 2d 584, 586 n.2 (D. N.J. 2003); *Manning v. S.C. Dep't of Highways and Pub. Transp.*, 914 F.2d 44, 48 (4th Cir. 1990); *Will v. Mich. Dep't of State Policy*, 491 U.S. 58, 65–66, 109 S. Ct. 2304, 2309, 105 L. Ed. 2d 45 (1989).

⁵¹⁴ *Nichols v. Domley*, 266 F. Supp. 2d 1310, 1313 (D. N.M. 2003).

⁵¹⁵ *Murphy v. Arkansas*, 127 F.3d 750, 754 (8th Cir. 1997).

⁵¹⁶ *Beach v. Minnesota*, No. 03-CV-862 (MJO/JGL), 2003 U.S. Dist. LEXIS 10856, at *8 (June 25, 2003), citing *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); see *Williams v. State of Missouri*, 973 F.2d 599, 600 (8th Cir. 1992).

⁵¹⁷ *Beach*, 2003 U.S. Dist. LEXIS 10856, at *7, citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L. Ed. 2d 67, 77–78 (1984);

Thus, the enactment of § 1983, creating a cause of action for deprivation of civil rights under color of state law, did not abrogate the states' sovereign immunity under the Eleventh Amendment to the United States Constitution.⁵¹⁹ The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The amendment protects an unconsenting state and state agencies but not units of local government from claims for damages and actions brought by private parties in federal courts.⁵²⁰

In *Alden v. Maine*⁵²¹ the Supreme Court held in a case involving the Fair Labor Standards Act⁵²² that Congress did not have the power to subject a non-consenting state to private suits for damages in the state's own courts. In regard to § 1983, in *Will v. Michigan Department of State Police*⁵²³ the Supreme

Court held that states are not within the statute's category of possible defendants and are not subject to suit.

Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. *The Eleventh Amendment bars such suits unless the State has waived its immunity*, *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 472-473 (1987) (plurality opinion), or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect was made clear in our decision in *Quern*. Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.⁵²⁴

Although state officials may be sued in their individual capacities for damages under § 1983 for depriving citizens of their federal constitutional and federal statutory rights (*see* part B.2, *infra*), a state transportation department is not subject to suit under § 1983.⁵²⁵ In *Manning v. South Carolina Department of Highway and Public Transportation*⁵²⁶ the plaintiff alleged that the department and certain officials thereof in the course of condemning the plaintiff's property violated the plaintiff's constitutional rights of due process.⁵²⁷ The court held that neither the department nor its officials acting in their official capacities were persons amenable to suit under § 1983.⁵²⁸

In *Vickroy v. Wisconsin Department of Transportation*, the plaintiffs, who were injured in an automobile accident, argued "that the Department violated their constitutional rights to travel...by causing or permitting road designs that lead to accidents."⁵²⁹ The court, while also agreeing that the plaintiffs' claim was frivolous, held that there was an "antecedent" problem in that the department was a unit of state government and thus not a person amenable to suit under § 1983.⁵³⁰ As explained in *Toledo, Peoria & Western Railroad Co. v. State of*

Egerdahl v. Hibbing Cmty. College, 72 F.3d 615, 619 (8th Cir. 1995).

⁵¹⁸ *Beach*, 2003 U.S. Dist. LEXIS 10856, at *8, *citing* *Clark v. Barnard*, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883); *Parden v. Terminal Ry.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964).

⁵¹⁹ *Quern v. Jordan*, 440 U.S. 332, 345, 99 S. Ct. 1139, 1147, 59 L. Ed. 2d 358, 369 (1979); *In re Secretary of Dep't of Crime Control and Pub. Safety*, 7 F.3d 1140, 1145 (4th Cir. 1993).

⁵²⁰ *Quern*, 440 U.S. at 338 ("This suit is brought by Illinois citizens against Illinois officials. In that circumstance, Illinois may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States." *Id.* at 349 (Brennan, J., concurring opinion).

⁵²¹ 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). The Court explained that

[t]he Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for *the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today....*

Id. at 712 (emphasis supplied).

⁵²² 29 U.S.C. § 201, *et seq.*

⁵²³ 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

⁵²⁴ *Id.* at 66 (emphasis supplied).

⁵²⁵ *Vickroy*, 73 Fed. App. 172.

⁵²⁶ 914 F.2d 44 (4th Cir. 1990).

⁵²⁷ *Id.* at 46-47.

⁵²⁸ *Id.* at 46-48 (emphasis supplied).

⁵²⁹ *Vickroy*, 73 Fed. App. at 173.

⁵³⁰ *Id.* at 173-74.

Illinois, Department of Transportation,⁵³¹ such an action lacks federal jurisdiction. In the *Toledo, Peoria & Western Railroad Co.* case the department and its officials appealed a mandatory injunction that had directed them to restore to the company "all possessory rights as the fee simple owner of a plot of land...."⁵³² The action was dismissed against the department: "federal courts lack jurisdiction over this matter as a section 1983 suit because a state agency is not a 'person' within the meaning of the Civil Rights Act."⁵³³

It does not appear that recently there have been many attempted § 1983 actions against transportation departments and their officials. As stated, such actions have been dismissed because of the states' immunity under the Eleventh Amendment. For instance, in *Gregory v. South Carolina Department of Transportation*,⁵³⁴ the plaintiff and property owner "claim[ed] that the state defendants targeted him and his neighborhood for a systematic undervaluation appraisal because of his race" in connection with the state's use of eminent domain to acquire property for a specific bridge project.⁵³⁵ The court ruled that the claim was barred by the Eleventh Amendment.

The practical effect of the Eleventh Amendment in modern Supreme Court jurisprudence is that "non-consenting States may not be sued by private individuals in federal court." In order for Congress to abrogate the states' sovereign immunity as granted by the Eleventh Amendment, Congress must 1) intend to do so unequivocally and 2) act under a valid grant of constitutional authority....

⁵³¹ *Toledo, Peoria & W. R.R. Co. v. State of Ill., Dep't of Transp.*, 744 F.2d 1296 (7th Cir. 1984).

⁵³² *Id.* at 1297.

⁵³³ *Id.* The court observed that

[T]he Third, Fifth, and Ninth Circuits agree. *Ruiz v. Estelle*, 679 F.2d 1115, 1137 (5th Cir. 1982) (in enacting section 1983, Congress did not intend to override the traditional immunity of states and state agencies), amended and vacated in part, 688 F.2d 266, cert. denied, 460 U.S. 1042, 103 S. Ct. 1438, 75 L. Ed. 2d 795 (1983); *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84, 86 & n.2 (3d Cir. 1969) (rule that local governments are not "persons" (since overruled by Supreme Court) also applies to states), cert. denied, 396 U.S. 1046, 90 S. Ct. 696, 24 L. Ed. 2d 691 (1970); *Bennett v. California*, 406 F.2d 36, 39 (9th Cir. (1969)) (state's immunity extends to suits under Civil Rights Act), cert. denied, 394 U.S. 966, 22 L. Ed. 2d 568, 89 S. Ct. 1320 (1969). See also *Ohio Inns, Inc. v. Nye*, 542 F.2d 673, 676, 680-81 (6th Cir. 1976) (state immunity not waived; open question whether state is "person" under section 1983), cert. denied, 430 U.S. 946, 97 S. Ct. 1583, 51 L. Ed. 2d 794 (1977) n.1. This section 1983 action against IDOT, a state agency, fails for lack of federal court jurisdiction. *Id.* at 1298-99.

⁵³⁴ 289 F. Supp. 2d 721, 723 (2003).

⁵³⁵ *Id.* at 723.

Plaintiff's suit against the South Carolina Department of Transportation is barred by the Eleventh Amendment. The Fourth Circuit has recognized that the South Carolina State Highway Department ("SCSHD") was protected by the Eleventh Amendment and thus was not amenable to suit unless Congress abrogated its rights under existing law. The South Carolina Department of Transportation ("SCDOT") replaced the SCSHD for all practical purposes as of 1993. See S.C. Code Ann. § 57-3-10 (2002) (the notes following state, "The 1993 amendment established the structure of the Department of Transportation, in place of former provisions establishing the Department of Highways and Public Transportation, pursuant to a restructuring of the Department").⁵³⁶

The court further noted that "a general jurisdictional grant does not suffice to show [that] Congress abrogated a state's Eleventh Amendment rights...."⁵³⁷

More recently, in *Paulson v. Carter*⁵³⁸ a federal district court agreed that the Oregon State Bar (OSB) and officials of the OSB acting in their official capacity were not persons within the meaning of § 1983. As explained by the Ninth Circuit, "claims under § 1983 are limited by the scope of the Eleventh Amendment."⁵³⁹ Accordingly, "state officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983.... Moreover, states or governmental entities that are considered arms of the State for Eleventh Amendment purposes are not persons under § 1983."⁵⁴⁰

As explained also in *Beach v. Minnesota*,⁵⁴¹ the Supreme Court has interpreted the Eleventh Amendment as barring individual citizens from suing states in federal court, including their own state.⁵⁴² Thus, a § 1983 claim brought by a terminated administrative law judge for the state's Department of Motor Vehicles against the department was barred by the Eleventh Amendment because the department was a state agency.⁵⁴³ Sovereign

⁵³⁶ *Id.* at 724 (some internal citations omitted).

⁵³⁷ *Id.* at 725, citing *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991).

⁵³⁸ No. CV-04-1501-40, 2005 U.S. Dist. LEXIS 10724 (D. Or. Jan. 6, 2005).

⁵³⁹ *Id.* at *16, citing *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997).

⁵⁴⁰ *Id.* at *15 (citations omitted).

⁵⁴¹ No. 03-CV-862 (MJO/JGL), 2003 U.S. Dist. LEXIS 10856 (D. Minn. June 25, 2003).

⁵⁴² *Id.* at **6-7, citing *Hans v. Louisiana*, 134 U.S. 1, 10, 10 S. Ct. 504, 505, 33 L. Ed. 842 (1890); *Murphy v. State of Ark.*, 127 F.3d 750, 754 (8th Cir. 1997).

⁵⁴³ *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir. 2004).

immunity will defeat entirely a suit under § 1983,⁵⁴⁴ except that states retain no sovereign immunity as against the federal government,⁵⁴⁵ and one may bring a § 1983 action against state officials in their official capacities for prospective, injunctive relief.⁵⁴⁶ See subsection E, *infra*.

b. “Persons” Under § 1983 and Government Officials

When a governmental official is sued both in his or her official and individual capacities for acts performed in each capacity, the alleged acts are treated as transactions of two different legal personages.⁵⁴⁷ The state’s sovereign immunity extends to protect individual defendants sued in their official capacities because the “Eleventh Amendment bars a suit by private parties to recover money damages from the state or its *alter egos* acting in their official capacities.”⁵⁴⁸ To the extent the allegations are against the individual defendants in their individual or nonofficial capacities, they are considered persons under § 1983.⁵⁴⁹ Section 1983 defendants must be connected in some way with a unit of state or local government separate from the state to meet the state action requirement. However, “[s]tate employees in their individual capacities...may be liable for damages under § 1983, even when the conduct in question is related to their official duties.”⁵⁵⁰ A private person may be a defendant if he or she has acted in conjunction with a governmental entity.⁵⁵¹ Only personal liability is established by showing merely that an official, acting under color of state law, caused the deprivation of a federal right.⁵⁵²

In *Toledo, Peoria & Western Railroad Co.*, the claim against the departmental officials was dismissed as well. The Seventh Circuit explained that

⁵⁴⁴ *Wood v. Strickland*, 420 U.S. 308, 317, 95 S. Ct. 992, 998, 43 L. Ed. 2d 214, 222 (1975).

⁵⁴⁵ *United States v. Miss. Dep’t of Pub. Safety*, 321 F.3d 495, 498 (5th Cir. 2003) (ADA); *West Virginia v. United States*, 479 U.S. 305, 312 n.4, 107 S. Ct. 702, 707 n.4, 93 L. Ed. 2d 639, 647 n.4 (1987).

⁵⁴⁶ *Miller v. King*, 384 F.3d 1248, 1260 (11th Cir. 2004).

⁵⁴⁷ *Johnson v. Bd. of County Comm’rs for County of Fremont*, 85 F.3d 489 (10th Cir. 1996).

⁵⁴⁸ *Gregory*, 289 F. Supp. 2d at 725, quoting from *Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1138 (4th Cir. 1990).

⁵⁴⁹ *Paulson*, 2005 U.S. Dist. LEXIS 10724 at *16.

⁵⁵⁰ *McCoy v. Goord*, 255 F. Supp. 2d 233, 245 (S.D.N.Y. 2003) (citation omitted) (involving prisoner’s claims of excessive force and lack of medical care).

⁵⁵¹ *Adickes v. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 1605–06, 26 L. Ed. 2d 142, 151 (1970).

⁵⁵² *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114, 122 (1985).

“[a] state official acting under color of state authority may be treated as a ‘person’ under section 1983.”⁵⁵³ However, “[t]he official may be sued [only] in his own right, in a suit that is not against the state, for acts outside his statutory authority or for acts within authority that is claimed to be unconstitutional.”⁵⁵⁴ The action was really only one against the state as it was the state that held “the disputed interest in the property.”⁵⁵⁵

In a case involving a claim against officers of the state’s public safety department alleging that they had violated the plaintiff’s constitutional rights under the First, Fourth, and Fourteenth Amendments, the court held that “[a]n official sued in his or her individual capacity is not cloaked in the state’s Eleventh Amendment protection from suit and can be a ‘person’ liable under Section 1983 for deprivation of federal rights.”⁵⁵⁶ As discussed below, under some circumstances a government officer otherwise amenable to suit under § 1983 may be shielded from liability by the doctrine of qualified immunity if his or her conduct did not violate clearly established constitutional rights about which a reasonable official would have known.

c. “Persons” Under § 1983 and Absolute or Qualified Immunity

Absolute Immunity.—Assuming that the individual defendant is amenable to suit under § 1983, there are, nevertheless, two types of immunity—absolute and qualified—that are available under the common law of governmental liability that remain available to public officials under § 1983. Absolute immunity protects government officials from liability completely but is accorded to public officials only in limited circumstances.⁵⁵⁷ Absolute immunity is available if the action in controversy is legislative, prosecutorial, or judicial in nature. To determine whether a defendant is entitled to absolute immunity requires that the court “evaluat[e] whether the official’s action is functionally comparable to that of judges.”⁵⁵⁸ As one district court has noted, “[t]ruly judicial acts’ are among the few functions accorded the more encompassing protections of absolute immunity.”⁵⁵⁹ One looks at the function performed rather than the identity of the actor.⁵⁶⁰

⁵⁵³ *Toledo, Peoria & W. R.R. Co.*, 744 F.2d at 1299.

⁵⁵⁴ *Id.* (citation omitted).

⁵⁵⁵ *Id.*

⁵⁵⁶ *Flores v. Long*, 926 F. Supp. 166, 168 (D. N.M. 1995).

⁵⁵⁷ *Borzyc v. Frank*, 340 F. Supp. 2d 955, 963 (W.D. Wisc. 2004).

⁵⁵⁸ *Id.* (citation omitted).

⁵⁵⁹ *Id.*, quoting *Forrester v. White*, 484 U.S. 219, 226–27, 108 S. Ct. 538, 543–44, 98 L. Ed. 2d 555, 564–65 (1988).

⁵⁶⁰ *Borzyc*, 340 F. Supp. 2d at 963–64.

Judges are absolutely immune from suits for monetary damages, and such immunity cannot be overcome by allegations of bad faith or malice.⁵⁶¹ Judicial immunity applies to bar an unsuccessful state litigant's § 1983 claims for monetary damages asserted against state judges in their individual capacities.⁵⁶² Judicial immunity can only be overcome if the judge has acted outside the scope of his or her judicial capacity or in the "complete absence of all jurisdiction."⁵⁶³ Persons exercising quasi-judicial functions have been held to have absolute immunity.⁵⁶⁴ In *Guttman v. Khalsa*⁵⁶⁵ an administrative hearing officer and administrative prosecutor for a state medical board were entitled to absolute immunity from liability under § 1983 for their roles in revoking a physician's state medical license. Similarly, prosecutors are absolutely immune from suits for monetary damages "in initiating a prosecution and in presenting the State's case."⁵⁶⁶ It has been held that a prosecutor's withholding of exculpatory evidence is a quasi-judicial act protected by absolute immunity.⁵⁶⁷ Furthermore, such immunity can not be overcome by allegations of malice.⁵⁶⁸

Qualified Immunity.—If absolute immunity is not available, public officials may still enjoy a qualified immunity. The qualified immunity doctrine strikes a balance between compensating those who have been injured by official conduct and protecting the government's ability to perform its traditional functions; in short, qualified immunity acts to safeguard government and thereby "to protect the public at large, not to benefit its agents."⁵⁶⁹

The courts must rule on the qualified immunity issue from the beginning, focusing on the charac-

terization of the constitutional right in controversy and deciding whether, based on the complaint, a constitutional violation is present.⁵⁷⁰ The doctrine requires that a court decide whether a plaintiff's allegation, if true, establishes a violation of a clearly established right. Even if a government official's conduct violates a clearly established right, "the official is nonetheless entitled to qualified immunity if his or her conduct was objectively reasonable."⁵⁷¹ Even an official whose conduct "violates some statutory or administrative provision" does not necessarily lose his or her qualified immunity.⁵⁷²

As the Supreme Court stated in *Davis v. Scherer*, "[t]he qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated."⁵⁷³ Moreover, "[i]n most instances, qualified immunity is regarded as sufficient to protect government officials in the exercise of their duties."⁵⁷⁴ The general rule of qualified immunity is intended to provide officials the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages."⁵⁷⁵

[I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for belief formed at the time and in light of all the circumstances, coupled with good faith belief, that afford a basis for qualified immunity of executive officers for acts performed in the course of official conduct.⁵⁷⁶

A defendant is entitled to qualified immunity only if the constitutional right he or she allegedly violated has not been clearly established.⁵⁷⁷ That is, one is not entitled to qualified immunity when the contours of the violated right have not been defined

⁵⁶¹ *Mireles v. Waco*, 502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed. 2d 9, 14 (1991).

⁵⁶² *Tsabbar v. Booth*, 293 F. Supp. 2d 328 (S.D.N.Y. 2003).

⁵⁶³ *Allen v. Feldman*, No. 03-555-JJF, 2004 U.S. Dist. LEXIS 10330, at *10 (D. Del. June 4, 2004).

⁵⁶⁴ *Van Horn v. Neb. State Racing Comm'n*, 304 F. Supp. 2d 1151, 1158 (D. Neb. 2004); *Mason v. Arizona*, 260 F. Supp. 2d 807, 820–21 (D. Ariz. 2003).

⁵⁶⁵ 320 F. Supp. 2d 1164 (D. N.M. 2003).

⁵⁶⁶ *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128, 144 (1976).

⁵⁶⁷ *Douris v. Schweiker*, 229 F. Supp. 2d 391 (E.D. Pa. 2002).

⁵⁶⁸ *Allen*, 2004 U.S. Dist. LEXIS 10330, at *10 (court dismissed claims against a Delaware state judge, a prosecutor, two public defenders, the Delaware Public Defender Office, the Delaware Public Archives, and the prothonotary of the state superior court brought under 42 U.S.C.S. § 1983).

⁵⁶⁹ *Wyatt v. Cole*, 504 U.S. 158, 168, 112 S. Ct. 1827, 1833, 118 L. Ed. 2d 504, 515 (1992).

⁵⁷⁰ *Carrasquillo v. Rodriguez*, 281 F. Supp. 2d 329, 334 (D.P.R. 2003).

⁵⁷¹ *Hernandez v. Tex. Dep't of Protective and Regulatory Servs.*, 380 F.3d 872, 879 (5th Cir. 2004), citing *Lukan v. N. Forest Indep. Sch. Dist.*, 183 F.3d 342, 346 (5th Cir. 1999).

⁵⁷² *Beltran v. City of El Paso* (5th Cir. 2004), 367 F.3d, 299, 308 (citation omitted).

⁵⁷³ *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed. 2d 139, 150 (1984).

⁵⁷⁴ *Borzych*, 340 F. Supp. 2d at 963.

⁵⁷⁵ *Davis*, 468 U.S. at 195.

⁵⁷⁶ *Scheurer v. Rhodes*, 416 U.S. 232, 247–48, 94 S. Ct. 1683, 1692, 40 L. Ed. 2d 90, 103 (1974).

⁵⁷⁷ *Doe ex rel. Doe v. Haw. Dep't of Educ.*, 334 F.3d 906, 908 (9th Cir. 2003).

with sufficient specificity such that a state official had fair warning that his or her conduct deprived a victim of his or her rights.⁵⁷⁸ In *Davis, supra*, the Supreme Court held that an employee who alleged that his employment was terminated without a due process hearing failed to show that the due process rights were clearly established at the time of the conduct at issue.⁵⁷⁹

As explained in *M.W., etc. v. Madison County Board of Education*,⁵⁸⁰

[t]o overcome qualified immunity, the right allegedly violated must be so clear that any reasonable public official in the defendant's position would understand that his conduct violated the right: "if officers of reasonable competence could disagree on this issue, immunity should be recognized...."

[T]here are two ways in which a plaintiff seeking to overcome the bar of qualified immunity can show that a right was clearly established in the law at the time the alleged violation occurred. First, "a district court within this circuit must be able to 'find binding precedent from the Supreme Court, the Sixth Circuit, or...itself' that directly establishes the conduct in question as a violation of the plaintiff's rights.... If no binding precedent is "directly on point," the court may still find a clearly established right if it can discern a generally applicable principle from either binding or persuasive authorities whose "specific application to the relevant controversy" is "so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional."⁵⁸¹

The doctrine of qualified immunity does not prevent a court from entering an order for declaratory and injunctive relief.⁵⁸² For example, in *Fort Eustis Books, Inc. v. Beale*⁵⁸³ the plaintiffs sought declaratory and injunctive relief against certain city attorneys and police officers in connection with the sei-

zure of plaintiff's property pursuant to a civil *ex parte* "search order." Although the court found that the plaintiff's allegations were insufficient for granting the relief, the court held that the defendants could not claim immunity where the plaintiffs sought only injunctive and declaratory relief.⁵⁸⁴ Furthermore, even though a defendant supervisor possibly would not be liable for damages under § 1983, he was nonetheless "a proper party to a suit to enjoin alleged unconstitutional conduct by the officers under his control."⁵⁸⁵

The qualified immunity doctrine thus "protects government officials who perform discretionary functions from suit and from liability for monetary damages under § 1983."⁵⁸⁶ Thus, as a general rule, in claims arising under federal law government officials acting within their discretionary authority are immune from civil damages if their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁵⁸⁷ The doctrine has protected an official from liability when the official enforced an illegal ordinance that the official thought was valid.⁵⁸⁸ However, a director of a federally funded teaching program was not entitled to qualified immunity where the director required a teacher to sign a release of various documents, including medical records, as a condition to the renewal of the teacher's contract; "qualified immunity does not protect...the plainly incompetent or those who knowingly violate the law."⁵⁸⁹

3. "Under Color of State Law"

a. Applicability of § 1983 to Units of Government Separate from the State

The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such violations of con-

⁵⁷⁸ *Myers v. Baca*, 325 F. Supp. 2d 1095, 1112 (C.D. Cal. 2004). See also *Murphy*, 127 F.3d at 755 (8th Cir. 1997) (the circuit court stating that a right is clearly established for qualified immunity purposes if the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right"), citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

⁵⁷⁹ *Davis*, 468 U.S. at 197.

⁵⁸⁰ 262 F. Supp. 2d 737 (E.D. Ky. 2003).

⁵⁸¹ *Id.* at 744-45 (citations omitted).

⁵⁸² *Hafer*, 502 U.S. at 27; *Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir. 1993), cited in *Meiners v. Univ. of Kansas*, 359 F.3d 1222, 1233, n.3 (10th Cir. 2004) ("Qualified immunity applies to claims for monetary relief against officials in their individual capacities, but it is not a defense against claims for injunctive relief against officials in their official capacities").

⁵⁸³ 478 F. Supp. 1170 (E.D. Va. 1979); see also *infra* note 587 for U.S. Supreme Court decision.

⁵⁸⁴ *Id.* at 1173.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Camilo v. Ramirez*, 283 F. Supp. 2d 440, 449 (D. P.R. 2003).

⁵⁸⁷ *Cagle v. Sutherland*, 334 F.3d 980, 988 (11th Cir. 2003) (internal quotations omitted); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000).

⁵⁸⁸ *Hobbs v. County of Westchester*, 2003 WL 21919882 (S.D.N.Y. 2003) (Unreported).

⁵⁸⁹ *Denius v. Dunlap*, 330 F.3d 919, 928 (7th Cir. 2003); see also *Dunnom v. Bennett*, 290 F. Supp. 2d 860 (S.D. Ohio 2003) (no qualified immunity for a supervisor in a case alleging sexual harassment).

stitutional or statutory rights occur.⁵⁹⁰ The reach of § 1983 was expanded in 1961 when the U.S. Supreme Court decided *Monroe v. Pape*⁵⁹¹ and was extended again by the Court's decision in *Monell v. New York*.⁵⁹² In *Monroe*, the Court held that the phrase "under color of law" included the misuse of power exercised under state law, even though the persons committing the acts that constituted the deprivation of rights were acting beyond the scope of their authority. The Court expanded the meaning of the phrase "under color of law" in this way because it believed that § 1983 was intended to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."⁵⁹³

In 1978, the Supreme Court in *Monell v. New York*⁵⁹⁴ overruled *Monroe v. Pape* insofar as the *Monroe* Court held that local governments were immune from suit under § 1983.⁵⁹⁵ By virtue of the *Monell* decision, municipal corporations are persons amenable to suit under § 1983. The *Monell* Court did uphold the *Monroe* decision insofar as the *Monroe* Court held that the doctrine of *respondeat superior* is not a basis for holding local governments liable under § 1983 for the constitutional torts of their employees.⁵⁹⁶ The *Monell* Court held

that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its law-makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court ...we must reverse the judgment below. In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the

⁵⁹⁰ Wyatt v. Cole, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992).

⁵⁹¹ Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), overruled in Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) insofar as the Court held in *Monroe* that local governments are immune from suit under § 1983. However, the Court upheld *Monroe* insofar as the *Monroe* Court held that the doctrine of *respondeat superior* is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees.

⁵⁹² *Monell*, 436 U.S. at 694–95.

⁵⁹³ *Id.* at 172.

⁵⁹⁴ *Monell*, 436 U.S. at 658.

⁵⁹⁵ *Id.* at 663.

⁵⁹⁶ *Id.* at 663 n.7.

1871 Act and our prior cases, and we expressly leave further development of this action to another day.⁵⁹⁷

In ruling that the Eleventh Amendment is not a bar to municipal liability, the *Monell* Court's holding was limited to "local government units which are not considered part of the state for Eleventh Amendment purposes."⁵⁹⁸

b. Applicability of § 1983 to State Actors

In *Lugar v. Edmondson Oil Co.*⁵⁹⁹ the Court set forth the standard for determining whether a party had acted under color of state law and is therefore subject to suit under § 1983.

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.⁶⁰⁰

A federal district court recently explained the *Lugar* standard in *Yanaki v. Iomed, Inc.*⁶⁰¹ In *Yanaki*, Iomed had filed a complaint against Yanaki alleging that Yanaki had appropriated confidential business information and had violated an employment agreement with Iomed. Iomed's attorneys thereafter obtained an *ex parte* civil "search order" for Yanaki's residence pursuant to which certain computer hardware and records were located and seized. Yanaki thereafter filed a § 1983 claim against the involved attorneys and government officials. The district court held that the plaintiff had failed to state a § 1983 claim. The court stated that the Supreme Court's decision in *Lugar, supra*, "clearly distinguishes between court orders purportedly authorized by unconstitutional statutes and unconstitutional orders purportedly authorized by constitutional statutes. The appropriate use by private litigants of a constitutional statute or rule does not constitute state action for the purposes of § 1983."⁶⁰²

In *Yanaki*, the plaintiff did not argue that the action taken was based on a statute that was uncon-

⁵⁹⁷ *Id.* at 694–95 (citation omitted).

⁵⁹⁸ *Id.* at 691 n.54.

⁵⁹⁹ 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982).

⁶⁰⁰ *Id.* at 937.

⁶⁰¹ 319 F. Supp. 2d 1261 (D. Utah 2004).

⁶⁰² *Id.* at 1265 (citation omitted).

stitutional but argued that the search order was unconstitutional. However, as for the alleged unconstitutional search order, “the mere involvement of a state court or state law enforcement officer in a private matter does not necessarily constitute state action....”⁶⁰³ Another court has stated that § 1983 actions are limited to those state court proceedings that are a “complete nullity.”⁶⁰⁴

As stated, a plaintiff must show that the conduct at issue resulted from state action. As explained in *Allocco v. City of Coral Gables*,⁶⁰⁵ there are other means or tests that have been used to expand the concept of state action. The *Allocco* case involved multiple constitutional and statutory claims against a municipality and the University of Miami (UM), a private institution. The plaintiffs, who had been employed as public safety officers for UM and as part-time law enforcement officers for the city, sought to obtain the same benefits and pay as full-time officers of the city.⁶⁰⁶ The court noted that “only in rare circumstances can a private party be viewed as a state actor for section 1983 purposes.”⁶⁰⁷ The court held that UM did not exercise a “right, privilege, or rule of conduct created by the state.”⁶⁰⁸ However, the court also addressed whether the plaintiffs could demonstrate that UM was a state actor based on the public function test, the state compulsion test, or the nexus/joint action test, which have been used to hold that a private party could be deemed to be a state actor.⁶⁰⁹

Under the public function test, “state action may be found only where the plaintiff is alleging that the private entity violated his constitutional rights while exercising ‘some power delegated to it by the State which is traditionally associated with sovereignty.’”⁶¹⁰ Under the state compulsion test, the government must have “coerced or at least significantly encouraged the action alleged [to have] violate[d] the Constitution.”⁶¹¹ Under the nexus/joint action test, the state must have “so far insinuated

itself into a position of interdependence with the [private party] that it must be recognized as a joint participant in the challenged activity.”⁶¹² In *Allocco*, the court held that the plaintiffs failed to establish that UM was a state actor for § 1983 purposes.

Finally, to be acting under color of state law it appears that the state employee sued in his or her personal capacity must be a supervisor or manager.⁶¹³ As a federal court in the Eastern District of New York has stated, most § 1983 claims “generally involve discrimination by a supervisor at the workplace.”⁶¹⁴

⁶¹² *Id.* at 1376, quoting *Patrick v. Floyd Med. Center*, 201 F.3d 1313, 1315 (11th Cir. 2000).

⁶¹³ *Valentine v. Chicago*, No. 03C2918, 2005 U.S. Dist. LEXIS 430, at **16–17 (N.D. Ill. Jan. 11, 2005).

Valentine has utterly failed to point to evidence that shows that, in regards to the alleged harassment, DiTusa, Senese, or Tominello acted under the color of state law. *Neither DiTusa nor Senese were supervisors for Section 1983 purposes.* Even if Senese was deemed a supervisor, in acting on behalf of the City, the evidence is clear that he acted entirely appropriately. There is no indication from the evidence that Tominello, as a mere co-worker, was acting in a role other than on his own behalf. Thus, the absence of any showing that a Defendant acted under the color of state law dictates that we grant Defendants' motion for summary judgment on the Section 1983 equal protection claims.

(Emphasis supplied).

⁶¹⁴ *Scatorchia v. County of Suffolk*, No. CV 01-3119 (TCP) (MLO), 2006 U.S. Dist. LEXIS 5617, at 12 (E.D.N.Y. Jan. 24, 2006); see *Gierlinger v. N.Y. State Police*, 15 F.3d 32, 34 (2d Cir. 1994), stating that

[S]ection 1983 liability can be imposed upon individual employers, or responsible supervisors, for failing properly to investigate and address allegations of sexual harassment when through this failure [] the conduct becomes an accepted custom or practice of the employer.... Thus, it was proper for the district court to instruct the jury on this claim. But as noted, the instructions must have permitted the jury to understand the requisite showing of involvement on the part of the particular defendant for liability to be sustained.

The trial court erred in its instructions to the jury on the question of § 1983 liability. It is not possible to determine from the instructions whether the jury found Gleason liable on the theory of respondeat superior, which is not available in a § 1983 claim, or liable for his own performance as a commanding officer.

(emphasis supplied; citation omitted). Following a decision on remand, the Second Circuit affirmed the judgment that was adverse to the defendant former supervisor on the plaintiff employee's retaliation claim but the court vacated in part and remanded on other issues. See *Gierlinger v. Gleason*, 160 F.3d 858 (2d Cir. 1998).

⁶⁰³ *Id.* at 1265 n.8.

⁶⁰⁴ *Id.* at 1266.

⁶⁰⁵ 221 F. Supp. 2d 1317 (S.D. Fla. 2002) (city had not become a joint participant in university's termination of public safety officers); see also *Commodari v. Long Island Univ.*, 62 Fed. Appx. 28 (2d Cir. 2003); *Hauschild v. Nielsen*, 325 F. Supp. 2d 995 (D. Neb. 2004) (state action did not exist in the case for purposes of joint activity test).

⁶⁰⁶ *Allocco*, 221 F. Supp. 2d at 1323.

⁶⁰⁷ *Id.* at 1373, quoting *Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001).

⁶⁰⁸ *Id.* (citation omitted).

⁶⁰⁹ *Id.* at 1374.

⁶¹⁰ *Id.* at 1374 (citation omitted).

⁶¹¹ *Id.* at 1375, quoting *National Broad Co. v. Communications Workers of America*, AFL-CIO, 860 F.2d 1026 (11th Cir. 1988).

c. Section 1983 as a Species of Tort Liability

Section 1983 creates a species of tort liability, and the statute is interpreted in light of the background of tort liability.⁶¹⁵ To satisfy the requirement for action under color of law or the state action element of a § 1983 action there need not be a specific intent to deprive an individual of a federally protected right. However, as very recent cases have held, the U.S. Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.⁶¹⁶ Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and do not divest officials of qualified immunity.⁶¹⁷ As discussed, “state officials are shielded from § 1983 damage liability if their conduct did not violate clearly established constitutional rights of which a reasonable official would have known.”⁶¹⁸

In *DeShaney v. Winnebago County Department of Social Services*⁶¹⁹ the Court held that the Due Process Clause does not transform every tort committed by a state actor into a constitutional violation.⁶²⁰ To successfully state a claim for a deprivation of procedural due process, a plaintiff must assert that a person acting under color of state law deprived the plaintiff of a protected property interest and that the procedures for challenging the deprivation are inadequate.⁶²¹ To prevail on a substantive due process claim “a plaintiff must establish as a threshold matter that he has a protected property interest to which the Fourteenth Amendment’s due process protection applies.”⁶²²

Not all property interests entitled to procedural due process protection are similarly protected by the concept of substantive due process: “[w]hile property interests are protected by procedural due process even though the interest is derived from

state law rather than the Constitution, substantive due process rights are created only by the Constitution.”⁶²³ Thus, except in certain situations, such as when a person is in the state’s actual custody and must rely on the state for protection or medical care, there is no cause of action under § 1983 when the action complained against was private in nature. In *DeShaney, supra*, there was no claim against a county’s department of social services and various employees for failing to protect a child from a violent father. The language of the Due Process Clause “cannot fairly be extended to impose an affirmative obligation on the state” to protect citizens against private actors.⁶²⁴ The Due Process Clause of the Fourteenth Amendment “does not transform every tort committed by a *state* actor into a constitutional violation” actionable under § 1983.⁶²⁵

d. State-Created Danger; Deliberate Indifference Doctrine

In *Brown v. Pennsylvania Department of Health Emergency Medical Services Training Institute*⁶²⁶ the Court of Appeals for the Third Circuit held that there is no federal constitutional right to rescue services, competent or otherwise, pursuant to the Due Process Clause.

One exception to this general rule of non-liability is the “state-created danger” exception, under which a plaintiff may state a claim for a civil rights violation if the plaintiff shows: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the conduct of a state actor who acts in haste and under pressure is “shocking to the conscience;” (3) there existed some relationship between the State and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would have existed for the third party to cause harm.⁶²⁷

If the state actors are not acting in haste and under pressure, the second element of the “state-created danger” exception is that the state actors must have acted in willful disregard for the safety of the plaintiff.⁶²⁸ Whether action is shocking to the

⁶¹⁵ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

⁶¹⁶ *Douglas v. Healy*, Nos. 01-CV-7039, 02-CV-2935, 2003 U.S. Dist. LEXIS 4922 at 13 (E.D. Pa. Feb. 28, 2003), quoting *Schieber v. City of Philadelphia*, 2003 U.S. App. LEXIS 3013, at **19–20 (3d Cir. 2003).

⁶¹⁷ *Hernandez v. Tex. Dep’t of Protective and Regulatory Servs.*, 380 F.3d 872 (5th Cir. 2004).

⁶¹⁸ *Murphy*, 127 F.3d, 750, 755 (8th Cir. 1999), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410–11 (1982).

⁶¹⁹ 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

⁶²⁰ *Id.* at 202.

⁶²¹ *Douglas v. Healy*, 2003 U.S. Dist. LEXIS 4922, at *4.

⁶²² *Id.* *10, quoting *Nicolas v. Pa. State Univ.*, 227 F.3d 133, 139–40 (3d Cir. 2000).

⁶²³ *Id.* at *5, quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S. Ct. 507, 515, 88 L. Ed. 2d 523, 535 (1985) (Powell, J., concurring).

⁶²⁴ *DeShaney*, 489 U.S. at 195.

⁶²⁵ *Id.* at 202.

⁶²⁶ *Brown v. Pa. Dep’t of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473 (3d Cir. 2003).

⁶²⁷ See *Douglas*, 2003 U.S. Dist. LEXIS 4922, at *12, quoting *Brown*, 318 F.3d at 479 (citing *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996)).

⁶²⁸ *Id.* at *12, citing *Brown*, 318 F.3d at 480–81 (The Third Circuit in *Brown* revised the standard for the second element for state actors acting in haste and under pressure, *i.e.*, emergency personnel, from the standard of

conscience and thus arbitrary in the constitutional sense depends on the context in which the action takes place. The degree of culpability required to meet the standard depends upon the particular circumstances confronting those acting on the state's behalf.⁶²⁹

The issue, of course, concerning whether there is an applicable policy or custom that has been violated arises in the context of actions under § 1983 against municipalities. In a case alleging that the government had a policy of intentional discrimination against women, the court held that, to establish deliberate indifference, the plaintiff must demonstrate culpability beyond mere negligence or even gross negligence.⁶³⁰ To sustain a gender-based equal protection challenge in a case involving an assault, a plaintiff must show (1) the existence of a policy, practice, or custom of law enforcement that provided less protection to victims of domestic assault than to victims of other assaults; (2) that discrimination against women was a motivating fact; and (3) that the plaintiff was injured by the policy, custom, or practice.⁶³¹

e. Liability for Acts in Excess of Authority or for Gross Negligence

If government defendants act in excess of their statutory authority, they may be subject to liability under § 1983. For example, in *Morgan v. Bubar*⁶³² the plaintiff and defendants were employees of the State of Connecticut. The plaintiff alleged that Bubar made defamatory statements about the plaintiff to their supervisor and that two supervisors failed to investigate or initiate an investigation of a report of violence allegedly committed by the plaintiff in the workplace.⁶³³ The court ruled that the allegations were sufficient “to support a conclusion that the defendants acted in excess of statu-

willful disregard to the standard of conduct that “shocks the conscience.” *Id.*)

⁶²⁹ *Schieber v. City of Philadelphia*, 320 F.3d 409, 418 (3d Cir. 2003).

⁶³⁰ *Hernandez*, 380 F.3d at 882, citing *Conner v. Travis County*, 209 F.3d 794, 796 (5th Cir. 2000). In *Hernandez*, the court observed that “[a]ccording to [Child Protective Services] policy, children may not be placed in homes which are under investigation for abuse,” a policy allegedly violated by the individual defendants. *See id.* at 884. *See also* *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992) (stating that the basis of 1983 liability “must amount to an intentional choice, not merely an unintentionally negligent oversight”).

⁶³¹ *Beltran v. City of El Paso*, 367 F.3d 299, 304–05 (5th Cir. 2004) (citation omitted).

⁶³² No. CV0205625555, 2003 Conn. Super. LEXIS 332 (Feb. 10, 2003).

⁶³³ *Id.* at **10–11.

tory authority such that the defendants are not shielded by the doctrine of sovereign immunity.”⁶³⁴

Furthermore, “[t]he doctrine of sovereign immunity does not shield state employees from liability for acts or omissions constituting gross negligence.”⁶³⁵ Thus, “[a] state employee who acts wantonly, or in a culpable or grossly negligent manner is not protected [by sovereign immunity]”.⁶³⁶

Gross negligence is defined as that degree of negligence “which shows indifference to others, disregarding prudence to the level that safety of others is completely neglected. Gross negligence is negligence which shocks fair-minded people, but is less than willful recklessness.” Whether certain behavior constitutes gross negligence is “generally a factual matter for resolution by the jury and becomes a question of law only when reasonable people cannot differ.”⁶³⁷

In cases alleging § 1983 claims based on a government defendant's nonfeasance or misfeasance, such as the failure to train personnel adequately, there is no basis for a constitutional violation because such claims could be made about almost any encounter resulting in an injury. Even if there is a viable constitutional claim, the defendant may have qualified immunity, which is “a shield from civil liability for ‘all but the plainly incompetent or those who knowingly violate the law.’”⁶³⁸

f. Non-Liability of Government Supervisors

Supervisors may not be held liable for the acts of their subordinates: “an individual cannot be held liable under Section 1983 in his individual capacity unless he ‘participated in the constitutional violation.’”⁶³⁹

As one court has explained,

[l]iability may not be premised on the *respondeat superior* or vicarious liability doctrines, “nor may a defendant be held liable merely by his connection to the events through links in the chain of command....”

Direct participation, however, is not necessary. A supervisory official may be personally liable if she has “actual or constructive notice of unconstitutional

⁶³⁴ *Id.* at **11–12.

⁶³⁵ *Gedrich v. Fairfax County Dep’t of Family Servs.*, 282 F. Supp. 2d 439, 474 (E.D. Va. 2003) (citation omitted).

⁶³⁶ *Id.* (internal quotation marks omitted).

⁶³⁷ *Id.* at 474–75 (citations omitted).

⁶³⁸ *Beltran*, 367 F.3d at 308, quoting *Jones v. City of Jackson*, 203 F.3d 875, 883 (5th Cir. 2000) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986)).

⁶³⁹ *Valentine*, 2005 U.S. Dist. LEXIS 430 at *17, quoting *Hildebrandt v. Ill. Dep’t of Natural Res.*, 347 F.3d 1014, 1039 (7th Cir. 2003).

practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act.⁶⁴⁰

To hold a supervisor liable under § 1983, “[a] plaintiff...is required to establish that: (1) his ‘constitutional rights were violated’ and (2) ‘the defendants acted under color of state law.’”⁶⁴¹ It must be shown that the alleged supervisor is one who “directed the constitutional violation” or that the violation must have “occurred with his ‘knowledge and consent.’”⁶⁴²

4. Official Policy or Custom in Regard to Municipal Liability

The *Monell* decision requires that before a municipal defendant may be held liable for deprivations of civil rights, there must be a showing that the deprivation resulted from a government policy or custom.⁶⁴³ The plaintiff must set for a “short and plain statement of the claim showing that the pleader is entitled to relief.”⁶⁴⁴ The official policy need not be formally adopted or written, as a persistent and well-settled custom may be the basis for a § 1983 claim.⁶⁴⁵

To support a claim “based upon the existence of an official custom or policy,” the plaintiff must show that

1) a policy or custom existed; 2) the governmental policy makers actually or constructively knew of its

existence; 3) a constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation. To adequately state such a claim, Plaintiffs must also specifically describe how the policy or custom relates to the constitutional violation.⁶⁴⁶

For purposes of municipal liability, “a ‘policy’ may be established by either a policy or decision adopted by the municipality or a single act of a municipal official with final policymaking authority,”⁶⁴⁷ but the custom or practice must be “so well settled and widespread that the policymaking officials of the municipality [may] be said to have actual or constructive knowledge of it, yet did nothing to end the practice.”⁶⁴⁸ An act performed pursuant to a custom that did not have formal approval of the “appropriate decision-maker” may fairly subject a municipality to liability under § 1983 “on the theory that the relevant practice is so widespread as to have the force of law.”⁶⁴⁹

In *Valentine v. City of Chicago*,⁶⁵⁰ the court agreed that

[a] local governmental unit's unconstitutional policy, practice, or custom can be shown by: “(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice, that, although unauthorized, is so permanent and well-settled that it constitutes a ‘custom or usage’ with the force of law; or (3) an allegation that a person with final policymaking authority caused the injury.”⁶⁵¹

Valentine was a female truck driver and sweeper for the city’s transportation department who alleged sexual harassment by two supervisors and a co-worker and who eventually filed an action under § 1983, as well as Title VII of the Civil Rights Act of 1964.⁶⁵² As for the § 1983 claim, the court granted a summary judgment in favor of the city, because “[a] municipal governmental unit cannot be held liable under Section 1983 ‘unless the deprivation of constitutional rights is caused by a municipal policy or custom.’”⁶⁵³ The plaintiff failed to show that “any express policy or practice was behind the alleged

⁶⁴⁰ *Morris v. Eversley*, 282 F. Supp. 2d 196, 203 (S.D.N.Y. 2003) (internal quotation marks omitted; citations omitted). As for factors to consider, the district court stated that

the personal involvement of a supervisory defendant may be shown by evidence that (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Id. (internal quotation marks omitted; citations omitted).

⁶⁴¹ *Valentine*, 2005 U.S. Dist. LEXIS 430, at *15.

⁶⁴² *Id.* at **17–18.

⁶⁴³ *Monell*, 436 U.S. at 694–95.

⁶⁴⁴ *McClure v. Biesenbach*, 402 F. Supp. 753, 760 n.32 (W.D. Tex. 2005), *citing* *Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).

⁶⁴⁵ *See generally* *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980).

⁶⁴⁶ *McClure*, 2005 U.S. Dist. LEXIS 3113, at *18 (emphasis in original) (citations omitted).

⁶⁴⁷ *Faas v. Washington County*, 260 F. Supp. 2d 198, 205–06 (D. Me. 2003), *citing* *St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988).

⁶⁴⁸ *Id.* at 206 (D. Me. 2003) (citation omitted).

⁶⁴⁹ *M.W. ex rel. T.W. v. Madison County Bd. of Educ.*, 262 F. Supp. 2d 737, 743 (E.D. Ky. 2003) (citation omitted).

⁶⁵⁰ No. 03C2918, 2005 U.S. Dist. LEXIS 430 (N.D. Ill. Jan. 11, 2005).

⁶⁵¹ *Id.* at *9, *quoting* *Chortek v. City of Milwaukee*, 356 F.3d 740, 748 (7th Cir. 2004).

⁶⁵² 42 U.S.C. § 2000e.

⁶⁵³ *Valentine*, 2005 U.S. Dist. LEXIS 430, at *8 (citation omitted).

harassment or alleged failure to prevent the harassment.”⁶⁵⁴

One federal court has noted that “an isolated incident or a meager history of isolated incidents is insufficient to prove the existence of an official policy or custom.”⁶⁵⁵ One incident of unconstitutional conduct by a city employee cannot be a basis for finding that there was an agency-wide custom for purposes of the imposition of municipal liability under § 1983.⁶⁵⁶ In *City of Oklahoma City v. Tuttle*⁶⁵⁷ the Court held that “[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.”⁶⁵⁸ Although it has been held that evidence of a single incident cannot establish the existence of a policy or custom for purposes of a § 1983 claim,⁶⁵⁹ in *McClure*, the district court held that in the Fifth Circuit a municipality may be held liable in a § 1983 action “for even a single decision made by its legislative body, even if the decision is singular and not meant as a continuing policy, ‘because even a single decision by such a body unquestionably constitutes an act of official government policy.’”⁶⁶⁰ On the other hand, it has been held that statements of individual lawmakers are not binding on a city.⁶⁶¹

For an official to represent government policy he or she must have final policymaking authority, authority that is lacking when an official’s decisions are subject to meaningful administrative review.⁶⁶² Whether a particular official has final policymaking authority for the purposes of § 1983 is a question of state law.⁶⁶³ The court must determine

whether the person or entity that made the policy at issue speaks for the government entity being sued. Such an inquiry seeks to determine whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue; as stated, the finding is dependent on an analysis of state law.⁶⁶⁴

In a case in which the plaintiffs alleged that a police officer and a code compliance officer unlawfully cancelled a concert the district court dismissed the § 1983 claims. The plaintiffs had failed to establish “that the officials’ actions were taken in violation of the ordinance and permit rules.”⁶⁶⁵ Indeed, the court deemed it to be significant that the plaintiffs had argued that the officials were liable not because they had followed a government policy but rather because they had arbitrarily and capriciously violated it.⁶⁶⁶

5. Remedies

In a § 1983 action, the court may award declaratory and injunctive relief, damages, and attorney’s fees. Moreover, as discussed herein, in regard to an individual who is an officer or employee of a state, the individual defendant may be liable for injunctive relief. Nominal, compensatory, and punitive damages also are available under § 1983. To recover compensatory damages, the plaintiff must prove that the unconstitutional activities were the cause in fact of actual injuries.⁶⁶⁷ To prove damages, evidence must be received on general damages, including emotional distress and pain and suffering, and on special damages, such as lost income and medical expenses.⁶⁶⁸

In addition to compensatory damages, a court may award punitive damages in a § 1983 suit to punish the defendant for outrageous conduct and to deter others from similar conduct in the future.⁶⁶⁹ Even if the plaintiff cannot prove actual damages, the court may award punitive damages.⁶⁷⁰ Municipalities, however, are generally immune from puni-

⁶⁵⁴ *Id.* at *9.

⁶⁵⁵ *Gedrich*, 282 F. Supp. 2d at 472 (E.D. Va. 2003) (citation omitted).

⁶⁵⁶ *Davis v. City of N.Y.*, 228 F. Supp. 2d 327, 346 (S.D.N.Y. 2002).

⁶⁵⁷ *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985).

⁶⁵⁸ *Id.* at 823–24.

⁶⁵⁹ *Fultz v. Whittaker*, 261 F. Supp. 2d 767 (W.D. Ky. 2003).

⁶⁶⁰ *McClure*, 402 F. Supp. 2d at 761.

⁶⁶¹ *Id.* at 762.

⁶⁶² *Caruso v. City of Cocoa, Fla.*, 260 F. Supp. 2d 1191, 1203 (M.D. Fla. 2003); *see also Stewart v. Bd. of Commr’s for Shawnee County, Kan.*, 320 F. Supp. 2d 1143 (D. Kan. 2004) (county department heads did not exercise final policymaking authority); *Pino v. City of Miami*, 315 F. Supp. 2d 1230 (S.D. Fla. 2004) (Section 1983 action failed where city manager had not ratified decision to transfer police officer).

⁶⁶³ *McMillan v. Monroe County, Ala.*, 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1, 8 (1997).

⁶⁶⁴ *McClure v. Houston County*, 306 F. Supp. 2d 1160 (M.D. Ala. 2003) (held that sheriff was not policymaker for county; thus, county had immunity to claims based on sheriff’s alleged failure to train or supervise).

⁶⁶⁵ *McClure*, 402 F. Supp. 2d at 762.

⁶⁶⁶ *Id.* at 761.

⁶⁶⁷ *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309, 106 S. Ct. 2537, 2544, 91 L. Ed. 2d 249, 260 (1986).

⁶⁶⁸ *Carey v. Phipus*, 435 U.S. 247, 263–64, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252, 264–66 (1978); *Ellis v. Blum*, 643 F.2d 68, 69 (2d Cir. 1981).

⁶⁶⁹ *Smith v. Wade*, 461 U.S. 30, 54–55, 103 S. Ct. 1625, 1639–40, 75 L. Ed. 2d 632, 650–51 (1983).

⁶⁷⁰ *Glover v. Ala. Dep’t of Corrections*, 734 F.2d 692 (11th Cir. 1984).

tive damages in § 1983 actions,⁶⁷¹ as are municipal officers when sued in their official capacities.⁶⁷²

Individuals who are not protected by other forms of immunity may be subject to punitive damages. Punitive damages are available “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.”⁶⁷³ The standard applicable to common law tort claims is the same for § 1983 actions. In *City of Newport v. Fact Concerts, Inc.* the Supreme Court was clear that punitive damages could be awarded “against the offending official, based on his personal financial resources....”⁶⁷⁴

As for injunctive relief, “[c]ivil rights actions under section 1983 are exempt from the usual prohibition on federal court injunctions of state court proceedings.”⁶⁷⁵ Although the Eleventh Amendment bars claims for damages against state agencies and officials acting in their official capacity, the federal courts may enjoin state officials acting in their official capacity as long as the injunction governs only the officer’s future conduct and no retroactive remedy is provided; the rule applies also to declaratory judgments.⁶⁷⁶ As has been noted, “[s]tate officials acting in their official capacities are § 1983 ‘persons’ when sued for prospective relief,” such as reinstatement as a state employee.⁶⁷⁷ Thus, where a state employee alleged that he was wrongfully terminated by the state’s Employment Security Department on account of his race and age, his § 1983

claim was not barred because he sought equitable relief, such as reinstatement as a state employee.⁶⁷⁸

The requirements for an injunction generally are that the movant must show that he or she will suffer irreparable harm if the injunction is not granted; that the movant would probably prevail on the merits; that the state would not be harmed by the injunction more than the movant would be helped by it; and that the granting of the injunction would be in the public interest. Alternatively, the movant must show either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions have been raised and that the balance of hardships tips sharply in the movant’s favor.⁶⁷⁹

6. Attorney’s Fees

A prevailing party in certain civil rights actions may recover attorney’s fees pursuant to 42 U.S.C. § 1988.⁶⁸⁰ Moreover, states may be able to prevent supplemental claims against the state either under the Eleventh Amendment or because the federal claims have been dismissed.⁶⁸¹ “Attorney’s fees in civil rights and employment discrimination cases are wholly outside the strictures of the Eleventh Amendment as the result of Congressional abrogation that the Supreme Court has upheld.”⁶⁸² Claimants who bring suit under a comprehensive federal statutory scheme that does not include a provision allowing for the recovery of attorney’s fees may not do so under § 1988. The assertion of a § 1983 claim in addition to another statutory claim does not create a claim for attorney’s fees under § 1988.⁶⁸³

In *Maher v. Gagne*⁶⁸⁴ the Supreme Court held that attorney’s fees under § 1988 were available in all types of § 1983 actions. A plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that

⁶⁷¹ *Ramonita Rodriguez Sostre v. Municipio de Canovanas*, 203 F. Supp. 2d 118 (D.P.R. 2002); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259, 101 S. Ct. 2748, 2756, 69 L. Ed. 2d 616, 627 (1981). *But see* *Peden v. Suwannee County Sch. Bd.*, 837 F. Supp. 1188, 1196–97 (M. D. Fla. 1993) (denying punitive damages where no compensatory damages were awarded). In *Peden*, the court stated that “[t]he real proposition for which the above cited cases stand could be summarized as follows: in a section 1983 action, a jury may properly award punitive damages even though it awards no compensatory damages, but *only* where the jury first finds that *a constitutional violation was committed by the party against whom the punitives are imposed.*” *Id.*

⁶⁷² *Ramonita*, 203 F. Supp. 2d at 120, *citing* *Gomez-Vazquez*, 91 F. Supp. 2d 481, 482–83 (D.P.R. 2000).

⁶⁷³ *Smith v. Wade*, 461 U.S. 30 at 56.

⁶⁷⁴ *Fact Concerts, Inc.*, 453 U.S. at 269.

⁶⁷⁵ *Schroll v. Plunkett*, 760 F. Supp. 1385, 1389 (D. Or. 1991).

⁶⁷⁶ *Ippolito v. Meisel*, 958 F. Supp. 155, 161 (S.D.N.Y. 1997); *see also* *Mercer v. Brunt*, 272 F. Supp. 2d 181 (D. Conn. 2002).

⁶⁷⁷ *Murphy v. Arkansas*, 127 F.3d 750, 754 (8th Cir. 1997).

⁶⁷⁸ *Id.*

⁶⁷⁹ *Remlinger v. State of Nevada*, 896 F. Supp. 1012, 1014–15 (D. Nev. 1995).

⁶⁸⁰ *See* *Carrion v. City of N.Y.*, 2003 WL 22519438 (S.D.N.Y. 2003) (unreported) (court upholding hourly rate of \$120 for prevailing defendants’ lead attorney in calculating attorney’s fees in false arrest claim).

⁶⁸¹ *See* *Valentine*, 2005 U.S. Dist. LEXIS 430, at **20–21; *Dilts v. Blair*, 2005 U.S. Dist. LEXIS 29426 (D. Id. 2005).

⁶⁸² SMITH & NORMAN, § 10.35, at 633.

⁶⁸³ *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984).

⁶⁸⁴ *Maher v. Gagne*, 448 U.S. 122, 128–29, 100 S. Ct. 2570, 2574–75, 65 L. Ed. 2d 653, 660–61 (1980).

directly benefits the plaintiff.⁶⁸⁵ The Supreme Court has stated that “although the technical nature of a nominal damage award...does not affect the prevailing party inquiry, it does bear directly on the propriety of fees awarded under § 1988.”⁶⁸⁶ Ordinarily, the prevailing plaintiff may recover attorney’s fees as a matter of course.⁶⁸⁷ The prevailing defendant, however, may recover attorney’s fees only when the court in its discretion finds that the plaintiff’s action was “frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.”⁶⁸⁸

One issue that has arisen is whether a plaintiff who prevails only on a pendent state law claim rather than his or her § 1983 claim may be awarded attorney’s fees. In *Southwestern Bell Telephone Company v. City of El Paso*,⁶⁸⁹ Southwestern Bell brought suit under § 1983 for declaratory and injunctive relief against the City and County Water Improvement District No. 1 (EPCWID). The action alleged that EPCWID’s application process and fees for the use of its facilities constituted an illegal taking in violation of the Fifth Amendment, as well as were violations of the Contract Clause of the United States Constitution and of the Federal Telecommunications Act of 1996. The district court denied Southwestern Bell’s motion for attorney’s fees, because the company was not granted any relief under § 1983 in the court’s summary judgment order and judgment. The district court held that because the company prevailed on its state law claims, it was not a “prevailing party” under § 1983.⁶⁹⁰

However, the Fifth Circuit held that a plaintiff may be deemed a prevailing party if he or she prevails on a supplemental state law claim that arises from a common nucleus of fact with federal constitutional claims, even if the court chooses to avoid ruling on the constitutional issues.⁶⁹¹ Thus, attorney’s fees may be awarded even if the § 1983 claim is not decided, provided that: (1) the § 1983 claim of

constitutional deprivation was substantial, and (2) the successful pendent claims arose out of a common nucleus of operative facts. A claim is substantial if it supports federal question jurisdiction; the “common nucleus of operative facts” element must satisfy the test established in *United Mine Workers v. Gibbs* for pendent jurisdiction.⁶⁹²

Another issue is whether there is a right to attorney’s fees when the plaintiff is awarded only nominal damages. In *Farrar v. Hobby*⁶⁹³ the Supreme Court held that in a civil rights suit for damages the awarding of nominal damages highlights the plaintiff’s failure to prove actual, compensable injury. Whatever the constitutional basis for substantive liability, damages awarded in a § 1983 action must always be designed to compensate injuries caused by the constitutional deprivation. If a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, “the only reasonable fee is usually no fee at all.”⁶⁹⁴

However, attorney’s fees have been awarded even when the amount of damages awarded was nominal. In *Ortiz de Arroyo v. Barcelo*⁶⁹⁵ the First Circuit held that the plaintiffs were the prevailing party entitled to attorney’s fees even though they did not obtain a favorable judgment or a formal settlement agreement in their § 1983 suit. In *Norris v. Murphy*,⁶⁹⁶ a jury awarded the plaintiff the nominal amount of \$1 in damages, but the court awarded virtually the entire amount of attorney’s fees and costs requested.

The Court has handed down several decisions that significantly cut into the award of attorney’s fees in § 1983 actions. The Court’s decision in *Marek v. Chesney*,⁶⁹⁷ interpreting Rule 68 of the Federal Rules of Civil Procedure, encourages settlement of civil rights cases by denying the award of attorney’s fees under § 1988 for fees incurred after a settlement offer is rejected, unless the final judgment obtained by the offeree is more favorable than the settlement offer.⁶⁹⁸

⁶⁸⁵ *Norris*, 287 F. Supp. 2d at 114, citing *Farrar v. Hobby*, 506 U.S. 103, 111–12, 113 S. Ct. 566, 572–74, 121 L. Ed. 2d 494, 503–04 (1992).

⁶⁸⁶ *Farrar*, 506 U.S. at 114.

⁶⁸⁷ *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed. 2d 1263, 1266 (1968); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

⁶⁸⁸ *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 178, 66 L. Ed. 2d 163, 172 (1980); *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648, 657 (1978).

⁶⁸⁹ 346 F.3d 541 (5th Cir. 2003).

⁶⁹⁰ *Id.* at 550–54.

⁶⁹¹ *Id.* at 550, citing *Scham v. District Courts Trying Criminal Cases*, 148 F.3d 554, 556 (5th Cir. 1998).

⁶⁹² *Id.* at 551.

⁶⁹³ 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992).

⁶⁹⁴ *Id.* at 115 (citation omitted).

⁶⁹⁵ 765 F.2d 275, 276–77 (1st Cir. 1985).

⁶⁹⁶ 287 F. Supp. 2d 111 (D. Mass. 2003).

⁶⁹⁷ 473 U.S. 1, 11–12, 105 S. Ct. 3012, 3018, 87 L. Ed. 2d 1, 11 (1985).

⁶⁹⁸ In *Wilson v. Nomura Securities Int’l*, 361 F.3d 86 (2d Cir. 2004), the court held that the acceptance of a Rule 68 offer fully settled Wilson’s Title VII claim, including any right to attorney’s fees.

Finally, the Eleventh Amendment does not bar recovery of attorney's fees against the state.⁶⁹⁹ On the other hand, attorney's fees are not recoverable against the state when the plaintiff prevails against a public official in his or her individual capacity.⁷⁰⁰

E. DISCRIMINATION CLAIMS UNDER OTHER FEDERAL LAWS AGAINST TRANSPORTATION DEPARTMENTS

1. Introduction

Although various forms of discrimination are prohibited by federal law,⁷⁰¹ states and their instrumentalities, such as transportation departments, as well as their officers and employees acting in their official capacity, have immunity for certain claims alleging discrimination by virtue of the states' sovereign immunity under the Eleventh Amendment to the United States Constitution. Moreover, there are law review articles and other commentary⁷⁰² arguing that, based on Supreme Court decisions in recent years, some discrimination-type claims presently permitted against the states may be subject to challenge. Nevertheless, states have immunity under the Eleventh Amendment to claims made under the Age Discrimination in Employment Act (ADEA)⁷⁰³ and under Title I of

the Americans with Disabilities Act (ADA).⁷⁰⁴ Individual employees may not be sued under Title VII.⁷⁰⁵

Besides the issue of sovereign immunity, this section will discuss how the law has evolved recently in the areas of discrimination prohibited by the ADA,⁷⁰⁶ the ADEA,⁷⁰⁷ or Title VII of the Civil Rights Act of 1964.⁷⁰⁸ This section of the report will discuss whether and when Congress may abrogate the states' sovereign immunity under the Eleventh Amendment, even when a claim arises under federal antidiscrimination law. Moreover, regardless of state immunity, each section will discuss the elements of claims arising out of alleged discrimination on the basis of age, disability, race, or sex.

2. Recent U.S. Supreme Court Decisions on the States' Sovereign Immunity Under the Eleventh Amendment

As discussed previously in the report, when a state transportation department asserts the Eleventh Amendment as a defense, an action under § 1983 will be dismissed unless the state has waived such immunity. Eleventh Amendment immunity will not shield agency officials from suit if they are sued in their individual, non-official capacity. Moreover, where government officials, sued in their individual capacity, have raised the defense of qualified immunity, some courts have imposed a "heightened pleading requirement"; that is, some factual detail is necessary so that the court will be able to determine whether a right was a clearly established one at the time of the allegedly wrongful conduct.⁷⁰⁹

⁶⁹⁹ *Hutto v. Finney*, 437 U.S. 678, 689–92, 98 S. Ct. 2565, 2572–74, 57 L. Ed. 2d 522, 533–35 (1978) (validity questioned by some citing references).

⁷⁰⁰ *Graham*, 473 U.S. at 167 (validity questioned by some citing references).

⁷⁰¹ See discussion and cases in HAROLD S. LEWIS, JR., *EMPLOYMENT DISCRIMINATION LAW AND PRACTICE* (2d ed. 2004); JOHN J. DONOHUE III, *FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW* (Foundation Press 2003); MICHAEL A. WARNER & LEE E. MILLER, *EMPLOYMENT DISCRIMINATION LAW* (2000); SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (1997); GABRIEL M. NUGENT, *EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION* (1998); and SHELDON H. NAHMOD, MICHAEL L. WELLS, & THOMAS A. EATON, *CONSTITUTIONAL TORTS* (Anderson Pub. Co. 1995).

⁷⁰² See Nicole E. Grodner, *Disparate Impact Legislation and Abrogation of the States' Sovereign Immunity after Nevada Department of Human Resources v. Hibbs and Tennessee v. Lane*, 83 TEX. L. REV. 1173, 1184 (2005) (hereinafter "Disparate Impact Legislation"). See also Bryan Dearing, *The State of the Nation, not the State of the Record: Finding Problems with Judicial 'Review' of Eleventh Amendment Abrogation Legislation*, 53 DRAKE L. REV. 421, 422 (2005) (hereinafter "State of the Nation").

⁷⁰³ *Cal. Public Employees' Retirement Sys. v. Arnett*, 528 U.S. 1111, 120 S. Ct. 930, 145 L. Ed. 2d 807 (2000)

(*vacating and remanding* in light of *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) (holding that the ADEA did not abrogate the states' Eleventh Amendment immunity from suit by private individuals)).

⁷⁰⁴ *The Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (holding that Eleventh Amendment immunity bars suits under Title I of the ADA for money damages against states). See *Lopez v. Police Dep't of Commonwealth of Puerto Rico*, 247 F.3d 26 (1st Cir. 2001).

⁷⁰⁵ *Dearth v. Collins*, 441 F.3d 931 (11th Cir. 2006) (holding that relief under Title VII is provided solely against the employer and not an individual employee); *Grant v. Lone Star Co.*, 21 F.3d 649, 651–53 (5th Cir. 1994); *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 404–05 (6th Cir. 1997).

⁷⁰⁶ 42 U.S.C. § 12101 *et seq.*

⁷⁰⁷ 29 U.S.C. § 621 *et seq.*

⁷⁰⁸ 42 U.S.C. § 2000e *et seq.*

⁷⁰⁹ See *GJR Investments v. County of Escambia, Fla.*, 132 F.3d 1359, 1367 (11th Cir. 1998) (citation omitted).

As for whether states have any immunity under the Eleventh Amendment from claims under the ADA, ADEA, or Title VII of the Civil Rights Act of 1964, the analysis in this section begins with the decision of the United States Supreme Court in 1976 in *Fitzpatrick v. Bitzer*.⁷¹⁰ In *Fitzpatrick*, a group of Connecticut state employees brought suit against the state alleging sexual discrimination regarding retirement benefits.⁷¹¹ The *Fitzpatrick* Court held that when Congress amended Title VII in 1972 to extend coverage to the states as employers, Congress clearly exercised its power under [Section] 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity.⁷¹² The issue, however, that was not raised in the *Fitzpatrick* case was whether the abrogation of immunity was "a proper exercise of congressional authority under [Section] 5 of the Fourteenth Amendment."⁷¹³

On several occasions since the *Fitzpatrick* decision, the Supreme Court has addressed the issue of whether Congress has exercised its authority properly when abrogating the states' sovereign immunity. The cases since *Fitzpatrick* are, of course, particularly relevant to whether the states have sovereign immunity for some claims under the federal antidiscrimination laws. A preliminary question that the Court has had to address was on which constitutional grants of authority Congress permissibly could rely to abrogate the states' sovereign immunity. In 1996, in *Seminole Tribe v. Florida*⁷¹⁴ the Court held that Congress may only authorize suits against nonconsenting states, that is, abrogate the states' sovereign immunity under the Eleventh Amendment, when Congress is acting within its power under Section 5 of the Fourteenth Amendment. Congress may not abrogate the states' sovereign immunity under another grant of constitutional authority to Congress, such as the Commerce Clause.⁷¹⁵

After the decision in *Seminole Tribe*, beginning in 1997, the Supreme Court struck down acts of Congress that were, in the Court's view, in excess of Congress's power under Section 5 of the Fourteenth Amendment. Thus, in 1997, in *City of Boerne v.*

Flores,⁷¹⁶ the Supreme Court held that the Religious Freedom Restoration Act of 1993 (RFRA) exceeded Congress's power under Section 5 of the Fourteenth Amendment. As the Court explained, the

RFRA prohibits "government" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."⁷¹⁷

The Court, stating that Congress does not have the "power to determine what constitutes a constitutional violation,"⁷¹⁸ held that Congress did not have "the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."⁷¹⁹ The Court, recognizing that it is not easy to differentiate "between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law,"⁷²⁰ held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁷²¹

In rendering its decision, the Court emphasized the absence of a sufficient record for the Congress to act under its Section 5 power. The "RFRA's legislative record lacks examples of modern instances of generally applicable laws [that were] passed because of religious bigotry."⁷²² The intent of the law, in the opinion of the Court, "cannot be understood as a response to, or designed to prevent, unconstitutional behavior."⁷²³ The Court noted that the "RFRA's substantial burden test...is not even a discriminatory effects or disparate impact test...."⁷²⁴

Although the first question is whether the Congress clearly expressed an intent to abrogate the states' sovereign immunity in a given area, the Congress may not purport to do so under Section 5 unless there is sufficient evidence to justify congressional action. Whether Congress has enacted purportedly remedial legislation pursuant to its Section 5 power depends on whether the legislation

⁷¹⁰ 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976).

⁷¹¹ *Id.* at 448.

⁷¹² *Id.* at 453.

⁷¹³ *Id.* at 456 n.11. See discussion of *Fitzpatrick* in LEWIS & NORMAN, *supra* note 481 § 10.35, at 624.

⁷¹⁴ 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

⁷¹⁵ *Gill v. Publ. Empl. Ret. Bd.*, 135 N.M. 472, 476, 90 P.3d 491, 495 (2004).

⁷¹⁶ 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

⁷¹⁷ *Id.* at 515-16, *citing* 42 U.S.C. § 2000bb-1.

⁷¹⁸ *Id.* at 519.

⁷¹⁹ *Id.*

⁷²⁰ *Id.* at 508.

⁷²¹ *Id.* at 520.

⁷²² *Id.* at 530.

⁷²³ *Id.* at 532.

⁷²⁴ *Id.* at 535.

passes the Court's congruence and proportionality test. An example is the case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.⁷²⁵ The state agency argued that the Patent Remedy Act⁷²⁶ was an unconstitutional abrogation of the states' sovereign immunity under Section 5 of the Fourteenth Amendment. In the Act, Congress had provided that states, their instrumentalities, and their officers and employees acting in their official capacities were subject to suit in federal court by any person for patent infringement.⁷²⁷ College Savings alleged that Florida Prepaid had infringed College Savings' patent for certain "financing methodology."⁷²⁸

The Court noted that pursuant to its holding in *City of Boerne*, the Court had to "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy...."⁷²⁹ However, the Court held that in enacting the Patent Remedy Act, Congress had "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."⁷³⁰ Moreover, "Congress itself said nothing about the existence or adequacy of state remedies in the statute," nor was there any evidence in the legislative history of patent infringement by the states.⁷³¹ Hence, the Congress had not properly abrogated sovereign immunity in making "all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for an indefinite duration."⁷³²

In contrast, in 2003 in *Nevada Department of Human Resources v. Hibbs*,⁷³³ the Court upheld the Family and Medical Leave Act (FMLA) of 1993 that "entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a 'serious health condition' in an employee's spouse, child or parent."⁷³⁴ The FMLA permits claims for monetary damages and equitable relief against employers, including public agencies. To the surprise of some

commentators,⁷³⁵ in light of the Court's decision in the *City of Boerne* and *Florida Prepaid* cases, the Court held that employees of the State of Nevada may recover damages in the event of the state's failure to comply with the family-care provision of the Act.

In *Hibbs* there was no serious issue regarding whether Congress intended to abrogate the sovereign immunity of the states. Moreover, the Court reiterated that under Section 5 of the Fourteenth Amendment, Congress may "do more than simply proscribe conduct" that the Court has held to be unconstitutional and that "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct."⁷³⁶ In *Hibbs*, the Court concluded that the Congress had evidence of a pattern of constitutional violations by the states. Furthermore, "Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways."⁷³⁷ The Court concluded that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough" for the enactment of the FLMA.⁷³⁸ The law, moreover, was "narrowly targeted" with other limitations that Congress had placed on its "scope."⁷³⁹

Other decisions upholding or denying congressional authority to abrogate the states' Eleventh Amendment immunity are discussed hereafter under the relevant sections pertaining to age, disability, and race and sex discrimination. In some areas of federal antidiscrimination law, the states are wholly or partially immune. After discussing the immunity issue, each section will discuss both the legal elements for claims of discrimination and any recent cases brought against transportation agencies. As will be seen, in discrimination cases, even when a transportation agency is not immune from suit, the agency frequently has prevailed on a motion for summary judgment, resulting in a dismissal of all or part of the case.

3. Age Discrimination in Employment Act

a. State Sovereign Immunity for Claims for Monetary Damages Under the ADEA

The ADEA, which prohibits employment discrimination on the basis of age against individuals

⁷²⁵ 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999).

⁷²⁶ 35 U.S.C. §§ 2171h, 296(a).

⁷²⁷ *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 632.

⁷²⁸ *Id.* at 631.

⁷²⁹ *Id.* at 639, citing *City of Boerne*, 521 U.S. 507, 525, 117 S. Ct. 2157, 2166, 138 L. Ed. 2d at 642.

⁷³⁰ *Id.* at 640.

⁷³¹ *Id.* at 644.

⁷³² *Id.* at 647.

⁷³³ 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003).

⁷³⁴ *Hibbs*, 538 U.S. at 724, quoting 29 U.S.C. § 2612(a)(1)(C).

⁷³⁵ See *supra* note 702, at 1184; see also Dearing, *supra* note 702, at 422.

⁷³⁶ *Hibbs*, 538 U.S. at 727–28.

⁷³⁷ *Id.* at 732.

⁷³⁸ *Id.* at 735.

⁷³⁹ *Id.* at 738.

age 40 or over, may be enforced in accordance with the powers, remedies, and procedures provided in the Fair Labor Standards Act.⁷⁴⁰ The ADEA provides:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.⁷⁴¹

In 1974 Congress provided that employees could maintain a suit under the ADEA against a public entity in any federal or state court.⁷⁴² However, in 2000 in *Kimel v. Florida Board of Regents*⁷⁴³ the Supreme Court struck down the law that abrogated the states' sovereign immunity for ADEA claims.⁷⁴⁴ The *Kimel* case concerned three suits by plaintiffs against Alabama and Florida state agency employers, *inter alia*, for monetary damages for alleged age discrimination. However, the *Kimel* Court held that Congress had exceeded its authority in abrogating the states' immunity for such suits.

Applying the congruence and proportionality test, the Court held that the substantive requirements imposed by the ADEA on the states "are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."⁷⁴⁵ Stating that "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest,"⁷⁴⁶ the Court held that Congress had not properly abrogated the states' immunity under Section 5 of the Fourteenth Amendment. The Court's reasoning was that the ADEA was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."⁷⁴⁷ That is, when extending

the ADEA to the states, Congress "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of a constitutional violation."⁷⁴⁸ Accordingly, Congress did not validly abrogate the states' sovereign immunity to suits by private individuals.⁷⁴⁹ In any case, the Court stated that in almost every state, "[s]tate employees are protected by state age discrimination statutes,"⁷⁵⁰ which are cited in a footnote to the opinion.⁷⁵¹

b. Elements of an ADEA Claim

Although a state transportation agency has sovereign immunity for claims for monetary damages, but not for injunctive relief, other transportation agencies that are not part of the state government may be subject to suit; thus, the elements of an ADEA claim will be discussed. For a plaintiff to establish a *prima facie* case of age discrimination, the plaintiff must show that "(1) he is a member of the protected class; (2) he is qualified for his position; (3) he has suffered an adverse employment action; and (4) the circumstances surrounding that action give rise to an inference of age discrimination."⁷⁵² Claims under the ADEA "are analyzed according to a burden shifting framework first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*"⁷⁵³....⁷⁵⁴ If the employer's action is motivated by something other than the employee's age, then there is no disparate treatment under the ADEA.⁷⁵⁵ Under the ADEA, employees may not hold another individual or a supervisor liable as they are not liable under the Act.⁷⁵⁶

⁷⁴⁸ *Id.* at 89.

⁷⁴⁹ *Id.* at 91.

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.* at 92 n.1.

⁷⁵² *Concepcion v. Nice Pak Products*, No. 03 Civ. 1984 (LTS) (THK) 2004 U.S. Dist. LEXIS 15873, *8 (S.D.N.Y. Aug. 13, 2004) (citation omitted). This formulation is by the court based on the ADEA, and is not found *per se* in the statute. See 29 U.S.C. §§ 621–34.

⁷⁵³ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973).

⁷⁵⁴ *Concepcion*, 2004 U.S. Dist. LEXIS 15873, at *8 (citation omitted).

⁷⁵⁵ *MacKinnon v. City of N.Y.*, Human Resources Admin., No. 99 Civ. 10193 (GBD) 2003 U.S. Dist. LEXIS 16622, at *5 (S.D.N.Y. Sept. 22, 2003).

⁷⁵⁶ *Cheng v. Benson*, 358 F. Supp. 2d 696, 700 (N.D. Ill. 2005) (citing precedents and a law review article for the proposition that "[t]he appellate courts consistently hold that liability [in employment discrimination law] should fall solely to the employer, thus prohibiting personal liability...." *Id.*).

⁷⁴⁰ 29 U.S.C. § 201, *et seq.*

⁷⁴¹ *Id.* § 623(a)(1)–(3).

⁷⁴² *Id.* § 626(c).

⁷⁴³ 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

⁷⁴⁴ 29 U.S.C. § 626(b), *citing* 29 U.S.C. §§ 626(c), 211, 216(b), 217.

⁷⁴⁵ *Kimel*, 528 U.S. at 83 (citations omitted).

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.* at 86, *citing City of Boerne*, 521 U.S. at 532, 117 S. Ct. at 2170, 138 L. Ed. 2d at 646.

The ADEA makes it unlawful for an employer to subject an employee to an adverse employment action because the employee previously charged the employer with age discrimination. To state

[a] *prima facie* case of retaliation under the ADEA requires proof that: (1) the plaintiff was engaged in an activity protected under the ADEA; (2) the employer was aware of the plaintiff's participation in the protected activity; (3) the plaintiff was subject to an adverse employment action; and (4) there is a nexus between the protected activity and the adverse action taken.⁷⁵⁷

It is not completely clear whether Congress has abrogated sovereign immunity as to retaliation claims against *federal agencies* under the ADEA. According to a federal court in Virginia, although 29 U.S.C. § 633a(a) waives sovereign immunity of federal agencies for age discrimination suits against them, the ADEA does not expressly prohibit suits for *retaliation* by federal agencies.⁷⁵⁸ Although the court recognized that the Second Circuit and D.C. Circuit have held that Congress waived sovereign immunity for retaliation claims against federal agencies under the ADEA,⁷⁵⁹ the district court in Virginia held that Congress chose not to waive immunity for retaliation claims against federal agencies.

4. Americans with Disabilities Act

a. Sovereign Immunity for Claims for Monetary Damages Under Title I

The ADA is designed “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁷⁶⁰ Prohibiting discrimination in the contexts of employment, public services, and public accommodations and services operated by private entities, the ADA provides the following for each context:

Employment.—“No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, ad-

vancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁷⁶¹

Public Services.—“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁷⁶²

Public Accommodations and Services Operated by Private Entities.—“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”⁷⁶³

As the Court stated in 2004 in *Tennessee v. Lane*,⁷⁶⁴ the ADA “forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.”⁷⁶⁵

“Title II...prohibits any public entity from discriminating against ‘qualified’ persons with disabilities in the provision or operation of public services, programs, or activities.”⁷⁶⁶ A “public entity” includes state and local governments and their agencies or instrumentalities.⁷⁶⁷ In 42 U.S.C. § 1213(2), the ADA specifically identifies transportation services. Thus,

[p]ersons with disabilities are “qualified” if they, “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”⁷⁶⁸

The ADA incorporates Section 505 of the Rehabilitation Act of 1973⁷⁶⁹ that authorizes private citizens to bring suit for money damages.⁷⁷⁰ A state is

⁷⁵⁷ *Concepcion*, 2004 U.S. Dist. LEXIS 15873 at **8–9, quoting *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 465 (2d Cir. 1997).

⁷⁵⁸ *Cyr v. Perry*, 301 F. Supp. 2d 527 (E.D. Va. 2004).

⁷⁵⁹ *Id.* at 533 (“Two other circuits...have addressed this issue and concluded that Congress has in fact waived this sovereign immunity and thus the federal government may be sued for retaliation under the ADEA,” citing *Forman v. Small*, 350 U.S. App. D.C. 24, 271 F.3d 285, 298–99 (D.C. Cir. 2001); *Bornholdt v. Brady*, 869 F.2d 57, 62 (2d Cir. 1989)).

⁷⁶⁰ 42 U.S.C. § 12101(b)(1).

⁷⁶¹ *Id.* § 12112.

⁷⁶² *Id.* § 12132.

⁷⁶³ *Id.* § 12182.

⁷⁶⁴ 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

⁷⁶⁵ *Id.* at 516–17.

⁷⁶⁶ *Id.* at 517. See 42 U.S.C. § 12132.

⁷⁶⁷ 42 U.S.C. § 1213(1).

⁷⁶⁸ *Lane*, 541 U.S. at 517.

⁷⁶⁹ 29 U.S.C. § 794a.

⁷⁷⁰ 42 U.S.C. § 12133.

subject to suit for discrimination in violation of the Rehabilitation Act if the state accepts Federal Rehabilitation Act funds.⁷⁷¹ In contrast, “[u]nder the ADA Congress did not manifest a clear intent to condition participation in the programs funded under the Act on a State’s consent to waive its constitutional immunity.”⁷⁷² A retaliation claim may not be brought under the ADA against a state entity if the state entity is not otherwise subject to sub-chapters I, II, and IV of the ADA.⁷⁷³

Although Title 1 of the ADA authorizes claims for monetary damages, such claims may not be made against states or their agencies or instrumentalities. In *Board of Trustees of the University of Alabama v. Garrett*⁷⁷⁴ the respondents had filed suits against Alabama state employers seeking monetary damages under Title I of the ADA. Title I, as noted, prohibits states and other employers from “discriminating against a qualified individual with a disability because of that disability...in regard to...terms, conditions, and privileges of employment.”⁷⁷⁵ In *Garrett*, the Court held that the Eleventh Amendment bars suits against the states for money damages for their failure to comply with Title I. In the Court’s opinion, congressional authority to abrogate the states’ sovereign immunity under Section 5 of the Fourteenth Amendment “is appropriately exercised only in response to state transgressions.”⁷⁷⁶ The legislative record, however, “failed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”⁷⁷⁷ Furthermore, the Court held that the remedy imposed by Congress was not “congruent and proportional to the targeted violation.”⁷⁷⁸

The Eleventh Amendment, however, may not be asserted to bar an ADA claim made by the United States against a state for monetary damages or injunctive relief. In *U.S. v. Mississippi Department of Public Safety*⁷⁷⁹ the United States alleged that the Mississippi state agency violated the ADA by dismissing an individual from the training academy of the Mississippi Highway Safety Patrol because of his disability, Type 2 diabetes.⁷⁸⁰ The United States

maintained that if the agency had made reasonable accommodations for his disability, the individual “would have been able to perform the essential functions of the job....”⁷⁸¹

The Fifth Circuit, reversing the district court’s dismissal of the suit, held that the claim for monetary damages and other compensatory relief was not barred by the Eleventh Amendment.⁷⁸² Although the State of Mississippi argued that the United States was attempting to “circumvent the safeguards of the Eleventh Amendment [to] obtain personal relief for private individuals,”⁷⁸³ the Fifth Circuit held that the Supreme Court in *Garrett*, *supra*, had stated that its ruling “had no impact on the ability of the United States to enforce the ADA in suits for money damages,” and that the United States was not barred by the Eleventh Amendment from suing to enforce federal law as authorized by the ADA.⁷⁸⁴

b. Sovereign Immunity and Title II of the ADA

Under Title II the states do not have sovereign immunity from ADA claims that arise out of a state’s denial of a fundamental right, such as access to the courts. Three years after the decision in *Garrett*, the Supreme Court in *Tennessee v. Lane*⁷⁸⁵ considered whether Title II of the ADA was a proper exercise of congressional authority under Section 5 of the Fourteenth Amendment to abrogate the states’ Eleventh Amendment immunity. The Court held that although Congress has broad power under Section 5 to devise “appropriate remedial and preventative measures for unconstitutional actions,” Congress “may not work a ‘substantive change in the governing law.’”⁷⁸⁶ Where the Congress acts to enforce constitutional rights based on disability, legislation is constitutional if it passes the lowest level of scrutiny, the rational basis test. Thus, classifications based on disability violate the said test only “if they lack a rational relationship to a legitimate governmental purpose.”⁷⁸⁷

In *Lane* the respondents alleged that as paraplegics “they were denied access to, and the services of, the state court system by reason of their dis-

⁷⁷¹ *Prowell v. State of Oregon*, No. 03-80-HA, 2003 U.S. Dist. LEXIS 25530, at *11 (D. Or. Aug. 11, 2003).

⁷⁷² *Id.* at *14.

⁷⁷³ *Id.* at **21–22.

⁷⁷⁴ 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

⁷⁷⁵ 42 U.S.C. § 12112(a).

⁷⁷⁶ *Garrett*, 531 U.S. at 368.

⁷⁷⁷ *Id.*

⁷⁷⁸ *Id.* at 374.

⁷⁷⁹ 321 F.3d 495 (5th Cir. 2003).

⁷⁸⁰ *Id.* at 497.

⁷⁸¹ *Id.*

⁷⁸² *Id.* at 498. The district court dismissed the claim for injunctive relief because the request was made against the state agency rather than a public official.

⁷⁸³ *Id.*

⁷⁸⁴ *Id.* at 499, *citing* *EEOC v. Waffle House*, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002).

⁷⁸⁵ 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

⁷⁸⁶ *Id.* at 520.

⁷⁸⁷ *Id.* at 522.

abilities.⁷⁸⁸ One respondent was unable to answer criminal charges without crawling up two flights of stairs to get to the courtroom because of the absence of an elevator. When he refused to crawl or to be carried the next time he was arrested for failure to appear.⁷⁸⁹ The other respondent, a court stenographer, had lost work and “an opportunity to participate in the judicial process” because of her disability.⁷⁹⁰ The Court found that “Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivation of fundamental rights” of persons with disabilities “in a variety of settings,” including courthouses and other state-owned buildings.⁷⁹¹ The Court held that Congress had the power under Section 5 of the Fourteenth Amendment to abrogate the states’ Eleventh Amendment immunity “to enforce the constitutional right of access to the courts.”⁷⁹² The Court also found that the remedy under the ADA was a limited one as Congress had only “required the States to take reasonable measures to remove architectural and other barriers to accessibility,”⁷⁹³ or in some instances to use less costly or other measures as allowed by the regulations.⁷⁹⁴

The Court decided the *Lane* case, however, on the narrow basis of whether the Congress could abrogate the states’ Eleventh Amendment immunity under Title II of the ADA where the claim involved a fundamental right, such as access to the courts. The *Lane* Court stated that “the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine ‘the full breadth of the statute’ all at once.”⁷⁹⁵ Furthermore, the Court stated that “[b]ecause this case implicates the right of access to the courts, we need not consider whether Title II’s duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*’s prohibition on irrational discrimination.”⁷⁹⁶ The Eleventh Amendment does not preclude injunctive relief from being sought and awarded against a state agency for a violation of federal law.

Thus, the states have sovereign immunity for claims for monetary damages under Title I of the ADA. As for sovereign immunity for claims arising

under Title II, the *Lane* decision dealt with the limited issue of a disability and a claim of discrimination in connection with the denial of a fundamental right—access to the courts. The Court has not ruled on whether there is sovereign immunity for other claims against the states under Title II.

As for future developments, it may be noted that in *Goodman v. Georgia*⁷⁹⁷ the Eleventh Circuit affirmed a district court’s decision granting summary judgment with respect to claims for monetary damages in an inmate’s suit against Georgia brought under Title II of the ADA. The court granted summary judgment on behalf of the state pursuant to state sovereign immunity but held that injunctive relief may be sought. During the appeal, the United States intervened by filing suit against Georgia.⁷⁹⁸ In 2005, the Supreme Court granted Goodman’s petition for *certiorari*,⁷⁹⁹ thus raising the issue of whether the ADA abrogates the states’ sovereign immunity for inmate suits by prisoners with disabilities alleging discrimination by state-operated prisons. In January 2006, the Supreme Court reversed the Eleventh Circuit and remanded. The Court held that “insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity. The Eleventh Circuit erred in dismissing those of Goodman’s Title II claims that were based on such unconstitutional conduct.”⁸⁰⁰

c. Elements of an ADA Claim

Claims may arise in which there is the presumably remote possibility that the state transportation agency does not have immunity (*see* discussion of Title II, *supra*) or in which the transportation agency is not an agency of the state. Thus, the elements of an ADA claim will be discussed next, as well as recent cases against transportation agencies.

There are two basic theories for claims by persons with disabilities. One theory is based on disparate treatment, “when an employer treats a person less favorably than others because of his or her

⁷⁸⁸ *Id.* at 513.

⁷⁸⁹ *Id.* at 514.

⁷⁹⁰ *Id.*

⁷⁹¹ *Id.* at 524–25.

⁷⁹² *Id.* at 531.

⁷⁹³ *Id.*

⁷⁹⁴ 28 C.F.R. §§ 35.151; 35.150(b)(1); 35.150(a)(2), (a)(3).

⁷⁹⁵ *Lane*, 541 U.S. at 531.

⁷⁹⁶ *Id.* at 533 n.20.

⁷⁹⁷ *Goodman v. Georgia*, 120 Fed. Appx. 785 (11th Cir. 2004) (unreported opinion) (referenced in “Table of Decisions without Reported Opinions”).

⁷⁹⁸ *See* Duke Law, Supreme Court Online, available at <http://www.law.duke.edu/publiclaw/supremecourtonline/certgrants/2005/goovgeo.html>.

⁷⁹⁹ *Goodman v. Georgia*, 544 U.S. 1031, 125 S. Ct. 2266, 161 L. Ed. 2d 1057 (2005).

⁸⁰⁰ *United States v. Goodman*, 544 U.S. 1031, 126 S. Ct. 877, 882, 163 L. Ed. 2d 650, 659 (2006).

protected characteristic, such as a disability.”⁸⁰¹ The second theory is based on disparate impact, which “involves facially neutral employment practices or fixed qualifications that in fact impact one group, such as the disabled, more harshly than others and ‘cannot be justified by business necessity’ or the particular business activity involved.”⁸⁰² Proof of a discriminatory motive is not required for a disparate impact claim.⁸⁰³

For a plaintiff to establish a *prima facie* case of discrimination under the ADA, the

plaintiff must show “(1) she is disabled within the meaning of the ADA, (2) she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) she suffered from an adverse employment decision because of her disability.”

With respect to the first part of the *prima facie* case, a plaintiff must prove that her condition, either in fact or in the perception of the employer, meets the statutory definition of a disability. The term “disability” is defined as follows:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.⁸⁰⁴

To establish that a claimant is disabled under the ADA, a “plaintiff must eventually show (1) that he is an individual with a disability as defined in the ADA, (2) that defendant knew this, (3) that he could have performed the essential functions of his job with reasonable accommodations, and (4) that defendant failed to make such accommodations.”⁸⁰⁵

There is a dearth of reported decisions involving the ADA and transportation departments in the past few years. In *Jordon v. Dallas Area Rapid Transit*⁸⁰⁶ the plaintiff (*pro se*) alleged discrimination under the ADA after sustaining an injury to

⁸⁰¹ *Casey’s Gen. Stores v. Blackford*, 661 N.W.2d 515, 519 n.2 (Iowa 2003), quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S. Ct. 1701, 1705, 123 L. Ed. 2d 338, 346 (1993).

⁸⁰² *Id.*

⁸⁰³ *Id.*

⁸⁰⁴ *Gilbert v. Indianapolis Pub. Schools, Dep’t of Transp.*, No. IP 00-1799-C-T/K, 2003 U.S. Dist. LEXIS 1193, at **14–15 (S.D. Ind. Jan. 5, 2003), (internal citations omitted).

⁸⁰⁵ *Faircloth v. Duke Univ.*, 267 F. Supp. 2d 470, 472 (M.D. NC 2003), citing *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373, 387 (4th Cir. 2001), cert. denied, 535 U.S. 933, 122 S. Ct. 1309, 152 L. Ed. 2d 219 (2002).

⁸⁰⁶ No. 3:04-CV-205-B, 2005, U.S. Dist. LEXIS 2888 (N.D. Tex. Feb. 24, 2005).

her neck and shoulder after a panel from a Dallas Area Rapid Transit (DART) bus fell on her. Jordon claimed that she was denied a reasonable accommodation for her disability because DART denied her request for alternative duty.⁸⁰⁷ The district court stated that for one to qualify as being disabled under the ADA, “an individual must meet what the United States Supreme Court has characterized as a ‘demanding standard.’”⁸⁰⁸

To qualify as disabled, an individual must “have a physical or mental impairment that substantially limits one or more of her major life activities.”⁸⁰⁹ The court held that Jordon “failed to raise a genuine issue of material fact as to whether she was ‘disabled’ within the meaning of the ADA....”⁸¹⁰ As the court explained,

the focus of the disability inquiry turns on the impact that Jordon's injury had on everyday, routine aspects of her daily life rather than its impact on her ability to perform specific tasks associated with her job as a bus operator at DART. Jordon must also show that the impact of her impairment was permanent or long term.⁸¹¹

The district court also rejected Jordon’s claim that DART had retaliated against her for having made a claim of discrimination.⁸¹² A *prima facie* case of retaliation requires a plaintiff to show

1) engagement in an activity protected by the ADA; 2) an adverse employment action; 3) a causal connection between the protected activity and the adverse action. “Once the plaintiff has established a *prima facie* case, the defendant must come forward with a legitimate, non-discriminatory reason for the adverse employment action.” If the defendant advances such a reason, the plaintiff must then come forward with sufficient evidence that the proffered reason is a pretext for retaliation and, ultimately, must show that “but for” the protected activity, the adverse employment action would not have occurred.⁸¹³

However, the court found, *inter alia*, that DART had “presented evidence of a legitimate, non-retaliatory reason for the employment actions” taken in respect to Jordon.⁸¹⁴ The court granted a summary judgment for DART and dismissed all claims.

Another case of interest under the ADA is *Gilbert v. Indianapolis Public Schools, Department of*

⁸⁰⁷ *Id.* at *10.

⁸⁰⁸ *Id.* at *11, quoting *Toyota Mf., Ky. v. Williams*, 534 U.S. 184, 195, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002).

⁸⁰⁹ *Id.*, citing 42 U.S.C. § 12102(2)(A).

⁸¹⁰ *Id.* at *14 (citation omitted).

⁸¹¹ *Id.* at *12 (citation omitted).

⁸¹² *Id.* at **15–16.

⁸¹³ *Id.* at *15 (internal citations omitted).

⁸¹⁴ *Id.* at *17.

Transportation,⁸¹⁵ in which Gilbert filed claims based on alleged discrimination and retaliation. Gilbert, a bus driver, beginning in 1991 or 1992 suffered from degenerative disc disease and wore a cervical neck collar as needed. However, Gilbert was reassigned in 1999 to drive a route that required her to assist children with special needs. Gilbert claimed “to be (regarded as) impaired in the major life activity of working, not that of performing manual tasks....”⁸¹⁶

The court held, however, that Gilbert had failed to show that any agent of the defendant regarded her “as impaired to the extent that she would have difficulty performing any function central to daily life, or that she would be excluded from a broad class or range of jobs.”⁸¹⁷ As for the plaintiff’s retaliation claim based on her transfer to a different bus after she refused to settle her lawsuit, the court agreed that “a refusal to settle would seem to qualify as participation in a proceeding under the ADA” and was protected conduct.⁸¹⁸ Nevertheless, Gilbert failed to show that she had been the victim of an adverse employment action as her transfer had been a lateral transfer without loss of benefits.⁸¹⁹

In a case on asthma and the ADA involving a private university, in which the plaintiff also made claims based on a hostile work environment and harassment, the university’s motion for summary judgment was denied where the plaintiff “alleged that his asthma, combined with the smoke in his working environment, made it difficult for him to perform his job to the point that he was forced into early retirement.”⁸²⁰ There were issues of fact regarding what would have been a reasonable accommodation and whether the defendant had done enough to enforce its workplace policy, as well as issues of fact concerning several of the plaintiff’s other claims.

d. Administration of the ADA from the Federal Perspective

The U.S. DOT has promulgated rules and regulations, entitled “Transportation for Individuals with Disabilities,” in response to the enactment of the ADA⁸²¹ that address transportation and disabled

⁸¹⁵ No. IP 00-1799-C-T/K, 2003 U.S. Dist. LEXIS 1193 (S.D. Ind. Jan. 5, 2003).

⁸¹⁶ *Id.* at *18 (citation omitted).

⁸¹⁷ *Id.* at *19.

⁸¹⁸ *Id.* at *22.

⁸¹⁹ *Id.* at *23.

⁸²⁰ *Faircloth*, 267 F. Supp. 2d 470, at 474.

⁸²¹ *Transportation for Individuals with Disabilities*, 40 C.F.R. pts. 37 and 38 (May 21, 1996). See ADA REGULATIONS, GUIDANCE, AND PROCEDURES, FEDERAL TRANSIT ADMINISTRATION, available at http://www.fta.dot.gov/14533_ENG_HTML.htm.

persons issues in full. The Federal Transit Administration’s (FTA) Web site contains extensive information on the ADA.⁸²² The site provides access to guidance on U.S. DOT disability law, bulletins on the topic, a toll-free assistance line, and a civil rights complaint form. In addition to the above rules and regulations, other rules and regulations have been promulgated by both the FHWA and the U.S. DOT that require each state to comply actively with the ADA. Compliance takes different forms and may require, for example, research on future transportation projects and what actions need to be taken with respect to the ADA. Generally, these rules and regulations require each state to certify multiple times at various stages of transportation projects that the state is in compliance with the ADA.⁸²³

e. State Laws Prohibiting Discrimination Against Persons with Disabilities

States also have civil rights laws prohibiting discrimination against persons with disabilities. For example, the Iowa Civil Rights Act “prohibits an employer from discriminating against a qualified person with a disability because of the person’s disability.”⁸²⁴ Iowa looks to the federal ADA “to help establish the framework to analyze claims and otherwise apply [the Iowa] statute.”⁸²⁵

[gov/14533_ENG_HTML.htm](http://www.fta.dot.gov/14533_ENG_HTML.htm).

⁸²² AMERICANS WITH DISABILITIES ACT OF 1990, FEDERAL TRANSIT ADMINISTRATION, available at http://www.fta.dot.gov/transit_data_info/ada/14524_ENG_HTML.htm.

⁸²³ See 23 C.F.R. § 450.220 (Apr. 6, 2006) (requiring each state to certify to the FHWA and FTA that its transportation planning process is being carried out in accordance with the ADA); see also *Metropolitan Transportation Planning Process*, 23 C.F.R. § 450.316 (2006) (requiring states to identify actions necessary to comply with the ADA); 23 C.F.R. § 450.334 (2006) (requiring each state to certify that the planning process addressed and is being conducted in accordance with the ADA); *Transportation for Individuals with Disabilities*, 49 C.F.R. pts. 27, 37, and 38 (containing U.S. DOT regulations on the ADA).

⁸²⁴ *Casey’s General Stores*, 661 N.W.2d at 519 (citation omitted). Although alcoholism was a disability under the law, the employee’s claim was not based on the employer’s failure to accommodate him due to his disability but rather based on the employee’s claim that he had suffered disparate treatment as the employer had failed to reassign him after revocation of the employee’s driver’s license. The claim failed in part because the employee did not identify a position that was available to which he could have been reassigned.

⁸²⁵ *Id.* (citation omitted).

A case applying state law on disability in the workplace is *Campbell v. N.C. Department of Transportation—Division of Motor Vehicles*⁸²⁶ in which the petitioner, employed as a process assistant with duties requiring her to work with open files, suffered from asthma. Dust in the open files allegedly aggravated her condition. The court held that someone such as Campbell “is ‘deemed to have voluntarily resigned’ by the State agency for being unable or unwilling to work in conditions that may constitute discrimination[;] such resignation can constitute a constructive discharge entitling the employee to file a contested case alleging termination” under the statute.⁸²⁷ Remanding the case, the court held, *inter alia*, that the “petitioner was clear in her request for reasonable accommodations” and “[t]he fact that her solution for a clean work environment was a job transfer does not support a conclusion that petitioner did not properly prove that she could perform her job with reasonable accommodations.”⁸²⁸

In sum, state agencies have sovereign immunity for claims for monetary damages under Title I of the ADA but no sovereign immunity for claims under Title II, at least insofar as the claims arise out of the denial of a fundamental right, such as access to the courts.

5. Discrimination Under Title VII of the Civil Rights Act of 1964

a. Absence of Sovereign Immunity for Title VII Claims Against States Under Present Law

As one authority has written, “Title VII of the Civil Rights Act of 1964 is the most broadly based and influential federal statute prohibiting discrimination in employment.”⁸²⁹ The law “protects against discrimination across the full range of employment practices or decisions....”⁸³⁰ Even so, there must be “persuasive evidence that any unlawful conduct on the part of the employer caused a real detriment” to the person’s employment.⁸³¹

Section 2000(e)-2(a) of Title 42 states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

The Civil Rights Act of 1991 amended Title VII, *inter alia*, “to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;” to ‘confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII;’ and to ‘respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes.’⁸³² Thus, 42 U.S.C. § 2000(e)-2(k)(1)(A) provides:

An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

With respect to liability for disparate treatment,⁸³³ “the federal courts have at times struggled to clarify the evidentiary frameworks for proving individual and systemic disparate treatment, but there has been no real question that such intentional conduct constitutes unlawful discrimination.”⁸³⁴ As seen, besides liability for disparate treatment, there is liability for neutral or “facially nondiscriminatory practices” or “neutral employer practices”...“that have greater adverse statistical impact on members of the plaintiff’s protected group (and therefore, inferentially, on the plaintiff) than on others.”⁸³⁵ Facially nondiscriminatory or neutral practices “that in operation fall with disproportionate adverse impact on the plaintiff’s protected group have proven far more troublesome” for

⁸²⁶ 155 N.C. App. 652, 575 S.E.2d 54 (N.C. App. 2003).

⁸²⁷ *Campbell*, 575 S.E.2d at 60 (citation omitted).

⁸²⁸ *Id.* at 62, 65.

⁸²⁹ LEWIS & NORMAN, *supra* note 481 § 2.1, at 42.

⁸³⁰ *Id.* § 2.1, at 43.

⁸³¹ *Id.* § 2.1, at 44.

⁸³² *Id.* § 2.1, at 45, *citing* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(1), (3), (4), 105 Stat. 1071. *See also* 42 U.S.C. § 1981(1), (3), (4).

⁸³³ *Id.* § 3.2, at 165.

⁸³⁴ *Id.* § 3.35, at 242.

⁸³⁵ *Id.* § 3.2, at 165.

the courts.⁸³⁶ Even with liability being imposed for disparate impact discrimination, a plaintiff may be unable “to specify a particular aspect of an employer’s subjective decision[-]making process that is allegedly responsible for an under[-] representation of the plaintiff class.”⁸³⁷

As the Eleventh Circuit observed in 1999 in *In re Employment Discrimination Litigation Against the State of Alabama*, (hereinafter the “*Alabama Employment Discrimination Case*”),⁸³⁸ “[t]he genesis of the disparate impact theory lies in the Supreme Court’s decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971).” In the *Griggs* case, Duke Power had abandoned a policy of open discrimination and substituted instead various employment qualification requirements or tests that had a disparate impact on African Americans.⁸³⁹ Under Title VII, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze the *status quo* of prior discriminatory employment practices.”⁸⁴⁰ In a disparate impact case the plaintiff does not have to show discriminatory intent on the part of the employer.⁸⁴¹ After the *Griggs* decision, Congress codified the appropriate burdens of proof in a disparate impact case in 42 U.S.C. § 2000e-2(k) (1994).⁸⁴²

⁸³⁶ *Id.* § 3.35, at 242.

⁸³⁷ *Id.* § 3.35, at 243.

⁸³⁸ 198 F.3d 1305, 1310 (11th Cir. 1999).

⁸³⁹ *Ala. Employment Discrimination Case*, 198 F.3d at 1311.

⁸⁴⁰ *Id.* at 1310 (some internal quotation marks omitted), quoting *Griggs*, 401 U.S. at 430, 91 S. Ct. at 853, 28 L. Ed. 2d at 163.

⁸⁴¹ *Id.* at 1310 n.8. As noted in Shoben, “*supra*, note 510 at 601 (2004):

Disparate impact must be distinguished from disparate treatment, which is a discrimination theory requiring a showing of intent. The confusing similarity in the names of these two discrimination theories is the unfortunate result of the Supreme Court’s footnote in International Brotherhood of Teamsters v. United States, [431 U.S. 324, 335 n.15 (1977)] in which the Court drew the distinction between Griggs-based impact claims and individual claims of intentional exclusion. The Court used the terms disparate impact and disparate treatment to make the distinction, and those terms have prevailed.

⁸⁴² See Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005) (includes overview of the disparate treatment approach to discrimination under Title VII). Sullivan argues that “[t]he state of employment discrimination practice can be easily summarized: plaintiffs are losing almost all of the cases they file except for a few isolated ones, most notably sexual harassment claims.” *Id.* at 912.

There is some law review and other commentary suggesting that, based on recent decisions of the Supreme Court (*e.g.*, *Flores*, *Garrett*, and *Kimel*), Congress’s abrogation of the states’ sovereign immunity under the Eleventh Amendment to Title VII claims for anything other than intentional discrimination could be successfully challenged. On the other hand, as seen, the Court, in *Hibbs* and in *Lane*, upheld the authority of Congress to abrogate the states’ immunity with respect to the FMLA and at least to some extent with respect to Title II of the ADA, respectively. Nevertheless, a few articles contend that the states should be able to claim immunity, particularly for Title VII claims based on gender-based disparate impact discrimination, because there was in their view an inadequate record of gender discrimination by the states. As discussed below, however, federal circuit courts of appeal have rejected arguments that Congress improperly abrogated the states’ sovereign immunity under Title VII, including claims for disparate impact.

In the *Alabama Employment Discrimination Case* the question was whether “Congress validly abrogated the states’ Eleventh Amendment sovereign immunity from claims arising under the disparate impact provisions of Title VII of the Civil Rights Act of 1964, as amended...”⁸⁴³ Plaintiffs, African Americans, alleged discrimination against them in a wide variety of employment actions, including, for example, hiring, lay-offs, terminations, and otherwise, for which they sought declaratory, compensatory, and injunctive relief.⁸⁴⁴ As the Eleventh Circuit noted, the court was addressing only the disparate impact provisions of Title VII.⁸⁴⁵ The district court “held that the Eleventh Amendment did not bar private suits against states under Title VII, which are predicated on a disparate impact theory of liability.”⁸⁴⁶

Likewise, the Eleventh Circuit held first that Congress had clearly “abrogate[d] the states’ sovereign immunity,” because in 1972 Title VII was amended to include governments, government agencies, and political subdivisions.⁸⁴⁷ Second, the court held that Congress’s authority was appropriately exercised under Section 5 of the Fourteenth Amendment. The court distinguished the disparate impact legislation at issue in this case from the RFRA at issue in *City of Boerne v. Flores*, *supra*. The court noted that, as decided in the *City of Boerne* case, *supra*, under Section 5 of the Four-

⁸⁴³ *Ala. Employment Discrimination Case*, 198 F.3d at 1308, citing 42 U.S.C. § 2000e, *et seq.*

⁸⁴⁴ *Id.* at 1309.

⁸⁴⁵ *Id.* at 1309 n.3.

⁸⁴⁶ *Id.* at 1310.

⁸⁴⁷ *Id.* at 1316, citing 42 U.S.C. § 2000e(a).

teenth Amendment Congress “does not have the power to alter the ‘substance of the Fourteenth Amendment’s restrictions on the States.’”⁸⁴⁸ Although “what the Constitution prohibits is intentional discrimination on the part of State actors,” Congress may deter or remedy constitutional violations “even if in the process [Congress] prohibits conduct which is not itself unconstitutional” as long as there is “congruence and proportionality between the injury to be prevented or remedied and the means to that end.”⁸⁴⁹

The Eleventh Circuit agreed that “the disparate impact analysis does not require plaintiffs to demonstrate a subjective discriminatory motive....”⁸⁵⁰ However, according to the court, the “issue of intent is [not] wholly irrelevant to a claim of disparate impact” as “a genuine finding of disparate impact can be highly probative of the employer’s motive since a racial ‘imbalance is often a telltale sign of purposeful discrimination.’”⁸⁵¹ Thus, the court held that “Congress has not sought to alter ‘the substance of the Fourteenth amendment’s restrictions on the States’ with the disparate impact provisions of Title VII.”⁸⁵² The court explained that “although the form of the disparate impact inquiry differs from that used in a case challenging state action directly under the Fourteenth Amendment, the core injury targeted by both methods of analysis remains the same: intentional discrimination.”⁸⁵³

Although the court addressed whether there was evidence supporting the law against disparate impact discrimination, the court did not review the record evidence in detail.⁸⁵⁴ “we need not dredge up this nation’s sad history of racial domination and subordination to take notice of the fact that the ‘injury’ targeted by Title VII, intentional discrimination against racial minorities, has since our inception constituted one of the most tormenting and vexing issues....”⁸⁵⁵ Nor did the court analyze whether or how the law satisfied the test of congruence and proportionality. Although the court referred to the strict scrutiny test, the court did not explain whether or how the legislation met the strictures of strict scrutiny. On the contrary, the court declared that “it is a rare day, indeed, that the courts find government actors to have adequately demonstrated a compelling interest, and a

rarer one still that courts find no less restrictive alternatives to be available.”⁸⁵⁶ The court concluded that “[t]he means used by Congress in the disparate impact provisions of Title VII, so closely aligned to the constitutional equal protection analysis,” were neither incongruent nor disproportional.⁸⁵⁷

The issue of whether Congress properly abrogated sovereign immunity in regard to disparate impact discrimination was addressed also in 2001 in *Okruhlik v. University of Arkansas*,⁸⁵⁸ a case involving claims of both race and sex discrimination and harassment under Title VII. More particularly, the plaintiffs brought claims based on disparate treatment and impact discrimination on the basis of gender, hostile workplace environment, sexual harassment, and discrimination in terminations and promotions. Arkansas argued that “claims of disparate treatment and disparate impact discrimination under Title VII...are barred by the Eleventh Amendment.”⁸⁵⁹

The court in *Okruhlik* observed that in 1972 Congress amended Title VII to extend the coverage of the Act to states and their employees.⁸⁶⁰ Furthermore, the court observed that in 1991 Congress expanded the available remedies against a state from back pay and equitable relief to include compensatory damages, but excluded punitive damages.⁸⁶¹ The court agreed that, as held by the Supreme Court and other courts, Congress clearly had abrogated sovereign immunity in regard to Title VII actions.⁸⁶² The court’s approach in *Okruhlik* differed from the court’s approach in the *Alabama Employment Discrimination Case* in that the *Okruhlik* court addressed initially “whether Congress identified a history and pattern of unconstitutional employment discrimination by the states [on the basis of race and gender].”⁸⁶³ The court rejected Arkansas’s contention that “Congress did not identify a history and pattern of unconstitutional race and gender employment discrimination *by states* and that the studies it relied upon were limited in scope.”⁸⁶⁴ Among other things, the court found “much support” in the record, including at various

⁸⁵⁶ *Id.*

⁸⁵⁷ *Id.* at 1323–24.

⁸⁵⁸ 255 F.3d 615 (8th Cir. 2001).

⁸⁵⁹ *Id.* at 621.

⁸⁶⁰ *Id.* at 622–23.

⁸⁶¹ *Id.* at 623.

⁸⁶² *Id.* at 624.

⁸⁶³ *Id.*, quoting *Bd. of Trustees of Univ. of Garrett*, 531 U.S. 356, 368, 121 S. Ct. 955, 964, 148 L. Ed. 2d 866, 880 (2000).

⁸⁶⁴ *Id.* (emphasis supplied).

⁸⁴⁸ *Id.* at 1319.

⁸⁴⁹ *Id.* at 1320, quoting *City of Boerne*, 521 U.S. at 520, 117 S. Ct. at 2164, 138 L. Ed. 2d at 639 (1997).

⁸⁵⁰ *Id.* at 1321.

⁸⁵¹ *Id.* (citations omitted).

⁸⁵² *Id.* at 1321–22 (citation omitted).

⁸⁵³ *Id.* at 1322.

⁸⁵⁴ *Id.*

⁸⁵⁵ *Id.* at 1323.

times “numerous reports detailing racial and gender discrimination by the states....”⁸⁶⁵

As for whether Title VII’s prohibitions impose greater limits on the states than does the Constitution, the court concluded that “Title VII does not make acts of state unlawful that would be permitted under the Constitution, and it is appropriate legislation.”⁸⁶⁶ The court recognized the congruence and proportionality test without discussing how the legislation met the test. Nevertheless, in the court’s view Congress could legislate against such discrimination by states where such discrimination “had the same effect as intentional discrimination....”⁸⁶⁷

More recently, in *Downing v. Board of Trustees of University of Alabama*⁸⁶⁸ the Eleventh Circuit held that Title VII’s antiharassment provision replicates the kind of intentional discrimination prohibited by the Equal Protection Clause and is congruent and proportional to it.⁸⁶⁹ The statutory provision was a valid abrogation under Section 5 of the Fourteenth Amendment “even if it prohibits conduct not itself unconstitutional it deters the kind of conduct the Clause prohibits.”⁸⁷⁰

Notwithstanding the fact that two circuits have ruled that Congress acted within its constitutional authority to abrogate the states’ sovereign immunity under Title VII, one article maintains that based on the Supreme Court’s decisions in *Hibbs* and *Lane*, *supra*, “many civil rights statutes, such as Title VII’s disparate impact provision, are still at risk of being deemed an invalid exercise of Congress’s abrogation authority.”⁸⁷¹ Some of the reasons given by the article and authorities cited therein are that

[a]lthough *Hibbs* and *Lane* represent refinements of the Court’s Eleventh Amendment jurisprudence, Title VII disparate impact claims against the state are still at risk.... First, the legislative record may not sufficiently justify prophylactic legislation. Second, the Court has repeatedly evidenced skepticism over the practical utility of disparate impact legislation. Third, the scope of Title VII more closely resembles the broadness of RFRA, the ADEA, and Title I of the ADA than the limited provisions of the FMLA and

Title II of the ADA—at least as those provisions were interpreted by the Court.⁸⁷²

Moreover, the foregoing article argues that because “Title VII prohibits disparate impact, whereas the Court has determined that only intentional discrimination violates the Constitution, Title VII’s ban on disparate impact discrimination does in fact extend beyond the applicable constitutional provision, making it prophylactic legislation.”⁸⁷³ The article argues that under recent Supreme Court precedent the Congress is required to “document massive findings” before abrogating the states’ sovereign immunity.⁸⁷⁴ In particular, it is questioned whether before Congress abrogated the states’ sovereign immunity for Title VII claims, there was a sufficient legislative record of “specific evidence” of discrimination by the states against women⁸⁷⁵ or whether the Title VII disparate impact legislation demonstrates congruence and proportionality.⁸⁷⁶ Nevertheless, the article concedes that “[a] majority of lower courts considering the issue [has] determined that Title VII’s prohibition of disparate impact discrimination is a congruent and proportional response....”⁸⁷⁷

Another article similarly argues that the Supreme Court

“increasingly appears to require a legislative record to justify enactments, and it then probes the record to determine its sufficiency.” The “findings” requirement, once considered an advantageous but unnecessary Section Five enforcement element, is now mandatory. An “unmistakably clear” statement, “remedial legislation,” and “congruence and proportionality” are not enough today for the states or the Court.⁸⁷⁸

Furthermore, the viability of the decisions in the *Alabama Employment Discrimination* case and in the *Okruhlik* case, has been questioned because they were decided, for example, prior to *Hibbs* and *Lane* and rely on a “nexus rationale,” meaning that “Congress is justified in prohibiting disparate impact because there are enough instances where unconstitutional purposeful discrimination can be inferred from disparate impact even without being provable.”⁸⁷⁹ Finally, the article also observes that

⁸⁶⁵ *Id.* at 624–25.

⁸⁶⁶ *Id.* at 625.

⁸⁶⁷ *Id.* at 626.

⁸⁶⁸ 321 F.3d 1017 (11th Cir. 2003).

⁸⁶⁹ See LEWIS & NORMAN, *supra* note 481, § 10.35, at 626 n.42.

⁸⁷⁰ *Id.* § 10.35, at 626 n.42.

⁸⁷¹ Disparate Impact Legislation, *supra* note 702, at 1184.

⁸⁷² *Id.* at 1211–12.

⁸⁷³ *Id.* at 1212.

⁸⁷⁴ State of the Nation, *supra* note 702, at 421, 422.

⁸⁷⁵ Disparate Impact Legislation, *supra* note 702, at 1216.

⁸⁷⁶ *Id.* at 1218.

⁸⁷⁷ *Id.* at 1219.

⁸⁷⁸ State of the Nation, *supra* note 702, at 435–36.

⁸⁷⁹ Disparate Impact Legislation, *supra* note 702, at 1220.

in *Alexander v. Sandoval*,⁸⁸⁰ the Supreme Court held that there is “no implied private right of action to enforce disparate impact regulations adopted by federal agencies...under Title VI of the Civil Rights Act of 1964.”⁸⁸¹

b. Prerequisites to Filing a Title VII Claim

As stated, under Title VII of the Civil Rights Act of 1964, it is unlawful “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin....”⁸⁸²

Title VII includes federal and state agency prerequisites to filing a Title VII lawsuit.⁸⁸³ As one authority observes, “[t]he path to court is strewn with a series of intricate and time-consuming administrative procedures at the state and federal levels” that are designed to give the federal and state agencies “opportunities to obtain voluntary resolution of discrimination disputes, as well as to promote federal–state comity.”⁸⁸⁴ To bring a Title VII claim, the plaintiff must timely file a charge of discrimination “with the U.S. Equal Employment Opportunity Commission (‘EEOC’) either in the first instance or, in the majority of states that have parallel state or local antidiscrimination legislation and agencies, after filing with [the state] agencies.”⁸⁸⁵ Second, the plaintiff must file “a federal or state court action within 90 days after receipt from EEOC of a ‘notice of right to sue.’”⁸⁸⁶ If the employee fails to adhere to these requirements, a court will lack jurisdiction over an employment discrimination action under Title VII. Title VII claims thus may be subject to dismissal for failure to exhaust administrative remedies,⁸⁸⁷ and claims may be time-barred depending on the claims and circumstances of the case.⁸⁸⁸

⁸⁸⁰ 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

⁸⁸¹ Disparate Impact Legislation, *supra* note 702, at 1220–22.

⁸⁸² 42 U.S.C. § 2000(e)-2(a); *Rhodes v. Ill. Dep’t of Transp.*, 359 F.3d 498, 504 (7th Cir. 2004).

⁸⁸³ LEWIS & NORMAN, *supra* note 481, § 4.1, at 261.

⁸⁸⁴ *Id.* § 4.1, at 261.

⁸⁸⁵ *Id.*; see also *Barlow v. AVCO Corp.*, 527 F. Supp. 269 (E.D. Va. 1981).

⁸⁸⁶ LEWIS & NORMAN, *supra* note 702 § 4.1, at 261.

⁸⁸⁷ *Gomez v. Orleans Parish Sch. Bd.*, No. 04-1521 Section “N” (1) 2005 U.S. Dist. LEXIS 17810, at *23 (E.D. La. Aug. 11, 2005).

⁸⁸⁸ *Id.* at *12.

c. Direct and Indirect Method of Proof

As with other forms of discrimination discussed herein, “a plaintiff may prove employment discrimination under Title VII by using either the ‘direct method’ or ‘indirect method.’”⁸⁸⁹ Although a specific situation may “implicate two or more modes of proof,” there are “distinct proof modes that have developed....”⁸⁹⁰

The direct method of proof occurs when a plaintiff must present “direct evidence of (1) a statutorily protected activity; (2) an adverse action taken by the employer; and (3) a causal connection between the two....” Under the indirect method, the plaintiff must show that “(1) she engaged in a statutorily protected activity; (2) [the plaintiff] performed her job according to her employer’s legitimate expectations; (3) despite her satisfactory job performance, she suffered an adverse action from the employer; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity.”⁸⁹¹

As for disparate impact cases, 42 U.S.C. § 2000e-2 (k)(1)(B)(i) states that

[w]ith respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent’s decision[-]making process are not capable of separation for analysis, the decision[-]making process may be analyzed as one employment practice.

Thus, with disparate impact, a plaintiff’s burden is only to show that the practice in question has a disproportionate impact on the protected class.⁸⁹² With intentional discrimination, intent matters, whereas there is no intent-analysis in disparate impact cases.⁸⁹³

There may be direct evidence of disparate treatment without the need of “inferences or presumption.”⁸⁹⁴ Nevertheless, a plaintiff may meet his or her burden “by constructing a ‘convincing mosaic’ of circumstantial evidence that allows a jury to infer intentional discrimination.”⁸⁹⁵ The types of circum-

⁸⁸⁹ *Rhodes v. Illinois*, 359 F.3d 498, 504 (7th Cir. 2004).

⁸⁹⁰ LEWIS & NORMAN, § 3.2, at 165.

⁸⁹¹ *Rhodes*, 359 F.3d at 508 (citations omitted).

⁸⁹² See *E.E.O.C. v. Consol. Servs. Sys.*, 777 F. Supp. 599, 603 (1991).

⁸⁹³ See *Nash v. Consol. City of Jacksonville*, Duval County, Fla., 763 F.2d 1393, 1397 (1985).

⁸⁹⁴ LEWIS & NORMAN, *supra* note 702 § 3.2, at 165.

⁸⁹⁵ *Nobles v. NALCO Chemical Co.*, No. 01C 8944 2004, U.S. Dist. LEXIS 3284, at *24 (N.D. Ill. March 3, 2004)

stantial proof include “suspicious timing, ambiguous statements, or other behavior;” statistical or anecdotal evidence “that persons outside the plaintiff’s protected group, otherwise similarly situated to the plaintiff, were treated differently with respect to the relevant terms and conditions of employment;” and the “pretext mode” as developed in the *McDonnell Douglas Corp. v. Green* case.⁸⁹⁶

Passage of time may defeat a direct or indirect claim because of the inability to prove proximate cause. For example, in *Sims v. Fort Wayne Community Schools*⁸⁹⁷ the defendant had disciplined and then terminated the plaintiff, a bus driver, who argued that she was discriminated against because of her race and that “other employees who engaged in similar conduct...were not disciplined as harshly.”⁸⁹⁸ Although the court recognized that the plaintiff could establish her claim either by a direct⁸⁹⁹ or indirect⁹⁰⁰ method, the plaintiff had failed to show the ability to prove under the direct method the “causal link between her protected activity and her suspensions and termination.”⁹⁰¹

(citation omitted) (employer’s motion for summary judgment granted in case in which plaintiff alleged race and sex discrimination claims under Title VII regarding termination of employment, failure to promote or transfer plaintiff, denial of a salary increase, failure to train, as well as a claim for retaliation for a harassing work environment).

⁸⁹⁶ LEWIS & NORMAN, *supra* note 702 § 3.10, at 179–81. See *id.* for elements required for *prima facie* case under *McDonnell Douglas* for “failure to hire.”

⁸⁹⁷ No. 1103-CV-430-TS, 2005 U.S. Dist. LEXIS 6174 (N.D. Ind. Feb. 2, 2005).

⁸⁹⁸ *Id.* at *19.

⁸⁹⁹ The direct evidence approach requires a plaintiff to present evidence of (1) a statutorily protected activity; (2) an adverse action taken by the employer; and (3) a causal connection between the two. *Id.* at *35, *citing* Sitar v. Ind. Dep’t of Transp., 344 F.3d 720, 728 (7th Cir. 2003).

⁹⁰⁰ The court explained that

under the *indirect method* the Plaintiff must show that: (1) she engaged in statutorily protected activity; (2) she was performing her job according to her employer’s legitimate expectations; (3) despite her satisfactory performance, she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in protected activity. This rule was developed to clarify the traditional burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), in the retaliation context, and eliminates the need for a plaintiff to show a causal link between protected activity and adverse employment action.

Id. at **35–36 (emphasis supplied) (citation omitted).

⁹⁰¹ *Id.* at *36.

There has to be “temporal proximity” between the time of the protected activity and the adverse employment action, *i.e.*, between the time of the recommended termination and the time of the complaint. “Here, the passage of time is far too great to infer a causal connection and time has become the Plaintiff’s enemy.”⁹⁰² The court also ruled that the evidence failed to show a material issue of fact as to whether the plaintiff’s discipline was pretext. That is, the record did not establish “that the [d]efendants’ reasons were (1) factually baseless, (2) not the actual motivation for the discharge, or (3) insufficient to motivate the discharge.”⁹⁰³ The court granted the defendant’s motion for summary judgment as the plaintiff was unable to show that her “discipline was a sham.”⁹⁰⁴

d. Elements for a Prima Facie Case of Discrimination Under Title VII

To establish a *prima facie* case, a plaintiff alleging discrimination must prove that he or she (1) was a member of a protected class; (2) was performing his or her job satisfactorily; (3) experienced an adverse employment action; and that (4) similarly situated individuals were treated more favorably.⁹⁰⁵ If the plaintiff establishes these required elements, the burden shifts to the defendant to come forward with a legitimate, noninvidious reason for its adverse action. Although the burden of production shifts to the defendant under this method, the burden of persuasion rests at all times on the plaintiff. Once the defendant presents a legitimate, noninvidious reason for the adverse action, the burden shifts back to the plaintiff to show that the defendant’s reason is pretextual. Direct evidence may consist of “statements by persons involved in the decision-making process which tend to show a discriminatory attitude” such that the court may “conclude that a discriminatory animus was the motivating factor in the employment decision.”⁹⁰⁶

As for what constitutes a materially adverse employment action, in *Rhodes v. Illinois Department of Transportation*⁹⁰⁷ the court agreed with the district court that Rhodes “failed to set forth a materially adverse employment action under either the

⁹⁰² *Id.* at *37.

⁹⁰³ *Id.* at *48, *citing* Tincher v. Wal-Mart Stores, 118 F.3d 1125, 1130 (7th Cir. 1997).

⁹⁰⁴ *Id.* at *53.

⁹⁰⁵ *Rhodes*, 359 F.3d at 504.

⁹⁰⁶ Merritt v. Iowa Dep’t of Transp., No. 3-964/03-0858, 2004 Iowa App. LEXIS 436, at *6 (Iowa App. March 10, 2004), *citing* Price Waterhouse v. Hopkins, 490 U.S. 228, 245, 109 S. Ct. 1775, 1787, 104 L. Ed. 2d 268, 284 (1989).

⁹⁰⁷ *Rhodes*, 359 F.3d at 504 (7th Cir. 2004).

direct or indirect method of proof.”⁹⁰⁸ Title VII was not designed “to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.”⁹⁰⁹ In another case, in ruling against the plaintiff, the district court stated that at least in the Fifth Circuit it was well established that “negative reprimands and poor performance evaluations do not constitute ultimate adverse employment decisions actionable under Title VII.”⁹¹⁰ Furthermore, “whether docking or withholding an employee’s pay constitutes an adverse employment action depends in part on whether the loss to the employee is *de minimis*.”⁹¹¹

Several cases were found in which plaintiffs brought one or more Title VII claims for disparate treatment against transportation agencies. A former employee brought an action alleging disparate treatment, a racially hostile work environment, and constructive discharge under Title VII, as well as claims under state law, in *Brown v. Arkansas State Highway and Transportation Department*.⁹¹² In dismissing nearly all claims, the district court emphasized that as soon as the plaintiff filed an official grievance, the Department launched an internal investigation and provided the crew with diversity training. With respect to the alleged racial slurs, there was insufficient evidence of harassment “so extreme as to change the terms or conditions of Plaintiff’s employment.”⁹¹³ Because of the dismissal of the claim of a racially hostile work environment, the court also dismissed the claim of constructive discharge.⁹¹⁴ However, as for Brown’s claim based on disparate treatment, the plaintiff made out a *prima facie* case of racial discrimination to overcome the defendant’s motion for summary judgment based on a merit raise having been awarded to a similarly situated white co-worker.⁹¹⁵

Payne v. State of Connecticut Department of Transportation,⁹¹⁶ in which the plaintiff alleged that the state DOT denied him a promotion on the basis of his race, age, and gender, is an example of how the burden shifts on a motion for summary judgment in a Title VII claim. Payne, an African Ameri-

can male, was 49 years old at the time he was denied a promotion. The DOT argued that Payne failed to establish a *prima facie* case because he could not show that he was the most qualified candidate for the position of section manager, and the record disclosed no irregularities in the DOT’s process. The court, noting that Payne satisfied the elements for establishing a *prima facie* case (including the fact that he possessed the basic skills necessary for the job of section manager), ruled that he was denied a promotion under circumstances that gave rise to an inference of discrimination. However, if the defendant DOT offers a legitimate, nondiscriminatory reason for its actions, then the burden shifts back to the plaintiff to fulfill his ultimate burden of proving that the defendant intentionally discriminated against him in the employment decision.⁹¹⁷ In order to satisfy this burden, the plaintiff may attempt to prove that the legitimate, nondiscriminatory reason offered by the defendant was not the employer’s true reason but was a pretext for discrimination. The court denied the DOT’s motion for summary judgment, *inter alia*, because Payne “has established a record sufficient to support an inference that the adverse employment action was pre-textual.”⁹¹⁸

In *Merritt v. Iowa Department of Transportation* the plaintiff, a long-time employee of the department, applied for a promotion to the position of Right-of-Way Agent IV, a position in which “women, minorities and disabled people were statistically under-represented.”⁹¹⁹ However, the court ruled that Merritt had “produced no evidence from which a reasonable fact finder could conclude [that] the DOT’s stated reason for not hiring her was ‘so lacking in merit as to call into question its genuineness.’”⁹²⁰

In *Sallis v. Minnesota*,⁹²¹ a Title VII case involving alleged racial slurs, in which plaintiff made a variety of claims (failure to promote, disparate treatment, hostile work environment, and retaliation), all claims were dismissed. As stated, one of the plaintiff’s claims was based on disparate treatment. To make a *prima facie* claim of disparate treatment,

the plaintiff must establish that (1) he is a member of a protected class, (2) he was qualified for his position and performed his duties adequately, and (3) he suffered an adverse employment action under cir-

⁹⁰⁸ *Id.* at 508.

⁹⁰⁹ *Gomez*, 2005 U.S. Dist. LEXIS 17810 at *32, quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

⁹¹⁰ *Id.* at *37 (citation omitted).

⁹¹¹ *Id.* at *42 (citation omitted). Nevertheless, there were genuine issues of fact relating to Gomez’s retaliation claim and the docking of her pay, the increase in work duties, and the denial of opportunity to work overtime. *Id.* at *46.

⁹¹² 358 F. Supp. 2d 729 (W.D. Ark. 2004).

⁹¹³ *Id.* at 735.

⁹¹⁴ *Id.* at 736.

⁹¹⁵ *Id.* at 737.

⁹¹⁶ 267 F. Supp. 2d 207 (D. Conn. 2003).

⁹¹⁷ *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 143, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105, 117 (2000).

⁹¹⁸ *Payne*, 267 F. Supp. 2d at 212.

⁹¹⁹ 2004 Iowa App. LEXIS 436, at *2.

⁹²⁰ *Id.* at *11, quoting *Dister v. Continental Group*, 859 F.2d 1108, 1116 (2d Cir. 1988).

⁹²¹ 322 F. Supp. 2d 999 (D. Minn. 2004).

cumstances that would permit the court to infer that unlawful discrimination had been at work.⁹²²

The district court ruled that “[w]ithout evidence of a racial motive, the Court can only conclude that the well-documented antipathy between Sallis and his supervisors was of a personal, rather than racial nature. And personal animus, even against a member of a protected class, ‘does not discrimination make.’”⁹²³

e. Title VII Claims Based on Sexual Harassment and Hostile Work Environment

For a plaintiff to prevail on a sexual harassment claim under Title VII, the

plaintiff must establish that: (1) [plaintiff] was subjected to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) the conduct was severe or pervasive enough to create a hostile work environment; (3) the conduct was directed at her because of [plaintiff's] sex; and (4) there is a basis for employer liability. Proof of a hostile work environment requires evidence that the plaintiff was subjected to conduct “so severe or pervasive as to alter the conditions of employment and create an abusive working environment.” To qualify as “hostile,” the work environment must be “both objectively and subjectively offensive....”⁹²⁴

For a plaintiff to establish a hostile work environment claim, the “plaintiff must show that he was a member of a protected class, that he was subjected to unwelcome harassment, that the harassment resulted from his membership in the group, and that the harassment affected a term, condition, or privilege of his employment.”⁹²⁵ To determine whether the conduct in the work environment has created “an objectively hostile work environment, courts must consider all of the circumstances, including factors such as: the frequency of the discriminatory conduct, the severity of the conduct, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee’s work performance.”⁹²⁶

Not all verbal or physical harassment in the workplace is prohibited under Title VII.⁹²⁷ To suc-

ceed on such a claim, the plaintiff must show that the work environment was “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”⁹²⁸ In the *Sallis* case, *supra*, where the plaintiff’s claims was based on a hostile work environment, in granting the defendant’s motion for summary judgment, the district court stated that “[b]ecause the discrimination laws are not a general civility code, offhand comments (unless extremely serious) and isolated incidents...will not amount to discriminatory changes in the terms and conditions of employment.”⁹²⁹

In the *Rhodes* case, the Department “concede[d] that Rhodes was subject to unwelcome, sexually-related conduct severe or pervasive enough to create a hostile work environment.”⁹³⁰ However, to hold the employer liable where the harasser is a co-worker, the plaintiff must show that the employer has been “negligent either in discovery or remedying the harassment.”⁹³¹ On the other hand, “[h]arassment by a supervisor of the plaintiff triggers strict liability, subject to the possibility of an affirmative defense in the event the plaintiff suffered no tangible employment action.”⁹³² The supervisor must be the plaintiff’s supervisor. However, in *Rhodes* the court held that Rhodes failed “to establish that she made a concerted effort to inform IDOT” that a problem existed.⁹³³

Finally, in a case in which the plaintiff alleged that an applicant for a position had a sexual relationship with her supervisor, the court agreed that the Title VII implementing regulation⁹³⁴ specifically identified favoritism based on sexual relationships as coming within the purview of what is prohibited by federal law, and furthermore agreed that the plaintiff’s complaint stated a claim because she had identified a specific lost opportunity.⁹³⁵

f. Retaliation Claims Under Title VII

As for claims of retaliation under Title VII, the title “prohibits an employer from discriminating against an employee because that employee has opposed any practice deemed unlawful under the

negative light are not sufficiently severe or pervasive so as to create a hostile work environment.” *Id.*

⁹²² *Brown*, 358 F. Supp. 2d at 734 (citation omitted).

⁹²⁹ *Sallis*, 322 F. Supp. 2d at 1008, quoting Wallin v. Minn. Dep’t of Corrections, 153 F.3d 681, 688 (8th Cir. 1998) (citation and internal quotations omitted).

⁹³⁰ *Rhodes*, 359 F.3d at 505.

⁹³¹ *Id.* at 506 (internal quotation marks omitted).

⁹³² *Id.* at 505 (citation omitted).

⁹³³ *Id.* at 507.

⁹³⁴ See 29 C.F.R. § 1604.11(g).

⁹³⁵ *Prowell*, 2003 U.S. Dist. LEXIS 25530 at *19.

⁹²² *Id.* at 1006–07, citing *Habib v. NationsBank*, 279 F.3d 563, 566 (8th Cir. 2001).

⁹²³ *Id.* at 1008 (citation omitted).

⁹²⁴ *Rhodes*, 359 F.3d at 505 (internal citations omitted).

⁹²⁵ *Brown v. Ark. State Highway and Transp. Dep’t*, 358 F. Supp. 2d at 734, citing *Jackson v. Flint Ink North Am. Corp.*, 370 F.3d 791, 793 (8th Cir. 2004).

⁹²⁶ *Nobles*, 2004 U.S. Dist. LEXIS 3284, at *34–35.

⁹²⁷ *Id.* at *35. According to the court, a few e-mails and documents that “paint men and/or African-Americans in a

Act.⁹³⁶ A plaintiff may establish a *prima facie* case of retaliation and overcome the defendant's motion for summary judgment using either the direct method or the indirect method.⁹³⁷ However, in a case involving sex discrimination, the Ninth Circuit held that a “plaintiff need not prove she was discriminated against under Title VII to sustain a claim for retaliation under § 2000(3)(a).”⁹³⁸

In the *Rhodes* case, *supra*, the court stated that the plaintiff could

overcome defendant's motion for summary judgment using either the direct method or the indirect method. Under the direct method, the plaintiff must present direct evidence of (1) a statutorily protected activity; (2) an adverse action taken by the employer; and (3) a causal connection between the two.

Under the indirect method, the plaintiff must show that (1) she engaged in a statutorily protected activity; (2) she performed her job according to her employer's legitimate expectations; (3) despite her satisfactory job performance, she suffered an adverse action from the employer; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity.⁹³⁹

The court held in the *Rhodes* case that plaintiff's retaliation claim failed “because IDOT had a legitimate, non-pretextual reason for marking her absent without pay.”⁹⁴⁰

In *Bovee v. State of New Mexico Highway and Transportation Department*⁹⁴¹ the state appellate court affirmed the dismissal of the plaintiff's retaliation suit. The court agreed with the trial court that the department legitimately could refuse to hire her based on representations she had made in an earlier Title VII lawsuit in which she had alleged her incapacity to perform the job of an engineer. It was not error for the trial court to dismiss Bovee's claims for breach of contract and violation of civil rights.

⁹³⁶ *Rhodes*, 359 F.3d at 508, citing 42 U.S.C. § 2000e-3(a).

⁹³⁷ See *Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720 (7th Cir. 2003). In *Sitar*, the plaintiff was one of the few women to work for INDOT in its historically male Westfield Unit, but she was transferred and terminated before the end of 6 months. INDOT claimed that the reason for the brevity of Sitar's tenure was unsatisfactory performance; Sitar argued that it was the result of sex discrimination, sexual harassment, and retaliation. The appellate court reversed and remanded a summary judgment in favor of the department.

⁹³⁸ *Prowell*, 2003 U.S. Dist. LEXIS 25530, at *23, citing *Trent v. Valley Elec. Ass'n*, 41 F.3d 524 (9th Cir. 1994).

⁹³⁹ *Rhodes*, 359 F.3d at 508 (citations omitted).

⁹⁴⁰ *Id.* at 509.

⁹⁴¹ 133 N.M. 519, 65 P.3d 254 (N.M. App. 2002).

F. FIRST AMENDMENT ISSUES

1. Adopt-a-Highway Programs

Several cases have presented a free speech issue under the First Amendment to the United States Constitution in the context of the “adopt-a-highway” programs and use of logos on state license plates. Because another report is addressing First Amendment issues in the transportation context, only several recent cases will be discussed in this section.

The question is to what extent the highway is a public forum and thus subject to the First Amendment, thereby prohibiting viewpoint discrimination by the government. In *Knights of KKK v. Arkansas State Highway and Transportation Department*⁹⁴² the court held that the Adopt-a-Highway Program was an innately public forum or had become one by the state's action. The court enjoined the state from denying the group's application to participate in the program as the state was constitutionally prohibited from discriminating against the group because it disagreed with the group's espoused views.

In *Robb v. Hungerbeeler*⁹⁴³ the court held that the Missouri Highways and Transportation Commission had infringed the group's expressive and associational rights to the extent that it had denied the group the ability to participate in the Adopt-a-Highway program based on the group's choice of name and the conduct of other groups and individuals associated with that name. The timing of the amended regulations and the fact that the applicant was the only group that the regulations had ever been used to exclude strongly suggested that the regulations had been used as a pretext to target the group in a viewpoint-discriminatory manner.

In *Cuffley v. Mickets*⁹⁴⁴ also involving an Adopt-a-Highway program, the court held that the state unconstitutionally denied the group's application based on the group's views; that there was no question that the state treated the group differently from the vast majority of applicants based on the state's perception of the group's beliefs and advocacy; and that the state's action violated the group's freedom of political association.⁹⁴⁵

⁹⁴² 807 F. Supp. 1427 (W.D. Ark. 1992).

⁹⁴³ 370 F.3d 735 (8th Cir. 2004).

⁹⁴⁴ 208 F.3d 702 (8th Cir. 2000).

⁹⁴⁵ In *Mo. ex rel. Mo. Highway & Transp. Comm'n v. Cuffley*, 112 F.3d 1332 (8th Cir. 1997), the Court of Appeals vacated a summary judgment and an award of attorney fees to the political group where the Commission brought a declaratory action that would have been a defense to a hypothetical action by the group. Because the action by the political group was only hypothetical, the Commission was not prejudiced by the inability to bring a

However, in an earlier case, *State of Texas v. Knights of the Ku Klux Klan*,⁹⁴⁶ the court ruled otherwise. The group brought suit to force the state to grant the group's application to participate in the state Adopt-a-Highway program. The court concluded that the state did not violate the First Amendment by refusing to allow the group to adopt a section of highway near a public housing project. The state's denial of the group's application was a reasonable effort to avoid strife and intimidation of current and prospective residents of the nearby housing project and to promote compliance with a federal desegregation order. The state's limit on speech was also a reasonable measure to insure free use of the state's public highways and to protect against the imposition of a message on captive recipients.

We hold that the State will not violate the First Amendment by rejecting the Klan's application to adopt a portion of highway near the housing project in Vidor, Texas. Assuming that the Klan's participation in the Program would constitute speech or expressive conduct protected by the First Amendment, the Program is a nonpublic forum and the Klan's exclusion from the Program is reasonable and viewpoint-neutral.⁹⁴⁷

The court held: "The Program is a nonpublic forum. The Program is not a traditional public forum, as are public streets and parks. Nor has it been designated by the State as a public forum. There is no indication that the State intended to open up the Program for public discourse."⁹⁴⁸ Furthermore, the court observed that the Klan wished to adopt a highway near a housing project that was under an order to desegregate; "[g]iven this context, the State could reasonably believe that the Klan's adoption of a section of highway outside the project would result in further intimidation of the residents of the housing project and would create unreasonable conflict."⁹⁴⁹ Although the court stressed the proximity of the housing project, later judicial authority, discussed above, holds that a denial of an application to a group such as the Ku Klux Klan is a violation of the group's First Amendment rights.

2. Logos on License Plates

It is also a denial of a group's First Amendment rights to deny a group's application to place a logo on a state license plate. In *Sons of Confederate Vet-*

preemptive action. The Commission had to act upon the political group's application before the case would be ripe.

⁹⁴⁶ 58 F.3d 1075, 1995 U.S. App. LEXIS 19468 (5th Cir. 1995).

⁹⁴⁷ *Knights of the Ku Klux Klan*, 58 F.3d at 1078.

⁹⁴⁸ *Id.* (citation omitted).

⁹⁴⁹ *Id.* at 1079.

erans, Inc. v. Commissioner of the Virginia Dept. of Motor Vehicles,⁹⁵⁰ in contrast to other Virginia statutes authorizing special plates for members or supporters of various organizations, the statute at issue contained a restriction (the logo restriction) providing that no logo or emblem of any description should be displayed or incorporated into the design of license plates issued under Virginia Code Section 46.2-746.22. The court held that the special plates authorized in Virginia were not instances of "government speech" and concluded that the logo restriction was an instance of viewpoint discrimination that did not survive review based on strict scrutiny.⁹⁵¹ Accordingly, the restriction that prohibited the Sons of Confederate Veterans from receiving special plates bearing the symbol of their organization, which included the Confederate flag, violated their First Amendment rights.

G. SUMMARY AND CONCLUSIONS

1. Constitutionality of Federal U.S. DOT DBE Law and Regulations

In *Adarand III*, the Supreme Court held that in the matter of race-based classifications in the field of public contracting, the standard of review that must be applied is strict scrutiny, whereas gender-based classifications continue to be reviewed on the basis of intermediate scrutiny. Strict scrutiny is applied to "smoke out" illegitimate uses of race" by assuring that the legislature had sufficient evidence of discrimination before resorting to the use of a "suspect tool" and to assure that the means chosen are a proper fit.⁹⁵²

Post *Adarand III*, several courts have held that TEA-21 and the DBE regulations promulgated in 1999 are constitutional. The federal DBE program has several objectives, including the assurance that there is "nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs."⁹⁵³ The regulations are intended "[t]o create a level playing field on which DBEs can compete fairly for DOT-assisted contracts"⁹⁵⁴ and "[t]o ensure that the Department's

⁹⁵⁰ 288 F.3d 610 (4th Cir. 2002).

⁹⁵¹ *Id.* at 627.

⁹⁵² *Rothe IV*, 324 F. Supp. 2d at 848, quoting *Croson*, 488 U.S. at 493, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854, 882 (1989).

⁹⁵³ 49 C.F.R. § 26.21(a)(1). See also § 26.3(a)(1) through (3). A recipient under the DBE program includes any recipients of Federal-aid highway funds pursuant to certain federal laws, federal transit funds, and airport funds.

⁹⁵⁴ *Id.* § 26.1(b).

DBE program is narrowly tailored in accordance with applicable law....⁹⁵⁵

When a governmental program relies on racial classifications, the program must satisfy a two-prong test: it “must serve a compelling governmental interest, and [it] must be narrowly tailored to further that interest.”⁹⁵⁶ When racial classifications are present in public contracting, the court “must determine whether the government’s articulated goal in enacting the race-based measures...is appropriately considered a ‘compelling interest’....”⁹⁵⁷ The court must decide whether the government’s interest is sufficiently strong to meet the government’s initial burden of demonstrating that there is a compelling interest, after which the court must decide whether the party challenging the program has met its “ultimate burden of rebutting the government’s evidence....”⁹⁵⁸

When enacting a DBE program, Congress may consider evidence of discrimination in society at large with respect to public contracting because the reach of Congress is “nationwide.”⁹⁵⁹ The courts in *Adarand*, *Sherbrooke Turf*, *Western States*, and *Northern Contracting* concluded “that Congress had spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁹⁶⁰ Thus, “Congress had a ‘strong basis in evidence’ to conclude that the DBE program was necessary to redress private discrimination in federally-assisted highway subcontracting.”⁹⁶¹ Strong evidence is that “‘approaching a *prima facie* case of a constitutional or statutory violation,’ *not* irrefutable or definitive proof of discrimination.”⁹⁶²

In regard to TEA-21, prior to the current SAFETEA-LU and the 1999 DBE regulations, the courts thus far have “conclude[d] that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its dis-

bursements.”⁹⁶³ For the government to fulfill the requirement that there is a compelling interest for a program, there must be “a strong basis in evidence to conclude that remedial action was necessary....”⁹⁶⁴ However, the government need not prove conclusively “the existence of past or present racial discrimination.”⁹⁶⁵

Assuming that a compelling interest has been demonstrated for a “race-conscious” approach, the government may use race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “passive participant in a system of racial exclusion practiced by elements of the local construction industry by allowing tax dollars to finance the evil of private prejudice.”⁹⁶⁶ However, the law must be narrowly tailored; reliance first on race-neutral means is important in demonstrating that an affirmative action program for public contracting is narrowly tailored.

Although several cases have addressed whether a claimant challenging a DBE program has standing, as the court observed in *Northern Contracting*, in most cases the claimants were held to have standing.⁹⁶⁷ Moreover, although complaints contesting contracts awarded on the basis of a DBE requirement have been challenged for mootness because the government had suspended the use of the DBE requirement and/or contract clause at issue, it has been held that because the program could be renewed, that means there is still a “live controversy.”⁹⁶⁸

As for whether a state implementing the federal DBE program had to make an independent showing to satisfy strict scrutiny, it has been held that the states did not have to satisfy independently

⁹⁵⁵ *Id.* § 26.1(c). See also § 26.1(d) through (g) for other stated objectives.

⁹⁵⁶ *Adarand VII*, 228 F.3d at 1164.

⁹⁵⁷ *Id.*

⁹⁵⁸ *Id.*

⁹⁵⁹ *Id.* at 1165.

⁹⁶⁰ *N. Contracting*, 2004 U.S. Dist. LEXIS 3226, at *100, quoting *Sherbrooke Turf*, 345 F.3d at 969–70.

⁹⁶¹ *Id.* at *121.

⁹⁶² *Concrete Works*, 321 F.3d at 971, quoting *Croson*, 488 U.S. at 500, 109 S. Ct. at 725, 102 L. Ed. 2d at 886 (O’Connor, J.).

⁹⁶³ *Adarand VII*, 228 F.3d at 1165, citing *Croson*, 488 U.S. at 492, 109 S. Ct. at 721, 102 L. Ed. 2d at 881 (O’Connor, J.).

⁹⁶⁴ *N. Contracting*, 2004 U.S. Dist. LEXIS 3226, at * 89, quoting *Shaw v. Hunt*, 517 U.S. at 909–10, 116 S. Ct. at 1903, 135 L. Ed. 2d at 222 (1996).

⁹⁶⁵ *Concrete Works*, 321 F.3d at 958, citing *Concrete Works*, 36 F.3d at 1522.

⁹⁶⁶ *Adarand VII*, 228 F.3d at 1164 (internal quotation marks omitted), quoting *Concrete Works*, 36 F.3d at 1519 (quoting *Croson*, 488 U.S. at 492).

⁹⁶⁷ See *Northeastern Fla. Chapter of Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993); *Adarand III*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995); *Sherbrooke Turf v. Minn. Dep’t of Transp.*, 345 F.3d 964 (8th Cir. 2003); *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993); and *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997).

⁹⁶⁸ *Rothe IV*, 324 F. Supp. 2d at 848.

“the compelling interest aspect of strict scrutiny review.”⁹⁶⁹ A contractor may not challenge a grantee state for “merely complying with federal law.”⁹⁷⁰ However, “a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.”⁹⁷¹ Thus, although a state DOT, for example, may not need to make a separate showing to satisfy the compelling-interest prong of the strict scrutiny test, the state may be required to show that the program was narrowly tailored; “to the extent the federal government delegates this tailoring function, a [s]tate’s implementation becomes critically relevant to a reviewing court’s strict scrutiny.”⁹⁷²

2. Claims Based on Highway Projects and Disparate Impact

In regard to disparate impact cases arising out of the location of highways and related projects, under Section 601 of Title VI of the Civil Rights Act of 1964,⁹⁷³ “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” However, the Supreme Court has interpreted Section 601 to proscribe only “intentional” discrimination.⁹⁷⁴

Moreover, as for the disparate impact regulations promulgated under Section 602 of Title VI, the Supreme Court has held that there is no private right of action to enforce the regulations.⁹⁷⁵ Nonetheless, transportation officials need to be aware of other civil rights-related laws and regulations that are implicated by planning and project decisions. The U.S. DOT is obligated “to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest....”⁹⁷⁶ Presently there are two means of enforcing the disparate impact regulations. First, federal financial assistance may be refused if an applicant “fails or refuses to furnish an assurance required under [49 C.F.R.] § 21.7 or otherwise fails or refuses to comply with a requirement imposed by or

pursuant to that section....”⁹⁷⁷ Second, an affected person may file a complaint with the funding agency alleging a violation.⁹⁷⁸

3. Immunity of a State or Its Officer Acting in Official Capacity from § 1983 Actions

As for actions under § 1983 of the Civil Rights Act of 1871,⁹⁷⁹ the section is based on the constitutional authority of Congress to enforce the Fourteenth Amendment. Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere.⁹⁸⁰ The section does not create a cause of action in and of itself. Rather, a plaintiff must prove that he or she was deprived of a right secured by the United States Constitution or the laws of the United States and that the deprivation of his or her right was caused by someone acting under color of state law.⁹⁸¹

Neither a state transportation department nor its officers acting in their official capacities may be sued under § 1983. Moreover, government officials who are sued also may have absolute or qualified immunity for § 1983 claims. The qualified immunity doctrine thus “protects government officials who perform discretionary functions from suit and from liability for monetary damages under § 1983.”⁹⁸² Thus, as a general rule in claims arising under federal law, government officials acting within their discretionary authority are immune from civil damages if their conduct does not “violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁹⁸³ Although municipalities are persons under § 1983,⁹⁸⁴ a state or state agency is not a person under § 1983⁹⁸⁵ and cannot be sued under § 1983 in state or federal court;⁹⁸⁶ neither may a state official be sued in his or her official capacity under §

⁹⁷⁷ 49 C.F.R. § 21.13(b).

⁹⁷⁸ *Id.* § 21.11(b). See generally U.S. DOT Order 1000.12, at V-1-V-10 (Jan. 19, 1977).

⁹⁷⁹ 42 U.S.C. § 1983.

⁹⁸⁰ See generally *Mosely*, 275 F. Supp. 2d at 612.

⁹⁸¹ *Hale v. Vance*, 267 F. Supp. 2d 725 (S.D. Ohio 2003); *Davis v. Olin*, 886 F. Supp. 804 (D. Kan. 1995).

⁹⁸² *Camilo*, 283 F. Supp. 2d at 449 (D.P.R. 2003).

⁹⁸³ *Cagle*, 334 F.3d at 988 (internal quotations omitted). See also *Harlow*, 457 U.S. at 818; *Mendenhall*, 213 F.3d at 230.

⁹⁸⁴ *Monell*, 436 U.S. at 688–90.

⁹⁸⁵ A state transportation department is not a person subject to suit under § 1983. *Vickroy*, 73 Fed. Appx. at 173 (7th Cir. 2003); *Jimenez*, 245 F. Supp. 2d at 586 n.2 (D. N.J. 2003); *Manning*, 914 F.2d at 48 (4th Cir. 1990); *Will*, 491 U.S. at 65–66.

⁹⁸⁶ *Nichols*, 266 F. Supp. 2d at 1313.

⁹⁶⁹ *Sherbrooke Turf*, 345 F.3d at 970.

⁹⁷⁰ *Id.* (citations omitted).

⁹⁷¹ *Id.* at 971.

⁹⁷² *Western States*, 407 F.3d at 997, quoting *Sherbrooke Turf*, 345 F.3d at 973.

⁹⁷³ 42 U.S.C. § 2000d.

⁹⁷⁴ *Choate*, 469 U.S. at 293.

⁹⁷⁵ *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

⁹⁷⁶ 23 U.S.C. § 109(h).

1983.⁹⁸⁷ In some limited situations, private companies or individuals may be subject to suit under § 1983 because they have acquired the status or condition of a state actor.

Although § 1983 does not restrict a state's Eleventh Amendment immunity,⁹⁸⁸ there are two exceptions. First, a state may be sued where Congress enacts legislation pursuant to Section 5 of the Fourteenth Amendment, unequivocally expressing its intent to abrogate the states' Eleventh Amendment immunity under the United States Constitution.⁹⁸⁹ Second, a state may consent to suit in federal court.⁹⁹⁰ Thus, § 1983 creating a cause of action for deprivation of civil rights under color of state law did not abrogate the states' sovereign immunity under the Eleventh Amendment.⁹⁹¹ As explained in *Beach v. Minnesota*,⁹⁹² the Supreme Court has interpreted the Eleventh Amendment as barring individual citizens from suing states in federal court, including their own state.⁹⁹³ The "Eleventh Amendment bars a suit by private parties to recover money damages from the state or its *alter egos* acting in their official capacities."⁹⁹⁴

The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such violations of constitutional or statutory rights occur.⁹⁹⁵ The reach of § 1983 was expanded in 1961 when the U.S. Supreme Court decided *Monroe v. Pape*⁹⁹⁶ and was extended again by the Court's decision in *Monell v. New York*.⁹⁹⁷ In *Monroe*, the Court held that the

phrase "under color of law" included the misuse of power exercised under state law, even though the persons committing the acts that constituted the deprivation of rights were acting beyond the scope of their authority. In 1978 the Supreme Court in *Monell v. New York*⁹⁹⁸ overruled *Monroe v. Pape* insofar as the *Monroe* Court held that local governments were immune from suit under § 1983.⁹⁹⁹ By virtue of the *Monell* decision, municipal corporations are persons amenable to suit under § 1983. The *Monell* Court did uphold the *Monroe* decision insofar as the *Monroe* Court held that the doctrine of *respondeat superior* is not a basis for holding local governments liable under § 1983 for the constitutional torts of their employees.¹⁰⁰⁰

For there to be a § 1983 action against a municipality, the claim must result from the violation of a government policy or custom.¹⁰⁰¹ Section 1983 creates a species of tort liability, and the statute is interpreted in light of the background of tort liability.¹⁰⁰² As held in *DeShaney v. Winnebago County Department of Social Services*,¹⁰⁰³ the Due Process Clause does not transform every tort committed by one acting under color of law into a constitutional violation.¹⁰⁰⁴ Moreover, not all property interests entitled to procedural due process protection are similarly protected by the concept of substantive due process: "[w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution."¹⁰⁰⁵

There is no cause of action under § 1983 when the action complained against was private in nature. The language of the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the state" to protect citizens against private actors.¹⁰⁰⁶ The Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a *state* actor into a constitutional violation" actionable under § 1983.¹⁰⁰⁷ Nevertheless, "[t]he doctrine of sovereign immunity does not shield state employees from liability for acts or

⁹⁸⁷ *Murphy*, 127 F.3d at 754.

⁹⁸⁸ *Beach*, 2003 U.S. Dist. LEXIS 10856, at *8, citing *Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) and *Williams v. Missouri*, 973 F.2d 599, 600 (8th Cir. 1992).

⁹⁸⁹ *Id.* at *7, citing *Pennhurst State Sch. & Hosp. v. Haldermann*, 465 U.S. 89, 99, 104 S. Ct. 900, 907-08, 79 L. Ed. 2d 67, 77-78 (1984) and *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 619 (8th Cir. 1995).

⁹⁹⁰ *Id.* at *8, citing *Clark v. Barnard*, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883) and *Parden v. Terminal Ry.*, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964).

⁹⁹¹ *Quern*, 440 U.S. at 345; *In re Sec'y of Dep't of Crime Control and Pub. Safety*, 7 F.3d at 1145.

⁹⁹² No. 03-CV-862 (MJD/JGL), 2003 U.S. Dist. LEXIS 10856 (D. Minn. June 25, 2003).

⁹⁹³ *Id.* at **6-7, citing *Hans v. Louisiana*, 134 U.S. 1, 10, 10 S. Ct. 504, 505, 33 L. Ed. 842, 845 (1890) and *Murphy v. Arkansas*, 127 F.3d 750, 754 (8th Cir. 1997).

⁹⁹⁴ *Gregory*, 289 F. Supp. 2d at 725, quoting *Huang*, 902 F.2d at 1138 (4th Cir. 1990).

⁹⁹⁵ *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992).

⁹⁹⁶ 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

⁹⁹⁷ *Monell*, 436 U.S. at 694.

⁹⁹⁸ 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

⁹⁹⁹ *Id.* at 663.

¹⁰⁰⁰ *Id.* at 663 n.7.

¹⁰⁰¹ *Id.* at 694-694.

¹⁰⁰² *City of Monterey Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).

¹⁰⁰³ 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

¹⁰⁰⁴ *Id.* at 202.

¹⁰⁰⁵ *Douglas*, 2003 U.S. Dist. LEXIS 4922, at *5, quoting *Ewing*, 474 U.S. at 229, 106 S. Ct. at 515, 88 L. Ed. 2d at 535 (1985) (Powell, J., concurring).

¹⁰⁰⁶ *DeShaney*, 489 U.S. at 195.

¹⁰⁰⁷ *Id.* at 202 (citation omitted).

omissions constituting gross negligence.¹⁰⁰⁸ Thus, "[a] state employee who acts wantonly, or in a culpable or grossly negligent manner is not protected [by sovereign immunity]".¹⁰⁰⁹ However, supervisors may not be held liable for the acts of their subordinates: "an individual cannot be held liable under Section 1983 in his individual capacity unless he 'participated in the constitutional violation.'"¹⁰¹⁰ It must be shown that the alleged supervisor is one who "directed the constitutional violation," or the violation must have "occurred with his 'knowledge and consent.'"¹⁰¹¹

In a § 1983 action, the court may award declaratory and injunctive relief, damages, and attorney's fees. A plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.¹⁰¹² Nominal, compensatory, and punitive damages also are available under § 1983. To recover compensatory damages, the plaintiff must prove that the unconstitutional activities were the cause in fact of actual injuries.¹⁰¹³ To prove damages, evidence must be received on general damages, including emotional distress and pain and suffering, and on special damages, such as lost income and medical expenses.¹⁰¹⁴ In addition to compensatory damages, a court may award punitive damages in a § 1983 suit to punish the defendant for outrageous conduct and to deter others from similar conduct in the future.¹⁰¹⁵ Even if the plaintiff cannot prove actual damages, the court may award punitive damages.¹⁰¹⁶ Municipalities, however, are generally immune from punitive damages in § 1983 actions,¹⁰¹⁷ as are municipal officers when sued in their official capacities.¹⁰¹⁸

¹⁰⁰⁸ *Gedrich*, 282 F. Supp. 2d at 474 (E.D. Va. 2003) (citation omitted).

¹⁰⁰⁹ *Id.* (internal quotation marks omitted).

¹⁰¹⁰ *Valentine*, 2005 U.S. Dist. LEXIS 430, at *17, quoting *Hildebrandt*, 347 F.3d at 1039 (7th Cir. 2003).

¹⁰¹¹ *Id.* at **17–18.

¹⁰¹² *Norris*, 287 F. Supp. 2d at 114, citing *Farrar*, 506 U.S. at 111–12, 113 S. Ct. at 572–74, 121 L. Ed. 2d at 503–04 (1992).

¹⁰¹³ *Memphis Cmty. Sch. Dist.*, 477 U.S. at 309.

¹⁰¹⁴ *Carey*, 435 U.S. at 263–64; *Ellis*, 643 F.2d at 69 (2d Cir. 1981).

¹⁰¹⁵ *Smith*, 461 U.S. at 54–55.

¹⁰¹⁶ *Glover v. Ala. Dep't of Corrections*, 734 F.2d 692 (11th Cir. 1984).

¹⁰¹⁷ *Ramonita Rodriguez Sostre v. Canovance*, 203 F. Supp. 2d 118 (D.P.R. 2002); *Fact Concerts, Inc.*, 453 U.S. at 259. *But see Peden v. Suwanee County Sch. Bd.*, 837 F. Supp. 1188 (1993) (denying punitive damages where no compensatory damages were awarded), *aff'd without opinion*, 51 F.3d 1049 (11th Cir. 1995).

As for injunctive relief, "[c]ivil rights actions under section 1983 are exempt from the usual prohibition on federal court injunctions of state court proceedings."¹⁰¹⁹ Although the Eleventh Amendment bars claims for damages against state agencies and officials acting in their official capacity, the federal courts may enjoin state officials acting in their official capacity as long as the injunction governs only the officer's future conduct and no retroactive remedy is provided; the rule applies also to declaratory judgments.¹⁰²⁰

4. Discrimination Claims Against Transportation Departments Under Federal Law

In regard to discrimination claims against transportation departments under other federal laws, state transportation departments, as well as their officers and employees acting in their official capacity, have immunity for certain claims alleging discrimination by virtue of the states' sovereign immunity under the Eleventh Amendment. On several occasions the Supreme Court has addressed the issue of whether Congress exercised its authority properly when abrogating the states' sovereign immunity. After the decision in *Seminole Tribe*, *supra*, the Supreme Court struck down acts of Congress that were in the Court's view in excess of Congress's power under Section 5 of the Fourteenth Amendment. For example, in *City of Boerne v. Flores*,¹⁰²¹ the Supreme Court held that the RFRA exceeded Congress's power under Section 5 of the Fourteenth Amendment. In rendering its decision, the Court emphasized the absence of a sufficient record for the Congress to act under its Section 5 power. Whether Congress has enacted purportedly remedial legislation pursuant to its Section 5 power depends on whether the legislation passes the Court's "congruence and proportionality" test. On the other hand, in 2003, in *Nevada Department of Human Resources v. Hibbs*,¹⁰²² the Court upheld the FMLA in which the Court concluded that "the

The real proposition for which the above cited cases stand could be summarized as follows: in a section 1983 action, a jury may properly award punitive damages even though it awards no compensatory damages, but only where the jury first finds that a constitutional violation was committed by the party against whom the punitives are imposed.

Id. at 1196–97.

¹⁰¹⁸ *Ramonita*, 203 F. Supp. 2d at 120, citing *Gomez-Vazquez*, 91 F. Supp. 2d at 482–83.

¹⁰¹⁹ *Schroll*, 760 F. Supp. at 1389 (D. Or. 1991).

¹⁰²⁰ *Ippolito*, 958 F. Supp. at 161 (S.D.N.Y. 1997); *see also Mercer v. Brunt*, 272 F. Supp. 2d 181 (D. Conn. 2002).

¹⁰²¹ 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

¹⁰²² 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003).

States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough" for the enactment of the FLMA.¹⁰²³

Nevertheless, in regard to the ADEA, in 2000 in *Kimel v. Florida Board of Regents*¹⁰²⁴ the Supreme Court struck down the law that abrogated the states' sovereign immunity for ADEA claims.¹⁰²⁵ The *Kimel* Court held that Congress had exceeded its authority in abrogating the states' immunity for such suits. The Court's reasoning was that the ADEA was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."¹⁰²⁶

As for claims against state transportation departments under the ADA, although Title 1 of the ADA authorizes claims for monetary damages, in 2001 the Court held in *Board of Trustees of the University of Alabama v. Garrett*¹⁰²⁷ that such claims may not be made against states or their agencies or instrumentalities. The Court held that the legislative record "fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."¹⁰²⁸ Furthermore, the Court held that the remedy imposed by Congress was not "congruent and proportional to the targeted violation."¹⁰²⁹

However, in *Tennessee v. Lane*¹⁰³⁰ the Court held that under Title II the states do not have sovereign immunity from ADA claims that arise out of a state's denial of a fundamental right, such as access to the courts. The Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivation of fundamental rights" of persons with disabilities "in a variety of settings," including courthouses and other state-owned buildings.¹⁰³¹ The Court held that Congress had the power under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity "to en-

force the constitutional right of access to the courts."¹⁰³²

The Court decided the *Lane* case, however, on the narrow basis of whether the Congress could abrogate the states' Eleventh Amendment immunity under Title II of the ADA where the claim involved a fundamental right, such as access to the courts. The *Lane* Court stated that "the decision in *Garrett*, which severed Title I of the ADA from Title II for purposes of the § 5 inquiry, demonstrates that courts need not examine 'the full breadth of the statute' all at once."¹⁰³³ It is unclear to what extent the states have sovereign immunity for other claims under Title II.

There could be ADA claims in which there is a presumably remote possibility that the state transportation agency would not have immunity (see discussion of Title II, *supra*) or in which the transportation agency is not an agency of the state. Assuming there is no immunity, as for the elements of an ADA claim, there are two basic theories for claims by persons with disabilities. One theory is based on disparate treatment "when an employer treats a person less favorably than others because of his or her protected characteristic, such as a disability."¹⁰³⁴ The second theory is based on disparate impact that "involves facially neutral employment practices or fixed qualifications that in fact impact one group, such as the disabled, more harshly than others and 'cannot be justified by business necessity' or the particular business activity involved."¹⁰³⁵ Proof of a discriminatory motive is not required for a disparate impact claim.¹⁰³⁶ As seen in the report, only a handful of decisions involving the ADA and transportation departments in the past few years have been located. It should be noted that states also have civil rights laws prohibiting discrimination against persons with disabilities.

Under Title VII of the Civil Rights Act of 1964, it is unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...." Once more, under Title VII there may be both disparate treatment and disparate impact claims. As with other forms of discrimination discussed in the report, "a plaintiff may prove

¹⁰²³ *Id.* at 735.

¹⁰²⁴ 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

¹⁰²⁵ 29 U.S.C. § 626(b), *citing* 29 U.S.C. §§ 626(c), 211, 216(b), 217.

¹⁰²⁶ *Kimel*, 528 U.S. at 86, *quoting* *City of Boerne*, 521 U.S. at 532.

¹⁰²⁷ 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001).

¹⁰²⁸ *Id.* at 368.

¹⁰²⁹ *Id.* at 374.

¹⁰³⁰ 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

¹⁰³¹ *Id.* at 524–25.

¹⁰³² *Id.* at 531.

¹⁰³³ *Id.*

¹⁰³⁴ *Casey's General Stores*, 661 N.W.2d at 519 n.2 (Iowa 2003), *quoting* *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S. Ct. 1701, 1705, 123 L. Ed. 2d 338, 346 (1993).

¹⁰³⁵ *Id.*

¹⁰³⁶ *Id.*

employment discrimination under Title VII by using either the ‘direct method’ or ‘indirect method.’¹⁰³⁷

Several cases were found in which plaintiffs brought one or more Title VII claims for disparate treatment against transportation agencies, for example, for alleged discrimination in hiring and promotions or retaliation occurring after an employee made a complaint. As for claims arising out of harassment and/or hostile workplace environment, not all verbal or physical harassment in the workplace is prohibited under Title VII.¹⁰³⁸ To succeed on such a claim, the plaintiff must show that the work environment was “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”¹⁰³⁹

There is some law review and other commentary suggesting that, based on recent decisions of the Supreme Court, Congress’s abrogation of the states’ sovereign immunity under the Eleventh Amendment to claims under Title VII for anything other than intentional discrimination could be subject to challenge. On the other hand, as seen, the Court in *Hibbs* and in *Lane, supra*, upheld the authority of Congress to abrogate the states’ immunity with respect to the FMLA and at least to some extent with respect to Title II of the ADA, respectively. Nevertheless, a few recent articles contend that the states may be able to claim immunity, particularly for Title VII claims based on gender-based disparate impact discrimination, because, in the authors’ opinion, Congress had an inadequate record of gender discrimination by the states. However, at least two federal circuit courts of appeal have rejected arguments that Congress improperly abrogated the states’ sovereign immunity under Title VII, including claims for disparate impact.

5. First Amendment Issues

Lastly, the refusal to allow groups such as the Ku Klux Klan to participate in an Adopt-a-Highway program or to permit a group such as the Sons of Confederate Veterans to have a logo on a license plate may constitute viewpoint discrimination by the government and violate the First Amendment. One case has held, however, that under the Adopt-a-Highway program, the state could refuse to permit the Klan to participate where the group sought to do so near a public housing project subject to a desegregation order because the housing project

would be both a captive audience and at risk of intimidation by the group.

¹⁰³⁷ *Rhodes*, 359 F.3d at 504.

¹⁰³⁸ *Nobles*, 2004 U.S. Dist. LEXIS 3284 (N.D. Ill. 2004), at *35.

¹⁰³⁹ *Brown*, 358 F. Supp. 2d at 734 (citation omitted).

SECTION 2

TRANSPORTATION AND THE UNITED STATES CONSTITUTION

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A. THE CONSTITUTION AND TRANSPORTATION

The U.S. Constitution was drafted in 1789. In part, it was designed to rectify the failings of the Articles of Confederation, with its weak federal government and inability to prohibit state restrictions on interstate commerce. The first 10 Amendments to the Constitution were ratified on December 15, 1791, and comprise what is known as the Bill of Rights. They became applicable to the states with ratification of the Fourteenth Amendment.¹

Explicit constitutional references to transport are few. The Constitution conferred upon Congress the power to build post roads. Though in the Jeffersonian era there was construction of national pikes, the post roads power lay largely dormant for much of the nation's later history. However, the power to regulate interstate and foreign commerce was, early on, applied to transportation.

The federal/state relationship on road building has early historic origins, traced back to the Jefferson-Jackson era, and resurrected with the Federal-Aid Road Act of 1916. The federal government funds and establishes standards, while the states and local governments actually build and maintain the highways.

Transportation has been the battleground for the resolution of many important issues. Many transportation cases (such as *Palsgraff* and *McPherson v. Buick* in the Torts context, and *Overton Park, Garcia*, and *Adarand* in the Constitutional Law context) have become seminal decisions, carefully examined in law reviews and in law school classrooms.

Much of highway litigation in the constitutional context has focused on disputes between the federal and state governments on interstate commerce and spending issues, or between governments and individuals on issues of takings and eminent domain, search and seizure, due process, and equal protection. The most critical constitutional provisions impacting transportation are the Commerce Clause, the Spending Clause, the (Fifth Amendment) Takings Clause, and the (Tenth and Eleventh Amendments¹) provisions on state sovereignty. These are addressed first herein, with constitutional issues of more generic applicability to all federal activities addressed subsequently.

Historically, constitutional jurisprudence involving transit providers can be divided into two broad periods. Running from the establishment of the first private transit operators in the late 19th century until the middle of the 20th century, con-

stitutional cases focused on such issues as whether economic regulation of private transit companies violated the contract, commerce, due process, and equal protection clauses of the U.S. Constitution. The role of the government as regulator is quite different from the role of government as a service provider. In the latter case, more of the Constitution comes into play.

This essay attempts to examine the major reported federal court decisions in which federal, state, and local highway departments or transit agencies have been litigants on constitutional law issues. Roughly speaking, the first half of this essay examines the constitutional conflicts arising from the exercise of federal power vis-à-vis state power, such as the federal government's exercise of its spending or commerce powers, which sometimes collide with different priorities and objectives exercised by the states under their police powers. The latter half examines the constitutional conflicts between individuals and federal, state, and local governments, such as the conflict when the exercise of individual freedoms guaranteed by the Bill of Rights collides with different governmental priorities. Increasingly, transit providers, highway departments, and other governmental institutions are defending claims based on federal and state constitutional causes of action.

To understand the constitutional relationship between the federal and state governments, one must understand something about how this relationship evolved within the history of the Republic. Government involvement in road building precedes the formation of the nation. The first major road on the American continent was built by the British government for military purposes.² With the adoption

² In 1758, British General Edward Braddock ordered 200 woodsmen to widen a narrow Indian trace into a 12-ft wide road across streams and eight major mountains. Some 2,200 British and Colonial troops then marched from Fort Cumberland, at the head of the Potomac River, to drive the French from Fort Duquesne. TOM LEWIS, *DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE* 56 (1997). With the European settlement of North America, towns and villages sprang up first along the Atlantic and Gulf coasts, at bays and rivers deep enough for navigation. Settlers gradually moved inland, and towns began to spring up along rivers. Away from the rivers, most roads were Indian trails, which could be traversed by only pack-horses or mules. A few private toll roads were constructed during the 18th century, some with governmental assistance. At the dawn of the 19th century, it took a week to travel by stagecoach from New York to Boston, and nearly 3 weeks to reach Charleston. ARTHUR TWINING HADLEY, *RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS* 24 (1903).

¹ *Chicago B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 239 (1897).

of the U.S. Constitution on July 2, 1789, Congress was given the responsibility “to regulate interstate and foreign commerce,” and “to establish Post Offices and post roads.” The Post Office Act of 1792 authorized the creation of post roads. Following its promulgation, a number of communities implored their Congressmen to encourage the Post Office Department to construct roads to connect parts of the country. Often, Congressmen were flooded with petitions for new post roads. Despite the position of many of the country’s founding fathers (including James Madison and James Monroe) that the power to establish post roads was intended as a power to designate, and not to build,³ Congress responded to public demand and authorized the construction of new post roads and post offices. The first post road statutes designated the precise routes to be built.⁴ Though there were only 6,000 miles of post roads in 1792, by 1829 there were 114,780 miles of roads.⁵ Stagecoach trails were improved into post roads, and quickly became arteries of commerce.⁶ In 1838, Congress declared all railroads to be post roads.⁷

The states jumped into the road-building business quite early as well. For example, the hard-surfaced 60-mile Lancaster Pike⁸ linking Philadel-

³ Gary Lawson & Patricia Granger, *The “Proper” Scope of Federal Power*, 43 DUKE L. J. 267 n.3 (1993); Christina Bates, *From 34 to 37 Cents: The Unconstitutionality of the Postal Monopoly*, 68 MO. L. REV. 123, 136 (2003).

⁴ For example, the first post road statute provided for the following route:

From Wasscasset in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah....

Act of Feb. 20, 1792, 1 Stat. at 232 § 1, quoted in Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 403 (2002).

⁵ Joseph Belluck, *Increasing Citizen Participation in U.S. Postal Service Policy Making*, 42 BUFF. L. REV. 253, 257 (1994).

⁶ Nan McKenzie, *Ambiguity Commercial Speech and the First Amendment*, 56 U. CINN. L. REV. 1295 (1988).

⁷ Belluck, *supra* note 5, at 253, 258–59.

phia and Lancaster, Pennsylvania, was built between 1792 and 1795.⁹ New York and southern New England followed Pennsylvania in road building. Many states (notably Pennsylvania and Kentucky) subsidized private turnpikes.¹⁰

It became increasingly apparent that transportation was essential to link the remote parts of the sparsely settled nation together and to facilitate communications, trade, economic growth, and defense. Public sentiment for increased governmental support for infrastructure construction began to grow.

In 1808, Treasury Secretary Gallatin became the first national figure to urge a national system of roads.¹¹ President Thomas Jefferson championed the first federal highway, the National Road. It followed the old Cumberland Road to the West, stretching from Cumberland, Maryland, to Vandalia, Illinois.¹² Construction began in 1808; 9 years later the road reached the Ohio border.¹³

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The first improved roads were primarily constructed through private enterprise, and therefore took the form of turnpikes or toll roads to provide a return on investment. Blocking access to these roads was a pole on a hinge. The pole was referred to as a pike, and once payment was made, the pike would be swung or turned (either upward or outward) to allow passage. Hence, derivation of the word “turnpike.” By the 1800s, there were hundreds of turnpike companies.

PAUL DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 5-6 (1997).

⁹ RUSSELL BOURNE, *AMERICANS ON THE MOVE: A HISTORY OF WATERWAYS, RAILWAYS AND HIGHWAYS* 27 (Fulcrum 1995).

¹⁰ HADLEY, *supra* note 2, at 26. Pennsylvania paid about \$1,000 a mile, about a third of the total cost.

¹¹ His proposal included a road system stretching from Maine to Georgia, roads or canals linking the Atlantic Coast to the Mississippi River, and roads to Detroit, St. Louis, and New Orleans radiating from Washington, D.C. *Id.* at 27–28.

¹² It was to be no steeper than a 4 percent grade, with a 30-ft roadbed. BOURNE, *supra* note 9, at 7-10. By purchasing the Louisiana Territory, President Thomas Jefferson also may have made it inevitable that the federal government would play a role in building transportation corridors west, beyond the Mississippi River. As Professor Daniels observed, “When to the vast acreage of national land east of the Mississippi, the purchase of Louisiana added a continental principality of almost boundless extent west of the river, the public illusion of wealth ‘beyond the dreams of avarice’ was created, and the floodgates of legislative profusion were certain eventually to be

To assert his objection to the constitutional principle involved, in 1822, President Monroe vetoed a bill for repairs on the Cumberland Road.¹⁴ When State's rights champion Andrew Jackson became President in 1832, national policy moved against federal support of highways. Though Jackson approved several bills to push the National Road further west, and was himself a major proponent of rail expansion,¹⁵ he vetoed the Maysville Turnpike from Wheeling, West Virginia, to Maysville, Kentucky.¹⁶ Presidents Tyler, Polk, and Pierce also vetoed federal aid to roads.¹⁷ The National Road became important in settling the Midwest. But the structure Jackson established, of state primacy in road construction (albeit with federal support), became the model upon which America's roads and highways were developed through the remainder of the 19th century.¹⁸ Thus, the states traditionally have been the dominant force in road building.

The first federal agency addressing roads was the Office of Road Inquiry, established in 1893 within the U.S. Department of Agriculture. From 1893 until 1916, the federal government focused on disseminating scientific, engineering, and economic information to assist in the design and construction of proper roads.¹⁹ Congress recognized the potential importance of motor carriages,²⁰ and began to pro-

opened." WINTHROP DANIELS, *AMERICAN RAILROADS: FOUR PHASES OF THEIR HISTORY* 38 (1932).

¹³ After that, high costs slowed additional construction. The National Road reached Columbus, Ohio, in 1833, and Vandalia, Illinois, in 1852. Senator John C. Calhoun was also a major proponent of national aid to roads as early as 1818. HADLEY, *supra* note 2, at 27.

¹⁴ *Id.*

¹⁵ DANIELS, *supra* note 12, at 65–66.

¹⁶ BOURNE, *supra* note 12, at 35.

¹⁷ DANIELS, *supra* note 12, at 37.

¹⁸ DEMPSEY & GESELL, *supra* note 8, at 6. Local jurisdictions also built roads as they later built airfields. In 1879, the North Carolina legislature passed the Mecklenburg Road Law, permitting the county to levy a property tax to support road construction. The Act was repealed the following year, but reenacted in 1885. By 1902, Mecklenburg was acknowledged to have the best roads in the State. Other states adopted similar laws. But not until the 20th century did the federal government resume its role in building highways.

¹⁹ ROSS NETHERTON, *FEDERALISM AND THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991*, 32 (NCHRP Legal Research Digest No. 7, 1995).

²⁰ The early 20th century saw the emergence of a new form of competition, the motor carrier. In 1904, there were but 700 trucks operating in the United States, most powered by steam or electrical engines. The following year, the first scheduled bus service began in New York City.

mote their growth with federal matching grants for highway construction, first with the Federal-Aid Road Act of 1916²¹ (which established the Bureau of Public Roads), and then the Federal Highway Act of 1921.²²

The 1916 Act was the first major federal foray into the realm of road building since Jackson put the brakes on federal road building in 1832. Significantly, it established the basic pattern of federal/state relationships on roads and highways (and subsequently airports). Henceforth, the federal government would subsidize planning and funding of highway projects, while the states would construct, own, and maintain their highways.²³ The federal government helped fund, and the states built, the nation's roads. This relationship set the stage for a number of constitutional conflicts between the federal and state governments, with the states exercising their police power to enhance the health, welfare, and safety of their citizens, and the federal government exercising its spending, commerce, and post roads powers under the Constitution.²⁴

But still, growth of this important means of transport was hampered by poor roads and the economic dominance of the railroad industry.

²¹ Pub. L. No. 64-156 (July 11, 1916). WALTER MCFARLANE, *STATE HIGHWAY PROGRAMS VERSUS THE SPENDING POWER OF CONGRESS* 3 (NCHRP Research Results Digest No. 136, 1982).

²² Soon dirt horse and wagon trails were extended, straightened, and paved.

²³ DEMPSEY & GESELL, *supra* note 18, at 7; MCFARLANE, *supra* note 21.

²⁴ World War I demonstrated the potential for motor transport. Thousands of motor vehicles were produced for the Army. On the fields of battle, they quickly proved their superiority over mules in transporting men and materiel to the front. After the Great War, thousands of surplus Army trucks became the vehicles for growth of the commercial motor transport industry.

By 1918, the nation had more than 600,000 trucks. With the development of a national system of highways in the 1920s, motor carriers became an increasingly viable competitor to railroads. The combination of the pneumatic tire, the internal combustion engine, assembly line production, and hard surface roads brought sensational growth to the industry.

Soon, the nation had an extraordinary distribution system, which vigorously stimulated national economic growth. Manufacturers of apparel, appliances, hardware, and a thousand other commodities soon found that their markets were no longer limited to large cities. The new distribution system of trucks taking merchandise to the farthest corners of the nation meant that manufacturers could now sell their goods on Main Street of the thousands

During the 1950s, President Dwight Eisenhower “saw the need to build a national system of interstate highways to link the country for, *inter alia*, purposes of national defense.”²⁵ Eisenhower launched a 17-year construction period of the U.S. Interstate highway program. The Federal-Aid Highway Act of 1956 launched the largest public works project ever undertaken—the 43,000-mi National System of Interstate and Defense Highways—which would provide the infrastructure to propel the nation to new levels of prosperity. The companion Highway Revenue Act of 1956 created the Highway Trust Fund, which was comprised of revenue from user charges (sales of gasoline, diesel, tires, and a weight tax for heavy trucks and buses)—the first time Congress had earmarked taxes for specific purposes.²⁶

With the decline of the private transit companies,²⁷ legislation passed by President Kennedy in

of small towns and hamlets sprinkled across the continent.

And the complexion of Main Street itself changed. No longer would general stores, which carried everything from fertilizer to soap, dominate the market. Specialized shops sprang up. Consumer choices multiplied. A lady on the plains of Kansas could now buy the same fashions on Main Street that were available on Park Avenue. The distribution system of the trucking industry made possible tremendous expansion in production and sales, and thus served as a catalyst for one of the most significant periods of economic growth in the nation’s history. See PAUL STEPHEN DEMPSEY, *THE SOCIAL & ECONOMIC CONSEQUENCES OF DEREGULATION: THE TRANSPORTATION INDUSTRY IN TRANSITION* 15 (1989).

²⁵ *Id.* at 19.

²⁶ MARK SOLOF, *HISTORY OF METROPOLITAN PLANNING ORGANIZATIONS—PART II*, at 6 (1998).

²⁷ With the advent of the automobile, urban transit also began to decline. In 1917, electric streetcars carried 1.1 billion passengers. But by 1923, fixed-guideway systems began to be replaced by buses, with their lower capital costs and greater operational flexibility. EDWARD WEINER, *URBAN TRANSPORTATION PLANNING IN THE UNITED STATES* 10 (Praeger, 2d ed. 1999). All transit—bus and rail—began to experience a loss of ridership beginning in the mid 1930s, as road improvements and automobile affordability created disbursed suburban housing patterns less conducive to transit. Automobile production stopped during World War II, as car factories turned to producing tanks, jeeps, and fighter and transport aircraft; fuel and rubber were rationed. Between 1941 and 1946, transit ridership grew by 65 percent to an all-time high of 23 billion trips annually. *Id.* at 15. But after World War II, demand for rail service began to decline, as passengers chose alternative means to get them to their destination—the bus, the airplane, or the automobile. By 1953, transit had fallen to fewer than 14 billion trips annually. U.S.

1961 provided the first federal program of urban transit support.²⁸ After transit providers became public entities, cases arose addressing whether they violated the free speech and religion, search and seizure, and due process and equal protection clauses, as well as whether their activities were shielded from liability as state actors.

B. FEDERAL POWERS AND EXECUTIVE BRANCH AGENCIES

1. Administrative Agencies

Congress has passed transportation laws in Titles 23 and 49 of the U.S.C., which are implemented by the President and his subordinates in the Executive Branch, including the U.S. DOT (and its various modal agencies, including, of particular relevance here, the FHWA and FTA), and interpreted by the courts. The Constitution is silent as to what powers governmental agencies may hold, or even whether they may be established. Nevertheless, in the ensuing 200 plus years after its adoption in 1789, a plethora of administrative agencies have been created and given broad quasi-judicial, quasi-legislative, and quasi-executive powers. Some commentators have described this as the “headless fourth branch” of our federal government.

Federal administrative agencies are defined by the Administrative Procedure Act (APA)²⁹ and by what they are not: they do not consist of the legislature, the courts, or the governments of the states or the District of Columbia. In the executive branch of the federal government, most agencies are pyramidal in structure, with a single individual at the apex of the pyramid, appointed by and serving at the discretion of the President with the “advice and consent” of the Senate. Under Article II, Section I of the Constitution, the President “shall...nominate, and by and with the Advice and Consent of the Senate, shall appoint...Officers of the United States....” Examples of Executive Branch agencies include the Department of Transportation, Department of Commerce, and Department of Defense. These nonregulatory agencies

DEPT OF TRANSP., *URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: AN HISTORICAL OVERVIEW* 17–19 (3d ed. 1988).

²⁸ Congress created a comprehensive program of transit assistance in the Urban Mass Transit Act of 1964. H.R. REP. NO. 204 (1963). The first long-term commitment for transit was the Urban Mass Transportation Assistance Act of 1970. The Federal Highway Act of 1973 opened the highway trust fund to transit, while the National Mass Transportation Assistance Act of 1974 made operating expenses eligible for federal funding.

²⁹ 5 U.S.C. § 551.

typically dispense monies (e.g., government insurance and pensions) to promote social and economic welfare.

The FHWA and FTA are Executive Branch agencies housed in the U.S. DOT. The FHWA Administrator, the FTA Administrator, and the Secretary of Transportation are appointed by the President and confirmed by the Senate.

2. From Dual Federalism to Cooperative Federalism to Interactive Federalism

For much of U.S. history, the relationship between the federal and state governments can be described as one of “dual federalism,” in which the national and state governments functioned independently as parallel sovereigns. By the 1940s, however, “cooperative federalism” began to supplant the coexistence of dual federalism. Cooperative federalism constitutes a blended program in which federal funding is used to support state and local action and federal goals are achieved indirectly through state and local action.³⁰ One source summarized how cooperative federalism manifested itself in the context of transportation:

[I]n the case of federal highway aid, it was the states that set the goal of “getting the farmer out of the mud” through improved rural road networks. State and local bodies decided where, when, and how their roads would be built. Federal oversight was chiefly to ensure that funded work was carried out efficiently and economically. In the process, federal influence also worked to improve standards of design and construction and preserve the system’s engineering integrity by preventing deprivation as a result of local political pressure....

In the 1960s, cooperative federalism entered a new phase, with dramatic increases in national programs directly addressing activities that previously had been the responsibility of state and local governments.... In the field of surface transportation, grants of federal-aid funds for highways, mass transit, and highway traffic safety were made conditional on the recipient’s compliance with national standards and regulations laid down by Congress and the Administration for achieving the goals of other non-transportation programs.³¹

Thus, neither FHWA nor FTA are regulatory agencies *per se*. Both are primarily funding agencies, implementing congressional power under the Spending Clause of the Constitution. Nonetheless, these agencies (and the parent U.S. DOT) have promulgated a number of regulations and imposed a wide range of legal obligations contractually (through the Master Agreement and various compliance statements), with the possibility of sus-

pending or terminating funds for noncompliance. A state highway department or transit provider can avoid some (but not all) of these obligations by refusing the federal funding attached thereto.³² Hence, though these agencies do not regulate in the *de jure* sense, they do so in the *de facto* sense. The use of conditional grants has certain pragmatic political advantages:

As Congress sought state implementation of national policies and goals, it remained insulated from the public who, in the face of things, was being regulated by state authority. And at the state level, departments of transportation could counter opposition from governors, legislators, local officials, and the public by pointing out that failure to comply with federal requirements could jeopardize the state’s share of federal funding.³³

More recently, some commentators have observed that cooperative federalism is evolving into “interactive federalism,” whereby negotiated compromises are resulting from informal give-and-take federal/state relationships. With the promulgation of the ISTEA of 1991, regional Metropolitan Planning Organizations (MPOs) were empowered to help coordinate regional transportation, land use, and environmental issues.³⁴

C. FEDERAL COMMERCE POWER

1. Interstate vs. Intrastate Commerce

Article I, Section 8 gives Congress plenary power to regulate interstate, foreign, and Indian commerce. Specifically, “The Congress shall have power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes....” Congress has used its preemptive authority in different ways—in some cases by direct regulations that assert the federal government’s authority over particular activities, and in other cases, by simply preempting inconsistent state law, but leaving it to the courts to enforce the preemption.

Federal power over interstate and foreign commerce is both substantively vast and potentially preemptive of state power. In *Caminetti v. United States*,³⁵ the Supreme Court held, “The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the

³² 5 PAUL STEPHEN DEMPSEY, *Transit Law*, in SELECTED STUDIES IN TRANSPORTATION LAW 1-6 – 1-7 (2004).

³³ NETHERTON, *supra* note 19, at 7.

³⁴ NETHERTON, *supra* note 19, at 15; DEMPSEY, *supra* note 32, at 1-13 – 1-14, 2-3 – 2-4, 2-25 – 2-26 (2004).

³⁵ 242 U.S. 470 (1917).

³⁰ NETHERTON, *supra* note 19, at 3.

³¹ *Id.* at 4.

channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.³⁶ Beginning in the mid-1930s, Congress began to expand Congress's Commerce Clause power.³⁷ Three broad areas have since been identified that Congress may legitimately regulate:³⁸

1. Congress may regulate the use of the channels of interstate commerce;³⁹
2. Congress may regulate instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the concern arises from intrastate activities;⁴⁰ and

3. Congress may regulate those activities having a substantial relation to, or substantial effect on, interstate commerce.⁴¹

In order for Congress to preempt state activity under the Commerce Clause, two requirements must be met: (1) there must be a rational basis for Congress's conclusion that the activity has a substantial impact on interstate commerce, and (2) the means chosen must be reasonably adapted to a constitutional end.⁴²

In order to constitute interstate commerce, an actual single movement does not have to be between states. The U.S. Supreme Court has observed that the Commerce Clause "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."⁴³ As an example, steel from Indiana moves by train to Wisconsin, where a Wisconsin trucker picks it up at the rail head and trucks it 10 miles. The truck movement, though wholly within a single state, is also interstate commerce. The issue of whether a given movement is intrastate, interstate, or foreign traditionally has turned on the essential character of the commerce.⁴⁴ Federal transportation agencies have focused on the "fixed and persisting transportation intent of the shipper at the time of shipment," and concluded that such character is retained throughout the movement in the absence of the interruption of its continuity.⁴⁵

In upholding the desegregation requirements of the Civil Rights Act of 1964 against local hotels and restaurants, the U.S. Supreme Court in *Heart of Atlanta Motel v. United States*,⁴⁶ concluded that racial discrimination by hotels, motels, and restaurants burdens interstate travel.⁴⁷ Even Ollie's Barbeque in Montgomery, Alabama, which served few

³⁶ 242 U.S. at 491.

³⁷ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

³⁸ In *English v. General Electric Co.*, 496 U.S. 72, 78 (1990), the Supreme Court observed:

Our cases have established that state law is pre-empted under the Supremacy Clause, ...U.S. Court., Art. VI, Cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law.... Pre-emption fundamentally is a question of congressional intent, ...and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one. Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation...so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress touch[es] "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." ...Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where...the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest...."

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, ...or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

[citations omitted].

³⁹ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

⁴⁰ See *Shreveport Rate Cases*, 234 U.S. 342 (1914).

⁴¹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

⁴² *Hodel v. Va. Surface Min. & Recl. Ass'n*, 452 U.S. 264 (1981). See Robert McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor and Rail Carriers*, 24 TRANSP. L.J. 155, 167 (1997).

⁴³ *Perez v. United States*, 402 U.S. 146, 151 (1971). See McFarland, *supra* note 42, at 155, 168.

⁴⁴ *Atlantic Coast Line R.R. Co. v. Standard Oil of Ky.*, 275 U.S. 257, at 268 (1927).

⁴⁵ *United States v. Majure*, 162 F. Supp. 594, 598 (S.D. Miss. 1957); *Dallum v. Farmers Coop. Trucking Ass'n*, 46 F. Supp. 785 (D. Minn. 1942). Paul Stephen Dempsey, *The Experience of Deregulation: Erosion of the Common Carrier System*, 13 TRANSP. L. INST. 121, 126-29 (1980).

⁴⁶ 379 U.S. 241 (1964).

⁴⁷ 379 U.S. at 253.

interstate travelers but purchased food that moved in interstate commerce, was deemed to fall under the power of Congress to regulate. Thus, the Court expanded the reach of the Congressional authority under the Commerce Clause to local establishments:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce...Thus, the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof....⁴⁸

Channels of commerce include the transportation corridors (e.g., roads and highways) through which persons and commodities move. Instrumentalities of commerce include automobiles and other vehicles. Congressional power to regulate the channels and instrumentalities of commerce may extend beyond the direct flow of commerce to include activity that is local in character.⁴⁹ With the expansive interpretation given interstate commerce, Congress's reach can be quite vast.

a. Highway Safety

Though road safety is often described as falling within the police powers of the states, federal regulation thereof has been upheld under the Commerce Clause. Beginning in 1966, Congress instituted a number of programs to improve federal and state cooperation to improve highway safety. Among these programs was the Hazard Elimination Program,⁵⁰ which provides federal funds to enable the states to improve their most dangerous road segments. But shortly after it was inaugurated, states began to complain that the absence of confidentiality would increase their risk of liability on dangerous highway segments before improvements could be made. In response, Congress amended the Highway Safety Act to provide that information compiled for the purpose of addressing potential accident sites "shall not be admitted into evidence in Federal or State court...."⁵¹ Congress subsequently expanded the evidentiary bar.

⁴⁸ 379 U.S. at 258, quoting from *United States v. Darby*, 312 U.S. 100, 118 (1941).

⁴⁹ *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005).

⁵⁰ 23 U.S.C. § 152.

⁵¹ 23 U.S.C. § 409 (added Pub. L. No. 100-17, tit. I, § 132(a), Apr. 2, 1987, 101 Stat. 170.).

The constitutionality of the statute was assailed in *Pierce County v. Guillen*.⁵² The Supreme Court earlier had noted that the Commerce Clause conferred upon Congress the power to "regulate the use of the channels of interstate commerce."⁵³ In *Guillen*, the Court held that "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement...would result in more diligent efforts to connect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads."⁵⁴ Such regulation, aimed at improving safety and increasing protection for interstate commerce by gathering highway data, fell within Congress's power under the Commerce Clause.⁵⁵

b. Drivers' Licenses

Similarly, federal regulation within the realm of drivers' licenses also has been upheld under the Commerce Clause. In *Reno v. Condon*,⁵⁶ a unanimous U.S. Supreme Court upheld the constitutionality of the Driver's Privacy Protection Act of 1994,⁵⁷ which restricted the ability of state Departments of Motor Vehicles (DMV) to disclose personal information about a driver without his consent.⁵⁸ The Court found that the statute regulated personal information that constituted a "thing in interstate commerce," that might be sold or released "into the interstate stream of business," and that this was sufficient to support federal regulation under the Commerce Clause.⁵⁹ The Court found that, unlike the situations in *New York* and *Printz* (discussed below), the statute at issue here regulated activities of states as owners of databases, rather than requiring state officials to assist in the enforcement of federal standards against their own citizens.⁶⁰

⁵² 537 U.S. 129 (2003).

⁵³ *United States v. Lopez*, 514 U.S. 549, 558 (1995).

⁵⁴ 537 U.S. at 147.

⁵⁵ 537 U.S. at 147.

⁵⁶ 528 U.S. 141 (2000).

⁵⁷ 18 U.S.C. §§ 2721–2725.

⁵⁸ In enacting the Driver Privacy Protection Act, Congress did not run afoul of the federalism principles enunciated in *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) and *Printz v. United States*, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). *Reno v. Condon*, 528 U.S. 141, 143 (2000).

⁵⁹ *Reno*, 528 U.S. at 148.

⁶⁰ *Reno*, 528 U.S. at 151. In enacting the Driver Privacy Protection Act, Congress did not run afoul of the federalism principles enunciated in *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)

c. Highway and Bridge Tolls

Recently, two federal Courts of Appeal have had occasion to address the applicability of the dormant Commerce Clause in the context of highway tolls.⁶¹ In *Doran v. Massachusetts Turnpike Authority*,⁶² a highway user challenged the tolls levied to finance Boston's "Big Dig," a project designed to bury portions of I-93 beneath the city and extend I-90 to Boston Logan International Airport. The Massachusetts Turnpike Authority (MTA) implemented a Resident Only Discount Program for vehicles using Fast Lane transponders. The dormant Commerce Clause prohibits economic protectionism, or measures designed to benefit in-state economic interests at the expense of out-of-state economic interests.⁶³ However, the First Circuit held that the MTA toll program affected both Massachusetts and out-of-state vehicles evenhandedly, without burdening interstate commerce, and served a legitimate state interest unrelated to economic protectionism.⁶⁴

*Endsley v. City of Chicago*⁶⁵ involved a dormant Commerce Clause challenge to tolls imposed on the Chicago Skyway toll bridge linking the Indiana Tollway with the rest of I-90 on grounds that the tolls were not apportioned to the use or cost of operating the highway. Under the dormant Commerce Clause, a fee is reasonable so long as it: (1) is based on a fair approximation of the use of the facilities; (2) is not excessive relative to the benefits conferred; and (3) does not discriminate against interstate commerce.⁶⁶

However, the Seventh Circuit found the city acted as a market participant, rather than a regulator—a property owner using its property to raise money, not as a regulator.⁶⁷ Using market participant jurisprudence,⁶⁸ the court found that the city was free to influence a discrete class of economic activity in which it was a participant, and that the

and *Printz v. United States*, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). See *Reno v. Condon*, 528 U.S. 141 (2000).

⁶¹ On the issue of user fees and the Commerce Clause, see generally Sullen Wolfe, *Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the "Silver Bullet"?*, 26 STETSON L. REV. 727 (1997).

⁶² 348 F.3d 315 (1st Cir. 2003).

⁶³ 348 F.3d at 318, citing *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

⁶⁴ 348 F.3d at 322–23.

⁶⁵ 230 F.3d 276 (7th Cir. 2000).

⁶⁶ 230 F.3d at 284, citing *Northwest Airlines v. County of Kent, Mich.*, 510 U.S. 355, 369 (1994).

⁶⁷ 230 F.2d at 284.

⁶⁸ See *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 125 (1984).

operation of private toll roads was a legitimate economic activity.⁶⁹

2. Collision with State Sovereignty

Although the Commerce Clause has been expansively interpreted by numerous courts, in recent decades significant limitations on Congress's power have been identified. In several narrowly decided cases, the Court has given state sovereignty increased emphasis as a limitation on congressional power.⁷⁰ Though these are not transportation cases, their potential impact on the exercise of Commerce Clause power by Congress is profound.

In *New York v. United States*⁷¹ (a case holding a federal statute unconstitutional because it sought to require the states to take title of low-level radioactive waste), the Supreme Court observed, "Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.... The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."⁷² Hence, Congress cannot require the states to enact or enforce a federal regulatory program.⁷³

In *Printz v. United States*,⁷⁴ the U.S. Supreme Court struck down the Brady Bill's requirement that local chief law enforcement officers conduct background checks on handgun purchasers as not "necessary and proper" to the execution of congressional power under the Commerce Clause. The Court found, "the whole *object* of the law to direct the functioning of the state executive and hence to compromise the structural framework of dual sovereignty" offended "the very *principle* of separate state sovereignty...."⁷⁵ The Court emphasized that "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer

⁶⁹ 230 F.2d at 284, citing *Overstreet v. North Shore Corp.*, 318 U.S. 125, 127 (1943).

⁷⁰ State prevailing wage rate laws fall within a regulatory field traditionally occupied by the states. *Frank Bros., Inc. v. Wisc. Dep't of Transp.*, 297 F. Supp. 2d 1140 (W.D. Wis. 2003); *Cal. Division of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325, 330, 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997).

⁷¹ 505 U.S. 144 (1992).

⁷² 505 U.S. at 166.

⁷³ *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *FERC v. Miss.*, 456 U.S. 742 (1982).

⁷⁴ 521 U.S. 898 (1997).

⁷⁵ 521 U.S. at 932 (emphasis in original).

or enforce a federal regulatory program...[for] such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”⁷⁶ Hence, it is unlikely that a federal requirement that state highway patrolmen enforce federal truck standards would be enforced.

Other limitations on Congress’s power have been found in attempts to regulate noneconomic areas, such as creating new federal criminal laws. In *United States v. Lopez*,⁷⁷ the Court struck down a federal statute seeking to prohibit possession of a firearm in a school zone, an attempt to regulate noneconomic, criminal activity, as beyond the pale of Commerce Clause authority. Similarly, in *United States v. Morrison*,⁷⁸ the Court struck down a federal statute seeking to create a civil remedy for victims of gender-motivated violence, saying “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”⁷⁹ The Court continued:

We...reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.... In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.... Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.⁸⁰

Thus, although the federal government could punish a state that refused to adopt federal highway speed limits by denying it federal highway money under the Spending Clause, it could not coerce a state’s law enforcement officers to enforce federal speed limits under the Commerce Clause. A state that chose to forego the federal money could chart its own course. This may be a *de jure* distinction without a *de facto* difference, however, since the economic penalty may be too dear to bear. Though a rose, under any other word, would smell as sweet, coercion, under any other word, smells of treachery most foul.

⁷⁶ 521 U.S. at 935.

⁷⁷ 514 U.S. 549 (1995).

⁷⁸ 529 U.S. 598 (2000).

⁷⁹ 529 U.S. at 613.

⁸⁰ 529 U.S. at 617–18.

D. FEDERAL SUPREMACY AND PREEMPTION OF STATE LAW

1. Examples

Article VI of the Constitution (the Supremacy Clause) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding....⁸¹

The Supremacy Clause of the U.S. Constitution “invalidates any state law that contradicts or interferes with an Act of Congress.”⁸² As one commentator observed, “The power of the federal government to displace state law in those areas in which Congress has the ability to legislate is a potent one; it divests states of the ability to regulate in an area within the state’s domain.”⁸³

With the gradual recognition of the legitimacy of state police powers, and deferential “rational basis” analysis, the Supreme Court began to retreat from dormant Commerce Clause preemption. Nevertheless, three circumstances exist under which state police power regulation of a matter of local concern will be deemed preempted by federal law:

1. *Explicit Preemption*—Where Congress explicitly preempted the states;⁸⁴
2. *Occupy the Field*—Where the scheme of federal regulation is so pervasive as to leave no room for the states to supplement it;⁸⁵ or
3. *Same Purpose Covered*—Where the object to be obtained by the federal law and the character of the obligations imposed by it reveal the same purpose as the state regulation.⁸⁶

⁸¹ U.S. CONST. art. VI, cl. 2.

⁸² *Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 627, 81 L. Ed. 2d 527, 104 S. Ct. 2610 (1984).

⁸³ Susan Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 90 (1995).

⁸⁴ See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

⁸⁵ *Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

⁸⁶ *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983).

Congress has used its preemptive authority in different ways—in some cases by direct regulations that explicitly assert the federal government’s authority over particular activities, and in other cases by simply preempting inconsistent state law, but leaving it to the courts to enforce the preemption. But courts also have deemed state law preempted even where it appears Congress never expressed an intention to preempt it, and indeed, in areas where Congress has never legislated at all. Sometimes, preemption is avoided via the technique of “cooperative federalism,” whereby Congress offers the states the choice of implementing the federal regulations, as for example, in the field of environmental regulation.⁸⁷

The most obvious case for federal preemption exists when Congress has expressly declared its intent.⁸⁸ For example, the Testing Act provides that “a State or local government may not prescribe, issue, or continue in effect a law, regulation, standard, or order that is inconsistent with regulations prescribed under this section.”⁸⁹ Yet, Congress is rarely so clear in demarking the jurisdictional lines between the federal and state spheres.

Among the most troublesome forms of preemption is where, under the “dormant” Commerce Clause (or negative Commerce Clause doctrine), a court holds that state action is preempted. Under the judicially created dormant Commerce Clause analysis, preemption is appropriate where (1) the federal scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”;⁹⁰ (2) the field of regulation has a federal interest “so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject”;⁹¹ and (3) the prospect of a conflict between the federal

⁸⁷ Craig Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 KAN. L. REV. 460, 519, 520 (2000).

⁸⁸ See, e.g., *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, 134 L. Ed. 2d 237, 116 S. Ct. 1103 (1996); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 822 (1st Cir. 1992). See also *National Freight v. Larson*, 760 F.2d 499 (3d Cir. 1985) (state statute imposing overall truck trailer lengths conflicted with a federal statute, and was therefore preempted under the Supremacy Clause).

⁸⁹ 49 U.S.C. § 5331(f)(1). See 49 C.F.R. §§ 653.9, 654.9. See also *United States v. Ohio Dep’t of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980) (federal government may bring suit against state highway department that fails to implement emission inspection requirements mandated by the Clean Air Act).

⁹⁰ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁹¹ *Id.*

and state regimes creates “a serious danger of conflict with the administration of the federal program.”⁹²

The Commerce Clause itself speaks in terms of *congressional* power to regulate, and is silent as to whether the unexercised commerce power of the Congress has preemptive authority, or whether the judiciary may infer preemption as desirable. The Commerce Clause says nothing about the authority of the judiciary to proclaim that congressional silence on an issue prohibits state regulation thereof.⁹³ In his concurring opinion in *American Trucking Associations v. Smith*⁹⁴ (a case holding that a flat tax on interstate commerce offended the Commerce Clause because it imposed a greater burden on out-of-state vis-à-vis in-state motor carriers), Justice Scalia described negative Commerce Clause jurisprudence as a “quagmire,” “arbitrary, conclusory, and irreconcilable with the constitutional text,” “inherently unpredictable,” and “has only worsened with age.”⁹⁵ Keep this description in mind as we review the inconsistent and unpredictable Commerce Clause preemptive jurisprudence below.

a. *Motor Carrier Safety Regulation*

The Federal Aviation Administration (FAA) Authorization Act of 1994 included an odd provision for an FAA authorization bill, one preempting state economic regulation of intrastate trucking. Without a committee hearing on the subject, Senator Wendell Ford (D-Ky.), then Chairman of the Senate Commerce Committee, had the preemption provision inserted as a rider on behalf of Kentucky’s largest employer, United Parcel Service, whose air cargo operations are hubbed at Louisville. It was oddly worded legislation, with certain provisions preserving state regulation of certain functions (including safety regulation) to the “authority of a State,”⁹⁶ while others restoring it to the “authority of a State or a political subdivision of a State.”⁹⁷ Literally, it would seem that the elimination of the reference to political subdivisions in some provisions, but not others, evidenced a congressional intent that certain functions could be performed by a state, while others could be per-

⁹² *Pennsylvania v. Nelson*, 350 U.S. 497, 505 (1956).

⁹³ See *Kassel v. Consolidated Freightways*, 450 U.S. 662, 691 (1981) (Rehnquist, J., dissenting).

⁹⁴ 496 U.S. 167, 200 (1990).

⁹⁵ 496 U.S. at 202 (Scalia, J., concurring).

⁹⁶ 49 U.S.C. § 14501(c)(2)(A).

⁹⁷ 49 U.S.C. § 14501(c)(2)(C), (3)(A).

formed by a state or political subdivision thereof.⁹⁸ The Courts of Appeals were divided on the issue.

The Supreme Court confronted the issue head on in *City of Columbus v. Ours Garage and Wrecker Service*,⁹⁹ in which a tow-truck operator and its trade association sought to enjoin the City of Columbus's tow-truck regulations as preempted.¹⁰⁰ In considering preemption, the Court noted that it begins "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."¹⁰¹ Emphasizing the "basic tenets of our federal system," the Court concluded that the statute did not manifest a clear intent that Congress sought to supplant local authority over the traditional state function of highway safety.¹⁰² The Court found the purpose of Congress was to ensure that federal preemption of state motor carrier economic regulation not impinge upon "the preexisting and traditional state police power over safety."¹⁰³ That power includes the discretion to delegate state regulatory authority over safety to local governments.¹⁰⁴ However, where local safety regulation conflicts with a federal safety statute, preemption rules apply.¹⁰⁵

b. Railway and Highway Crossing Safety Standards

Several federal statutes deny claimants tort relief when a railroad is complying with federal requirements.¹⁰⁶ Congress has insisted that "Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to rail-

road security shall be nationally uniform to the extent practicable."¹⁰⁷ States may only regulate in a manner not incompatible with federal standards.¹⁰⁸

The U.S. Supreme Court has had two occasions to review the preemptive effect of the Federal Railroad Safety Act of 1970¹⁰⁹ in the context of state tort actions. In *CSX Transportation, Inc. v. Easterwood*,¹¹⁰ the Court was confronted with a preemption claim raised against a negligence suit that included allegations that the train that injured the plaintiff was traveling at excessive speed, and that the railroad failed to maintain adequate warning devices at the grade crossing. The Supreme Court held that the excessive speeding allegation was preempted because the Federal Railroad Safety Administration had promulgated regulations establishing the speed limit over that segment of track, and the railroad had not exceeded them. However, the allegation of inadequate warning devices was not preempted, for neither were federal funds used in their purchase, nor were federal specifications as to the type of grade crossing warnings issued. The Court observed that the language in the statute preempting state law provides that it must "cover" the same subject matter, which the Court interpreted as mandating preemption "only if the federal regulations substantially subsume the relevant state law."¹¹¹

Seven years later, the Supreme Court revisited these preemption provisions in *Norfolk Southern Railway Co. v. Shanklin*.¹¹² Here, the Court found that allegations of negligence surrounding inadequate grade crossing warnings were preempted because, in this case, the devices were installed with federal funds, and as a consequence, federal regulations specified the precise warning devices to be installed, and the devices installed were subject to FHWA approval.¹¹³ "Once the FHWA approved the project and the signs were installed using federal funds, the federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby pre-empting respondent's claims."¹¹⁴

⁹⁸ But of course, there was no legislative history to review unless, of course, one had access to the files of United Parcel Service's lobbyists.

⁹⁹ 536 U.S. 424 (2002).

¹⁰⁰ *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424 (2002) (municipalities may regulate safety of tow truck operators).

¹⁰¹ 536 U.S. at 432.

¹⁰² 536 U.S. at 434.

¹⁰³ 536 U.S. at 439. *See also* Scadron v. Des Plaines, 1993 U.S. App. LEXIS 4694 (7th Cir. 1991) (unpublished decision), holding that a city's regulation of billboards under the Illinois Highway Advertising Control Act was not preempted. Note, however, that unpublished decisions, though illustrative of an application of law, are of no precedential value.

¹⁰⁴ 536 U.S. at 439.

¹⁰⁵ *See* CSX Transp. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996) (municipal ordinance that limited the time that trains could disrupt local traffic preempted by the Federal Railway Safety Act).

¹⁰⁶ *See, e.g.*, 49 U.S.C. § 11707 (no liability when railroad acts in compliance with routing instructions of the Surface Transportation Board).

¹⁰⁷ 49 U.S.C. § 20106 (1994 ed., 2005 Supp.)

¹⁰⁸ *Id.*

¹⁰⁹ 49 U.S.C. § 20101 *et seq.*

¹¹⁰ 507 U.S. 658 (1993). This case is discussed in McFarland, *supra* note 42, at 155, 177–80.

¹¹¹ 507 U.S. at 664.

¹¹² 529 U.S. 344 (2000).

¹¹³ 529 U.S. at 353–54.

¹¹⁴ *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 at 359 (2000) (state tort action alleging negligence in installation of warnings at railway grade crossings preempted where federal funds used in their installation).

Though the Circuit Courts of Appeals are divided on the issue, the prevailing view favors preemption. Some courts have held tort claims preempted where federal money participated in the installation of warning devices at grade crossings.¹¹⁵ Others have found railroad grade crossing suits preempted where federal participation was more than casual, though federal financial participation may be non-cash in nature.¹¹⁶ Still others have found preemption unless claimants could prove that the U.S. DOT Secretary had concluded that “the crossbucks, though desirable, were not adequate in themselves to warn the public of the danger” at the grade crossing in question.¹¹⁷ A few have hesitated, requiring the federally funded safety devices to have been installed and operating.¹¹⁸ At least one has bucked the trend, resisting the notion that federal funding would trigger preemption of state common law tort suits at grade crossings and refusing to accept that satisfaction of minimum federal requirements would be adequate from a safety standpoint.¹¹⁹

c. Vehicle Safety Standards

In *Geier v. American Honda Motor Co.*,¹²⁰ the Supreme Court was confronted with two conflicting provisions in the National Traffic and Motor Vehicle Safety Act of 1966. One, a preemption provision, provided: “Whenever a Federal motor vehicle safety standard...is in effect, no State or political subdivision of a State shall have any authority...to establish...any safety standard applicable to the same aspect of performance...which is not identical to the Federal standard.”¹²¹ The second, a savings clause, provided that “compliance with” a federal safety standard “does not exempt a person from liability at common law.”¹²² In a five-to-four decision, the U.S. Supreme Court found that neither provision precluded implied conflict preemption,¹²³ and with

¹¹⁵ *Hester v. CSX Transp.*, 61 F.3d 382 (5th Cir. 1995).

¹¹⁶ *Hatfield v. Burlington Northern R.R.*, 64 F.3d 559 (10th Cir. 1995).

¹¹⁷ *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996).

¹¹⁸ See *Elrod v. Burlington N. R.R.*, 68 F.3d 241 (8th Cir. 1995). See also *Thiele v. Norfolk & Western Ry.*, 68 F.3d 179 (9th Cir. 1995).

¹¹⁹ *Shots v. CSX Transp.*, 38 F.3d 304 (7th Cir. 1994). For an excellent discussion of these cases, see McFarland, *supra* note 42, at 155, 177–83.

¹²⁰ 529 U.S. 861 (2000).

¹²¹ 80 Stat. 719, now codified at 49 U.S.C. § 30103(b)(1) (1994 ed.). See Ellen Therof, *Preemption of Airbag Litigation: Just a Lot of Hot Air?*, 76 VA. L. REV. 577 (1990).

¹²² 49 U.S.C. § 30103(e).

¹²³ 529 U.S. at 869.

the collision of the preemption clause with the savings clause, effectively held the former clause trumped the latter. The Court concluded that a state common law “no-airbag” action was preempted since it would have been an obstacle to the implementation of the Federal Motor Vehicle Safety Standard regarding passive automobile restraints.¹²⁴

In *Geier*, the Court reasoned that

the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost and occasional risk to safety itself that too many different safety-standard cooks might otherwise create.... This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict....¹²⁵

In a lengthy and impassioned dissent on behalf of four members of the Court, Justice Stevens insisted that

the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States. Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States’ historic police powers—are not to be preempted by a federal statute unless it is the clear and manifest purpose of Congress to do so.¹²⁶

Further, this statute included a savings clause that, according to Stevens, “unambiguously expresses a decision by Congress that compliance with a federal safety standard does not exempt a manufacturer from *any* common law liability.”¹²⁷ *Geier* has stimulated a considerable amount of law review commentary, much of it critical of the majority’s decision.¹²⁸

¹²⁴ 529 U.S. at 886.

¹²⁵ 529 U.S. at 871.

¹²⁶ 529 U.S. at 894, footnote omitted.

¹²⁷ 529 U.S. at 898.

¹²⁸ See, e.g., Alexander Haas, *Chipping Away at State Tort Remedies Through Pre-emption Jurisprudence: Geier v. American Honda Motor Co.*, 89 CAL. L. REV. 1927 (2001); Joseph Mulherin, *Geier v. American Honda Motor Co.: Has the Supreme Court Extended the Pre-emption Doctrine Too Far?*, 21 NAALJ 173 (2001); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1 (2002).

d. Labor Regulation

Since 1931, the Davis-Bacon Act¹²⁹ has mandated that wages paid on federally funded projects be not lower than those prevailing in the project's locale on similar construction projects. However, in order to facilitate the purposes of the National Apprenticeship Act,¹³⁰ wages may be lower than prevailing journeyman levels for apprentices. The Employee Retirement Income Security Act of 1974 (ERISA) included a rather broad and vague preemption provision, providing that ERISA "shall supercede any and all State laws insofar as they may...relate to any employee benefit plan..."¹³¹ The U.S. Supreme Court has accepted *certiorari* in more than a dozen cases in an attempt to resolve conflicts in the lower courts' applying ERISA preemption to various state laws.¹³²

Though recognizing that ERISA's preemption provision is "clearly expansive" and of "broad scope," the Supreme Court in *California Division of Labor Standards Enforcement v. Dillingham Construction*¹³³ upheld California labor laws on apprentice wages as not relating to an employee-benefit plan and thus not preempted. It found that apprentice wages were remote from the areas that ERISA addressed—"reporting, disclosure, fiduciary responsibility, and the like."¹³⁴ Moreover, it concluded that interpreting the statute to preempt "traditional state-regulated substantive law in those areas where ERISA has nothing to say would be 'unsettling.'¹³⁵ It would also be contrary to the Courts' ordinary assumption that "federal laws do not supercede the historic police powers of the states."¹³⁶

However, in a number of transport contexts, federal courts have found state and local governmental action preempted. For example, in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Missouri*,¹³⁷ the U.S. Supreme Court held that the state statute authorizing

the governor's seizure of the transit company was invalid under the Supremacy Clause of the U.S. Constitution as making unlawful a peaceful strike, in conflict with Section 7 of the National Labor Relations Act (NLRA),¹³⁸ which guarantees the right to bargain collectively and the right to strike.¹³⁹ In *CF&I Steel v. Bay Area Rapid Transit District*,¹⁴⁰ a federal district court held that the Bay Area Rapid Transit District's attempt to debar a steel provider from doing further business with it because of alleged violations of the NLRA was beyond the power of state and local governments.¹⁴¹ In *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Oliver*,¹⁴² the U.S. Supreme Court held that state antitrust law was preempted where the allegedly anticompetitive agreement concerning wages and working conditions fell within the terms of a collective bargaining agreement negotiated under the NLRA.

2. Sovereign Immunity and the Supremacy Clause

Sovereign immunity will be discussed in detail below. However, the relationship between the Supremacy Clause and state sovereign immunity was discussed by the U.S. Supreme Court in *Alden v. Maine*¹⁴³ (a case involving a suit against a state employer for alleged violation of federal labor laws), in which the Court held that the Supremacy Clause did not trump immunity:

The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because the law derives not from the State itself but from national power.... We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. When a State asserts its immunity to suit, the question is not one of the primacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the States.¹⁴⁴

¹²⁹ 46 Stat. 1494, 40 U.S.C. § 276a-276a-5.

¹³⁰ 50 Stat. 664, 29 U.S.C. § 50.

¹³¹ 29 U.S.C. § 1144(a).

¹³² See cases cited in Justice Scalia's concurring opinion in *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 335 n.1 (1997).

¹³³ 519 U.S. 316 (1997).

¹³⁴ 519 U.S. at 330, citation omitted.

¹³⁵ *Id.*

¹³⁶ 519 U.S. at 331. State prevailing wage rate laws fall within a regulatory field traditionally occupied by the states. *Frank Bros., Inc. v. Wis. Dep't of Transp.*, 297 F. Supp. 2d 1140 (W.D. Wis. 2003); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325, 330, 136 L. Ed. 2d 791, 117 S. Ct. 832 (1997).

¹³⁷ 374 U.S. 74 (1963).

¹³⁸ 29 U.S.C. § 157 (2000).

¹³⁹ See also *Bus Employees v. Wis. Bd.*, 340 U.S. 383 (1951) (holding that the Wisconsin Public Utility Anti-Strike Law conflicted with the NLRA).

¹⁴⁰ 2000 U.S. Dist. LEXIS 13810 (N.D. Cal. 2000).

¹⁴¹ 2000 U.S. Dist. LEXIS 13810 (N.D. Cal. 2000). *Wis. Dep't of Indus. v. Gould*, 475 U.S. 282 (1986), citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 at 236 (1959).

¹⁴² 358 U.S. 283 (1959).

¹⁴³ 527 U.S. 706 (1999).

¹⁴⁴ *Alden*, 527 U.S. at 732.

E. FEDERAL SPENDING POWER

1. Conditional Grants as a Mechanism for Federal Regulation of State and Local Governments

Article I, Section 8 of the Constitution provides, *inter alia*: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States....”¹⁴⁵ FHWA and FTA are funding agencies primarily, implementing congressional power under the Spending Clause (sometimes referred to as the General Welfare Clause) of the Constitution.¹⁴⁶ The Spending Power includes the ability to impose requirements on state and local governments and private entities as a condition of receiving federal funds.

Often, federal appropriation statutes condition the receipt of federal funds on the state’s enactment of uniform statewide regulation.¹⁴⁷ For example, federal funds for highway safety have been conditioned on promulgation of a motorcycle helmet law applicable throughout the state.¹⁴⁸ Similarly, federal highway funds have been conditioned on a state’s promulgation of laws setting the drinking age at 21, or the enactment of a 55-mph speed limit.¹⁴⁹ Many of these federal mandates have been repealed as “the burden on the states that wanted a lesser degree of regulation became intolerable.”¹⁵⁰

The power of the purse is among Congress’s most effective tools in forcing its will upon the Nation, particularly as the federal budget has grown over

the last century. The Spending Clause is a major means of forcing states to abide by federal mandates.¹⁵¹

Federal preemption under the Commerce Clause differs significantly from preemption under the Spending Clause. In the former case, the Commerce Clause trumps inconsistent state law directly via the Supremacy Clause. In the latter case, the states are given a choice—they may comply with the federal mandate and receive federal funds, or they may avoid those mandates by refusing the federal funds attached thereto.¹⁵² In other words, if the state objects to the strings attached to the federal funds, it has the simple expedient of declining the money.¹⁵³ As the Supreme Court has observed, “legislation enacted pursuant to the spending power is much in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions.”¹⁵⁴ Moreover, under the spending clause, Congress can effectively regulate matters of local concern that it could not regulate directly.¹⁵⁵

The power to regulate via the spending clause is broad. In 1936, the U.S. Supreme Court, in *United States v. Butler*,¹⁵⁶ rejected the argument that the general national welfare is confined to those powers enumerated in the Constitution as within the province of Congress, and instead concluded that the power of Congress to tax and spend in order to promote the “general welfare” was not limited to explicit grants of power set forth in the Constitution. Specifically, the U.S. Supreme Court held that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”¹⁵⁷ However, the Court believed a balance must be struck to prevent federal encroachment on powers left to the states.¹⁵⁸

In *Butler*, the Court found the Federal Agricultural Adjustment Act to be an unconstitutional intrusion into the reserved powers of the states, as “a

¹⁴⁵ Article 1 also provides, in part:

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States...; Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; ...To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

¹⁴⁶ *San Antonio Metro. Transit Auth. v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983).

¹⁴⁷ *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 438 (2002).

¹⁴⁸ 23 U.S.C. § 153 (1994 ed.).

¹⁴⁹ 23 U.S.C. § 158 (1994 ed.).

¹⁵⁰ *Albert*, *supra* note 87, at 463, 530.

¹⁵¹ For a review of cooperative federalism and conditional grants see Netherton, *supra* note 19. See also *McFarlane*, *supra* note 21.

¹⁵² *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112 (1989).

¹⁵³ *McFarlane*, *supra* note 21, at 9. “If a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.” *New York v. United States*, 505 U.S. 144, 168 (1992).

¹⁵⁴ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

¹⁵⁵ *McFarlane*, *supra* note 21, at 8.

¹⁵⁶ 297 U.S. 1 (1936).

¹⁵⁷ *United States v. Butler*, 297 U.S. 1, at 66 (1936).

¹⁵⁸ *McFarlane*, *supra* note 21, at 6.

scheme for purchasing with federal funds submission to federal regulation.... The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.”¹⁵⁹ To allow Congress to so intrude upon state sovereignty would enable the spending power to “become the instrument for the complete subversion of the governmental powers reserved to the individual states.”¹⁶⁰

Cases since *Butler* have retreated from the restrictions it placed upon the spending power.¹⁶¹ However, four limitations have been identified which circumscribe Congress’s spending power:

1. The Constitution requires that spending be in pursuit of the “general welfare”;¹⁶² the expenditure must benefit society at large and not just a particular group; however, courts tend to defer to the judgment of Congress on this issue, for the discretion as to what constitutes general welfare “is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment”;¹⁶³
2. Where Congress seeks to impose conditions on federal funds, it “must do so unambiguously...enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation”;¹⁶⁴
3. Conditions upon receipt of federal funds must be related “to the federal interest in particular national projects or programs”;¹⁶⁵ and
4. Such conditions must not run afoul of other constitutional provisions that provide an independent bar to the imposition thereof.¹⁶⁶

a. *Minimum Age Drinking Laws*

The Supreme Court has had occasion to address congressional exercise of state “encouragement”

¹⁵⁹ 297 U.S. at 72–73. McFarlane, *supra* note 21, at 6–7.

¹⁶⁰ 297 U.S. at 75. McFarlane, *supra* note 21, at 7.

¹⁶¹ McFarlane, *supra* note 21, at 8.

¹⁶² 297 U.S. at 65.

¹⁶³ *Helvering v. Davis*, 301 U.S. 619, 640 (1937). “The [Supreme] Court has taken the position that general welfare is whatever Congress finds it to be.” McFarlane, *supra* note 21, at 9.

¹⁶⁴ *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹⁶⁵ *Massachusetts v. United States*, 435 U.S. 444, 461 (1978).

¹⁶⁶ *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269–70 (1985).

under the Spending Clause in the context of interstate highways. In the National Minimum Drinking Age Amendment of 1964,¹⁶⁷ Congress penalized states “in which the purchase or public possession...of any alcoholic beverage by a person who is less than twenty-one years of age is lawful” by directing the Secretary of Transportation to withhold 5 percent of their allocation of federal highway funds. South Dakota, which allowed persons 19 years old and older to purchase 3.2 percent beer, appealed the decision of U.S. DOT to withhold 5 percent of its federal highway money. With respect to the five aforementioned criteria, in *South Dakota v. Dole*,¹⁶⁸ the Supreme Court concluded:

1. Congress found that different drinking ages in different states encouraged young people to combine drinking and driving in interstate commerce—it gave them an incentive to drive to states where the drinking age was lower; prohibiting this clearly was in the public interest;
2. The conditions could not be more unambiguously stated—a state that allows its citizens under the age of 21 to drink alcoholic beverages results in losing 5 percent of federal highway money;
3. The condition imposed is directly related to one of the principal reasons why highway funds are expended—to encourage safe interstate travel; and
4. Though South Dakota contended that the Twenty-First Amendment prohibited Congress from regulating drinking ages, and contended further that Congress could not do indirectly what it was prohibited from doing directly, the fourth criterion was not so circumscribed; it only prohibits inducing states to engage in unconstitutional activities.¹⁶⁹

In *South Dakota v. Dole*, the Supreme Court also recognized that congressional exercise of the Spending Clause potentially could run afoul of the Tenth Amendment. The Court noted that the financial inducement must not be so coercive as to go beyond the point at which “pressure turns into compulsion.”¹⁷⁰ Here, the financial penalty constituted “relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such

¹⁶⁷ 23 U.S.C. § 158.

¹⁶⁸ *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁶⁹ 483 U.S. at 209–10. The court offered an example: “a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.” *Id.* at 210–11.

¹⁷⁰ *Stewart Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

laws remains the prerogative of the States not merely in theory but in fact.¹⁷¹ As a consequence, the Supreme Court held that even if Congress lacked the power to enact a national minimum drinking age, the encouragement of states to do so falls legitimately within the spending power of Article 1.¹⁷²

b. Maximum Speed Limits

In *People v. Williams*,¹⁷³ a lower California state court upheld the provisions of the Emergency Highway Energy Conservation Act,¹⁷⁴ which made a state's receipt of federal highway funds contingent on its establishment of a maximum speed limit of 55 mph as a legitimate exercise of power under the Spending Clause. The court summarized federal precedent on the subject:

Although article I, section 8 lists certain specific areas for which Congress has the "power to spend," it has been held that the "power to spend" encompassed within the "general welfare" clause is not limited to these specific areas. The "general welfare clause" is itself an independent—and expansive—source of Congress' spending authority. Moreover, Congress may attach conditions to the disbursement of federal funds as long as those conditions are related to a legitimate national goal of providing for the general welfare of the nation, have a rational relationship to the purpose of the federal funds whose receipt is conditioned, and are unambiguous. The conditions need not be restricted to those areas over which Congress has direct regulatory authority. Moreover, when Congress is legislating for the "general welfare," the means chosen by Congress to effectuate the congressional purpose are necessarily valid if Congress could reasonably conclude that "the means are 'necessary and proper' to promote the general welfare."¹⁷⁵

¹⁷¹ 483 U.S. at 211–12. In this case, the Court held that Congress may impose conditions on federal money in order to regulate the states. The U.S. Supreme Court held that Congress may legitimately withhold funds in order to encourage a state to enforce the age 21 drinking age if the condition: 1) is in pursuit of the general welfare, which is up to Congress to decide; 2) is unambiguous, so the state can exercise a choice; 3) is related to the national interest (drinking age goes up, drunk driving goes down); 4) does not conflict with other constitutional rights; and 5) is not coercive upon the state.

¹⁷² 483 U.S. at 212.

¹⁷³ 175 Cal. App. 3d Supp. 16 (Superior Ct. Cal. 1985).

¹⁷⁴ 23 U.S.C. § 154.

¹⁷⁵ 175 Cal. App. 3d Supp. at 18–19 [citations omitted].

c. Drug Testing Requirements

In *O'Brien v. Massachusetts Bay Transportation Authority*,¹⁷⁶ the First Circuit addressed the Omnibus Transportation Employee Testing Act of 1991,¹⁷⁷ which required states to conduct random drug and alcohol tests upon transit employees responsible for safety-sensitive functions as a condition of receiving federal transit funds. In *O'Brien*, the court held that when the federal government conditions the receipt of federal money on complying with certain requirements (in this case drug and alcohol testing), and the state accepts the money, the local law must yield.¹⁷⁸ If it accepts federal money, the state must comply with the federal requirements.

d. Highway Beautification

Before the federal government intervened, every state had promulgated legislation regulating outdoor advertising.¹⁷⁹ At least half the states exercised their police powers to restrict advertising through amortization rather than compensation. Under amortization, a state allows the billboard owner a reasonable time to continue the prohibited use to recover its investment before termination.¹⁸⁰ The Highway Beautification Act of 1965 (HBA) does not allow amortization as a manner of just compensation for any signs along a highway subject to the HBA.¹⁸¹ This is but one of several ways in which the HBA interferes with local zoning prerogatives, and another example of how grant conditions may trump well-established state and local prerogatives.

With the construction of the Interstate Highway system in the 1950s, the federal government began to turn its attention to highway beautification,

¹⁷⁶ 162 F.3d 40 (1st Cir. 1998).

¹⁷⁷ Pub. L. No. 102-143, 105 Stat. 952.

¹⁷⁸

Massachusetts authorities have elected to draw on federal coffers to finance a bevy of mass transit projects. Having accepted those funds, they must abide by the conditions that Congress attached to them, one of which mandates random drug and alcohol screens for employees who...perform safety-sensitive functions. Because applicable law includes an express preemption provision, contrary state law cannot stand as an obstacle to the testing protocol.

O'Brien, 162 F.3d at 45.

¹⁷⁹ Albert, *supra* note 87, at 463, 469. See, e.g., *Adams Outdoor Advertising v. City of Lansing*, 1998 U.S. Dist. LEXIS 19058 (W.D. Mich. 1998); and *Scadron v. City of Des Plaines*, 734 F. Supp. 1437 (N.D. Ill. 1990).

¹⁸⁰ Albert, *supra* note 87, at 463, 501.

¹⁸¹ See ROSS NETHERTON, REEXAMINATION OF THE LINE BETWEEN GOVERNMENTAL EXERCISE OF THE POLICE POWER AND EMINENT DOMAIN AT 32–35 (NCHRP Legal Research Digest No. 44, 2000).

first, in a weak system of bonus payments to states that agreed to control “outdoor advertisement signs, displays, or devices within six hundred and sixty feet of the edge of the right-of-way and visible from the main-traveled way of all portions of the Interstate System constructed upon any part of the right-of-way.”¹⁸² Congress transformed the beautification system from a reward to a coercive system with the HBA, denying states that did not conform federal highway dollars.¹⁸³ It was a carrot and stick approach. The federal government promised a carrot of federal money to assist in paying for sign removal, while threatening to strike a blow with the stick of denial of 10 percent of all federal highway money allocated to the state if the state was naughty and did not comply. Yet, though the carrot was dangled but never delivered, the stick was vigorously employed under the principle of “Spare the rod; spoil the child.”¹⁸⁴

In *South Dakota v. Adams*,¹⁸⁵ a federal district court addressed the constitutionality of the HBA’s authorization of a withholding of 10 percent of a state’s apportionment of federal highway funds where it failed to effectively control billboards through its zoning power. With respect to the Spending Clause challenge, the court held the Act “to be in furtherance of the general welfare” for it was designed “to protect the public interest in the highways, and promote the scenic and recreational value of the highways, and promote safety on the highways.”¹⁸⁶ The court noted that “the federal government may require the State to comply with certain conditions in order to obtain funds that the federal government grants to the State.... There is a vast difference between requiring a state to adopt certain regulations and denying funding to a state that refuses to adopt them.”¹⁸⁷ The court also upheld the Act’s challenge on interstate commerce (“public travel is part and parcel of interstate travel”),¹⁸⁸ and Tenth Amendment grounds (“the very fact that South Dakota chose not to enact billboard compliance legislation after having been specifically warned of the ten percent penalty shows (the conditional grant was not coercive)”¹⁸⁹). Other cases have addressed the conflict between state

police power in regulating public advertising vis-à-vis the First Amendment right of free speech.¹⁹⁰

2. Are There No Limits on Federal Spending Power?

In his insightful essay, *State Highway Programs Versus the Spending Powers of Congress*,¹⁹¹ Walter McFarlane points out the seeming impossibility of proving that a federal mandate is coercive:

Under the test, if the “simple expedient” of refusing the federal-aid threatens “economic catastrophe,” the statute will be struck down. Such a test bodes ill for any strength the States may seek in arguing coercion. It remains questionable “whether any showing of economic hardship, no matter how great, would be sufficient to compel a finding of coercion.

[T]he test for coercion is extremely rigid. A state’s chance of successfully attacking federal control appears very slim at present. The state will only be successful if it can prove that the coercion rises to a level that would prove “catastrophic” to the state’s function if it were to refuse the federal-aid or that coercion must emanate from a source other than the “inducement” of federal-aid.¹⁹²

But in *New York v. United States*,¹⁹³ the Supreme Court revealed limitations on congressional authority in terms of how far it may go in coercing state behavior. It concluded that certain monetary incentives of the Low-Level Radioactive Waste Policy Amendments Act of 1985¹⁹⁴ satisfied the requirements of the Spending Clause. However, the Act’s requirement that states either regulate according to Congress’s instructions, or take title of radioactive waste, violated the core of state sovereignty reserved by the Tenth Amendment, was not an exercise of any of Congress’s enumerated powers, and crossed the line from encouragement to coercion.¹⁹⁵ Congress may not “commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”¹⁹⁶ The Constitution does not give Congress the authority “to require the States to

¹⁹⁰ See, e.g., *Scadron v. City of Des Plaines*, 734 F. Supp. 1437 (N.D. Ill. 1990).

¹⁹¹ McFarlane, *supra* note 21.

¹⁹² McFarlane, *supra* note 21, at 10, 16 (citations omitted).

¹⁹³ 505 U.S. 144 (1992).

¹⁹⁴ 42 U.S.C. § 2021b.

¹⁹⁵ 505 U.S. at 175, 177. *But see* Dana Lee, *Federal Implementation Plan Withstands Virginia’s Tenth Amendment Challenge*, 17 J. LAND RESOURCES & ENVTL. L. 142 (1997).

¹⁹⁶ *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981).

¹⁸² Sec. 1, 72 Stat. at 905 (amending 23 U.S.C. § 131).

¹⁸³ *Albert*, *supra* note 87, at 463, 499.

¹⁸⁴ See generally *Albert*, *supra* note 87, at 463, 501.

¹⁸⁵ 506 F. Supp. 50 (C.D.S.D. 1980), *aff’d* *South Dakota v. Goldschmidt*, 635 F.2d 698 (8th Cir. 1980).

¹⁸⁶ *Adams*, 506 F. Supp. at 55.

¹⁸⁷ *Adams*, 506 F. Supp. at 57.

¹⁸⁸ *Adams*, 506 F. Supp. at 55.

¹⁸⁹ *Adams*, 506 F. Supp. at 58.

govern according to Congress' instructions."¹⁹⁷ In other words, in the absence of explicit constitutional authority (such as the power to regulate interstate commerce), Congress may not enact laws that coerce the states to perform an act that violates their sovereignty. Said the court:

We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts....

That is not to say that Congress lacks the ability to encourage a State to regulate in a particular way, or that Congress may not hold out incentives to the States as a method of influencing a State's policy choices. Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.¹⁹⁸

Relying on *New York v. United States*, Professor Craig Albert argues forcefully that the HBA is ripe for constitutional challenge.¹⁹⁹ He points out that the federal power to regulate highways resides solely in the Spending Clause: "if commerce were the basis for road building and regulation, then there would be no need for a Post Roads clause because the power to designate and build roads would be subsumed in the Commerce Clause."²⁰⁰

Though Professor Albert concedes the U.S. Supreme Court has never invalidated a conditional spending program under the Tenth Amendment, neither has it been confronted with "a refusal by Congress to spend that which it promised."²⁰¹ He argues that the billboard control provisions of the Act "constitute an unconstitutional infringement on the sovereignty of those states that would like to regulate or eliminate billboards through use of the police power but are not permitted to do so."²⁰²

¹⁹⁷ 505 U.S. at 162. *But see* *Reno v. Condon*, 528 U.S. 141 (2000), which upheld a statute that did "not require the States in their sovereign capacity to regulate their own citizens," nor did it require the state legislature "to enact any laws or regulations" or to "assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151.

¹⁹⁸ 505 U.S. at 166. One source argues that the amendments to the Highway Beautification Act violate the Tenth Amendment standards of *New York v. United States*. Albert, *supra* note 87, at 463, 535, 536.

¹⁹⁹ Professor Albert argues that the amendments to the Highway Beautification Act violate the Tenth Amendment standards of *New York v. United States*. Albert, *supra* note 87, at 463, 518 *et seq.* (2000).

²⁰⁰ *Id.*

²⁰¹ Albert, *supra* note 87, at 463, 524.

²⁰² Albert, *supra* note 87, at 463, 537.

Moreover, Professor Albert finds strong parallels between the application of the HBA and the facts of *New York v. United States*. In both cases, he points out, the states were required either to take title to the item (radioactive waste or billboards, respectively), or be "forced to recognize them as 'property,' when in fact the very definition of property is a state-based concept."²⁰³ Again, before the federal camel put its nose under the tent, the states handled billboard removal under its police powers and through the vehicle of amortization, rather than eminent domain and just compensation.²⁰⁴

Although neither the FHWA nor the FTA is a regulatory body, *per se*, pursuant to legislative authority, each has the ability to impose regulatory obligations on recipients of transit funding through regulations directly or through their funding agreements contractually. These agencies carry both a carrot and a stick. A wide range of statutes, regulations, and contractual agreements impose a plethora of federal requirements upon states, which they can either honor or violate at their own peril, the reward for compliance being the receipt of federal funds, and the penalty for violation being the withholding of federal funds. As *New York v. United States* reveals, there is a potential Tenth Amendment limit on the federal government's ability to coerce the states into enforcing a federal regulatory program. The perimeters of this limitation have yet to be developed, but the door has been opened.

F. EMINENT DOMAIN AND TAKINGS

1. Takings

The subject of eminent domain is a complex web of federal and state constitutional law, with a veritable patchwork quilt of statutes thrown in for good measure.²⁰⁵ However, the first aspect that must be grasped is the distinction between the exercise of

²⁰³ Albert, *supra* note 87, at 463, 536.

²⁰⁴ *See, e.g., Donrey Communications Co. v. City of Fayetteville*, 660 S.W.2d 900 (Ark. 1983). Such amortization is

not a public taking of private property without just compensation.... The principle of amortization rests on the reasonable exercise of the police power, and the financial detriment imposed upon a property owner by the reasonable exercise of police power does not constitute the taking of private property within the inhibition of the constitution.

Id. at 905.

²⁰⁵ Readers interested in this subject are encouraged to review NETHERTON, *supra* note 181, for a comprehensive treatment of the subject in the transportation context.

ordinary government police powers vis-à-vis “takings,” the latter being the focus of eminent domain actions. This distinction has proven problematic for courts in the past,²⁰⁶ and will likely continue to be so for the foreseeable future.²⁰⁷

The takings issue has its origins in the Fifth Amendment to the U.S. Constitution, which provides that “private property [shall not] be taken for public use without just compensation.”²⁰⁸ This principle was extended to the state governments through the Fourteenth Amendment, which provided that, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of...property, without due process of law....”²⁰⁹ Many state constitutions and statutes also embrace the public use and just compensation requirements. A state may not provide a lesser degree of protection than the U.S. Supreme Court has interpreted the Fifth Amendment as granting, because the takings clause has been incorporated into the Fourteenth Amendment and thereby extended to the states.²¹⁰ A state may, however, provide greater protection than that accorded under federal law, either through its own constitution or by statute. Should a state not have the power to condemn property for highway purposes, ample federal legislative authority exists to authorize condemnation.²¹¹

Until the early 20th century, the federal courts had held that a taking occurred only where there was direct appropriation of property for public use, or where there was physical intrusion upon the property.²¹² Yet even a physical appropriation or intrusion was not a taking if done to protect the health, safety, or morals of a community, as in such instances the action was deemed to constitute the

legitimate exercise of police power.²¹³ Today, a taking is deemed to have occurred when the owner has been substantially deprived of the beneficial use and enjoyment of his property.²¹⁴

A case that illustrates the collision between state police power and constitutionally protected property rights is *Panhandle Eastern Pipe Line Co. v. State Highway Commission*.²¹⁵ Without condemnation, the Kansas Highway Commission ordered the Panhandle Eastern Pipe Line Company to relocate certain transmission lines, located on its own rights-of-way, which would conflict with a proposed highway. However, the U.S. Supreme Court concluded that the company’s easements constituted property whose taking was restricted by requirements of the Fourteenth Amendment. Because the lines did not present a serious danger to the public, their removal was a takings for which just compensation was required. The Court observed:

The police power of a State, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the State to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self protection, and permits reasonable regulation of rights and property in par-

²⁰⁶ *Bohannon v. Camden Bend Drainage Dist.*, 208 S.W.2d 794 (Mo. Ct. App. 1948).

²⁰⁷ For readers interested in the relationship between police power and condemnation, it is recommended that they consult NETHERTON, *supra* note 181, and volume 1 of SELECTED STUDIES IN HIGHWAY LAW (hereinafter SELECTED STUDIES). See also Paul Dempsey, *Local Airport Regulation: The Constitutional Tension between Police Power, Preemption & Takings*, 11 PENN ST. ENVTL. L. REV. 1 (2002).

²⁰⁸ U.S. CONST. amend. V.

²⁰⁹ U.S. CONST. amend. XIV.

²¹⁰ *Chicago B.&Q. R.R. v. City of Chicago*, 166 U.S. 226, 239 (1897).

²¹¹ 23 U.S.C. §§ 107, 317.

²¹² Paul W. Garnett, *Forward-Looking Costing Methodologies and the Supreme Court’s Takings Clause Jurisprudence*, 7 COMMLAW CONCEPTUS 119, 121–23 (1999) (Garnett).

²¹³ *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887); “police power” is a broadly defined term that encompasses governmental regulatory authorities as well as law enforcement authorities proper.

²¹⁴ Generally speaking, a taking is not deemed to have occurred merely because the threat of condemnation causes a decline in market value or the loss of another financial opportunity. However, a taking generally will be deemed to have occurred where the owner of commercial property loses rental income to such a degree that he risks losing the property before condemnation occurs. Since there is no hard-and-fast rule defining what constitutes a substantial deprivation of the use and enjoyment of property, a case-by-case approach has been used to determine whether a *de facto* taking has occurred. Four factors have been identified: (1) the inevitability of condemnation; (2) unreasonableness of delay and severity of the hardship imposed; (3) oppressive or unreasonable conduct; and (4) physical invasion or direct legal restraint on the property. Ultimately, the issue is “whether there has been an abuse of the power of eminent domain.” JOHN VANCE, PLANNING AND PRECONDEMNATION ACTIVITIES AS CONSTITUTING A TAKING UNDER INVERSE LAW 12 (NCHRP Research Results Digest No. 150, 1986), and NCHRP Legal Research Digest No. 18 (1991), at 9.

²¹⁵ 294 U.S. 613 (1935).

particulars essential to the preservation of the community from injury.²¹⁶

In *Wright v. City of Monticello*,²¹⁷ a property owner used a street for ingress and egress that the city abandoned and transferred to his neighbors. In determining that a property owner has a right of access in the nature of an easement over streets and highways providing access to his property, the confiscation for which just compensation is required, the Arkansas Supreme Court held:

Under our decisions, the owner of property abutting upon a street or highway has an easement in such street or highway for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself; and any subsequent act by which that easement is substantially impaired for the benefit of the public is a damage to the lot itself within the meaning of the constitutional provision for which the owner is entitled to compensation. The reason is that its easement in the street or highway is incident to the lot itself, and any damage, whether by destruction or impairment, is a damage to the property owner and independent of any damage sustained by the public generally....

A property owner whose land abuts the land being taken by the government and who has a property right of egress and ingress through such land suffers a distinct injury not suffered by the general public [and therefore has standing to complain].²¹⁸

Without more, mere planning in anticipation of condemnation does not constitute a taking.²¹⁹ Moreover, an aggrieved property owner must demonstrate more than mere inconvenience shared by all. In *Warren v. Iowa State Highway Commission*,²²⁰ the Iowa Supreme Court addressed a claim by a property owner that highway construction had

closed off plaintiff's secondary road, causing her to travel more than 3 mi to arrive at the closed access point. The court was unsympathetic to her plight:

[O]ne whose right of access from his property to an abutting highway is cut off or substantially interfered with by the vacation or closing of the road has a special property which entitles him to damages. But if his access is not so terminated or obstructed, if he has the same access to the highway as he did before the closing, his damage is not special, but is of the same kind, although it may be greater in degree, as that of the general public, and he has lost no property right for which he is entitled to compensation....²²¹

Many owners of motels, or gasoline stations, or other business establishments find themselves left in a bywater of commerce when the route of a highway is changed so that the main flow of traffic is diverted.... But this gives the business man no claim for damages against the authority which has installed the traffic regulators which injure him.²²²

In an apparent recognition of the expanding power and authority of administrative agencies at all levels of government, in *Pennsylvania Coal Co. v. Mahon*,²²³ the U.S. Supreme Court addressed more directly the distinction between compensable takings and property losses or damages resulting from noncompensable police powers. The Court concluded that no "bright-line" rule existed, but suggested that the extent of the damage to the owner's property rights was one factor to be considered,²²⁴ and that it was possible for police powers to go "too far" and become takings.²²⁵ Yet the Court assiduously avoided making a definite decision about what constituted going "too far," and during the ensuing decades, the Court gave great deference to the expansion of government regulatory powers, particularly at the federal level.²²⁶

This began to change, however, in 1978, with the decision in *Pennsylvania Central Transportation Co. v. New York City*.²²⁷ In that case, the Court suggested four factors to consider when attempting to determine whether a taking has occurred: (1) the

²¹⁶ 294 U.S. at 622. In a case involving pipeline relocation for the construction of an Interstate highway, the U.S. Court of Claims held the United States was contractually bound to reimburse the State for these costs. In dictum, however, the Court observed that "the expectation of continued enjoyment of a revocable license is not mandated by the Fifth Amendment as an element of damage for an eminent domain taking. On this authority we may assume that the United States might have built the highway itself and not have had to reimburse the utility for the cost of relocating the pipeline." *Arizona v. United States*, 494 F.2d 1285, 1288 (Ct. Cl. 1974) (citations omitted).

²¹⁷ 47 S.W.3d 851 (Ark. 2001).

²¹⁸ 47 S.W.3d at 855.

²¹⁹ JOHN VANCE, PLANNING AND PRECONDEMNATION ACTIVITIES AS CONSTITUTING A TAKING UNDER INVERSE LAW (NCHRP Research Results Digest No. 150, 1986), and NCHRP Legal Research Digest No. 18 (1991), at 4.

²²⁰ 93 N.W.2d 60 (Iowa 1958).

²²¹ *Id.* at 65.

²²² 93 N.W.2d at 68.

²²³ *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (*Pennsylvania Coal Co.*); the traditional legal term for damages that cannot be redressed is *damnum absque injuria*, meaning "injury without wrong," however the term appears to be lapsing from use in favor of "non-compensable damages."

²²⁴ *Pennsylvania Coal Co.*, 260 U.S. at 413.

²²⁵ *Pennsylvania Coal Co.*, 260 U.S. at 415.

²²⁶ Garnett, *supra* note 212, at 119, 125–26.

²²⁷ *Penn. Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104 (1978).

character of the government action; (2) the economic impact of the action on the property owner; (3) the extent to which the government's action has interfered with the property owner's "distinct investment-backed expectations"; and (4) the effects of the action as taken on the parcel of land as a whole, rather than portions of it.²²⁸ Yet the Court declined to establish a "set formula" for takings, suggesting that, instead, takings proceedings are "essentially ad hoc factual inquiries."²²⁹

The *Penn Central* decision was followed by several more years of inactivity before the Court again returned to the subject of takings in 1986 with the case *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.²³⁰ This decision held that even where a property owner's rights are only temporarily abridged by regulatory action, compensation is owed for the value of the time period and degree of abridgement.²³¹ Close on the heels of that ruling, the Court established what has become known as the "essential nexus" rule.²³² This rule provides that, in addition to the traditional questions of whether a particular regulatory restriction constitutes a legitimate government interest and whether it denies an owner any economically viable use of the owner's property, there must also be a logical relationship (an "essential nexus") between the public purpose of the restriction and the nature of the restriction on the property.²³³

In 1992, the U.S. Supreme Court further refined its position by finding that a complete regulatory forfeiture of property without compensation is permissible only where the contemplated use of the property was already forbidden by the common law or statutes at the time the owner originally purchased the property.²³⁴ The Court's rationale was that in such instances the property owner had no reasonable expectation of being able to use the

property for such purposes in the first place, so it would not be as great a hardship to infringe upon his property rights.²³⁵ The Court's decision also established a new principle—the "per se takings" rule, which provides that where a regulation "denies all economically beneficial or productive use of land," a taking has occurred.²³⁶

Finally, in 1994, the Court brought the law of eminent domain at the federal level to its current state with the creation of another takings rule.²³⁷ The new rule, which supplements the essential nexus test discussed above, is the "rough proportionality" rule. This rule holds that even if an essential nexus exists between the public purpose of a regulatory restriction and the nature of the restriction, the nature and degree of the restriction must be approximately proportional to the damage it is intended to prevent or the benefit it is intended to create.²³⁸

A government agency need not have the ability to use eminent domain for a taking to result under any of these rules. It must only substantially deprive a property owner of the beneficial use of the property for public use to give rise to a question of whether a taking has occurred.²³⁹ It should be noted, however, that a Section 1983 action may only lie against a governmental entity when the government employee engaged in the taking had authority to do so. For example, in *Krmencik v. Town of Plattekill*,²⁴⁰ a city's superintendent of highways ordered a strip of land 8–12 ft wide and 275 ft long taken to widen a road. This prompted the property owner to file a Section 1983 action against the town. The federal district court noted that although the highway superintendent had authority to maintain and repair the town's roads, the authority to exercise eminent domain remained in the town's board and had never been delegated to him. The court held, "When an alleged infringement of a constitutionally protected right is traced

²²⁸ See *Penn Cent.*, 438 U.S. at 124–31.

²²⁹ 438 U.S. at 124.

²³⁰ 482 U.S. 304 (1987) (following a flood that destroyed structures essential to the plaintiff's business, the county adopted a new ordinance that prohibited the reconstruction of buildings in the flood zone).

²³¹ 482 U.S. at 317–18, 322.

²³² *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (as part of obtaining a new building permit, the plaintiffs were informed that they were required to grant an easement along the edge of the property to allow beachgoers to cross between two public beaches).

²³³ *Nollan*, 483 U.S. at 834, 837.

²³⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014, 1030–31 (1992) (*Lucas*) (the plaintiff acquired property for the purpose of building housing; however the State enacted legislation that had the effect of banning all new construction on the property).

²³⁵ *Lucas*, 505 U.S. at 1030–31.

²³⁶ *Lucas*, 505 U.S. at 1015. See also *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326–27, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002), on when a regulatory taking is not triggered.

²³⁷ *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (*Dolan*) (plaintiff was ordered by city to dedicate part of her property to flood control in exchange for a redevelopment permit).

²³⁸ 512 U.S. at 391.

²³⁹ *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177–78 (1872); see also *Fountain v. Metro. Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982) (hereafter *Fountain*).

²⁴⁰ 758 F. Supp. 103 (N.D.N.Y. 1991).

to an abuse of discretion by a municipal employee, no municipal liability exists under § 1983.”²⁴¹

While the U.S. Supreme Court spent decades struggling with whether to include damages and other infringements less than direct physical entry/appropriation within the term “takings,” most states historically have embraced broader criteria for defining takings, with roughly half the states specifically including damages to property within the terms of their constitutions.²⁴² However, state projects that receive certain types of federal funding must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URARPAPA),²⁴³ which may give property owners more or less rights relative to those of the state where the action is transpiring.

Where private parties are intended beneficiaries of governmental activity, fairness and justice do not require temporary losses of use that may result from that activity to be borne by the public as a whole through payment of compensation, even though the activity may also be intended incidentally to benefit the public. Were it otherwise, governmental bodies would be liable under the Just Compensation Clause to property owners every time policemen break down the doors of buildings to foil burglars thought to be inside, or every time firemen enter upon burning premises or adjacent properties and deprive the private owners of any use of the premises in order to fight the fire, or enter into evacuate buildings to prevent damage or destruction by rioters, or evacuate areas threatened by terrorist attacks.²⁴⁴

2. Public Use/Public Purpose

The next principal constitutional element in a takings action is the question of what constitutes “public use.” Eminent domain is the power of the government to take property without the owner’s consent. The Constitution requires that property must “be taken for public use,” for which taking “just compensation” must be paid to the property

owner.²⁴⁵ The plain meaning of the term “public use” would suggest that property may not be taken by government for a “private use.” But since the U.S. Supreme Court’s decision in *Berman v. Parker*,²⁴⁶ the literal language has not been followed, local governments have been given wide deference, and anything constituting a “public purpose” has been held to satisfy the constitutional requirement.²⁴⁷ This issue was usually not considered in early eminent domain cases, as in those instances property was usually acquired for roads, canals, railways, utilities, or government buildings that for the most part had clear value for the general public.²⁴⁸ But today, the terms “public use” and “public purpose” are used interchangeably, and any acquisition that can be justified on the basis of creating higher tax revenues, for example, can satisfy the “public use” requirement.²⁴⁹

In the late 1920s, the Michigan highway commissioner began a project to construct and widen a highway between Detroit and Pontiac. Part of the route was a rail line owned by the Detroit, Grand Haven & Milwaukee Railway Company. The state highway commissioner entered into an agreement with the railroad to acquire the right-of-way and relocate the rail line. He then entered into condemnation proceedings to fulfill that agreement and secure the necessary right-of-way for the relocated track. The property owner objected on grounds that the taking of his land for the purposes of exchanging it for land owned by the railroad was for a private (railway), and not for a public (highway), purpose.

Reviewing the Fourteenth Amendment and the Michigan Constitution, the U.S. Supreme Court in *Dohany v. Rogers, State Highway Commissioner of Michigan*,²⁵⁰ found that just compensation would be provided to the property owner for the taking. As to the issue of whether the taking was for a public purpose, the Court concluded:

²⁴⁵ Jennifer Kruckeberg, Can Government Buy Everything? The Takings Clause and the Erosion of the “Public Use” Requirement, 87 MINN. L. REV. 543, 544 (2002).

²⁴⁶ *Berman v. Parker*, 348 U.S. 26 (1954).

²⁴⁷ Some parties have attempted to argue that there is a meaningful difference between “public use” and “public purpose,” but the courts often have rejected these attempts. See *Rabinoff v. Dist. Court of Denver*, 360 P.2d 114 (Colo. 1961).

²⁴⁸ 1 SELECTED STUDIES IN TRANSPORTATION LAW 48 (hereinafter SELECTED STUDIES).

²⁴⁹ Kruckeberg, *supra* note 245, at 543. An eminent domain taking for strictly economic development purposes is for a public use. See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

²⁵⁰ 281 U.S. 362 (1930). 125 S. Ct. 2655 (2005).

²⁴¹ *Krmencik*, 758 F. Supp. at 107.

²⁴² Compare COLO. CONST. art. II, § 15 (provides for compensation for damage) with MASS. CONST. ANN. pt. 1, art. X (provides for compensation only where property is directly taken).

²⁴³ 42 U.S.C. §§ 1415, 2473, 3307, 4601–02, 4621–38, 4651–55.

²⁴⁴ *Nat’l Bd. of YMCA v. United States*, 395 U.S. 85, 23 L. Ed. 2d 117, 89 S. Ct. 1511 (1969); *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 41 Cal. Rptr. 2d 658, 895 P.2d 900 (1995); *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 2003 U.S. Claims LEXIS 47 (2003); *Bennis v. Michigan*, 516 U.S. 442, 134 L. Ed. 2d 68, 116 S. Ct. 994 (1996).

We need not inquire whether...the proposed taking of appellant's land is for highway or railway purposes. It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use.²⁵¹

In the late 19th and early 20th centuries, property was increasingly taken for reasons that had little obvious connection to the general public's interests. This culminated in the U.S. Supreme Court's 1954 decision in *Berman v. Parker*, which concerned condemnation of property for an urban redevelopment project.²⁵² In *Berman*, the Court stated:

The concept of [public use] is broad and inclusive...The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled....²⁵³

It is not for the courts to oversee the choices of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.²⁵⁴

The Court explained that once something was determined to fall under the legislature's control (in this case, zoning), the courts had no further authority to limit the scope of the legislature's action on the subject.²⁵⁵ This effectively abdicated any significant role for the federal courts in determining what constituted "public use." More recently, the U.S. Supreme Court has held that it "will not strike down a condemnation on the basis that it lacks a public use so long as the taking 'is rationally related to a conceivable public purpose.'"²⁵⁶ Despite the gradual return to a more favorable view of property owners' rights in regards to takings, there appears to be no parallel in the realm of public use doctrine.

For example, in *United States v. Union County 16.29 Acres of Land, More or Less*,²⁵⁷ a federal district court reviewed a federal condemnation of land for purposes of environmental mitigation, riprap

and gravel along a river, and wetlands mitigation along Oregon Forest Highway Route 154. Finding the proposed use rationally related to a conceivable public purpose, specifically authorized under the Federal Aid to Highways Act, and encouraged under the federal Clean Water Act and the Endangered Species Act, the court concluded, "Wetlands mitigation is a proper public use."²⁵⁸

In 2005, the U.S. Supreme Court revisited the takings issue in the context of a city's urban redevelopment efforts in *Kelo v. City of New London*.²⁵⁹ Reviewing its jurisprudence, the Court concluded that state and local governments would be precluded from taking the property of A for the sole purpose of giving it to B, even if just compensation were paid. They could not transfer property from one to another for the purpose of conferring a private benefit to the transferee. But a government could legitimately transfer private property from one owner to another if "use by the public" were the purpose of the taking. Thus, property has long been transferred to common carriers, such as railroads, since the public uses the transportation corridor.²⁶⁰ Though the transfer at issue was not of that type—unlike common carriers, the transferees were not required to make their services available to the public—the Court noted that it has long rejected the formalistic requirement that the condemned property be directly used by the public.²⁶¹ The Court observed that what constitutes a "public purpose" varies regionally and evolves over time; the determination is best made by the state legislatures and state courts, to which the federal courts owe great deference.²⁶² According to the Court, "our public use jurisprudence has wisely eschewed rigid formulas and intensive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."²⁶³

Most state courts have adopted the broad definition of "public use" articulated in *Berman*.²⁶⁴ However, in certain instances, eminent domain actions undertaken by private firms that were granted eminent domain powers have been successfully challenged as not being consistent with the principle of public use.²⁶⁵ This rejection of the public use

²⁵¹ 281 U.S. at 366.

²⁵² 348 U.S. 26 (1954).

²⁵³ 348 U.S. at 33, citations omitted.

²⁵⁴ 348 U.S. at 35–36.

²⁵⁵ 348 U.S. at 33–36.

²⁵⁶ *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992).

²⁵⁷ 35 F. Supp. 2d 773 (D. Or. 1997).

²⁵⁸ 35 F. Supp. at 776.

²⁵⁹ 125 S. Ct. 2655 (2005).

²⁶⁰ 125 S. Ct. at 2661.

²⁶¹ 125 S. Ct. at 2662.

²⁶² 125 S. Ct. at 2664.

²⁶³ *Id.*

²⁶⁴ 1 SELECTED STUDIES 49–50; see Joseph J. Lazzarotti, *Public Use or Public Abuse?*, 68 UMKC L. REV. 49 (1999), for a more complete discussion of courts' deference to legislative will on the subject as well.

²⁶⁵ 1 SELECTED STUDIES 50.

doctrine is particularly noticeable in efforts to acquire land for private parking facilities that are being justified on the basis of their purported benefit to the public.²⁶⁶ Yet urban redevelopment projects that seize property for demolition and subsequently turn over the property to private parties have been almost universally held to be within the terms of “public use.”²⁶⁷ Takings that are made to secure a source of income that will further a project that has a public use are also ordinarily acceptable, even when the property in question is not directly put to a public use.²⁶⁸

Under the “related-use doctrine,” many states have given highway departments wide latitude to acquire real estate for highway-related activity. For example, the Minnesota Supreme Court upheld the condemnation of land by the state highway department for the purpose of allowing the federal government to reconstruct a channel over a waterway adversely impacted by construction of a bridge. The court concluded, “While the property involved here will serve a purpose in the general scheme of navigation and flood control, it will also bring the channel of the river close to the high west bank, and thus essentially improve the public highway system.”²⁶⁹

Similarly, in *East Oaks Development v. Iowa Department of Transportation*,²⁷⁰ the Iowa Supreme Court had occasion to evaluate the public use attributes of condemnation of private property for relocation of an existing recreational bikeway threatened by a highway-widening project. Though the court found that the state DOT had no general eminent domain power to establish recreational trails or bikeways, nonetheless the taking was for the legitimate public purpose of improving “the highway system by allowing bikers to remain on a designated recreational trail without the necessity of crossing or traveling upon a highly traveled roadway.”²⁷¹

²⁶⁶ Compare *Wilmington Parking Auth. v. Rankin*, 105 A.2d 614 (Del. Ch. 1954) and *City and County of S.F. v. Ross*, 279 P.2d 529 (Cal. 1955).

²⁶⁷ See, e.g., *Rabinoff*, 360 P.2d 114; *David Jeffrey Co. v. City of Milwaukee*, 66 N.W.2d 362 (Wis. 1954); and *Belovsky v. Redevelopment Auth. of Phila.*, 54 A.2d 277 (Pa. 1947).

²⁶⁸ See, e.g., *Courtesy Sandwich Shop v. Port of N.Y. Auth.*, 190 N.E.2d 402 (N.Y. 1963) and *Lerch v. Md. Port Auth.*, 214 A.2d 761 (Md. 1965).

²⁶⁹ *Kelmar Corp. v. Dist. Court*, 130 N.W.2d 130 N.W.2d 228, 233 (1964), 22 (Minn. 1964).

²⁷⁰ 603 N.W.2d 566 (1999).

²⁷¹ *East Oaks*, 603 N.W.2d at 568.

3. Just Compensation

Where a “taking” has occurred, the measure of damages has been consistently held to be the constitutionally required “just compensation,” meaning that the property owner is to be put “in as good a position [financially] as if his property had not been taken.”²⁷² In most instances involving real estate acquisition, the means of calculating this figure has been the “fair market value” rule (i.e., “what a willing buyer would pay in cash to a willing seller” in an arm’s length transaction at the time the taking occurred).²⁷³ This rule has often been criticized by commentators as being unfair, particularly to businesses, as it ignores both direct relocation and opportunity costs.²⁷⁴ Indeed, the U.S. Supreme Court has explicitly ruled that no award for consequential damages resulting from a condemnation is necessary.²⁷⁵

Most states generally follow the fair market value rule as well,²⁷⁶ although they may also be subject to URARPAPA guidelines if federal funds are involved. Yet there has recently been movement in some states to recognize a broader definition of just compensation.²⁷⁷ These state-level reforms have included such things as permitting recovery of lost profits, attorney’s fees, loss of goodwill, and other costs flowing logically from the taking action.²⁷⁸ However, most states do not recog-

²⁷² *Olson v. United States*, 292 U.S. 246, 255 (1934).

²⁷³ *United States v. Miller*, 317 U.S. 369, 374 (1943). In most states, and under DOT’s regulations implementing URARPAPA, “fair market value” will also include compensation for residual property that has not been taken but has had its economic value damaged as a byproduct of the taking. See 49 C.F.R. § 24.102(k) (2001) for DOT’s regulation.

²⁷⁴ See Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579, 580–81 (1995) for a lengthy list of critics and their writings.

²⁷⁵ *United States v. Fifty Acres of Land*, 469 U.S. 24, 33 (1984). URARPAPA has attempted to partially remedy this situation by offering limited relocation assistance to individuals and businesses that suffer dislocation due to certain types of federally financed activities, but its scope is limited, leaving many types of property owners without compensation or grossly inadequate compensation for their losses. See *Norfolk Redevelopment and Housing Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30 (1983) (utilities cannot ordinarily receive compensation under URARPAPA).

²⁷⁶ *DeBow* at 585.

²⁷⁷ *DeBow* at 585–86.

²⁷⁸ *DeBow* at 586–88. See also Vivien J. Monaco, *The Harris Act: What Relief From Government Regulation Does it Provide for Private Property Owners?*, 26 STETSON L. REV. 861 (1997) (Monaco) for a detailed discussion of

nize such losses and continue to limit recovery to fair market value with minor exceptions, such as additional recovery for specific types of property being forfeited or where property is taken exclusively for a particular purpose.²⁷⁹

There are differences among the states on the issue of whether just compensation is limited to the taking of property or whether it is also recoverable for damage to property. The federal government and about 26 states fall into the former category (allowing compensation for property takings only), while about 24 states fall into the latter category (allowing compensation for either taking or damage to property). Another issue is whether loss of direct access to a highway without land-locking a parcel is a police power action not requiring compensation or is a taking or damage that does require compensation.

For example, in *National Auto Truckstops v. State of Wisconsin DOT*,²⁸⁰ the Wisconsin Supreme Court overturned a lower court's finding that relegating a truck stop to access via a frontage road during a highway reconstruction project was not a taking subject to compensation. In Wisconsin, compensation is to be paid for a partial taking of premises, such as a diminution of highway access.²⁸¹ The court concluded that "The essential inquiry is whether a change in access is 'reasonable,'" which is a question of fact for the jury.²⁸² If substituted access was reasonable, no compensation was due. However, if substituted access was inadequate, the court identified three methods of appraising the value of the partial taking of commercial property: (1) the "income approach" (focusing on the income generated by the property); (2) the "comparable sales approach" (comparing the sales price of comparable properties); and (3) the "cost approach" (the cost of replacement).²⁸³ In *de jure* condemnation, the depreciation of the value of the land caused by the

project for which the property is condemned generally is excluded from its valuation.²⁸⁴

Viewing the just compensation clause as intended to make the landowner whole for any government taking or damage to his property, but no more, many states have adopted a "setoff rule," requiring the financial injury of public construction to be set off by the financial benefit thereof.²⁸⁵ The majority approach is to classify benefits as either general (those flowing to the public in general) or special (those flowing uniquely to the aggrieved property owner), allowing setoff only for the latter.

In *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.*,²⁸⁶ the California Supreme Court jettisoned its traditional general/special setoff distinction and joined the minority of states that have rejected the distinction on grounds that it was fundamentally difficult to determine whether a particular benefit was special or general. The case involved the acquisition of a narrow strip of land for construction of an elevated light rail line. The unacquired property of the plaintiff near the station would increase in value, as would all surrounding property, given its proximity to a convenient transit corridor. The California Supreme Court noted that, in abolishing the special/general benefits distinction, it was joining a "respectable minority" of states that included Illinois, Michigan, New York, New Mexico, North Carolina, and West Virginia.²⁸⁷

4. Condemnation and Inverse Condemnation

There are two principal mechanisms by which an eminent domain power (EDP), most often a governmental entity, may take property.²⁸⁸ The first is

Florida's efforts to statutorily adjust its just compensation rule.

²⁷⁹ *DeBow* at 589–90.

²⁸⁰ 665 N.W.2d 198 (Wis. 2003).

²⁸¹ *National Auto*, 665 N.W.2d at 204.

²⁸² *National Auto*, 665 N.W.2d at 206. However, not all courts leave the question of reasonableness to the jury. For example, in *Ginn Iowa Oil Co. v. Iowa Dep't of Transp.*, 506 F. Supp. 967 (D. Iowa 1980), concerning the construction of a highway median in front of plaintiff's service station, the court concluded that the plaintiff had failed to prove that the action ran "counter to the common experience of mankind to such extent as to be unreasonable." *Id.* at 972.

²⁸³ *National Auto*, 665 N.W.2d at 207.

²⁸⁴ 42 U.S.C. § 4651(3). However, in inverse condemnation, the courts have taken at least three different approaches to this question: (1) there is no *de facto* taking without a showing of physical invasion; (2) a *de facto* taking can occur where the precondemnation activities have been such as to substantially impair, interfere with, or extinguish the beneficial use and enjoyment of the property; and (3) recovery may be allowed even absent a *de facto* taking where the condemnation authority has engaged in unreasonable delay, bad faith, or other egregious conduct. JOHN VANCE, PLANNING AND PRECONDEMNATION ACTIVITIES AS CONSTITUTING A TAKING UNDER INVERSE LAW (NCHRP Research Results Digest No. 150, 1986), and NCHRP Legal Research Digest No. 18 (1991), at 3.

²⁸⁵ This approach was approved in *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354 (1918).

²⁸⁶ 941 P.2d 825 (Cal. 1997).

²⁸⁷ 941 P.2d at 825.

²⁸⁸ For the purpose of this analysis, the term "EDP" will include both entities that have direct eminent domain abilities, such as a city government itself, and those that

condemnation, which is litigation initiated by a governmental entity; the second is *inverse condemnation*, which is where a taking results from a governmental actor's omissions or actions.²⁸⁹

An action for condemnation is brought by the EDP against the party whose property the EDP wishes to take or whose project will otherwise infringe upon the landowner's property, but such actions are rare except where the EDP wants to acquire actual possession of the property.²⁹⁰ More commonly, the EDP takes steps that a property owner perceives as infringing on his or her property rights. The property owner may then bring an action against the EDP either to obtain compensation or to force the EDP to cease its activities and, if necessary, disgorge the property if its conduct is determined by a court to have been impermissible.²⁹¹ This sort of conduct is termed an "inverse condemnation."²⁹²

Inverse condemnation is a "cause of action against a governmental defendant to recover the value of property which has been taken in fact by [the governmental defendant], even though no formal exercise of the power of eminent domain has been attempted by the taking agency."²⁹³ Property owners may allege that their property has been taken without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.²⁹⁴ In cases of a partial takings, the courts may impose an equitable servitude upon the

are of a character that makes them amenable to suits related to takings, such as MARTA in the *Fountain* case, where although the agency lacked express eminent domain power, the nature of its acts produced an inverse condemnation situation. Not all transit agencies have explicit eminent domain power, but their character and the nature of their activities usually make them vulnerable to inverse condemnation suits. If a transit agency is not of the nature that makes it subject to inverse condemnation suits, it may instead be subject to suits for trespass if it deprives a landowner of the use or value of his or her property. With respect to the takings issue in the transportation context, see NETHERTON, *supra* note 205, and VANCE, *supra* note 214.

²⁸⁹ WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 526 (3d ed. 2000) (STOEBUCK & WHITMAN).

²⁹⁰ STOEBUCK & WHITMAN, *supra* note 289, at 526.

²⁹¹ STOEBUCK & WHITMAN, *supra* note 289, at 526.

²⁹² STOEBUCK & WHITMAN, *supra* note 289, at 526.

²⁹³ *United States v. Clarke*, 455 U.S. 253, 257 (1980).

²⁹⁴ *United States v. Causby*, 328 U.S. 256 (1946). Paul Stephen Dempsey, *Trade & Transport Policy in Inclement Skies—The Conflict Between Sustainable Air Transportation and Neo-Classical Economics*, 65 J. AIR L. & COM. 639, 680 (2000).

land, requiring the defendant to pay past, present, and future damages caused by the offending nuisance.²⁹⁵

For example, in *Fountain v. Metropolitan Atlanta Rapid Transit Authority*,²⁹⁶ a case involving an alleged inverse condemnation on grounds that the Authority closed off the streets providing vehicular access to plaintiff's gasoline station, the Eleventh Circuit observed, "[a] taking occurs whenever a public entity substantially deprives a private party of the beneficial use of his property for a public purpose."²⁹⁷ Some courts, embracing the notion of inverse condemnation, have imposed equitable servitude on the property owners' land, forcing offenders to pay damages for past, present, and future harm caused by the nuisance.²⁹⁸ Similarly, in *Mekuria v. Washington Metropolitan Area Transit Authority*,²⁹⁹ inverse condemnation was found as a result of the closure by a transit agency of a street for 3 years as part of the construction of a new Metrorail station.³⁰⁰

²⁹⁵ See generally PAUL STEPHEN DEMPSEY & LAURENCE GESELL, *AIR COMMERCE AND THE LAW* 695 (2004); Dempsey, *supra* note 207, at 1.

²⁹⁶ 678 F.2d 1038 (11th Cir. 1982).

²⁹⁷ 678 F.2d at 1043.

²⁹⁸ *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). Generally, temporary injuries, inconveniences, annoyances, and discomforts resulting from the actual construction of public improvements are not compensable, provided that such interferences are not unreasonable. It is often necessary to break up pavement, narrow streets, and block ingress and egress of adjoining property when airports are being repaired, improved, constructed, or expanded. As one court noted,

It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the presence of machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement.

Orpheum Bldg. Co. v. S.F. Bay Area Rapid Transit Dist., 146 Cal. Rptr. 5, 80 Cal. App. 3d 863 (1978).

²⁹⁹ 45 F. Supp. 2d 19 (D.D.C. 1999).

³⁰⁰ *Mekuria v. Wash. Metro. Area Transit Auth.*, 45 F. Supp. 2d 19 (D.D.C. 1999). Readers interested in examining the development of inverse condemnation proceedings should examine the decision of *Orpheum Bldg. Co. v. S.F. Bay Area Rapid Transit Dist.*, 80 Cal. App. 3d 863, 146 Cal. Rptr. 5 (Cal. Ct. App. 1978) (*Orpheum*). The *Orpheum* case presented a nearly identical fact pattern to that of *Mekuria*; however, in the earlier case the plaintiffs failed to recover any of their losses. See 80 Cal. App. 3d at 866–68, 871–72, 874. The significance of the *Orpheum* case is that it was decided at the absolute peak of

Occasionally, an action is brought for mandamus to force the government to take property that has been adversely impacted by governmental activity. For example, in *Shaffer v. West Virginia Department of Transportation*,³⁰¹ a property owner filed mandamus proceedings to force the state to conduct eminent domain proceedings after his home and garage were flooded following the construction of highway stormwater drainage ditches and culverts. The plaintiff pointed to a provision in the West Virginia Constitution requiring that private property “shall not be taken or damaged for public use without just compensation.”³⁰² The West Virginia Supreme Court quoted from earlier cases: “If a highway construction or improvement project results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the West Virginia Commissioner of Highways has a statutory duty to institute proceedings in eminent domain within a reasonable time after completion of the work to ascertain the amount of damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings.”³⁰³

Inverse condemnation proceedings were historically disfavored, but today they are routine,³⁰⁴ largely due to the expansion of “takings” to include regulatory acts and other indirect means, which frequently result in an EDP being unaware that a potential taking has resulted. Such behavior by an EDP is constitutionally permissible where the property owner is permitted to bring an inverse condemnation suit for recovery³⁰⁵ or some other mechanism exists to assure the owner of receiving just compensation.³⁰⁶ However, even where an EDP knows that its acts will result in a potential taking, it may decide to proceed without providing prior notice, hearing, or compensation so long as there exists an adequate means for obtaining just compensation.³⁰⁷

court deference to government takings actions. (The *Penn Cent.* case was decided 2 1/2 months after *Orpheum*.)

³⁰¹ 542 S.E.2d 836 (W.Va. 2000).

³⁰² W.VA. CONST. art. III, § 9.

³⁰³ *Shaffer*, 242 S.E.2d at 840, quoting from *State ex rel Rhodes v. W. Va. Dep’t of Highways*, 187 S.E.2d 218 (1972).

³⁰⁴ See *STOEBUCK & WHITMAN*, *supra* note 289, at 526.

³⁰⁵ *Fountain*, 678 F.2d at 1043–44.

³⁰⁶ See, e.g., *Monaco*, *supra* note 278, at 897 *et seq.* for a discussion of the Harris Act as an alternative means of compensation in place of inverse condemnation.

³⁰⁷ See, e.g., *Yearsley v. Ross*, 309 U.S. 18 (1940), *Hurley v. Kincaid*, 285 U.S. 95 (1932), and *Stringer v. United States*, 471 F.2d 381 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973). However, FTA does not endorse the use of inverse

In the event of either a condemnation or inverse condemnation action, the general procedure followed by courts is largely the same. The court will determine whether a taking occurred and what the remedy should be by applying several factors:

1. Whether the EDP’s act promotes the health, safety, or morals of the public (*i.e.*, represents a use of the police power rather than a taking);³⁰⁸
2. Whether there was a physical invasion of the property;³⁰⁹
3. Whether the EDP’s act is reasonably necessary to achieve a substantial public benefit or imposes an unduly harsh private harm;³¹⁰
4. Whether the EDP’s act reflects a logical relationship between the nature of the act and its effect on the property (the “essential nexus” test);³¹¹
5. Whether the nature and degree of the EDP’s act is proportional to the benefit it is intended to create or the harm it is intended to prevent (the “rough proportionality” rule);³¹² and
6. The degree and period for which there is a diminution in value of the property (including a determination of the property’s original value).³¹³

Traditionally, courts focused on the final point of the analysis, as it is unusual that a taking is sufficiently complex or novel in nature as to require a detailed examination of the other points,³¹⁴ but recently the “essential nexus” test has received an increasing amount of attention.³¹⁵ Certainly the most important thing an attorney can do in preparation for a takings action is to assemble a compre-

condemnation actions. No reference to “inverse condemnation” or related actions is found on the FTA’s Web site. All FTA references to property acquisition assume that eminent domain or negotiation is being used to obtain the property.

³⁰⁸ *Mugler v. Kansas*, 123 U.S. 623, 661–66 (1887).

³⁰⁹ 505 U.S. at 1015.

³¹⁰ *Penn Cent.*, 438 U.S. at 127.

³¹¹ 483 U.S. at 836–37.

³¹² 512 U.S. at 390–91.

³¹³ *Pa. Coal Co.*, 260 U.S. at 413. See also *First English*, 482 U.S. at 316–18, 322 (“‘temporary’ takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings”); *Lucas*, 505 U.S. at 1015–19 (a taking results “where regulation denies all economically beneficial or productive use of land”).

³¹⁴ 1 SELECTED STUDIES at 109.

³¹⁵ See, e.g., *Town of Flower Mound v. Stafford Estates L.P.*, 71 S.W.3d 18, 30 (Tex. App. 2002).

hensive estimation of the disputed property's value, supported by corroborating expert witnesses.³¹⁶

A particularly grievous inverse condemnation recently took place in Washington, D.C., as part of the construction of a new Metrorail station.³¹⁷ The plaintiffs were the owners and lessees of properties along a stretch of street that was to be excavated by the Washington Metropolitan Area Transit Authority (WMATA) in conjunction with the construction project.³¹⁸ While WMATA did formally condemn several businesses in the construction zone, it reassured the plaintiffs that there "would be reasonable vehicular, pedestrian, and vendor access for deliveries" to their properties and that reasonable parking would be made available.³¹⁹ WMATA began construction in June 1994, eventually closing the entire street to vehicles in October of that year.³²⁰ The street did not reopen for more than 3 years.³²¹ While pedestrian access remained open, it was "a circuitous, uneven [route] with holes, depressions, and chunks of broken concrete."³²² At some points the sidewalk narrowed to

as little as 3 ft.³²³ The plaintiffs filed numerous complaints with WMATA, but no action was taken to remedy the situation.³²⁴ Ultimately, four of the businesses were obligated to close, while the remainder suffered heavy losses and were only able to remain open because their landlord accepted reduced rents or even permitted them to operate for free.³²⁵ The plaintiffs' appraiser estimated their total losses to be over \$362,600.³²⁶

While the court elected to use the *Penn Central* factors to evaluate whether WMATA's actions constituted a taking, it recognized that the plaintiffs had attempted to demonstrate that WMATA's actions fell within the U.S. Supreme Court's analysis in *Lucas v. South Carolina Coastal Council*.³²⁷ The court concluded, however, that it was not necessary to use the *Lucas* analysis,³²⁸ suggesting that *Lucas* and other recent takings cases should be understood as supplemental to traditional takings jurisprudence. First, the court briefly assessed the character of WMATA's actions, noting that for over 3 years direct access to the plaintiffs' businesses was obstructed, the detour constructed was inadequate, and pedestrian traffic was impeded as well.³²⁹ The court next briskly considered the economic impact of WMATA's construction work, concluding, "WMATA's actions inflicted serious economic harm on Plaintiffs' properties and businesses."³³⁰ Most of the court's energy was expended on the third *Penn Central* factor—investment-backed expectations.

WMATA argued that at least two of the plaintiffs had been making minimal profits before the construction began and therefore had no reasonable investment-backed expectations.³³¹ However, the court characterized this as "too narrow a view" of the matter.³³² While those plaintiffs were not "eco-

³¹⁶ 1 SELECTED STUDIES 111. Real estate salespersons and professional appraisers are usually the preferred types of witnesses for actions pertaining to eminent domain. Barring possible conflicts of interest, witnesses in those professions are rarely successfully challenged. See 1 SELECTED STUDIES 109 – 570-s19 for a detailed discussion of all aspects of a condemnation or inverse condemnation action.

³¹⁷ *Mekuria v. Wash. Metro. Area Transit Auth.*, 45 F. Supp. 2d 19 (D.D.C. 1999). Readers interested in examining the development of inverse condemnation proceedings should examine the decision of *Orpheum*. The *Orpheum* case presented a nearly identical fact pattern to that of *Merkuria*; however, in the earlier case the plaintiffs failed to recover any of their losses. See *Orpheum*, 80 Cal. App. 3d at 866–68, 871–72, 874. The significance of the *Orpheum* case is that it was decided at the absolute peak of court deference to government takings actions. (The *Penn Cent.* case was decided 2 1/2 months after *Orpheum*.)

³¹⁸ 45 F. Supp. 2d at 21.

³¹⁹ 45 F. Supp. 2d at 22.

³²⁰ 45 F. Supp. 2d at 21–22.

³²¹ 45 F. Supp. 2d at 22. WMATA did construct a detour to permit vehicles to reach the properties, but it was designed in a manner that prevented most motorists from realizing it was available. 45 F. Supp. 2d at 23. The detour, by WMATA's own admission, was also too narrow to admit delivery trucks, despite the transit authority having informed the plaintiffs prior to construction that the detour would be large enough for such purposes. No parking was provided. 45 F. Supp. 2d at 23.

³²² 45 F. Supp. 2d at 23.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ 45 F. Supp. 2d at 26.

³²⁶ 45 F. Supp. 2d at 27.

³²⁷ 45 F. Supp. 2d at 28. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). See also *Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326–27; 122 S. Ct. 1465; 152 L. Ed. 2d 517 (2002), on when regulatory taking not triggered.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ 45 F. Supp. 2d at 28–29. The court spent a mere two paragraphs to reach this part of the decision, relying heavily on the evidence adduced at trial, where WMATA itself admitted that the plaintiffs suffered large financial losses and merely contested the amount of the loss. *Merkuria*, 45 F. Supp. 2d at 27–29.

³³¹ 45 F. Supp. 2d at 29.

³³² *Id.*

conomic successes,” the court found they were at least recouping their costs prior to the construction, and WMATA had promised them that access would remain effectively unimpeded; thus they could have reasonably expected to continue to operate.³³³ The court did, however, agree with WMATA that three of the plaintiffs who renewed their leases during the construction could not have had reasonable expectations of income at that point in time.³³⁴ Yet even here WMATA was dealt a blow, as the court noted that WMATA had informed the public that the project would be completed by “summer 1997,” yet did not actually complete work and reopen the street until December 21, 1997.³³⁵ Therefore, the court concluded that even the plaintiffs who renewed their leases during construction had reasonable investment-backed expectations, both from the beginning of construction to the time they renewed their leases and again from “summer 1997”³³⁶ to December 21, 1997, when the street was in fact reopened.³³⁷

WMATA made a final stand on the last factor—the extent of interference with a parcel of land as a whole, rather than a specific portion of it—but the court showed little sympathy for the transit authority’s arguments. WMATA argued that because two of the plaintiffs each owned multiple buildings on a single lot and only some of those buildings were affected by the construction, they should be precluded from recovering.³³⁸ The court considered WMATA’s interpretation of the factor “overly-restrictive,” noting that the U.S. Supreme Court in *Lucas* stated that a “parcel” should be defined by the owner’s reasonable expectations under state property law.³³⁹ The court observed that each building had a separate mailing address and separate utilities and was physically separated from each of the other buildings, with no joint access.³⁴⁰

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Noting that “summer” is ordinarily understood to include the months of June, July, and August, the court found that the midpoint of those months, July 17, would be the expected date of completion. 45 F. Supp. 2d at 29 n.8.

³³⁷ 45 F. Supp. 2d at 29.

³³⁸ 45 F. Supp. 2d at 30.

³³⁹ 45 F. Supp. 2d at 30 (quoting *Lucas*, 505 U.S. at 1016).

³⁴⁰ 45 F. Supp. 2d at 30. Furthermore, the only reason the buildings were now on the same lots was because the District of Columbia had consolidated separate, yet adjoining, lots owned by the same person as an efficiency measure for collecting property taxes. 45 F. Supp. 2d at 30.

Thus, the court determined that it would not be appropriate to disqualify those two plaintiffs under the final *Penn Central* factor.³⁴¹ Therefore, the court ruled that a taking had occurred, and WMATA was obligated to pay the plaintiffs the fair rental value of their properties, less the actual rents received,³⁴² plus compound interest through the time the award was to be paid.³⁴³

G. STATE AND LOCAL AUTHORITY

1. The Police Power of the States

Opposite the Supremacy Clause prohibitions against state action lies the inherent police power of the states.³⁴⁴ As one state court described it, “The police power is an attribute of sovereignty, possessed by every sovereign state and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written Constitution.”³⁴⁵ The U.S. Supreme Court described the po-

³⁴¹ *Id.*

³⁴² And for those plaintiffs who renewed their leases, less the fair rental value for the period in which their expectations were found to be unreasonable. *Merkuria*, 45 F. Supp. 2d at 30.

³⁴³ 45 F. Supp. 2d at 30–31. WMATA does not appear to have challenged the court’s ruling, as over 3 years have passed with no further action on the case. Only one news story mentioned *Merkuria* after the decision, and a WMATA lawyer cited in the story “declined to comment” on the case. See Vanessa Blum, *Making D.C. Welfare System Work*, LEGAL TIMES, Apr. 26, 1999, at 2.

³⁴⁴ See Dempsey, *supra* note 295, at 1.

³⁴⁵ *Ex Parte Tindall*, 229 P. 125, 130 (Okla. 1924) (citing 6 R.C.L. § 182, at 183):

While the term “police power” has never been specifically defined nor its boundaries definitely fixed, yet it may be correctly said to be an essential attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal.

Another court stated:

The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government, is vested in the legislatures of the several states of the union, the only limit to its exercise being that the statute shall not conflict with any provision of the state constitution, or with the Federal Constitution, or laws made under its delegated powers.

Bagg v. Wilmington, Columbia & Augusta R.R. Co., 14 S.E. 79, 80 (N.C. 1891).

lice power as “the power of the State...to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.”³⁴⁶

Since the end of the *Lochner*³⁴⁷ era, courts have been relatively deferential to state and local government in areas historically of local concern, so long as the legislative decisions do not conflict with federal regulation exerted under the Commerce Clause.³⁴⁸ The U.S. Supreme Court has upheld local regulation of public health, safety, and welfare where “any state of facts either known or which could reasonably be assumed” supported the regulation.³⁴⁹ The Court has resorted to wholly hypothetical facts to uphold the legislation, concluding that the “day is gone when this Court uses the Due Process Clause...to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”³⁵⁰ Under the rational basis test, courts have upheld state or local regulation where any facts actually exist or would convincingly justify the classification if the facts did exist, or have been urged in the classifica-

tion's defense by those who either promulgated the regulation or argued in support of the regulation.³⁵¹

In *South Carolina Highway Department v. Barnwell Brothers*,³⁵² the Supreme Court addressed state size and length restrictions on trucks. It found that

there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the Commerce Clause, such regulation in the absence of Congressional action has for the most part been left to the states.³⁵³

States possess inherent power to protect the safety, health, and welfare of their citizens. Typically, such regulation does not impinge upon fundamental rights. The presumption against federal preemption of state and local regulation of the health and safety of their residents is a strong one.³⁵⁴ As a consequence, the means states choose to protect such interests are entitled to judicial deference unless

1. The means chosen do not bear a rational relationship to the ends the state seeks to achieve;³⁵⁵
2. The regulation impermissibly affects interstate commerce,³⁵⁶ or

³⁴⁶ *Barbier v. Connolly*, 113 U.S. 27, 31 (1884); *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

³⁴⁷ *Lochner v. New York*, 198 U.S. 45 (1905). Justice Oliver Wendall Holmes dissented, saying:

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract.... But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen of the [S]tate or of *laissez faire*.

Id. at 75.

³⁴⁸ Beginning with *Nebbia v. New York*, 291 U.S. 502 (1934), the U.S. Supreme Court generally has been deferential to the exercise of police power by the states in regulating matters of local concern.

³⁴⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938); *See also McGowan v. Maryland*, 366 U.S. 420, 426 (1961) and *Hold Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 74 (1978).

³⁵⁰ *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955). The Nevada Supreme Court has echoed this holding, concluding “[i]t is well-settled under rational basis scrutiny that the reviewing court may hypothesize the legislative purpose behind legislative action.” *Boulder City v. Cinnamon Hills Assocs.*, 871 P.2d 320, 327 (Nev. 1994).

³⁵¹ *Briscoe v. Prince George's County Health Dep't*, 593 A.2d 1109 (Md. 1991); *Dep't of Transp. v. Armacost*, 474 A.2d 191, 201 (Md. 1984); *Furgeson v. Skrupa*, 372 U.S. 726, 729–31 (1963).

³⁵² 303 U.S. 177 (1938).

³⁵³ 303 U.S. at 185. In *Barnwell*, the U.S. Supreme Court held that in determining whether a state regulation is constitutional, the test is “whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.” (citing *Stephenson v. Binford*, 287 U.S. 251, 272 (1932)). In resolving the latter inquiry, “the courts do not sit as Legislatures...[to weigh] all the conflicting interests.” “[Fairly] debatable questions as to [a regulation's] reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body.” The court must assess “upon the whole record whether it is possible to say that the legislative choice is without rational basis.” 303 U.S. at 190–93. “[T]he Court has been most reluctant to invalidate under the Commerce Clause state regulation in the field of safety where the propriety of local regulation has long been recognized [citing cases].” *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 443 (1978).

³⁵⁴ *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Bizzard v. Roadrunner Trucking*, 966 F.2d 777, 780 (3d Cir. 1992).

³⁵⁵ *See, e.g., Dallas v. Stanglin*, 490 U.S. 19 (1989).

3. The regulation discriminates against nonresidents.³⁵⁷

In *Southern Pacific Co. v. Arizona*,³⁵⁸ the Supreme Court held that “the states [have] wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.”³⁵⁹ This was a case in which the Supreme Court held that state limitations on train lengths were an unreasonable burden on interstate commerce. Similarly, in *Hendrick v. State of Maryland*,³⁶⁰ the Court held that state regulation of the highways has long been recognized as “an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens....”

Although in *Kassel v. Consolidated Freightways Corp.*,³⁶¹ the U.S. Supreme Court struck down truck length regulations on grounds that they failed to advance safety concerns and were therefore an unreasonable burden on interstate commerce, the Court acknowledged:

³⁵⁶ See, e.g., *Camps Newfound/Owatonna v. City of Harrison*, 520 U.S. 564 (1997).

³⁵⁷ See, e.g., *Turner v. Maryland*, 107 U.S. 38 (1882).

³⁵⁸ 325 U.S. 761 (1945).

³⁵⁹ In *Southern Pac. Co. v. Ariz. ex. rel Sullivan*, 325 U.S. 761 (1945), a case in which the Supreme Court held that state limitations on train lengths were an unreasonable burden on interstate commerce, the Court nevertheless observed

the states [have] wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

The Court noted that in *Barnwell*, “The fact that [the regulation of highways] affect alike shippers in interstate and intrastate commerce in great numbers, within as well as without the state, is a safeguard against regulatory abuse.” *Id.*

³⁶⁰ 235 U.S. 610, 622 (1915).

³⁶¹ *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 67 L. Ed. 2d 580, 101 S. Ct. 1309 (1981). In this case, the Supreme Court struck down truck length regulations on grounds that they failed to advance safety concerns and were therefore an unreasonable burden on interstate commerce.

[A] State’s power to regulate commerce is never greater than in matters traditionally of local concern. For example, regulations that touch upon safety—especially highway safety—are those that “the Court has been most reluctant to invalidate.” Indeed “if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with the related burdens on interstate commerce.” Those who would challenge such bona fide safety regulations must overcome a “strong presumption of validity.”³⁶²

In *Kassel*, the Court invalidated Iowa’s restriction on twin trailer vehicles as an undue burden on interstate commerce, just as it had previously done with regard to Wisconsin’s prohibition in *Raymond Motor Transportation v. Rice*.³⁶³ These decisions and Wisconsin’s reaction to them (i.e., designating a system for their operation), led to federal National Network designation of routes on which longer combinations of truck tractors and semitrailers may operate.³⁶⁴

2. Interaction Between State Police Power and the Commerce Clause

a. State Economic Regulation of Transportation

The need to regulate interstate commerce was one of the principal reasons the Nation came together to replace the Articles of Confederation with the Constitution. Article I, Section 8 of the U.S. Constitution vests in Congress the “power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”³⁶⁵

State and local regulatory institutions may exercise “public utility” regulatory functions over public and private common and contract carriers. For example, they may regulate entry into the marketplace under “public convenience and necessity” and “fit, willing and able” standards,³⁶⁶ and require that rates be filed in tariffs and be “just and reasonable” and “nondiscriminatory.”³⁶⁷ Under their police powers, state regulatory bodies may also regulate safety of vehicles (their age, inspection, mainte-

³⁶² *Kassel*, 450 U.S. at 670 (citing *Raymond Motor Transp. v. Rice*, 434 U.S. 429 (1978), and *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959)).

³⁶³ *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 54 L. Ed. 2d 664, 98 S. Ct. 787 (1978).

³⁶⁴ The federal government mandates the minimum system. 49 U.S.C. § 31111, and 23 C.F.R. pt. 658.

³⁶⁵ U.S. CONST. art I, § 8.

³⁶⁶ PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 49–150 (1986); Paul Dempsey, *Taxi Industry Regulation, Deregulation, and Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73 (1996).

³⁶⁷ DEMPSEY & THOMS, *supra* note 366, at 161–206.

nance, and repair); drivers (age and qualifications); and companies (financial and insurance requirements).³⁶⁸ The U.S. Supreme Court has noted that the Commerce Clause is both a “prolific [source] of national power and an equally prolific source of conflict with legislation of the [states.]”³⁶⁹

Three 19th century decisions of the Supreme Court were instrumental in defining Congress’s power over interstate commerce, and gave impetus to federal economic regulation.

*Gibbons v. Ogden*³⁷⁰ addressed the question of whether the State of New York could grant a monopoly franchise to operators of steamboats in New York waters and prohibit others from entering the trade. Aaron Ogden, who had been assigned the monopoly franchise (earlier granted to Robert Livingston and Robert Fulton), argued that the constitutional phrase “commerce” referred only to the purchase and sale of goods and did not comprehend navigation. The court disagreed, concluding that commerce included “every species of commercial intercourse” between states, or between the United States and foreign nations, including navigation, and that such commerce was subject to the exclusive regulatory province of Congress.

*Munn v. Illinois*³⁷¹ addressed the fundamental issue of whether private property was under the exclusive control of its owners, or whether certain enterprises were of such character as to become quasi-public institutions, in which the people had an interest. The case involved the question of whether Illinois could properly regulate the rates of grain storage elevators within the state. In *Munn*, managers and lessees of grain storage elevators in Chicago were prosecuted for ignoring state licensing and rate-setting statutes. The defendants argued that the state had no right to infringe on their economic freedom through such regulations and that the state law was inconsistent with the commerce clause of the U.S. Constitution.³⁷² The Supreme Court held that private property used in a manner affecting the general community becomes “clothed with a public interest” and subject to control “by the public for the common good.”³⁷³ Hence, a

state government could regulate private property dedicated to a public use. The Court also noted that regulation of the grain elevators was a domestic concern and therefore found that the state was free to exercise its governmental powers over such a concern, “even though in so doing it [might] indirectly operate upon commerce outside its immediate jurisdiction.”³⁷⁴ Thus, the state’s power to regulate would be restricted only when Congress itself enacted legislation dealing with interstate rate regulations. Said the court:

[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, [and] common carriers...and, in so doing, fix a maximum charge to be made for the services rendered....

[W]hen private property is “affected with a public interest, it ceases to be *juris privati* only.” Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.... [Common carriers stand] in the very “gateway of commerce,” and, take a toll from all who pass. Their business most certainly “tends to a common charge, and is becoming [ing] a thing of public interest and use.”³⁷⁵

Hence, a state government may regulate private property dedicated to a public use. But the real catalyst for federal legislation establishing economic regulation over common carriers was the case of *Wabash, St. Louis and Pacific Railway v. Illinois*,³⁷⁶ issued in 1886. In *Wabash*, the U.S. Supreme Court struck down an Illinois law regulating interstate rail rates as unconstitutional. Although numerous bills proposing federal railroad regulation were introduced into Congress prior and subsequent to *Munn*,³⁷⁷ Congress did not feel compelled to act until the Court decided *Wabash*.³⁷⁸

In *Wabash*, the Court held unconstitutional an Illinois law that prohibited a rail carrier from charging the same or higher rate for transporting the same commodity over a lesser distance than

Wisconsin legislature); *Chicago, B. & Q.R.R. v. Iowa*, 94 U.S. 155 (1876) (railroads engage in public employment and affect public interest; rates subject to legislative control).

³⁶⁸ See, e.g., *Dempsey*, *supra* note 366, at 73, 77–86.

³⁶⁹ *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 534 (1949).

³⁷⁰ 9 Wheat. 1, 6 L. Ed. 23 (1824).

³⁷¹ 94 U.S. 113 (1876).

³⁷² *Id.* at 119.

³⁷³ *Id.* at 126. Although *Munn* did not directly involve rail carriers, subsequent decisions applied this principle to railroads. See, e.g., *Winona & St. P.R.R. v. Blake*, 94 U.S. 180 (1876) (railroad rates subject to regulation by Minnesota legislature); *Peik v. Chicago & Nw. Ry.*, 94 U.S. 164 (1876) (railroad rates subject to ceilings prescribed by

³⁷⁴ *Munn v. Illinois*, 94 U.S. 113, 135 (1876).

³⁷⁵ *Munn*, 94 U.S. at 125–26, 132. Although *Munn* dealt with grain elevators, the principle announced therein was subsequently extended to railroads. See *C B & Q R Co. v. Iowa*, 94 U.S. 155 (1876), *Ruggles v. Illinois*, 108 U.S. 526 (1883), and *Illinois Central v. Illinois*, 108 U.S. 541 (1883).
³⁷⁶ 118 U.S. 557 (1886).

³⁷⁷ Between 1868 and 1886, Congress considered approximately 150 bills and resolutions. Harris, *Introduction, Symposium on the Interstate Commerce Commission*, 31 GEO. WASH. L. REV. 1, 11 (1962).

³⁷⁸ 118 U.S. 557 (1886).

over a greater distance in the same direction. The Supreme Court of Illinois had conceded that the statute might affect interstate commerce, but ruled that the state legislature was free to act until Congress exercised its power to regulate interstate rail traffic.³⁷⁹ In overturning the state court's ruling, the U.S. Supreme Court recognized that Congress had not enacted legislation in this area, yet focused on the oppressive conditions that would be imposed on carriers if the individual states regulated interstate transportation within their borders. The Court emphasized that the framers of the Constitution had vested in Congress the sole authority to regulate interstate commerce: "the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the state might choose to impose upon it."³⁸⁰

Wabash appeared to state a conclusion contrary to that expressed in *Munn*. The Court was holding that even when Congress had not exercised its jurisdiction under the Commerce Clause of the Constitution, the state could not regulate businesses operating in interstate or foreign commerce.³⁸¹ Under the dormant Commerce Clause,³⁸² the Court held that even in the absence of federal regulation, the states could not regulate the interstate rates of the railroads.³⁸³ Because nearly three-fourths of the commodities shipped at the time were transported in interstate commerce, which was rendered immune from state control, the *Wabash* decision became a powerful stimulus for federal legislation, leading to the creation of the Interstate Commerce Commission (ICC) in 1887.³⁸⁴ Under the notion that

congressional power was plenary and exclusive, the dormant Commerce Clause continued to preempt state regulation of interstate commerce for some time.

In upholding the power of a state to regulate interstate ferries, the U.S. Supreme Court, in *Port Richmond and Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*,³⁸⁵ distinguished *Wabash* as focusing on the interstate character of

railroad transportation, which might extend not only from one State to another but through a series of States, or across the Continent, and the consequences which would ensue if each State should undertake to fix rates for such portions of continuous interstate hauls as might be within its territory, the conclusion was reached that "this species of regulation" was one "which must be, if established at all, of a general and national character" and could not be "safely and wisely remitted to local rules."³⁸⁶

Ferries were of a different character, for they "are simply means of transit from shore to shore. These have always been regarded as instruments of local convenience which, for the proper protection of the public, are subject to local regulation."³⁸⁷

So, too, was economic regulation extended to transit companies. In *Honolulu Rapid Transit & Land Company v. Territory of Hawaii*,³⁸⁸ the U.S. Supreme Court held,

The business conducted by the Transit Company is not purely private. It is of that class so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character and may be exercised directly by the legislature itself. But the legislature may delegate to an administra-

³⁷⁹ *Id.* at 566.

³⁸⁰ *Id.* at 572–73.

³⁸¹ *Id.* at 577.

³⁸² In *Leisy v. Hardin*, 135 U.S. 100 (1890), the U.S. Supreme Court held:

Whenever...a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent...the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation...of commodities is national in character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states to do so, it thereby indicates its will that such commerce shall be free and untrammelled.

Leisy v. Hardin, 133 U.S. 100 (1890).

³⁸³ 118 U.S. at 572–73.

³⁸⁴ Initially, Congress conferred upon the ICC the power to ensure that rail rates were "just and reasonable," and

in 1920 added a requirement that no new rail lines should be built unless the applicant satisfied the "public convenience and necessity" (Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *TRANSP. L.J.* 235, 272–73 (2003)).

³⁸⁵ 234 U.S. 317 (1914). The Supreme Court held that state regulation of commuter ferries between New York and New Jersey did not violate the commerce clause. Today, economic regulation by states undergoes rational basis review.

³⁸⁶ 234 U.S. at 330–31.

³⁸⁷ *Port Richmond*, 234 U.S. at 331. *But see* *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204 (1894), which held that a state could not impose a toll upon an Interstate bridge on persons both entering and leaving the state without unduly infringing federal Commerce Clause power.

³⁸⁸ 211 U.S. 282 (1908).

tive body the execution in detail of the legislative power of regulation.³⁸⁹

By the mid-1920s, 33 states regulated motor freight transport, and 43 regulated bus companies. But the U.S. Supreme Court in 1925 handed down a decision that stripped the states of their ability to regulate interstate movements.³⁹⁰ At issue in *Buck v. Kuykendall*³⁹¹ was the denial by the State of Washington of a motor common carrier's application for operating authority on the ground that the routes were adequately served by four connecting auto stage lines and frequent steam rail service.³⁹² Although the Supreme Court recognized that a state legitimately may constrain interstate transportation in order to promote safety or conservation of the highways, the Court concluded that states could not obstruct the entry of motor carriers into interstate commerce for purposes of prohibiting competition.³⁹³ Prior to this decision, 40 states had denied the use of their highways to motor carriers operating without certificates of public convenience and necessity.³⁹⁴ The ruling in *Buck* prohibited state controls on entry for motor carriers engaged in interstate commerce.³⁹⁵ Nonetheless, the Court recognized an appropriate role for the states: "With the increase in number and size of the vehicles used on a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid."³⁹⁶

Congress subjected motor carriers to economic regulation (including the requirement that rates be "just and reasonable" and entry be consistent with the "public convenience and necessity") in 1935. The states continued to regulate their intrastate activities until the mid-1990s.³⁹⁷ Such economic

regulation was challenged on due process grounds. As described below, applying the rational basis test, these statutes were almost universally upheld.

b. State Safety Regulation of Transportation

Although the regulation of highway safety falls within the state's police power, it cannot legitimately be employed to advance the interests of in-state vis-à-vis an out-of-state carriers. In *Kassel v. Consolidated Freightways*,³⁹⁸ the U.S. Supreme Court noted that state regulation of highway safety is an important part of state police power, an area the Court has been most reluctant to invalidate on dormant Commerce Clause grounds. Nevertheless, in *Kassel*, the Court did precisely that, striking down Iowa's prohibitions on the use of 65-ft double-trailer trucks upon its highways, as it had in *Raymond Motor Transportation v. Rice*,³⁹⁹ with respect to Wisconsin's prohibition. In both cases, the Court found the safety justification to be illusory and a significant impairment of interstate commerce. The court also found the "special deference" normally accorded state highway safety regulation to be unwarranted where local economic interests suffer less burden vis-à-vis out-of-state interests from such regulation because of specially tailored exemptions from their application favoring local interests.⁴⁰⁰ In *Kassel*, the Court concluded that, instead of being motivated that 65-ft doubles were less safe than 550-ft singles, the state instead "seems to have hoped to limit the use of its highways by deflecting some through traffic,"⁴⁰¹ thereby imposing an impermissible burden on interstate commerce, for which "the deference traditionally accorded a State's safety judgment is not warranted."⁴⁰²

³⁸⁹ 211 U.S. at 290–91.

³⁹⁰ See *Buck v. Kuykendall*, 267 U.S. 307 (1925).

³⁹¹ 267 U.S. 307 (1925).

³⁹² *Id.* at 313.

³⁹³ *Id.* at 315–16.

³⁹⁴ Webb, *Legislative and Regulatory History of Entry Controls on Motor Carriers of Passengers*, 8 TRANSP. L.J. 91, 92 (1976).

³⁹⁵ See, e.g., *Panhandle Eastern Pipe Line Co. v. Mich. Pub. Service Comm'n*, 44 N.W.2d 324 (Mich. 1950).

³⁹⁶ 267 U.S. 307 at 315 (1925).

³⁹⁷ The rationale for economic regulation of common carriers was expressed by one court as follows:

The primary consideration for requiring motor carriers to secure [certificates of public convenience and necessity] is "to promote good service by excluding unnecessary competing carriers." ...The practical necessity for regulation of this and similar business affected with a public interest...is to promote public interest by preventing waste....

The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one's choice should be denied.... It is true that certified carriers benefit from the restricted competition, but this is merely incidental in the solution of the problem of securing adequate and permanent service by the avoidance of useless duplication with its consequent impairment of service and increase of rates charged the public. The public interest is paramount.

In re *Dakota Transp., Inc.*, 291 N.W. 589 (S.D. 1940), quoting Justice Brandeis' dissenting opinion in *New State Ice Co. v. Liebman*, 285 U.S. 262.

³⁹⁸ 450 U.S. 662 (1981).

³⁹⁹ 434 U.S. 429 (1978).

⁴⁰⁰ 434 U.S. at 444 n.18; 450 U.S. at 675–76.

⁴⁰¹ 450 U.S. at 677.

⁴⁰² 450 U.S. at 678.

In *Kassel*, the Court observed that the state regulation significantly burdened interstate commerce:

Iowa's law substantially burdens interstate commerce. Trucking companies that wish to continue to use 65-foot doubles must route them around Iowa or detach the trailers of the doubles and ship them separately. Alternatively, trucking companies must use the smaller 55 foot singles or 60-foot doubles permitted under local law. Each of these options engenders inefficiency and added expense.⁴⁰³

If, indeed, the burden of state regulation of trailer lengths is so severe, one wonders why Congress had not yet exercised its plenary powers under the Commerce Clause to promulgate a uniform nationwide statute governing trailer lengths, for Article I, Section 8 confers such power upon Congress, not the courts. By striking down state statutes by means of the unexercised Commerce Clause, the courts arguably exercise power reserved to the legislative branch by the Constitution. The Commerce Clause, after all, explicitly gives to Congress, not the courts, the power to regulate interstate commerce.⁴⁰⁴

Statutes that impose greater burdens on out-of-state carriers than in-state motor carriers violate the Commerce Clause. Thus, the Supreme Court, in *American Trucking Assns v. Scheiner*,⁴⁰⁵ struck down a flat tax on motor carriers because it fell disproportionately on out-of-state carriers who are likely to drive fewer miles on state highways than in-state carriers.⁴⁰⁶ Nebraska was also held to have violated the Commerce Clause by imposing retaliatory taxes on tractors and trailers registered in other states.⁴⁰⁷ The Illinois splash guard requirement for trucks was held to have violated the Commerce Clause because it conflicted with mud-guard regulations of other states, and placed too great a burden on motor vehicles crossing state lines.⁴⁰⁸

⁴⁰³ *Kassel*, 450 U.S. at 674. However, Texas size and weight limits on trucks were upheld as a legitimate exercise of state police power and constitutional in *Sproles v. Binford*, 286 U.S. 374 (1932).

⁴⁰⁴ See *Kassel*, 450 U.S. at 690–91 (Rehnquist, J., dissenting), and *Am. Trucking Ass'ns*, 496 U.S. at 202–24 (Scalia, J., concurring).

⁴⁰⁵ 483 U.S. 266 (1987).

⁴⁰⁶ In *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), the Court took some of the sting out of this conclusion by deciding to apply its doctrine prospectively only.

⁴⁰⁷ *Dennis v. Higgins*, 498 U.S. 439 (1991).

⁴⁰⁸ *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

3. Interaction of State Police Powers and the Due Process Clause

As noted above, the question of whether a state may regulate business practices consistent with the due process obligations of the Fourteenth Amendment was addressed early on by the Supreme Court in *Munn v. Illinois*,⁴⁰⁹ in which the court upheld state regulation of grain elevator rates. The court observed that the critical test was whether the "private property is 'affected with a public interest,' [for when] one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good." Under *Munn*, once business was determined to be clothed with a public interest, "the legislature was free to impose whatever rate regulations seemed to it desirable."⁴¹⁰ Other courts have noted that, "It is laid down as a fundamental principle that persons engaged in occupations in which the public have an interest or use may be regulated by statute."⁴¹¹

Lochner v. New York,⁴¹² a decision that struck down maximum hours regulations for bakers, inaugurated a period from 1905 until 1934 in which the Supreme Court invalidated approximately 200 economic regulations, principally under the Due Process Clause of the Fourteenth Amendment. *Lochner* inaugurated a period when the Court, under the doctrine of substantive or economic due process, reviewed the constitutionality of state and federal legislation against claims that it arbitrarily, unnecessarily, or unwisely interfered with the individual's liberty of contract. During the *Lochner* era, the Court upheld regulation if it believed the regulation truly necessary to protect the health, safety, or morals of the public, but struck down the regulation if the Court perceived it designed to readjust the market in favor of one party over another.⁴¹³ One source described *Lochner* as "one of the most condemned cases in United States history and has been used to symbolize judicial dereliction and abuse."⁴¹⁴

The *Lochner* era came to an end with the Supreme Court's decision in *Nebbia v. New York*.⁴¹⁵ In *Nebbia*, the Court upheld a law that set minimum

⁴⁰⁹ 94 U.S. 113 (1876).

⁴¹⁰ D. BOIES & P. VERKUIL, PUBLIC CONTROL OF BUSINESS 103 (1977).

⁴¹¹ *Ex Parte Tindall*, 229 P. 125 (Okla. 1924).

⁴¹² 198 U.S. 45 (1905).

⁴¹³ GEOFFREY STONE, LOUIS SEIDMAN, CASS SUNSTEIN & MARK TUSHNET, CONSTITUTIONAL LAW (1986).

⁴¹⁴ B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980).

⁴¹⁵ 291 U.S. 502 (1934).

prices for milk in order to ensure that producers received a reasonable return for their labor and investment, as a prophylactic against milk contamination.⁴¹⁶

Since the end of the *Lochner* era, courts have been extremely deferential to legislative decisions in areas of economic regulation. Where neither a fundamental right nor a suspect class is involved, the legislative decision withstands constitutional assault where the "classification is based on rational distinctions and bears a direct and real relation to the legislative object or purpose of the legislation."⁴¹⁷ Thus, the Supreme Court has held, "if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative discretion."⁴¹⁸

⁴¹⁶ Referring to *Munn's* insistence that property can be regulated only if "affected with a public interest," the Court observed that this phrase "means no more than an industry, for adequate reason, is subject to control for the public good." The Court held:

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit government regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. ...[The] Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases....

So far as the requirement of due process is concerned, ...a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.... [If] the legislative policy be to curb unrestrained and harmful competition...[it] does not lie within the courts to determine that the rule is unwise. ...Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

Id. at 525, 527, and 537-38.

⁴¹⁷ *Old South Duck Tours v. Mayor and Aldermen of the City of Savannah*, 2000 Ga. LEXIS 700 (Oct. 10, 2000), citing *Love v. State*, 517 S.E.2d 53 (Ga. 1999).

⁴¹⁸ *Day-Bright Lighting v. Missouri*, 342 U.S. 421 (1952). As noted above, many states began to regulate railroads in the 19th century, and motor carriers in the 1920s. Such economic regulation was challenged on due process

grounds. For example, in a Montana case, an aggrieved carrier argued:

The state cannot, under the guise of the regulation of the use of the highways, regulate the business of those who use the highways. A permit to use the highway may be required, a tax may be charged, but the business of those who use the highway cannot be regulated to the extent that it is prohibited. The commission in this case did not attempt to forbid the plaintiff from using the highways because of the size of his trucks, or the reckless manner in which he operates his trucks, or because of excessive speed that he travels on the highways, but because of the fact that if he is permitted to operate, some common carriers assert that their business will be deprived of some of their traffic.

Barney v. Bd. of R.R. Comm'rs, 1932 Mont. LEXIS 7, 10, 17 P.2d 82 (Mont. 1932). The Montana Supreme Court disagreed, holding:

The power to select, limit, and prohibit uses of the highways by carriers for hire, which is implied in the requirement of a certificate of public convenience and necessity, is justified both as a regulation of the business, and as a regulation for the protection and safety of the highways. There is thereby no unequal protection of law, but a reasonable classification. Complainant does not show that it is likely to be deprived of any liberty or property without due process of law, but only of a privilege on a highway to which he has no constitutional or statutory right.

Id. quoting *S. Motorways v. Perry*, 39 F.2d 145, 147 (D.C.). Similarly, the Oklahoma Supreme Court upheld the constitutionality of its state's regulation of motor carriers:

The principle applied in the regulation of the use of the highways for private enterprise rests upon public convenience and public necessity, a principle recognized and in large degree applied by the national government in placing the control and regulation of the railroads of the country in the hands of the Interstate Commerce Commission....

It was upon this theory and the application of this principle that this court... held that the state was within the rightful exercise of its police power in the regulation of the use of the highways in sustaining the constitutionality of the law here again challenged, and denied that it in anywise was in contravention of either the Fourteenth Amendment to the federal Constitution as in abridgment of any right or privilege of the citizen, or in deprivation of property without due process of law, or in denial to the citizen of the equal protection of the law. ...

The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control. ...⁴¹⁸

Barbour v. Walker, 259 P. 552 at 554 (Okla. 1927), citing *Barbier v. Connolly*, 113 U.S. 27. The Virginia Supreme Court agreed with the notion that states may lawfully prescribe the use of its highways, saying,

The U.S. Supreme Court has concluded:

[I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy...[That doctrine] has long since been discarded...[It] is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition...."⁴¹⁹

Applying the rational basis test, the Supreme Court has held that a statutory classification is to be struck down only if the means chosen by the legislature are "wholly irrelevant to the achievement of the State's objective."⁴²⁰

Where a state has decided to regulate a business, the judicial focus is on the application of the regulation—whether the regulation is reasonable and its decision not arbitrary or capricious.⁴²¹ "The exercise by a state of its police powers will not be interfered with by the Courts unless such exercise is of an arbitrary nature having no reasonable relation to the execution of lawful purposes."⁴²² Where a regulation is subject to rational basis review, most

notwithstanding the constitutional guarantees...no private individual, firm, or corporation has any right to use the public highways in the prosecution of the business of a common carrier for hire without the consent of the State; that such consent may be altogether withheld or granted as a privilege upon such terms and conditions as the State may prescribe in the exercise of its police power; and that in such exercise of the police power there may be limitations and conditions, and thereby discriminations made between those to whom the privilege is granted and denied, provided the discriminations are based on some reasonable classification which is not purely arbitrary, does not disclose personal favoritism or prejudice, and is fair and just.

Gruber v. Commonwealth, 125 S.E. 427 (Va. 1924).

⁴¹⁹ Ferguson v. Skrupa, 372 U.S. 726 at 729–30 (1963).

⁴²⁰ McGowan v. Maryland, 366 U.S. 420, 425 (1961); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).

⁴²¹ Bluefield Tele. Co. v. Pub. Serv. Comm'n, 135 S.E. 833 (W.Va. 1926). Long Motor Lines v. S.C. Pub. Serv. Comm'n, 103 S.E.2d 762 (S.C. 1958).

⁴²² Long Motor Lines v. S.C. Pub. Serv. Comm'n, 103 S.E.2d 762 (S.C. 1958), citing Jones v. City of Portland, 245 U.S. 217. See also *In re Dakota Transp.*, 291 N.W. 589 (S.D. 1940): "the reviewing court cannot substitute its judgment for that of the Commission and disturb its finding where there is any substantial basis in the evidence for the finding or where the order of the Commission is not unreasonable or arbitrary."

states accord it a "strong presumption of constitutionality and a reasonable doubt as to its constitutionality is sufficient to sustain it."⁴²³

4. Interaction of State Police Power and the Contracts Clause

Article 1, Section 10 of the Constitution provides, in part, "No State shall...pass any...Law impairing the Obligation of Contracts...."⁴²⁴ When transit services were provided by private firms, this clause spurred litigation between transit companies and their regulators or municipal governments. As transit began to be provided by public entities, the clause became less relevant, for the provider and the regulator were, in essence, part and parcel of the government. Hence, it deserves only brief mention here, for its historical contribution to the law.

In *City of Cleveland v. Cleveland City Railway Company*,⁴²⁵ the U.S. Supreme Court held that the Contracts Clause was violated when a city ordinance attempted to set transit fares at levels different from those previously agreed to contractually. The court found the ordinance "impaired the obligations of contracts entered into by the City of Cleveland fixing the rate of fare to be charged on the lines of railroad operated by the complainant...."⁴²⁶ Conversely, in *Underground Railroad of New York v. the City of New York*,⁴²⁷ where a pre-existing subway complained that the city had granted exclusive property rights owing to it to a new transit company, the Court found that no right was violated because the property rights complained of were never vested; therefore the complainant had no contract rights that were impaired.⁴²⁸

5. Tenth Amendment Limits on Federal Power

The Tenth Amendment of the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." On its face, the Amendment would seem to limit the federal government to enumerated powers explicitly conferred in the Constitution, leaving to the states and the people all of the remaining power. In practice, however, this

⁴²³ *Briscoe v. Prince George's County Health Dep't*, 593 A.2d 1109, 1113 (Md. 1991), quoting *State v. Good Samaritan Hosp.*, 473 A.2d 892.

⁴²⁴ U.S. CONST., § 10, provides that, "No State shall...pass any...law impairing the Obligation of Contracts,"

⁴²⁵ 194 U.S. 517 (1904).

⁴²⁶ 194 U.S. at 538.

⁴²⁷ 193 U.S. 416 (1904).

⁴²⁸ 193 U.S. at 430.

Amendment has done little to circumscribe broad and growing federal power. Nonetheless, the Supreme Court's short-lived flirtation with the Tenth Amendment as a potential limitation on federal power arose in a transportation context.

Originally, the wage and overtime provisions of the Fair Labor Standards Act of 1938 (FLSA)⁴²⁹ did not apply to employees of state and local governments. In 1961, however, Congress extended the Act's minimum-wage coverage to employees of any private mass transit carrier with annual gross revenue exceeding \$1 million.⁴³⁰ In 1966, Congress extended FLSA coverage to state and local government employees by withdrawing the exemptions from, *inter alia*, transit carriers whose rates and services were subject to state regulation; Congress also eliminated the overtime exemption for public transit employees other than drivers, operators, and conductors.⁴³¹ In 1974, Congress repealed the remaining overtime exemption for transit employees and extended FLSA to virtually all state and local government employees.⁴³² Acting pursuant to the Commerce Clause, Congress amended the FLSA to include all employees of state and local governments as subject to minimum wage and maximum hour provisions.

In *National League of Cities v. Usery*,⁴³³ the Supreme Court held that the Commerce Clause does not empower Congress to enforce minimum wage and overtime pay provisions of the FLSA against the states in areas of traditional governmental functions; such powers are reserved to the states under the Tenth Amendment.⁴³⁴ The Court also held that the 1974 Amendments were invalid "insofar as they operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁴³⁵ The FLSA Amendment was deemed unconstitutional, for states should be able to act as "sovereign governments."

In *Garcia v. San Antonio Metropolitan Transit Authority*,⁴³⁶ the U.S. Supreme Court overruled *Usery*, concluding that there was nothing in the FLSA, as applied to a transit agency, that was de-

structive of state sovereignty or in violation of the Tenth Amendment.⁴³⁷ In *Garcia*, the Court held that governmental employees were subject to overtime restrictions.⁴³⁸ The Court concluded that deciding which are, or are not, traditional government functions is "unworkable." Instead, political checks will provide the necessary oversight, and state sovereignty will not be destroyed. Transit employees are covered under FLSA, and they can enforce their claims in suits brought in federal or state court.⁴³⁹

6. State Immunity from Suit Under the Eleventh Amendment

The Eleventh Amendment was ratified on February 7, 1795. It provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Two core principles were identified by the U.S. Supreme Court in *Hans v. Louisiana* in 1890: (1) each state is a sovereign entity in the federal system; and (2) it is an inherent attribute of sovereignty that a state is not amenable to suit brought by an individual absent its consent.⁴⁴⁰ Moreover, although the Eleventh Amendment explicitly bars foreign citizens from bringing suit against another state in federal court, it implicitly bars a citizen from bringing suit against his own state in federal court as well.⁴⁴¹ The Supreme Court has repeatedly acknowledged that when Article III judicial power was created, the framers did not contemplate that federal jurisdiction would exist for suits against unconsenting states.⁴⁴²

⁴³⁷ Gregg Rubenstein, *The Eleventh Amendment, Federal Employment Laws and State Employees: Rights Without Remedies?*, 78 B. U. L. REV. 621 (1998).

⁴³⁸ Following *Garcia*, there were several lawsuits in which transit workers requested overtime. The defense was that *Garcia* should be applied prospectively, not retroactively. See *Bester v. Chicago Transit Auth.*, 887 F.2d 118 (7th Cir. 1989).

⁴³⁹ *Welch v. State Dep't of Highways and Pub. Transp.*, 780 F.2d 1268, 1272 (5th Cir. 1986); *Mineo v. Port Auth. of N.Y. and N.J.*, 779 F.2d 939 (3d Cir. 1985).

⁴⁴⁰ *Hans v. Louisiana*, 134 U.S. 1 (1890).

⁴⁴¹ 134 U.S. at 10.

⁴⁴² *North Carolina v. Temple*, 134 U.S. 22 (1890). The *Pennhurst* line of cases affirm that states are not subject to suit in federal courts unless they consent. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984). *Pennhurst* held that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that]

⁴²⁹ Pub. L. No. 718, 52 Stat. 1060, Fair Labor Standards Act, as amended, 29 U.S.C. §§ 206 and 207 (2000).

⁴³⁰ Fair Labor Standards Amendments of 1961, 75 Stat. 65 (1961).

⁴³¹ Fair Labor Standards Amendments of 1966, 80 Stat. 831 (1966).

⁴³² Fair Labor Standards Amendments of 1974, 88 Stat. 58 (1974).

⁴³³ 426 U.S. 833 (1976).

⁴³⁴ 426 U.S. at 852.

⁴³⁵ 426 U.S. at 852.

⁴³⁶ 469 U.S. 528 (1985).

Recent Eleventh Amendment jurisprudence has followed an uneven line, but appears to be moving toward a more expansive interpretation, trumping federal statutory efforts to intrude upon state sovereignty. In *Parden v. Terminal Railway of Alabama Docks Dep't*,⁴⁴³ the Supreme Court held that by entering into the business of operating a railroad, a State waives its immunity from suit in federal court and therefore becomes subject to suits for damages under the Federal Employee Liability Act (FELA), which applies to “every common carrier by railroad.”⁴⁴⁴

Then, in *Welch v. Texas Dep't of Highways and Public Transportation*,⁴⁴⁵ a state highway employee brought a suit against her employer under the Jones Act for injuries suffered while working on a ferry dock operated by the state DOT.⁴⁴⁶ The Court held that Congress had not unmistakably expressed its intention to abrogate the Eleventh Amendment by allowing suit under the Jones Act in federal court. Therefore, such suits were barred.⁴⁴⁷ The Court in *Welch* reexamined its holding in *Parden*, and concluded that its Eleventh Amendment findings were no longer good law, particularly as it had concluded that the state had consented to suit in federal courts. *Welch* overruled *Parden* to the extent that it was inconsistent with the requirement that Congress can only abrogate the Eleventh Amendment in unmistakably clear language.⁴⁴⁸

Then, the Supreme Court appeared to change course again in *Hilton v. South Carolina Public Railways Commission*,⁴⁴⁹ retreating back to *Parden* in another FELA case. *Hilton* involved a suit brought by an employee of a state-owned railroad injured in the course of employment. Notwithstanding *Welch's* repudiation of *Parden*, the Court in *Hilton* refused to abrogate 28 years of *stare decisis* and held FELA applicable to state-operated railroads.⁴⁵⁰

Two recent, but narrowly decided, U.S. Supreme Court cases expand state sovereign immunity from suit. The first hinges its analysis on the Eleventh Amendment. The second extends immunity beyond

the boundaries of the Eleventh Amendment. Though they are not transportation cases, their impact on the transportation sector likely will be of significance, and for that reason, they are discussed here.

*Seminole Tribe of Florida v. Florida*⁴⁵¹ was a suit brought by an Indian tribe against the State of Florida under the Indian Gaming Regulatory Act, which gave a tribe the right to bring suit in federal court against a state to enforce the Act's requirement that the state negotiate in good faith to conclude a compact allowing the tribe to engage in gaming activities.⁴⁵² To determine whether the federal statute has abrogated a state's sovereign immunity, the Court asked two questions: (1) has Congress unequivocally and unmistakably expressed its intention to abrogate the state's immunity; and (2) has Congress acted pursuant to a valid exercise of power?⁴⁵³

With respect to the first question, the Supreme Court found that Congress did indeed intend to abrogate sovereign immunity by subjecting states to suit in the Indian Gaming Regulatory Act. With respect to the second question, the Court noted that it previously had found Congressional authority to abrogate in only two provisions of the Constitution—the Fourteenth Amendment and the Commerce Clause.⁴⁵⁴ Adopted well after the original Constitution and the Eleventh Amendment, the Fourteenth Amendment, “by expanding federal power at the expense of state autonomy,”⁴⁵⁵ “operated to alter the pre-existing balance between the state and federal power achieved by Article III and the Eleventh Amendment.”⁴⁵⁶ The Court noted that the Fourteenth Amendment extended federal power to intrude upon the Eleventh Amendment, and therefore Section 5 of the Fourteenth Amendment gave Congress the power to abrogate its immunity from suit.

However, the abrogation of the Eleventh Amendment by the Commerce Clause had been found in only a single case, *Pennsylvania v. Union*

limits the grant of judicial authority in Article III.” 465 U.S. at 98.

⁴⁴³ 377 U.S. 184 (1964).

⁴⁴⁴ 45 U.S.C. § 51.

⁴⁴⁵ 483 U.S. 468 (1987).

⁴⁴⁶ *Id.* (state highway department immune from suit under the Jones Act because that statute did not expressly abrogate Eleventh Amendment immunity).

⁴⁴⁷ 483 U.S. at 476.

⁴⁴⁸ 483 U.S. at 478.

⁴⁴⁹ 502 U.S. 197 (1991).

⁴⁵⁰ 502 U.S. at 201–02.

⁴⁵¹ 517 U.S. 44 (1996) held that Congress may waive state immunity from suit if Congress passes a law seeking to enforce either the Thirteenth, Fourteenth, or Fifteenth Amendments (e.g., equal protection, due process) and Congress explicitly reveals its intention to subject states to federal suits. However, Congress may not abrogate a state's immunity when Congress legislates based on a separate enumerated power.

⁴⁵² 25 U.S.C. § 2710(d).

⁴⁵³ 517 U.S. at 55.

⁴⁵⁴ 517 U.S. at 59.

⁴⁵⁵ *Id.*

⁴⁵⁶ 517 U.S. at 65–66.

Gas Co.,⁴⁵⁷ a plurality opinion. Both the interstate Commerce Clause and the Indian Commerce Clause are found in Article 1, Section 8 of the Constitution, and the Court could find no principled distinction between them; in fact, plenary power had been conferred on the federal government over the Indian tribes, while the states retained authority over some aspects of intrastate and interstate commerce.⁴⁵⁸ In *Seminole Tribe*, the Court found that *Union Gas* was wrongly decided and overruled it, finding:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.⁴⁵⁹

Though in *Ex Parte Young*⁴⁶⁰ the Supreme Court had allowed federal jurisdiction against a state official in order to avoid a violation of federal law, the Court in *Seminole Tribe* refused to allow suit against the Florida Governor, holding that “where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*.”⁴⁶¹ Because Congress had enacted a remedial scheme for the enforcement of a right, this “narrow exception” to the Eleventh Amendment could not be used to enforce it against a state official.⁴⁶²

In *Kimel v. Florida Board of Regents*,⁴⁶³ the U.S. Supreme Court held that although the ADA reflects a clear congressional intent to abrogate state sovereign immunity, the abrogation exceeded its authority under the Eleventh Amendment to the U.S. Constitution, which shields unconsenting states from suit in federal court.⁴⁶⁴ Neither the

Fourteenth Amendment nor the Commerce Clause conferred on Congress the authority to arrest age discrimination. Thus, a public transit operator that enjoys sovereign immunity may be shielded from suit under the ADA.⁴⁶⁵ Decisions concerning the hiring, firing, and disciplining of employees are discretionary (as opposed to ministerial) in nature, and therefore enjoy immunity from judicial review.⁴⁶⁶ However, where the public transit operator is not considered an arm of the state for Eleventh Amendment purposes, it enjoys no such immunity.⁴⁶⁷

Reviewing this jurisprudence, Professor James Leonard concluded that federal courts have lost jurisdiction over suits against nonconsenting states based on Article I legislation. Leonard summarized contemporary Eleventh Amendment principles as

consent, a state could not be subject to a private cause of action brought in a quasi-judicial proceeding before a federal administrative agency.

⁴⁶⁵ *Jones v. WMATA*, 205 F.3d 428 (D.C. Cir. 2000); *Taylor v. Wash. Metro. Area Transit Auth.*, 109 F. Supp. 2d 11 (D.D.C. 2000).

⁴⁶⁶ The hiring, training, and supervising of employees is a discretionary function subject to immunity. *Burkhart v. WMATA*, 112 F.3d 1207 (D.C. Cir. 1997) (hiring and supervision of a bus driver is discretionary in nature; court denied claim of negligent hiring, training, and supervision in a case of a physical altercation between a deaf passenger and a bus driver and thus fails to hold WMATA liable on the claim of negligent hiring, training, and supervision). See also *Taylor v. WMATA*, 109 F. Supp. 2d 11, 16 (D.D.C. 2000)

(An activity that amounts to a “quintessential” governmental function, such as law enforcement, is clearly “governmental” and falls within the scope of sovereign immunity. For activities that are not quintessential governmental functions, the Court must consider whether the activity is “discretionary” or “ministerial.” *Id.* Only if the activity is “discretionary” will it be considered “governmental” and therefore protected by sovereign immunity. An activity that is found to be “ministerial” is not protected by sovereign immunity.) [citations omitted].

Beebe v. WMATA, 129 F.3d 1283 at 1287 (D.C. Cir. 1997)

(To determine whether an activity is discretionary, and thus shielded by sovereign immunity, we ask whether any statute, regulation, or policy specifically prescribes a course of action for an employee to follow. If no course of action is prescribed, we then determine whether the exercise of discretion is grounded in social, economic, or political goals. If so grounded, the activity is “governmental,” thus falling within section 80’s retention of sovereign immunity.)

⁴⁶⁷ *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (2001).

⁴⁵⁷ 491 U.S. 1 (1989).

⁴⁵⁸ 517 U.S. at 63.

⁴⁵⁹ 517 U.S. at 72–73 [citations omitted].

⁴⁶⁰ 209 U.S. 123 (1908).

⁴⁶¹ 517 U.S. at 74.

⁴⁶² 517 U.S. at 76.

⁴⁶³ 528 U.S. 62 (2000).

⁴⁶⁴ See also *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 122 S. Ct. 1864 (2002), which held that, absent its

(1) nonconsenting states are immune to suit *eo nomine* in federal courts by private individuals, foreign citizens, foreign sovereigns, and Indian tribes, but not to suits by other states or the United States; (2) plaintiffs may obtain prospective relief against a continuing violation of federal law by bringing suit against a state official; and (3) Congress may abrogate Eleventh Amendment immunity if it legislates properly under section 5 of the Fourteenth Amendment.⁴⁶⁸

Certain transit providers that are state agencies enjoy the Eleventh Amendment shield against a federal court claim brought by a private individual.⁴⁶⁹ However, local governmental institutions do not enjoy immunity under the Eleventh Amendment.⁴⁷⁰ For example, in *Williams v. Dallas Area Rapid Transit*,⁴⁷¹ the Fifth Circuit found that DART was not a state agency immune from suit under the Eleventh Amendment. Similarly, in *Pendergrass v. The Greater New Orleans Expressway Commission*⁴⁷² (involving a claim that the officers of the Greater New Orleans Expressway Commission (GNOEC) violated a speeding and intoxicated motorist's Fourth Amendment rights by using excessive force on him), the Fifth Circuit concluded that GNOEC was not entitled to Eleventh Amendment immunity as an "arm of the state." In both cases, the court analyzed the transit provider's functions under the six-part test developed in *Clark v. Tarrant County*:

1. whether the state statutes and case law characterize the agency as an arm of the state;
2. the source of funds for the entity;
3. the degree of local autonomy the entity enjoys;
4. whether the entity is concerned primarily with local, as opposed to statewide, problems;
5. whether the entity has authority to sue and be sued in its own name; and

⁴⁶⁸ James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans With Disabilities Act After Seminole Tribe and Flores*, 41 ARIZ. L. REV. 651, 659 (1999). See also Sullen Wolfe, *Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the "Silver Bullet"?*, 26 STETSON L. REV. 727 (1997).

⁴⁶⁹ MARTIN COLE & CHRISTINE BROOKBANK, STRATEGIES TO MINIMIZE LIABILITY UNDER FEDERAL AND STATE ENVIRONMENTAL LAWS (TCRP Legal Research Digest No. 9, 1998).

⁴⁷⁰ The Eleventh Amendment "bars suits against states but not lesser entities." *Alden v. Maine*, 527 U.S. 706, 710 (1999).

⁴⁷¹ 242 F.3d 315 (5th Cir. 2001).

⁴⁷² 144 F.3d 342 (5th Cir. 1998).

6. whether the entity has the right to hold and use property.⁴⁷³

However, employing similar criteria, both the Georgia DOT⁴⁷⁴ and the Alabama DOT⁴⁷⁵ have been found to be arms of the state for purposes of the Eleventh Amendment shield.

7. State Sovereignty Beyond the Eleventh Amendment

*Alden v. Maine*⁴⁷⁶ took state immunity from suit beyond the Eleventh Amendment, vesting it in general principles of state sovereignty that preceded the Constitution and were confirmed by it. *Alden* involved a suit brought by state probation officers against their employer, the State of Maine, for violating the overtime provisions of the FLSA.⁴⁷⁷ After the lower federal courts dismissed the employees' suit on *Seminole Tribe* grounds, they filed the same action in state court, which dismissed the suit on sovereign immunity grounds. The court in *Alden* performed an exhaustive review of the history of state sovereignty at the time the Constitution was drafted and the reasons for promulgation of the Eleventh Amendment.

The Eleventh Amendment was adopted in response to the errant U.S. Supreme Court decision in *Chisholm v. Georgia*,⁴⁷⁸ decided only 5 years after the Constitution was ratified, and holding that a state could be subject to suit without its consent under Article III, which gave the federal judiciary jurisdiction to hear suits "between a State and Citizens of another State." The Eleventh Amendment was quickly adopted "not to change but to restore the original constitutional design,"⁴⁷⁹ for at the time the Constitution was drafted and ratified, it was

⁴⁷³ 798 F.2d 736, 744 (5th Cir. 1986).

⁴⁷⁴ *Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637 (11th Cir.), cert. denied, 506 U.S. 1022 (1992); *Hatmaker v. Ga. Dep't of Transp.*, 973 F. Supp. 1047 (M.D. Ga. 1995).

⁴⁷⁵ *Harbert Int'l v. James*, 157 F.3d 1271 (11th Cir. 1998). However, a state agency that accepts federal funds waives Eleventh Amendment immunity for suits brought under the Civil Rights Act of 1964, 42 U.S.C. § 2000d-7(a)(1). *Powers v. CSX Transp.*, 105 F. Supp. 2d 1295, 1301 (S.D. Ala. 2000).

⁴⁷⁶ 527 U.S. 706 (1999) (Immunity from suit in federal courts extends to immunity from suit in state court. State could not be sued in its own court under the FLSA, such would be "ultimately to commandeer the entire political machinery of the State against its will....") *Id.* at 749.

⁴⁷⁷ 29 U.S.C. § 210 *et seq.*

⁴⁷⁸ 2 Dall. 419 (1793).

⁴⁷⁹ 527 U.S. at 722.

universally the doctrine that a sovereign could not be sued without its consent.⁴⁸⁰

To address the anomaly created by *Chisholm*, the Eleventh Amendment exempted states from suit brought by citizens of another, or a foreign, state. Though the Supreme Court often referred to state immunity from suit as Eleventh Amendment immunity, the Court in *Alden* described this reference as “convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment.”⁴⁸¹ The Court was careful to note that the immunity extended well beyond the language of that Amendment:

[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.⁴⁸²

The Court in *Alden* concluded that Congress lacks power under Article I to subject the states to private suits in state courts.⁴⁸³ Nonetheless, the Court acknowledged that sovereign immunity does not prohibit all judicial review of state conformity with its obligations under the Constitution and federal law. Sovereign immunity limits litigation only in the absence of state consent, and many states have enacted statutes waiving sovereign immunity to various degrees, thereby making themselves subject to suit. In ratifying the Constitution, states also consented to suits brought by other states or the federal government to ensure that the laws are faithfully executed. Additionally, the states consented to Congressional authorization of private suits under Section 5 of the Fourteenth Amendment.⁴⁸⁴ Moreover, though sovereign immunity bars suits against states,⁴⁸⁵ it does not prohibit

suits against the federal government,⁴⁸⁶ nor against a city or other governmental unit that is not an arm of a state.⁴⁸⁷ Moreover, administrative determinations have been held not to constitute adjudicatory determinations barred by state sovereign immunity.⁴⁸⁸

8. State Immunity from Suit Under the Interstate Compact Clause

According to the Interstate Compact Clause, agreements between states require the blessing of Congress. Article 1, Section 10 of the Constitution provides, in part: “No State shall, without the Consent of the Congress...enter into any Agreement or Compact with another State....”⁴⁸⁹ Pursuant to this clause, in 1966, the U.S. Congress approved establishment of WMATA in an Interstate Compact between Maryland, Virginia, and the District of Columbia, creating WMATA to deal with growing traffic problems in the Washington area.⁴⁹⁰ The legislation created sovereign immunity for suits based on tort actions caused by its employees in the performance of a governmental function. In *Beebe v. Washington Metropolitan Area Transit Authority*, the D.C. Circuit Court of Appeals held that the employment, training, hiring, firing, and supervi-

tion 1983 suit against the state highway commission for wrongly taking property by exercising its right of way was dismissed under Eleventh Amendment).

⁴⁸⁶ In many suits involving the federal and state governments, such as NEPA suits, only the federal government may be subject to suit (unless the state voluntarily stays involved—which is often the case). The opportunity to participate or not participate can be an important factor in such litigation. There are a number of NEPA “delegation” provisions either in existing law (for HUD grant programs—see 42 U.S.C. § 5304(g)) or being considered (as is the case with the Transportation reauthorization legislation). Consent by a state to suit in federal court has been seen as an essential element of these delegation proposals.

⁴⁸⁷ *Alden*, 527 U.S. at 756. See *Monell v. Dep’t of Social Servs.*, 436 U.S. 658 (1978) (local governing bodies are “persons” within § 1983 and can be sued directly. However, the Eleventh Amendment provides state immunity for suits brought under § 1983). JAMES HENDERSON, JR., RICHARD PEARSON & JOHN SILICIANO, *THE TORTS PROCESS* 803 (5th ed. 1999).

⁴⁸⁸ *Tennessee v. USDOT*, 326 F.3d 729 (6th Cir. 2003) (interpreting under 49 U.S.C. § 5125(d)).

⁴⁸⁹ U.S. CONST. art. 1, § 10, cl. 3 provides that, “No State shall, without the Consent of the Congress...enter into any Agreement or Compact with another State....”

⁴⁹⁰ See Pub. L. No. 89-774, 80 Stat. 1324 (1966). See, e.g., *Dant v. District of Columbia*, 829 F.2d 69, 71, 74 (D.C. Cir. 1987); *Morris v. WMATA*, 781 F.2d 218, 219, 222 (D.C. Cir. 1986).

⁴⁸⁰ 527 U.S. at 715–16.

⁴⁸¹ 527 U.S. at 713.

⁴⁸² 527 U.S. at 728–29 [citations omitted].

⁴⁸³ 527 U.S. at 748.

⁴⁸⁴ *Alden*, 527 U.S. at 756.

⁴⁸⁵ See, e.g., *Fireman’s Fund Ins. Co. v. Dep’t of Transp. and Dev., State of La.*, 792 F.2d 1373 (5th Cir. 1986) (state transportation department immune from suit in federal court on action brought by insurer to rid itself of an obligation under a contract with a highway contractor); *Higginbotham v. Oklahoma*, 328 F.3d 638 (10th Cir. 2003) (taxpayer suit brought against the state of Oklahoma for issuance of highway bonds was held barred by Eleventh Amendment); *Kissinger v. Ark. State Hwy. Comm’n*, 1995 U.S. App. LEXIS 3782 (8th Cir. 1995) (unpublished) (Sec-

ing of employees was a discretionary governmental function shielded from liability.⁴⁹¹

Similarly, in *Sanders v. Washington Metropolitan Area Transit Authority*,⁴⁹² 18 bus or rail employees involved in on-the-job incidents who had failed their blood and urine tests brought a § 1983 and Fourteenth Amendment claim against the WMATA. The D.C. Circuit held that WMATA was immune from suit because, in the charter establishing the multistate authority, the local jurisdictions had conferred upon it both sovereign immunity and Eleventh Amendment insulation from suit in federal courts.⁴⁹³

H. DUE PROCESS

1. Which Liberty and Property Interests Are Constitutionally Protected?

The affirmation of individual rights is emphasized in the first 10 amendments to the Constitution, which were ratified on December 15, 1791, and comprise what is known as the Bill of Rights. They became applicable to the states with ratification of the Fourteenth Amendment. As we have seen, the first 2 of these 10 amendments guarantee the sovereign rights of the states vis-à-vis the federal government. The rest guarantee individual liberty, as do many of the subsequent amendments. It is the intersection (some would say collision) of the inherent “police powers” of the states with the powers delegated to the federal government or the constitutional rights of the people that has achieved some prominence in constitutional litigation.

The Fifth Amendment provides, in part, that “No person shall...be deprived of life, liberty, or property, without due process of law....”⁴⁹⁴ Ratified on July 9, 1868, the Fourteenth Amendment provides, in part, that “No State shall...deprive any person of life, liberty, or property, without due process of law....”⁴⁹⁵

The Fifth and Fourteenth Amendments to the U.S. Constitution protect individuals against deprivation of life, liberty, and property without due process of law.⁴⁹⁶ In due process analysis, the initial question is whether life, liberty, or property is implicated by the government action at issue. Though initially the courts focused on whether the individual had a “right” or a “privilege” in the liberty or

property, contemporary courts look not to the weight, but to the nature of the interest at stake.⁴⁹⁷

To have a property interest in a benefit, the individual must have more than an abstract need or desire for it and more than a unilateral expectation of it; he or she must have a “legitimate claim of entitlement.”⁴⁹⁸ The concept of property denotes a broad range of interests secured by existing rules or understandings.⁴⁹⁹ Property rights are not created by the Constitution, but stem from an independent source, such as state law.⁵⁰⁰

Several cases have arisen in the employment context. Public employees subject to dismissal who have a property interest in their job created by common law or by statute (sometimes referred to as a “legitimate claim of entitlement”) may not be discharged⁵⁰¹ or suspended⁵⁰² without due process. In *Cleveland Board of Education v. Loudermill*,⁵⁰³ the U.S. Supreme Court held that one is not deprived of a liberty when he or she “is not rehired in one job, but is free as before to seek another.”⁵⁰⁴ “While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once committed, without appropriate procedural safeguards.”

In *Lerner v. Casey*,⁵⁰⁵ decided in the shadow of McCarthyism, the Supreme Court held that due process was not violated when a subway conductor was dismissed by the New York Transit Authority when he refused to answer the question of whether he was a member of the Communist Party. The Court found his dismissal was not predicated upon his exercise of his Fifth Amendment rights, but because his refusal to answer cast doubt on his trustworthiness and reliability.⁵⁰⁶

In *Burns v. Greater Cleveland Transit Authority*,⁵⁰⁷ an employee alleged the transit authority had denied him due process in dismissing him during the probationary period. The Sixth Circuit held

⁴⁹⁷ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 at 572 (1972).

⁴⁹⁸ *Id.* at 577.

⁴⁹⁹ *Perry v. Sinderman*, 408 U.S. 593 (1972).

⁵⁰⁰ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 at 577 (1972).

⁵⁰¹ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972).

⁵⁰² *Gilbert v. Homar*, 520 U.S. 924 (1997).

⁵⁰³ 470 U.S. 532 (1985).

⁵⁰⁴ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 at 576 (1972).

⁵⁰⁵ 357 U.S. 468 (1958).

⁵⁰⁶ 357 U.S. at 476–79.

⁵⁰⁷ 1991 U.S. App. LEXIS 30363 (6th Cir. 1991).

⁴⁹¹ 129 F.3d 1283 (D.C. Cir. 1997).

⁴⁹² 819 F.2d 1151 (D.C. Cir. 1987).

⁴⁹³ *Id.*

⁴⁹⁴ U.S. CONST. amend. 5.

⁴⁹⁵ U.S. CONST. amend. 14, § 1.

⁴⁹⁶ See generally Paul Stephen Dempsey, *Transit Law*, in 5 SELECTED STUDIES 10-14 – 10-15.

that the issue of whether one has a liberty or property interest protected by the due process clause is determined by reference to state law. The court held that where the state law holds that a probationary employee does not have a legitimate claim of entitlement in a job, his dismissal therefrom does not violate the due process clause. Similarly, in *Medellin v. Chicago Transit Authority*,⁵⁰⁸ a federal district court reviewed the relevant state statutes and concluded they created neither a property interest in, nor a legitimate claim of entitlement for, employment. Some courts have taken the position that, absent a statute that confers a right to employment, employment is “at will” and not a property interest to which due process applies.⁵⁰⁹

To have a constitutionally protected liberty interest, one must allege more than the loss of reputation alone. More than a mere stigma—such as a tangible interest in employment—is required.⁵¹⁰ For example, in *Schlesinger v. New York City Transit Authority*,⁵¹¹ a federal district court reviewed the allegation in a transit employee’s due process claim that his employer defamed him. The court found that the defamatory statements did not go to the heart of his professional competence, but only accused him of acting in an unprofessional manner; he was neither terminated nor demoted from his job. Hence, he failed to satisfy the “stigma plus” requirement in order to establish a constitutionally protected liberty interest.⁵¹²

In *Ward v. Housatonic Area Regional Transit District*,⁵¹³ a passenger denied the opportunity to ride transit buses lost his due process challenge because he failed “to point to the existence of any state law which would allow him to assert a property interest in fixed route bus service.”⁵¹⁴

2. What Process Is Due?

If a liberty or property interest is deemed to exist, the government may not take it without due process. Notice and an opportunity for comment are the essential components of due process. Must the opportunity for comment be conducted pre- or post-deprivation, and may it be in writing, or must it use oral procedures (including a trial-type hearing)? In assessing a due process claim, the courts examine (1) the private interest affected; (2) the

risk of erroneous deprivation of that interest through the existing procedures and the value of additional safeguards; and (3) the government’s interest.⁵¹⁵

In *Cleveland Board of Education v. Loudermill*,⁵¹⁶ the Supreme Court held that due process requires “some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment.”⁵¹⁷ There must be a pretermination hearing of a security guard accused of lying on his application, though it need not be elaborate, to serve as

an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.... The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.⁵¹⁸

However, in *Gilbert v. Homar*,⁵¹⁹ the Supreme Court held that temporary job suspension requires only a prompt post-suspension hearing.⁵²⁰

⁵¹⁵ *Mathews v. Eldridge*, 424 U.S. 319 (1976). See *Dimino v. N.Y. City Transit Auth.*, 64 F. Supp. 2d 136, 158–59 (E.D.N.Y. 1999) (holding that a transit employee who was involuntarily placed on medical leave for pregnancy suffered only a temporary loss of job and salary that was “relatively minor and correctable at a later point. Furthermore, the procedural safeguards that were in place, and the government’s overwhelming interest more than satisfy the limited due process protections implicated.”). *Id.* at 159.

⁵¹⁶ 470 U.S. 532 (1985).

⁵¹⁷ *Id.* at 542.

⁵¹⁸ *Id.* at 545–46.

⁵¹⁹ 520 U.S. 924 (1997).

⁵²⁰ *Id.* This case involved the suspension of a university police officer who was arrested and charged with drug offenses. Where the justification for suspension is not so clear cut, the courts may reach a different conclusion. See *e.g.*, *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895 (8th Cir. 1994). *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986):

In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job....While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes

⁵⁰⁸ 1994 U.S. Dist. LEXIS 10370 (N.D. Ill. 1994).

⁵⁰⁹ *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff’d*, 341 U.S. 918 (1951); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

⁵¹⁰ *Paul v. Davis*, 424 U.S. 693, 701 (1976).

⁵¹¹ 2001 U.S. Dist. LEXIS 632 (S.D.N.Y. 2001).

⁵¹² *Id.* at *20–24.

⁵¹³ 154 F. Supp. 2d 339 (D. Conn. 2001).

⁵¹⁴ 154 F. Supp. 2d at 348.

In *Grandi v. New York City Transit Authority*,⁵²¹ a bus driver was placed on involuntary medical leave and ultimately discharged on the ground that he was psychologically unfit for the job. The court held that an employee is not denied due process when he fails to avail himself of a grievance procedure established under a collective bargaining agreement.⁵²² Hence, a claimant must use the available procedural opportunities.

In *Marsh v. Skinner*,⁵²³ the Second Circuit held that the plaintiff who alleged he had a mental disability had “failed to demonstrate a constitutionally protected property interest deserving of due process safeguards under the Fifth and Fourteenth Amendments. In short, because Marsh is not entitled to Half-Fare Program benefits under the applicable statutory provisions, he lacks a cognizable property interest in those benefits.”⁵²⁴ The New York City DOT and Metropolitan Transportation Authority found he was not a “handicapped person” eligible for the Half-Fare benefits.

Denial of continued eligibility to a disabled person for paratransit services requires due process, for disability rights have also been deemed civil rights. The U.S. DOT has opined, “Once an entity has certified someone as eligible, the individual’s eligibility takes on the coloration of a property right.... Consequently, before eligibility may be removed ‘for cause’...the entity must provide administrative due process to the individual.”⁵²⁵

Though the due process clause refers only to procedural requirements, it also contains a substantive

that otherwise may be legitimate, the Board’s layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board’s selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause. 476 U.S. at 274, 275.

With respect to employee reclassification, see *Bahr v. State Inv. Bd.*, 521 N.W.2d 152 (Wis. 1994), where a person was moved legislatively from a classified civil service position to an unclassified employment at will position.

⁵²¹ 1999 U.S. App. LEXIS 2697 (2d Cir. 1999).

⁵²² See also *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987); *McDarby v. Dinkins*, 907 F.2d 1334, 1337 (2d Cir. 1990); *Narumanchi v. Bd. of Trustees*, 850 F.2d 70, 72 (2d Cir. 1988).

⁵²³ 922 F.2d 112 (2d Cir. 1990).

⁵²⁴ The Court cited *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

⁵²⁵ *Transportation for Individuals with Disabilities*, 56 Fed. Reg. 45584 (Sept. 6, 1991) (codified at 49 C.F.R. pts. 27, 37, and 38); 49 C.F.R. pt. 37, app. D. See generally *Goldberg v. Kelly*, 397 U.S. 254 (1970).

component that prohibits arbitrary and wrongful acts irrespective of the fairness of the procedures by which they are implemented.⁵²⁶ Even where a property interest is not implicated, the government may not deny a person a benefit on a basis that infringes his or her constitutional rights, for such a decision would be patently arbitrary and discriminatory, and therefore a denial of due process.⁵²⁷ Such unconstitutional means, for example, might include deprivation of a privilege on grounds of racial discrimination⁵²⁸ or retaliation for exercise of free speech.⁵²⁹ Vagueness in the standards governing public officials has led to claims of arbitrary and discriminatory conduct on behalf of transit officials in denying proposed bus advertising.⁵³⁰

However, substantive due process claims are difficult to establish, requiring proof that the governmental action is egregious, outrageous, and consciousness-shocking, and not sufficiently advancing any legitimate state interest. Thus, for example, an allegation that a highway authority had denied a property owner’s due process rights by allegedly misinterpreting the law on drainage issues, and approving an environmental impact statement that allegedly resulted in highway water runoff causing flooding, was held insufficient to “meet the extreme

⁵²⁶ *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

⁵²⁷ *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

⁵²⁸ This was alleged in the Title VII employment context in *Pate v. Alameda-Contra Costa Transit Dist.*, 697 F.2d 870 (9th Cir. 1983). Plaintiffs failed to prove a grooming code violated Title VII as sexual discrimination in *Hearth v. Metro. Transit Comm’n*, 436 F. Supp. 685 (D. Minn. 1977). Fare increases were not deemed to be arbitrary or discriminatory in *D.C. Transit Sys. v. WMATA*, 466 F.2d 384 (D.C. Cir. 1972).

⁵²⁹ See *Perry v. Sinderman*, 408 U.S. 583 (1972). Examples in the general area of transportation include: *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (requiring that regulation limiting distribution of literature and solicitation to exterior of airport terminals be reasonable); *Jacobsen v. Howard*, 109 F.3d 1268 (8th Cir. 1997) (state regulation that bans newspaper machines from rest stops unreasonable infringement of newspaper’s first amendment rights); *Jews for Jesus, Inc. v. Bd. of Airport Comm’rs*, 785 F.2d 791 (9th Cir. 1986) (city ordinance that prohibits all U.S. Const. amend. I activity is unconstitutional).

⁵³⁰ *United Food and Commercial Workers Union v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998). However, in *Searles v. Se. Pa. Transp. Auth.*, 990 F.2d 789 (2d Cir. 1993), the Second Circuit found that the Constitution was not implicated when a patron was killed upon an accidental derailment.

circumstances warranted for a substantive due process action to prevail under § 1983.⁵³¹

Similarly, in *Imrie v. Golden Gate Bridge, Highway and Transportation District*,⁵³² a substantive due process claim against a bridge and highway district failed. Marissa Renee Imrie was a 14-year-old girl who took a taxi to the Golden Gate Bridge, where she jumped to her death. The estate alleged the district violated her constitutional rights by failing to erect a suicide barrier, although after more than 1,200 individuals had jumped to their death off the bridge (making it the number one suicide venue in the Nation), the district should have known about the danger and prevented it. The federal district court noted that the Due Process Clause generally confers no affirmative right to governmental assistance, except (1) where the government has affirmatively acted to place one in danger; or (2) when the government has a special relationship with the individual.⁵³³ The court found neither circumstance present in Ms. Imrie's case, but merely "that defendants failed to take action knowing that the Bridge was dangerous to those who wished to commit suicide, a claim of negligence that is not remediable through the Due Process Clause."⁵³⁴ The district did not leave the decedent in a more dangerous position than the one in which it found her.⁵³⁵

However, a substantive due process claim was sustained in *Davis v. Brady*,⁵³⁶ a case in which police officers arrested a drunk, then deposited him in a nearby town on the curb of a 55-mph highway with few street lights and no sidewalk, where he was hit by a car, causing his leg to be amputated. The Sixth Circuit held that, "where the plaintiff suffered injury as a result of being placed in the state's custody...a constitutional claim arises when the injury occurred as a result of the state's deliberate indifference to the risk of such an injury."⁵³⁷

3. Due Process Under the Administrative Procedure Act

Federal agency due process is governed by the APA. Most state legislatures have promulgated state administrative procedure acts that contain similar provisions governing due process.

Section 553 of the APA defines the procedural obligations applicable to most rulemaking proceedings. Notice of proposed rulemaking must be published in the *Federal Register*, unless relevant parties have actual notice.⁵³⁸ Interpretive and procedural rules, as well as general statements of policy, are exempt from the requirement of publication. Also exempt are situations where the agency finds it "impracticable, unnecessary, or contrary to the public interest."⁵³⁹

Parties have a right to participate through submission of written pleadings, with or without the opportunity to advocate their position or introduce evidence orally. More formal procedures are available only if the "rules are required to be made on the record after opportunity for an agency hearing...."⁵⁴⁰ Publication or service of a substantive rule must ordinarily be accomplished 30 days prior to its effective date.

Rulemaking involves an agency's exercise of its quasi-legislative powers in the promulgation of prospective standards of conduct. Adjudication involves the performance of its quasi-adjudicatory powers in the resolution of issues that usually involve factual situations occurring at some prior point in time.

Rulemaking is prospective in nature. It prescribes future standards of conduct rather than consequences of past conduct. Adjudication ascribes legal obligations based upon present or past conduct.

Rulemaking usually impacts the rights of a large number of persons. A subsequent proceeding is ordinarily required before an individual will be sanctioned for its violation. Adjudication usually applies immediately to named persons and specific factual situations.

The APA provides some rather obscure definitions of rulemaking and adjudication. An adjudication consists of the agency process for the formulation of an "order."⁵⁴¹ An "order" constitutes the final disposition of agency business in a matter other than "rulemaking," but including licensing.⁵⁴²

A rule consists of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.⁵⁴³ The procedural obligations for rulemaking are usually "informal," consisting of notice published in the *Federal Register* and the disposition of

⁵³¹ *Castro Rivera v. Fagundo*, 310 F. Supp. 2d 428, 436 (D.P.R. 2004).

⁵³² 282 F. Supp. 2d 1145 (N.D. Cal. 2003).

⁵³³ 282 F. Supp. 2d at 1148.

⁵³⁴ 282 F. Supp. 2d at 1149.

⁵³⁵ *Id.*

⁵³⁶ 143 F.3d 1021 (6th Cir. 1998).

⁵³⁷ 143 F.3d at 1026.

⁵³⁸ 5 U.S.C. § 553(b).

⁵³⁹ 5 U.S.C. § 553(b)(3)(B).

⁵⁴⁰ 5 U.S.C. § 553(c).

⁵⁴¹ 5 U.S.C. § 551(7).

⁵⁴² 5 U.S.C. § 551(6).

⁵⁴³ 5 U.S.C. § 551(4).

the proceeding on the basis of written pleadings. The procedural obligations for adjudication are more frequently “formal,” or trial-type, in nature.

There are four types of rules:

1. *Substantive rules* are the most significant of the four. They identify appropriate standards of future conduct and have the force and effect of law;
2. *Procedural rules* identify the procedural obligations for agency or regulated activity;
3. *Housekeeping rules* deal with relatively trivial executive-type administrative matters; and
4. *Interpretive rules* clarify or explain existing law, rather than create new law. Standing alone, they do not have the force and effect of law. While they may explain the agency’s interpretation of its enabling statute, they are normally not deemed binding on either the agency or persons subject to its jurisdiction.

Courts will not ordinarily construe the agency’s statutory language identifying procedural obligations for rulemaking as essentially synonymous with the “on the record” language of § 553(c), thereby triggering the formal procedures expressed in §§ 556 and 557.

As an example, in *United States v. Florida East Coast Railway Co.*,⁵⁴⁴ the ICC promulgated “incentive per diem” rules designed to provide an economic incentive for railroads to promptly return boxcars to their owners. The procedures employed by the agency somewhat exceeded those specified in 5 U.S.C. § 553 for informal rulemaking, but were somewhat less than the formal rulemaking procedures identified in §§ 556 and 557. The Interstate Commerce Act provides that the ICC “may, after hearing,” *inter alia*, promulgate various rules affecting rail transportation, including use of boxcars.⁵⁴⁵ Various railroads challenged the rules on the ground that formal procedures should have been utilized.

The U.S. Supreme Court acknowledged that the words “on the record” of § 553(c) are not words of art; often statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings. Moreover, the APA neither limits nor repeals additional procedural requirements to those specified in the APA, such as those imposed by the “after hearing” language at issue here.⁵⁴⁶

But the Court held that the meaning of a term such as “hearing” will vary depending upon whether it is found in the context of statutory pro-

visions involving adjudication or rulemaking. If the former, it is more likely that formal procedures will be required. If the latter, it is a rare case in which formal procedures will be mandated.

Even the modest procedural hurdles of § 553 do not apply to interpretive rules, general statements of policy or procedural rules, or when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. Even if §§ 556 and 557 are triggered because the rulemaking statute is interpreted to require § 553(c) “on the record” procedures, nevertheless § 556(d) allows the submission of the evidence in written form if the parties will not be “prejudiced thereby.” As a result of *United States v. Florida East Coast Railway Co.*, most agency ratemaking is through informal, legislative, notice-and-comment procedures.

For formal rulemaking, utilizing the “trial-type” procedures in an “on the record” proceeding pursuant to 5 U.S.C. §§ 556 and 557, the scope of review is whether the agency’s decision is supported by “substantial evidence.”⁵⁴⁷ The APA is silent as to what the appropriate scope of review is for informal or hybrid rulemaking. Courts ordinarily apply the “arbitrary or capricious” standard.⁵⁴⁸

Under 5 U.S.C. § 554(a), “every case of adjudication required by statute to be determined on the record after opportunity for agency hearing” requires formal, trial-type procedures under §§ 556 and 557, unless it falls within one of the exemptions specified by statute. The scope of review for formal adjudication is “substantial evidence.”

Almost 90 percent of agency actions taken with respect to individuals are done in the context of informal adjudication. Although the agency need not prepare a contemporaneous record for purposes of potential judicial review, many now do. Here again, the scope of review is “arbitrary and capricious.”

As explained below, *de novo* judicial review under 5 U.S.C. § 706(2)(E) has been circumscribed by the decision of the U.S. Supreme Court in *Citizens to Preserve Overton Park v. Volpe*,⁵⁴⁹ to two situations: (1) where agency fact-finding was inadequate; and (2) where new factual issues are raised in actions for judicial enforcement of agency sanctions.

An administrative agency is free to apply a new principle retroactively in an adjudicatory proceeding. It need not utilize rulemaking as the sole means of announcing new policy on a prospective basis.

⁵⁴⁴ 410 U.S. 224 (1973).

⁵⁴⁵ 49 U.S.C. § 1(14)(a).

⁵⁴⁶ 5 U.S.C. § 559.

⁵⁴⁷ 5 U.S.C. § 706(2)(E).

⁵⁴⁸ 5 U.S.C. § 706(2)(A).

⁵⁴⁹ 401 U.S. 402 (1971).

4. Judicial Review of Administrative Agency Action

Judicial review of administrative agency findings of questions of fact is governed by the substantial evidence rule. The substantial evidence rule originated in the 1912 U.S. Supreme Court decision of *ICC v. Union Pacific R. Co.*⁵⁵⁰ Substantial evidence is more than a mere scintilla. It is such evidence as a reasonable mind might accept to support a conclusion. Mere uncorroborated hearsay or rumor is not substantial evidence. It is such evidence as would be sufficient to justify a refusal to direct a verdict if the case were before a jury.

The substantial evidence standard has since been codified in the APA.⁵⁵¹ In determining whether an agency decision is supported by substantial evidence, courts must evaluate the whole record in its entirety, not merely those portions on which the agency relied.

Judicial review of factual conclusions is essential as a means of checking agency abuse of discretion. Yet *de novo* review is impractical for the bulk of agency decisions. They are simply too numerous and complex. The substantial evidence standard exists as a compromise between total judicial deference and *de novo* review.

The “clearly erroneous” standard, which applies to appellate review of trial court findings, differs from the substantial evidence standard of review of administrative agency decisionmaking. The latter is a narrow standard of review, thereby permitting agencies greater discretion than accorded trial courts. The technical rules of evidence (including in particular the hearsay rule and its multitude of exceptions) are generally inapplicable in administrative proceedings.

The APA provides that “the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions.” Formal rulemaking and formal adjudication under §§ 556 and 557 are subject to the substantial evidence test. Presumably, then, agency decisions not subject to §§ 556 and 557 or otherwise “on the record” are subject to reversal or remand if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” These criteria relate to whether the decision was based on relevant factors, or whether it constituted a clear error of judgment. Few courts have invalidated agency action on the ground that it was a clear error of judgment. This standard essentially requires a party to persuade the court that the agency’s decision has no rational basis—a difficult burden to

carry. Of course, no agency decision can sustain judicial scrutiny if it is unconstitutional.

The APA requires a reviewing court to overturn agency actions deemed to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The U.S. Supreme Court, in *Citizens to Preserve Overton Park v. Volpe*,⁵⁵² emphasized that this standard of review is a narrow one and that the courts are not to substitute their judgment for that of the agency. In essence, one must prove that the agency’s action is without a rational basis, a difficult task given the talents of agency opinion writers.⁵⁵³

In *Overton Park v. Volpe*,⁵⁵⁴ the Secretary of Transportation authorized construction of an Interstate highway through Overton Park in Memphis, Tennessee. The highway would consume 26 acres of the 343-acre city park. The Secretary made no findings explaining his decision and its consistency with federal statutes, but provided litigation affidavits asserting that the decision was his and was supportable by law. Federal legislation prohibited federal highway construction through public parks where a “feasible and prudent” alternative route exists.⁵⁵⁵ The Supreme Court required the case to be remanded so that the full record before the DOT Secretary at the time he rendered his decision could be evaluated. A 27-day trial in the federal district court followed. At trial, it was revealed that the Secretary had never made the corridor determination the statute required, and even if he had done so, it was based on an incorrect view of the law. The case was remanded back to the U.S. DOT for the appropriate findings. Ultimately, Secretary Volpe concluded that building the Interstate highway through the park would not satisfy the statutory standards and could not be approved.⁵⁵⁶

Subsequently, the Supreme Court would hold that, “It is quite plain from our holding in *Citizens to Preserve Overton Park v. Volpe* that *de novo* re-

⁵⁵² 401 U.S. 402 (1971).

⁵⁵³ For example, a FHWA regulation banning the use of radar detectors in CMVs held not formulated in an arbitrary and capricious manner in *Radio Ass’n on Defending Airwave Rights v. USDOT*, 47 F.3d 794 (6th Cir. 1995). NHTSA rulemaking on vehicle fuel economy was held not arbitrary and capricious because its statutory interpretation of the Energy Policy and Conversation Act of 1975 was a reasonable accommodation of competing factors in *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990).

⁵⁵⁴ 401 U.S. 402 (1971).

⁵⁵⁵ 23 U.S.C. § 138.

⁵⁵⁶ PETER STRAUSS, TODD RAKOFF & CYNTHIA FARINA, *GELLHORN AND BYSE’S ADMINISTRATIVE LAW* 995–96 (10th ed. 2003).

⁵⁵⁰ 222 U.S. 541 (1912).

⁵⁵¹ 5 U.S.C. § 706(2)(E) (where the proceeding is subject to 5 U.S.C. §§ 556 and 557 or otherwise “on the record”).

view is appropriate only where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions.⁵⁵⁷ *De novo* review would be available only if the agency's action was "unwarranted by the facts," *i.e.*, if it was adjudicatory in nature and its factfinding was inadequate, or when issues not before the agency are proffered in a proceeding to enforce nonadjudicatory agency action.⁵⁵⁸ Hence, proper agency due process is essential to sustaining agency action.

Overton Park has become a landmark case of both Constitutional Law and Administrative Law, for it established the importance of the administrative record that documents the basis for the decision.⁵⁵⁹ Both *Overton Park* and the cases that followed establish the standards by which that record—the "whole record"—will be judged and what it might contain. There remains considerable controversy about what should be in the record. Modern agency practice is to include everything relevant to the decision. Transparency is thereby enhanced.

Under the APA, in formal adjudicative or rule-making proceedings, "[t]he transcript of testimony and exhibits, together with all papers...filed...constitutes the exclusive record for decision."⁵⁶⁰ Hence, agency decisions utilizing formal procedures must be based on the record. However, an agency may take official notice of matters of common knowledge not within the record, *i.e.*, facts that are commonly known or that can be referred to by administrative agencies. Ordinarily such facts must be set forth in the record in formal rulemaking or adjudication, and opposing parties must be given an opportunity to rebut them.⁵⁶¹

For example, in *United States v. Abilene & Southern Railway, Co.*,⁵⁶² the ICC set joint rates among a bankrupt railroad and 40 other railroads, utilizing the annual reports of the 40 rail carriers. The Abilene & Southern Railway argued that the ICC's order was void, since it relied upon information not formally introduced as evidence.

Agency decisionmaking must be based on the evidentiary record, and nothing can be considered as evidence that has not been properly introduced

as such. Such a rule is necessary to protect the rights of the parties in an adversary proceeding. The Supreme Court held that the ICC may not rely on information not introduced as evidence.

However, in *Market Street Railway v. Railroad Commission*,⁵⁶³ the Supreme Court held that although due process requires that the agency base its conclusions upon matters in the record and that parties have an opportunity to rebut the conclusion, absent any demonstration of error or prejudice, the reliance upon a matter of incidental importance (here, reports filed subsequent to the hearing) is not error. This case involved a decision of the California Railroad Commission to reduce the fares of the San Francisco Market Railway from 7 to 6 cents. The Railway contended the Commission's order was invalid, because it evaluated the evidence without the assistance of expert testimony, and its decision was based on evidence outside the record.

An agency action may be attacked on grounds that it is *ultra vires*,⁵⁶⁴ or has serious procedural infirmities.⁵⁶⁵ Of course no agency decision can sustain judicial scrutiny if it is unconstitutional.⁵⁶⁶

Section 15(g)(5) of the Model State APA provides for judicial reversal of agency decisions that are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." However, the 1982 Model Act revokes the "clearly erroneous" standard in favor of the federal "substantial evidence" test. Where the agency decision "substantially affects a fundamental vested right," some state courts have exercised their independent judgment as to the evidence.⁵⁶⁷

Between the extremes of *de novo* review and strong deference to administrative decisionmaking, some courts have taken a "hard look" at the agency's decisional process, ensuring that they have considered all relevant issues and policies and taken a good look at the facts, while allowing the agency the discretion to determine policy. It is the agency's process and its justification or rationale for its selection of a policy alternative that becomes the focus of this approach.⁵⁶⁸

Many jurists have conceded the pragmatic realities posed by judicial review of highly complex technical issues for which administrative agencies have greater expertise. For example, in *Motor Ve-*

⁵⁵⁷ *Camp v. Pitts*, 411 U.S. 138, 141 (1973) (citations omitted).

⁵⁵⁸ 5 U.S.C. § 706(2)(F).

⁵⁵⁹ See Peter Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 U.C.L.A. L. REV. 1251 (1992).

⁵⁶⁰ 5 U.S.C. § 556(e).

⁵⁶¹ *Id.*

⁵⁶² 265 U.S. 274 (1924).

⁵⁶³ 324 U.S. 548 (1945).

⁵⁶⁴ 5 U.S.C. § 706(2)(C).

⁵⁶⁵ 5 U.S.C. § 706(2)(D).

⁵⁶⁶ 5 U.S.C. § 706(2)(B).

⁵⁶⁷ *Strumsky v. San Diego Employees Ret. Ass'n*, 520 P.2d 29 (Cal. 1974).

⁵⁶⁸ *Scenic Hudson Pres. Conference v. FPC* (I), 354 F.2d 608 (2d Cir. 1965).

hicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,⁵⁶⁹ the U.S. Supreme Court observed the inherent problems faced in assessing the wisdom of seat belt regulation. Over the course of 60 ratemaking notices beginning in the mid-1960s, the U.S. DOT issued various rules requiring installation of mobile seat belts. Passive restraints were, under the rules, to be installed in large cars in 1982 and in all cars by 1985. However, in 1981, President Reagan's Secretary of Transportation, Drew Lewis, announced that the rulemaking would be reopened because of the deleterious economic circumstances in which the domestic automobile industry found itself. The U.S. DOT's National Highway Traffic Safety Administration (NHTSA) rescinded the earlier rules on grounds that it could no longer find that significant safety benefits would be realized therefrom. In 1977, it had anticipated that air bags would be installed in 60 percent of new vehicles and automatic seat belts in 40 percent. By 1981, it appeared that seat belts would be installed in 99 percent and could be detached easily. Because of the \$1 billion cost that would be imposed upon the industry by the rule, the NHTSA found that anticipated safety benefits would not warrant the expenditure.

The U.S. Supreme Court held the rule rescission arbitrary and capricious. Rule rescission or modification is significantly different from a failure to act. Where an agency changes direction, it must provide a reasoned analysis for the change. While an agency need not promulgate rules to last forever and must be given sufficient latitude to adjust its policies to comport with contemporary needs, deregulation is not always in the best public interest.

The Court held that the scope of review under the arbitrary and capricious standard is narrow; the courts may not substitute their judgment for that of the agency. However, the agency must review the relevant evidence and provide a satisfactory explanation of its result, including a rational connection between the facts and its conclusion. An agency rule could be deemed arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence...or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."⁵⁷⁰

NHTSA failed to consider what benefits might be realized by an "air bag only" rule. Although a rulemaking will not be deemed inadequate merely because it failed to consider "every alternative device

and thought conceivable to the mind of man,"⁵⁷¹ the air bag is a technological alternative within the scope of the existing rule. Also, NHTSA was too quick to dismiss the benefits of automatic seat belts. An agency that changes its course must supply a reasoned analysis.

The test on review for an agency's factual findings is often whether they are supported by substantial evidence, as discussed above. In making factual determinations, the findings of the agency, if supported by substantial evidence, are conclusive. It is not the task of the court to substitute its judgment of factual questions for those of the agency if they are supported by evidence. But issues of statutory interpretation are for the judiciary to resolve giving appropriate weight to the initial legal determinations of the agency.⁵⁷²

In reviewing agency interpretations of their enabling statutes, many modern courts apply the rational basis test.⁵⁷³ Under it, courts uphold the agency's statutory findings, if they are reasonable, even where the court might have construed the language of the statute differently. But some courts refuse to accord an agency's legal conclusions as great a deference as they ascribe to its factual findings, insisting that questions of law are for the independent judgment of the reviewing court.⁵⁷⁴

In *Chevron, Inc. v. Natural Resources Defense Council*,⁵⁷⁵ the U.S. Supreme Court established a policy of giving broad deference to administrative agencies' interpretation of their statutes. It held that if the intent of Congress is clear in the statute, the court and the agency are bound to give effect to the express intent of Congress. If Congress explicitly or implicitly left a gap in the provisions of the statute for the agency to fill, the agency may clarify the provisions by regulation. The gap is deemed to be an express delegation of authority to the agency, and a court may not on review substitute its own construction of the statutory provision. The regulation is given controlling weight unless it is "arbitrary, capricious, or manifestly contrary to the statute."⁵⁷⁶

Statutory ambiguity and unilluminating legislative history provide the agency with broad discretion in implementing regulations, and agencies are not bound to follow prior agency interpretation. Challenges to agency construction of statutory pro-

⁵⁷¹ *Id.* at 57, quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. at 551.

⁵⁷² *NLRB v. Hearst Publ'ns*, 322 U.S. 111 (1944).

⁵⁷³ *Gray v. Powell*, 314 U.S. 402 (1941).

⁵⁷⁴ *See Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

⁵⁷⁵ 467 U.S. 837 (1984).

⁵⁷⁶ *Id.* at 844.

⁵⁶⁹ 463 U.S. 29 (1983).

⁵⁷⁰ *Id.* at 43.

visions based on the wisdom of the agency's policy must fail if the agency has made a reasonable and legitimate policy choice.

Agencies have frequently been given authority to promulgate regulations, the violation of which is a statutorily created criminal offense. The legislature mandates the imposition of criminal sanctions, a task that cannot be performed by an administrative agency. But when an agency promulgates regulations, the violations of which may lead to the imposition of criminal penalties, it must do so with a reasonable level of precision.

For example, in *Boyce Motor Lines, Inc. v. United States*,⁵⁷⁷ the ICC promulgated a regulation that required drivers of vehicles containing dangerous or hazardous materials to "avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." The statute imposed penalties of fines and/or imprisonment for a knowing violation. Boyce Motor Lines was charged with transporting carbon bisulphide through the Holland Tunnel in New York, a congested thoroughfare, on three occasions, on the third of which there was an explosion of the material, injuring some 60 persons.

The U.S. Supreme Court upheld the regulation. It acknowledged that criminal statutes must be sufficiently definite to give notice to the public, so that their prohibitions may be avoided, and to allow one charged with an offense arising thereunder to know with what he is being charged. Nevertheless, the English language is inherently ambiguous and cannot command the precision of mathematics. Hence, only a reasonable degree of certainty can be expected. Some courts have insisted that agencies adopt more specific standards for the performance of their statutory responsibilities—that they narrow or crystallize their area of discretion.⁵⁷⁸

Regulations that are properly promulgated and within the scope of authority delegated have the force and authority of law. Stated differently, a rule or regulation has the same effect as the statute upon which it is based, so long as the rule of regulation is not *ultra vires* of jurisdiction conferred by the statute, and its method of promulgation does not suffer from procedural infirmities. And, as a general principle, a regulation is binding upon the agency that promulgated it.

The U.S. Supreme Court evaluated the ICC's ratemaking power in *Arizona Grocery Co. v. Atchison*,

Topeka & Santa Fe Railway.⁵⁷⁹ In 1920, railroads charged \$1.045 per 100 lb of sugar between Phoenix and California. Shippers objected, and the ICC on July 26, 1922, ordered the rates lowered to \$0.965 and awarded reparations. Later that year, shippers again challenged these rates as unreasonable and sought reparations. In 1925, the commission ordered the rates reduced to \$0.73 and awarded reparations on shipments after July 1, 1922.

The Court held that the ICC may not award reparations with respect to rates charged that were set at a level approved by it. The Court acknowledged that the ICC's ratemaking powers were comprehensive, and when it declared a rate to be just and reasonable, it spoke as the legislature, and its pronouncement has the force of a statute.

Nevertheless, the ICC had earlier declared the \$0.965 rate to be just and reasonable. The ICC may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed. The Commission may not order reparations when it has declared the earlier, higher rate to be lawful.

Arizona Grocery is usually cited in support of the proposition that an agency must ordinarily follow its own rules, until they are properly amended or repealed. Many cases have held that an agency must abide by the rules it promulgates when it subsequently engages in *ad hoc* adjudication.⁵⁸⁰

Procedural requirements that agencies must employ for adjudication and rulemaking have five sources:

- The *organic statute* creating the agency, which may specify the procedures it is to utilize;
- *Procedural regulations* promulgated by the agency itself;
- The *Administrative Procedure Act*, which establishes procedural requirements for most federal agencies;
- *Federal common law* created by judges to facilitate judicial review; and

⁵⁷⁹ 284 U.S. 370 (1932). Prior to 1906, the ICC had jurisdiction to declare rates unreasonable and award reparations for sums unlawfully collected, but it could not prescribe rates for the future. In 1906, it was given the latter power. All railroad rates must be filed with the ICC, which determines if they are "just and reasonable." In 1920, the Commission was given authority to prescribe minimum as well as maximum rates.

⁵⁸⁰ See, e.g., *United States v. Caceres*, 440 U.S. 741 (1979).

⁵⁷⁷ 342 U.S. 337 (1952).

⁵⁷⁸ *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

- The *United States Constitution*, particularly its Fifth and Fourteenth Amendment due process requirements, as interpreted by the courts.

Constitutional due process requirements may create a hearing obligation where a “relatively small number of persons are exceptionally affected, in each case upon individual grounds....”⁵⁸¹ But conversely, where a large number of persons are affected by an agency action essentially analogous to that performed by the legislature, a formal hearing is not required.⁵⁸² The U.S. Supreme Court has noted that there is “a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards on the other hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.”

For example, in *Southern Railway v. Virginia*,⁵⁸³ the U.S. Supreme Court reviewed a decision of the highway commissioner of the Commonwealth of Virginia, who, acting under authority of Virginia law, but without notice or hearing, ordered the Southern Railway to eliminate a grade crossing and construct an overhead passage. The Southern Railway refused, arguing that the procedures employed failed to satisfy the due process requirements of the Fourteenth Amendment. The statute was silent as to the availability of judicial review.

The Court concluded that the summary decrees of the highway commissioner ordering bridge construction were inconsistent with Fourteenth Amendment due process obligations. Clearly, a requirement to expend money to eliminate a railway grade crossing and construct a bridge in its place constitutes the taking of property. Whatever the summary ability of the legislature to confiscate property, there is a significant difference where that power is delegated to an administrative official. Since the statute conferring such powers includes no provision for a hearing or judicial review, it constitutes the delegation of arbitrary and unconstitutional authority.

⁵⁸¹ *Londoner v. Denver*, 210 U.S. 373 (1908).

⁵⁸² *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). Where a large number of individuals are affected by agency action, it is impractical that they each be given a hearing. The machinery of government would grind to a halt if all aggrieved parties were given a formal hearing.

⁵⁸³ 290 U.S. 190 (1933).

I. JUDICIAL REVIEW

1. Standing

Article III of the Constitution vests review of governmental decisions in the courts.⁵⁸⁴ In the seminal decision of *Marbury v. Madison*,⁵⁸⁵ the U.S. Supreme Court held that judicial review is the power to review legislation/executive acts and declare such laws unconstitutional: “It is emphatically the province and duty of the judicial department to say what the law is.” This power to interpret the Constitution and declare the acts of the coordinate branches of government unconstitutional is enormous power indeed. Yet, judicial review also is limited to justiciable “cases or controversies” in which plaintiffs have standing to seek review.

Standing is a threshold question in every federal case, determining the authority of the federal court to entertain the suit.⁵⁸⁶ Article III of the United States Constitution limits judicial power to the resolution of “cases and controversies.” One who seeks redress in federal courts must demonstrate that: (1) he personally has suffered actual or threatened injury as a result of the defendant’s putatively illegal conduct;⁵⁸⁷ (2) the injury is fairly traceable to the defendant’s actions; and (3) that such injury is likely to be redressed by the re-

⁵⁸⁴ U.S. CONST. art. III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another state;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects....

⁵⁸⁵ 5 U.S. (1 Cranch.) 137 at 177 (1803).

⁵⁸⁶ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

⁵⁸⁷ *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). See also *Reynolds v. McInnes*, 380 F.3d 1303 (11th Cir. 2004) (non-African American employees had standing to bring civil contempt action against the Alabama DOT on the basis of a consent decree imposing race-conscious standards).

quested relief.⁵⁸⁸ These requirements tend to assure that an actual case or controversy exists, and that the court will not be adjudicating some abstract issue. The dispute must be presented in an adversary context and in a form capable of judicial resolution.

*Leibovitz v. New York City Transit Authority*⁵⁸⁹ involved a transit employee who alleged she suffered emotional distress because of sexual harassment of other employees. Though the U.S. Court of Appeals for the Second Circuit denied her relief, it engaged in a detailed discussion of Article III standing jurisprudence.⁵⁹⁰ Diane Leibovitz was one of 40 Deputy Superintendents of the 44,000 employees of the New York City Transit Authority. She became emotionally distressed as she heard the several complaints of other female employees of incidents of sexual harassment. She claimed she began to suffer a major depressive disorder because of her inability to secure a remedy for the women who had been subjected to a hostile work environment. The jury found that Leibovitz herself had not been the subject of sexual harassment, nor had she witnessed it firsthand. The jury found, however, that Ms. Leibovitz suffered emotional distress as a result of the sexual harassment of other women in her shop, and awarded her damages based on her hostile work environment claim.⁵⁹¹ The Second Circuit concluded that the jury's finding that Leibovitz was emotionally traumatized as a result of her workplace being permeated by sexual harassment was sufficient to establish Article III standing.⁵⁹² It mattered not that she suffered nontangible, noneconomic injury, nor that her injury may have been the indirect result of the sexual harassment of other women, for the Court found her injury to be distinct and palpable, and that it was remediable through a damage award. Thus, she had standing.⁵⁹³

⁵⁸⁸ *Allen v. Wright*, 468 U.S. 737, 751 (1984). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the U.S. Supreme Court identified several requirements for standing:

- *Injury in Fact*: The plaintiff must suffer "concrete" harm, not "vague, uncertain harm." Such harm can be "physical, economic or deprivation of a particular right."
- *Causal Connection*: If the sought relief were granted, would harm against plaintiff continue?
- *Redressability*: Even if the plaintiff sought relief they wanted, would they secure the result they are seeking?

⁵⁸⁹ 252 F.3d 179 (2d Cir. 2001).

⁵⁹⁰ See Christopher O'Connor, *Stop Harassing Her or We'll Both Sue: Bystander Injury Sexual Harassment*, 50 CASE. W. RES. L. REV. 501 (1999), which discusses the lower court decision in her favor.

⁵⁹¹ 252 F.3d at 182–83.

⁵⁹² 252 F.3d at 184–85.

⁵⁹³ 252 F.3d at 185.

Statutes may also create standing. Where a statute clearly reflects an intent to protect a competitive interest, the protected party has standing to bring suit to require compliance.⁵⁹⁴ But in *Area Transportation, Inc. v. Ettinger*,⁵⁹⁵ a federal district court held that a school bus operator lacked standing to force FTA to declare the public transit provider ineligible for future federal transit assistance grants and require the recipient to repay the grants it received for each year it was in violation. In order to establish standing under the APA, a plaintiff must prove: (1) he or she suffered an "injury in fact"—an invasion of a concrete and particularized legally recognized interest; (2) there was a causal connection between defendant's action and plaintiff's injury, such that the injury is fairly traceable to defendant's action and not caused by some third party not before the court; and (3) a favorable decision will likely redress the injury. The court found that the private carrier failed to prove its injury was fairly traceable to the FTA's decision, and that the remedy sought would not redress its injury.

State and federal law diverges on the issue of whether taxpayers have standing to challenge governmental actions as taxpayers. In general, no statutory authorization is necessary for a "taxpayer's action" in a state court. The right of a taxpayer to sue to restrain the alleged improper expenditure of public funds derives from the common law. "Of the right of resident tax payers to invoke the interposition of a court...to prevent an illegal disposition of [public] moneys...or the illegal creation of a debt...there is at this day no serious question. The right has been recognized by the state courts in numerous cases."⁵⁹⁶ However, as an ordinary matter, suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's "interest in the moneys of the Treasury...is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of

⁵⁹⁴ *City of Evanston v. Reg'l Transp. Auth.*, 825 F.2d 1121, 1123 (7th Cir. 1987); *S. Suburban Safeway Lines v. City of Chicago*, 416 F.2d 535, 539 (7th Cir. 1969); *Bradford Sch. Bus Transit v. Chicago Transit Auth.*, 537 F.2d 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977). However, some courts have found that the Federal Transit Act was intended to benefit the public at large and not create special benefits for particular classes of persons. See *e.g.*, *ABC Bus Lines v. Urban Mass Transp. Admin.*, 831 F.2d 360 (1st Cir. 1987), and *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982).

⁵⁹⁵ 75 F. Supp. 2d 862, 1999 U.S. Dist. LEXIS 18503 (N.D. Ill. 1999); *aff'd*, *Area Transp. Inc. v. Ettinger*, 219 F.2d 671 (7th Cir. 2000).

⁵⁹⁶ *Crampton v. Zabriskie*, 101 U.S. (11 Otto) 601, 609, 25 L. Ed. 1070 (1880).

the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention].⁵⁹⁷

One may satisfy the personal injury requirement of standing by a showing of economic or noneconomic loss, including injuries to aesthetic values or environmental well-being.⁵⁹⁸ For example, in *Hatmaker v. Georgia Department of Transportation*,⁵⁹⁹ a group of citizens complained that the Georgia DOT had failed to research the historic value of a certain oak tree (the “Friendship Oak”) when it approved a road-widening project, in violation of Section 4(f) of the Department of Transportation Act of 1966,⁶⁰⁰ and Section 18 of the Federal Highway Act of 1968.⁶⁰¹ The federal district court held plaintiffs had satisfied both the economic and noneconomic strands of standing. They had invested more than \$8,000 in maintaining the health of the Friendship Oak; they visited the tree to stand in awe of its natural beauty, decorated it with Christmas lights, and studied the tree in their capacity as licensed arborists. They also proved an injury fairly traceable to the alleged unlawful conduct—the failure of Georgia DOT to research adequately the history of the Friendship Oak had led the Secretary of U.S. DOT to make a decision in violation of Section 4(f). Thus, all elements of standing were satisfied.⁶⁰²

2. Preclusion

Under the APA, “A person suffering legal wrong because of agency action, or adversely affected or aggrieved...is entitled to judicial review thereof.”⁶⁰³ However, the judicial review provisions are inapplicable where “statutes preclude judicial review....”⁶⁰⁴ Preclusion statutes are ordinarily narrowly construed.

The APA allows judicial review except to the extent statutes preclude review, or the agency’s determination is committed to its discretion by law.⁶⁰⁵ Preclusion of review is limited to those situations where agency action is reasonable rather than arbitrary. Thus, although an agency action may be

committed to its discretion by law, review is permitted where the agency abuses its discretion.⁶⁰⁶

The APA has been construed to mean that agency decisionmaking may be precluded if committed to its discretion by law only if the exercise of discretion is reasonable. Stated differently, the courts may properly reverse agency action for abuse of discretion. The exception for action committed to agency discretion has been described as rather narrow, and exists in those rare circumstances where the “statutes are drawn in such broad terms that in a given case there is no law to apply.”⁶⁰⁷ There appears to be a strong presumption in favor of judicial review.⁶⁰⁸

3. Ripeness

The case-or-controversy requirement of Article III requires that the action be “ripe” for judicial review. The purpose of the ripeness doctrine “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”⁶⁰⁹

Only final agency decisions are subject to review. When one seeks discretionary relief from the judiciary for an agency action, the courts may resist review until the controversy is “ripe.” This avoids premature adjudication of disputes that have not reached sufficient concreteness to warrant judicial interference, and avoids disruption of agency decisionmaking until the impact thereof has run its course.

In 1994, Michael Cuffley, a representative of the Missouri Realm of the Knights of the Ku Klux Klan submitted an application with the Missouri Highway and Transportation Commission to participate in the state’s Adopt-A-Highway program. The Adopt-A-Highway program is designed to reduce the state’s litter collection expenses by enlisting volunteers to help. The state neither approved nor denied the Klan’s application, but instead filed an action in federal district court seeking a declaratory judgment that would allow it to deny the Klan’s application; the Klan counterclaimed, seeking a declaratory judgment and writ of mandamus or-

⁵⁹⁷ *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923); *ASARCO v. Kadish*, 490 U.S. 605, 613; 109 S. Ct. 2037; 104 L. Ed. 2d 696 (1989).

⁵⁹⁸ See *Sierra Club v. Morton*, 405 U.S. 727 (1972); *United States v. SCRAP*, 412 U.S. 669 (1973).

⁵⁹⁹ 973 F. Supp. 1047 (M.D. Ga. 1995).

⁶⁰⁰ 49 U.S.C. § 303.

⁶⁰¹ 23 U.S.C. § 138.

⁶⁰² *Hatmaker*, 973 F. Supp. at 1051–52.

⁶⁰³ 5 U.S.C. § 702.

⁶⁰⁴ 5 U.S.C. § 701(a)(1).

⁶⁰⁵ 5 U.S.C. § 701(a)(1)&(2).

⁶⁰⁶ 5 U.S.C. § 706(2)(A).

⁶⁰⁷ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁶⁰⁸ See, e.g., *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958).

⁶⁰⁹ *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 at 200 (1983), Citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1951).

dering the Highway Commission to allow it to participate in the program. The district court granted the Klan's motion and awarded it attorney's fees.⁶¹⁰

On appeal, the Eighth Circuit, in *Missouri Highway and Transportation Commission v. Cuffley*,⁶¹¹ concluded that, because the State had never acted on the Klan's application, "the critical facts involved in this dispute are hypothetical and speculative" and therefore not ripe for review.⁶¹² "Until the State acts on the Klan's application and creates a concrete record for judicial consideration, this dispute is simply not ripe for review," observed the court. "If the State is unsure how to handle the Klan's application, it should seek the advice of its legal staff, not the advice of a federal judge."⁶¹³

Nevertheless, the modern trend has been to relax the ripeness prohibition of discretionary judicial review. Where a party is faced with an agency decision having immediate adverse effects, and the consequences for noncompliance are severe, courts have been willing to open the doors to judicial review.

4. Primary Jurisdiction

Primary jurisdiction is closely related to the doctrine of exhaustion. Exhaustion applies whenever the dispute is first cognizable solely in an administrative agency.⁶¹⁴ The courts will defer action until the agency has concluded its proceedings. Primary jurisdiction involves a dispute that, although originally cognizable by the judiciary, requires resolution of certain issues within the special competence of an administrative agency. Here, judicial review is deferred until these issues have been first resolved by the agency.

The advantages of the application of the primary jurisdiction doctrine are:

- *Agency expertise.* The agency has been entrusted by the legislative branch to regulate a particular industry or area of public concern and has developed some expertise in the regulated affairs and application of the governing statute. The insights gained through agency experience and specialization may be useful in resolving complex issues of law or fact; and

- *Uniformity.* Allowing the administrative agency an opportunity to decide all major issues surrounding the substance of its jurisdiction encourages uniformity of decisionmaking, as well as stability and predictability in the law. These are objectives the legislature probably desired when it established the agency.

Nevertheless, referring questions to administrative agencies that the courts must ultimately review may only consume unnecessary time and money, and lead to less efficient and less economical decisionmaking.

In *United States v. Western Pacific Railroad*,⁶¹⁵ Western Pacific Railroad brought an action against the United States in the court of claims for payment for the transportation of napalm bombs without fuses. The Railroad argued that the napalm constituted "incendiary bombs" for which a higher tariff applied, rather than the classification of "gasoline in steel drums" as maintained by the United States, for which a lower tariff applied. The court of claims held for the United States. The Railroad argued that the question is one to be resolved by the ICC. The U.S. Supreme Court held that the court of claims should have applied the doctrine of primary jurisdiction and referred the issue of rail tariff interpretation to the ICC for its initial determination.

Early cases relied upon the desire to encourage uniformity of treatment of issues within the specialized competence of administrative agencies as a principal rationale for primary jurisdiction.⁶¹⁶ This avoids one string of agency precedent, and a separate line or lines of federal court precedent.

More recently, courts have stressed agency expertise and specialized knowledge as a rationale for the primary jurisdiction doctrine. The complex and technical issues of tariff interpretation presented here are well suited for agency disposition. The agency, rather than the courts, has familiarity with issues such as why a higher tariff was ascribed to bombs than to gasoline, and whether these reasons would be applicable to the instant shipment. Courts, which do not make rates, cannot discern precisely all the factors that comprise the rate-making process.

The rationale of the agency expertise as a reason for applying the doctrine of primary jurisdiction has led to the creation of an exception where only a question of law is presented and no factual issue is in dispute. Thus, preliminary resort to the ICC was not deemed necessary in *Great Northern Railway*

⁶¹⁰ *Mo. Highway & Transp. Comm'n v. Cuffley*, 927 F. Supp. 1248 (E.D. Mo. 1996).

⁶¹¹ 112 F.3d 1332 (8th Cir. 1997).

⁶¹² 112 F.3d at 1337.

⁶¹³ 112 F.3d at 1338.

⁶¹⁴ For example, employment discrimination claims must first be brought before the EEOC or the corresponding state agency before filing suit. Paul Stephen Dempsey, *Transit Law*, 5 SELECTED STUDIES 10-18.

⁶¹⁵ 352 U.S. 59 (1956).

⁶¹⁶ See *Tex. & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

Co. v. Merchants Elevator Co.,⁶¹⁷ where the Court held that, “The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to undisputed facts.”⁶¹⁸

5. Deprivation of Individual Rights: Section 1983 Actions

The vehicle by which many constitutional rights violations are alleged against state and local governments is § 1983 of Title 42 of the U.S.C.⁶¹⁹ The Civil Rights Act of 1871 (now codified at 42 U.S.C. § 1983) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress.⁶²⁰

⁶¹⁷ 259 U.S. 285 (1922).

⁶¹⁸ 259 U.S. at 294. Primary jurisdiction was not applied in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), which held that courts have applied the doctrine of primary jurisdiction even where common law remedies exist and the agency lacks jurisdiction to resolve the controversy on grounds that uniformity and consistency of decision making are thereby enhanced. In this case, considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Civil Aeronautics Board. The issues here of fraudulent misrepresentation fall within the traditional competence of the judiciary.

Primary jurisdiction was applied in *Far East Conference v. United States*, 342 U.S. 570 (1952), where the Court held the questions posed under the Shipping Act are highly technical and complex. They require the exercise of a high degree of expertise by those who, like the members of the FMB, are highly trained and experienced in such matters. In cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. Uniformity and consistency of decision making are enhanced by preliminary resort to administrative agencies better equipped than courts to gain insight by specialization and experience.

⁶¹⁹ See *Dempsey*, *supra* note 614, at 10–12.

⁶²⁰ 42 U.S.C. § 1983. See, e.g., *Monell v. Dep’t of Social Services of the City of N.Y.*, 436 U.S. 658, 691 (1978). Allegations of racial discrimination are handled under § 1981; constitutional violations other than racial discrimination are handled under § 1983. *Gorman v. Roberts*, 909 F. Supp. 1479 (M.D. Ala. 1995) (white Alabama DOT highway employee did not have a § 1981 claim because he

In order to prevail under § 1983, a plaintiff must prove:

1. He held a constitutionally protected right;
2. He was deprived of this right in violation of the Constitution;
3. The governmental authority intentionally caused this deprivation; and
4. The governmental unit acted under color of state law.⁶²¹

To determine whether a statute gives rise to a federal right enforceable under § 1983, the courts examine whether: (1) Congress intended the provision to benefit the plaintiff; (2) the right assertedly protected by the statute is not so amorphous as to strain judicial competence; and (3) the statute unambiguously imposes a mandatory, binding obligation upon the states.⁶²² If these criteria are satisfied, a presumption exists that § 1983 provides a remedy unless Congress intended to foreclose one.

Employing these criteria, the Seventh Circuit in *Indianapolis Minority Contractors Association v. Wiley*⁶²³ concluded that the statutory scheme created by ISTE and STURAA, though requiring that states expend at least 10 percent of federal funds with small business concerns owned and controlled by socially and economically disadvantaged individuals (DBEs), imposed an obligation on the states rather than creating entitlements upon individuals. Therefore, the claims that the Indiana DOT had improperly satisfied the DBE requirement by awarding contracts to “sham” or “front” companies owned by wealthy black businessmen who were not truly disadvantaged were not cognizable under § 1983.⁶²⁴

A local governmental entity may be held liable under § 1983 for: (1) an explicit policy that, when enforced, causes a constitutional deprivation; (2) a widespread practice that, though not authorized by law or express municipal policy, is so established as

failed to demonstrate he suffered discrimination based on his race).

⁶²¹ *Sims v. Mulcahy*, 902 F.2d 524, 538 (7th Cir. 1990), *cert. denied*, 498 U.S. 897 (1990); *Webb v. City of Chester*, 813 F.2d 824, 828 (7th Cir. 1987); *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990); *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1406 (5th Cir. 1995). The U.S. Supreme Court has rejected the defense that the “under color of” language applies only to conduct authorized and not forbidden by state law. *Monroe v. Pape*, 365 U.S. 167 (1961).

⁶²² *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 509–11 (1990).

⁶²³ 187 F.3d 743 (7th Cir. 1999).

⁶²⁴ 187 F.3d at 751.

to constitute a “custom or usage” with the force of law; or (3) a constitutional injury that was caused by a person with final policymaking authority.⁶²⁵

Section 1983 actions have been brought against state highway departments and regional transit agencies for a number of alleged constitutional violations, including advertising restrictions;⁶²⁶ employee drug testing;⁶²⁷ employee disciplinary actions, suspensions, or dismissals;⁶²⁸ and assault and battery or other abuses.⁶²⁹

In *Bivens v. Six Unknown Federal Narcotics Agents*,⁶³⁰ the U.S. Supreme Court held that, although not explicitly authorized by § 1983, federal officials may be sued for damages flowing from their denial of a person’s constitutional rights, implying a cause of action directly from the Constitution itself.⁶³¹ The Court held a plaintiff must show

⁶²⁵ *Allen v. Chicago Transit Auth.*, 2000 U.S. Dist. LEXIS 11499 (E.D. Ill. 2000).

⁶²⁶ Examples of such cases include *Maldonado v. Harris*, 370 F.3d 945 (9th Cir. 2004) (First Amendment challenge against California’s Outdoor Advertising Act); *Planned Parenthood Ass’n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) (claim brought under 1983 for denial of advertising); *Lebron v. WMATA*, 585 F. Supp. 1461 (D.D.C. 1984) (1983 claim brought for restrictions on advertising).

⁶²⁷ *Tanks v. Greater Cleveland Reg’l Transit Auth.*, 930 F.2d 475 (6th Cir. 1991) (1983 action brought against drug testing); *Moxley v. Reg’l Transit Servs.*, 722 F. Supp. 977 (W.D.N.Y. 1977) (1983 claim brought against drug testing); *Dykes v. SEPTA*, 68 F.3d 1564 (3d Cir. 1994) (1983 action brought challenging drug test).

⁶²⁸ *Morris v. WMATA*, 781 F.2d 218 (D.C. Cir. 1986).

⁶²⁹ *Ricciuti v. N.Y. City Transit Auth.*, 941 F.2d 119 (2d Cir. 1991) (1983 action brought against assault and battery by transit police); *Fisher v. WMATA*, 690 F.2d 1133 (D.C. Cir. 1982) (1983 action brought for arrest, search and seizure, and stripping of patron).

⁶³⁰ 403 U.S. 388 (1971). In *Bivens*, the plaintiff alleged that police officers entered and searched his apartment and arrested him on narcotics charges without a warrant and without probable cause.

⁶³¹ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The Court briefly summarized the facts of this case:

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner’s complaint alleged that on that day respondents, agents of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The agents manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the

(1) a constitutionally protected right, (2) an invasion of that right, and (3) that the requested relief is appropriate.⁶³²

A number of § 1983 actions against state and local governments have been dismissed under the *Rooker-Feldman* doctrine,⁶³³ which holds that federal courts (other than the U.S. Supreme Court) do not have jurisdiction to review state court decisions, or issues inextricably intertwined therewith. For example, in *Shooting Point v. Cumming*,⁶³⁴ a property owner brought suit against neighboring landowners and the resident engineer of the Virginia Department of Transportation (VDOT) for violating a 15-ft-wide easement for purposes of egress and ingress to Virginia Highway Route 622. The Fourth Circuit concluded:

The Virginia courts have clearly held that Shooting Point was required to obtain a commercial entrance permit and that, under the then prevailing law, Shooting Point was not entitled to that permit. Because the Virginia courts implicitly held that Shooting Point was properly subject to the VDOT regulations, a federal court finding of selective enforcement in violation of the equal protection clause of the Fourteenth Amendment would clearly contravene the state courts’ judgment. The district court, therefore, correctly concluded that the *Rooker-Feldman* doctrine precludes its exercise of federal jurisdiction over Shooting Point’s selective enforcement claim....⁶³⁵

Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officers is simply not the business of federal courts.... Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes.⁶³⁶

Similarly, in *Sophocleus v. Alabama Department of Transportation*,⁶³⁷ a landowner filed a § 1983 action complaining that state condemnation pro-

federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

⁶³² *Davis v. Passman*, 442 U.S. 228 (1979). A private cause of action against deprivation of a constitutional protected right may be pursued against the federal government unless special factors counsel hesitation, or Congress has explicitly decreed an alternative remedy to be a substitute for recovery directly under the Constitution and that remedy is equally as effective. *Carlson v. Green*, 466 U.S. 14 (1980).

⁶³³ D.C. Ct. of App. v. *Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

⁶³⁴ 368 F.3d 379 (4th Cir. 2004).

⁶³⁵ 368 F.3d at 384.

⁶³⁶ 368 F.3d at 385, quoting *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995).

⁶³⁷ 305 F. Supp. 2d 1238 (M.D. Ala. 2004).

ceedings used to take his home for the widening of Highway 280 violated his Fifth and Fourteenth Amendment rights. The federal district court held that these claims were raised in state court, in a condemnation case and an eviction case, and such claims therefore could not, under *Rooker-Feldman*, be litigated again in federal court.⁶³⁸

But the plaintiff fared better in *Maldonado v. Harris*,⁶³⁹ a case in which a landowner sought to erect a double-sided billboard on the roof of his building adjacent to U.S. Highway 101. Maldonado had been denied a permit to use his billboard for off-premises advertising by the California Department of Transportation (Caltrans) because the segment of Highway 101 in question had been designated a "landscaped freeway" where, under the California Outdoor Advertising Act,⁶⁴⁰ off-premises advertising is prohibited. Despite denial, Maldonado persisted in using the billboard for off-premises advertising, and Caltrans brought a state nuisance action and secured a permanent injunction against him. He was twice found in contempt of court for violating the injunction. Nonetheless, the Ninth Circuit declined to bar his 1983 action under *Rooker-Feldman*, finding: "The legal wrong that Maldonado asserts in his action is not an erroneous decision by the state court in the nuisance suit brought against Maldonado by Caltrans, but the continued enforcement by Caltrans of a statute Maldonado asserts is unconstitutional."⁶⁴¹ Neither was the claim precluded under common law rules of preclusion:

The primary right in the state nuisance action was not Maldonado's right to advertise on his billboard, but the right of the people of California to be free from obtrusive advertising displays along major highways.... On the other hand, the primary right involved in the instant action is...Maldonado's right to advertise freely on his property, a right that Maldonado claims is protected by the First Amendment. Because the primary rights involved in the two suits are different, the causes of action are also different, and the judgment against Maldonado in the nuisance action therefore does not bar any of his federal claims.⁶⁴²

J. PRIVILEGES AND IMMUNITIES

1. Hiring Preferences

Related to the Commerce Clause, and its protection of a national economic system, is the Privileges

and Immunities Clause—"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁶⁴³ Both Article IV, Section 2, and the Fourteenth Amendment⁶⁴⁴ guarantee the citizens protection against state deprivation of their "privileges and immunities" of national citizenship by either the federal or state government, respectively.

In an early decision, a court noted that the Clause protects interests

which are in their nature, fundamental; which belong, of right, to the citizens of all free governments.... [These may] be all comprehended under the following general heads: Protection by the government: the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may prescribe for the general good of the whole.⁶⁴⁵

It is the last phrase—"such restraints as the government may prescribe for the general good of the whole"—that allows states to impose regulation upon its citizens, so long as it not provide preferential treatment to in-state, as opposed to out-of-state, citizens, unless there is a "substantial reason" for the difference in treatment.

Application of the Privileges and Immunities Clause initially involves an inquiry into whether the discrimination against out-of-state residents is sufficiently "fundamental" to promotion of interstate harmony to fall within its purview.⁶⁴⁶ The U.S. Supreme Court has held that "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."⁶⁴⁷ For example, under the Privileges and Immunities Clause, the Supreme Court has struck down a state fee of \$2,500 for nonresident commercial fisherman when residents were charged only \$25.⁶⁴⁸ The Court has also held that limiting bar admission to local residents violated the Clause.⁶⁴⁹ But again, there must be discrimination against nonresidents to trigger the Clause.

⁶⁴³ U.S. CONST. art. IV, § 2, cl. 1.

⁶⁴⁴ "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 2.

⁶⁴⁵ *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3230) (CCED Pa. 1825).

⁶⁴⁶ *Baldwin v. Mont. Fish and Game Comm'n*, 436 U.S. 371 at 387 (1978).

⁶⁴⁷ *United Bldg. & Constr. Trades Council v. Mayor*, 465 U.S. 208 at 218 (1984).

⁶⁴⁸ *Toomer v. Witsell*, 334 U.S. 385 (1948).

⁶⁴⁹ *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985).

⁶³⁸ 305 F. Supp. 2d at 1251.

⁶³⁹ 370 F.3d 945 (9th Cir. 2004).

⁶⁴⁰ CAL. BUS. & PROF. CODE §§ 5200–5486.

⁶⁴¹ 370 F.3d at 950.

⁶⁴² 370 F.3d at 952.

However, the Supreme Court has noted that the “privileges and immunities clause is not an absolute.”⁶⁵⁰ The Court has held, “Every inquiry under the Privileges and Immunities Clause ‘must...be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.’”⁶⁵¹

In *Heim v. McCall*,⁶⁵² the U.S. Supreme Court upheld preferences for New York residents included in construction contracts for New York City railways by the Board of Rapid Transit Railroad Commissioners under a New York statute providing that only U.S. citizens shall be employed on public works, and that preference shall be given to New York citizens. The court upheld the statute as not unconstitutional under the Privileges and Immunities Clause, or the Fourteenth Amendment’s equal protection requirement.⁶⁵³

However, FHWA contract requirements prohibit all local hiring preferences.⁶⁵⁴ As a consequence, state DOTs may not include in a Federal-aid contract any provisions that require a contractor to give any local preference in hiring.

2. The Right to Travel

Individual citizens have a constitutional right to travel.⁶⁵⁵ Infringements upon that right must satisfy a compelling governmental interest.⁶⁵⁶ But highway toll increases do not impermissibly burden that right.⁶⁵⁷

⁶⁵⁰ *Toomer v. Witsell*, 334 U.S. 385 at 396 (1948).

⁶⁵¹ *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208 at 222 (1984). Citing *Toomer v. Witsell*.

⁶⁵² 239 U.S. 175 (1915).

⁶⁵³ In the earlier decision of *Atkin v. Kansas*, 191 U.S. 207 (1903) at 222, 223, the Supreme Court declared that “it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.” See also *White v. Mass. Council of Constr. Empls.*, 460 U.S. 204; 103 S. Ct. 1042; 75 L. Ed. 2d 1 (1983).

⁶⁵⁴ 23 C.F.R. § 635.117(b) applies to all Federal-aid construction projects. It provides: “(b) No procedures or requirement shall be imposed by any State which will operate to discriminate against the employment of labor from any other State, possession or territory of the United States, in the construction of a Federal-aid project.”

⁶⁵⁵ See, e.g., *United States v. Guest*, 383 U.S. 745 (1966).

⁶⁵⁶ *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

⁶⁵⁷ *Wallach v. Brezenoff*, 930 F.2d 1070 (3d Cir. 1991).

Though nowhere explicitly found in the Constitution, the right to travel is firmly embedded in constitutional jurisprudence,⁶⁵⁸ and is assertable both against private and governmental infringements.⁶⁵⁹

The right to travel has at least three components:

1. It protects the right of citizens of one state to enter and leave another state;⁶⁶⁰
2. It protects the right of citizens of one state to be treated as welcome visitors rather than unfriendly aliens when they are temporarily present in another state;⁶⁶¹ and
3. It protects the right of travelers who elect to become permanent residents of the second state to be treated like its other citizens.⁶⁶²

K. FREEDOM OF RELIGION

1. The Free Exercise Clause

The First Amendment provides, in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” This provision has two clauses: (1) a free exercise clause (to prevent persecution of religious beliefs), and (2) an establishment clause (to prevent government from establishing a religion or enshrining religious beliefs). Relatively few free religion cases have arisen in a transportation context.

The U.S. Supreme Court has analyzed free exercise cases under the rational basis test, under which a rationally-based neutral law of general application will not be deemed to violate the free exercise of religion although it incidentally burdens a particular religious belief or practice.⁶⁶³ “[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the

⁶⁵⁸ *United States v. Guest*, 383 U.S. 745, 757 (1966).

⁶⁵⁹ *Shapiro v. Thompson*, 394 U.S. 618 at 643 (1969).

⁶⁶⁰ *Edwards v. California*, 314 U.S. 160 (1941) (state law prohibiting transportation of any indigent person in California held unconstitutional).

⁶⁶¹ This right is explicitly protected by art. IV, § 2 of the Constitution. See 526 U.S. 501.

⁶⁶² This right is explicitly protected by the opening words of the Fourteenth Amendment. The Supreme Court held that “a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.” *Slaughter-House Cases*, 83 U.S. 36 (1873). For a more recent review of the parameters of this third prong of the right to travel, see *Saenz v. Roe*, 526 U.S. 489 at 500 (1999).

⁶⁶³ *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).⁶⁶⁴

In *Miller v. Reed*,⁶⁶⁵ the Ninth Circuit addressed a claim by a motorist that the state's requirement that he reveal his social security number for purposes of drivers license renewal violated his deeply held religious beliefs. Though he belonged to no organized religion, he alleged that he held a long-standing personal theological belief that the "unique defining purpose of life is separate, individual existence," and that "the use of a single common identifier in multiple relationships represents the creation of an external analog of the individual, a surrogate shadow-identity...which is narrowed and limited by the perceptions and purposes of those using this analog."⁶⁶⁶ Disclosing his social security number to the state would, according to his personal religion, be "tantamount to a sin."⁶⁶⁷ The state would not renew his drivers license without the number.

The court concluded that the California Vehicle Code was valid as a neutral law of general applicability advancing a legitimate state interest in locating the whereabouts of errant parents for purposes of supplying child support, for collecting tax obligations and overdue and unpaid fines, penalties, assessments, bail, and parking penalties. Therefore, the court concluded, the requirement did not violate his right to the free exercise of religion.⁶⁶⁸

A number of First Amendment religion cases have arisen in the area of employment discrimination. Religious rights are not absolute, and must bend to reasonable government policies. The U.S. Supreme Court set the stage in *Goldman v. Weinberger*, where it concluded that the government's interest in uniformity and discipline legitimately justified a dress code, that it could prohibit an Orthodox Jew from wearing a yarmulke with his Air Force uniform, and that such a requirement did not infringe on his First Amendment free exercise rights.⁶⁶⁹

Similar to the holding in *Goldman*, a Federal District Court in *Kalsi v. New York City Transit Authority*⁶⁷⁰ addressed a challenge to the requirement that New York subway inspectors wear hard hats to avoid the risk of head injury while working under the cars. A Sikh, whose religious beliefs required him to wear a turban at all times, was dis-

missed when he refused to wear the hard hat over his turban. The court found that the hard hat requirement was not pretextual, was grounded on legitimate safety concerns, and that his dismissal was not religiously motivated.

In the context of transit, in *In the Matter of New York City Transit Authority*, a bus driver, who was a Seventh Day Adventist, was dismissed after she refused to work sundown on Friday to sundown on Saturday. The court held that an employer need not make such accommodations when it would be prohibited by the nondiscriminatory provisions of its collective bargaining agreement.⁶⁷¹ Similarly, in *Mateen v. Connecticut Transit*,⁶⁷² an African American and Black Muslim transit bus driver unsuccessfully claimed racial and religious discrimination after he was fired for causing an accident that damaged his bus, and after numerous negative reports from several supervisors as to his abrasive and belligerent conduct.⁶⁷³

2. The Establishment Clause

The First Amendment's Establishment Clause provides that "Congress shall make no law respecting the establishment of religion."⁶⁷⁴ It prevents a governmental unit from promoting or affiliating with any religious doctrine or organization.⁶⁷⁵ However, a government action of some kind is required.⁶⁷⁶ The U.S. Supreme Court has held that for a government action not to constitute an endorsement of religion: (1) the action must have a secular purpose; (2) the primary effect of the action must be neither to advance nor inhibit religion; and (3) the action must not foster excessive governmental entanglement with religion.⁶⁷⁷

In 1959, the city of Marshfield, Wisconsin, accepted a gift of a 15-ft tall white marble statue of Jesus Christ, arms open in prayer, from a local unit of the Knights of Columbus. The city placed it in a

⁶⁷¹ 627 N.Y.S.2d 360 (N.Y.S. Ct. 1995).

⁶⁷² 550 F. Supp. at 52 (D. Conn. 1982).

⁶⁷³ "A keen mind and manual dexterity are not the only criteria that management may utilize in determining a person's qualifications for employment. An ability to work well with others, patience, pleasantness, and self-control are permissible factors to be placed on the scale. In view of a bus operator's daily and extensive contact with the public, these personal characteristics are components for the successful performance of the job." 550 F. Supp. at 55 (D. Conn. 1982).

⁶⁷⁴ U.S. CONST. amend. 1.

⁶⁷⁵ *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989).

⁶⁷⁶ *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 779 (1995).

⁶⁷⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁶⁶⁴ 494 U.S. at 879.

⁶⁶⁵ 176 F.3d 1202 (9th Cir. 1999).

⁶⁶⁶ 176 F.3d at 1204.

⁶⁶⁷ *Id.*

⁶⁶⁸ 176 F.3d at 1207.

⁶⁶⁹ *Goldman v. Weinberger*, 475 U.S. 503 (1986).

⁶⁷⁰ 62 F. Supp. 2d 745 (E.D.N.Y. 1998).

public park facing Wisconsin Highway 13, the main thoroughfare in the city, clearly visible to travelers on the road. It stood on a base with 12-in block letters saying “Christ Guide Us On Our Way.” Thirty-nine years later, a local resident objected to the presence of the statue on public property. When the city failed to move the statue onto private property, he filed suit. The city then sold the 0.15-acre portion of the park on which the statue rested to a newly formed citizens’ association (the “Fund”). The plaintiff argued that the land sale was a sham transaction attempting to circumvent the “government action” requirement, and that the sale itself should be considered a “government action.” He further argued that the sale did not end the government endorsement of Christian religion, because the proximity of the statue to the public park and the highway could still reasonably be perceived as government endorsement of religion.⁶⁷⁸

In *Freedom from Religion Foundation v. City of Marshfield*,⁶⁷⁹ the Seventh Circuit concluded, “Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion.”⁶⁸⁰ The court found no such extraordinary circumstances justifying disregarding the sale as a sham for purposes of endorsing religion, and that the city did not engage in religious endorsement by selling the property to a religious institution.⁶⁸¹

However, the court found that the plot of land severed from the park was visually indistinguishable from the remaining land that constituted the public park, and would convey the impression that the statue was on city park property, and that the city endorsed its religious message, for “Fund land is virtually indistinguishable from City land, especially when viewed from Highway 13.”⁶⁸² A governmental entity may not endorse religion in this way. As a remedy, the Seventh Circuit suggested that the city construct a gated fence or wall, accompanied by a clearly visible disclaimer, so that a reasonable person would not confuse the speech made by the Fund on its private property with an endorsement by the city.⁶⁸³

In 2005, in *Van Orden v. Perry*,⁶⁸⁴ the U.S. Supreme Court addressed the Establishment Clause in the context of a monolith inscribed with the Ten Commandments on the grounds of the Texas State

Capitol building. The Court noted that the fact that a historic display has religious content or a message consistent with religious doctrine does not, of itself, violate the Establishment Clause. Though the Court earlier found a state requirement that a copy of the Ten Commandments be placed in every school classroom violates the Establishment Clause, the placement of the Ten Commandments on the grounds of the State Capitol is far more passive, and therefore less objectionable.⁶⁸⁵

L. FREEDOM OF SPEECH

1. Employee Speech

The First Amendment provides that “Congress shall make no law...abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Though it explicitly prohibits congressional legislation abridging speech, it has been deemed broadly applicable to the states with the adoption of the Fourteenth Amendment. It applies to any form of state action, whether in the form of legislation, common law, or administrative law.

For a highway department or transit operator, freedom of speech issues arise in a variety of contexts, including:

1. When the employer attempts to restrict the speech of its employees;
2. When an employer retaliates against an employee for asserting his or her right to complain against employment conditions, or for otherwise speaking out on a matter of public concern;
3. When the transit provider seeks to restrict the speech of its patrons;
4. When the highway department or transit provider seeks to restrict advertising of other visual communications on the highways, vehicles, and facilities; and
5. When the governmental entity seeks to restrict the speech of members of the public who are not patrons, such as panhandlers and street musicians.⁶⁸⁶

The U.S. Supreme Court has held that the courts must balance the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the state, as an employer,

⁶⁷⁸ *Freedom from Religion v. City of Marshfield*, 203 F.3d 487, 489–91 (7th Cir. 2000).

⁶⁷⁹ 203 F.3d 487 (7th Cir. 2000).

⁶⁸⁰ 203 F.3d at 491.

⁶⁸¹ 203 F.3d at 493.

⁶⁸² 203 F.3d at 495.

⁶⁸³ 203 F.3d at 497.

⁶⁸⁴ 125 S. Ct. 2854 (2005).

⁶⁸⁵ 125 S. Ct. at 2864.

⁶⁸⁶ See generally NORMAN HERRING & LAURA D'AURI, RESTRICTIONS ON SPEECH AND EXPRESSIVE ACTIVITIES IN TRANSIT TERMINALS AND FACILITIES (TCRP Legal Research Digest No. 10, 1998).

in promoting the efficiency of the service it provides.⁶⁸⁷ Even where the governmental purpose is legitimate, it cannot be pursued by overbroad means when more narrowly tailored alternatives exist.⁶⁸⁸

In *Scott v. Myers*, a transit operator attempted to prohibit uniformed employees from wearing buttons, badges, or other insignia except with permission. The Second Circuit held the restriction as too broad, and the justification as too weak, but noted that, “a properly drafted rule, narrowly tailored to apply only to uniformed employees in circumstances that place them into contact with the public, with proper justification in the record, would pass constitutional muster.”⁶⁸⁹

In *Zalewska v. County of Sullivan, New York*,⁶⁹⁰ the Second Circuit held that a female transit employee’s First Amendment rights were not impinged by a dress code requiring that all employees wear pants.

In *Smith v. Arkansas State Highway Employees*,⁶⁹¹ the U.S. Supreme Court found no First Amendment violation in the refusal of the Arkansas State Highway Department to refuse to consider an employee grievance unless it had been filed by the union rather than directly by an employee. Said the court,

The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.⁶⁹²

The role of the government as an employer is different from its role as a sovereign. As an employer, a governmental institution “may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.”⁶⁹³ However, a governmental institution may not discharge, or otherwise retaliate against, an employee on a basis that infringes on his or her constitutionally protected interests.⁶⁹⁴ An employee of a public employer may not be discharged for the exercise of constitutionally pro-

ected speech.⁶⁹⁵ Nor may an employer lawfully retaliate against an employee for the exercise of his or her free speech rights.⁶⁹⁶

Courts must be vigilant “to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees’ speech.”⁶⁹⁷

Claims brought under either the First Amendment’s Free Speech Clause or Right to Petition Clause are governed by an interest balancing test, whereby the interests of the employee, as a citizen (in commenting on matters of public concern), are weighed against the interests of the government, as an employer (in promoting the efficiency of the workplace and its services). In such a case, the plaintiff must prove that the speech was a matter of public concern⁶⁹⁸ (i.e., whether it may be “fairly characterized as constituting speech on a matter of public concern”),⁶⁹⁹ and the employment retaliation was motivated by use of such speech.⁷⁰⁰ Whether particular speech addresses a matter of public concern is determined by the content, form, and context of the statement.⁷⁰¹ The court examines the motive of the speaker to determine whether the speech was calculated to redress personal grievances (such as the employee’s personal dissatisfaction with the conditions of employment), or whether the speech has a broader public purpose.⁷⁰²

⁶⁹⁵ Rankin v. McPherson, 483 U.S. 378, 383 (1987); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 282–84 (1977).

⁶⁹⁶ Connick v. Myers, 461 U.S. 138, 140 (1983) (“A public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”)

⁶⁹⁷ 483 U.S. at 384.

⁶⁹⁸ Connick v. Myers, 461 U.S. 146 (1983).

⁶⁹⁹ *Id.*

⁷⁰⁰ White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1059 (2d Cir. 1993).

⁷⁰¹ *Id.* at 147–48 (1983).

⁷⁰² Schlesinger v. N.Y. City Transit Auth., 2001 U.S. Dist. LEXIS 632 (S.D.N.Y. 2001) (The speech in question contained plaintiff’s complaints about, among other things, inadequate job description, salary, and improper classification as an employee. The court found that the statements were general in nature and related to his own personal situation, and thus did not give rise to a claim under U.S. Const. amend. I.:

Plaintiff’s claim of retaliation is based on the following events: (1) plaintiff’s October 25, 1999 memorandum to Gorman complaining of his inadequate job description and inadequate salary; (2) plaintiff’s January 5, 2000 meeting with the IG, during which he complained of “fraud”; and (3) plaintiff’s February 4, 2000 letter to Gorman com-

⁶⁸⁷ Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

⁶⁸⁸ NAACP v. Alabama, 377 U.S. 288, 307–08 (1964).

⁶⁸⁹ Scott v. Myers, 191 F.3d 82, 86 (2d Cir. 1999).

⁶⁹⁰ 316 F.3d 314 (2d Cir. 2003).

⁶⁹¹ 441 U.S. 463 (1979).

⁶⁹² 411 U.S. at 465 [citations omitted].

⁶⁹³ United States v. Nat’l Treasury Employees Union, 513 U.S. 454, 465 (1995).

⁶⁹⁴ Rankin v. McPherson, 483 U.S. 378 (1987).

Speech addressing a purely private matter, such as an employee's dissatisfaction with the conditions of his or her employment, is not constitutionally protected.⁷⁰³ However, even if the speech is a matter of public concern, the court must weigh the employee's interest in expression against the employer's interest in regulating it and, in particular, whether such regulation is necessary so that the government can maintain an efficient and effective workplace.⁷⁰⁴

In *Hall v. Missouri Highway & Transportation Commission*,⁷⁰⁵ Thelma Hall sued her employer, the Missouri Highway and Transportation Commission (MHTC), on grounds that she was fired in retaliation for exercising her First Amendment rights by complaining of discrimination against her because of her age. The MHTC oversees the Missouri Department of Transportation (MoDOT). Hall alleged that younger women in her department were promoted over older women with seniority. The Eighth Circuit found that her complaints about age discrimination related to a matter of public concern.⁷⁰⁶

In response, her supervisor (Ron Hopkins) alleged that Hall's speech disrupted MoDOT's operations in the following ways: "He repeatedly told Hall that her behavior was inappropriate, he spoke with his supervisor, and he often modified his own habits to accommodate Hall."⁷⁰⁷ The Eighth Circuit therefore applied the *Pickering* balancing test, which requires a weighing of the conflicting interests between the employee's exercise of speech and the employer's interest in regulating speech and arriving at "a balance between the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of pub-

plaining of his and his co-workers' workload and of his erroneous classification and Hay Point rating. None of these statements addressed a matter of public concern. All of plaintiff's comments "were personal in nature and generally related to [his] own situation."

Plaintiff was not speaking as a citizen, but rather as an employee complaining of his own labor dispute. Even though plaintiff's complaints of his heavy workload also addressed the workload of his co-workers, such speech does not constitute a matter of public concern because it related primarily "to plaintiff's personal circumstance and was motivated purely by self-interest." at *17 [citations omitted].

⁷⁰³ *Lewis v. Cowen*, 165 F.3d 154 (2d Cir.), cert. denied, 528 U.S. 823 (1999).

⁷⁰⁴ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

⁷⁰⁵ 235 F.3d 1065 (8th Cir. 2000).

⁷⁰⁶ 235 F.3d at 1067–68.

⁷⁰⁷ 235 F.3d at 1068.

lic services it performs through its employees."⁷⁰⁸ The Eighth Circuit applies six factors to assess this balance:

the need for harmony in the office; (2) whether the government's responsibilities require a close working relationship; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.⁷⁰⁹

Reviewing the evidence, the court found that though Hall's complaints disrupted MoDOT, she had a strong constitutionally protected interest in speaking out about age discrimination, and accordingly, the *Pickering* balancing test tipped in her favor.⁷¹⁰

The Massachusetts Turnpike Authority (MTA) establishes tolls for the Massachusetts Turnpike, the Boston Harbor tunnel crossings, and the Metropolitan Highway System. In *Mihos v. Swift*,⁷¹¹ Christy Peter Mihos, appointed by a prior governor (Cellucci) to fill an unexpired term as a member of the MTA, was dismissed from office by a subsequent governor (Swift) on grounds he failed to approve a toll increase the new governor supported. Governor Swift concluded that "acts or omissions concerning [MTA's] finances...were fiscally irresponsible, resulting in adverse consequences of substantially decreasing projected revenues of the Authority, damaging the Authority's credit outlook, and creating financial instability."⁷¹²

Jurisprudence in the First Circuit confers on members of a board a constitutionally protected right to vote their conscience and be free of political retaliation: "Voting by members of municipal boards, commissions, and authorities comes within the heartland of First Amendment doctrine, and the status of public officials' votes as constitutionally protected speech was established beyond peradventure of doubt...."⁷¹³ The court in *Mihos* found that Governor Swift violated a "clearly established" constitutional right to vote on public issues, and that termination of Ms. Mihos violated the First Amendment, for "an appointed official has a responsibility to act in the public interest, and deserves protection against retaliation for doing so."⁷¹⁴ However, as we shall see, this approach is not uni-

⁷⁰⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563 at 568 (1968).

⁷⁰⁹ 235 F.3d at 1068.

⁷¹⁰ 235 F.3d at 1069.

⁷¹¹ 2002 U.S. Dist. LEXIS 21513 (D. Mass. 2002).

⁷¹² *Levy v. the Acting Governor*, 767 N.E.2d 66 at 72 (Mass. 2002) (In this case, Mihos was also a party plaintiff).

⁷¹³ *Stella v. Kelly*, 63 F.3d 71, 75 (1st Cir. 1975).

⁷¹⁴ 2002 U.S. Dist. LEXIS 21513, at 18–19.

versally taken. Many courts hold that, absent statutory protection for removal “with cause,” a political and policy making appointee may be removed from office on the basis that his or her politics are contrary to the executive.

In *Vezzetti v. Pellegrini*,⁷¹⁵ Charles Vinzetti and David Stuart complained that they had been removed from office on the grounds of their political affiliation as Republicans by the Town Board of Orangetown, of which Democrats had achieved control. Vinzetti had been Highway Superintendent, and was replaced by a Democrat. The U.S. Supreme Court has observed that, for some positions, political affiliation is a legitimate qualification of office: “policy making and confidential employees probably could be dismissed on the basis of their political views.... [A] State demonstrates a compelling interest in infringing First Amendment rights only when it can show that ‘party affiliation is an appropriate requirement for the effective performance of the public office involved.’”⁷¹⁶

In *Vezzetti*, the Second Circuit identified the criteria to be used in determining whether the political dismissal exception should be applied, as whether the employee:

- (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has some contact with elected officials, and (8) is responsive to partisan politics and political leaders.⁷¹⁷

Applying these criteria, the court found that Vezzetti presided over a large budget, managed and hired a large number of employees, consulted directly with elected officials on budgets and programs, developed public relations programs promoting highway programs, and frequently made public speeches. On the evidence, the court concluded that “Vezzetti held a job for which political affiliation is a valid consideration.... [T]hese elements are sufficient to place the Highway Superintendent within the category of policymaking positions for which party affiliation and a shared ideology may be an appropriate employment consideration.”⁷¹⁸ Conversely, however, while a policymaker may be dismissed for political reasons, the court emphasized that the First Amendment is violated when an employee holding a nonpolicy-making job is dismissed from employment for political reasons.⁷¹⁹

⁷¹⁵ 22 F.3d 483 (2d Cir. 1994).

⁷¹⁶ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 71 n.5 (1990).

⁷¹⁷ 22 F.3d at 486.

⁷¹⁸ *Id.*

⁷¹⁹ 22 F.3d at 486–87.

Similarly, in *Rash-Aldrich v. Ramirez*,⁷²⁰ the Fifth Circuit held that where a city council member has been appointed to a board of an MPO, that council member may be removed from the board upon refusal to vote in accordance with the city’s wishes,⁷²¹ and such removal does not violate the individual’s First Amendment rights.

In *Huntsinger v. Board of Directors of the E-470 Public Highway Authority*,⁷²² Eva Hutsinger brought an action against Colorado’s E-470 Public Highway Authority (which was responsible for the financing, construction, and operation of the E-470 highway, skirting the eastern suburbs of Denver) on grounds she was terminated from employment because of the exercise of her First Amendment rights. Ms. Hutsinger was a professionally licensed civil engineer who worked as a Special Projects Engineer at the Authority for a little more than 3 years prior to her termination. Her husband had worked for a prospective contractor of the Authority, and continued to hold a promissory note of nearly \$300,000 from said contractor. Ms. Hutsinger was given a notice of termination of employment that referred to the “Conflict of Interest” provisions in the Authority’s personnel policies. The Tenth Circuit agreed with the U.S. District Court that Ms. Hutsinger’s speech was motivated primarily by personal interest, and that her complaint included no allegation of malfeasance or mismanagement on the part of the Authority that would warrant its First Amendment protection.⁷²³

In *Schlesinger v. New York City Transit Authority*,⁷²⁴ Wilhelm Schlesinger sued the New York Transit Authority (NYTA) alleging he was retaliated against for exercising his First Amendment rights by increasing his workload without giving him a promotion or increasing his salary, giving him a negative performance evaluation, and charging him with disciplinary violations and seeking his suspension from work. The U.S. District Court held that none of Schlesinger’s statements addressed a matter of public concern, and were instead personal in nature, relating to his own personal labor dispute.⁷²⁵

⁷²⁰ 96 F.3d 117 (5th Cir. 1996).

⁷²¹ Federal regulations require that the MPO policy body must include within its voting members local elected officials; officials of agencies that administer or operate major modes of transport (e.g., transit operators, airports, rail operators); and state officials. 23 C.F.R. § 450.306(i).

⁷²² 35 Fed. Appx. 749 (10th Cir. 2002).

⁷²³ 35 Fed. Appx. at 755, 757.

⁷²⁴ 2001 U.S. Dist. LEXIS 632 (S.D.N.Y. 2001).

⁷²⁵ 2001 U.S. Dist. LEXIS 632, at 17.

Similarly, in *Stein v. City of Rockland*,⁷²⁶ the court found that the employee's speech criticizing the highway department, accusing the superintendent of "imperial management," and complaining to legislators of a "de facto" demotion, were personal employment issues, not matters of public concern, and therefore not constitutionally protected.

Since 1882, the Supreme Court has upheld the authority of the government to restrict the political speech of its employees.⁷²⁷ Legislation such as the Hatch Act has been upheld on grounds that restrictions on the rights of public employees to engage in political activities fosters the legitimate governmental interest of: (1) protecting the public employees' job security; (2) eradicating corruption; (3) promoting governmental efficiency; and (4) encouraging impartiality, and the public's perception of impartiality, in governmental services.⁷²⁸ These restrictions have been deemed legitimate whether imposed by federal, state, or local governments.⁷²⁹

In *Horstkoetter v. Dep't of Public Safety*,⁷³⁰ two Oklahoma Highway Patrolmen complained about the disciplinary action threatened against them if they did not remove political signs placed in the yards of their homes by their spouses. The policy of the Oklahoma Highway Patrol prohibits its members from wearing political badges, buttons, or similar emblems, and displaying a partisan political sticker or sign on their vehicles or at their homes. The Tenth Circuit found that most states restrict the political activities of their highway patrolmen.⁷³¹ These restrictions served three legitimate governmental interests: (1) assuring prospective law enforcement officers they will not be obligated to publicly display political affiliation in assuring their retention and promotion; (2) promoting efficiency and harmony among law enforcement personnel; and (3) assuring the public that police services will be provided impartially, without political overtones.⁷³² The court found that these governmental interests outweighed the employees' First Amendment interests in the display of political signs on their real property; however, the court found that the policy could not be imposed upon patrolmen's spouses to prohibit erection of political signs on real property to which they held title.⁷³³

⁷²⁶ 1997 U.S. Dist. LEXIS 13714 (S.D.N.Y. 1997).

⁷²⁷ *Ex Parte Curtis*, 106 U.S. 371 (1882).

⁷²⁸ See *Horstkoetter v. Dep't of Public Safety*, 159 F.3d 1265, 1272 (10th Cir. 1998), and cases cited therein.

⁷²⁹ *Broadrick v. Oklahoma*, 413 U.S. 601, 606 (1973).

⁷³⁰ 159 F.3d 1265 (10th Cir. 1998).

⁷³¹ 159 F.3d at 1272 n.2.

⁷³² 159 F.3d at 1273-74.

⁷³³ 159 F.3d at 1276.

*Stanek v. Department of Transportation*⁷³⁴ involved removal of Floyd Stanek, an FHWA highway engineer, on several grounds of misconduct, including his unauthorized use of a government word processor and disks for both personal correspondence and "whistleblowing" activities. Mr. Stanek had produced a paper, "The Paradox of Highway Technology," in which he criticized an FHWA-financed Transportation Research Board Strategic Transportation Research Study (STRS), and encouraged state officials to deliver to him their listings of highway research needs, which he would compile and deliver to various congressional committees. FHWA argued that it dismissed Mr. Stanek because he was attempting to conduct his own personal system for identifying and soliciting research needs in competition with FHWA, and in a conflict of interest between his official duties and his private advocacy.⁷³⁵

Though the information Mr. Stanek was disseminating was a matter of public concern, nevertheless the court found that "Common sense suggests that an agency cannot function correctly where an employee establishes an unauthorized quasi-official 'office' that directly competes in function with an existing government program."⁷³⁶ Once a government employee, though addressing a matter of public interest, interferes with the agency's interest in maintaining a single coherent policy, the speech is unprotected. The court concluded that "the FHWA's interest in maintaining a coherent system of coordinating its research needs outweigh Stanek's interest in commenting publicly on STRS."⁷³⁷

2. Signage and Advertising Restrictions

Roadside signs can distract motorists, thereby posing traffic safety hazards. Visual clutter also poses problems of aesthetic blight. On occasion, governments have exercised their police powers to regulate signage. However, signs are also a medium of expression, and therefore potentially protected by the First Amendment. This section discusses the conflict between police powers and free speech in the context of signage.

The U.S. Supreme Court has had several opportunities to address the conflict between the exercise of local police powers and the First Amendment speech on the issue of public signage. In *Metromedia v. San Diego*,⁷³⁸ the Court addressed a city ordinance, promulgated for purposes of traffic safety

⁷³⁴ 805 F.2d 1572 (Fed. Cir. 1986).

⁷³⁵ 805 F.2d at 1574.

⁷³⁶ 805 F.2d at 1579.

⁷³⁷ *Id.*

⁷³⁸ 453 U.S. 490 (1981).

and aesthetics, prohibiting commercial signage, except on-site, and all noncommercial signage. The Court found that the city's interest in traffic safety and aesthetics in avoiding visual clutter justified a restriction against off-site commercial billboards.⁷³⁹ However, the portions of the ordinance that discriminated against content-based speech by permitting on-site commercial speech, but prohibiting on-site noncommercial speech, impermissibly offended the First Amendment.⁷⁴⁰

However, the views of the Supreme Court Justices in *Metromedia* were much fragmented. Seven Justices articulated a view that a complete prohibition of all off-premises commercial advertising would be constitutionally permissible. Five Justices concluded that the limited exception to the ordinance's prohibition against off-premises advertising was too insubstantial to constitute content-based discrimination.

In *Members of City Council of Los Angeles v. Taxpayers for Vincent*,⁷⁴¹ the U.S. Supreme Court upheld a Los Angeles ordinance prohibiting the posting of signs on public property (in this instance, political campaign signs on roadside utility pole wires) on grounds of avoiding visual clutter. The Court saw no problem in the ordinance's regulation of signage on public, but not private, property, finding that the "private citizen's interest in controlling the use of his own property justifies the disparate treatment."⁷⁴² Moreover, the challengers of the ordinance had "failed to demonstrate the existence of a traditional right of access respecting such items as utility poles...comparable to that recognized for public streets and parks."⁷⁴³ Hence, utility poles were not a public forum. The Court concluded that the ordinance was content-neutral, justified on the basis of the city's legitimate interest in preserving aesthetics, narrowly tailored to advance that reasonable basis, and therefore, constitutional.

In order to minimize visual clutter, the City of Ladue prohibited all residential signs, except those falling within 1 of 10 specified exemptions. Margaret Gilleo filed an action alleging that the ordinance violated her First Amendment right of free speech by prohibiting her from displaying a sign stating "For Peace in the Gulf" at her home. In *City of Ladue v. Gilleo*,⁷⁴⁴ the U.S. Supreme Court acknowledged that, though signs are a form of expression protected by the First Amendment, they neverthe-

less pose distinct problems that are subject to local police powers, for they obstruct views, distract motorists, and displace alternative uses for land. Hence governments legitimately may regulate the physical characteristics of signs.⁷⁴⁵ However, the Court was troubled by the fact that the city foreclosed a unique and important means of communication (i.e., residential signage) to political, religious, and personal messages.⁷⁴⁶ The court noted, "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech."⁷⁴⁷

A California policy that allowed American flags hung from highway overpass fences but excluded other expressive banners was unreasonable; individuals who faced the risk of irreparable injury were entitled to a preliminary injunction against the policy. At issue in *Brown v. California Dep't of Transportation*⁷⁴⁸ were flags and political signs draped from highway overpasses. Though Caltrans required a permit for permission to install highway signs (that were only available for signs designating highway turnoffs for special events, and even then, not from highway overpasses), the state ignored the requirement for U.S. flags draped from highway overpasses after the September 11, 2001 (9/11), aerial tragedy. Though flags were tolerated, political signs hung beside them (expressing "At What Cost?" and "Are you Buying this War?") were removed. Upon challenge of the discriminatory policy, Caltrans argued that the flag is viewpoint neutral. The Ninth Circuit disagreed: "The reason the events of September Eleventh evoked such a spontaneous proliferation of flags is precisely because of its message."⁷⁴⁹ In issuing an injunction against the violation of the claimants' First Amendment rights, the Court passionately proclaimed: "In the wake of terror, the message expressed by flags flying on California's highways has never held more meaning. America, shielded by her very freedom, can stand strong against regimes that dictate their citizenry's expression only by embracing her own sustaining liberty."⁷⁵⁰

The strength of the right of the citizenry to free expression was also revealed in cases granting the right of the Klan to participate in highway beautification projects. The denial of the application of the

⁷³⁹ 452 U.S. at 511–12.

⁷⁴⁰ 453 U.S. at 525–27.

⁷⁴¹ 466 U.S. 789 (1984).

⁷⁴² 466 U.S. at 811.

⁷⁴³ 466 U.S. at 814.

⁷⁴⁴ 512 U.S. 43 (1994).

⁷⁴⁵ 512 U.S. at 48.

⁷⁴⁶ 512 U.S. at 54.

⁷⁴⁷ 512 U.S. at 55.

⁷⁴⁸ 321 F.3d 1217 (9th Cir. 2003).

⁷⁴⁹ 321 F.3d at 1223.

⁷⁵⁰ 321 F.3d at 1224.

Klan by the Missouri Highway and Transportation Commission to participate in the state's Adopt-A-Highway program (which was designed to reduce litter and improve highway beautification) was deemed unconstitutional in *Robb v. Hungerbeeler*.⁷⁵¹ The federal district court held that though neither the shoulders of the highways nor the Adopt-A-Highway program constituted a public forum,⁷⁵² the state could not rule the Klan ineligible because the Klan denied membership to individuals based on their race, color, or national origin, as that would violate the Klan's First Amendment freedom of association. In nonpublic fora, the state may restrict access only if the restriction is reasonable and viewpoint-neutral.⁷⁵³ "The Klan's expressive speech of picking up trash along a highway right-of-way cannot be trumped because some people may disagree with its beliefs and advocacy...."⁷⁵⁴ On appeal, the Eighth Circuit concurred, concluding that the highway department may not discriminate against the Klan because it discriminates against people on the basis of race or because it has a history of violence, for such a state action "unconstitutionally restricts its expressive and associational rights."⁷⁵⁵

To implement the HBA,⁷⁵⁶ many states enacted statutes regulating highway billboards.⁷⁵⁷ Many municipalities, too, have sought to regulate billboards. *Scadron v. City of Des Plaines*⁷⁵⁸ involved application of a municipal ordinance that prohibited "advertising designed to be viewed from a limited access highway...[that would] constitute a hazard to the safe and efficient operation of vehicles upon a limited access highway, or creates a condition which endangers the safety of persons or property therefrom."⁷⁵⁹ The city's Sign Code found that "a multiplicity of signs is distracting to motorists and a hazard to vehicular traffic," and that regulation was necessary to "(1) Limit distraction to motorists...(2) Control and abate the unsightly use of buildings and land...[and] (3) Preserve the

beauty of the landscape and residential and commercial architecture."⁷⁶⁰ Scadron was denied a permit by the City of Des Plaines to erect billboards with two sign faces measuring 20 ft by 60 ft on property abutting the entrance ramp to I-294. He claimed his First Amendment rights thereby had been violated.

The federal district court saw things differently, however, finding safety and aesthetic rationales sufficient to regulate the size and location of billboards:

The City in this case has elected not to ban advertising signs altogether, but rather to restrict their size. This decision is directly related to safety and aesthetic goals; it is eminently reasonable for the City to determine that small signs do not pose the same traffic safety risks or aesthetic concerns as do large billboards. If, as Scadron alleges, the restrictions are so severe as to amount to a total ban, that ban is still valid under the [Supreme Court's] reasoning of *San Diego*. The Court holds that the size restrictions are valid as reasonable content-neutral restrictions.⁷⁶¹

Given the higher speeds of vehicles traveling on interstate highways, a city could reasonably conclude that special consideration should be given to minimization of distractions along such highways. Similarly, the substantial authority of governmental bodies to advance aesthetic interests makes this court loathe to second-guess inherently subjective aesthetic judgments of governmental bodies.⁷⁶²

The advertiser fared better in *Lamar Advertising Co. v. Township of Elmira*.⁷⁶³ Lamar Advertising Company applied to the Michigan Department of Transportation (MDOT) and the Township of Elmira to erect a billboard on Michigan Highway 32. MDOT approved the application, but the township held the application in abeyance until it was able to promulgate a billboard ordinance, with which the application could not comply. Upon denial of his application, Lamar brought a § 1983 action against the township for violation of his First Amendment rights. The federal district court concluded that the application should have been reviewed under the law applicable at the time it was filed. The failure to process the application until the advertising ordinance was promulgated constituted an impermissible prior restraint on speech.⁷⁶⁴

In *Lehman v. City of Shaker Heights*,⁷⁶⁵ the U.S. Supreme Court upheld an advertising ban in transit vehicles, observing

⁷⁵¹ 281 F. Supp. 2d 989 (E.D. Mo. 2003), *aff'd* 370 F.3d 735 (8th Cir. 2004).

⁷⁵² See also *State of Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995).

⁷⁵³ 281 F. Supp. 2d at 1001 (citation omitted).

⁷⁵⁴ 281 F. Supp. 2d at 1003.

⁷⁵⁵ *Robb v. Hungerbeeler*, 370 F.3d 735, 745 (8th Cir. 2004). See also *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000).

⁷⁵⁶ 23 U.S.C. § 131.

⁷⁵⁷ Freedom of speech issues, and the distinction between commercial and other types of speech, are important for the billboard control provisions of the Highway Beautification Act. See the Supreme Court's decision in *City of Ladue*, 512 U.S. 43 (1994).

⁷⁵⁸ 734 F. Supp. 1437 (N.D. Ill. 1990).

⁷⁵⁹ 734 F. Supp. at 1439.

⁷⁶⁰ *Id.* at n.4.

⁷⁶¹ 734 F. Supp. at 1447.

⁷⁶² 734 F. Supp. at 1448.

⁷⁶³ 328 F. Supp. 2d 725 (E.D. Mich. 2004).

⁷⁶⁴ 328 F. Supp. 2d at 735.

⁷⁶⁵ 418 U.S. 298 (1974).

In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.... The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.⁷⁶⁶

⁷⁶⁶ 418 U.S. at 302 and 304. However, there has been much academic criticism of *Lehman*, a 5-4 decision. For example, Professor William Lee wrote:

The ban appeared to be facially neutral because it was directed at all candidates rather than those of one party. Yet the transit system advertisements were not of equal value to all candidates. Testimony in *Lehman* revealed that most of the transit system's riders were residents of the state assembly district Lehman sought to represent.... Thus, the ban's effects on Lehman were different than the effect on a candidate who needed to reach residents of a large area or who had greater financial resources. The plurality, however, failed to consider the possibility of the ban's disparate effects.

William Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757 at 775 (1986) [citations omitted]. See also Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949 (1991), and Matthew McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929 (2000).

The candidate argued that the transit cars were public forums and that the city policy impermissibly discriminated on the basis of message content. A plurality of the Court, however, upheld the policy despite its subject matter categorization. Instead of applying either the stringent scrutiny applicable to content-based restrictions in public forums, or the intermediate scrutiny applicable to content-neutral, public forum time, place, and manner restrictions, the plurality simply determined that the transit cars were not public forums and then asked whether the challenged policy was "arbitrary, capricious, or invidious."

Barbara Gaal, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 128-29 (1982) [citations omitted]. For an argument that these restrictions are constitutionally impermissible, see Michael Garvey, *Next Stop Censorship: A Facial Challenge to the Metropolitan Transportation Authority's Newly Adopted Advertising Standards*, 72 ST. JOHN'S L. REV. 485 (1998). See also NORMAN HERRING & LAURA D'AURI, RESTRICTIONS ON SPEECH AND EXPRESSIVE ACTIVITIES IN TRANSIT TERMINALS AND FACILITIES (TCRP Legal Research Digest No. 10, 1998).

In *Children of the Rosary v. City of Phoenix*,⁷⁶⁷ a city's ban on bus advertising of the sale of anti-abortion bumper stickers was upheld on grounds that advertising panels on a bus are nonpublic fora, for which the city is proprietor. The city may regulate the types of advertising sold if the advertising standards are reasonable and nondiscriminatory. The regulations constitute a reasonable effort to advance the city's interest in protecting revenue, and maintain neutrality on political and religious issues.⁷⁶⁸

However, a ban on political advertising in bus shelters was enjoined by a federal district court in *Klein v. Baise*.⁷⁶⁹ Klein was prohibited from placing advertisement for his candidacy for city treasurer by a provision in the Illinois Highway Code providing that "no political advertising shall be placed on any shelter on any street or highway...."⁷⁷⁰ The Court found an injunction warranted on five grounds:

1. *Irreparable injury to plaintiff*: "Klein's rights of free speech and of access to the electoral process are extremely important First Amendment rights, and even minimal periods of loss of such rights unquestionably constitute irreparable injury."
2. *Lack of an adequate remedy at law*: Damages would be difficult to calculate, and no amount of damages would be sufficient to compensate the plaintiff if he lost the election.
3. *Likelihood of success on the merits*: Plaintiff's likelihood of success is high. "Any absolute restriction on political advertising...is content-based in that it prohibits public discussion of an entire topic." Because the statute prohibits speech based on its content, it can be sustained "only if the government can show the regulation is a precisely drawn means of serving a compelling state interest."
4. *Balancing of harms*: No harm has been identified to a defendant if the preliminary injunction is issued.
5. *Public Interest*: No interest of any third party has been revealed that would be infringed by the issuance of the requested injunction.⁷⁷¹

⁷⁶⁷ 154 F.3d 972 (9th Cir. 1998), cert. denied, 526 U.S. 1131 (1999).

⁷⁶⁸ See generally Herring & D'Auri, *supra* note 766. In *Pub. Utilities Comm'n of the District of Columbia v. Polak*, 343 U.S. 451 (1952), the U.S. Supreme Court held that the broadcast of radio over a transit bus does not interfere with patrons' First Amendment rights.

⁷⁶⁹ 708 F. Supp. 863 (N.D. Ill. 1989).

⁷⁷⁰ ILL. REV. STAT. ch. 121, ¶ 9-112.3.

⁷⁷¹ Klein, 708 F. Supp. at 865-66.

3. Time, Manner, and Place Restrictions

A content-neutral limitation may lawfully restrict speech if it (1) is narrowly tailored to serve a substantial governmental interest; (2) reasonably regulates the time, manner, and place of speech; and (3) leaves open alternative channels for expression.⁷⁷²

Observing that a city ordinance that prohibited all First Amendment activity would be unconstitutional, the Ninth Circuit, in *Jews for Jesus, Inc. v. Board of Airport Commissioners*,⁷⁷³ held that time, place, and manner restrictions must be evaluated to determine whether the banned expression is basically incompatible with the normal activity of a location at a particular time.⁷⁷⁴ The extent to which the government may regulate speech depends on the nature of the property at issue.⁷⁷⁵ With respect to fora that are traditionally public (e.g., sidewalks, streets, and parks) or intentionally designated for expression, the government may only impose a content-specific restriction if one is necessary to serve a compelling governmental interest, and it is narrowly tailored to serve that purpose.⁷⁷⁶

In *International Society of Krishna Consciousness v. Lee*,⁷⁷⁷ the U.S. Supreme Court held that airport terminals are not public fora. In *Jacobsen v. Howard*,⁷⁷⁸ the Eighth Circuit held that a state regulation that banned newspaper machines from rest stops constituted an unreasonable infringement of the newspaper's First Amendment rights. But in *Gannett Satellite Information Network v. Metropolitan Transportation Authority*,⁷⁷⁹ the newspaper could not prevail on its claim "that the more expensive alternative distribution methods deprive it of its first amendment right to distribute papers."⁷⁸⁰

The U.S. Supreme Court also has placed a heavier burden of justification for bans against the solicitation of signatures in public places.⁷⁸¹ In *Inter-*

national Society of Krishna Consciousness v. Lee,⁷⁸² the Court invalidated bans on leafleting, dismissing the danger to traffic congestion, and recognized it as a particularly unobtrusive form of expression; regulations limiting the distribution of literature and solicitation to the exterior of airport terminals must be reasonable. In *Schneider v. State*,⁷⁸³ the Court held that littering is the fault of the litterbug, not the fault of the leafleteer.

In *Jews for Jesus v. Massachusetts Bay Transportation Authority*,⁷⁸⁴ the First Circuit reviewed a transit agency ban of noncommercial expression from the paid areas of all its subway stations and from the free areas of 12 of its stations. The transit agency claimed that its ban on leafleting was necessary to protect the public safety, insisting that "leafleting threatens public safety by disrupting passenger flow and by creating litter." It further alleged that litter more adversely affects handicapped passengers and causes accidents and fires and other disruptions in service, and that leafleting encourages pickpocketing. The Court noted that the transit agency "deliberately has invited into the subway system a range of expressive activities that can produce problems similar to those it attributes to leafleting,"⁷⁸⁵ including business flyers, wandering newspaper hawkers, and the sale of food and beverages in disposable containers. However, the transit authority may legitimately ban expressive activity during crowded peak hours when the dangers to the public are enhanced.⁷⁸⁶

In *Wright v. Chief of Transit Police*,⁷⁸⁷ the Second Circuit struck down a transit agency's prohibition members of the Socialist Workers Party on selling newspapers in the subway by hand and trying to engage interested persons in conversations to persuade them to buy the newspapers, requiring the transit authority to devise a means more narrowly tailored to protect those legitimate objectives other than a complete ban.⁷⁸⁸ But in upholding a restriction on leafleting on transit platforms, the federal district court in *Storti v. Southeastern Transp. Auth.*⁷⁸⁹ held, "Because the platforms and paid areas are non-public fora, SEPTA may regulate and even entirely ban expression in them so long as the

⁷⁷² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁷⁷³ 785 F.2d 791 (9th Cir. 1986).

⁷⁷⁴ *Grayned v. Rockford*, 408 U.S. 104, 116 (1972).

⁷⁷⁵ *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985).

⁷⁷⁶ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

⁷⁷⁷ 505 U.S. 672 (1992).

⁷⁷⁸ 109 F.3d 1268 (8th Cir. 1997).

⁷⁷⁹ 745 F.2d 767 (2d Cir. 1984).

⁷⁸⁰ *Id.* at 774. However, *Gannett* is no longer good law. See *Cincinnati v. Discovery Network*, 507 U.S. 410, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993); *Jacobsen v. Howard*, 109 F.3d 1268 (8th Cir. 1997); *Jacobsen v. Howard*, 335 F. Supp. 2d 1009 (D.S.D. 2004).

⁷⁸¹ *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

⁷⁸² 505 U.S. 672 (1992).

⁷⁸³ 308 U.S. 147, 162 (1939).

⁷⁸⁴ 984 F.2d 1319 (1st Cir. 1993).

⁷⁸⁵ 984 F.2d 1319, 1325 (1st Cir. 1993).

⁷⁸⁶ *Id.*

⁷⁸⁷ 558 F.2d 67 (2d Cir. 1977).

⁷⁸⁸ 558 F.2d 67, 68 (2d Cir. 1977).

⁷⁸⁹ 1999 U.S. Dist. LEXIS 14515 (E.D. Pa. 1999).

regulations are viewpoint-neutral and reasonable.⁷⁹⁰

In *Young v. New York City Transit Authority*,⁷⁹¹ the Second Circuit concluded that begging was not so identified with a particularized message as to bring it within the scope of protected speech under the First Amendment. Even assuming that begging possessed some characteristics of protected speech, the court held that the prohibition against begging satisfied First Amendment scrutiny because it met the standard for prohibition of expressive conduct and served legitimate governmental interests unrelated to the suppression of free expression. Moreover, the court found that the subway system was not a public forum. Concluding that begging was more conduct than speech, the court expressed “grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection.”⁷⁹² The court noted that “The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment.”⁷⁹³ The purpose of the prohibition served legitimate public interests unrelated to the suppression of free speech, and was content neutral.⁷⁹⁴

Prior restraints on speech are scrutinized carefully by the courts. Determining that MTA advertising space was a public forum, the Second Circuit in *New York Magazine v. The Metropolitan Transportation Authority*⁷⁹⁵ concluded that the refusal of MTA to run an advertisement critical of the mayor was an unconstitutional prior restraint of commercial speech.

M. SEARCHES AND SEIZURES

1. Highways and the Fourth Amendment

The Fourth Amendment provides: “The right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures, shall not be violated....” Searches without consent or a valid search warrant, or without probable cause that a crime has been committed, usually are deemed unreasonable.⁷⁹⁶ The enhanced security measures in the post 9/11 environment likely will generate more litigation over the propriety of government action in the search and seizure arena and test the full limits of the Fourth Amendment, as in certain contexts, searches for purposes of protecting national security will satisfy a compelling government interest.

The stop of a vehicle on the highway constitutes a Fourth Amendment seizure.⁷⁹⁷ In the absence of individualized suspicion of wrongdoing, a search or seizure is ordinarily unreasonable.⁷⁹⁸ However, where there is probable cause to believe a vehicle contains evidence of a crime, and it is impractical to secure a warrant, every part of the vehicle can be searched.⁷⁹⁹ A dog sniff performed on a vehicle stopped for a traffic infraction does not rise to the level of a constitutionally cognizable infringement.⁸⁰⁰ Moreover, driving in open view on a public highway creates no privacy protection, and observation or a photograph of the vehicle committing an unlawful act is not deemed a Fourth Amendment search.⁸⁰¹

In *Delaware v. Prouse*,⁸⁰² the U.S. Supreme Court held unconstitutional a suspicionless, discretionary stop of a motorist for a spot check of his driver’s license and registration. The Court was troubled by the officer’s exercise of “standardless and unconstrained discretion.”⁸⁰³

In *City of Indianapolis v. James Edmond*,⁸⁰⁴ the city set up highway checkpoints at which vehicles

⁷⁹⁰ *Storti v. Se. Transp. Auth.*, 1999 U.S. Dist. LEXIS 14515 at *25 (E.D. Pa. 1999).

⁷⁹¹ 903 F.2d 146 (2d Cir. 1990).

⁷⁹² 903 F.2d at 153.

⁷⁹³ 903 F.2d at 154.

⁷⁹⁴ William Mitchell II, “Secondary Effects” Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling, 24 U. BALT. L. REV. 291, 307 (1995); John Haggerty, *Begging and the Public Forum Doctrine in the First Amendment*, 34 B.C. L. REV. 1121, 1122 (1993).

⁷⁹⁵ 136 F.3d 123 (2d Cir. 1998).

⁷⁹⁶ For a review of exceptions to the warrant requirement, see RICHARD JONES, APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS (NCHRP Legal Research Digest No. 43, 2000).

⁷⁹⁷ *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990). With respect to warrantless searches, see JONES, *supra* note 796.

⁷⁹⁸ *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

⁷⁹⁹ JONES, *supra* note 796, at 5.

⁸⁰⁰ *Illinois v. Caballes*, 543 U.S. 405; 125 S. Ct. 834 (2004).

⁸⁰¹ DANIEL GILBERT, NINA SINES & BRANDON BELL, PHOTOGRAPHIC TRAFFIC LAW ENFORCEMENT 9 (NCHRP Legal Research Digest No. 36, 1996). See also MARGARET HINES, JUDICIAL ENFORCEMENT OF VARIABLE SPEED LIMITS (NCHRP Legal Research Digest No. 47, 2002).

⁸⁰² 440 U.S. 648 (1979).

⁸⁰³ 440 U.S. at 661.

⁸⁰⁴ 531 U.S. 32 (2000).

were stopped, and their drivers were asked to produce their license and registration. The officers were issued elaborate written instructions to look for signs of impairment and to conduct an open-view examination from the outside of the vehicle. Meanwhile, drug-sniffing dogs were walked around the outside of the stopped vehicles. The city conducted six such roadblocks over a 2-month period, stopping 1,161 vehicles and arresting 104 motorists, of which 55 were drug-related.

Edmund was not a case in which the officers were acting under “standardless and unconstrained discretion,” as in *Prouse*. Instead, the Court was troubled by what it regarded as the primary purpose of the searches—to find evidence of ordinary criminal wrongdoing. According to the Court, “We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”⁸⁰⁵ The Court emphasized that it declined “to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.”⁸⁰⁶ According to the Court, the critical issue was the purpose of the highway roadblock, for “a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar.”⁸⁰⁷

In *Edmund*, the City of Indianapolis justified its vehicle checkpoints on its interest in interdicting unlawful drugs. One wonders how the program would have fared had the city instead justified the program on its need to keep drug-impaired drivers off the highways to enhance safety.

Nonetheless, the Fourth Amendment does not compel government officials to treat an owner’s car as his castle.⁸⁰⁸ Absent individualized suspicion, the U.S. Supreme Court has upheld the constitutionality of highway search and seizure in three areas: (1) border patrol checkpoints; (2) sobriety checkpoints; and (3) information-seeking checkpoints. In *dictum*, the Court also has indicated that other situations would warrant a reasonable search and seizure, including (4) a roadblock designed to thwart an imminent terrorist attack; (5) a roadblock designed to catch a dangerous criminal likely to flee via a particular route;⁸⁰⁹ (6) a roadblock for the purpose of verifying drivers’ licenses and regis-

trations;⁸¹⁰ and (7) searches at airports or government buildings.⁸¹¹

In *United States v. Martinez-Fuerte*,⁸¹² the Supreme Court addressed Fourth Amendment challenges to stops at two permanent immigration checkpoints within 100 miles of the Mexican border. Emphasizing the difficulty of containing illegal immigration at the border and of guarding the border’s entire length, the Court found the balance of interests tipped in the government’s favor in policing the Nation’s borders.⁸¹³ Hence the court upheld brief, suspicionless seizures of motorists whose purpose was to intercept illegal aliens.

Similarly, the Supreme Court upheld the constitutionality of sobriety checkpoints whose purpose was removal of drunk drivers from the road in *Michigan Dep’t of State Police v. Sitz*.⁸¹⁴ The suspicionless stops of motorists were conducted so police could detect evidence of intoxication and remove intoxicated drivers from the road.⁸¹⁵ Suspicious motorists were asked to produce their license and registration, and, if it was thought necessary, were subjected to sobriety tests.⁸¹⁶ The governmental purpose of advancing highway safety by reducing the immediate hazard posed by drunk drivers and getting them off the road was deemed to be a sufficiently compelling state interest to warrant the intrusion.⁸¹⁷

In *Illinois v. Lidster*,⁸¹⁸ the Supreme Court addressed the constitutionality of a highway checkpoint set up to obtain information concerning a hit-and-run accident occurring 1 week earlier at the same location. During the stop, an officer detected alcohol on the breath of a motorist. He was given a sobriety test, and then arrested. Pointing to the Court’s decision in *Edmund*, the motorist challenged his arrest on Fourth Amendment grounds. Coming only 4 years after *Edmund* seemingly put the brakes on stops made without individualized suspicion, the Court felt compelled to distinguish *Edmund*:

The checkpoint here differs significantly from that in *Edmund*. The stop’s primary law enforcement purpose was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in

⁸⁰⁵ 531 U.S. at 41.

⁸⁰⁶ 531 U.S. at 44.

⁸⁰⁷ 531 U.S. at 47.

⁸⁰⁸ *New York v. Class*, 475 U.S. 106 (1986).

⁸⁰⁹ *City of Indianapolis v. James Edmond*, 531 U.S. 32, 44 (2000).

⁸¹⁰ *Delaware v. Prouse*, 440 U.S. 648 (1979).

⁸¹¹ 531 U.S. at 48–49.

⁸¹² 428 U.S. 543 (1976).

⁸¹³ 428 U.S. at 561–66.

⁸¹⁴ 496 U.S. 444 (1990).

⁸¹⁵ 496 U.S. at 447–48.

⁸¹⁶ 496 U.S. at 447.

⁸¹⁷ 496 U.S. at 451.

⁸¹⁸ 540 U.S. 419 (2004).

providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.⁸¹⁹

Weighing and balancing the competing interests, the Court found the state interest in fostering "important criminal investigatory needs" outweighed the individual's inconvenience of "only a brief wait in line—a very few minutes at most."⁸²⁰

2. Drug and Alcohol Testing

Government drug testing of employees constitutes a search or seizure under the Fourth Amendment.⁸²¹ Collection and testing of urine⁸²² or blood pursuant to a government directive intrudes upon "an excretory function traditionally shielded by great privacy."⁸²³ The testing of urine for drugs constitutes a search and, therefore, "must meet the reasonableness requirement of the Fourth Amendment."⁸²⁴ Courts balance the intrusiveness of the test against the government's interest in testing.⁸²⁵ Among the exceptions to the Fourth Amendment warrant requirement is the "administrative search exception," which upholds drug testing without individualized suspicion in highly regulated industries.⁸²⁶

Elaborate regulations have been promulgated by the U.S. DOT for random and incident-related drug and alcohol testing of employees engaged in safety-sensitive functions. They have been the subject of much litigation. In most instances, the courts have found the government's interest in protecting public safety compelling. For example, in *Transport Workers' Union of Philadelphia v. Southeastern*

Pennsylvania Transportation Authority,⁸²⁷ the Third Circuit held that the government's interest in protecting the safety of large groups of people traveling by mass transit overrides the personal interest of transit employees against warrantless searches.⁸²⁸

In *Skinner v. Railway Labor Executives' Ass'n*,⁸²⁹ the U.S. Supreme Court upheld the constitutionality of Federal Railroad Administration (FRA) regulations requiring blood and urine tests of railroad employees involved in certain train accidents and of employees who violate certain safety rules. The railroad employees' reasonable expectations of privacy were diminished by their participation in an industry pervasively regulated for safety, and the persons tested "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."⁸³⁰ The Court weighed the government-employer interest in stopping misuse of drugs by employees in safety-sensitive positions compelling against the intrusion upon personal privacy affected by the requirement of administering a urinalysis test.⁸³¹

In the absence of individualized suspicion, the reasonableness of such a search depends on balancing the "special needs" of the government against the extent of the intrusiveness of the testing procedure.⁸³² Reasonableness is judged by balancing the search's intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. The factors to be considered include the nature of the privacy interest upon which the search intrudes, the character of the intrusion, the immediacy of the government concern, and the efficacy of the search for meeting it.⁸³³

Many cases have arisen in the transit context. The balancing test fell in the government's favor

⁸¹⁹ 540 U.S. at 423.

⁸²⁰ 540 U.S. at 427.

⁸²¹ *Transport Workers' Union of Phila. v. Se. Pa. Transp. Auth.*, 863 F.2d 1110, 1115 (3d Cir. 1988).

⁸²² Urine specimen guidelines are published at www.dot.gov/ost/dapc.

⁸²³ *Vernonia Sch. District v. Acton*, 515 U.S. 646, 658, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995). *Transport Workers' Union of Phila. v. Se. Pa. Transp. Auth.*, 863 F.2d 1110, 1119 (3d Cir. 1988).

⁸²⁴ *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989); see *Burka v. N.Y. City Transit Auth.*, 739 F. Supp. 814, 819 (S.D.N.Y. 1990). See Jill Dorancy-Williams, *The Difference Between Mine and Thine: The Constitutionality of Public Employee Drug Testing*, 28 N.M. L. REV. 441 (1998).

⁸²⁵ *Gonzalez v. Metro. Transp. Auth.*, 174 F.3d 1016 (9th Cir. 1999).

⁸²⁶ *Policeman's Benevolent Ass'n v. Township of Washington*, 850 F.2d 133, 135 (3d Cir. 1988).

⁸²⁷ 863 F.2d 1110 (3d Cir. 1988).

⁸²⁸ *Transport Workers' Union of Phila. v. Se. Pa. Transp. Auth.*, 863 F.2d 1110 (3d Cir. 1988).

⁸²⁹ *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989). See Dorancy-Williams, *supra* note 824, at 451.

⁸³⁰ *Skinner*, 489 U.S. 602, at 628.

⁸³¹ *Skinner*, 489 U.S. at 614. See also *Drake v. Delta Airlines*, 923 F. Supp. 387, 396–97 (E.D.N.Y. 1996), *aff'd in relevant part*, *Drake v. Delta Airlines*, 147 F.3d 169, 170–71 (2d Cir. 1998). *Beharry v. MTA*, 1999 U.S. Dist. LEXIS 3157 (1999).

⁸³² *Chandler v. Miller*, 520 U.S. 305, 318, 137 L. Ed. 2d 513, 117 S. Ct. 1295 (1997). See Dorancy-Williams, *supra* note 824, at 451.

⁸³³ *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995).

where a transit provider sought a urine sample from a safety-sensitive employee in *Beharry v. New York City Transit Authority*.⁸³⁴ There, the federal district court held, “the Authority’s request that Beharry provide a small urine sample within a two-hour period caused a minimal interference with Beharry’s privacy rights, which must be outweighed by the Authority’s concerns with protecting the safety of its employees and customers.”⁸³⁵ Similarly, the Sixth Circuit in *Holloman v. Greater Cleveland Regional Transit Authority*,⁸³⁶ held that the transit authority had a compelling governmental interest in “protecting the safety of its passengers and the general public by ensuring that its drivers do not operate buses while under the influence of alcohol or drugs,” and that this interest outweighed the employee’s diminished expectations of privacy.⁸³⁷ In *Amalgamated Transit Union v. Suscy*,⁸³⁸ the Seventh Circuit held, “the public interest in the safety of mass transit riders outweighs any individual interest in refusing to disclose physical evidence of intoxicating or drug abuse.”⁸³⁹

The Third Circuit in *Transport Workers’ Union of Philadelphia v. Southeastern Pennsylvania Transportation Authority*,⁸⁴⁰ upheld the random testing of safety-sensitive transit employees where the transit authority adduced evidence of a significant drug problem. The random drug testing program was reasonable because “the plan contains sufficient safeguards, in the form of confidentiality, chain of custody, verification, and random selection procedures, to protect against abuse of discretion by implementing officials.”⁸⁴¹

But not all drug and alcohol testing has been upheld. For example, in *Gonzalez v. Metropolitan Transit Authority*,⁸⁴² the Ninth Circuit found the testing unconstitutional because it was unclear whether the employees would pose a substantial immediate threat to public safety if impaired by drugs or alcohol, whether the procedure for testing them would be reasonably effective for finding out if they are impaired, or whether the tests as performed constituted an undue invasion of their privacy. Similarly, in *Bolden v. Southeastern Pennsylvania Transportation Authority*,⁸⁴³ compulsory,

suspicionless, back-to-work testing of a maintenance custodian who tested positive for marijuana use was held to be a violation of the employee’s constitutional rights. The employee was not a safety-sensitive employee likely to create any great risk of causing harm to others, and did not have diminished privacy expectations due to the pervasive government regulation.

N. EQUAL PROTECTION

1. Facial or “As Applied” Challenges

Ratified on July 9, 1868, the Fourteenth Amendment to the Constitution provides, *inter alia*, “No State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws.”⁸⁴⁴ Further, “The Congress shall have power to enforce, by appropriate legislation, the provision of this article.”⁸⁴⁵

The Fourteenth Amendment guarantees “a right to be free from invidious discrimination in statutory classifications and other governmental activity.”⁸⁴⁶ Essentially, all similarly situated people should be treated alike.⁸⁴⁷ The Equal Protection Clause not only protects fundamental rights, and protects citizens against suspect classifications such as race, it also protects them from arbitrary and irrational state action.⁸⁴⁸

To establish a *prima facie* case of discrimination under the Equal Protection Clause, the plaintiff must demonstrate that he is a member of a protected class, that he is otherwise similarly situated to members of the unprotected class, that he was treated differently from members of the unprotected class, and that the defendant acted with discriminatory intent. If the plaintiff makes out a *prima facie* case of discrimination, the burden shifts to the government to articulate a legitimate

⁸⁴⁴ U.S. CONST. amend. XIV, § 1.

⁸⁴⁵ U.S. CONST. amend. XIV, § 5.

⁸⁴⁶ *Harris v. McRae*, 448 U.S. 297, 322 (1980).

⁸⁴⁷ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

⁸⁴⁸ *Hamlyn v. Rock Island County Metro. Mass Transit Dist.*, 986 F. Supp. 1126 (C.D. Ill. 1997) (transit authority’s reduced fare program violates the Equal Protection Clause because it discriminates against passengers with AIDS). In *Hamlyn*, because of his AIDS affliction, plaintiff had difficulty walking more than one block. However, the reduced fare program established by the transit agency excluded persons whose sole disability was AIDS from eligibility. The court found that AIDS was a qualifying disability under the ADA and Rehabilitation Act, and that discrimination against persons who have AIDS violates the Fourteenth Amendment.

⁸³⁴ 1999 U.S. Dist. LEXIS 3157 (E.D.N.Y. 1999).

⁸³⁵ *Id.* at 30.

⁸³⁶ 1991 U.S. App. LEXIS 6904 (6th Cir. 1991).

⁸³⁷ *Id.* at 2.

⁸³⁸ 538 F.2d 1264 (7th Cir. 1976).

⁸³⁹ *Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976).

⁸⁴⁰ 863 F.2d 1110 (3d Cir. 1988).

⁸⁴¹ 863 F.2d at 1121.

⁸⁴² 174 F.3d 1016 (9th Cir. 1999).

⁸⁴³ 953 F.2d 807 (3d Cir. 1991).

nondiscriminatory reason for taking the action alleged by the plaintiff to be discriminatory. If the defendant succeeds in meeting this burden, the burden shifts back to the plaintiff to demonstrate that the proffered reason is merely a pretext for discrimination.⁸⁴⁹

In a facial challenge, as opposed to an “as applied” challenge, of a governmental classification, the plaintiff must prove (1) that the state action, on its face, results in members of a certain group being treated differently from other individuals based on membership in the group;⁸⁵⁰ and (2) if a cognizable class is treated differently, the distinction between the groups must be illegitimate.⁸⁵¹ If the classification is one enumerated in the Fourteenth Amendment (such as one based on race), it is a “suspect classification,” entitled to heightened scrutiny. However, if the classification is not suspect, courts review state action under the “rational basis” test.⁸⁵² If the challenge to the state action is on an “as applied” rather than a “facial” basis, plaintiff must prove the presence of an unlawful intent to discriminate against him or her for an invalid reason.⁸⁵³

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁸⁵⁴ the U.S. Supreme Court held that agency rules may establish a “discriminatory effect” basis upon compliance with Title VI of the Civil Rights Act of 1964,⁸⁵⁵ even if absent such a rule “discriminatory intent” must be found. U.S. DOT rules adopt the discriminatory effect standard.⁸⁵⁶ The Court established a five-part test to determine whether the government acted with the intent or purpose to racially discriminate.⁸⁵⁷

1. Whether the impact of the official action falls more heavily on one race than another and cannot be explained in any other way besides race;
2. The historical context of the decision;
3. The sequence of events immediately preceding the contested decision;
4. Deviations from normal decision making processes; and
5. The legislative and administrative history of the particular decision.⁸⁵⁸

2. Race

Clearly, the central purpose of the Fourteenth Amendment was to redress racial discrimination. Allegations of racial discrimination are subjected to strict scrutiny. To discriminate based on race, the government must demonstrate a compelling governmental interest.

In *Fullilove v. Klutznick*,⁸⁵⁹ the U.S. Supreme Court upheld a federal statute requiring that 10 percent of certain federal grants be awarded to minority contractors against Equal Protection challenge. But in *City of Richmond v. J.A. Croson Co.*,⁸⁶⁰ the Supreme Court struck down the City of Richmond’s ordinance that 30 percent of all construction contracts be given to minority-owned businesses, condemning the practice of relying on “a generalized assertion of past discrimination” to correct sweeping efforts to rectify past societal discrimination where no actual discrimination was identified.⁸⁶¹ In distinguishing the cases, the Court emphasized that the federal government has a specific constitutional mandate (under Section 5 of the Fourteenth Amendment) to enforce its dictates.⁸⁶² “That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate.”⁸⁶³ Because the Court could find no evidence of any identified discrimination in the Richmond construction injury, it found that the city failed to establish a compelling interest to distribute public construction contracts on the basis of race.⁸⁶⁴ Professor Richard Primus notes that, beginning with *Croson*, “equal protection has become hostile to

⁸⁴⁹ *McMillian v. Svetanoff*, 878 F.2d 186, 189 (7th Cir. 1989).

⁸⁵⁰ *Jones v. Helms*, 452 U.S. 412, 423–24 (1981).

⁸⁵¹ *Plyler v. Doe*, 457 U.S. 202, 217–18 (1981).

⁸⁵² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985).

⁸⁵³ *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

⁸⁵⁴ *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) (holding that the denial of zoning for low-income housing that would benefit mostly minorities did not violate the Equal Protection Clause because plaintiffs failed to prove racial discrimination was the motivating factor for the zoning decision).

⁸⁵⁵ 42 U.S.C. § 2000d.

⁸⁵⁶ See 49 C.F.R. § 21.5(b).

⁸⁵⁷ *Village of Arlington*, 429 U.S. at 252; Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9(1) J. ENVTL. L. & LITIG. 121, 125 (1994).

⁸⁵⁸ Collin, *supra* note 857, at 121, 125.

⁸⁵⁹ 448 U.S. 448 (1980).

⁸⁶⁰ 488 U.S. 469 (1989).

⁸⁶¹ 488 U.S. at 498–501.

⁸⁶² 488 U.S. at 490.

⁸⁶³ *Id.* “Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” *Id.* at 493.

⁸⁶⁴ 488 U.S. at 505.

government action that aims to allocate goods among racial groups, even when intended to redress past discrimination.”⁸⁶⁵

Since promulgation of the STAA of 1982,⁸⁶⁶ federal highway statutes have required that at least 10 percent of federal construction funds be set aside for small businesses owned and controlled by “socially and economically disadvantaged individuals.”⁸⁶⁷ This program includes a race-based presumption to define the class of beneficiaries and allows the use of race-conscious remedial measures.

*Adarand Constructors v. Pena*⁸⁶⁸ became the seminal case on minority set-asides in the context of highway construction. There, Adarand, a male Caucasian, was the low bidder for a subcontract, but the prime contractor instead awarded the subcontract to a bidder previously certified by the state DOT as a DBE. Adarand alleged violation of the Equal Protection Clause of the U.S. Constitution.⁸⁶⁹ As it had in *Croson*, the U.S. Supreme Court subjected the DOT’s use of race-based measures in its regulations to strict scrutiny analysis.⁸⁷⁰ Significantly, the Court in *Adarand* applied strict scrutiny analysis to *federal* affirmative action programs that use racial or ethnic criteria as a basis for decision-making, a standard that had previously only been applied to state or local programs.⁸⁷¹ The Court

⁸⁶⁵ Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 496 (2003):

Since the Supreme Court’s decisions in *Croson* and *Adarand*, all laws using express racial classifications have been subject to strict scrutiny and can be sustained only in exceptional circumstances. Strict scrutiny applies regardless of whether the classifications benefit or burden historically disadvantaged groups, or even if they impose no differential burden or benefit on different racial groups. Many critics have characterized this doctrine as normatively and analytically misguided. As a descriptive matter, however, classification has become central to equal protection doctrine.

Id. at 502-04 [citations omitted].

⁸⁶⁶ Pub. L. No. 97-424.

⁸⁶⁷ This phrase is defined in 15 U.S.C. § 637.

⁸⁶⁸ 515 U.S. 200 (1995), *remanded* *Adarand Constructors v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997), *vacated sub nom.* *Adarand Constructors v. Slater*, 169 F.3d 1292 (10th Cir. 1999), *rev’d* *Adarand Constructors v. Slater*, 528 U.S. 216 (2000), *remanded* *Adarand Constructors v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *amended sub nom.* *Adarand Constructors v. Mineta*, 121 S. Ct. 1401 (2001), *cert. granted*, *Adarand Constructors v. Mineta*, 121 S. Ct. 1598 (2001).

⁸⁶⁹ U.S. CONST. amend. V.

⁸⁷⁰ 515 U.S. at 237–39.

⁸⁷¹ SANDRA VAN DE WALLE, THE IMPACT OF CIVIL RIGHTS LEGISLATION UNDER TITLE VI AND RELATED LAWS ON

held, “We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests.”⁸⁷² Thus, all affirmative action programs—whether federal, state, or local—are now subjected to “strict scrutiny,”⁸⁷³ and will pass constitutional muster only if they are narrowly tailored to serve a compelling government interest.⁸⁷⁴ In analyzing such programs, among the salient questions to be addressed are:

1. Did the government entity give any consideration to the use of race-neutral means to increase minority participation in governmental contracting?
2. Is the program limited in time so that it will not last longer than the discriminatory effects it is designed to eliminate?

After *Adarand*, FHWA amended the relevant regulations to eliminate the offending provisions. After several remands and a rewriting of the U.S. DOT highway regulations, the aspirational goal of awarding 10.93 percent of design and construction contracts to DBEs was upheld.⁸⁷⁵

More recently, in a challenge against the implementation of the revised federal DBE program by MnDOT and NDOR, the Eighth Circuit reviewed TEA-21’s earmark of 10 percent of federal highway funds for businesses owned by socially and economically disadvantaged individuals. In *Sherbrooke Turf Inc. v. Minnesota DOT*,⁸⁷⁶ the court found that the FHWA’s DBE set-aside program survived strict scrutiny as furthering a compelling interest, being narrowly tailored and applied, and placing an em-

TRANSIT DECISION MAKING (TCRP Legal Research Digest, 1997).

⁸⁷² 515 U.S. at 227; 115 S. Ct. at 2113.

⁸⁷³ Under strict scrutiny, affirmative action programs pass constitutional muster if they are narrowly tailored to serve a compelling interest. *See Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995).

⁸⁷⁴ *See Adarand Constructors v. Pena*, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). VAN DE WALLE, *supra* note 871.

⁸⁷⁵ The history of the *Adarand* litigation is discussed in detail in Paul Stephen Dempsey, *Transit Law*, 5 SELECTED STUDIES 10-6 – 10-12. Since those cases are examined in detail there, they are discussed more succinctly here.

⁸⁷⁶ 345 F.3d 964 (8th Cir. 2003).

phasis on race-neutral means to accomplish its goals.⁸⁷⁷

In *McNabola v. Chicago Transit Authority*,⁸⁷⁸ a Chicago Transit Authority (CTA) per diem contract employee alleged that CTA dismissed him because he was white. McNabola demonstrated that he was similarly situated to other nonwhite per diem employees, and that he was treated differently because of his race and terminated with discriminatory intent. The CTA argued that it had terminated McNabola because of complaints from CTA employees about McNabola's examinations, unauthorized hospital visits, and the use of a CTA prescription pad for a private patient. McNabola presented contrary evidence suggesting that the proffered reasons were merely a pretext, and that he actually was terminated pursuant to CTA's custom of terminating white per diem employees and replacing them with African Americans. The Seventh Circuit concluded CTA had violated the Equal Protection Clause of the Constitution. Similarly, in *Schlesinger v. New York City Transit Authority*,⁸⁷⁹ a federal district court upheld a *prima facie* claim of intentional discrimination based on "a widespread pattern of discrimination...against white managers and professionals and a pattern of favoritism on behalf of black professionals."⁸⁸⁰

Similarly, in *Malabed v. North Slope Borough*,⁸⁸¹ a federal district court concluded that a transit agency's employment preferences (in this case, favoring Native Americans) affecting fundamental rights or suspect classifications (such as race) could not withstand constitutional scrutiny without particularized findings logically related to the perceived evil sought to be remedied.⁸⁸²

3. Gender

Gender discrimination is subject to intermediate scrutiny. In order to discriminate based on gender, the government must show an important substantial interest. For example, Oklahoma forbade the sale of 3.2 percent beer to men under age 21 but permitted the sale of such beer to women over 18.⁸⁸³

⁸⁷⁷ 345 F.3d at 974.

⁸⁷⁸ 10 F.3d 501 (7th Cir. 1993).

⁸⁷⁹ 2001 U.S. Dist. LEXIS 632 (S.D.N.Y. 2001).

⁸⁸⁰ *Id.* at 33.

⁸⁸¹ 42 F. Supp. 2d 927 (D. Alaska 1999).

⁸⁸² 41 F. Supp. 2d at 941. The court in *Malabed* also relied on the nonconstitutional theory that the preference, adopted by North Slope Transit as an ordinance, violated a charter provision of North Slope Borough that barred discrimination based on national origin.

⁸⁸³ 429 U.S. 190 (1976). However, the Supreme Court subsequently gave state prerogatives under the 21st

In *Craig v. Boren*,⁸⁸⁴ the U.S. Supreme Court held that these gender-based differences must be invalidated, even though law favors women, because "the relationship between gender and traffic safety" is "too tenuous." Gender was not deemed a sufficiently accurate proxy for the regulation of drinking and driving. Essentially, the Court found the means to achieve the stated objective of enhancing traffic safety were not related adequately to that objective. In order to sustain gender-based discrimination, the state must prove that the discriminatory means employed were substantially related to the achievement of important governmental objectives.⁸⁸⁵

A county's requirement that all of its vehicle drivers wear pants was held not to have violated a female driver's rights of free speech, due process, or equal protection. Thus, in *Zalewska v. County of Sullivan, New York*,⁸⁸⁶ the Second Circuit held that equal protection was not violated when a female transit bus driver was required to comply by a dress code requiring that all employees wear pants.

4. Sexual Orientation

To discriminate based on sexual orientation, there must be a conceivable rational relationship to the state interest. In *Romer v. Evans*,⁸⁸⁷ the U.S. Supreme Court had occasion to review a referendum to deny homosexuals protection from discrimination. Colorado voters had amended the Colorado Constitution to prohibit any Colorado state and local government agency (such as the Colorado DOT) from protecting homosexuals against discrimination. The state constitutional amendment was held unconstitutional under the U.S. Constitution because it was deemed to be "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests."

5. Drug Usage

Concerns over safety have led transportation agencies to impose discriminatory restrictions on drug users in safety-sensitive positions. By and large, these safety restrictions have been upheld as constitutional. In *New York City Transit Authority v. Beazer*,⁸⁸⁸ the U.S. Supreme Court upheld as constitutional the NYTA's policy of refusing employment to individuals in safety-sensitive positions

amendment greater deference. See *Bacchus Imports v. Ditz*, 468 U.S. 263 (1984).

⁸⁸⁴ 429 U.S. at 204.

⁸⁸⁵ *United States v. Virginia*, 518 U.S. 515 (1996).

⁸⁸⁶ 316 F.3d 314 (2d Cir. 2003).

⁸⁸⁷ 517 U.S. 620 at 635 (1996).

⁸⁸⁸ 440 U.S. 568 (1979).

who use methadone, concluding that the policy satisfied legitimate objectives of safety and efficiency.⁸⁸⁹ The majority found that these goals were “significantly served by—even if they do not require—[the methadone] rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions.”⁸⁹⁰ Decisions of transit providers to dismiss or refuse to hire individuals on drugs do not violate the Equal Protection Clause of the Fourteenth Amendment.⁸⁹¹ The Court found that the uncertainties associated with the rehabilitation of heroin addicts precludes drawing a bright line at the point at which addiction ends; it is therefore neither unprincipled nor invidious for the employer to postpone eligibility for work until the methadone treatment is completed.⁸⁹²

In *Beazer*, the U.S. Supreme Court reaffirmed its distinction between invidious discrimination (which is a classification drawn “with an evil eye and an unequal hand” or motivated by “a feeling of antipathy” against a certain group), and discriminatory rules essential to secure general benefits. Here, the transit authority was motivated by its need to operate a safe and efficient transportation system rather than by any special animus against drug addicts.⁸⁹³ It is not the role of the Court to second-guess the employer, for “No matter how unwise it may be for the TA to refuse employment to individual car cleaners, track repairmen, or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision.”⁸⁹⁴

6. Voting

In *Cunningham v. Seattle*,⁸⁹⁵ a federal district court found that the organization of the governing transit agency violated the Equal Protection Clause of the U.S. Constitution and the “one person/one vote” doctrine of *Reynolds v. Sims*.⁸⁹⁶ Because 24 of its 42 members were elected rather than appointed, and represented jurisdictions with differing populations, resulting in a disproportionate representation of voters, the organizational structure of the

⁸⁸⁹ Allan Ides, *Realism, Rationality and Justice Byron White: Three Easy Cases*, 1994 BYU L. REV. 283, 286 (1994); David Hollar, *Physical Ability Tests and Title VII*, 67 U. CHI. L. REV. 777, 781 (2000).

⁸⁹⁰ 440 U.S. at 587 n.31.

⁸⁹¹ N.Y. City Transit Auth. v. *Beazer*, 440 U.S. 568 (1979).

⁸⁹² 440 U.S. at 591–92.

⁸⁹³ 440 U.S. at 593 n.40.

⁸⁹⁴ 440 U.S. at 594.

⁸⁹⁵ 751 F. Supp. 885 (W.D. Wash. 1990).

⁸⁹⁶ 377 U.S. 533 (1964).

transit agency violated the equal protection rights of its constituents.

7. Environmental Justice

In *Labor/Community Strategy Center v. Los Angeles Metro. Transp. Auth.*,⁸⁹⁷ the Ninth Circuit concluded that the authority violated a consent decree to purchase 248 additional buses to reduce transit overcrowding.⁸⁹⁸ Yet, the environmental justice movement was dealt a strong blow in *Alexander v. Sandoval*,⁸⁹⁹ a case in which a Mexican immigrant brought a class action lawsuit under Title VI challenging Alabama’s English-only policy for administration of its driver’s license tests.⁹⁰⁰ Title VI, Section 2000(d) prohibits any program or activity that receives federal financial assistance from excluding participants based on race, color, or national origin.⁹⁰¹ The court held that private individuals could sue to enforce Section 2000(d) of Title VI, but that Section 2000(d) only prohibits intentional discrimination.⁹⁰² Because the English-only policy created a “disparate impact” based on national origin and race, and did not involve intentional discrimination, there is no private right of action to enforce regulations promulgated under Section 2000(d).⁹⁰³

O. CONCLUSION

Though the U.S. Constitution explicitly addresses transportation only briefly, we have seen that many of its provisions are implicated in the jurisdictional conflicts that inevitably arise between federal and state governments. Building, providing, subsidizing, and regulating transportation infrastructure is a major function of state and local governments, but one in which the federal government provides important funding and seeks to regulate and oversee as well. Federal spending and commerce power is vast, as is the ability of the federal government to preempt state action. In contrast, state police power has also been accorded

⁸⁹⁷ 263 F.3d 1041 (9th Cir. 2001).

⁸⁹⁸ *Id.*

⁸⁹⁹ 532 U.S. 275 (2001).

⁹⁰⁰ 532 U.S. at 276; 121 S. Ct. 1511, 1513 (2001); 42 U.S.C. §§ 2000(d)–2000(d)-1 (2000).

⁹⁰¹ 42 U.S.C. § 2000(d).

⁹⁰² 121 S. Ct. at 1513.

⁹⁰³ 532 U.S. at 282; 121 S. Ct. at 1517, 1523. The Camden New Jersey Environmental Justice/Title VI cases that were directly affected by the *Alexander v. Sandoval* decision are discussed in *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771 (3d Cir. 2001). For a review of the environmental justice issue, see Paul Stephen Dempsey, *Transit Law*, 5 SELECTED STUDIES 3-39 – 3-42.

wide berth. In recent decades, as the Rehnquist Court moved to expand state powers, more has been deemed to fall within the domain of state governments. Whether the Roberts Court will continue this jurisprudential trend remains to be seen.

The Constitution as battleground also emerges in the conflicts between governmental institutions and individual rights. Many of these conflicts are not unique to transportation agencies, yet a number of important cases have been decided in a transportation context.

As in all industries, it is difficult to predict how constitutional jurisprudence will evolve. What is clear, however, is that conflicts between governmental institutions in a federal system and conflicts between those institutions and individuals will continue to be an important focus for the courts, and the evolution of constitutional jurisprudence in this arena will continue to be of interest to transportation lawyers.

SECTION 3

INDIAN TRANSPORTATION LAW

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A. INTRODUCTION

1. Purpose and Scope of This Report

This report will examine legal issues arising out of federal, state, and local transportation agencies' relations with Indian tribes. Government-to-government relations with Indian tribes touch a gamut of legal issues: contracting with tribes, Tribal Employment Rights Ordinances (TERO), funding issues, land-use impacts of tribal improvements on state highways, real property issues arising out of rights-of-way through Indian reservations, regional planning issues, compliance with environmental laws bumping up against Indian sovereign immunity, tort liability issues, etc. The federal government has a fairly well delineated relationship with Indian tribes based upon unique trust obligations owed to them as domestic dependent nations. States and local governments do not have the same relationship and yet must interact with tribal governments on a number of legal issues. The constitutional or statutory authority conferred upon these state and local jurisdictions, to the extent it exists, is a patchwork of laws that varies from jurisdiction to jurisdiction. In some cases there are huge gaps in the law relative to a state or local transportation agency's ability to conduct business with a tribe. Moreover, there is an overlay of federal law that may affect the rights and obligations of state and local agencies.

Two prior Legal Research Digests related to Indian legal issues are *Legal Issues Relating to the Acquisition of Right-of-Way and the Construction and Operations of Highways over Indian Lands*,¹ and *Application of Outdoor Advertising Controls on Indian Land*.² This report is designed to revise, update, and condense the material from these earlier digests.

B. INDIANS, INDIAN TRIBES, INDIAN RESERVATIONS, AND INDIAN COUNTRY

1. Background

The U.S. Census Bureau estimates that as of July 1, 2003, the number of people who are American Indian and Alaska Native or American Indian and Alaska Native in combination with one or more other races is 4.4 million—1.5 percent of the total

U.S. population.³ It estimates the number of American Indians and Alaska Natives alone or in combination with one or more races living on reservations or other trust lands to be 538,300 (175,200 reside on Navajo Nation Reservations and trust lands that span portions of Arizona, New Mexico, and Utah). According to the Bureau's July 1, 2003, estimates, California has an American Indian and Alaska native population of 683,900, followed by Oklahoma (394,800), and Arizona (327,500).⁴ The Bureau of Indian Affairs (BIA) estimates that in 1990 almost 950,000 Indians lived on or adjacent to Federal Indian reservations.⁵

There are a total of 278 land areas in the United States administered as Federal Indian reservations (reservations, pueblos, rancherias, communities, etc.), located in 34 states. The Navajo Reservation is the largest, occupying 16 million acres of land in Arizona, New Mexico, and Utah.⁶ Many of the smaller reservations are less than 1,000 acres, with the smallest less than 100 acres. A total of 56.2 million acres of land are held in trust by the United States for various Indian tribes and individuals. While much of this is reservation land, not all trust land is reservation land, and vice versa.⁷ A map of the United States that shows the Indian lands can be found at <http://epa.gov/pmdesignations/biamap.htm>.

³ News Release, U.S. Census Bureau, U.S. Department of Commerce, American Indian and Alaska Native Heritage Month: November 2004 (October 25, 2004), available at <http://www.census.gov/Press-Release/www/releases/archives/002950.html>.

⁴ *Id.* Reporting American Indian tribal groups with more than 50,000 members as Apache, Cherokee, Chippewa, Choctaw, Lumbee, Navajo, Pueblo, and Sioux. Cherokee and Navajo are easily the largest, with populations of 234,000 and 204,000, respectively. Eskimo is the largest Alaska Native tribal group, with 37,000 members.

⁵ BUREAU OF INDIAN AFFAIRS, AMERICAN INDIANS TODAY 9-10 (1991) (hereinafter AMERICAN INDIANS TODAY), available at <http://www.cwis.org/fwdp/Americas/biafaq91.htm>.

⁶ Other large reservations include the San Carlos (1.8 million acres), Hopi (1.6 million acres), Tohono O'odham (1.2 million acres), and Fort Apache (1.7 million acres), all in Arizona; the Wind River in Wyoming (1.9 million acres); the Pine Ridge (1.8 million acres) and Cheyenne River (1.4 million), both in South Dakota; the Crow (1.5 million acres) in Montana; and the Yakima (1.1 million acres) in Washington.

⁷ AMERICAN INDIANS TODAY, *supra* note 5 at 9.

¹ RICHARD O. JONES (NCHRP Legal Research Digest No. 30, 1994).

² RICHARD O. JONES (NCHRP Legal Research Digest No. 41, 1998).

2. Who Are Indians?⁸

The term "Indian," as applied to the inhabitants of the Americas, is a misnomer stemming from Columbus's belief that he had reached India. The term remains in use to refer to those inhabitants and their descendants. It was institutionalized by being placed in the U.S. Constitution.⁹ The term carries both racial and legal implications, with the two not necessarily being conjoined. According to Cohen:

The term "Indian" may be used in an ethnological or in a legal sense. If a person is three-fourths Caucasian and one-fourth Indian, that person would ordinarily not be considered an Indian for ethnological purposes. Yet legally such a person may be an Indian. Racial composition is not always dispositive in determining who are Indians for purposes of Indian law. In dealing with Indians, the federal government is dealing with members or descendants of political entities, that is, Indian tribes, not with persons of a particular race.¹⁰ (citations omitted)

There is no single federal or tribal criterion establishing a person's identity as an Indian. Government agencies use differing criteria to determine who is an Indian eligible to participate in their programs. Tribes also vary their criteria for membership.¹¹ For example, the Indian Reorganization Act of 1934 (IRA),¹² used this definition:

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal people of Alaska shall be considered Indians.¹³

Courts also have adopted various definitions of the term "Indian" that could be used by the courts.¹⁴ The diversity of the use and varying definitions of

⁸ See generally WILLIAM C. CANBY, JR. *AMERICAN INDIAN LAW IN A NUT SHELL* 3-10 (4th ed., West Group 2004) (1998); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 19-26 (The Michie Company 1982) (1941); ROBERT N. CLINTON, NELL JESSUP NEWTON, MONORE EDWIN PRICE, *AMERICAN INDIAN LAW: CASES AND MATERIALS* (1991); STEPHAN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES: THE BASIC ACLU GUIDE TO INDIAN AND TRIBAL RIGHTS* (1992).

⁹ Lawrence R. Baca, *The Pinta, the Nina, the Santa Maria...and Now Voyager II: An Introduction to Federal Indian Law*, 36 FED. B. NEWS J. No. 6, at 421 (1989).

¹⁰ COHEN, *supra* note 8, at 19.

¹¹ AMERICAN INDIANS TODAY, *supra* note 5, at 13.

¹² 25 U.S.C. §§ 461-79 (1982).

¹³ See 25 U.S.C. § 479.

¹⁴ Baca, *supra* note 9, at 421.

the term "Indian" require the practitioner to specifically determine at the outset the purpose for which identification is relevant. Perhaps the most important definition is the one used in the Indian Self-Determination and Education Assistance Act (ISDEAA),¹⁵ which provides that "Indian" means a person who is a member of an Indian tribe."

3. What Is an Indian Tribe?¹⁶

Originally, an Indian tribe was a body of people bound together by blood ties who were socially, politically, and religiously organized; who lived together in a defined territory; and who spoke a common language or dialect.¹⁷ Even though the Constitution, Article I, Section 8, Clause 3, and many federal statutes and regulations use the term, there is today no single federal statute that defines "Indian Tribe" for all purposes.¹⁸ Probably the most important definition is that provided in Section 450b(e) of the ISDEAA:

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C.S. §§ 1601 et seq.] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

While a group of Indians may consider itself to be a "tribe," that group must meet the requirements for recognition established by the Secretary of the Interior to presently qualify for federal benefits afforded "Indian tribes." Such recognition by the Secretary of the Interior is given substantial, perhaps complete, deference by courts.¹⁹ The govern-

¹⁵ 25 U.S.C.S. § 450 *et seq.*, 450b(d).

¹⁶ See generally Weatherhead, *What Is an "Indian Tribe"—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1 (1980); COHEN, *supra* note 8, at 3-4; AMERICAN INDIAN LAW DESKBOOK 28-34 (1993) (hereinafter DESKBOOK); CLINTON *et al.*, *supra* note 8, at 79-83; PEVAR, *supra* note 8, at 14-15.

¹⁷ AMERICAN INDIANS TODAY, *supra* note 5, at 13; See also *Montoya v. United States*, 180 U.S. 261, 266 (1901), where the Court said: "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

¹⁸ COHEN, *supra* note 8, at 3.

¹⁹ DESKBOOK, *supra* note 16, at 32, n.19; *but see* *Koke v. Little Shell Tribe of Chippewa Indians of Mont.*, 2003 Mt. 121, 133, 315 Mont. 510, 513, 68 P.3d 814, 816 (2003): "[t]ribes may still be recognized as such under common law. The Supreme Court established criteria for common law recognition of a tribe in *Montoya v. United States*, 180 U.S. 261, 21 S. Ct. 358, 359, 45 L. Ed. 521, 36 Ct. Cl. 577

ment's recognition or failure to recognize a tribe, while a political decision, is still subject to judicial review for compliance with law and regulation or due process claims.²⁰ In 1978, the U.S. Department of the Interior (DOI) adopted regulations²¹ establishing a procedure for tribal recognition. The extensive elements mandatorily required to be stated in a petition for recognition are set out in 25 C.F.R. § 83.7.

As late as 1977, out of 400 tribes then claiming to exist, less than 300 had been officially recognized by the Secretary of the Interior.²² By 1991, there were 510 federally recognized tribes in the United States, including about 200 village groups in Alaska.²³ In 2002, the BIA listed 562 recognized tribes, which included some 225 Alaska Native entities.²⁴ The latest BIA listing, published on March 21, 2005,²⁵ shows additional increases.²⁶

4. What Are Meant by the Terms "Indian Country" and "Indian Reservations"?²⁷

a. "Indian Reservation"

Although the term "Indian reservation" has been historically used, and appears in scores of provisions of the U.S.C., particularly Title 25, "Indians," there is no single federal statute that defines it for all purposes. However, the term does have an accepted meaning in law. Prior to 1850, the definition of the term "Indian reservation" was a "parcel of land set aside by the federal government for Indian use."²⁸ The modern meaning, since 1850, has been

(1901); first, members must be of the same or a similar race; second, they must be united in a community; third, they must exist under one leadership or government; and fourth, they must inhabit a particular, though sometimes ill-defined territory." Little Shell Tribe of Chippewa Indians, 68 P.3d at 816–17.

²⁰ CANBY, *supra* note 8, at 5–6, citing *Miami Nation of Indians v. United States Dep't of the Interior*, 255 F.3d 342, 347–49 (7th Cir. 2001); *Greene v. Babbitt*, 64 F.3d 1266, 1274–75 (9th Cir. 1995).

²¹ 25 C.F.R. pt. 83.

²² AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 461 (1977).

²³ AMERICAN INDIANS TODAY, *supra* note 5, at 9.

²⁴ 67 Fed. Reg. 46328 (July 12, 2002).

²⁵ The list is published pursuant to 25 U.S.C. § 479a-1.

²⁶ 70 Fed. Reg. 13518 (March 21, 2005).

²⁷ See Pommersheim, *The Reservation as Place: A South Dakota Essay*, 36 S.D. L. REV. 246 (1989); COHEN, *supra* note 8, at 27–46; CLINTON et al., *supra* note 8, at 39–41; DESKBOOK, *supra* note 16, at 14–15; PEVAR, *supra* note 8, at 16–19.

²⁸ *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1266 (10th Cir. 2001).

"land set aside under federal protection for the residence of tribal Indians."²⁹ For purposes of Title 23, the term "Indian reservation road" includes a public road on or providing access to an Indian reservation, Indian trust land, or restricted Indian land.³⁰

b. "Indian Country"

Federal policy from the beginning has recognized and protected separate status for tribal Indians in their own territory.³¹ After the Continental Congress declared its jurisdiction over Indian tribes on July 12, 1775,³² the first Indian treaty guaranteed the Delaware Indians "all their territorial rights in the fullest and most ample manner..."³³ In describing the territory controlled by Indians, the Congress first used the term "Indian country."³⁴ Thereafter, the term was used in various criminal statutes relating to Indians, but usually was not defined.³⁵ The U.S. Supreme Court, in supplying a definition, developed a recognized common law test or definition.³⁶ This common law definition was adopted by Congress in its 1948 revision of Title 18, U.S.C., the Major Crimes Act. The Reviser's Notes

²⁹ *Id.*

³⁰ 23 U.S.C. § 101 (2001).

³¹ COHEN, *supra* note 8, at 28.

³² 2 J. CONTINENTAL CONG. 175 (1775). See also U.S. CONST. art. 1, § 8, cl. 3, giving Congress "power to regulate commerce with the Indian tribes."

³³ "Treaty with the Delawares," Sept. 17, 1778, 7 Stat. 13.

³⁴ "The Trade and Intercourse Act of 1790," 1 CONG. ch. 33, 1 Stat. 137.

³⁵ See *United States v. John*, 437 U.S. 634, 649 n.18, 98 S. Ct. 2541, 2549, 57 L. Ed. 2d 489, 500, where the Court notes that

Throughout most of the 19th century, apparently the only statutory definition [of "Indian Country"] was that in § 1 of the Act of June 30, 1834, 4 Stat. 729.... This Court was left with little choice but to continue to apply the principles established under earlier statutory language and to develop them according to changing conditions. See *e.g.*, *Donnelly v. United States*, 228 US 243 (1913).

³⁶ *Id.* at 647–49 nn. 16 and 18 (1978). For example, see *United States v. McGowan*, 302 U.S. 535, 58 S. Ct. 286, 82 L. Ed. 410 (1937), involving the Reno Indian Colony, which was situated on 28.38 acres of land owned by the United States and purchased to provide lands for needy Indians scattered throughout the State of Nevada, and established as a permanent settlement. *Held*: "[I]t is immaterial whether Congress designates a settlement as a 'reservation' or 'colony,' ...it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian country' [within the meaning of 25 U.S.C. § 247, relating to taking intoxicants into 'Indian country.']"

indicate that this definition was based on several decisions of the Supreme Court interpreting the term as it was used in various criminal statutes relating to Indians.³⁷ In revising the Act, Congress deleted the express reference to “reservation” in favor of the use of the term “Indian country.” The term is defined in 18 U.S.C. § 1151:³⁸

Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter [18 U.S.C. 1151 *et seq.*], means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

In *Indian Country, U.S.A. v. Oklahoma Tax Comm’n*,³⁹ denying Oklahoma the right to enforce State bingo regulations and tax bingo sales in Indian country, the Tenth Circuit Court noted that “[a]lthough section 1151 by its terms defines Indian country for purposes of determining federal criminal jurisdiction, the classification generally applies to questions of both civil and criminal jurisdiction. See *Cabazon*, 107 S. Ct. At 1087 n. 5.” Thus, whether a court is applying 18 U.S.C. § 1151 in a criminal case, or using that section as a common law definition of “Indian country” in a civil case, it simply refers to those lands that Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments.⁴⁰ In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,⁴¹ denying the right of Oklahoma to collect a tax on tribal cigarette sales to Indians on trust land not formally designated a “reservation,” Chief Justice Rehnquist noted that

In *United States v. John*, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated “trust land” or “reservation.” Rather, we ask whether the area has been “validly set apart for the use of the Indians as such, under the superintendence of the Government.” *Id.*, at 648-649; see also *United States v. McGowan*, 302 U.S. 535, 539 (1938).

³⁷ *Id.*

³⁸ *Id.* at 647 n.16.

³⁹ 829 F.2d 967, 973 (10th Cir. 1987).

⁴⁰ *Id.*

⁴¹ 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112, 1121 (1991).

The term “Indian country” has become the controlling term of art for jurisdictional issues in Indian law. Even though 18 U.S.C. § 1151 *et seq.* deals primarily with crimes and criminal procedures, extending the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States,⁴² the U.S. Supreme Court has held that the definition given by § 1151 also applies to state *civil* jurisdiction:⁴³ “[T]he principle that section 1151 defines Indian country for both civil and criminal jurisdiction purposes is firmly established. Any suggestion to the contrary...is simply erroneous.”⁴⁴ The Court has also held that a tribe may exercise civil authority over Indian country as defined by 18 U.S.C. § 1151.⁴⁵ In addition, the Supreme Court has held that land held in trust by the United States for a tribe is Indian country subject to tribal control whether or not that land has reservation status.⁴⁶

C. HISTORICAL BACKGROUND OF TRIBAL/INDIAN STATUS

1. Early History: Colonial and Formative Era

At the outset of the European settlement of North America, the continent was occupied by more than 400 independent Indian nations, with an estimated population of nearly 1 million.⁴⁷ Whether out of fear, respect, or both, agreements between the colonists and the tribes reflected treatment of each tribe as a sovereign nation, recognizing tribal ownership of the lands Indians occupied. Thus, the British colonists were generally prudent to pur-

⁴² 18 U.S.C. § 1152: “Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country.”

⁴³ *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1385 (10th Cir. 1996), *citing*: *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2, 95 S. Ct. 1082, 1084, 43 L. Ed. 2d 300, 304 (1975). (Mustang was a civil case that considered the issue of whether the Cheyenne-Arapaho Tribes of Oklahoma may impose a severance tax on oil and gas production on allotted lands, holding that the definition of Indian Country in 18 U.S.C. § 1151 applied, supporting jurisdiction in the tribe.)

⁴⁴ *Id.* at 1385, quoting *Pittsburgh & Midway Coal Mining v. Watchman*, 52 F.3d 1531, n.10 (10th Cir. 1995).

⁴⁵ *DeCoteau*, 420 U.S. at 427, n.2.

⁴⁶ *Okl. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112, 1121 (1991).

⁴⁷ PEVAR, *supra* note 8, at 1–2.

chase Indian lands with consent of the tribe.⁴⁸ During this colonization period, the English Crown also treated the Indian tribes as foreign sovereigns and provided protection of the tribes from any encroachment by the colonists. For example, following the end of the French and Indian War (1754–1763) and the defeat of France by England, King George III, by royal proclamation, prohibited settlement or encroachment on Indian lands west of the Appalachian Mountains. One of the disputes arising from this proclamation resulted in the first U.S. Supreme Court decision relating to Indian law.⁴⁹

The Continental Congress declared its jurisdiction over Indian tribes on July 12, 1775.⁵⁰ The Delaware Treaty of Fort Pitt⁵¹ was the only treaty ratified by the Continental Congress.⁵² This would be the first of 367 ratified Indian treaties between 1778 and 1868, when the final treaty was signed with the Nez Percés.⁵³ The Fort Pitt Treaty guaranteed the Delaware Indians “all their territorial rights in the fullest and most ample manner...”⁵⁴ Thus, federal policy from the beginning has recognized and protected separate status for tribal Indians in their own territory.⁵⁵

Following the Revolutionary War, Congress continued to make strong efforts to resist state/citizen aggression towards Indians and Indian lands to avoid Indian retaliation. The Northwest Ordinance of 1787⁵⁶ clearly reflects this effort by declaring: “The utmost good faith shall always be observed towards Indians; their land and property shall never be taken from them without their consent.”⁵⁷ The establishment of central government power over Indian affairs by the Continental Congress in 1775 was continued in the new U.S. Constitution. Article 1, Section 8, Clause 3, provides that “Congress shall have power...to regulate commerce with foreign Nations, among the several States and with the Indian Tribes.” The President was authorized to make treaties with Indian tribes, with Senate consent, by Article II, Section 2, Clause 2. Con-

gress, in passing a series of Trade and Intercourse Acts beginning in 1790, began a statutory pattern designed to separate Indians from non-Indians under federal control and regulation. For example, Congress required persons trading with Indians to have a federal license, authorized criminal prosecution of non-Indians for crimes against Indians, and prohibited acquisition of Indian land without federal government consent.

Gold was discovered on Georgia’s Cherokee lands in the late 1820s. This heightened the demand for white access to the Cherokee land and increased illegal entry by whites, leading to conflict and violence.⁵⁸ The State of Georgia reacted by passing several laws “purporting to abolish the Cherokee government, nullify all Cherokee laws, and extend Georgia state law over the Cherokee Nation.”⁵⁹ It would be in this climate of hostility that the Cherokees would turn to the U.S. Supreme Court for help, utilizing the able assistance of William Wirt, former Attorney General under Presidents Monroe and Adams.

2. Foundation Principles Established by Early Supreme Court Cases

a. Chief Justice Marshall’s Indian Trilogy: Federal Plenary Power

Three opinions by Chief Justice John Marshall, known as the Marshall trilogy, established the foundation principles of American Indian law. The primary principle is federal plenary power in Indian affairs. In the first case, *Johnson v. McIntosh*,⁶⁰ the Court held that the Indians had only a right of possession, with legal title and the power to transfer ownership resting only in the federal government. In the second case, *Cherokee Nation v. Georgia*,⁶¹ the Court clarified the status of Indian tribes within our legal framework as being neither states nor foreign nations, but “domestic dependent nations...in a state of pupilage.” In the third case, *Worcester v. Georgia*,⁶² the Court concluded that the states have no power in Indian territory and that the Indian nations are distinct political communities, having territorial boundaries within which their authority is exclusive, subject to federal plenary power.

(1) *Johnson v. McIntosh* was the first decision of the Supreme Court determining ownership of land occupied by Indians and the power of Indians to

⁴⁸ BRYON H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS, 21 (Charles Zelden ed., 2002) (hereinafter WILDENTHAL).

⁴⁹ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). See WILDENTHAL, *supra* note 48, at 21.

⁵⁰ 2 J. CONTINENTAL Cong. 175 (1775). See also U.S. CONST. art. 1, § 8, cl. 3, giving Congress “power to regulate commerce with Indian tribes.”

⁵¹ 7 Stat. 13-15 (Sept. 17, 1778).

⁵² *Id.* at 31–33.

⁵³ *Id.* at 1.

⁵⁴ 7 Stat. 13 (1778).

⁵⁵ COHEN, *supra* note 8, at 28.

⁵⁶ 1 Stat. 50 (Aug. 7, 1789).

⁵⁷ PEVAR, *supra* note 8, at 3.

⁵⁸ Anchor-Books Editions, WILDENTHAL, *supra* note 48, at 39.

⁵⁹ *Id.*

⁶⁰ 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823).

⁶¹ 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831).

⁶² 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832).

convey such land. The plaintiffs claimed the land under 1773 and 1775 grants by chiefs of the Illinois and the Piankeshaw Indian Nations. The grants purported to convey the soil as well as the right of dominion to the grantees. The defendant claimed ownership under a grant from the United States. The court held the Indian conveyances invalid. Chief Justice Marshall's opinion found that the United States government became owner of lands under the European doctrine of discovery and conquest:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.... So, too, with respect to the concomitant principle, that Indian inhabitants are to be considered merely as occupants, to be protected of their lands, but to be deemed incapable of transferring the absolute title to others.... Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right....⁶³

(2) *Cherokee Nation v. Georgia* resulted from an original bill brought in the U.S. Supreme Court by the Cherokee Nation seeking an injunction to restrain the State of Georgia from executing certain state laws, which it alleged "go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."⁶⁴ The Cherokee Nation proceeded as a foreign state against the State of Georgia under Article III, Section 2, of the Constitution, which gives the court jurisdiction in controversies between a state of the United States and a foreign state. Chief Justice Marshall delivered the path-marking opinion for the majority, and had no difficulty in concluding that

[t]he acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts...[but] the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States.⁶⁵

As to the legal status of Indian tribes, Chief Justice Marshall provided the following language, which has been seized upon in developing the "trust responsibility" of the federal government:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestionable right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may be doubted whether those tribes...can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.... Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.⁶⁶

(3) *Worcester v. Georgia*, considered the more important of the Cherokee cases, produced Chief Justice Marshall's opinion that is considered the foundation of federal jurisdictional law over Indian affairs. The case was heard on a writ of error issued to certain Georgia judges to review the conviction of Worcester and others with the offense of "residing within the limits of the Cherokee nation without a license" and "without having taken the oath to support and defend the constitution and laws of the state of Georgia." Readily accepting jurisdiction, Chief Justice Marshall identified the issue as "whether the act of the legislature of Georgia, under which [Worcester] has been prosecuted and condemned, be consistent with, or repugnant to, the Constitution, laws and treaties of the United States."⁶⁷ The opinion reviews the history of Indian affairs under the English Crown, finding "no example...of any attempt on the part of the crown to interfere with the internal affairs of the Indians." It goes on to review practices under the Continental Congress, finding that it followed the Crown's model in its Indian treaties. Chief Justice Marshall then reviews in detail the 1785 Treaty of Hopewell and the 1791 Treaty of Holston between the United States and the Cherokee Nation. His opinion concludes:

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. * * * The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States. The act of the State of Georgia under

⁶³ *McIntosh*, 21 U.S. (8 Wheat.), at 586, 587, 603.

⁶⁴ *Cherokee Nation*, 30 U.S. (5 Pet.), at 15.

⁶⁵ *Id.* at 16, 20.

⁶⁶ *Id.* at 17.

⁶⁷ *Worcester*, 31 U.S. (6 Pet.) at 541-42.

which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity....⁶⁸

b. Enduring Principles of Chief Justice Marshall's Indian Trilogy

Besides establishing federal plenary power in Indian affairs, these three cases also established the following enduring principles.⁶⁹

1. Indian tribes, because of their original political/territorial status, retain incidents of preexisting sovereignty;
2. This sovereignty may be diminished or dissolved by the United States, but not by the states;
3. Because of this limited sovereignty and the tribe's dependence on the United States, the government has a trust responsibility relative to Indians and their lands.

c. Court Emphasis on Trust Responsibility

In applying these enduring principles in the intervening years, the Court has continually emphasized "the distinctive obligation of trust incumbent upon the Government in its dealing with these dependent and sometime exploited people." (*Seminole Nation v. United States*).⁷⁰ The Court went on to express this "obligation of trust":

In carrying out its treaty obligations with Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.⁷¹

Thus, the federal government has long been recognized as holding, along with its plenary power to regulate Indian affairs, a trust status towards Indians—a status accompanied by fiduciary obligations. While there is legally nothing to prevent Congress from disregarding its trust obligations, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the Nation's trust obligations.⁷²

⁶⁸ *Id.* at 557, 561.

⁶⁹ DESKBOOK, *supra* note 16, at 4.

⁷⁰ 316 U.S. 286, 296, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480, 1490 (1942).

⁷¹ *Id.* at 296–97.

⁷² *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (1975), citing *Squire v. Capoman*, 351 U.S.

3. Federal Policy Regarding Indians and Indian Tribes

a. Introduction

Indian law is best understood in historical perspective because it reflects national Indian policy that has been constantly changing, never consistent. Federal Indian policy has shifted "from regarding tribes as sovereign equals, to relocating tribes, to attempts to exterminate or assimilate them, and currently, to encouraging tribal self-determination."⁷³ Understanding the history of these shifting policies is important to the student of American Indian law because there are lasting effects from each policy that still linger today. Given the importance of these shifting views, we begin the historical perspective with the removal policy.

b. Removal Policy (1830 to 1861)⁷⁴

The period between 1830 and 1861 is known as the "Removal Period," marking a time when, because of increasing pressure from the states, the federal government began to force the eastern tribes to cede their land by treaty in exchange for reserved land in the west. Several treaties in the 1850s "reserved" land for tribal occupancy.⁷⁵ According to Prucha:

In the late 1820s and the 1830s a full-scale debate on Indian treaties renewed the criticisms of treaty making that Andrew Jackson had brought forth a decade earlier. There was a powerful onslaught against the treaties and the Indian nationhood on which they rested and an equally vigorous and eloquent defense of both, set in a framework of preservation of national faith and honor. The debate centered on the Cherokees in Georgia, but it had broader applicability.⁷⁶

Under Jackson, elected president in 1828, the removal policy ripened into official action. Jackson's first message to Congress sought federal legislation to authorize removal of the Cherokees and the other four "Civilized Tribes" (the Choctaw,

1, 7-8, 76 S. Ct. 611, 100 L. Ed. 883 (1956).

⁷³ PEVAR, *supra* note 8, at 2.

⁷⁴ See generally JOHN EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* 170 (1988) (hereinafter EHLE); FRANCIS P. PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 156–207 (1944) (hereinafter PRUCHA); ROBERT V. REMINI, *ANDREW JACKSON AND HIS INDIAN WARS* 226–53 (2001); WILDENTHAL, *supra* note 48, at 39–40.

⁷⁵ CLINTON ET AL., *supra* note 8, at 146, citing as examples: Treaty with the Kansas, Oct. 5, 1859, 12 Stat. 1111; Treaty with the Winnebago, Apr. 15, 1859, 12 Stat. 1101; Treaty with the Menominee, May 12, 1854, 10 Stat. 1064.

⁷⁶ PRUCHA, *supra* note 74, at 156.

Chickasaw, Creek, and Seminole) to the west.⁷⁷ In response, following bitter debate, Congress passed the Indian Removal Act, and President Jackson signed it on May 28, 1830 (4 Stat. 411), authorizing the President to negotiate with the eastern tribes for relocation. The act expressly provided for grants of federal land west of the Mississippi for any Indians who “may choose to exchange the lands where they now reside, to remove there” (Oklahoma “Indian Territory”).⁷⁸

The program of voluntary land exchange and removal became one of coercion, with journeys of great hardship and imposed suffering, such as that of the Trail of Tears experienced by the Five Civilized Tribes during their movement from the Southeast to what is now Oklahoma.⁷⁹ Prucha notes that

The southern Indians had been forced into treaties they did not want, treaties whose validity they denied but which were adamantly enforced. The hardships of removal were extreme. Yet these Indian nations were not destroyed.... [S]upporters in Congress and the decisions of John Marshall in the Cherokee cases provided a theoretical basis for the continuing political autonomy of the tribes and their rights to land.⁸⁰

According to Pevar:

Between 1832 and 1843 most of the eastern tribes either had their lands reduced in size or were coerced into moving to the West. Many tribes, at first given “permanent” reservations in Arkansas, Kansas, Iowa, Illinois, Missouri, and Wisconsin, were forced to move even farther west to the Oklahoma Indian Territory. Indian treaties were broken by the government almost as soon as they were made.⁸¹

c. Reservation Policy (1861 to 1887)

The period 1861 to 1887 is known as the “Reservation Period,” when Congress recognized the treaty “reserved” lands as permanent areas under tribal jurisdiction within the states (“reservations”). This was first done in the Enabling Act for the Kansas Territory.⁸² Other such Enabling Acts or state constitutions recognized these “reservations” and disavowed state jurisdiction.⁸³ The move to

make the reserved lands permanent helped to give stability to tribal territorial boundaries and honor to the treaties. During the treaty-making period (1789–1871), the overriding goal of the United States was to obtain aboriginal Indian lands, especially those being encircled by non-Indian settlements.⁸⁴ During this treaty-making period, “aboriginal title” was virtually extinguished, usually by treaties reserving different lands for exclusive tribal occupancy, and reservations were established by statute,⁸⁵ agreements, and Executive Orders.⁸⁶ Eventually, the reservations “came to be viewed...as instruments for ‘civilizing’ the Indians,” with federally appointed Indian agents placed to insure Indian adaptation to non-Indian ways.⁸⁷

d. Allotment and Assimilation Policy (1887 to 1934)

Although tribal land is held in common for the benefit of all members of the tribe, during a long

This disclaimer, however, is not to be interpreted as a total disclaimer of jurisdiction over the actions of Indians. These states are:

1. Alaska: ALASKA CONST. art. 12, § 12; Enabling Act, 72 Stat. 339, § 4, as amended, 73 Stat. 141.
2. Arizona: ARIZ. CONST. art 20; Enabling Act, 36 Stat. 568, § 19.
3. Idaho: IDAHO CONST. art 21, § 19; Enabling Act, 26 Stat. 215.
4. Montana: MONT. CONST. ord. I, § 2; Enabling Act, 25 Stat. 676, §§ 4 and 10; Pres. Procl. 26 Stat. 1551.
5. New Mexico: N. M. CONST. art 21, §§ 2 and 10; Enabling Act, 36 Stat. 557; Joint Res., 37 Stat. 39; Pres. Procl., 37 Stat. 1723.
6. North Dakota: N. D. CONST. art. 16; Enabling Act, 25 Stat. 676, §§ 4 and 10; Pres. Procl., 26 Stat. 1548.
7. Oklahoma: OKLA. CONST. art. I, § 3; Enabling Act, 34 Stat. 267, §§ 1, 2, and 3; Pres. Procl., 35 Stat. 2160.
8. South Dakota: S. D. CONST. art. 22, § 2; Enabling Act, 25 Stat. 676, §§ 4 and 10; Pres. Procl., 26 Stat. 1549.
9. Utah: UTAH CONST. art. 3; Enabling Act, 28 Stat. 107, § 3; Pres. Procl., 29 Stat. 876.
10. Washington: WASH. CONST. art. 26; Enabling Act, 25 Stat. 676; Pres. Procl., 26 Stat. 1552.
11. Wyoming: WYO. CONST. art. 21, § 26; Enabling Act, 26 Stat. 222.

⁷⁷ WILDENTHAL, *supra* note 48, at 38.

⁷⁸ *Id.* at 40.

⁷⁹ CANBY, *supra* note 8, at 18.

⁸⁰ PRUCHA, *supra* note 74, at 182.

⁸¹ PEVAR, *supra* note 8, at 4.

⁸² *Id.* at 147, citing the Act of Jan. 29, 1861, ch. 20, § 1, 12 Stat. 127; see also Robert H. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 960–61 (1975).

⁸³ Eleven states initially disclaimed jurisdiction over Indian lands, including Indian reservation land, in their state constitutions at the time they received statehood.

⁸⁴ COHEN, *supra* note 8, at 66.

⁸⁵ DESKBOOK, *supra* note 16, at 45–46.

⁸⁶ COHEN, *supra* note 8, at 28.

⁸⁷ CANBY, *supra* note 8, at 19, where he also notes:

The appointment of Indian agents came to be heavily influenced by organized religions, and when reservation schools were first set up in 1865, they too were directed by religious organizations with a goal of “Christianizing” the Indians. In 1878, off-reservation boarding schools were established to permit education of Indian children away from their tribal environments.

period of our history, 1854 to 1934, the United States followed a policy of allotting tribal land to individual Indians.⁸⁸ This policy was intended to promote assimilation of Indians into American society.⁸⁹ There were those, sympathetic to the plight of Indians living in hopeless poverty, who sincerely believed this could be remedied by granting individual ownership of land, which would thereby develop a “middle class” of Indian farmers.⁹⁰ Under this policy, the United States allotted millions of acres of tribal lands on certain Indian reservations.⁹¹ The passage of the General Allotment Act of 1887, commonly referred to as the Dawes Act, constituted a formalization of this policy, and is considered to be “the most important and, to the tribes, the most disastrous piece of Indian legislation in United States history.”⁹²

The Dawes Act provided for the mandatory allotment of reservation lands to individual Indians, with surplus lands made available to non-Indians by fee patent. It also provided that allottees became U.S. citizens and would be subject to state criminal and civil law.⁹³ In 1924, Congress conferred citizenship upon all Indians born within the United States (8 U.S.C. § 1401(b)). Although Section 5 of the Act provided that title to allotments were to be held in trust by the United States for 25 years—longer if determined by the President—the majority of Indian lands passed from native ownership under the allotment policy.⁹⁴

⁸⁸ See generally DELOS S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS, READJUSTMENT OF INDIAN AFFAIRS: HEARINGS ON H.R. 7902 BEFORE THE HOUSE COMM. ON INDIAN AFFAIRS, 73d CONG., 2d SESS. 428–89* (Francis P. Prucha, ed., Univ. of Oklahoma Press, 1973) (1934) (History of the Allotment Policy) (hereinafter D. OTIS).

⁸⁹ See *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1, 96 S. Ct. 1793, 1794, n.1, 48 L. Ed. 2d 274 (1976). Cited in *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982).

⁹⁰ CANBY, *supra* note 8, at 21. See also *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253–154, 112 S. Ct. 683, 685–86, 116 L. Ed. 2d 687, 695 (1992); *Shangreau v. Babbitt*, 68 F.3d 208 (8th Cir. 1995).

⁹¹ President Roosevelt described the allotment process in his message to Congress in 1906 as “a mighty pulverizing engine to break up the tribal mass.” 35 CONG. REC. 90 (1906).

⁹² CANBY, *supra* note 8, at 21.

⁹³ *Id.* at 22.

⁹⁴ In 1934, Congress enacted the Indian Reorganization Act, ch. 576, 48 Stat. 984 (codified as amended 25 U.S.C.A. §§ 461-479 (2005)), which ended the allotment policy.

The Dawes Act was challenged by the confederated tribes of the Kiowa, Comanche, and Apache Indians, residing in the Territory of Oklahoma, alleging violation of their treaty rights. The resulting 1903 U.S. Supreme Court decision in *Lone Wolf v. Hitchcock*, 187 U.S. 553, upholding the allotment policies of Congress, according to one legal scholar, “is probably the most infamous and harshly criticized Indian law decision in the history of U.S. courts.”⁹⁵ A unanimous Court, in rejecting the challenge, held that

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of government policy, particularly if consistent with perfect good faith towards the Indians. * * * We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises.⁹⁶

According to Pevar:

The effect of the General Allotment Act on Indians was catastrophic. Most Indians did not want to abandon their communal society and adopt the way of life of a farmer. Further, much of the tribal land was unsuitable for small scale agriculture. Thousands of impoverished Indians sold their parcels of land to white settlers or lost their land in foreclosures when they were unable to pay state real estate taxes. Moreover, tribal government was seriously disrupted by the sudden presence of so many non-Indians on the reservation and by the huge decrease in the tribe’s land base.⁹⁷

Out of approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900.⁹⁸ By 1934 approximately 90 million acres passed from tribal lands status, through individual Indian allotment status, to non-Indian fee ownership.⁹⁹ Although the allotment policy ended with passage of the IRA in 1934,¹⁰⁰ it resulted in reservations becoming checkerboarded between tribal lands, allotted individual Indian lands held in federal trust, and patented

⁹⁵ WILDENTHAL, *supra* note 48, at 53.

⁹⁶ 187 U.S. 553, 566, 568, 23 S. Ct. 216, 221, 222, 17 L. Ed. 299, 306–07 (1903).

⁹⁷ PEVAR, *supra* note 8, at 5.

⁹⁸ D. OTIS, *supra* note 89, at 87.

⁹⁹ *Id.* at 17.

¹⁰⁰ 48 Stat. 984, 73 Pub. L. No. 383 (1934).

lands, owned in fee by either Indians or non-Indians, but no longer in trust status. This situation exists today within the exterior boundaries of many reservations. On some reservations there is a high percentage of land owned and occupied by non-Indians, although 140 reservations have entirely tribally owned land.¹⁰¹ This checkerboard, mixed ownership situation on many reservations significantly complicates the process of acquiring lands within those reservations because the federal requirements differ as to each type of land holding.

e. Indian Reorganization Policy (1934 to 1953)

The 1930s saw an abrupt policy change in the government's handling of Indian affairs, due in large measure to recognition that the Dawes Act had been a failure. A major vehicle for change was a Brookings Institution 2-year study by Lewis Meriam that produced a report entitled, *The Problem of Indian Administration* (commonly called the "Meriam Report"), which was released in 1928, documenting the failure of the allotment policy.¹⁰² John Collier, who had long been actively involved in the Indian reform movement, was appointed as Commissioner of Indian Affairs by President Roosevelt in 1933,¹⁰³ and "aggressively promoted a new policy in Indian affairs that revived tribalism and Indian cultures."¹⁰⁴ Congress, in passing the IRA in 1934 (Wheeler-Howard Act),¹⁰⁵ adopted much of his program, including the strengthening and modernizing of tribal governments.¹⁰⁶ Canby states that "[t]he Indian Reorganization Act was based on the assumption, quite contrary to that of the Allotment Act, that the tribes not only would be in existence for an indefinite period, but that they *should* be."¹⁰⁷

The purpose of the Act was "to rehabilitate the Indian's economic life and give him a chance to develop the initiative destroyed by a century of oppression and paternalism."¹⁰⁸ Major features of the Act included provisions for

- Ending the allotment policy.
- Holding Indian allotments in trust indefinitely.
- Returning to tribes the surplus land not already sold.
- Authorizing the Interior Secretary to acquire lands for tribes.
- Authorizing the Interior Secretary to create new reservations.
- Authorizing tribes to organize as federally chartered corporations and adopt constitutions (with approval of the Secretary of Interior and subject to ratification by a majority of tribal members).
- Requiring the Secretary of Interior to give Indians preference in employment for BIA.

Pevar notes that between 1935 and 1953, "Indian land holdings increased by over two million acres, and federal funds were spent for on-reservation health facilities, irrigation works, roads, homes, and community schools."¹⁰⁹ Probably the greatest success of the Act was stopping further reduction of the tribal land base. The "encouragement of tribal self-government enjoyed a more limited success."¹¹⁰ "But on the whole the Act must be considered a success in providing a framework, however flawed, for growing self-government by the tribes in the decades following its passage."¹¹¹

f. Termination Policy (1953 to 1969)

Congress abruptly changed Indian policy in 1953, adopting a radical new policy of "termination." The 83rd Congress enacted House Concurrent Resolution No. 108, resolving to, at the earliest possible time, "make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States," ending their status as wards of the United States.¹¹² The BIA began a survey of tribes suitable for termination, which resulted in termination of more than 100 tribes by congressional

¹⁰¹ AMERICAN INDIANS TODAY, *supra* note 5, at 9.

¹⁰² PRUCHA, *supra* note 74, at 374, n.29; CANBY, *supra* note 8, at 24.

¹⁰³ PEVAR, *supra* note 8, at 6. Pevar notes that Collier declared in 1934 that "No interference with Indian religious life or expression will hereafter be tolerated. The cultural history of Indians is in all respects to be considered equal to that of any non-Indian group." Citing at footnote 22 the *Annual Report*, Commissioner of Indian Affairs, 1934, at 90.

¹⁰⁴ PRUCHA, *supra* note 74, at 374-75.

¹⁰⁵ 48 Stat. 984, 73 Pub. L. No. 383 (1934), codified at 25 U.S.C. §§ 461-494.

¹⁰⁶ PRUCHA, *supra* note 74, at 374-75.

¹⁰⁷ CANBY, *supra* note 8, at 24.

¹⁰⁸ PEVAR, *supra* note 8, at 6, citing H.R. REP. NO. 73-1804, at 6, 90 (1934). *See also* Mescalero Apache Tribe v.

Jones, 411 U.S. 145, 152, 93 S. Ct. 1267, 1273, 36 L. Ed. 2d 114, 122 (1973) (quoting H.R. REP. NO. 73-1804, at 6 (1934); *see also* Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 n.5, 107 S. Ct. 971, 976, 94 L. Ed. 2d 10, 19 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335, 103 S. Ct. 2378, 2387, 76 L. Ed. 611, 621 (1983); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 168, 100 S. Ct. 2069, 2089, 65 L. Ed. 2d 10, 38 (1980).

¹⁰⁹ PEVAR, *supra* note 8, at 7.

¹¹⁰ CANBY, *supra* note 8, at 25.

¹¹¹ *Id.*

¹¹² H. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

action, primarily in Oregon and California.¹¹³ Pevar points out that upon termination, “the tribe lost its powers of self-government, the tribe and its members became ineligible for government services generally provided to Indians and tribes, and tribal members became subject to state law.”¹¹⁴

Another product of this termination policy was enactment of Public Law 83-280¹¹⁵ (commonly referred to as Public Law 280, hereinafter “P.L. 280”), the only federal law extending state jurisdiction to Indian reservations generally.¹¹⁶ This Act mandatorily delegated civil and criminal jurisdiction over reservation Indians to five states (California, Minnesota, Nebraska, Oregon, and Wisconsin), the “mandatory” states. A sixth mandatory state, Alaska, was added in 1958.¹¹⁷ In addition, the Act authorized for the remaining states the option of assuming such jurisdiction.¹¹⁸ Out of 44 “option” states, only 10 assumed jurisdiction under P.L. 280.¹¹⁹ According to Canby:

The effect of Public Law 280 was drastically to change the traditional division of jurisdiction among those states where the law was applied...[displacing] otherwise applicable federal law and...[leaving] tribal authorities with a greatly diminished role. It ran directly counter to John Marshall’s original characterization of Indian country as territory in which the laws of the state “can have no force.” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).¹²⁰

g. Self-Determination Policy (1969 to Present)

(1) *General.*—The Termination Era was short-lived, and by 1959, “the Eisenhower administration backed off any further pursuit of termination without Indian consent, which was decidedly lacking.”¹²¹ Wildenthal observes that the historical timing of the U.S. Supreme Court’s unanimous decision in

*Williams v. Lee*¹²² was also a significant factor and “a key turning point in the return to a policy of self-determination and greater respect for tribal sovereignty.”¹²³ The issue in *Williams* was whether the Arizona State courts had jurisdiction of a suit by Lee, a non-Indian store merchant on the Navajo Reservation, to collect for goods sold on credit to Williams, a Navajo Indian resident. Williams’s motion for dismissal, on the ground that jurisdiction lay in the tribal court rather than state court, was denied. The Supreme Court held that the motion should have been granted, concluding in an opinion by Justice Black:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian.... The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–566.

Vine Deloria, writer and a leading Indian historian, observes that, by 1958, Indians were becoming active voters, causing congressional candidates to become more cautious about suggesting a break in “the traditional federal-Indian relationship,” and that the “[t]ermination policy simply evaporated in the early 1960s because not enough advocates could be found in Congress to make it an important issue.”¹²⁴

In 1968, building on social welfare programs benefiting impoverished Indians, President Johnson, in a message to Congress, described Indians as the “forgotten” Americans, declaring: “We must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination.”¹²⁵ The same year Congress passed the Indian Civil Rights Act of 1968 (ICRA), 82 Stat. 77, 25 U.S.C. § 1301 *et seq.*, imposing upon the tribes most of the Bill of Rights, including protection of free speech, free exercise of religion, and due process and equal protection of the laws. Another provision of that Act amended P.L. 280, to require tribal consent for states to assume civil and

¹¹³ PEVAR, *supra* note 8, at 57, citing at n.63: American Indian Policy Review Commission, Final Report, at 447-53.

¹¹⁴ *Id.* at 57, citing, “e.g., Menominee Termination Act, 25 U.S.C. Secs. 985 *et seq.*; Klamath Termination Act, 25 U.S.C. Secs. 564 *et seq.* See discussion, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986).”

¹¹⁵ Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588, amending ch. 53 of 18 U.S.C. to add § 1162 and ch. 85 of 28 U.S.C. to add § 1360.

¹¹⁶ PEVAR, *supra* note 8, at 113.

¹¹⁷ Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

¹¹⁸ Pub. L. No. 83-280, §§ 6, 7.

¹¹⁹ PEVAR, *supra* note 8, at 116: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.

¹²⁰ CANBY, *supra* note 8, at 28, 232–58.

¹²¹ WILDENTHAL, *supra* note 48, at 31.

¹²² 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

¹²³ WILDENTHAL, *supra* note 48, at 86.

¹²⁴ AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY (Vine Deloria, Jr., ed., 1985); VINE DELORIA, JR., THE EVOLUTION OF FEDERAL INDIAN POLICY MAKING 251 (hereinafter AMERICAN INDIAN POLICY).

¹²⁵ PEVAR, *supra* note 8, at 8, citing in n.27, 4 GOV’T PRINTING OFFICE, PRESIDENTIAL DOCUMENTS, WEEKLY COMPILATION OF, no. 10 (1968).

criminal jurisdiction over Indian country (25 *United States Code Annotated* (U.S.C.A.) §§ 1321-22, 1326). In addition, a procedure was enacted providing for states to retrocede jurisdiction previously assumed under P.L. 280 (25 U.S.C.A. § 1323). By 1992, six states had retroceded jurisdiction to some extent.¹²⁶

President Nixon is credited with changing the direction of the federal government and its treatment of Indian tribes and Indians. Building on President Johnson's rejection of the Termination Policy, President Nixon, in a landmark message in 1970, called for a federal policy of "self determination" for the Indian tribes. He denounced the termination policy, stating, "This, then, must be the goal of any new Indian policy toward the Indian people: to strengthen the Indian sense of autonomy without threatening his sense of community."¹²⁷ While stressing the continued importance of the trust relationship, he urged Congress to undertake a program of legislation that would permit the tribes to manage their own affairs. This ignited a bipartisan consensus that has remained, more or less, ever since.¹²⁸ This consensus has produced a significant number of legislative enactments validating and advancing "self determination" for Indian tribes, officially supported by the six ensuing U.S. Presidents.¹²⁹

(2) *Significant Self-Determination Era Legislation.*—The first piece of legislation in this era was

¹²⁶ *Id.* at 116–18.

¹²⁷ *Id.* at 8, quoting from: GOV'T PRINTING OFFICE, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY.

¹²⁸ WILDENTHAL, *supra* note 48, at 31.

¹²⁹ See COHEN, *supra* note 8, at 181–88. See also CANBY, *supra* note 8, at 32, pointing out that: "In 1983 President Reagan reaffirmed the policy of strengthening tribal governments...[and] repeated President Nixon's repudiation of the termination policy. Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983)." President George H.W. Bush issued a proclamation on March 2, 1992, 57 Fed. Reg. 7873, proclaiming 1992 as the "Year of the American Indian," affirming "the right of Indian tribes to exist as sovereign entities...[and] express[ed] our support for tribal self-determination." In 1994, President Clinton issued a Presidential Memorandum to all heads of executive departments and agencies, recognizing the sovereignty of tribal governments, directing that each department and agency operate "within a government-to-government relationship with federally recognized tribal governments," and requiring all federal agencies to consult with tribal councils before developing federal regulations affecting Indian reservations. 59 Fed. Reg. 22951 (1994). This was further endorsed by President Clinton in 2000, 65 Fed. Reg. 67249, and President George W. Bush in 2002, 67 Fed. Reg. 67773.

the Indian Education Act of 1972,¹³⁰ designed to meet the special needs of Indian children, but which one commentator viewed as opening "a Pandora's box of benefits because it failed to describe precisely the Indians who were to be the beneficiaries of an expanded federal effort in Indian education."¹³¹ Next came the Indian Financing Act of 1974,¹³² establishing a revolving loan fund to aid development of Indian resources. Then came the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA),¹³³ "perhaps the single most important piece of Indian legislation since the Indian Reorganization Act."¹³⁴ This Act and other selected legislation considered important to Indian transportation law issues are discussed immediately below. Other "self-determination" legislation will be discussed in detail in later sections.

(a) *The ISDEAA* directs the Secretary of the Interior and the Secretary of Health and Human Services to contract with tribal organizations for specified programs administered by their departments for the benefit of Indians, including construction programs.¹³⁵ Relative to subcontracting, 25 U.S.C. § 450e(b)(2) requires all federal agencies to the greatest extent practicable to give preference in the award of subcontracts to Indian organizations and Indian-owned economic enterprises in any contracts with Indian organizations or for the benefit of Indians.¹³⁶

¹³⁰ 86 Stat. 334, 92 Pub. L. No. 318 (1972).

¹³¹ AMERICAN INDIAN POLICY, *supra* note 124, at 253.

¹³² 25 U.S.C. §§ 1451 *et seq.*

¹³³ Pub. L. No. 93-638 (Jan. 7, 1975), 88 Stat. 2205, 25 U.S.C. §§ 450e *et seq.*

¹³⁴ PEVAR, *supra* note 8, at 8.

¹³⁵ 25 U.S.C. § 450f(a).

¹³⁶ See Alaska Chapter, Associated General Contractors v. Pierce, 694 F.2d 1162 (9th Cir. 1982), holding that the Indian Self-Determination Act, § 7(b), 25 U.S.C.S. § 450e(b), did not violate the Due Process Clause of the U.S. Const., and upholding the HUD preference for Indian-owned construction companies regulations; See also St. Paul Intertribal Housing Bd. v. Reynolds, 564 F. Supp. 1408 (D. Minn. 1983), upholding HUD program giving contracting preference to Indian-owned businesses in HUD-financed Indian housing programs; See also Hoopa Valley Indian Tribe v. United States, 415 F.3d 986 (9th Cir. July 2005), where the court of appeals affirmed both the administrative and district court decision that certain activities under the Trinity River Mainstream Restoration Program were not subject to ISDEAA because they were designed to benefit the public as a whole rather than "Indians because of their status as Indians." This case offers an excellent discussion on contracting preferences pursuant to both Title I and Title IV of ISDEAA. The case further distinguishes programs that are specifically targeted to Indians in contrast to programs that collaterally benefit

In connection with employment, 25 U.S.C. § 450e(b)(1) requires all Federal agencies to the greatest extent practicable to give preference in opportunities for training and employment to Indians in any contracts with Indian organizations or for the benefit of Indians. The Act's provisions for Indian preference in contracting and subcontracting has caused much confusion relative to the Federal-Aid Highway Program. This is due, in part, to the fact that Indian tribal officials believed its provisions to apply to all federal highway construction funds, including the grant-in-aid to the states for highway construction. The confusion is understandable given the fact that certain earmarked funds from the Highway Trust Fund administered by the Secretary of the Interior are subject to the ISDEAA, i.e., Indian reservation road funds administered under 23 U.S.C. § 204. However, no contracting preference for Indian-owned firms is either authorized or mandated under the Federal-Aid Highway Program.

(b) *Archaeological Resources Protection Act of 1979 (ARPA)*.¹³⁷ ARPA provides for the protection and management of archaeological resources, and specifically requires notification of the affected Indian tribe if archaeological investigations proposed would result in harm to or destruction of any location considered by the tribe to have religious or cultural importance. This Act directs consideration of the American Indian Religious Freedom Act (AIRFA) in the promulgation of uniform regulations.

(c) *American Indian Religious Freedom Act (AIRFA)*.¹³⁸ AIRFA was a joint resolution to establish a policy to remedy and alleviate the suppression of the practice of Indian religions, but providing no enforcement remedy. Section 1 provides as follows:

[H]enceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites.

Federal agencies are directed to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices. The Court of Appeals for the D.C. Circuit determined that there is a compliance element in this Act in the context of the National Environmental Policy Act of 1969 (NEPA), requiring that the views of Indian leaders

Indians as part of the broader population.

¹³⁷ Pub. L. No. 96-95, 93 Stat. 721, 16 U.S.C. § 470aa.

¹³⁸ S.J. Res. 102, Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. § 1996 (1979).

be obtained and considered when a proposed land use might conflict with traditional Indian religious beliefs or practices, and that unnecessary interference with Indian religious practices be avoided during project implementation on public lands, although conflict does not bar adoption of proposed land uses where they are in the public interest.¹³⁹ A more detailed discussion of AIRFA may be found at H.2.c.1, *infra*.

(d) *Indian Gaming Regulatory Act of 1988 (IGRA)*.¹⁴⁰ This Act requires states that do not totally prohibit gambling (meeting certain criteria) to negotiate compacts with Indian tribes desiring to establish gambling operations.¹⁴¹ Congress enacted IGRA in response to the U.S. Supreme Court decision in *California v. Cabazon Band of Mission Indians*,¹⁴² where it held that neither the State nor the county had any authority to enforce its gambling laws within the reservations of the Cabazon and Morongo Bands of Mission Indians in Riverside County, California, following the rule in *Bryan v. Itasca County*¹⁴³ that state law may be applicable when it is prohibitory and inapplicable when regulatory. Both tribes, by ordinances approved by the federal government, conducted on-reservation bingo games. The Cabazon Band also operated a card club for draw poker and other card games. The games were open to the general public and predominantly played by non-Indians coming onto the reservations. In a seven to two opinion, Justice White found P.L. 280 did not authorize State

¹³⁹ *Wilson v. Block*, 708 F.2d 735, 747, 228 U.S. App. D.C. 1661 (D.C. Cir. 1983).

¹⁴⁰ 102 Stat. 2467, Pub. L. No. 100-497 (1988) (codified at 25 U.S.C. §§ 2701-2721).

¹⁴¹ See generally Jason Kalish, *Do the States Have an Ace in the Hole or Should the Indians Call Their Bluff? Tribes Caught in the Power Struggle Between the Federal Government and the States*, 38 ARIZ. L. REV. 1345 (1996); Anthony J. Marks, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?* 17 LOY. ENT. L. J. 157 (1996); Jason D. Kolkema, *Federal Policy of Indian Gaming on Newly Acquired Lands and the Threat to State Sovereignty: Retaining Gubernatorial Authority Over the Federal Approval of Gaming on Off-Reservation Sites*, 73 U. DET. MERCY L. REV. 361 (1996);

Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769 (1995); Jeffrey B. Mallory, *Congress' Authority to Abrogate a State's Eleventh Amendment Immunity from Suit: Will Seminole Tribe v. Florida be Seminal?*, 7 ST. THOMAS L. REV. 791 (1995); Leah L. Lorber, *State Rights, Tribal Sovereignty, and the "White Man's Firewater": State Prohibition of Gambling on New Indian Lands*, 69 IND. L. J. 215 (1993).

¹⁴² 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

¹⁴³ 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 710 (1976).

regulation here since criminal laws were not involved (noting in footnote 11 that “it is doubtful that P.L. 280 authorizes application of any local laws to Indian reservations”). The Court rejected California’s contention that the tribes were “marketing an exemption” from state law (condemned by the Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 155), stating:

[T]he decision...turns on whether state authority is pre-empted by the operation of federal law; and “[s]tate jurisdiction is pre-empted...if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify assertion of state authority.” *Mescalero*, 462 U.S. at 333, 334. The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its “overriding goal” of encouraging tribal self-sufficiency and economic development. *Id.* at 334–335. While noting that the State’s concern that organized crime would be attracted to the high stakes games, was “a legitimate concern...we are unconvinced that it is sufficient to escape the pre-emptive force of federal and tribal interests apparent in this case” and “the prevailing federal policy continues to support these tribal enterprises....”¹⁴⁴

Congress enacted IGRA to provide a statutory basis for the operation of gaming by Indian tribes as a “means of promoting tribal economic development, self-sufficiency, and strong tribal governments.” The Act requires Indian tribes to appropriate the profits from gaming activities to fund tribal government operations or programs and to promote economic development.¹⁴⁵ One section of IGRA, dealing with newly acquired trust lands, has particular relevance to state transportation agencies. Section 2719(a) prohibits gaming on lands acquired in trust for Indian tribes after October 17, 1988. However, it provides a waiver of this provision in section 2719(b)(1)(A), where:

[T]he Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination.

(e) *Native Americans Graves Protection and Repatriation Act (NAGPRA)*.¹⁴⁶ NAGPRA applies to the human remains of Native American peoples, to

¹⁴⁴ Cabazon Band of Mission Indians, 480 U.S. at 202.

¹⁴⁵ 25 U.S.C. § 2710(b)(2)(B) (1994).

¹⁴⁶ 101 Pub. L. No. 601, 104 Stat. 3048 (1990) (Codified at 25 U.S.C §§ 3001–3013, 18 U.S.C. § 1170).

funerary objects, and to sacred and cultural patrimony objects, and also governs the intentional excavation or removal of Native American human remains and objects from federal or tribal lands, not allowing excavation or removal unless authorized by permit under the ARPA, 16 United States Code Service (U.S.C.S.) § 470aa–470mm. NAGPRA’s site protection measures only apply to remains and objects located on tribal, Native Hawaiian, or federal lands. The Act also governs the inadvertent discovery of Native American cultural items on federal or tribal lands.¹⁴⁷

4. Federal Trust Responsibility and “Indian Title”

a. Federal Government’s Trust Responsibility to Indian Tribes

In the more than 600 treaties entered into with Indian tribes between 1787 and 1871, when Congress ended such treaty making,¹⁴⁸ many explicitly provided for territorial protection by the United States,¹⁴⁹ while numerous treaties declared the tribes’ status to be dependent nations. During this period of “extinguishment” of aboriginal title and establishment of reservations, the concept of a federal trust responsibility to Indians evolved judicially.¹⁵⁰ It first appeared in *Cherokee Nation v. Georgia*,¹⁵¹ where Chief Justice Marshall concluded that Indian tribes “may, more correctly, perhaps, be denominated domestic dependent nations...in a state of pupilage and that [t]heir relation to the United States resembles that of a ward to his guardian.”¹⁵² Pevar cites a 1977 Senate report as expressing the modern view of this trust relationship:

The purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.¹⁵³

¹⁴⁷ *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 887–88 (2003).

¹⁴⁸ The Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71). The federal government continued to deal with Indian tribes after 1871 by agreements, statutes, and executive orders that had legal ramifications similar to treaties.

¹⁴⁹ COHEN, *supra* note 8, at 65, n.38.

¹⁵⁰ See generally *id.* at 220–21.

¹⁵¹ 30 U.S. (5 Pet.) 1 (1831).

¹⁵² *Id.* at 17.

¹⁵³ PEVAR, *supra* note 8, at 27, 34, n.13, American Indian Policy Review Commission, Final Report, at 130 (1977).

This trust relationship is now one of the significant features of Indian law, and it plays a major role in the procedures established for the acquisition of Indian lands¹⁵⁴ and in state police power regulation of Indian lands, as will be discussed later. The strength of the trust relationship is demonstrated by the decision in *United States v. Mitchell*,¹⁵⁵ where the Court held the United States subject to suit for money damages for violation of fiduciary duties in its management of forested allotted lands.¹⁵⁶

b. Indian Title

(1) “Aboriginal” or “Indian” Title.—The aboriginal entitlement concept was addressed in the early case of *Johnson v. McIntosh*,¹⁵⁷ where Chief Justice Marshall held that discovery gave the European powers the fee simple ownership of the domain they discovered, subject to a right of occupancy by the Indians, or “Indian Title.” The discovering sovereign thus acquired “an exclusive right to extinguish the Indian title either by purchase or conquest.” This fee title passed to the United States on independence.¹⁵⁸ “Aboriginal title” derives from actual, exclusive, and continuous occupancy for a long period of time.¹⁵⁹ And such title is good against anyone but the United States.¹⁶⁰ The federal government possesses the unquestioned power to convey the fee lands occupied by Indian tribes, although the grantee takes only the naked fee and cannot dis-

turb the occupancy of the Indians.¹⁶¹ Subsequent decisions clearly established that the extinguishment of Indian title (occupancy) could only be accomplished by Congress through treaty, statute or congressionally authorized Executive actions,¹⁶² or by voluntary abandonment of aboriginal land.¹⁶³

(2) “Treaty” or “Recognized Title.”—The second type of Indian title, “recognized” or “treaty” title, derives from an acknowledgment by the United States that a particular tribe of Indians has a legal right permanently to occupy and use certain land.¹⁶⁴ This type of title constitutes a legal interest in the land that can only be extinguished upon payment of compensation.¹⁶⁵ Abrogation of treaty-recognized title requires an explicit statement by Congress or congressional intent that is clear from the legislative history or surrounding circumstances of the particular act.¹⁶⁶ Such intent was found by the U.S. Supreme Court in *Clairmont v. United States*,¹⁶⁷ where the Court found that Congress intended to extinguish Indian title by the grant of a railroad right-of-way through the Flathead Reservation in Montana.¹⁶⁸ However, as noted by Canby, “[r]ecognition of title is a question of intent, and is sometimes the subject of great controversy. See *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).”¹⁶⁹

¹⁵⁴ COHEN, *supra* note 8, at 221.

¹⁵⁵ 463 U.S. 206, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983)

¹⁵⁶ Writing for the majority, Justice Marshall stated, *inter alia*:

Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.... This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of trust [citations omitted]. 463 U.S. 206, 226.

¹⁵⁷ 21 U.S. (8 Wheat.) 543 (1823).

¹⁵⁸ *Id.* at 587–88.

¹⁵⁹ *Strong v. United States*, 518 F.2d 556, 560, 207 Ct. Cl. 254, 259 (1975); *Sac and Fox Tribe of Okla. v. United States*, 315 F.2d 896, 903, 161 Ct. Cl. 189, 201 (1963).

¹⁶⁰ See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288–89, 75 S. Ct. 313, 321–22, 99 L. Ed. 314, 325–26 (1955).

¹⁶¹ *Bennett County S.D. v. United States*, 394 F.2d 8, 11. *Cf.*, *United States v. Thomas*, 151 U.S. 577, 14 S. Ct. 426, 38 L. Ed. 276 (1894); *State of Wisconsin v. Hitchcock*, 201 U.S. 202, 26 S. Ct. 498, 50 L. Ed. 727 (1906).

¹⁶² See, e.g., *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 945 (Ct. Cl. 1974).

¹⁶³ *Barker v. Harvey*, 181 U.S. 481, 498–99, 21 S. Ct. 690, 696–97, 45 L. Ed. 963, 971 (1901).

¹⁶⁴ *United States v. Bouchard*, 464 F. Supp. 1316, 1347 (W.D. Wis. 1978); *Bennett County, S.D. v. United States*, 394 F.2d 8, 11.

¹⁶⁵ See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 n.29, 100 S. Ct. 2716, 2740, 65 L. Ed. 2d 844, 876 (1980); *Minn. Chippewa Tribe v. United States*, 315 F.2d 906, 161 Ct. Cl. 258 (1963); *United States v. Creek Nation*, 295 U.S. 103, 55 S. Ct. 681, 79 L. Ed. 1331 (1935).

¹⁶⁶ *Lac Courte Oreilles Band, Etc. v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983), *citing* *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S. Ct. 2245, 37 L. Ed. 92 (1973).

¹⁶⁷ 225 U.S. 551, 32 S. Ct. 787, 56 L. Ed. 1201 (1912).

¹⁶⁸ *Id.* at 555–56.

¹⁶⁹ CANBY, *supra* note 8, at 377–78. Canby notes: “Executive orders do not establish recognized title, and lands set aside by that method may be taken by the federal government without compensation.” *citing* *Sioux Tribe v. United States*, 316 U.S. 317 (1942); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949); *Karuk Tribe v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000).

(3) *“Trust Status” Title.*—As noted in C.5, *supra*, Congress, in enacting the IRA, recognized that one of the keys to tribal self-determination was the ability of the Indian tribes to retain, protect, and supplement their land base. Accordingly, the IRA expressly discontinued the allotment program,¹⁷⁰ indefinitely extended the periods of trust status of Indian trust lands,¹⁷¹ authorized the Secretary of the Interior to restore unallotted surplus reservation lands to Indian “trust status” ownership,¹⁷² limited the sale or transfer of restricted Indian land,¹⁷³ and specifically addressed the problem of lost Indian land by authorizing the Interior Secretary to acquire land in trust “for the purpose of providing land for Indians.”¹⁷⁴ Stricter limits apply to acquisitions of land into trust if it is to be used for Indian gaming. The IGRA (25 U.S.C. § 2719), with certain exceptions, prohibits gaming on off-reservation lands that were acquired in trust after 1988, unless the Interior Secretary, after consultation with the Indian tribe and appropriate state and local officials, including officials of other nearby Indian tribes, determines that such a gaming establishment would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but “only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination....”

In enacting IRA Section 5 (25 U.S.C. § 465), Congress, by providing that the legal condition would be federal ownership in “trust status,” doubtlessly intended and understood that Indians would be able to use the land free from state and local regulation or interference as well as free from taxation.¹⁷⁵ BIA regulations clearly reflect this understanding and intent. 25 C.F.R. Part I provides as

¹⁷⁰ IRA § 1, 25 U.S.C. § 461.

¹⁷¹ IRA § 2, 25 U.S.C. § 462.

¹⁷² IRA § 3, 25 U.S.C. § 463.

¹⁷³ IRA § 4, 25 U.S.C. § 464.

¹⁷⁴ IRA § 5, 25 U.S.C. § 465, which provides, *inter alia*, as follows:

The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians....

Title to any lands or rights acquired...shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

¹⁷⁵ *Chase v. McMasters*, 573 F.2d 1011 (1978).

follows in subsection 1.4, “*State and local regulation of the use of Indian property*”:

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(4) *Authorities, Policy, and Procedures for Trust Acquisitions.*—While Indian trust land acquisitions are authorized by 25 U.S.C. § 465, they must comply with procedures established in 25 C.F.R. Part 151.¹⁷⁶ These procedures require notice to state and local governments of any request for land to be purchased in or converted to Indian trust status. The notice is to inform these governments of the 30-day written comment opportunity relative to “potential impacts on regulatory jurisdiction, real property taxes and special assessments.” The regulation also sets out the criteria the Secretary will consider in evaluating requests.¹⁷⁷

¹⁷⁶ 25 C.F.R. § 151.1 prescribes the purpose and scope of these regulations:

The regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations. These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members.

¹⁷⁷ 25 C.F.R. § 151.10 (2005): On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in

In 1996, in response to the Court of Appeals for the Eighth Circuit decision in *State of South Dakota v. U.S. Department of the Interior*,¹⁷⁸ the DOI published a new regulation providing that “the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust,” and that “the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.”¹⁷⁹ Both the DOI and the U.S. Department of Justice now take the position that judicial review of an IRA land trust acquisition may be obtained by filing suit within the 30-day waiting period, although action taken after the United States formally acquires title will continue to be barred by the Quiet Title

trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW, Room 4525 MIB, Washington, DC 20240.)

¹⁷⁸ 69 F.3d 878 (8th Cir. 1995).

¹⁷⁹ 25 C.F.R. § 151.12. See 61 Fed. Reg. 18082 (1996). The preamble states that it is being adopted “[i]n response to a recent court decision, *State of South Dakota v. U.S. Department of the Interior*, 69 F.3d 878 (8th Cir. 1995),” and that the procedure set forth “permits judicial review before transfer of title to the United States.”

Act,¹⁸⁰ which waives immunity from suit for suits to quiet title, but not to trust or restricted Indian lands.¹⁸¹

5. Legal Presumptions and Canons of Construction¹⁸²

Supreme Court Justice Powell observed in a 1985 decision that “[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of Indians, *Choctaw Nation v. United States*, 318 U.S. 423, 431–432 (1943).”¹⁸³

In *Choctaw*, it was the opinion of the Court that

[W]e may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.... Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and “in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.” [citations omitted].¹⁸⁴

The same general rule of liberal construction has been applied by the Supreme Court to “statutes

¹⁸⁰ 28 U.S.C. § 2409a.

¹⁸¹ 28 U.S.C. § 2409a(a). See 519 U.S. 919, 117 S. Ct. 286, 136 L. Ed. 205 (1996). The United States petition for *certiorari* abandoned the government’s position that decisions under Section 465 were not reviewable under the Administrative Procedure Act, advising the U.S. Supreme Court as follows:

The Department of Interior has accordingly determined (and the Department of Justice agrees) that a decision to acquire land in trust under Section 5 of the IRA is subject to judicial review under the APA, see 5 U.S.C. 706(2), taking into account the factors identified in the Secretary’s regulations as relevant in making such decisions.

¹⁸² See generally DESKBOOK, *supra* note 16, at 7–9; CANBY, *supra* note 8, at 109–17; PRUCHA, *supra* note 74, at 386–87.

¹⁸³ *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 247, 105 S. Ct. 1245, 1258, 84 L. Ed. 2d 169, 187 (1985).

¹⁸⁴ *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431, 63 S. Ct. 672, 87 L. Ed. 877, 883 (1943). Chief Justice Marshall established the principle in *Worcester v. The State of Georgia*, 31 U.S. 515, 6 Pet. 515, 582, 8 L. Ed. 483, “The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.”

passed for the benefit of the dependent Indian tribes or communities,¹⁸⁵ even to tax exemptions.¹⁸⁶ The U.S. Court of Appeals for the Ninth Circuit recently observed that “[C]ourts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights.... Any ambiguities in construction must be resolved in favor of the Indians.”¹⁸⁷ Canby notes that the usual rule “is that the canon of sympathetic construction has more strength than the ordinary canons of statutory interpretation.”¹⁸⁸ But he cautions that “[t]he Supreme Court has recently expressed doubt that the canon of sympathetic construction carries as much force when a court is interpreting a statute rather than a treaty,” noting that the Court, in denying a federal tax exemption to tribal gaming, “relied on the canon of construction that federal tax provisions should not be interpreted to create exemptions that are not clearly expressed.”¹⁸⁹

Canby goes on to use two cases to demonstrate how “the presumption against unexpressed exemption” from federal taxation can trump a treaty provision, previously held to defeat state taxes against Indians. The holdings, both by the U.S. Ninth Circuit Court of Appeals, involved the 1855 Treaty with the Yakama Indian Nation, which assured the Yakamas “the right, in common with citizens of the United States, to travel upon all public highways.” In the first case, *Cree v. Flores*,¹⁹⁰ the court interpreted this treaty provision, using the canons of interpretation for treaties, to exempt the Yakamas from Washington truck license and overweight permit fees. But in the later case, *Ramsey v. United States*,¹⁹¹ the court found the *Cree* decision not binding in a lawsuit dealing with federal heavy vehicle and diesel fuel taxes, because the “federal standard requires a definite expression of exemption stated plainly in a statute or treaty before any further inquiry is made or any canon of interpretation employed.”

Whether a specific federal statute of general applicability applies to activities on Indian lands depends on the intent of Congress.¹⁹² Certainly, such

laws will be held to apply where Indians or tribes are expressly covered, but also where it is clear from the statutory terms that such coverage was intended.¹⁹³ Where retained sovereignty is not invalidated and there is no infringement of Indian rights, Indians and their property are normally subject to the same federal laws as others.¹⁹⁴

D. JURISDICTION OVER INDIANS, INDIAN TRIBES, AND INDIAN COUNTRY

1. Inherent Tribal Sovereignty

Notwithstanding the plenary power of Congress, beginning with the opinions of Chief Justice Marshall in *Cherokee Nation v. Georgia*¹⁹⁵ and *Worcester v. Georgia*,¹⁹⁶ the U.S. Supreme Court has held that Indian tribes retain inherent sovereign authority over their reservation lands and activities, except to the extent withdrawn by treaty, federal statute, or by implication as a necessary result of their status as “dependent domestic nations.” Since those decisions, the Supreme Court “has consistently recognized that Indian tribes retain ‘attributes of sovereignty over both their members and their territory,’...and that ‘tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.’”¹⁹⁷ In these decisions, the Court viewed the Indian nations as having distinct boundaries within which their jurisdictional authority was exclusive—a “territorial test.” Pevar examines nine of the most important areas of tribal self-government.¹⁹⁸

1. Forming a government;
2. Determining tribal membership;
3. Regulating tribal property;
4. Regulating individual property;
5. The right to tax;
6. The right to maintain law and order;

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 283.

¹⁸⁷ 30 U.S. (5 Pet.) 1 (1831).

¹⁸⁸ 31 U.S. (6 Pet.) 515 (1832).

¹⁸⁹ *Indian Country, U.S.A. v. Okla. Tax Comm’n*, 829 F.2d 967 (10th Cir. 1987), *citing* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544, at 557, 95 S. Ct. at 718, and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154, 100 S. Ct. 2069, 2081, 65 L. Ed. 2d 10 (1980)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–33, 103 S. Ct. 2378, 2384–85, 76 L. Ed. 2d 611 (1983).

¹⁹⁰ PEVAR, *supra* note 8, at 79–110.

¹⁸⁵ *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 89, 39 S. Ct. 40, 42, 63 L. Ed. 138, 141 (1918).

¹⁸⁶ *Carpenter v. Shaw*, 280 U.S. 363, 366, 50 S. Ct. 121, 122, 741 L. Ed. 478, 481 (1930).

¹⁸⁷ *Confederated Tribes of Chehalis Indian Reservation v. State of Washington*, 96 F.3d 334, 340 (1996).

¹⁸⁸ CANBY, *supra* note 8, at 116, *citing* *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

¹⁸⁹ *Id.* at 115, *citing* *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S. Ct. 428, 151 L. Ed. 2d 474 (2001).

¹⁹⁰ 157 F.3d 762 (9th Cir. 1998).

¹⁹¹ 302 F.3d 1074 (9th Cir. 2002).

¹⁹² COHEN, *supra* note 8, at 282.

7. The right to exclude nonmembers from tribal territory;
8. The right to regulate domestic relations;
9. The right to regulate commerce and trade.

However, the Court has now rejected the broad assertion that the federal government has exclusive jurisdiction in Indian matters for all purposes, and cautioned that

Generalizations on this subject have become particularly treacherous. The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*...has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together affect the respective rights of State, Indians, and the Federal Government, *Mescalero Apache Tribe v. Jones*,¹⁹⁹.... The upshot has been the repeated statements of this Court to the effect that, *even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.*²⁰⁰ (*Emphasis supplied*)

2. "Indian Country," the Jurisdictional Benchmark

Although the term "Indian reservation" has been historically used and appears in scores of provisions of the U.S.C., particularly Title 25 (Indians), the controlling term of art has become "Indian country." The origin and meaning of the term "Indian country" are discussed at B.2.b, *supra*. The classification of land as "Indian country" is considered "the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian Lands."²⁰¹ The Supreme Court has held that land held in trust by the United States for

¹⁹⁹ *Id.* at 148 (1973), *citing* *Organized Village of Kake v. Egan*, 369 U.S. 60, 71–73, 82 S. Ct. 562, 568–69, 7 L. Ed. 2d 573 (1962).

²⁰⁰ *Id.*, *citing* *Kake*, at 75, 82 S. Ct. at 570; *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); *N.Y. ex rel. Ray v. Martin*, 326 U.S. 496, 499, 66 S. Ct. 307–08, 90 L. Ed. 261 (1946); *Draper v. United States*, 164 U.S. 240, 17 S. Ct. 107, 41 L. Ed. 419 (1896).

²⁰¹ *Indian Country*, 829 F. 2d at 973, *citing* *Solem v. Bartlett*, 465 U.S. 463, 465 n.2, 104 S. Ct. 1161, 1163 n.2, 79 L. Ed. 2d 443 (1984); *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427–28 & n.2, 95 S. Ct. 1082, 1084 & n.2, 43 L. Ed. 2d 300 (1975); *Kennerly v. Dist. Court*, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971); *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *COHEN*, *supra* note 8, at 27–46 ("Indian country" is usually the governing legal term for jurisdictional purposes). *COHEN*, *supra* note 8, at 5–8 ("Indian country" generally determines allocation of tribal, federal, and state authority).

a tribe is Indian country subject to tribal control whether or not that land has reservation status.²⁰² While there is a presumption against state jurisdiction in Indian country,²⁰³ the Supreme Court has recognized that state laws may reach into Indian country "if Congress has expressly so provided," and a state may validly assert such jurisdiction even absent express consent in very limited circumstances.²⁰⁴

While there have been several laws enacted conferring state jurisdiction over particular tribes,²⁰⁵ the only federal law extending state jurisdiction to Indian reservations generally is P.L. 280.²⁰⁶ Although P.L. 280 provides criminal jurisdiction in Indian country to certain listed states, as an exception to 18 U.S.C. §§ 1152 and 1153,²⁰⁷ the civil jurisdiction provided such states²⁰⁸ has been construed by the Supreme Court as being limited to allowing state courts to resolve private disputes in "civil causes of action between Indians or to which Indians are parties which arise in areas of Indian country" in the listed states.²⁰⁹ The civil jurisdiction

²⁰² *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112, 1121 (1991).

²⁰³ *Indian Country*, 829 F.2d at 976, *citing* *Cabazon*, at 107 S. Ct. 1092 n.18; *Cheyenne-Arapaho Tribes*, 618 F.2d at 668; *cf.* *Montana v. United States*, 450 U.S. 544, 557, 101 S. Ct. 1245, 1254, 67 L. Ed. 2d 493 (1981); *see generally* C. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 93-106 (1987).

²⁰⁴ *CABAZON*, 107 S. Ct. at 1087, 1091.

²⁰⁵ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 361 L. Ed. 2d 114 (1973).

²⁰⁶ *PEVAR*, *supra* note 8, at 113.

²⁰⁷ *See* 18 U.S.C. § 1162. States listed are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin.

²⁰⁸ 28 U.S.C. § 1360. *State civil jurisdiction in actions to which Indians are parties*

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil cause of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

²⁰⁹ *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976). *See* *PEVAR*, *supra* note 8, at 161:

The only difference between a P.L. 280 state and a non-P.L. 280 state is that courts of the former are permitted to resolve private disputes brought by reservation Indians. A state court in a non-P.L. 280 state has no jurisdiction over such a dispute, even if all the parties ask the court to re-

provided clearly does not extend to the full range of state regulatory authority:

Public Law 280 merely permits a State to assume jurisdiction over “civil causes of action” in Indian country. We have never held that Public Law 280 is independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations.²¹⁰

P.L. 280 and the implications of this ruling are discussed further in D.9, *infra*.

3. Jurisdictional Tests for Impermissible State Jurisdiction

In the early decisions of the U.S. Supreme Court, when the Court viewed the Indian nations as having distinct boundaries within which their jurisdictional authority was exclusive, the test for impermissible state jurisdiction was a “territorial test,” which simply asked whether the state action had invaded Indian tribal territory. Later cases developed the “infringement test,” which asked whether the state action had infringed on the rights of reservation Indians to make their own laws and be ruled by them.²¹¹ Still later, the trend was “away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption,” the “preemption test,”²¹² which

solve it. [citing, *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986); *Camenout v. Burdman*, 84 Wn 2d 192, 525 P.2d 217 (Wash. 1974). *Cf.* *Kennerly v. District Court*, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971).]

²¹⁰ *Okla. Tax Comm’n v. Potawatomi Tribe*, 498 U.S. 505, 513, 111 S. Ct. 905, 911, 112 L. Ed. 2d 1112, 1122–23 (1991), citing *Bryan v. Itasca County, Id.*, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 and *Rice v. Rehner*, 463 U.S. 713, 734, n.18, 103 S. Ct. 3291, 77 L. Ed. 2d 761 (1983); and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208–10, and n.8, 107 S. Ct. 1083, 1088–89, 94 L. Ed. 2d 244, 254–55 (1987).

²¹¹ *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 271, 3 L. Ed. 2d 251, 256 (1959): “Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”

²¹² *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172, 92 S. Ct. 1257, 1262, 36 L. Ed. 2d 129, 135–36 (1973). *See also White Mountain Apache*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980), where the Court set out the modern preemption principles, and where a state motor carrier license tax on a non-Indian contractor was overturned; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983), where a unanimous Court denied New Mexico concurrent jurisdiction of non-Indian fishermen and hunters on the

asked whether federal action had preempted any state action. The analysis of preemption in Indian cases differs from traditional preemption analysis because the courts will find it to exist even in the absence of congressional intent. Preemption of state regulation of Indians by federal regulation takes three forms: (1) preemption when federal law expressly provides; (2) preemption due to comprehensive or pervasive federal regulation; and (3) preemption due to conflict with federal policies or achievement of congressional purpose found in underlying statutes.²¹³

The modern cases “avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power.”²¹⁴ The Indian sovereignty doctrine is still considered relevant, not because it always provides a definitive resolution, but “because it provides a backdrop against which the applicable treaties and statutes must be read.”²¹⁵

The two barriers of “infringement” and “preemption” are still considered independent because either standing alone can be a sufficient basis for holding state law inapplicable.²¹⁶ The principles for applying the two tests were set out by the Supreme Court in the 1980 decision *White Mountain Apache Tribe v. Bracker*,²¹⁷ which held, in a suit for refund of motor carrier license and use fuel taxes paid by a logging company under contract to sell, load, and transport timber on a reservation, that such taxes were preempted by federal law. In a six to three

reservation on the basis of federal preemption, concluding: “Given the strong interest favoring exclusive tribal jurisdiction and the absence of State interests which justify the assertion of concurrent authority, we conclude that the application of the State’s hunting and fishing laws to the reservation is preempted.” *Mescalero*, 462 U.S. 324.

²¹³ These preemption tests appear to be the same that are used in implied regulatory preemption cases. *See CHMERINSKI, CONSTITUTIONAL LAW 374–81* (2d ed., 2005).

²¹⁴ *McClanahan*, 411 U.S. at 172, comparing *United States v. Kagama*, 118 U.S. 375 (1886), with *Kennerly v. Dist. Court*, 400 U.S. 423 (1971) and providing the following comment:

The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. *Cf. Organized Village of Kake v. Egan*, 369 U.S. 60, 62 (1962); *Federal Indian Law 846*. The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

²¹⁵ *Id.*

²¹⁶ *White Mountain Apache Tribe*, 448 U.S. 136, 144, 100 S. Ct. 2578, 2583, 65 L. Ed. 2d 665, 672 (1980).

²¹⁷ *Id.*

decision, Justice Marshall, writing for the majority concluded:

Where, as here, the Federal government has undertaken comprehensive regulation of the harvesting and sale of timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.²¹⁸

Justice Marshall's opinion provided distinct standards for applying the "infringement" and "preemption" tests when state authority in Indian country is challenged, and observed:

This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a *particularized inquiry* into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law....²¹⁹ (emphasis added).

State efforts to exercise authority in matters affecting tribes continue to be subject to this particularized inquiry standard.

4. Judicial Limitations on Tribal Sovereignty

For almost 150 years the U.S. Supreme Court did not add to the nonstatutory limitations on tribal sovereignty arising from Chief Justice Marshall's decisions in the Cherokee trilogy.²²⁰ Those limitations were: that due to their status as "domestic dependent nations,"²²¹ (1) tribes could not freely alienate their land, and (2) they could not make treaties with foreign nations. But in 1978, with the criminal case of *Oliphant v. Suquamish Indian Tribe*, the Court began to formulate a modern doctrine for determining the extent of tribal sovereignty. The Court there found new inherent limitations on tribal sovereignty as it pertained to criminal jurisdiction over non-Indians, stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns. Five years later, in *Montana v. United States*, the Court extended the *Oliphant* decision to hold that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the

tribe unless authorized by Congress. A brief review of these cases follows:

a. *Oliphant v. Suquamish Indian Tribe*²²²

This case involved two non-Indian residents of the Port Madison Reservation in Washington, Mark David Oliphant and Daniel B. Belgrade, who were arrested by tribal authorities. Oliphant was charged with assaulting a tribal officer and resisting arrest. Belgrade, after a high-speed race along reservation highways, was charged with "recklessly endangering another person" and "injuring tribal property."²²³ The tribe argued that it had inherent sovereign authority to exercise criminal jurisdiction over these non-Indians.²²⁴ Justice Rehnquist, joined by six other justices, held that criminal prosecution of non-Indians was outside the inherent sovereign powers of the tribes, due to the tribe's domestic dependent status: "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress * * * Indian tribes do not have inherent jurisdiction to try and to punish non-Indians...." Canby observed that these "new inherent limitations on tribal sovereignty...represented a significant potential threat to tribal governmental power."²²⁵ This threat was soon realized by the Court's decision in *Montana v. United States*, where it stated: "Though *Oliphant* only determined tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."²²⁶

b. *Montana v. United States*

The "particularized inquiry" called for in *Bracker* was made by the Court in *Montana*, which has been called the "seminal" case on tribal jurisdiction in the modern era. In *Montana*, the Crow tribe sought a declaratory judgment to sustain its regulatory authority to prohibit hunting and fishing by nonmembers within the reservation boundaries. The tribe claimed ownership of the bed of the Big Horn River, relying on the Fort Laramie treaties of 1851 and 1868.²²⁷ The suit involved the attempt by

²¹⁸ *Id.* at 152.

²¹⁹ *Id.* at 145. See also *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989).

²²⁰ See C.3.a, *supra*.

²²¹ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

²²² 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 909 (1978).

²²³ *Id.* at 194.

²²⁴ *Id.* at 196.

²²⁵ CANBY, *supra* note 8, at 77.

²²⁶ 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493, 510 (1980).

²²⁷ *Montana*, 450 U.S. at 547-48. By Article II of the 1868 treaty, the United States agreed that the reservation "shall be...set apart for the absolute and undisturbed use and occupation" of the Crow Tribe, and that no non-

both the State of Montana and the Crow Tribe to regulate fishing by *non-Indians* on *non-Indian-owned fee lands* within the reservation. Due to the sale of fee-patented lands under the Allotment Acts, about 30 percent of the Crow reservation was now owned in fee by non-Indians.²²⁸ The Court held that the treaties “fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to new States when they assume sovereignty.”²²⁹ The Court then held that the 1868 treaty language “must be read in light of the subsequent alienation of those lands” [by the Allotment Acts], ruling that the 1868 treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians.²³⁰

In addition to relying on the treaties, the Crow tribe relied on its inherent power as a sovereign to prohibit hunting and fishing by nonmembers. In responding to this assertion, the Court, in denying tribal jurisdiction over non-Indians on fee-owned land, went on to create a general rule as to the “inherent power” of Indian tribal governments:

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members and to prescribe rules of inheritance for members.... *But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation....* Since regulation of hunting and fishing by *nonmembers* of a tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow tribe to [do so].... The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over *non-Indians*[,] [s]tressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns.... Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the *inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe*.²³¹ (Emphasis added).

The Court went on to establish two basic exceptions for determining when inherent sovereign

power of a tribe could exercise some forms of civil jurisdiction over nonmembers on their reservations, even on non-Indian fee lands.²³²

1. A tribe may regulate, through taxation, licensing, or other means, the activities of *nonmembers* who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements;
2. A tribe may also retain inherent power to exercise civil authority over the conduct of *non-Indians* on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

The Court provided a list of cases fitting within these two exceptions, indicating the type of activities the Court had in mind for allowing tribal civil jurisdiction over nonmembers, even on non-Indian fee lands. The four cases listed as fitting exception one were as follows:²³³

- *Williams v. Lee*²³⁴ (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants);
- *Morris v. Hitchcock*²³⁵ (upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation);
- *Buster v. Wright*²³⁶ (upholding tribe’s permit tax on nonmembers for the privilege of conducting business within tribe’s borders; court characterized as “inherent” the tribe’s “authority...to prescribe the terms upon which noncitizens may transact business within its borders”);
- *Washington v. Confederated Tribes of Colville Indian Reservation*²³⁷ (tribal authority to tax on-reservation cigarette sales to nonmembers “is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status”).

The Court listed four cases addressing exception two, each of which raised the question of whether a state’s exercise of authority would unduly interfere with tribal self-government. In the first two cases, the Court held that a state’s exercise of authority would intrude, and in the last two, the Court saw no impermissible intrusion:

²³² *Id.* at 565–66.

²³³ *Id.* *Strate v. A-1 Contractors*, 520 U.S. 438, 457, 117 S. Ct. 1404, 1415, 137 L. Ed. 2d 661, 677–78 (1997).

²³⁴ 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

²³⁵ 194 U.S. 384, 24 S. Ct. 712, 48 L. Ed. 1030 (1904).

²³⁶ 135 F. 947, 950 (Cal. 8th 1905).

²³⁷ 447 U.S. 134, 152–54, 100 S. Ct. 2069, 2081–82, 65 L. Ed. 2d 10, 28–30 (1980).

Indians except agents of the government “shall ever be permitted to pass over, settle upon, or reside in” the reservation.

²²⁸ *Id.* at 548.

²²⁹ *Id.* at 553.

²³⁰ *Id.* at 561.

²³¹ *Id.* at 544, 564.

- *Fisher v. District Court*²³⁸ (recognizing the exclusive competence of a tribal court over an adoption proceeding when all parties belonged to the tribe and resided on its reservation);
- *Williams v. Lee*²³⁹ (holding a tribal court exclusively competent to adjudicate a claim by a non-Indian merchant seeking payment from tribe members for goods bought on credit at an on-reservation store);
- *Montana Catholic Missions v. Missoula County*²⁴⁰ (“the Indians’ interest in this kind of property [livestock], situated on their reservations, was not sufficient to exempt such property, when owned by private individuals, from [state or territorial] taxation”);
- *Thomas v. Gay*²⁴¹ (“[territorial] tax put upon cattle of [non-Indian] lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians”).

Before the decision in *Montana*, tribal authority to regulate was based upon geography, which meant that tribes could regulate all activity and land within the reservation’s boundaries. But under the *Montana* general rule, tribal sovereignty has been reduced to a mixture of geography and tribal membership. One commentator notes that “[a]s a ‘rule’ limiting inherent tribal sovereignty, it continues to gain strength, indeed, *it appears to have become the foundation case for contemporary Indian law in the Supreme Court.*”²⁴² (Emphasis added.)

5. Selected Progeny of Montana

a. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*²⁴³

The case involved the authority of the tribes to impose zoning regulations on two pieces of property owned in fee by nonmembers, when the land was already zoned by Yakima County, Washington. The reservation was divided informally into an “open area” and a “closed area,” with one fee-owned property at issue being in this open area. The other fee-owned property at issue was in the closed area,

²³⁸ 424 U.S. 382, 386, 96 S. Ct. 943, 946, 947, 47 L. Ed. 2d 106, 110 (1976).

²³⁹ *Lee*, 358 U.S. at 220.

²⁴⁰ 200 U.S. 118, 128–29, 26 S. Ct. 197, 201, 50 L. Ed. 398 (1906).

²⁴¹ 169 U.S. 264, 273, 18 S. Ct. 340, 344, 42 L. Ed. 740, 744 (1898).

²⁴² CANBY, *supra* note 8, at 78.

²⁴³ 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989).

97 percent of which was tribal land containing no permanent residents and described as an “undeveloped refuge of cultural and religious significance,” with restricted access to nonmembers. There were three separate opinions, with three distinct views of inherent power:

1. Justice White, joined by three justices, held that the tribe had neither treaty-reserved nor inherent powers to zone nonmember fee land.
2. Justice Blackmun, joined by two justices, concluded that the tribe had the full inherent sovereign power to zone both member and nonmember fee lands lying within the reservation.
3. Justice Stevens, joined by one justice, was of the opinion that the tribe could zone the nonmember fee property in the closed area, but not the open area.

This split decision resulted in tribal zoning being upheld only as to the closed area. The White opinion is significant because four justices departed from the analysis in *Montana*, holding that tribal regulatory jurisdiction over nonmember fee lands was prohibited *per se*, even when conduct (overdevelopment) threatened the political integrity, the economic security, or the health and welfare of the tribe (exception (2) of *Montana*).²⁴⁴ The analysis of *Brendale* in the *American Indian Law Deskbook* concludes that

[d]espite the fractured nature of the opinions in *Brendale*, a present majority of the Court has adopted the general premise that, outside a land-use situation, inherent tribal regulatory authority extends to nonmembers only when express or constructive consent is present, such as through voluntary on-reservation business transactions with tribes or use of tribal lands.²⁴⁵

b. *Strate v. A-1 Contractors*²⁴⁶

The Court’s decision in this case is extremely important to state highway agencies maintaining right-of-way over Indian reservations. Before this decision, the *Montana* rule covered only the regulatory authority of a tribe over nonmembers. But here, the Court extended the *Montana* rule to apply to cases dealing with the adjudicatory authority of tribes: “tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.”

²⁴⁴ *Montana*, 450 U.S. at 565.

²⁴⁵ DESKBOOK, *supra* note 16, at 109–10.

²⁴⁶ 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

The suit arose out of a collision between plaintiff, the wife of a deceased tribal member, and defendant, an employee of a contractor doing business with the tribe on the reservation, both nonmembers. The collision occurred on a North Dakota state highway running through the Fort Berthold Indian Reservation. In a unanimous decision upholding the *en banc* decision of the Court of Appeals for the 8th Circuit, the Court ruled that the State's federally granted right-of-way over tribal trust land was the "equivalent, for nonmember governance purposes, to alienated, non-Indian land."²⁴⁷ It therefore concluded that *Montana*, "the pathmarking case concerning tribal civil authority over nonmembers,"²⁴⁸ was the controlling precedent, and rejected Tribal court subject matter jurisdiction over nonmembers in the case. In reaching this ruling, the Court considered the following factors relative to the right-of-way: (1) the legislation that created the right-of-way; (2) whether the right-of-way was acquired by the state with the consent of the tribe; (3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way; (4) whether the land was open to the public; and (5) whether the right-of-way was under state control.²⁴⁹ The Court held that the tribe's loss of the "right of absolute and exclusive use and occupa-

²⁴⁷ *A-I Contractors*, 520 U.S. at 454. *Accord*, *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (accident between member and nonmember on Montana U.S. Highway 2 on the Blackfeet Reservation, State right-of-way found to be equivalent to fee land); *See also Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (death action arising from a collision between an automobile and train on railroad right-of-way, within the exterior boundaries of the Crow Reservation. *Held*: "[A] right-of-way granted to a railroad by Congress over reservation land is 'equivalent for nonmember governance purposes, to alienated, non-Indian land.'" Court rejected contention that *Montana's* exception (1) ("consensual relationships") applied, holding that "[a] right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing consensual relationship." At 1064.).

²⁴⁸ *Id.* at 445.

²⁴⁹ *See A-I Contractors*, 520 U.S. at 455-56; *See also State of Mont. Dep't of Transp. v. King*, 191 F.3d 1108, 1113 (n.1) (9th Cir. 1999). *But see McDonald v. Means*, 309 F.3d 530, 536, 539 (9th Cir. 2001) (Tort action arising from car striking horse on Bureau of Indian Affairs Route 5 on Northern Cheyenne Reservation, *Held*:

We conclude that BIA roads constitute tribal roads not subject to *Strate*, and that the BIA right-of-way did not extinguish the Tribe's gatekeeping rights to extent necessary to bar tribal court jurisdiction under *Montana*.... The BIA right-of-way is not granted to the State, and forms no part of the State's highway system.

tion...implied the loss of regulatory jurisdiction over the use of the land by others."²⁵⁰ The Court went on to hold that "[a]s to nonmembers...a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."²⁵¹ (Emphasis supplied).

The Court rejected assertions that either of the *Montana* two exceptions applied. In rejecting application of exception two ("threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe"), due to safety concerns, the Court stated:

Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule.... Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve "the right of reservation Indians to make their own laws and be ruled by them...." The *Montana* rule, therefore, and not its exceptions, applies to this case.²⁵²

*c. Atkinson Trading Co. v. Shirley*²⁵³

The decision in this case relates to the taxation of nonmembers on non-Indian fee land and may have implications for contractors working solely on state highway agency right-of-way. The primary importance of the case is the Court's ruling on the two *Montana* exceptions.

Chief Justice Rehnquist, writing for a unanimous Court, addressed the question of whether the general rule of *Montana* applied to tribal attempts to tax nonmember hotel occupants of a hotel operating within the confines of the Navajo Reservation, but on non-Indian fee land. There was no dispute that the hotel benefited from the Navajo Nation's police and fire protection. The Court invalidated the tax,

²⁵⁰ *A-I Contractors*, 520 U.S. at 456, quoting *South Dakota v. Bourland*, 508 U.S. 679, 689, 113 S. Ct. 2309, 2316, 24 L. Ed. 2d 606, 619 (1993).

²⁵¹ *Id.* at 453.

²⁵² *Id.* at 458-59. *See also Michael Boxx v. Long Warrior*, 265 F.3d 777 (9th Cir. 2001) (an alcohol-related truck rollover accident was not such a safety concern to tribe as to qualify for *Montana* exception (2).); *In County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998), a suit by a tribal member for false arrest by a county deputy on tribal lands, the court of appeals, in denying applicability of *Montana* exception (1), held that "*Montana's* exception for suits arising out of consensual relationships has never been extended to contractual agreements between two governmental entities and we decline to hold that the exception applies to an intergovernmental law enforcement agreement.").

²⁵³ 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).

holding that the *Montana* general rule applied “straight up,” that such a tax upon nonmembers on non-Indian fee land was “presumptively invalid,” and that “neither of Montana’s exceptions obtains here.”²⁵⁴ The opinion distinguished the Court’s ruling in *Merrion v. Jicarilla Apache Tribe*,²⁵⁵ upholding a severance tax imposed on non-Indian lessees authorized to extract oil and gas from tribal land, pointing out that *Merrion* was “careful to note that an Indian tribe’s inherent power to tax only extended to ‘transactions occurring on trust lands and significantly involving a tribe or its members.’”²⁵⁶

In rejecting the applicability of *Montana* exception one, “consensual relationship,” the Court observed:

[W]e think the generalized availability of tribal services patently insufficient to sustain the Tribe’s civil authority over nonmembers on non-Indian fee land. The consensual relationship must stem from “commercial dealing, contracts, leases, or other arrangements,” [citations omitted]...and a nonmember’s actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.... We therefore, reject respondents’ broad reading of *Montana*’s first exception, which ignores the dependent status of Indian tribes and subverts the territorial restriction upon tribal power.²⁵⁷

In rejecting the applicability of *Montana* exception two, the Court raised the threshold for the political integrity exception announced in *Montana*:

[W]e fail to see how petitioner’s operation of a hotel on non-Indian fee land “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁵⁸ [U]nless the drain of the nonmember’s conduct upon tribal services and resources is so severe that it actually “imperil[s]” the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.²⁵⁹

*d. Nevada v. Hicks*²⁶⁰

Hicks clearly expanded the application of the *Montana* rule, holding that *Montana* applies regardless of land status, and making clear that tribal jurisdiction over nonmembers is extremely limited, even on tribal land. In addition, it further narrowed the *Montana* exceptions.

²⁵⁴ *Id.* at 647, 654, 659.

²⁵⁵ 445 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982).

²⁵⁶ *Atkinson Trading*, 532 U.S. at 653, citing *Jicarilla Apache Tribe*, 455 U.S. at 137.

²⁵⁷ *Id.* at 655.

²⁵⁸ *Id.* at 657.

²⁵⁹ *Id.*, n.12.

²⁶⁰ 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

Hicks presented the question of whether a tribal court may assert jurisdiction over civil claims against state game wardens who entered tribal land to execute state and tribal court search warrants against a tribal member suspected of having violated state law outside the reservation.²⁶¹ Hicks, a member of the Fallon Paiute–Shoshone Tribes in Nevada, resided on tribally owned trust land within the reservation, and was suspected of killing, off the reservation, a California bighorn sheep, a gross misdemeanor under Nevada law. Acting under search warrants issued by both state and tribal courts, Nevada game wardens, accompanied by tribal officers, unsuccessfully searched Hicks’ home. Hicks, claiming that certain Rocky Mountain bighorn sheep heads (unprotected species) had been damaged and that the search exceeded the bounds of the warrant, brought suit in tribal court against the tribal judge, tribal officers, state wardens, and the State of Nevada. Following tribal court dismissals and voluntary dismissals, only his suit against the state wardens in their individual capacities remained. The causes of action included trespass to land and chattels, abuse of process, denial of equal protection, denial of due process, and unreasonable search and seizure, each remediable under 42 U.S.C. § 1983.²⁶² The Ninth Circuit affirmed the district court in supporting tribal jurisdiction over tortious conduct claims against nonmembers arising from their activities on tribal trust land. 193 F.3d 1020 (1999). The U.S. Supreme Court granted *certiorari* and reversed. Justice Scalia delivered the Court’s opinion, joined by Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas, and Ginsburg. Concurring opinions were rendered by Justices Souter, Kennedy, Thomas, Ginsburg, O’Connor, Stevens, and Breyer.

Justice Scalia’s opinion identifies the “principle of Indian law central to” the issue of tribal court jurisdiction over civil claims against nonmembers as

our holding in *Strate v. A-1 Contractors* [citation omitted]: “As to nonmembers...a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction....” We first inquire, therefore, whether the... Tribes—either as an exercise of their inherent sovereignty, or under grant of federal authority—can regulate state wardens executing a search warrant for evidence of an off-reservation crime. Indian tribes’ regulatory authority over nonmembers is governed by the principles set forth in *Montana v. United States* [citations omitted], which we have called the “pathmarking case” on the subject.²⁶³

²⁶¹ *Id.* at 355.

²⁶² *Id.* at 356–57.

²⁶³ *Id.* at 357–58. In footnote 2, Justice Scalia points out that

The tribe and the United States argued that “since Hick’s home and yard are on tribe-owned land within the reservation, the tribe may make its exercise of regulatory authority over nonmembers a condition of nonmembers’ entry.”²⁶⁴ Justice Scalia responded by pointing out that in *Oliphant*, the Court drew no distinctions based on the status of land in denying tribal criminal jurisdiction over nonmembers; however, he recognized that non-member ownership status of land was central to the analysis in both *Montana and Strate*. But, he concludes that the “ownership status of land...is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or control internal relations[,]’ [b]ut the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.”²⁶⁵ (Emphasis supplied.)

The opinion then proceeds to the questions: (1) “whether regulatory jurisdiction over state officers in the present context is ‘necessary to protect tribal self-government or to control internal relations,’ and, if not, (2) whether such regulatory jurisdiction has been congressionally conferred.”²⁶⁶ The Court answered both questions in the negative. In responding to question one, the opinion stresses the need for “accommodation” of tribal, federal government, and state interests, using, essentially, a balancing of interests test.²⁶⁷

we have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. See, e.g., *Williams v. Lee*, 358 US 217, 3 L Ed 2d 251, 79 S Ct. 269 (1959). In *Strate v. A-1 Contractors*, 520 US 438, 453, 137 L Ed 2d 661, 117 S Ct 1404 (1997), however, we assumed that “where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts,”... Our holding in this case is limited to the question of tribal court jurisdiction over state officers enforcing state law. We leave open the question of tribal court jurisdiction over nonmember defendants in general.

²⁶⁴ *Id.* at 359.

²⁶⁵ *Id.* at 360.

²⁶⁶ *Id.*

²⁶⁷ See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001), at 1236, who observes:

A devoted Indian law optimist might attempt to cabin the implications of *Hicks* by noting that, essentially, the Court adopted a balancing test to determine whether the tribal court had jurisdiction over these non-Indian defendants, and the state’s strong interest in investigating off-reservation crimes outweighed the tribal interest. There is room, the optimist might protest, for other non-Indian defendants to present stronger cases for tribal jurisdiction,

Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.... Our cases make clear that the Indians right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation’s border...it was “long ago” that “the Court departed from Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries. [citations omitted] ...the principle that Indians have the right to make their own laws and be governed by them requires “an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.” *Washington v. Confederated Tribes of Colville Reservation*, 447 US 134, 156, 65 L Ed 2d 10, 100 S Ct 2069 (1980) ...a proper balancing of state and tribal interests would give the Tribes no jurisdiction over state officers pursuing off-reservation violations of state law.”²⁶⁸

The opinion responds to the pending questions as follows:

We conclude today...that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to “the right to make laws and be ruled by them.” The State’s interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government.... Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation.... Because the...Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent’s claim.... Nor can the Tribes iden-

even in the absence of a consensual relationship. (Footnotes omitted).

See also David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001), at 331, who observes:

...Justice Scalia stressed that “the State’s interest in execution of process is considerable enough to outweigh the tribal interest in self-government even when it relates to Indian-fee lands.” As Justice O’Connor observed, “The majority’s sweeping opinion, without cause, undermines the authority of tribes to make their own laws and be ruled by them.” From the perspective of one knowledgeable in Indian law, “The majority’s analysis...is exactly backwards.”

²⁶⁸ *Id.* at 361–62, 374.

tify any authority to adjudicate respondents § 1983 claim.²⁶⁹

One treatment of *Montana's* consensual relationship exception by the Court appears in a footnote that concludes that “other arrangement” is clearly another “private consensual relationship,” implying that governmental consensual relationships are not excepted.²⁷⁰ This treatment is disturbing because it may adversely affect or seriously inhibit state/tribal cooperative agreements. Justice O'Connor takes issue with the majority's dismissal of the applicability of this exception, contending that “the majority provides no support for this assertion.”²⁷¹ After an extensive review of existing state authority to enter into consensual relationships with tribes and giving several examples of consensual relationships between state and tribal governments, she asserts that “our case law provides no basis to conclude that such a consensual relationship could never exist,” concluding that “[T]here is no need to create a per se rule that forecloses future debate as to whether cooperative agreements, or other forms of official consent, could ever be a basis for tribal jurisdiction.”²⁷²

Canby observed that

Hicks is thus the culmination of a series of cases that has reversed the usual presumption regarding sovereignty when the tribe's power over nonmembers is concerned. Instead of presuming that tribal power exists, and searching whether statutes or treaties negate that presumption, the Court presumes that tribal power over nonmembers is absent unless one of the *Montana* exceptions applies or Congress has otherwise conferred the power. *Hicks*, 533 U.S. at

²⁶⁹ *Id.* at 364, 366, 374.

²⁷⁰ See *Hicks*, 533 U.S. at 359, n.3: “Montana recognized an exception...for tribal regulation of ‘the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.’” *Montana*, 450 U.S. at 565. Though the wardens in this case “consensually” obtained a warrant from the Tribal Court before searching respondent's home and yard, we do not think this qualifies as an “other arrangement” within the meaning of this passage. Read in context, an “other arrangement” is clearly another *private consensual* relationship, from which the official actions at issue in this case are far removed.

²⁷¹ *Hicks*, 533 U.S. at 392.

²⁷² *Id.* at 394. CANBY, *supra* note 8, at 84, observes that *Hicks*

appears to render futile and unnecessary the cooperative arrangements reflected in the state court's requirement in *Hicks* of a tribal warrant, or in tribal-state extradition agreements that have been worked out during the past fifty years. See, e.g., *Arizona ex rel. Merrill vs. Turtle* 413 F.2d 683 (9th Cir. 1969).

359–60.... In any event, the Supreme Court appears to have cemented firmly its view that tribes, as domestic dependent nations, have no authority over nonmembers unless one of the two *Montana* exceptions applies, and no criminal authority over non-Indians at all.²⁷³

6. Tribal Court “Exhaustion Rule”

The last question addressed by the Court in *Hicks* was “whether the petitioners were required to exhaust their jurisdictional claims in Tribal Court before bringing them in Federal District Court. See *National Farmers Union Ins. Co. v. Crow Tribe*, 471 US 845, 856–857, 105 S Ct 2447, 85 L Ed 2d 818 (1985).”²⁷⁴ *National Farmers* was a federal-question case arising from a tort claim for injury to an Indian child resulting from an accident on school property owned by the State of Montana within the Crow Reservation. The decision in *National Farmers* had announced that, prudentially, a federal court, although having authority to determine whether a tribal court has exceeded the limits of its jurisdiction, should stay its hand “until after the Tribal Court has had a full opportunity to determine its own jurisdiction.”²⁷⁵ This general rule became known as the “tribal court exhaustion rule.” The Court recognized three exceptions to the exhaustion requirement in *National Farmers*:²⁷⁶

1. Where the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;
2. Where the action is patently violative of express jurisdictional prohibitions; or
3. Where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

The Court in *Hicks* determined that “[n]one of these exceptions seems applicable to this case,” but noted that

we added a broader exception in *Strate*: “[w]hen...it is plain that no federal grant provides for tribal governance of nonmembers conduct on land covered by *Montana's* main rule,” so the exhaustion requirement “would serve no purpose other than delay.” 520 US, at 459-460, and n 14, 137 L Ed 2d 661, 117 S Ct 1404.²⁷⁷

The Court, while finding this exception “technically inapplicable,” found the reasoning behind it clearly applicable: “Since it is clear, as we have

²⁷³ CANBY, *supra* note 8, at 84–86.

²⁷⁴ *Hicks*, 533 U.S. at 369.

²⁷⁵ *National Farmers*, 471 U.S. at 857.

²⁷⁶ *Id.* at 856, n.21.

²⁷⁷ *Hicks*, 533 U.S. 369.

discussed, that tribal courts lack jurisdiction over state officials for causes of action relating to their performance of official duties, adherence to the tribal exhaustion requirements in such cases “would serve no purpose other than delay,” and is therefore unnecessary.²⁷⁸

Strate, discussed *supra*, D.5.b, was a tort action by non-Indians occurring on state-owned right-of-way found to be covered by *Montana’s* rule that the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally does not extend to the activities of nonmembers of the tribe. Because the tribal court clearly did not have subject matter jurisdiction, the *Strate* decision added another exception to the exhaustion rule, as referred to in *Hicks*: “Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement...must give way, for it would serve no purpose other than delay.”²⁷⁹

The decision in *Strate* discussed at length the Court’s decision in *Iowa Mutual Insurance Co. v. LaPlante*. *Iowa Mutual* involved an accident in which a member of the Blackfeet Indian Tribe was injured while driving a cattle truck within the boundaries of the reservation.²⁸⁰ The injured member was employed by a Montana corporation that operated a ranch on the reservation. The driver and his wife, also a tribe member, sued in the Blackfeet Tribal Court, naming several defendants: the Montana corporation that employed the driver; the individual owners of the ranch, who were also Blackfeet Tribe members; the insurer of the ranch; and an independent insurance adjuster representing the insurer. See *ibid.* Over the objection of the insurer and the insurance adjuster—both companies not owned by members of the tribe—the tribal court determined that it had jurisdiction to adjudicate the case.²⁸¹

Thereafter, the insurer commenced a federal-court action against the driver, his wife, the Montana corporation, and the ranch owners. Invoking federal jurisdiction based on diversity of citizenship,²⁸² the insurer alleged that it had no duty to defend or indemnify the Montana corporation or the ranch owners because the injuries fell outside the coverage of the applicable insurance policies.²⁸³

²⁷⁸ *Id.*

²⁷⁹ *Strate*, 520 U.S., at 459–60, and n.14. *Accord*, State of Montana Dep’t of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999). Burlington N. R.R. Co. v. Red Wolf, 196 F.2d 1059 (9th Cir. 1999) and Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997).

²⁸⁰ 480 U.S. 10, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

²⁸¹ *Id.* at 12.

²⁸² 28 U.S.C. § 1332.

²⁸³ *Iowa Mutual*, 480 U.S. at 12–13.

Federal District Court dismissed the insurer’s action for lack of subject-matter jurisdiction, and the Court of Appeals affirmed.²⁸⁴ The Supreme Court reversed and remanded, holding that:

Although petitioner alleges that federal jurisdiction in this case is based on diversity of citizenship, rather than the existence of a federal question, the exhaustion rule announced in *National Farmers Union* applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a “full opportunity to determine its own jurisdiction.” *Ibid.* In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter’s authority over reservation affairs.... At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts...alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement....²⁸⁵

The U.S. Supreme Court added another exception, albeit a narrow one, to the tribal exhaustion rule in *El Paso Natural Gas Co. v. Neztosie*,²⁸⁶ holding that it was improper for lower federal courts to require tribal exhaustion over Price-Anderson claims jurisdiction. El Paso Natural Gas Co. operated open uranium mines on Navajo Nation lands. The suit was filed in the District Court of the Navajo Nation, alleging severe injuries to Neztosie and others from exposure to radioactive and other hazardous materials resulting from the mine operation. The Supreme Court found that the preemption provision of the Price-Anderson Act,²⁸⁷ which transforms into a federal action “any public liability action arising out of or resulting from a nuclear accident,” Section 2210(n)(2), applied to the facts. The Court recognized that the Act “not only gives a district court original jurisdiction over such a claim...but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court.”²⁸⁸ However, the Act was silent as to removal from tribal court, and the Court found it implausible that this omission favored tribal court exhaustion:

We are at a loss to think of any reason that Congress would have favored tribal exhaustion. Any generalized sense of comity toward non-federal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle of deference.... *The ap-*

²⁸⁴ *Id.* at 13–14.

²⁸⁵ *Id.* at 16, 17, 19.

²⁸⁶ 526 U.S. 473, 119 S. Ct. 1430, 143 L. Ed. 2d 635 (1999).

²⁸⁷ 42 U.S.C. § 2014(hh).

²⁸⁸ *El Paso Natural Gas*, 526 U.S. at 484.

parent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal- as to state-court litigation. (Emphasis added).²⁸⁹

The United States Court of Appeals for the Ninth Circuit has required exhaustion in diversity cases brought by Indian plaintiffs even if there are no proceedings pending in tribal court.²⁹⁰

7. Full Faith and Credit/Comity on Judgments²⁹¹

The United States Constitution, Article IV, Section 1, provides that each state shall give full faith and credit to the “public Acts, Records, and judicial Proceedings of every other state,” but by its terms does not provide for full faith and credit to the judgments of Indian tribes. The implementing statute, 28 U.S.C. § 1738, provides that such “records and judicial proceedings...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” Because Indian nations are not referenced in the statute, the question is whether tribes are “territories or possessions” of the United States under the statute.

The United States Court of Appeals for the Ninth Circuit, in *Wilson v. Marchington*,²⁹² addressed this question and whether, and under what circumstances, a tribal court tort judgment is entitled to recognition in the United States courts. The court noted that the “United States Supreme Court has not ruled on the precise issue and its pronouncements on collateral matters are inconclusive.”²⁹³

²⁸⁹ *Id.* at 485–86.

²⁹⁰ *Wellman v. Chevron U.S.A.*, 815 F.2d 577 (9th Cir. 1987); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991).

²⁹¹ See generally CANBY, *supra* note 8, at 226–29; DESKBOOK, *supra* note 16, at 147–50; Robert N. Clinton, *Comity & Colonialism: The Federal Courts’ Frustration of Tribal/Federal Cooperation*, 36 ARIZ. L. REV. 1 (2004).

²⁹² 127 F.3d 805 (9th Cir. 1997) (1998).

²⁹³ *Marchington*, 127 F.3d at 808. See CLINTON, *supra* note 291, where Professor Clinton disagrees with the 9th Circuit statement and states that “[u]ntil recently the assumption that judgments of tribal courts of record were entitled to full faith and credit went unquestioned,” at 13. He goes on to point out that most of the early tribal courts of record were located in the Indian Territory and decisions of the Eighth Circuit Court of Appeals covered that region, citing 8th Circuit Court decisions giving full faith and credit to tribal judgment (e.g. *Standley v. Roberts*, 59 F.836, 845 (8th Cir. 1894), where the court noted: “judgment of the courts of these [tribal] nations, in cases within their jurisdiction, stand on the same footing [as] those of the courts of territories of the Union and are entitled to

The court gave as an example, *United States ex rel. Mackey v. Coxe*,²⁹⁴ where the court held the Cherokee Nation was a territory as that term was used in a federal letters of administration statute. By contrast it cited *New York ex rel. Kopel v. Bingham*,²⁹⁵ where the court cited with approval *Ex Parte Morgan*,²⁹⁶ in which the district court held that the Cherokee Nation was not a “territory” under the federal extradition statute. They noted that “State courts have reached varied results, citing either *Mackey* or *Morgan* as authority.”²⁹⁷

In consideration of this inconclusive status of the law, the court was of the view that

the decisive factor in determining Congress’s intent was the enactment of subsequent statutes which expressly extended full faith and credit to certain tribal proceedings, believing that such “later legislative [enactments] can be regarded as a legislative interpretation of an earlier act and ‘is therefore entitled to great weight in resolving any ambiguities and doubts.’ [citations omitted].”²⁹⁸

The court went on to note that

there are policy reasons which could support an extension of full faith and credit to Indian tribes...which] are within the province of Congress

the same full faith and credit.” Clinton also points out that the Supreme Court has given “indication that, ‘Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts.’” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 n.21, 98 S. Ct. 1670, 1681, 56 L. Ed. 2d 106, 120 (1978).

²⁹⁴ 59 U.S. 100, 103–04, 15 L. Ed. 299, 301 (1855).

²⁹⁵ 211 U.S. 468, 474–75, 29 S. Ct. 190, 191–92, 53 L. Ed. 286, 289 (1909).

²⁹⁶ 20 F. 298, 305 (W.D. Ark. 1883).

²⁹⁷ *Id.* at n.2.:

Compare *Jim v. CIT Fin. Serv.*, 87 N.M. 362, 533 P.2d 751 (N.M. 1975) (citing *Mackey* and holding that tribes are entitled to full faith and credit), and *In re Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (Wash. 1976) (citing CIT and concluding that tribes are entitled to full faith and credit) with *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (Ariz. Ct. App. 1977) (citing *Morgan* and holding that an Indian reservation is not a territory for purposes of full faith and credit).

²⁹⁸ *Id.* at 808–09, citing the Indian Land Consolidation Act, 25 U.S.C. §§ 2201–2211 (1983) (extending full faith and credit for certain actions involving trust, restricted or controlled lands), the Maine Indian Claims Settlement Act, 25 U.S.C. § 1725(g) (1980) (requiring the Passamaquoddy Tribe, the Penobscot Nation and the State of Maine to “give full faith and credit to the judicial proceedings of each other”), and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (Extending full faith and credit to tribal custody proceedings).

or the states, not this Court[,] concluding that “[f]ull faith and credit is not extended to tribal judgments by the Constitution or Congressional act, and we decline to extend it judicially.”²⁹⁹

The court further concluded that

[i]n absence of a Congressional extension of full faith and credit, the recognition and enforcement of tribal judgments in federal court must inevitably rest on principles of comity...[which] ‘is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.’ *Hilton v. Guyot*, 159 U.S. 113, 163–64, 40 L. Ed. 95, 16 S. Ct. 139 (1895).³⁰⁰

Recognizing that “the status of Indian tribes as ‘dependent domestic nations’ presents some unique circumstances,” the court believed that “comity still affords the best general analytical framework for recognizing tribal judgments.”³⁰¹ While believing that the guiding principles of comity were provided by *Hilton* and the *Restatement (Third) of Foreign Relations Law of the United States* (1986), the court concluded

that as a general principle, federal courts should recognize and enforce tribal judgments, [but] not if:

1. the tribal court did not have both personal and subject matter jurisdiction; or
2. the defendant was not afforded due process of law.

In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances:

1. the judgment was obtained by fraud;
2. the judgment conflicts with another final judgment that is entitled to recognition;
3. the judgment is inconsistent with the parties’ contractual choice of forum; or
4. recognition of the judgment, or cause of action upon which it is based, is against public policy of the United States or the forum state in which recognition of the judgment is sought.³⁰²

²⁹⁹ *Id.*, and n.3: See, e.g., OKLA. STAT. tit. 12, § 728 (permitting the Supreme Court of the State of Oklahoma to extend full faith and credit to tribal court judgments); WIS. STAT. § 806.245 (granting full faith and credit to judgments of Wisconsin Indian tribal courts); WYO. STAT. ANN. § 5-1-111 (granting full faith and credit to judicial decisions of the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Reservation). Montana has judicially refused to extend full faith and credit to tribal orders, judgments, and decrees. *In re Day*, 272 Mont. 170, 900 P.2d 296, 301 (Mont. 1995).

³⁰⁰ *Id.* at 809.

³⁰¹ *Id.* at 810.

³⁰² *Id.*

The court, commenting on *due process*, as that term is employed in comity, observed that it

encompasses most of the *Hilton* factors, namely that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and there is no showing of prejudice in the tribal court or in the system governing laws. Further, as the Restatement (Third) noted, evidence “that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition.” Restatement (Third) § 482 emt. b.³⁰³

The opinion went on to recognize that comity “does not require that a tribe utilize judicial procedures identical to those used in the United States Courts...and that] [e]xtending comity to tribal judgments is not an invitation for...unnecessary judicial paternalism in derogation of tribal self-governance.”³⁰⁴

Turning to the tribal court judgment under review, the court found that it was not entitled to recognition or enforcement “because the tribal court lacked subject matter jurisdiction, one of the mandatory reasons for refusing to recognize tribal court judgment...*Strate v. A-1 Contractors* [citation omitted].”³⁰⁵ The court noted that

this case mirrors the facts of *Strate* almost precisely: it was an automobile accident between two individuals on a United States highway designed, built, and maintained by the State of Montana, with no statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway...Thus, although the parameters of the *Strate* holding are not fully defined, its application to the specific circumstances of this case precludes tribal court jurisdiction.³⁰⁶

The opinion concludes:

The principles of comity require that a tribal court have competent jurisdiction before its judgment will be recognized by the United States courts. Because the tribal court did not have subject matter jurisdiction over Marchington or Inland Empire Shows, Inc., Wilson’s judgment may neither be recognized nor enforced in the United States courts.³⁰⁷

Marchington urged the court to require reciprocal recognition of judgments as an additional mandatory prerequisite, but the court declined to do so, noting that “[t]he question of whether a reciprocity requirement ought to be imposed on an Indian tribe

³⁰³ *Id.* at 811.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 813.

³⁰⁶ *Id.* at 814–15.

³⁰⁷ *Id.* at 815.

before its judgments may be recognized is essentially a public policy question best left to the executive and legislative branches...[t]he fact that some states have chosen to impose such a condition by statute reinforces this conclusion....³⁰⁸

Subsequent to *Marchington*, the United States Court of Appeals for the Ninth Circuit, in *Bird v. Glacier Electric Coop.*,³⁰⁹ addressed the issue of whether the district court could give comity to a tribal court judgment where the closing argument of the successful plaintiff in tribal court included numerous statements encouraging ethnic and racial bias of an all-tribal-member jury against a corporate defendant that was owned and controlled by persons who were not tribal members. The court concluded “that the district court erred in giving comity to recognize and enforce the tribal court judgment here because, in view of the closing argument the tribal court proceedings offended due process.”³¹⁰

³⁰⁸ *Id.* at 812, and n.6: “See, e.g., S.D. Codified Laws § 1-1-25(2)(b) (permitting South Dakota courts to recognize a tribal judgment if the courts of that tribe recognize the orders and judgments of the South Dakota courts); OKLA. STAT. tit. 12, § 728(B) (allowing the Supreme Court of Oklahoma to recognize tribal court judgments where the tribal courts agree to grant reciprocity of judgment); WIS. STAT. § 806.245(1)(e) (granting full faith and credit to judgments if, *inter alia*, the tribe grants full faith and credit to the judgments of Wisconsin courts); WYO. STAT. ANN. § 5-1-111(a)(iv) (granting full faith and credit to the Eastern Shoshone and Northern Arapaho Tribes if, *inter alia*, the tribal court certifies that it grants full faith and credit to the orders of judgments of Wyoming).

³⁰⁹ 255 F.3d 1136 (9th Cir. 2000).

³¹⁰ *Id.* at 138, 1152.

8. Sovereign Immunity of Tribes and Tribal Officials³¹¹

a. The Doctrine of Tribal Immunity

The U.S. Supreme Court noted in its decision in *Oklahoma Tax Commission v. Citizen Band Pottawatomie Indian Tribe of Oklahoma*³¹² that “[a] doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in a number of cases. *Turner v. United States*, 248 U.S. 354, 358 (1919); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58.” The Court’s decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,³¹³ reaffirmed the doctrine in a suit for breach of contract involving off-reservation commercial conduct of a tribal entity. The suit was on a note signed by the chairman of the tribe’s Industrial Development Commission, in the name of the tribe. The note was for the purchase from Manufacturing Technologies of corporate stock in Clinton–Sherman Aviation, Inc., and contained no waiver of immunity by the tribe. The Court noted that “[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.... [O]ur cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred...[n]or have we yet drawn a distinction between governmental and commercial activities of a tribe [citations omitted].”³¹⁴ The Court went on to express

³¹¹ See generally DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 217–48 (2001); CANBY, *supra* note 8, at 95–104; Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L. J. 137 (2004); Gabriel S. Galanda, *Arizona Indian Law: What You Should Know*, 39 ARIZ. ATTORNEY 24 (2003); Dao Lee Bernardi-Boyle, *State Corporations for Indian Reservations*, 26 AM. INDIAN L. REV. 41 (2001–2002); Michael P. O’Connell, 2000 *Native American Law Symposium: Citizen Suits Against Tribal Governments and Tribal Officials Under Federal Environmental Laws*, 36 TULSA L. J. 335 (2000); John F. Petoskey, *Northern Michigan: Doing Business with Michigan Indian Tribes*, 76 MICH. BAR JOUR. 440, 441–42 (1997); William V. Vetter, *Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994); Amelia A. Fogleman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345 (1993).

³¹² 498 U.S. 505, 509, 111 S. Ct. 905, 910, 112 L. Ed. 2d 1112, 1120 (1991).

³¹³ 523 U.S. 751, 118 S. Ct. 170, 140 L. Ed. 2d 981 (1998).

³¹⁴ *Id.* at 754–55. *Cf.* McNally CPA’s & Consultants, S.C.

doubt as to “the wisdom of perpetuating the doctrine,” noting that “tribal immunity extends beyond what is needed to safeguard tribal self-governance...[but] declin[ing] to revisit our case law and choos[ing] to defer to Congress.”³¹⁵

b. Immunity Covers Tribal Officials Acting in Official Capacity

Tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority.³¹⁶ An exception to the immunity of tribal officials is invoked when the complaint alleges that the named officer defendants have acted outside the authority that the sovereign is capable of bestowing, and suit may proceed against them to determine that issue.³¹⁷ In addition, tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.³¹⁸ “Tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect.”³¹⁹

v. DJ Hosts, Inc., 2004 Wis. App. 221; 2004 Wis. App. LEXIS 960 (2004) (suit by accounting firm for services for Wisconsin for-profit corporation, DJ Hosts, prior to purchase of 100 percent of corporate shares by The Ho-Chuck Nation, where circuit court dismissed the action based on tribal sovereign immunity. *Held*: “We conclude that when the sole facts are that an Indian tribe purchases all of the shares of an existing for-profit corporation and takes control over the operations of the corporation, tribal immunity is not conferred on the corporation.”). *See also* Bernardi-Boyle, *supra* note 311, where the author states, *inter alia*:

This article suggests that tribes can overcome the stigma of instability and attract capital by conducting business through corporations formed under state law. In this way tribes can assure a fair deal to investors despite their sovereign immunity, taxing power, and ability to escape suits in non-tribal court systems. While multiple law review articles have been written on this topic, few have proposed ways in which the tribes themselves can eliminate the immunity problem.

26 AM. INDIAN L. REV. 41, 42.

³¹⁵ *Kiowa*, 523 U.S. at 758, 760. In *Thomas v. Choctaw Services Enterprise*, 313 F.3d 910 (5th Cir. 2002), the court of appeals held that a tribally owned enterprise was not subject to liability under Title VII, the same as tribes.

³¹⁶ *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479–80 (9th Cir. 1985).

³¹⁷ *Tenneco Oil Co. v. The Sac and Fox Tribe of Indians*, 725 F.2d 572, 574–75 (10th Cir. 1984).

³¹⁸ *Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1995).

³¹⁹ *Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000), quoting *Burlington N. R.R. Co. v. Blackfeet Tribe Burlington*.

The Court, in holding that sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute, applied the rule of *Ex parte Young* to tribal officials.³²⁰ In addition, tribal officers may be sued if the suit is not related to official duties.³²¹

c. Waiver of Immunity

(1) *Congressional Action Restricting Tribal Immunity*.—Tribal immunity is subject to the superior and plenary control of Congress, and it may be abrogated by statute.³²² But, “a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed,’”³²³ and “courts should ‘tread lightly in the absence of clear indications of legislative intent’ when determining whether a particular federal statute waives tribal sovereign immunity.”³²⁴ In *Public Service Company of Colorado v. Shoshone-Bannock Tribes*, the court found that the Hazardous Materials Transportation Act (HMTA),³²⁵ by its terms, “clearly contemplates that Indian tribes may be sued in court if they enact regulations that are alleged to be preempted by the

³²⁰ O’Connell, *supra* note 311 at 399 cites *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), as providing a

long-recognized exception to sovereign immunity by suit against government officials [that] requires an allegation made competently and in good faith that a government official, purportedly acting on behalf of the government he or she serves, acted outside of lawful authority of the sovereign and therefore in his or her individual capacity in violation of a federal law or constitutional provision.

See also CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 287–95 (4th ed. 1983), providing a valuable discussion of *Ex parte Young* and stating, *inter alia*, that: “There is no doubt that the reality is as [dissenting] Justice Harlan stated it, and that everyone knew that the Court was engaging in fiction when it regarded the suit as one against an individual named Young rather than against the state of Minnesota,” (at 289). Wright goes on to note at 292 that: “[F]or half a century Congress and the Court have vied in placing restrictions on the doctrine there announced. Yet this case, ostensibly dealing only with the jurisdiction of the federal courts, remains a landmark in constitutional law.”

³²¹ *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 171–73, 97 S. Ct. 2616, 2621, 53 L. Ed. 2d 667, 674 (1977).

³²² *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56–58, 98 S. Ct. 1670, 1676–77, 56 L. Ed. 2d 106, 114–15 (1978).

³²³ *Id.* at 58.

³²⁴ *Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1206 (9th Cir. 1994), quoting *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 462 (8th Cir. 1993).

³²⁵ 49 U.S.C. §§ 1801 *et seq.* (now 49 U.S.C. §§ 5101 *et seq.*)

HMTA...[and] therefore necessarily abrogates the tribes' immunity from suit."³²⁶ Tribes are also subject to suit in federal court under the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA).³²⁷ In addition, suits are authorized against tribes under the whistleblower provisions of the Safe Drinking Water Act.³²⁸ However, the ADA has been held not to waive tribal immunity "because it contains no terms indicating an intent to permit suits against tribes."³²⁹

(2) *Express Waiver*.—The Supreme Court's decision in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*,³³⁰ held that North Dakota could not require a tribe's blanket waiver of sovereign immunity as a condition for permitting the tribe to sue private parties in state court, finding that condition "unduly intrusive on the Tribe's common law sovereign immunity."³³¹ So tribal immunity is a matter of federal law and is not subject to diminution by the states.³³² But, while *Kiowa* reaffirmed the doctrine of tribal immunity, it also reaffirmed that such immunity could be voluntarily waived by the tribe.³³³ The Court's decision in *C & L Enterprises, Inc v. Citizen Band Potawatomi Indian Tribe*³³⁴ addressed the question of whether the tribe had waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L in accordance with a standard contractual arbitration clause.³³⁵ The Court, while

noting that "to relinquish its immunity, a tribe's waiver must be 'clear[,]...'"³³⁶ was "satisfied that the Tribe in this case has waived, with the requisite clarity, immunity from the suit C & L brought to enforce its arbitration award."³³⁷ The Court rejected the tribe's insistence that express words of waiver were required, citing with approval *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*³³⁸ (clause requiring arbitration of contractual disputes and authorizing entry of judgment upon arbitral award "in any court having jurisdiction thereof" expressly waived tribe's immunity).

(3) *Waiver by Tribal Corporations*.—The Court of Appeals for the Ninth Circuit in its decision in *American Vantage Companies, Inc. v. Table Mountain Rancheria*³³⁹ noted that there is a historical connection between waiver of immunity and incorporation of Indian tribes. Enactment of Section 17 of the IRA gave tribes the power to incorporate. This was "done so in part to enable tribes to waive sovereign immunity, thereby facilitating business transactions and fostering tribal economic development and independence. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 157, 36 L. Ed. 2d 114 (1973)." But "[a] tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so."³⁴⁰ Canby points out that many of the corporate charters under the Act conferred the power to "sue and be sued," but "[a] majority of courts, however, has held that a

³²⁶ *Id.* at 1206–07.

³²⁷ *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989).

³²⁸ *Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999).

³²⁹ *Fla. Paralegic Ass'n v. Miccosukee Tribe of Fla.*, 166 F.3d 1126 (11th Cir. 1999).

³³⁰ 476 U.S. 877, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986).

³³¹ *Id.* at 891.

³³² *Kiowa*, 523 U.S. at 756.

³³³ *Id.* at 754.

³³⁴ 532 U.S. 411, 121 S. Ct. 1589; 149 L. Ed. 2d 623 (2001).

³³⁵ See *Citizen Band*, 532 U.S. at 414–15: The Tribe entered into a contract with C & L for installation of a roof on a building owned by the Tribe. The building was not on the Tribe's reservation or on land held by the federal government in trust for the Tribe. The contract was a standard form agreement copyrighted by the American Institute of Architects, proposed by the Tribe and its architect. The arbitration clause in question provided:

All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise.... The award

rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

The American Arbitration Association Rules provide that "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." The contract included a choice-of-law clause, providing; "The contract shall be governed by the law of the place where the Project is located." Oklahoma has adopted a Uniform Arbitration Act, which instructs that "the making of an agreement...providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." OKLA. STAT. tit. 15, § 802B. The Act defines "court" as "any court of competent jurisdiction in this state."

³³⁶ *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991).

³³⁷ *Id.* at 418.

³³⁸ 86 F.3d 656, 660 (7th Cir. 1996).

³³⁹ 292 F.3d 1091, 1098 (2002).

³⁴⁰ *Id.* at 1099. See *Parker Drilling*, 451 F. Supp. at 1136; see also *Ransom v. St. Regis Mohawk Educ. U. Cmty. Fund*, 86 N.Y.2d 553, 658 N.E.2d 989, 994–95, 635 N.Y.S.2d 116 (N.Y. 1995). CANBY, *supra* note 8, at 94–95.

mere 'sue and be sued' clause does not constitute a waiver."³⁴¹ "Similarly, incorporation of a tribal sub-entity under state laws enabling corporations to sue and be sued does not waive immunity. *Ransom*, [supra]...."³⁴²

d. Tribal Issues with State Sovereign Immunity

(1) *Eleventh Amendment Immunity*.—In *United States v. Minnesota*,³⁴³ the U.S. Supreme Court held that the United States had standing to sue on behalf of Indian tribes as guardians of the tribe's rights, and that, since "the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States," no Eleventh Amendment bar would limit the United States' access to federal courts for that purpose. But as to Indian tribes suing states, the Supreme Court decision in *Blatchford v. Native Village of Noatak*³⁴⁴ held that the Eleventh Amendment bars such suits without the state's consent.³⁴⁵ The Court rejected the argument that 28 U.S.C. § 1362 (granting district courts original jurisdiction to hear all civil actions brought by Indian tribes) abrogated state sovereign immunity.³⁴⁶

Congress passed IGRA in 1988, pursuant to the Indian Commerce Clause, to provide a statutory basis for the operation and regulation of gaming by

Indian tribes.³⁴⁷ The Act provided in Section 2710(d)(1) that class III gaming must, *inter alia*, be conducted in conformance with a tribal-state compact. Section 2710(d)(7) provided that a tribe could bring an action in federal court against the state for refusal to bargain in good faith for a state-tribal gaming compact. The Supreme Court decision in *Seminole Tribe of Florida v. Florida*³⁴⁸ involved a suit to compel negotiations under that provision of IGRA. The State of Florida's motion to dismiss on the ground of sovereign immunity was dismissed by the District Court, and the Court of Appeals for the Eleventh Circuit dismissed the Tribe's appeal. The Supreme Court granted *certiorari*, affirming the Eleventh Circuit's dismissal of the Tribe's suit. Chief Justice Rehnquist, writing for the majority in a five to four decision, agreed that "Congress clearly intended to abrogate the State's sovereign immunity through § 2710(d)(7)[,]" but held that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes pursuant to the Indian Commerce Clause and that *Ex parte Young* may not be used to enforce Section 2710(d)(3) against a state official.³⁴⁹

A year later the Court rendered another decision involving the doctrine of *Ex parte Young*, in the case of *Idaho v. Coeur d'Alene Tribe of Idaho*,³⁵⁰ again illustrating its careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case, particularly where there is a state judicial remedy available. The case involved an action by a tribe alleging ownership in the submerged lands and the bed of Lake Coeur d'Alene and various of its navigable tributaries and effluents (submerged lands) lying within the original boundaries of the Coeur d'Alene Reservation within the State of

³⁴¹ CANBY, *supra* note 8, at 102. See, e.g., *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 86–87 (2d Cir. 2001); *Ninegret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 29–30 & n.5 (1st Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581 (8th Cir. 1998).

³⁴² CANBY, *supra* note 8, at 102.

³⁴³ 270 U.S. 181, 46 S. Ct. 298, 70 L. Ed. 539 (1926).

³⁴⁴ 501 U.S. 775, 111 S. Ct. 2578, 1115 L. Ed. 2d 696 (1991).

³⁴⁵ The Eleventh Amendment provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The *Blatchford* Court commented at 501 U.S. 779, that:

Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, [citations omitted] and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention" [citations omitted].

³⁴⁶ *Blatchford*, 501 U.S. at 787.

³⁴⁷ 25 U.S.C. § 2702.

³⁴⁸ 517 U.S. 44, 116 S. Ct. 1114, 130 L. Ed. 2d 878 (1996).

³⁴⁹ *Id.* at 53–75. Chief Justice Rehnquist stated:

The situation presented here, however, is sufficiently different from that giving rise to the traditional *Ex parte Young* action so as to preclude the availability of that doctrine.... Here, of course, we have found that Congress does not have authority under the Constitution to make a State suable in federal court under § 2710(d)(7). Nevertheless, the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under § 2710(d)(3).

At 1132–33.

³⁵⁰ 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).

Idaho. The Tribe sought, *inter alia*, a declaratory judgment establishing its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands. The District Court found that the Eleventh Amendment barred all claims against the State and its agencies and officials, but the Ninth Circuit, while agreeing on the Eleventh Amendment bar, found that the doctrine of *Ex parte Young* was applicable and allowed the claims for declaratory and injunctive relief against the officials to proceed insofar as they sought to preclude continuing violations of federal law. The Supreme Court readily affirmed that, as to the State, the suit was barred based upon Eleventh Amendment sovereign immunity, citing *Blatchford*.³⁵¹ Turning to the availability of the *Ex parte Young* exception, the Court stated that “[w]e do not then, question the continuing validity of the *Ex parte Young* doctrine,”³⁵² but in providing extensive analysis of the doctrine, the Court noted:

Today...it is acknowledged that States have real and vital interests in preferring their own forum in suits brought against them, interest that ought not to be disregarded based upon a waiver presumed in law and contrary to fact. See e.g., *Edelman v. Jordan*, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). In this case, there is neither warrant nor necessity to adopt the *Young* device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State. Idaho’s courts are open to hear the case, and the State neither has nor claims immunity from their process or their binding judgment.³⁵³

The Court continued: “Our recent cases illustrate a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case...[t]his case-by-case approach to the *Young* doctrine has been evident from the start.”³⁵⁴ The Court went on to find the *Ex parte Young* exception inapplicable, holding that “[t]he dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and insist upon responding to these claims in its own courts, which are open to hear and determine the case.”³⁵⁵

(1) *State Immunity in Tribal Court*.—Eleventh Amendment immunity was not an issue in *State of*

Montana v. Gilham,³⁵⁶ where the Court of Appeals for the Ninth Circuit addressed the question of whether the State of Montana may be subject to a tort action in Blackfeet Tribal Court. The suit involved the fatal injury of the decedent’s daughter, a tribal member, when the car in which she was a passenger struck a permanently anchored highway sign at the intersection of U.S. Highways 2 and 89 within the external boundaries of the Blackfeet Indian Reservation in Montana. The mother, Toni Gilham, brought an action against the driver of the car, who was intoxicated at the time of the accident, and the State of Montana in Blackfeet Tribal Court, alleging negligent design, construction, and maintenance of the intersection. Montana filed a motion to dismiss for lack of jurisdiction, based upon sovereign immunity. The tribal court denied the motion and the case proceeded to trial, resulting in a judgment against the driver and Montana for \$280,000.³⁵⁷ Appeals by Montana to the Blackfeet Court of Appeals and the Blackfeet Supreme Court on the immunity issue were not successful. These courts found that Article II, Section 18, of the Montana Constitution waived Montana’s immunity from suit in the tribal courts.³⁵⁸ Montana filed suit in U.S. District Court challenging tribal court jurisdiction and seeking an injunction against further proceedings. The district court granted summary judgment and injunctive relief to Montana, denying Gilham’s cross-motion for summary judgment. The court held that Article II, Section 18, of the Montana Constitution did not waive immunity for suit in tribal court since it only waives Montana’s immunity in state courts.³⁵⁹

The Ninth Circuit decision initially noted that “any limitation on tribal court authority to entertain a suit against a State must arise from a source other than direct application of the Eleventh Amendment or congressional act.” The court then concluded “that the States have retained their historic sovereign immunity from suits by individuals and that nothing in the inherent retained powers of tribes abrogates that immunity.”³⁶⁰ The court distinguished the decision in *Nevada v. Hall*³⁶¹ (holding that sovereign immunity did not prevent Cali-

³⁵⁶ 133 F.3d 1133 (1997).

³⁵⁷ *Id.* at 1134.

³⁵⁸ *Id.* at 1135. MONT. CONST. art II, § 18 provides: “State subject to suit. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.”

³⁵⁹ *Gilham*, 133 F.3d at 1135.

³⁶⁰ *Id.* at 1136–37.

³⁶¹ 440 U.S. 410, 411–12, 99 S. Ct. 1182, 1183–84, 59 L. Ed. 2d 416, 419 (1979).

³⁵¹ *Id.* at 261, 268–69, citing *Blatchford* at 501 U.S. 775, 782, where the Court said “we reasoned that the States likewise did not surrender their immunity for the benefit of the tribes. Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity.”

³⁵² *Id.* at 269.

³⁵³ *Id.* at 274.

³⁵⁴ *Id.* at 278–80.

³⁵⁵ *Id.* at 287–88.

fornia residents injured in an automobile accident with an employee of the University of Nevada from suing the State of Nevada in California state courts) on the basis that Gilham's suit directly implicated the exercise of Montana's sovereign functions, a factor not involved in *Nevada v. Hall*, which was simply a *respondeat superior* case.³⁶² The court then turned to the issue of whether Montana had waived immunity to suit in tribal court. The court reviewed the rationale of several decisions that found that a state's waiver of immunity in its own courts did not constitute a waiver of its Eleventh Amendment immunity from suit in federal courts. The court then held that

[f]or similar reasons, Montana has not waived its immunity from suit in tribal court.... [I]ndeed, given the standard to find a waiver, the only reasonable construction of the language of Article II, § 18 is that Montana has consented to suit only in its own state courts. See, e.g. *Holladay v. Montana*, 506 F. Supp. 1317, 1321....³⁶³

The court went on to note that "under the circumstances presented in this case, where the tribal courts lack jurisdiction because of Montana's sovereign immunity, state court jurisdiction would be proper."³⁶⁴ The court declined to address whether agents of a state may be sued in tribal court or whether states may be subject to a contract suit in tribal court, limiting its holding to the facts presented by this case.³⁶⁵

9. Criminal Jurisdiction³⁶⁶

a. General

While jurisdictional lines regarding crimes committed in Indian country are more or less settled, jurisdictional disputes on Indian reservations often involve questions of overlapping federal, state, and tribal jurisdiction.³⁶⁷ The following terse comment is pertinent:

³⁶² *Gilham* at 133 F.3d at 1137–38.

³⁶³ *Id.* at 1139.

³⁶⁴ *Id.* at n.6.

³⁶⁵ *Id.* at 1140 n.8.

³⁶⁶ See generally CANBY, *supra* note 8, at 124–84; Vernoica L. Bowen, *The Extent of Indian Regulatory Authority Over Non-Indian: South Dakota v. Bourland*, 27 CREIGHTON L. REV. 605, 612–15, 631–34 (1994); Peter Fabish, *The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina*, 66 WASH. L. REV. 567 (1994); DESKBOOK, *supra* note 16, at 84–97; PEVAR, *supra* note 8, at 129–53.

³⁶⁷ *State of Washington v. Schmuck*, 121 Wash. 2d 373, 380; 850 P.2d 1332, 1335 (1993), citing F. COHEN, FEDERAL INDIAN LAW, ch. 6 (1982); *Falling Through the Cracks After Duro v. Reina: A Close Look at a Jurisdictional Failure*, 15 PUGET SOUND L. REV. 229, 230–35

Law enforcement in Indian Country is a complicated matter. On most Indian reservations federal, state, and tribal governments all have a certain amount of authority to prosecute and try criminal offenses. This jurisdictional maze results from a combination of Congressional enactment, judge-made law, and the principle of inherent tribal sovereignty. Thus a determination of who has authority to try a particular offense depends upon a multitude of factors: the magnitude of the crime, whether the perpetrator or the victim is an Indian or a non-Indian, and whether there are any statutes ceding jurisdiction over certain portions of Indian Country from one sovereign to another.³⁶⁸

b. P. L. 280³⁶⁹

As previously discussed at Section III.C.6, one of the legislative products of the termination policy was the enactment in 1953 of P.L. 83-280, 67 Stat. 588, mandatorily delegating extensive civil and criminal jurisdiction over Indian country to five states (California, Minnesota, Nebraska, Oregon, and Wisconsin), with a sixth mandatory state (Alaska) added in 1958. P.L. 280, Section 7, gave all other states the option of assuming such jurisdiction. Nine states chose to assume either total or partial jurisdiction (Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah and Washington).³⁷⁰ A 10th state, South Dakota, attempted to assume jurisdiction in 1966, but only over highways. This action was invalidated by the Eighth Circuit Court, and therefore the state has no P.L. 280 jurisdiction.³⁷¹ ICRA³⁷² amended P.L. 280 in two important aspects. First, as to optional states acquiring new civil or criminal jurisdiction, Congress imposed as a condition of approval that there be tribal consent based upon a positive vote of a ma-

(1991).

³⁶⁸ David H. Getches, Daniel M. Rosenfelt, Charles F. Wilkinson, CASES AND MATERIALS ON FEDERAL INDIAN LAW (1979), quoting T. Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 KAN. L. REV. 387 (1974).

³⁶⁹ See generally CANBY, *supra* note 8, at 232–58; Arthur F. Foerster, *Divisiveness and Delusion: Public Law 280 and the Evasive Criminal/Regulatory Distinction*, 46 UCLA L. REV. 1333 (1999); Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975); PEVAR, *supra* note 8, at 129–53.

³⁷⁰ PEVAR, *supra* note 8, at 116–17.

³⁷¹ *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990). For an analysis of this case, see Keith Cable, *Rosebud v. South Dakota: How Does Tribal Sovereignty Affect the Determination of State Jurisdiction on Reservation Highways?*, 36 S.D. L. REV. 400 (1991).

³⁷² 82 Stat. 73 (Title II—Rights of Indians; Civil Rights Act of 1968. Pub. L. No. 90-284).

jury of the tribe's members.³⁷³ At this time no tribe has granted such consent. Secondly, Congress authorized the federal government "to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction" previously granted.³⁷⁴ Six states have retroceded jurisdiction over tribes, in whole or in part (Minnesota, Nebraska, Nevada, Oregon, Washington, and Wisconsin).³⁷⁵

The Supreme Court's decision in *Bryan v. Itasca County, Minnesota*³⁷⁶ noted that the

provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280... § 2 of the Act, ...[but] [i]n marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting § 4's grant of civil jurisdiction to the States.

The civil authority granted by Section 4 is over "civil causes of action," but the *Bryan* Court held that this was limited to adjudicatory jurisdiction:

[T]he consistent and exclusive use of the terms "civil causes of action," "[arising] on," "civil laws...of general application to private persons or private property," and "[adjudication]," in both the Act and its legislative history virtually compels our conclusion that the primary intent of § 4 was to grant jurisdiction over private civil litigation involving reservation Indians in state court.³⁷⁷

Thus, the *Bryan* decision limited the civil grant of P.L. 280, Section 4, to adjudication of private civil cases involving Indians in state court, but held that it did not grant general *civil regulatory* authority.³⁷⁸ This *Bryan* principle has significant impacts on state efforts to regulate certain conduct, including motor vehicle violations, which will be discussed in paragraph 3.

c. State Criminal/Prohibitory Versus Civil/Regulatory under P.L. 280

The U.S. Supreme Court would approve and further clarify the *Bryan* principle in *California v. Cabazon Band of Mission Indians*,³⁷⁹ a case involving the attempt by the State of California and Riverside County, California, to regulate gambling (bingo and draw poker) on the reservations of the Cabazon and Morongo Bands of Mission Indians. There the Supreme Court found that

when a State seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.³⁸⁰

The Court noted with approval the Ninth Circuit Court of Appeals' use of a distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws, which it had used in an earlier decision to apply what it thought to be the civil/criminal dichotomy drawn in *Bryan*:³⁸¹

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.³⁸²

The Court concluded:

We are persuaded that the prohibitory/regulatory distinction is consistent with *Bryan's* construction of Pub. L. 280. It is not a bright-line rule.... In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.... But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law.... Accordingly, we conclude that Pub. L. 280 does not authorize California to enforce Cal. Penal Code Ann. § 326.5 (West Supp. 1987) within the Cabazon and Morongo Reservations.... Nor does Pub. L. 280 authorize the county to apply its gambling ordinances to the reservations.³⁸³

³⁸⁰ *Id.* at 208.

³⁸¹ See *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185 (1982), which also involved applicability of § 326.5 of the California Penal Code to Indian reservations.

³⁸² *Bryan*, 426 U.S. at 209.

³⁸³ *Id.* at 210–11, n.11. Foerster, *supra* note 369 at 1359, considers *Cabazon* to be ineffective:

The Criminal/regulatory test set forth in *Cabazon* and the factors upon which courts have come to rely are ineffective in distinguishing between criminal and regulatory laws. Cases involving essentially the same laws are resolved differently because of arbitrary and irrelevant distinctions. Often, the different outcomes are based on the importance of the law to the state rather than on any meaningful analysis about the criminal nature of the statute.

But see San Manual Indian Bingo and Casino, 341 NLRB No. 138, at 1055 (2004), where the NLRB over-

³⁷³ 25 U.S.C. §§ 1322, 1326.

³⁷⁴ 25 U.S.C. § 1323(a).

³⁷⁵ PEVAR, *supra* note 8, at 118.

³⁷⁶ 426 U.S. 373, 380, 96 S. Ct. 2102, 2107, 48 L. Ed. 2d 710, 716 (1976).

³⁷⁷ *Id.* at 385.

³⁷⁸ *Id.* at 385, 388–90.

³⁷⁹ 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 244 (1987).

(1) *State Traffic and Motor Vehicle Statutes.*—The following cases dealing with whether a state statute is criminal/prohibitory or civil/regulatory are instructive:

- In *County of Vilas v. Chapman*,³⁸⁴ the Supreme Court of Wisconsin relied on the analysis and principles established in *Rice v. Rehner*³⁸⁵ in holding that Vilas County, Wisconsin, had jurisdiction to enforce a noncriminal traffic ordinance against a member of the Lac du Flambeau Band of Lake Superior Chippewa Indians for an offense occurring on a public highway within the boundaries of a reservation. The State Supreme Court went through a three-step process as outlined in *Rice*:

1. Deciding whether the tribe had a tradition of tribal self-government in the area of traffic regulation on Highway 47 within the reservation;³⁸⁶
2. Evaluating the balance of federal, state, and tribal interest in the regulation of Highway No. 47;³⁸⁷ and
3. Determining whether the federal government had preempted state jurisdiction to regulate Highway 47 within the Lac du Flambeau Reservation.³⁸⁸

The Wisconsin Court, while noting that it had found a tradition of traffic regulation by the Menominee Tribe in an earlier case, found in marked contrast that the Lac du Flambeaus had no motor vehicle code in effect at the time of the offense, and therefore no tradition of self-government in this area. In balancing the federal, state, and tribal interest, the Supreme Court of Wisconsin found that the State had a dominant interest in regulating traffic on Highway 47 against both Indians and other users of public highways.

- In *Confederated Tribes of the Colville Reservation v. Washington*,³⁸⁹ the tribe sought to prohibit the State of Washington from enforcing its traffic laws on public roads within the tribe's reservation.

turned longstanding previous policy and held that gaming facility tribally owned and within confines of reservation was subject to NLRB jurisdiction. Contrast this case with *Yukon Kuskokwin Health Corp. v. Int'l Bhd. of Teamsters, Local 959*, 341 NLRB 139, at 1075 (2004), where the Board found no NLRB jurisdiction in Alaska Native health facility. Arguably, one distinction in these cases is that while in both situations there were many non-tribal member employees, unlike the gaming facility only Alaska Natives could utilize the health facility.

³⁸⁴ 122 Wis. 2d 211, 361 N.W.2d 699 (Wis. 1985).

³⁸⁵ 463 U.S. 713, 103 S. Ct. 329, 77 L. Ed. 2d 961 (1983).

³⁸⁶ *Chapman*, 361 N.W. at 702.

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 702–03.

³⁸⁹ 938 F.2d 146 (9th Cir. 1991).

In 1979, the state legislature had “decriminalized” several traffic offenses, including speeding, and designated each as a “traffic infraction”: “a traffic infraction may not be classified as a criminal offense.”³⁹⁰ The Washington State courts had found a traffic infraction not to be a felony or misdemeanor.³⁹¹ The court noted that while “speeding remains against the state’s public policy, *Cabazon* teaches that this is the wrong inquiry [that] *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity... or whether all but a small subset of a basic activity is prohibited.”³⁹² The Court of Appeals held that “speeding is but an extension of driving—the permitted activity—which occasionally is incident to the operation of a motor vehicle,” concluding that “RCW Ch. 46.63 should be characterized as a civil, regulatory law...[which] the state may not assert...over tribal members on the Colville reservation.”³⁹³ Noteworthy are these comments by the court relative to tribal traffic codes:

Indian sovereignty and the state’s interest in discouraging speeding are both served by our decision here: the Tribes have enacted a traffic code, employ trained police officers, and maintain tribal courts staffed by qualified personnel to deal with criminal traffic violations. The Tribes are willing and able to enforce their own traffic laws against speeding drivers and even to commission Washington state patrol officers to assist them.³⁹⁴

- *Germaine v. Circuit Court for Vilas County, Wis.*³⁹⁵ A habeas corpus proceeding was held following the conviction in state court of Germaine, an enrolled member of the Lac du Flambeau Band of Lake Superior Chippewa Indians, for operating his motor vehicle on a state highway within the reservation after his driver’s license had been revoked for the fourth time. The fourth conviction carried a mandatory minimum jail sentence of 60 days as well as a minimum fine of \$1,500.³⁹⁶ Germaine challenged Wisconsin’s jurisdiction under P.L. 280 to enforce its traffic laws on the reservation. The court, in upholding the dismissal of the writ of habeas corpus, relied on the “shorthand test” of *Cabazon* to determine whether the conduct at issue violated the State’s public policy:

The State of Wisconsin seeks to protect the lives and property of highway users from all incompetent, incapacitated, and dangerous drivers anywhere on its

³⁹⁰ WASH. REV. CODE § 46.63.020.

³⁹¹ *Confederated Tribes*, 938 F.2d at 148.

³⁹² *Id.* at 149.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ 938 F.2d 75 (7th Cir. 1991).

³⁹⁶ WIS. STAT. § 343.44(1)-(2).

highways on a reservation or off. A clear and mandatory criminal penalty is imposed to enforce its prohibition. This is public policy enforcement of high order. The state's public policy in enforcing this criminal penalty and deterring dangerous drivers does no violence to any tribal vehicle regulation which the tribe enforces.... Congress has made it plain that Wisconsin can enforce its criminal laws on reservations. That is all Wisconsin is doing.³⁹⁷

• *State of Minnesota v. Stone*.³⁹⁸ Members of the White Earth Band of Chippewa Indians were cited for the following violations of Minnesota's traffic and driving-related laws: no motor vehicle insurance and no proof of insurance; driving with an expired registration; driving without a license; driving with an expired license; speeding; no seat belt; and failure to have child in child-restraint seat. The district court dismissed these charges for lack of jurisdiction under P.L. 280 because the traffic and driving-related laws at issue were civil/regulatory rather than criminal/prohibitory. The Minnesota Supreme Court affirmed³⁹⁹ and adopted a two-step approach to applying the *Cabazon* test for Minnesota courts:

The first step is to determine the focus of the *Cabazon* analysis. The broad conduct will be the focus of the test *unless* the narrow conduct presents substantially different or heightened public policy concerns. If this is the case, the narrow conduct must be analyzed apart from the broad conduct. After identifying the focus of the *Cabazon* test, the second step is to apply it. If the conduct is generally permitted, subject to exceptions, then the law controlling the conduct is civil/regulatory. If the conduct is generally prohibited, the law is criminal/prohibitory. In making this distinction in close cases, we are aided by *Cabazon's* "shorthand public policy test," which provides that conduct is criminal if it violates the state's public policy...we interpret "public policy," as used in the *Cabazon* test, to mean public criminal policy...[which] seeks to protect society from serious breaches in the social fabric which threaten grave harm to persons or property.⁴⁰⁰

³⁹⁷ *Germaine*, 938 F.2d at 77–78.

³⁹⁸ 572 N.W.2d 725 (Minn. 1997).

³⁹⁹ *Id.* at 727.

⁴⁰⁰ *Id.* at 730. The state high court found the following factors to be useful in determining whether an activity violates the state's public policy in a nature serious enough to be considered "criminal.":

- (1) the extent to which the activity directly threatens physical harm to persons or property or invades the rights of others;
- (2) the extent to which the law allows for exceptions and exemptions;
- (3) the blameworthiness of the actor;
- (4) the nature and severity of the potential penalties for violation of the law. The list is not meant to be exhaustive, and no single factor is dispositive.

The Minnesota Supreme Court went on to determine that "the broad conduct of driving is the proper focus of the *Cabazon* test," applying the test to hold that "driving is generally permitted, subject to regulation [and] clearly does not violate the public criminal policy of the state...[finding] no need to apply the shorthand public policy test." The court found that "each of the laws involved...is civil/regulatory and the state lacks jurisdiction under Public Law 280 to enforce them against members of the [tribe]."⁴⁰¹

• *State of Minnesota v. Couture*.⁴⁰² The issue presented was whether Couture, an Indian resident of the Fond du Lac Reservation, could be charged with aggravated driving on the reservation while under the influence of alcohol in violation of Minn. Stat. Section 169.129 (1996). The court, following the two-step approach of *Stone*, and relying on its decision in *State v. Zornes*,⁴⁰³ held that the statute is a criminal/prohibitory law for which Couture could be charged under P.L. 280.⁴⁰⁴

• *State of Minnesota v. Busse*.⁴⁰⁵ Busse was charged with a gross misdemeanor for driving after cancellation of his Minnesota driver's license as inimical to public safety under Minn. Stat. Section 171.04, subd. 1 (9) (1998). His driver's license had been cancelled as a result of four separate convictions for driving under the influence. Busse's conviction in state district court was reversed by the state court of appeals, which held that the charged offense was civil/regulatory, concluding that consideration of the offense that triggered the cancellation was inappropriate, and therefore driving after cancellation as inimical to public safety was no different than driving after revocation based on failure to show proof of insurance in *State v. Johnson*, 598 N.W.2d 680 (Minn. 1999).⁴⁰⁶ The Minnesota Supreme Court disagreed, concluding that "looking at the underlying basis for a license revocation or, in this case, cancellation, is not prohibited when determining whether the offense involves heightened public policy concerns.... Accordingly, our focus remains on whether the specific offense reflects heightened public policy concerns."⁴⁰⁷ The court concluded:

⁴⁰¹ *Id.* at 731.

⁴⁰² 587 N.W.2d 849 (Minn. App. 1999).

⁴⁰³ *State v. Zornes*, 584 N.W.2d 7, 11 (1998), held that "driving while intoxicated gives rise to heightened policy concerns" and that "the states interest in enforcing its DWI laws presents policy concerns sufficiently different from general road safety."

⁴⁰⁴ *Couture*, 587 N.W.2d at 854.

⁴⁰⁵ 644 N.W.2d 79 (Minn. 2002).

⁴⁰⁶ *Id.* at 80–82.

⁴⁰⁷ *Id.* at 84.

In sum, the criminal sanction imposed, the direct threat to physical harm, the need for the state to be able to enforce cancellations based on a threat to public safety, and the absence of exceptions to the offense of driving after cancellation based on being inimical to public safety all demonstrate heightened public policy concerns.... Thus, the conduct at issue...is generally prohibited conduct and under our *Cabazon/Stone* analysis the offense is criminal/prohibitory...[and] Minnesota courts have subject matter jurisdiction....”⁴⁰⁸

• In *Prairie Band Potawatomi Nation v. Wagon*,⁴⁰⁹ the court of appeals held that the State of Kansas cannot impose its motor vehicle laws on tribal members even when they travel off the reservation. The State has to recognize motor vehicle registration and title issued by the Nation. Kansas’s sovereignty and public safety interests do not trump the tribe’s interest in self-governance.

d. Hot Pursuit, Stop and Detain, and Arrest

A significant challenge facing tribal police officers and state/local police officers is how to determine jurisdiction to issue a citation or make an arrest when a violation is observed. The decisions in the following selected cases reflect how various courts have dealt with the issues of “hot pursuit,” “stop and detain,” and “arrest.”

• In *State of Washington v. Schmuck*,⁴¹⁰ the issue was whether an Indian tribal officer has the authority to stop and detain a non-Indian who allegedly violates state and tribal law while traveling on a public road within a reservation until that person can be turned over to state authorities for charging and prosecution. Schmuck was found guilty of driving while intoxicated on the Port Madison Reservation after being detained by a Suquamish tribal officer and turned over to the Washington State Patrol. The Supreme Court of Washington affirmed the conviction and, in upholding the tribal officer’s stop and detention, observed:

Thus, twice the Supreme Court has stated that a tribe’s proper response to a crime committed by a non-Indian on the reservation is for the tribal police to detain the offender and deliver him or her to the proper authorities. This is precisely what Tribal Officer Bailey did: he detained Schmuck and promptly delivered him up in accordance with *Oliphant’s* and *Duro’s* directive.... In addition...the Ninth Circuit has squarely addressed the issue of tribal authority to detain a non-Indian in a case directly on point. *Ortiz-Barraza v. United States*, 512 F.2d 1176 (9th Cir. 1975).... The Ninth Circuit held that an Indian tribe has inherent authority to stop and detain a non-

Indian allegedly violating state or federal law on public roads running through the reservation until the non-Indian can be turned over to appropriate authorities.

• In *City of Farmington v. Benally*,⁴¹¹ a city police officer observed a vehicle weaving in its lane, repeatedly crossing the center divider, and speeding within the city limits. He attempted to stop the vehicle, but it sped off. A high-speed chase ensued, during which other traffic violations were observed by the officer. The vehicle was finally pulled over, but it was almost 3 miles within the boundaries of the Navajo Reservation. Defendant Benally was identified as an enrolled member of the Navajo Nation. The officer observed that Benally smelled of alcohol and had slurred speech and bloodshot, watery eyes. He arrested him, transported him to Farmington City police station, and charged him with a number of offenses, including driving under the influence of intoxicating liquor and/or drugs. He was convicted by a magistrate court.⁴¹² The district court’s dismissal was affirmed by the appeals court, relying on the New Mexico Supreme Court decision in *Benally v. Marcum*.⁴¹³

The district court relied on *Benally*...where under nearly identical facts, a member of the Navajo Tribe was pursued onto the reservation and arrested for violation of city traffic ordinances.... Our Supreme Court held that the arrest was illegal because it violated tribal sovereignty by circumventing the procedure for extradition from the Navajo Reservation.... This holding was based on well-established law that Indian tribes have the right to self-government that may not be impaired or interfered with by the state, absent congressional approval. 89 N.M. at 465-66, 553 P.2d at 1272-73; see *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959).⁴¹⁴

• In *United States v. Patch*,⁴¹⁵ the Ninth Circuit affirmed a decision to convict and fine defendant, a member of the Colorado River Indian Tribe (CRIT), for simple assault in violation of 18 U.S.C. § 113(a)(5). The issue was whether the assault victim, Michael Schwab, a La Paz County, Arizona, deputy sheriff, had the authority to stop vehicles on the state highway to determine his jurisdiction to issue a citation. The agreed facts were that, while patrolling State Highway 95 in Indian country, Schwab’s patrol car was “tailgated” by Patch. Schwab attempted to stop him, but had to pursue him to determine whether he was a tribal member. Under county procedures, once Swab knew that Patch was a tribal member, he was supposed to

⁴⁰⁸ *Id.* at 88.

⁴⁰⁹ 402 F.3d 1015 (10th Cir. 2005).

⁴¹⁰ 121 Wash. 2d 373, 850 P.2d 1332 (1993).

⁴¹¹ 119 N.M. 496, 892 P.2d 629 (1995).

⁴¹² *Id.* at 497.

⁴¹³ 89 N.M. 463, 553 P.2d 1270 (1976).

⁴¹⁴ *Benally*, 119 N.M. at 497.

⁴¹⁵ 114 F.3d 131 (9th Cir. 1997).

notify the tribal police who had jurisdiction on the CRIT. The pursuit ended at Patch's sister's house, where Schwab followed Patch onto the porch and attempted to detain him, but was assaulted by Patch. Patch's conviction for assault rested on whether Schwab was acting within his official duties when he grabbed Patch by the arm on the porch.⁴¹⁶

The court stated:

Arizona State Highway 95 at issue here crosses the CRIT reservation and is subject to overlapping jurisdiction. Offenses committed in Indian country can be subject to federal, state, or tribal jurisdiction depending on the severity of the crime and on whether the offender and/or victim are tribal members. *Duro v. Reina* [citation omitted]. On this section of road, Arizona police have authority to arrest non-Indians for traffic violations...but they do not have authority to arrest tribal members. [citations omitted]. As a practical matter, without a stop and inquiry, it is impossible to know who was driving the pickup truck. The question therefore is whether Schwab had the authority to stop offending vehicles to determine whether he had authority to arrest.... We hold that the attempted stop in this case was valid as a logical application of [*Terry v. Ohio*, 392 U.S. 1 (1967)]...Schwab had the authority under *Terry* to stop vehicles on State Highway 95 to determine his jurisdiction to issue a citation....⁴¹⁷

Concerning the issue of hot pursuit, the Court observed:

Under the doctrine of hot pursuit a police officer who observes a traffic violation within his jurisdiction to arrest may pursue the offender into Indian country to make the arrest...Schwab was justified in following Patch to a place where he could effect a stop, in this case the private porch of a residence in Indian country.⁴¹⁸

• *State of Washington v. Waters*,⁴¹⁹ involved civil traffic infractions in West Omak, Washington, across the river from East Omak, which is on the Colville Indian Reservation. Omak City Police Sergeant Rogers, who is also a commissioned Colville Tribal Law Enforcement Officer, while on patrol in a marked police car, observed defendant Waters commit minor civil traffic infractions, and followed his car across the river to East Omak, activating his emergency lights. Waters, an enrolled member of the Colville Confederated Tribes, refused to stop. A hot pursuit ensued through residential areas at excessive speeds, with Waters running stop signs. After an hour-long, high-speed chase on state highways, Waters was arrested on tribal reservation trust property for felony eluding, driving while

license suspended, driving while under the influence, and resisting arrest. Waters moved to dismiss, arguing that the officers did not have authority to arrest him on the reservation.⁴²⁰

The court distinguished *Benally*, which involved misdemeanor violations, not a felony. The court held that because the charge was felony eluding,

the Omak police therefore had authority to arrest Mr. Waters, if the arrest followed a fresh pursuit. The Washington Mutual Air Peace Officers Powers Act authorizes officers to enforce state laws throughout the territorial bounds of the state when the officer is in fresh pursuit. RCW 10.93.070(6). Fresh pursuit empowers an officer to arrest criminal or traffic violators and take them into custody anywhere in the state, including a reservation. RCW 10.93.120(1)(a).⁴²¹

E. CONTRACTING WITH INDIAN TRIBES AND TRIBAL ENTITIES⁴²²

1. General

As a matter of federal law, Indian tribes, as sovereign governments, operate on a government-to-government basis with federal, state, and local governments. Tribal governments also engage in commercial activities on behalf of their members, which may include business-related contracts with federal, state, and local governments in connection with transportation projects/activities. The issues involved in commercial contracts with tribes and tribal entities will be discussed in this section. Government-to-government cooperation, including cooperative agreements, will be discussed in the next section.

Tribal business contracts with non-Indians raise three major issues:

1. Sovereign immunity;⁴²³

⁴²⁰ *Id.* at 973–74.

⁴²¹ *Id.* at 976.

⁴²² See generally Amelia A. Fogleman, *Notes: Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Business*, 79 VA. L. REV. 1345 (1993); Michael O'Connell, *Indian Law Theme Issue: Business Transactions with Tribal Governments in Arizona*, 34 ARIZ. ATTORNEY 27 (1998); John F. Petoskey, *Northern Michigan: Doing Business with Michigan Indian Tribes*, 76 MICH. B. J. 440 (1997); Mark A. Jarboe, *Fundamental Legal Principles Affecting Business Transactions in Indian Country*, 17 HAMLIN L. REV. 417 (1994); William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994).

⁴²³ Sovereign immunity of tribes and tribal officials is discussed in Section D.8, with waiver of immunity being

⁴¹⁶ *Id.* at 132–33.

⁴¹⁷ *Id.* at 133–34.

⁴¹⁸ *Id.* at 134.

⁴¹⁹ 93 Wash. App. 969; 971 P.2d 538 (1999).

2. What law(s) may govern a transaction between an Indian tribe and a non-Indian; and
3. How will disputes be resolved: federal, state, or tribal courts?⁴²⁴

Relative to issue two, in situations where Indian lands are involved, contracts must be approved by the Secretary of the Interior.

Petoskey states that the “first focus of a business relationship is to determine what entity within the tribe, or in most cases the tribe itself, is doing business with the non-Indian entity.”⁴²⁵ O’Connell notes that

tribal constitutions and other tribal laws, ordinances and resolutions usually establish the authority and limitations within which tribal governments and tribal representatives must act as a matter of tribal law, [and that] [a]bsent a valid delegation of authority under tribal law, tribal government representatives generally lack inherent authority to enter binding agreements on behalf of a Tribe, to waive tribal sovereign immunity, or to agree to arbitration or other dispute resolution procedures.⁴²⁶

These tribal representatives may be subordinate entities created or authorized to conduct tribal business, as “instrumentalities, agencies or departments of tribal government,” or as “tribal government corporations...which serve as arms and instrumentalities of government.”⁴²⁷

This critical examination of tribal constitution and other tribal laws, ordinances, and resolutions is demonstrated in *White Mountain Apache Indian*

Tribe v. Shelley.⁴²⁸ This was an alleged breach of a road construction contract where the Arizona Supreme Court addressed the question of whether defendant Fort Apache Timber Company (FATCO) was a legal entity separate and apart from the White Mountain Apache Tribe (TRIBE), or part of the TRIBE and entitled to the TRIBE’s immunity. The court examined the TRIBE’s constitution and determined that the TRIBE had “the authority to create subordinate organizations for economic purposes.”⁴²⁹ The court then examined the “Plan of Operation” of FATCO and found that it was “a subordinate economic organization of the TRIBE...[and] is a part of the TRIBE and as such enjoys the same immunity from suit that the TRIBE enjoys.”⁴³⁰

While tribal governments are free to establish business corporations under state corporate laws, Petoskey points out that

because of the implied waiver of sovereign immunity and the potential lack of immunity from federal and state taxation that would result, most tribes do not use state law to create these entities, and generally use tribal or federal law, 25 U.S.C 477 [Section 17 of the Indian Reorganization Act, 48 Stat. 987 (1934)], to create a federal corporation....⁴³¹

Each tribe that accepted the IRA was given “the option to have the Secretary of the Interior (Secretary) issue a federal charter of incorporation to the tribal government [and] granted to such corporations...the power to engage in business and the power to lease tribal land....”⁴³² But, he notes, “Section 17 and tribally chartered corporations are generally immune if their charters or by-laws do not waive immunity.”⁴³³

covered in Section D.H.C.

⁴²⁴ Petoskey, *supra* note 422, at 440.

⁴²⁵ *Id.* He notes that

Michigan tribes have varying degrees of separation of power within their tribal constitutions. Some tribal constitutions concentrate tribal power in the tribal chair, while others create a representative form of government, and still others have a “general council” where all eligible tribal citizens can overturn a decision of the “executive council.” Most Michigan tribal councils act in both legislative and executive capacities.

⁴²⁶ O’Connell, *supra* note 422, at 27.

⁴²⁷ *Id.* O’Connell notes that the phrase “tribal enterprise” describes

a broad class of entities which conduct tribal business as instrumentalities, agencies or departments of tribal government but which have not been established as a tribal corporation, authority or other separate legal entity with an independent board of directors. Like other instrumentalities, agencies or departments of tribal government, tribal Enterprises are vested with sovereign immunity and are not persons for diversity purposes under 28 U.S.C. § 1332. (Footnotes omitted).

2. IRA Business Corporations

IRA, Section 16 (25 U.S.C. § 476(e)), provides that “[i]n addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the...rights and powers...to negotiate with the Federal, State, and local

⁴²⁸ 107, Ariz. 4, 480 P.2d 654 (1971).

⁴²⁹ *Id.* at 6.

⁴³⁰ *Id.* at 6–7. *Cf.* Dixon v. Picopa Constr. Co., 160 Ariz. 251, 772 P.2d 1104 (1989), a suit in tort, where the Arizona Supreme Court found that Picopa, a corporation formed under the laws of the Salt River Pima-Maricopa Indian Community, was not a subordinate economic organization within the meaning of *White Mountain Apache*, but “has a board of directors, separate from the tribal government, which exercises full managerial control over the corporation...[and] unlike FATCO, ...the tribal government does not manage the corporation.”

⁴³¹ Petoskey, *supra* note 422, at 441.

⁴³² O’Connell, *supra* note 422, at 27–28.

⁴³³ Petoskey, *supra* note 422, at 442.

governments.” IRA, Section 17, as amended,⁴³⁴ provides as follows:

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

As discussed in Section D.8.c, this power to incorporate was done so in part to enable tribes to waive sovereign immunity, thereby facilitating business transactions and fostering tribal economic development and independence, but a tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so. Vetter points out that while not all tribes are organized under IRA Section 16, a “large percentage of the tribes that established an I.R.A. Section 16 government also set up an I.R.A. Section 17 corporation...initially [adopting] an Interior Department model...[which] included a ‘sue and be sued’ clause, consistent with the 1934 congressional purpose.”⁴³⁵ But, as previously noted, Canby points out that while many of the corporate charters under the IRA confer the power to “sue and be sued,” a majority of courts have held that such a clause standing alone does not constitute a waiver of immunity.⁴³⁶ Because of this, modern Section 17 corporations have provided for limited waiver language in their charters.⁴³⁷ Thus, as noted above, determining whether a waiver of sovereign immunity by the tribe or tribal entity exists becomes a critical issue in the formation of a contract.

⁴³⁴ 25 U.S.C. § 477.

⁴³⁵ Vetter, *supra* note 422, at 176, 180. He quotes this Department of Interior model provision as follows:

[The corporation has the power] [t]o sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and be sued shall not be deemed a consent by the said Tribe [I.R.A. § 16 government?], or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

⁴³⁶ CANBY, *supra* note 8, at 102.

⁴³⁷ O’Connell, *supra* note 422, at 28, n.17.

3. Approval by the Secretary of the Interior⁴³⁸

The most important federal statute concerning business transactions that relate to “Indian lands” was enacted in 1872, and is now codified in 25 U.S.C. § 81 (2005), entitled: “Contracts with Indian tribes or Indians.”⁴³⁹ Subsections (b) and (c) provide:

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

Approval criteria, while cast in the negative, forces the contracting parties to contractually address the three major issues raised above:

(d) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract—

- (1) violates Federal law; or
- (2) does not include a provision that—

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or

(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

Out of an abundance of caution, and in consideration of the fact that failure to obtain approval under Section 81 invalidates the agreement, the

⁴³⁸ 25 U.S.C. § 81.

⁴³⁹ Subsec. (a) provides as follows:

(a) In this section:

(1) The term “Indian lands” means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term “Indian tribe” has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(3) The term “Secretary” means the Secretary of the Interior.

prudent “course of action is to assume that Section 81 applies...until you have ruled out the possibility that approval is required.”⁴⁴⁰ Vetter states that “it is probably safe to say that Secretarial approval is required for any contract that limits tribal control of Indian land or transfers possession or control (even for limited period) to a non-Indian party.”⁴⁴¹ O’Connell notes that “the uncertain boundaries of Section 81 often lead parties to seek BIA ‘accommodation approval’ of agreements where the need for Section 81 approval is unclear[,]” but cautions that such approvals “trigger review under NEPA, NHPA and ESA.”⁴⁴² He recommends consideration of “belt and suspenders” clauses “making all agreements with tribal governments and tribal business entities conditional to receipt of Section 81 approval.”⁴⁴³

4. Dealing with Jurisdictional Issues

a. Personal Jurisdiction

The U.S. Supreme Court ruled unanimously in *Williams v. Lee*⁴⁴⁴ that state courts have no jurisdiction over non-Indian civil suits against Indians for transactions arising on a reservation. So any state court jurisdiction in Indian country must be based upon specific federal law.⁴⁴⁵ While there have been several laws enacted conferring state jurisdiction over a particular tribe(s), the only federal law extending state jurisdiction to Indian reservations generally is P.L. 280, discussed earlier, which allowed states to assume jurisdiction over civil causes of action in Indian country (see Section D.9.b. for current status of states having such state court jurisdiction).⁴⁴⁶ But in *Montana v. United States*,⁴⁴⁷

⁴⁴⁰ Petoskey, *supra* note 422, at 443, citing two recent cases that establish guidelines in applying § 81: Capitan Grande Band of Mission Indians v. Amer. Mgmt. & Amusement, 840 F.2d 1394 (9th Cir. 1987); Altheimer v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993).

⁴⁴¹ Vetter, *supra* note 422, at 171, citing at n.5: Barona Group of Capital Grande Band of Mission Indians v. Amer. Mgmt. & Amusement, 840 F.2d 1394 (9th Cir. 1987); A.K. Mgmt. Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986); Wisc. Winnebago Bus. Comm. v. Koberstein, 762 F.2d 613 (7th Cir. 1985); United States ex rel. Shakopee Mdewakanton Sioux Cmty. v. Pan Amer. Mgmt. Co., 616 F. Supp. 1200 (D. Minn. 1985).

⁴⁴² O’Connell, *supra* note 422, at 29.

⁴⁴³ *Id.*

⁴⁴⁴ 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

⁴⁴⁵ *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 129 (1973).

⁴⁴⁶ The Supreme Court held in *Okla. Tax Comm’n v. Pottawatomie Tribe*, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991), that “Public Law 280 merely permits a

the Supreme Court held that Indian tribes retain inherent power to exercise civil jurisdiction over nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements; however, Indians and tribal entities are not restricted to tribal court, but may litigate in state court when there is state court jurisdiction over the non-Indian defendant, wherever the cause of action arose.”⁴⁴⁸

b. Subject Matter Jurisdiction

(1) *Tribal Courts*.—Vetter points out that while “most tribal courts have subject matter jurisdiction over all types of civil actions, [m]any tribal codes do not include commercial statutes, such as the Uniform Commercial Code, [n]or...an extensive ‘common law.’”⁴⁴⁹ To remedy this, “tribal codes or tribal court decisions allow reference to federal and state law.”⁴⁵⁰

(2) *State Courts*.—Because the preservation of tribal self-government is so dominant in federal law, subject matter jurisdiction issues addressed by state courts “are almost entirely tied to tribal sovereignty issues...[and] turn, in part, on the extent to which the Indian entity or individual voluntarily goes outside reservation boundaries.”⁴⁵¹ Vetter cites *R.C. Hedreen Co. v. Crow Tribal Housing Authority*⁴⁵² as an example of a breach of contract diversity action filed by a non-Indian construction contractor where the court found “adequate substantial contacts with the state” to give the court jurisdiction.⁴⁵³

State to assume jurisdiction over ‘civil causes of action’ in Indian country.”

⁴⁴⁷ 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493, 510 (1981).

⁴⁴⁸ *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877 (1986). Canby points out that

on some reservations the Indian plaintiff has no alternative; a number of tribal codes provide for civil jurisdiction over non-Indian defendants only when they stipulate to it. In summary, then, it is clear that state courts have jurisdiction over suits against non-Indians (and perhaps nonmembers) no matter where the claim arose.

CANBY, *supra* note 8, at 189–90.

⁴⁴⁹ Vetter, *supra* note 422, at 187–88.

⁴⁵⁰ *Id.* at 188.

⁴⁵¹ *Id.*

⁴⁵² 521 F. Supp. 599 (D. Mont. 1981).

⁴⁵³ Vetter, *supra* note 422, at 189. The substantial contacts were: (1) the contracts were made with non-Indian entities residing off the reservation, (2) they [the contracts] contemplated the procurement of supplies and labor off the reservation, (3) bides for the work were solicited off the reservation, (4) the [non-Indian] plaintiff executed the contracts off the reservation, and (5) the bond

But, the court's decision was criticized in *R.J. Williams Co. v. Ft. Belknap Housing Authority*,⁴⁵⁴ where the Ninth Circuit employed a different test for significant contact.⁴⁵⁵ Vetter cites an off-reservation construction contract case, *Padilla v. Pueblo of Acoma*,⁴⁵⁶ where the exercise of state jurisdiction was held not to infringe on tribal self-government, "primarily because the contract-related events occurred almost exclusively off the reservation."⁴⁵⁷

(3) *Federal Courts*.—Federal courts have a limited role in civil disputes arising in Indian country. The two applicable bases for jurisdiction are federal question and diversity of citizenship. Claims arising under federal law may be brought under such statutes as 28 U.S.C. § 1331 or § 1343, provided all other requirements are met. Indian tribes are allowed by 28 U.S.C. § 1362 to bring suits in federal courts, but the claim must still be based on federal law.⁴⁵⁸ For diversity jurisdiction, Indian tribes are not citizens of any state.⁴⁵⁹ The United States Ninth Circuit Court recently noted in *American Vantage Companies v. Table Mountain Rancheria*⁴⁶⁰ that "[m]ost courts to have considered the question—including the First, Second, Eighth and Tenth Circuits—agree that unincorporated Indian tribes cannot sue or be sued in diversity because they are not citizens of any state." [Citations omitted]. But individual Indians, tribal entities, and tribally incorporated corporations are citizens of the state where the reservation is located for diversity purposes.⁴⁶¹ Vetter points out that even though diver-

essential to the contracts was procured and signed off the reservation. Hedreen 521, F. Supp. 607 n.4.

⁴⁵⁴ 719 F.2d 979 (9th Cir. 1983).

⁴⁵⁵ *Id.* The Court employed a "significant contacts" test commonly used in conflicts-of-law issues: In determining the locus of a contract dispute, courts generally look to (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the place of residence of the parties, evaluating each factor according to its relative importance with respect to the dispute. When a contract concerns a specific physical thing, such as land or a chattel, the location of the thing is regarded as highly significant. *Id.* at 985.

⁴⁵⁶ 107 N.M. 174, 754 P.2d 845 (N.M. 1988).

⁴⁵⁷ *Id.*

⁴⁵⁸ CANBY, *supra* note 8, at 216–17.

⁴⁵⁹ *Standing Rock Sioux v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974).

⁴⁶⁰ 292 F.3d 1091, 1095 (9th Cir. 2002).

⁴⁶¹ Vetter, *supra* note 422, at 190, citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971, 942 L. Ed. 2d. 10 (1987); *Weeks Constr. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986); *Enter. Elec. Co. v. Blackfeet Tribe*, 353 F. Supp. 991 (D. Mont. 1973).

sity or federal question is established, a federal forum is not assured:

Even with personal and subject matter jurisdiction, a federal court may stay proceedings, or dismiss the case pending exhaustion of tribal remedies, as a matter of comity. If there is a tribal court that has, or may have, jurisdiction, the federal policy supporting tribal self-government supports deferring to tribal court, particularly on issues of tribal court jurisdiction. That rule was first enunciated in *National Farmers Union Insurance Companies v. Crow Tribe*⁴⁶² concerning federal question jurisdiction, and was extended to diversity cases in *Iowa Mutual Insurance Co. v. LaPlante*.⁴⁶³

c. *Planning Ahead*

Vetter states that "the court decisions that have considered an express contract provision providing for choice of law and choice of forum have enforced those provisions."⁴⁶⁴ A recent example was the Supreme Court decision in *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*,⁴⁶⁵ previously reviewed at Section D.8.d., which held that the tribe waived its immunity from suit in state court when it expressly agreed (1) to arbitrate contractual disputes, (2) to be governed by Oklahoma law, and (3) to contract enforcement of any arbitration awards in any court having jurisdiction thereof. Vetter recommends that a written contract should at least include, in addition to an express waiver of immunity, the following:⁴⁶⁶

- Consent to the jurisdiction of specific courts or jurisdictions (e.g. "North Dakota state courts" or "federal court system");
- Agreement that the law of a specific state will be applied in interpretation and enforcement; and
- Express consent to judicial enforcement of any arbitration award, if the agreement includes an arbitration clause.

But he concludes that "[i]f there is any doubt about the official nature of the contract, the tribe's governing body should be requested to approve it through a regularly adopted resolution."⁴⁶⁷

⁴⁶² 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

⁴⁶³ 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987).

⁴⁶⁴ Vetter, *supra* note 422, at 194.

⁴⁶⁵ 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

F. GOVERNMENT-TO-GOVERNMENT COOPERATION⁴⁶⁸

1. General

Tribal-state relations are, without doubt, the most significant challenge in Indian law today. The sharing of “adjacent lands, resources and citizens...has historically created conflict, often leading to expensive and lengthy litigation...[which] has done little to resolve the core uncertainties and distrust between states and tribes.”⁴⁶⁹ The great majority of the 28 U.S. Supreme Court Indian law decisions between 1991 and 2002 focused on tribal-state relations.⁴⁷⁰ Commentators view the result as a loss to both parties, but suggest possible solutions to the problem of uncertainty and litigation:

The tribes and states have expended precious resources on continuous litigation.... The relationship between the tribes and states has been strained, causing both parties to jealously guard jurisdiction over areas that affect the other. Consequently, it is in the best interests of the tribes and states to direct time and money toward durable solutions to the underlying problems. States and tribes should look to a forum other than the courtroom to address their disagreements and reach solutions that benefit both parties’ objectives. One possible solution to the problem of uncertainty and litigation is a cooperative agreement between an Indian tribe and a state.⁴⁷¹

⁴⁶⁸ See generally Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239 (1991); Joel H. Mack and Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295 (1993); DESKBOOK, *supra* note 16, at chap. 14, State-Tribal Cooperative Agreements; CTC & ASSOCIATES, WISCONSIN DOT SYNTHESIS REPORT: STATE DOTs AND NATIVE AMERICAN NATIONS (Jan. 2004), <http://www.dot.wiscosin.gov/library/research/docs/tsrs/tsrnativeamerican.pdf>.

⁴⁶⁹ DESKBOOK, *supra* note 16, at 383.

⁴⁷⁰ Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. UNIV. L. REV. 1177 (2001), Appendix: Supreme Court Indian Law Cases Since 1991, at 1268–71.

⁴⁷¹ Mack and Timms, *supra* note 468, at 1297–98, adding that:

Cooperative agreements between an Indian tribe and a state focus on substantive issues with the purpose of solving a particular problem affecting the states and the Indian tribes. Generally, the tribe and state agree to ignore jurisdictional issues for purposes of the agreement. Thus, cooperative agreements are able to frame the issues that need to be addressed and limit the continual jurisdictional disputes that lead to litigation. Furthermore, if conflicts do arise, litigation will be more focused on substantive issues rather than jurisdictional issues.

Professor Frank Pommersheim, recognized authority in Indian law, noted in his 1991 article, *Tribal-State Relations: Hope For The Future?*, that “[d]espite the absence of any readily applicable doctrine for understanding or describing tribal-state relations, there potentially exists a vital zone for creative free-play and mutual governmental respect and advancement.”⁴⁷² This “vital zone” includes the negotiation of tribal-state cooperative agreements. He concludes his case study of such agreements with this statement:

The preceding case studies reflect an array of recent tribal-state negotiations. Success has not always been forthcoming. The importance of these negotiating efforts, however, cannot be sufficiently emphasized. With the growing costs of litigation and the politically sensitive nature of many conflicts, both tribes and states are recognizing that negotiation is the only viable alternative.⁴⁷³

A joint project between the National Conference of State Legislatures (NCSL) and the National Congress of American Indians (NCAI) recently published the guide, *Government to Government: Understanding State and Tribal Governments* (2000),⁴⁷⁴ intended to help states and tribes understand each other and begin the process of exploring new avenues for improvement of governmental service for the citizens of both tribes and states. This guide suggests that new intergovernmental

⁴⁷² Pommersheim, *supra* note 468, at 251.

⁴⁷³ *Id.* at 298. Professor Pommersheim noted (at 266) that information from the states, together with analysis of available data at that time, 1991, showed that the majority of tribal-state agreements may be broken down into the following subject matter headings and number of agreements:

Jurisdiction or PL 280 Agreements.	5
Gaming Compacts.	12
Environmental Agreements.	13
Hunting and Fishing.	18
Health and Welfare Programs	17
Water Agreements.	11
Indian Burial Sites.	4
Law Enforcement	7
Economic or Taxing Agreements.	10
Education Agreements or Awareness Projects.	2

⁴⁷⁴ Susan Johnson, Jeanne Kaufmann, John Dossett, and Sarah Hicks, NATIONAL CONFERENCE OF STATE LEGISLATURES AND NATIONAL CONGRESS OF AMERICAN INDIANS, GOVERNMENT TO GOVERNMENT: UNDERSTANDING STATE AND TRIBAL GOVERNMENTS 3 (2000) (hereinafter “NCSL/NCAI Guide”). The guide notes that a “major impetus for the increased need for improved tribal-state relations is devolution—the transfer of resources and responsibilities, often through federal block grants or other funding mechanisms, to state, local or tribal governments.”

institutions, including cooperative agreements, can protect jurisdiction and avoid expensive legal conflicts:

Many tribes and states are discovering ways to set aside jurisdictional debate in favor of cooperative government-to-government relationships that respect the autonomy of both governments. Tribal governments, state governments and local governments are finding innovative ways to work together to carry out their governmental functions. New intergovernmental institutions have been developed in many states, and state tribal cooperative agreements on a broad range of issues are becoming commonplace.

Cooperation does not mean that either a state or a tribe is giving away jurisdiction or sovereignty. Some areas of disagreement may always exist, as they may with any neighboring governments. Certainly, both states and tribes will preserve their ability to litigate over jurisdictional, legal and constitutional rights when it is in their best interest to do so. However, many costly and unproductive legal conflicts can be avoided and many beneficial results can be obtained through efforts by both states and tribes to understand each other and resolve conflicts.

The NCSL and NCAI, in a later publication, *Government to Government: Models of Cooperation Between States and Tribes (2002)*,⁴⁷⁵ notes that “of all the state-tribal relationships, institutions and agreements in various states, one particular mechanism does not appear to be inherently better than another.... It is the function that matters, not the specific mechanism that might be used to achieve that function.” The NCSL/NCAI guide suggests these principles as the basis for those functions:⁴⁷⁶

- A Commitment to Cooperation;
- Mutual Understanding and Respect;
- Regular and Early Communication;
- Process and Accountability for Addressing Issues; and
- Institutionalization of Relationships.

The NCSL/NCAI guide provides 10 mechanisms or institutions that may facilitate improved intergovernmental relationships:

- *State Legislative Committees* (Fourteen states have 17 different legislative committees to address Indian issues).
- *State Commissions and Offices* (Approximately 34 states have an office or commission dedicated to Indian affairs).⁴⁷⁷
- *State-Tribal Government-to-Government Agreements and Protocols* (e.g., Washington Centennial Accord; Oregon Statute and Executive Order on Tribal-State Relations; Alaska Millennium Agreement).
- *Tribal Delegates in State Legislatures* (Maine is the only state with tribal delegates to state legislature, but Wisconsin, South Dakota, and Virginia have considered it).
- *Intertribal Organizations* (Membership organizations representing some or all tribes in a state or region).
- *Dedicated Indian Events at the Legislatures* (Several states, such as Arizona, Maine, New Mexico, Oklahoma, and Oregon, designate specific days during legislative sessions for interaction with tribal governments).
- *Individual Legislator Efforts*.
- *State Recognition of Native Cultures and Governments* (Twelve states—Alabama, Connecticut, Delaware, Georgia, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, North Carolina, and Virginia—have recognized more than 40 American Indian tribes as separate and distinct governments within their borders).
- *Training for Legislators and Tribal Leaders on Respective Government Processes*.
- *Other Potential Legislative Mechanisms*.

As noted above, NCSL/NCAI report that approximately 34 states have an office or commission dedicated to Indian affairs, established to serve as a liaison between the state and tribes on matters of interest to the state and tribes. For example, in 1976, the Colorado legislature established its Commission of Indian Affairs in the Office of the Lieutenant Governor with this legislative declaration:⁴⁷⁸

The general assembly finds and declares that the affairs of the two Indian tribes whose reservations are largely within the state of Colorado, the Southern Ute tribe and the Ute Mountain tribe, include matters of state interest and that the state of Colorado recognizes the special governmental relationships and the unique political status of these tribes with respect to the federal government and, further, that

⁴⁷⁵ Susan Johnson, Jeanne Kaufmann, John Dossett, and Sarah Hicks, NATIONAL CONFERENCE OF STATE LEGISLATURES AND NATIONAL CONGRESS OF AMERICAN INDIANS, *GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES* (2002) (hereinafter “NCAI/NCSL Models of Cooperation”).

⁴⁷⁶ *Id.* at 6–11.

⁴⁷⁷ The NCSL maintains a Web site listing State Committees and Commissions on Indian Affairs at <http://www.ncsl.org/programs/statetribestlegcom.htm>.

⁴⁷⁸ COLO. REV. STAT. 24-44-101.

it is in the best interest of all the people of Colorado that there be an agency providing an official liaison among all persons in both the private and public sectors who share a concern for the establishment and maintenance of cooperative relationships with and among the aforesaid tribes.

The duties of the Colorado Commission of Indian Affairs are typical of the duties of other such state commissions or councils.⁴⁷⁹ NCSL/NCAI report that many of these offices are called "Governor's Office of Indian Affairs," but most commissions are established through legislation, with membership a mix of Indian and non-Indian members.⁴⁸⁰ At present, at least 16 states provide for such statutorily created organizations to coordinate intergovernmental dealings between tribal governments and the state.⁴⁸¹

⁴⁷⁹ See COLO. REV. STAT. § 24-44-103: (1) It is the duty of the commission:

(a) To coordinate intergovernmental dealings between tribal governments and this state;

(b) To investigate the needs of Indians of this state and to provide technical assistance in the preparation of plans for the alleviation of such needs;

(c) To cooperate with and secure the assistance of the local, state, and federal governments or any agencies thereof in formulating and coordinating programs regarding Indian affairs adopted or planned by the federal government so that the full benefit of such programs will accrue to the Indians of this state;

(d) To review all proposed or pending legislation and amendments to existing legislation affecting Indians in this state;

(e) To study the existing status of recognition of all Indian groups, tribes, and communities presently existing in this state;

(f) To employ and fix the compensation of an executive secretary of the commission, who shall carry out the responsibilities of the commission;

(g) To petition the general assembly for funds to effectively administer the commission's affairs and to expend funds in compliance with state regulations;

(h) To accept and receive gifts, funds, grants, bequests, and devices for use in furthering the purposes of the commission;

(i) To contract with public or private bodies to provide services and facilities for promoting the welfare of the Indian people;

(j) To make legislative recommendations;

(k) To make and publish reports of findings and recommendations.

⁴⁸⁰ NCAI/NCSL Models of Cooperation, *supra* note 475, at 24-25.

⁴⁸¹ Statutorily created commissions and councils include:

But whether the state organization is a legislative committee, a commission, a council, or the Governor's office, the mechanism or approach used in seeking a cooperative relationship, as noted above, may be as important as who leads it. Professor Pommersheim identified the State of Washington's approach in reaching its 1989 Centennial Accord as a prototype, making this statement:

Tribal-state relations are often caught in a history.... The principles embedded in a prototype set of negotiated sovereignty accords could go a long way toward ameliorating this declivity. * * * These accords would involve no waiver or abridgement of any rights by either side, but would simply take the word "respect"...and apply it to the legal realm. The quality and texture of tribal-state relations are such that it is necessary for states to demonstrate publicly and in writing that they recognize tribal sovereignty—that is, the right of tribal governments to exist, to endure, and to flourish. Such accords might be seen as establishing an innovative set of new political and diplomatic protocols which might serve as a gateway to a more fulfilling and successful future.⁴⁸²

Alabama (ALA. CODE §§ 41-9-708-717, Alabama Indian Affairs Commission).

Arizona (ARIZ. REV. STAT. ANN. §§ 41-541-594, Arizona Commission on Indian Affairs).

Colorado (COLO. REV. STAT. §§ 24-44-101-108, Colorado Commission on Indian Affairs)

Connecticut (CONN. GEN. STAT. ANN. §§ 10-381-391, Native American Heritage Advisory Council).

Georgia (GA. CODE ANN. §§ 44-12-280-285, Council on American Indian Concerns).

Idaho (IDAHO CODE §§ 67-4004-4007, Idaho Council on Indian Affairs).

Louisiana (LA. REV. STAT. ANN. tit. 46, § 2302, Governor's Office of Indian Affairs).

Minnesota (MINN. STAT. § 3.922, Indian Affairs Council).

Nevada (NEV. REV. STAT. §§ 233A .010-233A.100, Nevada Indian Commission).

North Carolina (N.C. GEN. STAT. §§ 143B-404-411, Commission on Indian Affairs; N.C. 143B-411.1-411.4, North Carolina Advisory Council on The Eastern Band of Cherokee).

North Dakota (N.D.C.C. §§ 54-36-01-06, North Dakota Indian Affairs Commission).

Oklahoma (OKLA. STAT. tit. 74, §§ 1201-1205, Oklahoma Indian Affairs Commission).

Oregon (OR. REV. STAT. 172.100).

South Dakota (S.D. CENT. CODE § 1-4-1, Office of Tribal Governmental Relations).

Tennessee (TENN. CODE ANN. §§ 4-34-101-4-34-108, Tennessee Commission of Indian Affairs).

Utah (UTAH CODE ANN. §§ 9-9-101-108, Division of Indian Affairs).

⁴⁸² Pommersheim, *supra* note 468, at 269.

2. Washington's Centennial Accord

The 1989 Washington Centennial Accord between 28 federally recognized Washington Indian tribes and the State of Washington⁴⁸³ is an outstanding example of a state expanding the liaison outreach of state government agencies to tribal governments in a full government-to-government relationship. This Accord, initiated by the Governor's proclamation of January 3, 1989, and signed by the Governor and a representative of each tribe, "provides a framework for that government-to-government relationship and implementation procedures to assure execution of that relationship." Pertinent to the issue of effective outreach is this provision of the Accord:

a. Parties

There are twenty-eight federally recognized Indian tribes in the state of Washington. Each sovereign tribe has an independent relationship between the state of Washington, through its governor, and the signatory tribes.

The parties recognize that the state of Washington is governed in part by independent state officials. Therefore, although, this *Accord* has been initiated by the signatory tribes and the governor, it welcomes the participation of, inclusion in and execution by chief representatives of all elements of state government so that the government-to-government relationship described herein is completely and broadly implemented between the state and the tribes.

In 1999, the Governor's Office of Indian Affairs issued the *Washington State/Tribal Government-to-Government Implementation Guidelines*, which were determined by a combined tribal and state task force. WSDOT implemented these guidelines with its WSDOT Centennial Accord Plan (2003),⁴⁸⁴ based on an Executive Order by Washington's Secretary of Transportation, issued in February, 2003,⁴⁸⁵ providing, *inter alia*:

This Executive Order establishes the commitment of...WSDOT employees to provide consistent and equitable standards for working with the various tribes across the state, and flexibility in recognition that each federally recognized tribe is a distinctly sovereign nation. The goal is to create durable intergovernmental relationships that promote coordinated

transportation partnerships in service to all our citizens.⁴⁸⁶

WSDOT's Tribal Liaison Office, established in 2001, is assigned responsibility for assisting tribes and the department with implementing effective government-to-government relations, reporting to the WSDOT chief of staff. Office responsibilities include the following:⁴⁸⁷

- Providing tribes with a point of contact within the department and helping tribes gain access to the appropriate staff in understanding the department's programs, policies, and procedures;
- Assisting the department in understanding tribal issues, making contacts, initiating consultation, and promoting on-going coordination with tribes;
- Facilitating meetings, negotiating intergovernmental agreements on behalf of the department and Secretary, and helping reconcile differences between the department and tribal governments.

3. Minnesota's Transportation Accord

Minnesota's state-tribal "Government To Government Transportation Accord" was executed on April 1, 2002. Signatories were MnDOT, the 11 federally recognized Indian tribal governments within Minnesota, and FHWA's Minnesota Division. This accord reflected the signatories' "desire to improve their mutual cooperation as neighbors by improving the development, maintenance, and operation of interconnected transportation systems." Acknowledging the need for "better coordination and understanding between the parties on transportation planning, development and maintenance projects," the accord provided as one of its purposes and objectives this statement:

This agreement demonstrates a commitment by the parties to give practical implementation to a new government-to-government partnership in a broad array of transportation matters. This partnership is designed to demonstrate mutual respect for each other, to enhance and improve communication between the parties, to foster increased cooperation on transportation projects, and to facilitate the respectful resolution of inter-governmental differences that may arise from time to time in the area of transportation. The development of this agreement is intended to build confidence among its parties on each of these objectives. The parties have adopted this agreement in order to institutionalize new information-sharing cooperative intergovernmental project development within their respective governmental structures.

⁴⁸³ The Centennial Accord is published on the Intranet by the Washington Governor's Office of Indian Affairs, available at <http://www.goia.wa.gov/Government-to-Government/Data/CentennialAccord.htm>.

⁴⁸⁴ See WSDOT's Tribal Consultation Policy, http://www.wsdot.wa.gov/tribal/consultation_policy.pdf.

⁴⁸⁵ Washington Secretary of Transportation Executive Order No. E 1025.00, dated Feb. 19, 2003, entitled "Tribal Consultation." Source: Tribal Liaison Office, WSDOT, available at <http://www.wsdot.wa.gov/tribal/>.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

Subsequent to completion of the Transportation Accord, Minnesota Governor Pawlenty, in April 2003, issued Executive Order 03-05, "Affirming the Government-to-Government Relationship Between The State of Minnesota and Indian Tribal Governments Located Within the State of Minnesota."⁴⁸⁸ This Executive Order, *inter alia*, provided that

Agencies of the State of Minnesota and persons employed by state agencies (the "State") shall recognize the unique legal relationship between the State of Minnesota and Indian tribes, respect the fundamental principles that establish and maintain this relationship and accord tribal governments the same respect accorded to other governments.⁴⁸⁹

MnDOT's implementation of the Transportation Accord and the Executive Order include

- Issuance of Minnesota Tribes and Transportation E-Handbook, an online resource guide for tribal, township, city, county, state, and federal officials and citizens working on transportation issues affecting tribal land in Minnesota.⁴⁹⁰
- Development of "Indian Employment: Memorandum of Understanding,"⁴⁹¹ now executed by six tribes.⁴⁹²
- Execution in August 2004 of programmatic agreements with three tribes for complying with Section 106 of the National Historic Preservation Act.⁴⁹³

⁴⁸⁸ Executive Order 03-05, dated April 9, 2003, filed with the Secretary of State, April 11, 2003.

⁴⁸⁹ *Id.*

⁴⁹⁰ <http://www.dot.state.mn.us/mntribes/handbook/toc.html>.

⁴⁹¹ <http://www.dot.state.mn.us/mntribes/mouemployment.html>.

⁴⁹² Bois Forte Band of Chippewa, Leech Land Band of Ojibwe Indians, Red Lake Band of Chippewa Indians, Shakopee Mdewakanton Sioux Community, Upper Sioux Indian Community, and White Earth Band of Ojibwe.

⁴⁹³ Lower Sioux Indian Community, the Bois Forte Band of Chippewa, and the Fond du Lac Band of Chippewa. As previously noted, Section H.3.C of the National Historic Preservation Act requires all federal agencies to consult with Indian tribes for undertakings that may affect properties of traditional religious and cultural significance on or off tribal lands. The regulations (36 C.F.R. § 800.2(c)(2)(ii)(A)) require agency officials to ensure that consultation in the § 106 process provides the Indian tribe a reasonable opportunity to identify its concerns about historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.

4. Other State Approaches/Experiences⁴⁹⁴

Wisconsin DOT's Transportation Synthesis Report of January 2004 summarized the existing state strategies for coordinating relationships with Native American nations on transportation issues as follows:⁴⁹⁵

- Tribal Liaison (person or office): California, Washington, Montana, Minnesota, and Arizona;
- Tribal Summits: Washington, New Mexico, Iowa, Idaho, Minnesota, Pennsylvania, and Wisconsin; and
- Advisory Committee: In addition to their tribal liaisons, California and Arizona have standing committees that meet regularly to address tribal transportation issues. California's Native American Advisory Committee, which advises the Caltrans director, consists of tribal representatives. Arizona's Tribal Strategic Partnering Team includes representatives from tribes and state and federal agencies.

The approaches and experiences of selected states are set out below.

a. Arizona⁴⁹⁶

Arizona has 21 federally recognized tribes, all but one with a reservation in the state. Indian reservations occupy 27.7 million acres, about 28 percent of the State's land base. In 1999, the Arizona Department of Transportation (ADOT) established its ADOT Tribal Strategic Partnering Team (ATSPT), bringing together representatives from state, tribal, federal, and local agencies to discuss tribal transportation issues and to develop forums to address these issues. The ATSPT meets quarterly and distributes the results of its proceedings to participants, tribal representatives, and area planning organizations. ADOT has 10 districts responsible for construction and maintenance, each headed by a district engineer whose duties include working with Native American tribes on such issues as highway improvements, funding, and operational matters.

b. California⁴⁹⁷

California has a larger number of tribal governments (109) than any other state. Caltrans has established a Native American Liaison Branch in the Office of Regional and Interagency Planning to serve as the initial contact and ombudsperson on Native American issues. This office promotes government-to-government relationships, providing

⁴⁹⁴ CTC & ASSOCIATES, *supra* note 468.

⁴⁹⁵ *Id.* at 2.

⁴⁹⁶ *Id.* at 3-4.

⁴⁹⁷ *Id.* at 3.

information, training, and facilitation services. A Native American Advisory Committee advises the Caltrans director about issues of interest, and recommends policies and procedure for adoption. Caltrans has also set up Native American cultural coordinators in each of its districts, with many districts also having Native American liaisons. Caltrans has published an extensive *Transportation Guide for Native Americans*, dated February 2002, as a resource guide for Native American officials.⁴⁹⁸

c. Iowa⁴⁹⁹

Iowa has over 25 tribes having a current or historic interest in the state. In May 2001, the FHWA Iowa Division and the Iowa DOT partnered with the Iowa Office of the State Archaeologist and the Iowa State Historic Preservation Officer to host the Tribal Summit on Historic Preservation and Transportation. A follow-up workshop and site visit helped tribal representatives learn more about the transportation planning process and mitigation efforts for Section 106 resources. Planning for both the summit and the workshops included tribal representatives. Agreement on process and procedures included tailored Memoranda of Understanding with affected tribes, standardized notification form, and standardized tribal consultation points.

d. New Mexico⁵⁰⁰

New Mexico has 22 federally recognized tribes and carries on tribal liaison through participation in an action committee that includes representatives from the New Mexico DOT, New Mexico Land Office and Office of Indian Affairs, FHWA, Department of Energy, BIA, tribal organizations, and several tribes. This action committee follows up on issues raised in a 1999 tribal-state transportation summit. Summit attendees included local, state and federal agencies, together with tribal government representatives to discuss transportation concerns. Attendees signed Memoranda of Agreement and created the action committee to implement government-to-government protocols between tribal governments and state transportation agencies.

⁴⁹⁸ <http://www.dot.ca.gov/hq/tpp/offices/orip/na/Trans-GuideForNativeAmericans.pdf>.

⁴⁹⁹ *Respectful Communication Accelerates the Section 106 Process: Iowa's New Tribal Constitution Process, SUCCESSES IN STEWARDSHIP* (FHWA, Washington, DC), July 2002, available at <http://environment.fhwa.dot.gov/strmlng/newsletters/jul02.htm>.

⁵⁰⁰ CTC & ASSOCIATES, *supra* note 468, at 8.

e. Wisconsin⁵⁰¹

The Wisconsin Department of Transportation (WisDOT) and the Wisconsin Division of FHWA have partnered to work with Wisconsin's 11 federally recognized tribes on a government-to-government basis. Assisting and partnering with them have been the Lac Courte Oreilles Ojibwa Community College and the College of the Menominee Nation. This alliance has resulted in positive benefits to all partners, tribal governments, and individual Indians. Activities have included sharing of resources, outreach to and training for Native American individuals and firms, development of the Lac Courte Oreilles/Sawyer County Transit System, and the advancement of Native American hiring preference. Historic coordination with the tribes occurs at two levels: a policy committee and direct project-related. The tribes are invited to participate in the policy committee along with FHWA, WisDOT Central Office, WisDOT district representatives, and several archeologists. An historic Memorandum of Agreement has been prepared for use on major construction projects to cover any potential archaeological involvement during construction. WisDOT is developing a statewide policy for working with the tribes, as well as a WisDOT/Tribal Partnership Agreement, outlining how business will be conducted between the Department and Wisconsin's 11 tribes.

5. Tribal-State Cooperative Agreements

a. Background

A "cooperative agreement" between an Indian tribe and a state may be described as an intergovernmental agreement that settles or avoids jurisdictional disputes and determines certain substantive matters by forming political policies between governmental entities.⁵⁰² While properly drafted tribal-state cooperative agreements should be developed on general contract principles and designed to be enforceable in court, it is not clear whether or not they are enforceable as contracts due to the paucity of case law dealing with the issue.⁵⁰³ The

⁵⁰¹ MARY B. WILLIAMS & JOHN C. CARROLL, REPORT: OUTREACH TO NATIVE AMERICANS: A COMPREHENSIVE LOOK AT WISCONSIN'S EFFORTS (October 31, 2002), available at http://www.fhwa.dot.gov/hep/tribaltrans/oct31_03.htm.

⁵⁰² MACK & TIMMS, *supra* note 468, at 1305.

⁵⁰³ *Id.* See also *State of Minnesota v. Manypenny*, 662 N.W.2d 183, 187 (2003), where the court in upholding a cooperative agreement authorizing tribal officers to lawfully arrest Indians on the reservation stated that "the scant case-law treatment addressing the issue of cooperative agreements appears only in dicta." In the earlier case of *State of Minnesota v. Stone*, 572 N.W.2d 725, 732

discussion and recommendations appearing in Section XI on contracting with Indian tribes and tribal entities should be considered should parties to a cooperative agreement intend to treat such an agreement as enforceable.

Pommersheim's case study clearly demonstrated that the use of tribal-state cooperative agreements is not a new thing. For example, he points out that some states, retroceding jurisdiction under P.L. 280, entered into cross-deputization agreements between tribal law enforcement and state patrol.⁵⁰⁴ He also refers to the 1989 *Legislative Report of The National Conference of State Legislatures*, which addressed existing state-tribal transportation agreements as a beginning point to dealing with routing and emergency response issues for nuclear waste transportation.⁵⁰⁵

Cooperative agreements were also pioneered by Congress in the Indian Child Welfare Act (1978)⁵⁰⁶ and IGRA (1988),⁵⁰⁷ which authorize or require state-tribal cooperative agreements to effectuate each Act. The U.S. Supreme Court suggested the use of cooperative agreements in its decision in *Oklahoma Tax Commission v. Citizen Band Pota-*

(1997), the Minnesota Supreme Court stated: "We anticipate that tribes without the resources to sustain their own [motor vehicle] enforcement systems will enter into cooperative agreements with state and local governments to obtain these services."

⁵⁰⁴ Pommersheim, *supra* note 468, at 239, n.184. The Indian Law Enforcement Reform Act, Pub. L. No. 101-379, 104 Stat. 473 (1990) (See 25 U.S.C. §§ 2801-2809), was enacted by Congress to provide authority for cross-deputization agreements involving enforcement of federal or tribal laws by states in Indian country.

⁵⁰⁵ *Id.*, note 152, at 260. See also MACK & TIMMS, *supra* note 468, citing Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 410; and JAMES B. REED & MARA A. COHEN, JURISDICTION OVER NUCLEAR WASTE TRANSPORTATION ON INDIAN TRIBAL LANDS: STATE TRIBAL RELATIONSHIPS (NCSL, State Legislative Report, Vol. 16, No. 4, at 5, 1991):

For example, the Wisconsin Department of Natural Resources entered into a cooperative agreement with the Menominee Tribe to fill in the regulatory gaps relating to hazardous and solid waste management. Prior to the agreement, state officials were unsure of their proper rule; therefore, they were hesitant to work with Indian tribes, even when asked to help. State workers who responded to a Menominee hazardous waste spill did not know if their insurance covered them while working outside the state's jurisdiction.

⁵⁰⁶ Pub. L. No. 95-606, 92 Stat. 3069 (1978).

⁵⁰⁷ Pub. L. No. 100-497, 102 Stat. 2467 (1988).

watomi Indian Tribe of Oklahoma.⁵⁰⁸ The Court ruled that Oklahoma had no jurisdiction to tax tribal members on trust land cigarette sales, but upheld the State's right to collect such taxes on sales to nonmembers of the tribe. The Court suggested that this could be done by a tribal-state cooperative agreement: "States may also enter into agreements with tribes to adopt a mutually satisfactory regime for the collection of this sort of tax."⁵⁰⁹

The Montana legislature responded to the Supreme Court's suggestion in 1993 by amending its State-Tribal Cooperative Agreement Act⁵¹⁰ to specifically include a cooperative regime for tax assessment and collection or refund by the State, a public agency, or a Montana Indian tribe. The Preamble to the amendment⁵¹¹ is noteworthy for its focus on state-tribal government-to-government relationship and cooperation:

WHEREAS, the Legislature finds it necessary to clarify provisions of the State-Tribal Cooperative Agreements Act in order to reduce the delays in implementing taxation agreements entered into between the State of Montana and Montana Indian Tribes; and

WHEREAS, clarifying provisions of the State-Tribal Cooperative Agreements Act will also reduce the need for duplicative language, which results in increased costs associated with publication of the Montana Code Annotated; and

WHEREAS, the Supreme Court, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S. Ct. 905 (1991), stated, among alternatives, that the state and a tribe may adopt a "mutually satisfactory regime" for collection of a tax but did not mandate that a state collect the tax; and

WHEREAS, in an effort to promote a government-to-government relationship between the State of Montana and Montana Indian Tribes and in recognition that both the state and tribal governments must be trusted to act responsibly, it is appropriate that the party designated to collect taxes on an Indian reservation pursuant to any agreement be subject to negotiation.

THEREFORE, the Legislature of the State of Montana finds it appropriate to amend the State-Tribal Cooperative Agreements Act to specifically include tax assessment and collection or refund and to establish specific requirements for tax assessment and collection or refund by the state, a public agency, or a Montana Indian Tribe. (Emphasis supplied).

⁵⁰⁸ 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991).

⁵⁰⁹ *Id.* at 514.

⁵¹⁰ MONT. CODE ANN. §§ 18-11-101, *et seq.*

⁵¹¹ See MONT. CODE ANN. § 18, ch. 625, L. 1993.

b. State's Legal Authority for Intergovernmental Agreements with Tribes

A survey was conducted of state transportation attorneys requesting their feedback on the state's approach and legal authority to contract and enter into cooperative agreements and funding agreements with Indian tribes/tribal entities. Eight states responded,⁵¹² with three reporting no authority due to absence of federally recognized tribes.⁵¹³ Four states reported having statutory authority to contract or enter into cooperative agreements with tribes.⁵¹⁴ One state, Colorado, reported that the authority for such agreements comes from basic principles of sovereignty and Article XIV, Section 18, of the Colorado Constitution, dealing with intergovernmental relationships. Colorado has used this authority to enter into two intergovernmental agreements with the Southern Ute Tribe: (1) a Taxation Compact; and (2) an Air Quality Compact. These compacts have been approved by the State legislature and enacted as positive law.⁵¹⁵

c. State Enabling Statutes

Based upon the results of the survey and additional research, it was determined that there are at least 16 states that have enacted statutes authorizing the governor, state agencies, and/or local governments to enter into agreements with tribes for prescribed purposes, including the joint exercise of jurisdiction.⁵¹⁶ State enabling legislation takes two

⁵¹² Colo., Ill., Md., Minn., Ohio, Utah, Wash., and Wis.

⁵¹³ Ill., Md., and Ohio.

⁵¹⁴ Minn., Utah, Wash., and Wis.

⁵¹⁵ COLO. REV. STAT. 24-61-101, *et seq.*; COLO. REV. STAT. 24-62-101, *et seq.*

⁵¹⁶ California:

CAL. STS. & HIGH. CODE § 94 (Traffic Mitigation, cultural, environ.)

CAL. FISH & GAME CODE § 16000, *et seq.* (Indian Fishing);

CAL. HEALTH & SAFETY CODE § 25198.1, *et seq.* (Hazardous Waste)

CAL. PUB. RES. CODE § 44201, *et seq.* (Waste Management)

CAL. GOV'T CODE § 98000, *et seq.* (Indian Gaming)

Idaho: IDAHO CODE § 67-4001, *et seq.* (State-Tribal Relations Act)

Iowa: IOWA CODE ANN. § 232B.11 (Care & Custody of Indian Children)

Illinois: 230 ILL. COMP. STAT. 35 (Native American Gaming Compact Act, eff. 1/1/05)

Kansas: KAN. STAT. ANN. §§ 46.2301-2302 (Indian Gaming Compacts)

Michigan: MICH. COMP. LAWS ANN. § 205.30c(12) (Taxation Agreements)

Minnesota: MINN. STAT. § 161.368, *et seq.* (Highway Contracts)

broad forms: the joint powers approach under which each cooperating entity must have the appropriate power; and the power of one unit approach under which only one of the consenting entities needs to have the appropriate power. The State of Washington's Interlocal Cooperation Act was enacted in 1967 to enable local governmental units to cooperate with other localities, including "any Indian tribe recognized as such by the federal government."⁵¹⁷ The statute authorizes "joint powers agreements," mandating specified provisions in the agreement.⁵¹⁸ The State of New Mexico has a simi-

Montana: MONT. CODE ANN. § 18-11-101, *et seq.* (State-Tribal Cooperative Agreements)

Nebraska: R.R.S. NEB. § 13-1502, *et seq.* (State-Tribal Cooperative Agreements)

New Mexico: N.M. STAT. ANN. § 11-1-1, *et seq.* (Joint Powers Agreements)

North Dakota: N.D. CENT. CODE § 54-40.2-01, *et seq.* (Administrative Services)

Oklahoma: OKLA. STAT. ANN. chap. 35A, § 1221, *et seq.* (Mutual Interest Issues)

South Dakota: S.D.C.C. § 10-12A-4.1

Utah: UTAH CODE ANN. §§ 11-13-103, 11-13-201 (Joint Powers)

Washington: WASH. REV. CODE § 39.34.010, *et seq.* (Joint Powers)

Wisconsin: WIS. STAT. ANN. § 14.035 (Gaming Compacts); WIS. STAT. ANN. § 66.0301(b)(2) (Interlocal Cooperative Agreements); WIS. STAT. ANN. § 160.36 (Ground Water Monitoring);

⁵¹⁷ WASH. REV. CODE 39.34. WASH. REV. CODE 39.34.020(1) defines "Public agency," as follows:

any agency, political subdivision, or unit of local government of this state including, but not limited to, municipal corporations, quasi municipal corporations, special purpose districts, and local service districts; any agency of the state government; any agency of the United States; any Indian tribe recognized as such by the federal government; and any political subdivision of another state.

⁵¹⁸ WASH. REV. CODE 39.34.030, Joint powers—Agreements for joint or cooperative action, requisites, effect on responsibilities of component agencies—Financing of joint projects, provides, *inter alia*:

(1) Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having the power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

(2) Any two or more public agencies may enter into agreements with one another for joint or cooperative action

lar Joint Powers Agreement Act,⁵¹⁹ which defines the covered “public agency” to include “an Indian nation, tribe or pueblo; a subdivision of an Indian nation, tribe or pueblo that has authority pursuant to the law of that nation, tribe or pueblo to enter into joint powers agreements directly with the state.”⁵²⁰ Montana enacted its State–Tribal Cooperative Agreement Act in 1981 “to promote cooperation between the state or public agency and a sovereign tribal government in mutually beneficial activities and services.”⁵²¹ Nebraska enacted its

pursuant to the provisions of this chapter.... Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies of the participating public agencies shall be necessary before any such agreement may enter into force.

(3) Any such agreement shall specify the following:

(a) Its duration; (b) The precise organization, composition and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created...; (c) Its purpose or purposes; (d) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor; (e) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination; (f) Any other necessary and proper matters.

⁵¹⁹ N.M. STAT. ANN. §§ 11-1-1–11-1-7.

⁵²⁰ N.M. STAT. ANN. § 11-1-2 (2004). The authority to enter into agreements and the requirement for approval of the secretary of finance and administration are provided in § 11-1-3:

If authorized by their legislative or other governing bodies, two or more public agencies by agreement may jointly exercise any power common to the contracting parties, even though one or more of the contracting parties may be located outside this state; provided, however, nothing contained in this Joint Powers Agreements Act [11-1-1 to 11-1-7 NMSA 1978] shall authorize any state officer, board, commission, department or any other state agency, institution or authority, or any county, municipality, public corporation or public district to make any agreement without the approval of the secretary of finance and administration as to the terms and conditions thereof. Joint powers agreements approved by the secretary of finance and administration shall be reported to the state board of finance at its next regularly scheduled public meeting. A list of the approved agreements shall be filed with the office of the state board of finance and made a part of the minutes.

⁵²¹ MONT. CODE ANN. 18-11-101, *et seq.* Section 103 provides as follows:

18-11-103 Authorization to enter agreement—general contents.

State-Tribal Cooperative Agreements Act in 1989.⁵²² Among other features of this Act is a provision

(1) Any one or more public agencies may enter into an agreement with any one or more tribal governments to:

(a) perform any administrative service, activity, or undertaking that a public agency or a tribal government entering into the contract is authorized by law to perform; and

(b) assess and collect or refund any tax or license or permit fee lawfully imposed by the state or a public agency and a tribal government and to share or refund the revenue from the assessment and collection.

(2) The agreement must be authorized and approved by the governing body of each party to the agreement. If a state agency is a party to an agreement, the governor or the governor's designee is the governing body.

(3) The agreement must set forth fully the powers, rights, obligations, and responsibilities of the parties to the agreement.

(4) (a) Prior to entering into an agreement on taxation with a tribal government, a public agency shall provide public notice and hold a public meeting on the reservation whose government is a party to the proposed agreement for the purpose of receiving comments from and providing written and other information to interested persons with respect to the proposed agreement.

(b) At least 14 days but not more than 30 days prior to the date scheduled for the public meeting, a notice of the proposed agreement and public meeting must be published in a newspaper of general circulation in the county or counties in which the reservation is located.

(c) At the time the notice of the meeting is published, a synopsis of the proposed agreement must be made available to interested persons.

⁵²² R.R.S. NEB. §§ 13-1502, *et seq.* The statute mandates the required contents of the agreement:

§ 13-1504. Agreement; contents

An agreement shall specify:

(1) Its duration;

(2) The precise organization, composition, and nature of any separate legal entity created;

(3) Its purpose;

(4) The manner of financing the agreement and establishing and maintaining a budget;

(5) The method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination, if any;

(6) Provisions for administering the agreement, which may include, but not be limited to, the creation of a joint board responsible for such administration;

authorizing the appropriation of funds and provision of personnel or services:

§ 13-1507. Public agency; appropriate funds; provide personnel

Any public agency entering into an agreement may appropriate funds for, and may sell, lease, or otherwise give or supply material to, any entity created for the purpose of performance of the agreement and may provide such personnel or services as are within its legal power to furnish.

Minnesota has expressly authorized the department of transportation to enter into cost-sharing agreements with tribal authorities for highway work on tribal lands. Minn. Stat. Section 161.368, enacted in 2003, provides:

On behalf of the state, the commissioner [Commissioner of Transportation] may enter into cost-sharing agreements with Indian tribal authorities for the purpose of providing maintenance, design, and construction to highways on tribal lands. These agreements may include (1) a provision for waiver of immunity from suit by a party to the contract on the part of the tribal authority with respect to any controversy arising out of the contract and (2) a provision conferring jurisdiction on state district courts to hear such a controversy.

Caltrans' authority to enter into contracts with federally recognized tribes is limited to "activities related to on-reservation or off-reservation cultural resource management and environmental studies and off-reservation traffic impact mitigation projects on or connecting to the state highway system."⁵²³ The statute mandates that the contract

(7) The manner of acquiring, holding, and disposing of real and personal property used in the agreement;

(8) When an agreement involves law enforcement:

(a) The minimum training standards and qualifications of law enforcement personnel;

(b) The respective liability of each public agency and tribal government for the actions of law enforcement officers when acting under the provisions of an agreement;

(c) The minimum insurance required of both the public agency and the tribal government; and

(d) The exact chain of command to be followed by law enforcement officers acting under the agreement; and

(9) Any other necessary and proper matters.

⁵²³ CAL STS. & HIGH. CODE (2005) § 94. Authority to enter into contracts; Contracts with federally recognized Indian tribes

(a) The department may make and enter into any contracts in the manner provided by law that are required for performance of its duties, provided that contracts with fed-

"shall provide for a limited waiver of sovereign immunity by that Indian tribe for the state for purpose of enforcing obligations arising from the contracted activity."⁵²⁴

G. ACQUISITION OF INDIAN LAND FOR PUBLIC TRANSPORTATION PURPOSES

1. General

As a general rule, Indian lands are not included in the term "public lands," which are subject to sale or disposal under general statutory law,⁵²⁵ and all questions with respect to rights of occupancy in land, and the manner, time, and conditions of extinguishment of Indian title are solely for consideration of the federal government.⁵²⁶ As a corollary to this, third parties such as states and political

erally recognized Indian tribes shall be limited to activities related to on-reservation or off-reservation cultural resource management and environmental studies and off-reservation traffic impact mitigation projects on or connecting to the state highway system.

(b) To implement off-reservation traffic impact mitigation contracts with federally recognized Indian tribes, all of the following shall apply:

(1) Any contract shall provide for the full reimbursement of expenses and costs incurred by the department in the exercise of its contractual responsibilities. Funds for the project shall be placed in an escrow account prior to project development. The contract shall also provide for a limited waiver of sovereign immunity by that Indian tribe for the state for the purpose of enforcing obligations arising from the contracted activity.

(2) The proposed transportation project shall comply with all applicable state and federal environmental impact and review requirements, including, but not limited to, the California Environmental Quality Act (Division 13 (commencing with *Section 21000*) of the *Public Resources Code*).

(3) The department's work on the transportation project under the contract shall not jeopardize or adversely affect the completion of other transportation projects included in the adopted State Transportation Improvement Program.

(4) The transportation project is included in or consistent with the affected regional transportation plan.

⁵²⁴ *Id.* at (b)(1).

⁵²⁵ *Bennett County S.D. v. United States*, 394 F.2d 8, 11 (8th Cir. 1968). *Cf. Mo.-Kan.-Tex. Ry. Co. v. United States*, 235 U.S. 37, 35 S. Ct. 6, 59 L. Ed. 116 (1914); *N. Pac. Ry. Co. v. United States*, 227 U.S. 355, 33 S. Ct 368, 57 L. Ed. 544 (1913); *Putnam v. United States*, 248 F.2d 292 (8th Cir. 1957).

⁵²⁶ *Bennett County*, 394 F.2d at 11, *Cf. United States v. Santa Fe Pac. Ry. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941).

subdivisions acquire only such rights and interests in Indian lands as may be specifically granted to them by the federal government. To assure the utmost fairness in transactions between the United States and Indian tribes, any intent to deprive a tribe of its rights in land, or otherwise bring about the extinguishment of Indian title, either by grants in abrogation of existing treaties or through other congressional legislation, must be clearly and unequivocally stated, and language appearing in such grants and statutes is not to be construed to the prejudice of the Indians.⁵²⁷

2. Grants of Indian Land for Highway Purposes

a. Use of BIA Authority and Procedures

(1) *Statutory Provisions.*—The Act of March 3, 1901, 31 Stat. 1058, was one of an amalgam of special purpose access statutes dating back as far as 1875, each limiting the nature of rights-of-way to be obtained and creating an unnecessarily complicated procedure.⁵²⁸ Two methods were provided for acquiring right-of-way for highways through lands allotted in severalty: (1) by grant of permission by the Secretary of the Interior⁵²⁹ and (2) by condemnation.⁵³⁰ In 1948, Congress enacted a general stat-

⁵²⁷ *Bennett County*, 394 F.2d at 11 and 12. See *United States v. Santa Fe Pac. Ry. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941); *N. Pac. Ry. Co. v. United States*, 227 U.S. 355, 33 S. Ct. 368, 57 L. Ed. 544 (1913). *Leavenworth, etc. R.R. Co. v. United States*, 92 U.S. 733, 23 L. Ed. 634 (1875); *United States v. Shoshone Tribe*, 304 U.S. 111, 58 S. Ct. 794, 82 L. Ed. 1213 (1938).

⁵²⁸ See, e.g., 25 U.S.C. §§ 311 (opening of highways); 312 (rights-of-way for railway, telegraph, and telephone lines); 318a (roads on Indian reservations); 319 (rights-of-way for telephone and telegraph lines); 320 (acquisition of lands for reservoirs or materials); 321 (rights-of-way for pipe lines); 43 U.S.C. §§ 959 (rights-of-way for electrical plants); 961 (rights-of-way for power and communications facilities).

⁵²⁹ See 25 U.S.C.A. § 311. Ch. 832, § 4, 31 Stat. 1058, 1084 (codified at 25 U.S.C. § 311), provides:

The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.

⁵²⁶ See 25 U.S.C.A. § 357. Chap. 832, § 3, 31 Stat. 1084 (codified at 25 U.S.C. § 357) provides: "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where

ute entitled "Indian Right of Way Act."⁵³¹ The purpose of this Act was to simplify and facilitate the process of granting rights-of-way across Indian lands.⁵³² Section 1 of the Act, codified as 25 U.S.C.A. § 323, authorizes the Secretary of the Interior to grant rights-of-way for any purposes over all trust and restricted lands.⁵³³ The statute provides that "any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands" was not repealed. Thus, 25 U.S.C.A. §§ 311 and 357 remain unchanged.⁵³⁴ The 1948 statute provides that "no grant of a right-of-way over and across any lands belonging to a tribe" organized under IRA "shall be made without the consent of the proper tribal officials."⁵³⁵ Consent of each tribe is required by Departmental regulations for

located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

⁵³¹ Act of Feb. 5, 1948, ch. 45, 62 Stat. 17 (codified at 25 U.S.C. §§ 323–28).

⁵³² *Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956, 958 (8th Cir. 1983). For example, the court noted that frequently, "many individual Indians, often widely scattered, owned undivided interests in a single tract of land. Obtaining the signatures of all the owners was a time-consuming and burdensome process, both for the party seeking the right-of-way and for the Interior Department." *Id.* at 959.

⁵³³ 25 U.S.C.A. § 323 (2004), Rights-of-way for all purposes across any Indian Lands, provides:

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

⁵³⁴ 25 U.S.C.A. § 326 (2004), provides: "Sections 323 to 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920...nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." See also *Neb. Pub. Power Dist. v. 100.95 Acres of Land in County of Thurston, Neb.*, 719 F.2d 956, 959 (1983), holding that: "The 1948 Act does not, by its express terms, amend or repeal any existing legislation concerning rights-of-way across Indian lands."

⁵³⁵ Chap. 45, § 2, 62 Stat. 18 (codified at 25 U.S.C.A. § 324 (2004)). Consent is also required for tribes organized under the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501–509, and for Alaska Native villages organized under the Indian Reorganization Act. 25 U.S.C. §§ 461–479.

any rights-of-way over tribal lands.⁵³⁶ Consent of individual Indians is also generally required⁵³⁷ with certain statutory exceptions covered by the Act.⁵³⁸

(2) *BIA Regulations (25 C.F.R. Part 169).*—The BIA implementation regulations appear at 25 C.F.R. Part 169. The BIA regulation covering applications for rights-of-way for public highways is 25 C.F.R. § 169.28, which refers specifically to 25 U.S.C. § 311. Excepted from the regulation are the States of Nebraska and Montana, which are to follow the requirements of the Act of March 4, 1915 (38 Stat. 1188).⁵³⁹ The regulations require that applications for public highway rights-of-way over and across roadless and wild areas “shall be considered in accordance with the regulations contained in part 265 of this chapter.”⁵⁴⁰

(3) *Judicial Construction of Highway Right-of-Way Grants.*—The Supreme Court of Arizona, in

⁵³⁶ 25 C.F.R. § 169.3(a) (2004). See *S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983), holding that “[t]he Secretary acted within his power in requiring by regulation that tribal consent be obtained for the acquisition of rights-of-way....”

⁵³⁷ See 25 C.F.R. § 169.3(b).

⁵³⁸ 25 U.S.C. § 324; 25 C.F.R. § 169.3(c) (2004). The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when: (1) The individual owner is a minor or non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or owner, which cannot be adequately compensated for by monetary damages; (2) The land is owned by more than one person, and the owners or owner of a majority of the interests consent to the grant; (3) The whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (4) The heirs or devisees of a deceased owner of the land have not been determined, and the Secretary finds that the grant will cause no substantial injury to the land or owner thereof; (5) The owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof. 25 C.F.R. § 169.3(a) (2004).

⁵³⁹ Sec. 169.28(b) provides an optional course for two states:

In lieu of making application under the regulations in this part 169, the appropriate State or local authorities in Nebraska or Montana may, upon compliance with the requirements of the Act of March 4, 1915 (38 Stat. 1188), lay out and open public highways in accordance with the respective laws of those States.

⁵⁴⁰ 25 C.F.R. pt. 265.

Application of Denet-Claw,⁵⁴¹ dismissed traffic citations to a Navajo Indian for violations occurring on U.S. 66 within the Navajo Reservation. The court rejected

the State's contention that the granting of an easement for a right of way [under 25 U.S.C. § 311] by implication conferred jurisdiction on Arizona courts over Indian traffic offenders [as] untenable as it completely ignores the express definition of what constitutes “Indian country” found in section 1151, [18 U.S.C. § 1151].⁵⁴²

The Supreme Court of New Mexico, in *State of New Mexico v. Begay*, agreed, holding,

[T]hat the authority under which the State was permitted to construct Highway 666 through, and over, the Navajo reservation [25 U.S.C. § 311] failed to extinguish the title of the Navajo Indian Tribe.... Since the State has no jurisdiction over Indian reservations until title in the Indians is extinguished, and the easement to the State did not affect the beneficial title, there is no basis upon which the State can claim jurisdiction.⁵⁴³

Finally, in *State v. Webster*,⁵⁴⁴ the Wisconsin Supreme Court held that the State did not have jurisdiction to charge and prosecute traffic offenses by Menominee Indians on a state highway within the reservation because (a) title to the land underlying the state highway remained part of the reservation, (b) the tribe had a well-established tradition of tribal self-government in the area of traffic regulation, and (c) state jurisdiction would interfere with tribal self-government and impair a right granted or reserved by federal law. The court said:

We conclude that the language of 25 U.S.C. sec. 311, taken together with the expressed congressional intent to include rights-of-way as part of Indian country, implies that the granting of the Highway 47 right-of-way pursuant to sec. 311 neither extinguished title in the Menominee Tribe nor constituted a general grant of jurisdiction to the state over the land constituting the right-of-way. Anything in *State v. Tucker*, *supra*, contrary to our holding in this case is hereby overruled.⁵⁴⁵

As previously noted at Section D.5.b., the U.S. Supreme Court, in *Strate v. A-1 Contractors*, considered the adjudicatory authority of the tribe in

⁵⁴¹ 83 Ariz. 299, 320 P.2d 697 (1958).

⁵⁴² *Id.* at 700.

⁵⁴³ 63 N.M. 409, 320 P.2d 1019–20 (1958).

⁵⁴⁴ 114 Wis. 2d 418, 338 N.W.2d 474 (1983).

⁵⁴⁵ *Id.* at 480. The Court cited *United States v. Harvey*, 701 F.2d 800, 805 (9th Cir. 1983), (25 U.S.C. § 311 is not a general grant of jurisdiction to the states over the land constituting the right-of-way); *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975) (rights-of-way running through a reservation remain part of the reservation and within the territorial jurisdiction of tribal police); *Id.* at 479.

connection with a 6.59-mi stretch of North Dakota State Highway No. 8, conveyed by the United States to the State by “an easement for a right-of-way” over tribal lands pursuant to 25 U.S.C. § 325. The granting instrument detailed only one specific reservation by Indian landowners: “to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupancy of the premises affected by the right-of-way.”⁵⁴⁶ The Court, noting that “the right-of-way is open to the public, and traffic on it is subject to the State’s control...[with the Tribe] retain[ing] no gatekeeping right,” held that the 6.59-mi stretch was “equivalent, for nonmember governance purposes, to alienated, non-Indian land.” The Court, in a unanimous decision based on the *Montana* rule,⁵⁴⁷ held that “[a]s to nonmember...a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction [and] civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally [do] not extend to the activities of nonmembers of the tribe.”⁵⁴⁸

Relying on the decisions in *Montana* and *Strate*, the United States Court of Appeals for the Ninth Circuit, in *State of Montana Department of Transportation v. King*,⁵⁴⁹ held that the Fort Belknap Indian Community lacked jurisdiction to regulate the State’s employment practices in performing repair work on a state highway that crosses the reservation on right-of-way owned by the State (specifically to enforce a TERO against Montana DOT employees).⁵⁵⁰ The State acquired the right-of-way over the Fort Belknap Indian Reservation from the United States, pursuant to 25 U.S.C. §§ 323–328, in order to construct and maintain Highway 66. As part of the transfer, the State became responsible

for constructing and maintaining the highway pursuant to the Federal-Aid Highway Act of 1956.⁵⁵¹ The court noted that the “community consented to the transfer, and each individual allottee received compensation for the easement...[t]he State agreed to construct and maintain the highway, and the highway is open to the public.” The court of appeals observed that *Strate* “held that the tribe’s loss of the ‘right of absolute and exclusive use and occupation...implies the loss of regulatory jurisdiction over the use of the land by others....” citing its analysis in *Wilson v. Marchington*,⁵⁵² and concluding:⁵⁵³

Thus, Montana’s main rule, which is consistent with the origins of tribal power, precludes the Community from exercising regulatory jurisdiction over the State’s employment practices on the right of way owned by the State.... As to the issues before us, we hold that the State of Montana and its officials are outside of the regulatory reach of the Community’s TERO for work performed on the right of way owned by the State.⁵⁵⁴

The following factors, considered by the courts in *Strate* and the *Montana DOT* case, will no doubt become critical when construing grants of highway right-of-way across Indian lands: (1) the legislation that created the right-of-way, (2) whether the right-of-way was acquired by the state with the consent of the tribe, (3) whether the tribe had reserved the right to exercise dominion and control over the right-of-way, (4) whether the land was open to the public, and (5) whether the right of way was under state control. Another important factor will be the extent to which the tribe has retained reservations within the granting instrument. Because of unfavorable court decisions involving right-of-way in Indian country, this issue remains a topic of importance.

(4) *Utilities within the Right-of-Way*.—The Supreme Court considered the question of whether a grant of right-of-way over allotted lands held in trust under 23 U.S.C. § 311 included the right to permit maintenance of rural electric service lines within the highway bounds, in *United States v. Oklahoma Gas & Electric Co.*⁵⁵⁵ The action was brought by the Secretary of the Interior, who considered this use, under license by the Oklahoma State Highway Commission, as not warranted by the grant. The Court noted that such use was a lawful and proper highway use under Oklahoma law. It held that the utility use in accordance with state law was covered under the § 311 grant of

⁵⁴⁶ *Strate*, 520 U.S. at 454–55.

⁵⁴⁷ *Id.* at 454–56.

⁵⁴⁸ *Id.* at 453, citing *Montana*, 450 U.S. at 565.

⁵⁴⁹ 191 F.3d 1108 (9th Cir. 1999).

⁵⁵⁰ *Id.* at 1111:

To address the lack of employment opportunities, the Fort Belknap Indian Community Council enacted an affirmative action policy, called the Tribal Employment Rights Ordinance (“TERO”). The TERO regulates the employee relations of covered employers through restrictions on hiring, promotion, transfer, and reduction in force preferences for tribal members, Native Americans who are not tribal members, and spouses of tribal members. The TERO’s affirmative action requirements include hiring quotas, special seniority rules, use of the TERO office as an employment source, mandatory advertising, and mandatory cross-cultural training. All covered employers are required by the TERO to secure a permit and pay an annual business fee of \$100.00. Each employee of a covered employer is required to obtain a work permit, which costs \$100.00....

⁵⁵¹ *Id.* at 1111. See 23 U.S.C.A. §§ 101 *et seq.*

⁵⁵² 127 F.3d 805, 813 (9th Cir. 1997).

⁵⁵³ *King*, 191 F.3d at 1113.

⁵⁵⁴ *Id.* at 1113, 1115.

⁵⁵⁵ 318 U.S. 206, 63 S. Ct. 534, 87 L. Ed. 716 (1943).

right-of-way. A U.S. district court followed this precedent in *United States v. Mountain States Telephone and Telegraph Co.*, which involved buried cable on state highway across tribal land, ruling that "Mountain Bell does have a right to maintain its buried telephone cable in the highway right-of-way and is not trespassing."⁵⁵⁶

While utilities do have the right to place and maintain facilities within the right-of-way, this in no way solves the issue of utilities using tribal lands to gain access to their facilities located on state right-of-way. It seems clear that in such a situation the utility company would come under the jurisdiction of the tribal government and be subject to tribal requirements for any necessary licenses or permits. In addition, if the utility facilities moved off the state highway right-of-way and entered tribal land, the utility would need to obtain the necessary rights-of-way, licenses, or permits.

b. Use of FHWA Title 23 U.S.C. Procedures

The question sometimes arises as to whether the right-of-way acquisition or appropriation procedures of 23 U.S.C. §§ 107 and 317 may be used to obtain rights-of-way over Indian lands. Section 107 authorizes the Secretary of Transportation, at the request of a state, to acquire by federal condemnation lands or interests in lands required for rights-of-way for the Interstate system of highways, when the state is unable to do so. Section 317 details the procedure to be followed in appropriating lands or interests in lands owned by the United States for the right-of-way of any highway upon application of the Secretary of Transportation to the federal agency having jurisdiction over the land.⁵⁵⁷ This provision of law was addressed by the Court of Appeals for the Ninth Circuit in *United States v. 10.69*

⁵⁵⁶ 434 F. Supp. 625 (D. Ct. Mont. 1977), at 629. *Accord*: *Gates of the Mountains Lakeshore Homes, Inc. v. Noble*, 565 F. Supp. 788, 794 (D. Ct. Mont. 1983). *See also* *State of Wyoming ex rel. Alice Peterson v. Milbank Mut. Ins. Co.*, 617 P.2d 1056, 1076 (1980).

⁵⁵⁷ Subsec. (a) of § 317 provides that the Secretary of Transportation "shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands it is desired to appropriate." Subsec. (b) provides that the lands may be appropriated for highway purposes if within 4 months after the filing of the map by the Secretary of Transportation, the Secretary of the Department having jurisdiction over the lands either (1) does not certify that appropriation would be "contrary to the public interest or inconsistent with the purposes for which such land (has) been reserved," or (2) does agree to the appropriation under such conditions as "he deems necessary for the adequate protection and utilization of the reserve." 23 U.S.C. § 317.

Acres of Land,⁵⁵⁸ involving Indian tribal lands held in trust by the United States for the benefit of the Confederated Tribes and Bands of the Yakima Indian Nation, which the WSDOT needed for an Interstate highway right-of-way. The U.S. DOT was requested to acquire the land invoking § 107, and the Department of Justice commenced condemnation action in the U.S. district court. The district court dismissed, and the Ninth Circuit affirmed, on the ground that such tribal lands can be appropriated for highway purposes "only by utilizing the administrative procedures provided for in 23 U.S.C. § 107(d) and 317," which the court said "are to be read together."⁵⁵⁹ The court of appeals reviewed the Title 23 U.S.C. procedures of §§ 107 and 317 together with the Title 25 U.S.C. procedures of §§ 311, 323–328, and 357, and found them to be complementary. Circuit Judge Browning concluded:

The structure of these provisions of Titles 23 and 25, and the evident purpose they serve, offer strong support for interpreting sections 107(a) and (d) and 317 of Title 23 to mean that Indian tribal lands may be secured for highway use only by administrative appropriation under sections 107(d) and 317, and not by condemnation under section 107(a). The officials most immediately concerned with the administration of the federal highway program are apparently of the same view (referring to Bureau of Public Roads Policy and Procedure Memorandum 80-8 of April 17, 1967).⁵⁶⁰

Based upon this Ninth Circuit decision, it seems clear that a state transportation agency may apply directly to the BIA for rights-of-way across Indian lands, following the procedures of 25 C.F.R. Part 169, or it may make application through the FHWA. FHWA regulation at 23 C.F.R. § 710.601 provides that the state transportation department "may file an application with FHWA, or it can make application directly to the land-owning agency if the land-owning agency has its own authority for granting interests in land."⁵⁶¹ In either

⁵⁵⁸ 425 F.2d 317 (9th Cir. 1970).

⁵⁵⁹ *Id.* at 318.

⁵⁶⁰ *Id.* at 319–20, and n.8. PPM 80-8 provided that applications for rights-of-way across Indian lands "shall be filed with the Department of Interior in accordance with the regulations established by the Bureau of Indian Affairs for the processing of applications under 25 U.S.C. 325-328," referring to 25 C.F.R. § 161, which is now 25 C.F.R. § 169.

⁵⁶¹ The criteria for applications are listed in 23 C.F.R. § 710.601 as follows:

(d) Applications under this section shall include the following information:

- (1) The purpose for which the lands are to be used;
- (2) The estate or interest in the land required for the project;

case, as pointed out by the court, the consent of the Secretary of the Interior would be necessary, and his approval, if given, would be subject to such requirements as deemed necessary.

The power of the United States to control the affairs of Indians is subject to constitutional limitations and does not enable the United States, without paying just compensation, to appropriate lands of an Indian tribe.⁵⁶² Therefore, unlike the vast majority of federal land transfers occurring under 23 U.S.C. §§ 107 and 317, which are at no cost to a state transportation agency, just compensation of not less than the fair market value of the rights granted, plus severance damages, if any, must be paid to the tribe or individual Indian owners for rights-of-way granted, except when waived in writing.⁵⁶³

3. Use of Eminent Domain to Acquire Indian Land

The Act of March 3, 1901, provided, *inter alia*, that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."⁵⁶⁴ This provision of law was considered by the U.S. Supreme Court in *State of Minnesota v. United States*,⁵⁶⁵ where the United States challenged a condemnation action brought by Minnesota in State court for a highway over nine parcels allotted in severalty to individual Indians by trust patents. Minnesota contended that the statute (25 U.S.C. § 357) authorized it to condemn allotted lands in state courts without making the United States a party. The Court first held that

since the United States was the owner of the fee, the suit was one against the United States and it was an indispensable party to the condemnation. Secondly, the Court noted that the statute "contains no permission to sue in the court of a state[,]"⁵⁶⁶ and that "judicial determination of controversies concerning [Indian] lands has been commonly committed exclusively to federal courts."⁵⁶⁷

Several U.S. circuit courts have rejected the contention that the Indian Right of Way Act of 1948 impliedly repealed portions of the Act of 1901 and that a condemnation action requires the consent of the Secretary of the Interior or of the Indians.⁵⁶⁸ According to these cases, § 357 stands alone in providing the authority to condemn allotted Indian land without consent of Indians or the Secretary of the Interior. However, as previously noted, tribal land is not subject to condemnation.⁵⁶⁹ In *Nebraska Public Power District v. 100.95 Acres of Land in County of Thurston, Nebraska*, while the utility had the authority to condemn allotted land, just prior to the condemnation action the allottees transferred all but a life estate to the United States, in trust for the Winnebago Tribe, making the needed land tribal land not subject to condemnation under § 357. However, land owned in fee simple by a tribe is subject to condemnation.⁵⁷⁰ The court of appeals also held that since the condemnation was an action *in rem*, the suit was not barred by tribal sovereign immunity.

The U.S. Supreme Court in *United States v. Clarke*⁵⁷¹ considered the question of whether 25 U.S.C. § 357 authorizes the taking of allotted In-

(3) The Federal-aid project number or other appropriate references;

(4) The name of the Federal agency exercising jurisdiction over the land and identity of the installation or activity in possession of the land;

(5) A map showing the survey of the lands to be acquired;

(6) A legal description of the lands desired; and

(7) A statement of compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4332, *et seq.*) and any other applicable Federal environmental laws, including the National Historic Preservation Act (16 U.S.C. 470(f)), and 23 U.S.C. 138.

⁵⁶² *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 123, 58 S. Ct. 799, 82 L. Ed. 1219 (1938).

⁵⁶³ 25 U.S.C. § 325; 25 C.F.R. § 169.12.

⁵⁶⁴ Appropriations Act of Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1084 (codified at 25 U.S.C. § 357).

⁵⁶⁵ 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235 (1939).

⁵⁶⁶ *Id.* at 386.

⁵⁶⁷ *Id.* at 389. In *Nicodemus v. Wash. Power Co.*, 264 F.2d 614 (9th Cir. 1959), the court cited *Minnesota v. United States*, in holding: "The United States is an indispensable party to a suit to establish or acquire an interest in allotted Indian land held under a trust patent, and such a suit must be instituted and maintained in the federal court." at 615. *Accord*: *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 357 (9th Cir. 1982), *United States v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003).

⁵⁶⁸ See *Nicodemus v. Wash. Water Power Co.*, 264 F.2d 614 (9th Cir. 1969), *S. Cal. Edison Co. v. Rice* (9th Cir. 1882), *Yellowfish v. City of Stillwater*, 691 F.2d 926 (10th Cir. 1982); *Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956 (8th Cir. 1983).

⁵⁶⁹ *United States v. 10.69 Acres of Land*, 425 F.2d 317 (9th Cir. 1970); *Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956 (8th Cir. 1983).

⁵⁷⁰ See *Cass County Water Res. Dist. v. 1.43 Acres of Land in Highland Township, Cass County, N.D.*, 643 N.W.2d 685 (N.D. 2002).

⁵⁷¹ 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980).

dian land by physical occupation, commonly called "inverse condemnation." The Court, reversing the Court of Appeals for the Ninth Circuit, found that the word "condemned," as used in 1901 when 25 U.S.C. § 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it, not to physical occupation, or "inverse condemnation," even though that method was authorized by state law.⁵⁷² The Supreme Court decision strictly construes the statute and would appear to foreclose any taking of allotted Indian land except by formal condemnation proceedings. This would also seem to preclude, for example, "regulatory takings" that were not authorized in formal condemnation proceedings. In *Imperial Granite Company v. Pala Band of Mission Indians*,⁵⁷³ the Court held that Indian trust land could not be acquired for a road of necessity by prescription, or adverse possession.⁵⁷⁴

H. FEDERAL HIGHWAY PROGRAMS INVOLVING INDIAN LANDS⁵⁷⁵

1. The Federal-Aid Highway Program

The Federal-Aid Highway Program is a federally assisted state program. The state highway agency (SHA) is the recipient of federal funds and is responsible for administering the program. The role of FHWA is to administer the Federal-aid program in partnership with the SHA.

In order to participate in the Federal-Aid Highway Program, each state is required to have a SHA that has the power and is equipped and organized to discharge the duties required by Title 23.⁵⁷⁶

⁵⁷² *Id.* at 254, 259.

⁵⁷³ 940 F.2d 1269, 1272 (9th Cir. 1991).

⁵⁷⁴ *Id.*

Imperial cannot acquire property rights in trust property by prescription. See *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956) (Indian Intercourse Act, 25 U.S.C. § 177, prohibiting alienation of Indian lands other than by treaty or convention, provides "special reason why the Indians' property may not be lost through adverse possession"), *cert. denied*, 352 U.S. 988, 77 S. Ct. 386, 1 L. Ed. 2d 367 (1957); *United States v. Walker River Irrigation Dist.*, 104 F.2d 334 (9th Cir. 1939).

⁵⁷⁵ Congress recently passed new highway reauthorization H.R. 3; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU); Pub. L. No. 109-59 (Aug. 10, 2005; 119 Stat. 1144; 835 pp). SAFETEA-LU changes will be discussed in various sections of this paper, as applicable.

⁵⁷⁶ 23 U.S.C. § 302.

States typically select and develop specific transportation projects, award construction contracts, and are responsible for maintenance. While tribes are not direct recipients of apportioned Federal-aid funds for state highway transportation projects, states do have numerous statutory responsibilities to tribal governments in the use of these funds. However, federal-aid dollars are apportioned with numerous state responsibilities towards tribes. For example, and as discussed later, states with tribal lands within the state's boundaries are required to consult with tribal governments and the Secretary of the Interior in the planning process.⁵⁷⁷ Similar tribal government and DOI consultation is also required in the preparation of the State Transportation Improvement Program (STIP).⁵⁷⁸ While there is no clear enforcement mechanism set forth in Section 135 relative to state and tribal government consultation, FHWA has a continuing and strong interest in ensuring that the consultation requirements are met. Indeed, FHWA guidance directs its division offices to establish and maintain a working relationship with tribes and to ensure that tribal governments are part of the SHA's planning, environment, and technology transfer with respect to the Federal-Aid Highway Program.⁵⁷⁹ In this regard, it is not uncommon for states to use Federal-aid highway funds for state- and county-owned roads running near, through, or entirely on a reservation.⁵⁸⁰ Finally, states constructing roads totally within a reservation are not constrained by Federal-aid matching requirements; 100 percent federal funding is permitted.⁵⁸¹ However, should a state wish to construct a project within a reservation without the requisite 100 percent funding, a tribe is permitted to use its own Indian Reservation Roads (IRR) funds to meet any cost sharing requirements should a state need additional funds.⁵⁸² Although IRR funds are federal funds, they represent an exception to the rule that federal funds cannot be used to match other federal funds. This is

⁵⁷⁷ 23 U.S.C. § 135.

⁵⁷⁸ *Id.*

⁵⁷⁹ 1997 FHWA Guidance on Relations with American Indian Tribes has been updated to 2004 Guidance found at <http://www.fhwa.dot.gov/hep/tribaltrans/topics.htm>.

⁵⁸⁰ The BIA system consists of over 50,000 mi of roads almost evenly divided between BIA/tribal roads and State/county owned roads.

⁵⁸¹ 23 U.S.C. § 120 (f).

⁵⁸² Section 106(j) of the ISDEAA (25 U.S.C. § 450 j-1 (j)) provides as follows: "(n) notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation under other Federal and non-Federal programs."

because Section 106(j) of the ISDEAA provides express statutory authority to use funds provided under a self-determination contract to meet the nonfederal matching share. Presumably, this would also apply to a self-governance agreement.

2. The Indian Reservation Road Program

The federal government's role with respect to road projects on Indian lands originates from a 1928 Act⁵⁸³ now codified in Title 25.⁵⁸⁴ This Act authorized the Secretary of Agriculture (which had responsibility for federal roads at that time) to cooperate with SHAs and DOI to survey, construct, reconstruct, and maintain Indian reservation roads serving Indian lands.⁵⁸⁵ The Federal-Aid Highway Act of 1944⁵⁸⁶ required the Public Roads Administration to approve the location, type, and design of all IRR roads and bridges before any expenditure was made and generally to supervise all such construction. In 1946, the predecessor agencies of BIA and FHWA (the Office of Indian Affairs and the Public Roads Administration) entered into their first agreement to jointly administer the statutory requirements for the IRR program. In 1958, the laws related to highways were revised, codified, and reenacted as Title 23, U.S.C.⁵⁸⁷ Since that time, there have been other interagency agreements to carry out FHWA and BIA duties and responsibilities.⁵⁸⁸ In 1973, BIA and FHWA entered into an agreement for an "Indian Roads Needs Study"; FHWA was to assist BIA in identifying roads that were at that time, or that should have been, included, as BIA's responsibility. In 1974, BIA and FHWA entered into two separate agreements that set out the joint and individual statutory responsibilities of FHWA and BIA for constructing and improving Indian reservation roads and bridges. The intent of both agreements was to establish a Federal-aid Indian road system consisting of public Indian reservation roads and bridges for which no other Federal-aid funds were available. Both BIA and FHWA jointly designated those roads, but FHWA was responsible for approving the location, type, and design of IRR and bridge projects and supervising construction of these projects. At that time, IRR projects were authorized under the Fed-

eral-Aid Highway Act⁵⁸⁹ but constructed with DOI appropriations. In 1979, BIA and FHWA entered into another agreement that explicitly recognized the role of individual tribes in defining overall transportation needs. This agreement provided that the Indian road system was to consist of

[t]hose Indian reservations roads and bridges which are important to overall public transportation needs of the reservations as recommended by the tribal governing body. These are public roads for which BIA has primary responsibility for maintenance and improvement. Roads included on the Indian Road System shall not be on any Federal-aid system for which financial aid is available under 23 U.S.C. 104.⁵⁹⁰

It was not until 1982 that the IRR program became a multiyear reauthorization, similar to the Federal-Aid Highway Program. Until then, the Indian road system was funded under the DOI's General Appropriations and administered by the BIA. Since funding varied from year to year with no multiyear funding assurances, it was difficult to develop the type of long-range transportation planning that the states had come to rely upon through the highway reauthorization bills. In 1982, under STAA,⁵⁹¹ Congress created the Federal Lands Highway Program (FLHP). This coordinated program addressed access needs to and within Indian and other federal lands. The IRR program is a funding category within the FLHP. In addition, the STAA expanded the IRR system to include tribally owned public roads as well as state- and county-owned roads. Today, IRRs are an integral part of the FLHP.⁵⁹² This program is jointly administered by FHWA and BIA; however, FHWA has direct oversight and coordinating responsibilities to ensure that all federal roads that are public roads are treated under uniform policies similar to those governing federal-aid highways.

After STAA's enactment, BIA and FHWA entered into a new 1983 Memorandum of Agreement that set forth the respective duties and responsibilities of each agency for the IRR program. Under the interagency agreement, BIA, working with each tribe, was to develop an annual priority program of construction projects and submit it to FHWA for review, concurrence, and allocation of funds. This 1983 agreement also specifically referenced the Buy Indian Act⁵⁹³ in response to a new Title 23 provision⁵⁹⁴ that provided an exemption, if in the public

⁵⁸³ Pub. L. No. 520, 45 Stat. 750 (May 26, 1928). *See also* SAFETEA-LU § 1119(a), which allows IRR funds to be used for any matching or cost participation under another federal program.

⁵⁸⁴ 25 U.S.C. § 318a.

⁵⁸⁵ *Id.*

⁵⁸⁶ Pub. L. No. 521, 58 Stat. 838, § 10(c).

⁵⁸⁷ Pub. L. No. 85-767, 72 Stat. 885 (Aug. 27, 1958).

⁵⁸⁸ 23 U.S.C. § 208, repealed in 1983. Pub. L. No. 97-424, 96 Stat. 2115, tit. 1, § 126 (d) (Jan. 6, 1983).

⁵⁸⁹ *Id.*

⁵⁹⁰ FHWA/BIA Agreement of 1979.

⁵⁹¹ Pub. L. No. 97-424, 96 Stat. 2097 (1983).

⁵⁹² 23 U.S.C. § 204.

⁵⁹³ Act of June 25, 1910, 25 U.S.C. § 47 (2005). 35 Stat. 71; *see also* 25 U.S.C. § 13.

⁵⁹⁴ 23 U.S.C. § 204(e).

interest, to the competitive bidding requirements with respect to all funds appropriated for the construction and improvements of IRRs that the Secretary administers. The 1983 interagency agreement also recognized that, although FHWA's assistance and oversight would continue, both FHWA and BIA would be responsible for the implementation and success of the IRR program. As a result of Section 1028 of ISTEA, which provided for the Highway Bridge Replacement and Rehabilitation Program, BIA and FHWA amended their 1983 agreement to provide for their respective responsibilities for that program.

STAA changed the way BIA could do business with respect to IRRs. The 1982 STAA authorized IRR funding from the Highway Trust Fund in the amount of \$75 million for FY 1983 and \$100 million for FYs 1984–86.⁵⁹⁵ In 1986, STURAA was passed.⁵⁹⁶ While the level of funding dropped to \$80 million per year for FYs 1987–91, the program could still rely on long-term funding. A large jump in IRR funding occurred with the passage of the 1991 highway reauthorization, commonly known as ISTEA.⁵⁹⁷ This 6-year transportation bill placed a significant emphasis on state transportation planning and the consultation involvement of tribal governments.⁵⁹⁸ IRR funding increased to \$159 million for FY 1992 and \$191 million for FYs 1993–97.⁵⁹⁹ ISTEA made changes to the IRR bridge program⁶⁰⁰ to require an inventory, classification, and prioritization of replacement of IRR bridges, and required that a percentage of state funds be used for IRR bridge projects.⁶⁰¹ In addition, ISTEA allowed tribes to use their planning funds pursuant to the ISDEAA.⁶⁰²

The 2005 highway reauthorization, SAFETEA-LU, contains many new provisions affecting the IRR program as well as other transportation issues and needs in Indian country. However, the IRR program remains a program jointly administered by BIA and FHWA's Federal Lands Highway.⁶⁰³ The purpose of the IRR program is to provide safe and adequate transportation and public road access to and within Indian reservations, Indian lands, and communities for Indians and Alaska Natives, visitors, recreational users, resource users, and others, while contributing to economic development, self-

determination, and employment of Indians and Alaska Natives. As of October 2000, the IRR system consisted of approximately 25,700 mi of BIA and tribally owned public roads and 25,600 mi of state, county, and local government public roads.

The duties and responsibilities of BIA and FHWA are described in a Memorandum of Agreement between the two agencies. Each fiscal year FHWA determines the amount of funds available for construction. The funds are then allocated to the BIA.⁶⁰⁴ Prior to the implementation of the new Final Rule on IRR Funding, Policies, and Procedures in November 2004,⁶⁰⁵ BIA worked with tribal governments and tribal organizations to develop an annual priority program of construction projects that was submitted to FHWA for approval based on available funding. BIA then distributed the allocated funds to the IRR regions according to the annual approved priority program of projects based on a relative-need formula. In light of the new rule discussed, *infra*, the procedure and distribution of funds has markedly changed.

In 1998, the new highway reauthorization, TEA-21, again addressed the IRR program.⁶⁰⁶ It provided that an Indian tribal government could enter into contracts or agreements with the BIA pursuant to the ISDEAA for IRR program roads and bridges.⁶⁰⁷ It established an Indian Reservation Roads Bridge Program (IRRBP), under which a minimum of \$13 million of IRR program funds was set aside for a nationwide priority program for improving deficient IRR bridges.⁶⁰⁸ The IRR funding level was increased to \$1.6 billion for FYs 1998–2003 (\$275 million per year).⁶⁰⁹ Following TEA-21, the U.S. DOT issued an Order to ensure that programs, policies, and procedures administered by the DOT were responsive to the needs and concerns of American Indians, Alaska Natives, and tribes.⁶¹⁰ In addition, guidelines were issued regarding IRR Transportation Planning Procedures. These guidelines were developed jointly by various tribal, federal, state, and

⁶⁰⁴ It is expected that new procedures will be implemented in light of SAFETEA-LU.

⁶⁰⁵ 69 Fed. Reg. 43090 (July 19, 2004); 23 C.F.R. pt. 170.

⁶⁰⁶ TEA-21, Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

⁶⁰⁷ *Id.* § 1115.

⁶⁰⁸ *Id.*, now codified at 23 U.S.C. § 202(d)(3)(B). *See also* FHWA's final rule for the IRRBP at 68 Fed. Reg. 24642, now found at 23 C.F.R. § 661.

⁶⁰⁹ *Id.* § 1101(a)(8). With numerous extensions of TEA-21, funding has been at the FY 2004 level. As stated previously, reauthorization bills are currently pending in Congress.

⁶¹⁰ DOT Order 5301, Nov. 16, 1999.

⁵⁹⁵ Pub. L. No. 97-424.

⁵⁹⁶ Pub. L. No. 100-17, 101 Stat. 132 (Apr. 2, 1987).

⁵⁹⁷ Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

⁵⁹⁸ *Id.* § 1025.

⁵⁹⁹ *Id.* § 1003.

⁶⁰⁰ *Id.* § 1028.

⁶⁰¹ *Id.*

⁶⁰² *Id.*, now codified at 23 U.S.C. § 202.

⁶⁰³ 23 U.S.C. § 204.

association representatives.⁶¹¹ Finally, TEA-21 required that the federal government (with representatives from DOI and the DOT) enter into negotiated rulemaking with tribal governments to develop IRR program procedures and a funding formula to allocate IRR funds.⁶¹² The Negotiated Rulemaking Committee developed proposed regulations for the IRR program to implement the applicable portions of TEA-21 and established a funding formula for FY 2000 and each subsequent year based on factors that reflect the relative needs of the Indian tribes, and reservations or tribal communities, for transportation assistance; the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each BIA area; geographic isolation; and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.⁶¹³ In short, the Secretary of the Interior was required to develop this rule in a manner that reflects the unique government-to-government relationship between Indian tribes and the United States.⁶¹⁴

The Rulemaking Committee was further charged to develop a funding distribution method based on factors that reflect the relative needs of the Indian tribes and reservation or tribal communities for transportation assistance; the relative administrative capacities of, and challenges faced by, various Indian tribes, including the cost of road construction in each BIA area; geographic isolation; and difficulty in maintaining all-weather access to employment, commerce, health, safety, and educational resources.⁶¹⁵ The committee arrived at a new distribution formula, now known as the Tribal Transportation Allocation Methodology.⁶¹⁶ This new distribution formula for IRR funds is essentially a tribal shares program with each federally recognized tribe receiving a portion of the future allocated IRR funds based on a defined methodology. The negotiated rule provided for an IRR Coordinating Committee to address ongoing issues in tribal transportation. This committee has already been established with tribal members from each of the 12 BIA regions and 2 federal members. This committee, announced in the September 8, 2005,

Federal Register, will meet twice a year. The first meeting was held in the fall of 2005.

The 2005 highway legislation, SAFETEA-LU, made significant changes to the IRR program.⁶¹⁷ While TEA-21 had a level \$275 million per year for the IRR program, SAFETEA-LU provides greatly increased funding, from \$300 million in FY 2005 with steady increases up to \$450 million for FY 2009. An additional \$14 million per year of contract authority is provided for the IRRBP. Prior to SAFETEA-LU, FHWA had stewardship and oversight responsibilities but no direct agreements with tribes, as the BIA had administered the IRR program. The new highway legislation significantly changed the administration of the IRR program. The FHWA may now provide IRR funding directly to a requesting Indian tribal government or consortium (two or more tribes) that has satisfactorily demonstrated financial stability and financial management to the Secretary of Transportation. The IRR funds may be used to carry out, in accordance with ISDEA,⁶¹⁸ contracts and agreements for planning, research, design, engineering, construction, and maintenance relating to the IRR program or project. In addition, SAFETEA-LU codifies existing policy, namely that IRR funds shall only be expended on projects identified in a transportation improvement program approved by the Secretary of Transportation.⁶¹⁹ However, tribal governments may now approve plans, specifications, and estimates and commence construction with IRR funds if certifications are provided that applicable health and safety standards are met.⁶²⁰

Because the Tribal Transportation Allocation Method (tribal shares funding formula) is in large part driven by the IRR inventory, SAFETEA-LU requires a comprehensive National Tribal Transportation Facility Inventory within 2 years of enactment.⁶²¹ Finally, although BIA will retain primary responsibility for IRR maintenance programs through DOI appropriations, up to 25 percent of a tribe's IRR funds may now be used for the purpose of road and bridge maintenance.⁶²² In addition, the legislation clearly provides that an Indian tribe may enter into a road maintenance agreement with a state to assume the responsibilities of the state for roads in and providing access to Indian reservations. These maintenance agreements will be tracked and reported back to Congress.⁶²³

⁶¹¹ The 1999 TTAP can be found at <http://www.fhwa.dot.gov/flh/reports/indian/intro.htm>.

⁶¹² TEA-21, § 1115. The Rule was negotiated pursuant to 5 U.S.C. § 561, The Negotiated Rulemaking Act of 1990, Pub. L. No. 101- 648, 104 Stat. 4969.

⁶¹³ *Id.*

⁶¹⁴ *Id.*

⁶¹⁵ *Id.*, codified at 23 U.S.C. § 202(d)2(D).

⁶¹⁶ 69 Fed. Reg. 43090, subpt. C at 43115 (July 19, 2004).

⁶¹⁷ See §§ 110l(a)(9) and 119 of SAFETEA-LU.

⁶¹⁸ 25 U.S.C. § 450b, et seq.

⁶¹⁹ Sec. 1119 of SAFETEA-LU.

⁶²⁰ Sec. 1119(e) of SAFETEA-LU.

⁶²¹ Sec. 1119(f) of SAFETEA-LU.

⁶²² Sec. 1119(i) of SAFETEA-LU.

⁶²³ Sec. 1119(k) of SAFETEA-LU.

The new highway legislation provides tribes more visibility at the U.S. DOT. SAFETEA-LU creates a new political position, Deputy Assistant Secretary of Transportation for Tribal Government Affairs.⁶²⁴ This position is established to plan, coordinate, and implement DOT programs serving Indian tribes.

3. The IRR Bridge Program

Prior to TEA-21, IRR bridges were part of the highway bridge replacement and rehabilitation program.⁶²⁵ Under this program, a small percentage of bridge funds from each of the 50 states was used for IRR bridge repair. The current IRRBP was authorized under TEA-21.⁶²⁶ It is a national priority program designed to improve deficient IRR bridges. The word “national” is used both in the statute as well as in the legislative history, making clear the point that the funds were to be used throughout the country, presumably in a prudent manner, wherever there were deficient IRR bridges.⁶²⁷ Both the IRRBP statute and its legislative history⁶²⁸ envision a national program to address the large number of deficient IRR bridges. TEA-21 directed the Secretary to establish a nationwide priority program for improving deficient IRR bridges, and provided that, in cooperation with the Secretary of the Interior, not less than \$13 million in IRR funds shall be set aside for projects to replace or rehabilitate eligible deficient IRR bridges recorded in the National Bridge Inventory; and, that funds to carry out IRR bridge projects would be available only on approval of plans, specifications, and estimates by the Secretary.⁶²⁹ The new highway authorization, SAFETEA-LU, provides an additional \$14 million from the Highway Trust Fund for FYs 2005–09 for IRRBP. Unlike TEA-21, where IRRBP funds were a set-aside from the program, these funds are in addition to the annual IRR program funding level. In addition, the statute now explicitly allows these funds to be used for planning and design in addition to engineering and construction activities.⁶³⁰

4. Emergency Relief Program for Federally Owned Roads

FHWA operates the Emergency Relief for Federally Owned Roads (ERFO) program.⁶³¹ The Office of Federal Lands Highways is responsible for management oversight and accountability of the ERFO program.⁶³² This program provides disaster assistance for federal roads, including Indian reservation roads. The ERFO program is intended to help pay the unusually heavy expenses associated with the repair and reconstruction of federal roads and bridges seriously damaged by a natural disaster over a wide area or a catastrophic failure from any external cause.⁶³³

Structural deficiencies, normal physical deterioration, and routine heavy maintenance do not qualify for ERFO funding.⁶³⁴ Tribal governments that have the authority to repair or reconstruct federal roads may apply for ERFO funds.⁶³⁵ Tribes can also administer approved ERFO repairs under a self-determination contract or self-governance agreement.⁶³⁶ FHWA determines if the natural disaster or catastrophic failure is of sufficient extent and intensity to warrant consideration for ERFO funding. If approved for ERFO funding, the federal share payable is 100 percent.⁶³⁷ In addition, if ERFO funds are approved and available, they can be used to supplement ordinarily allocated IRR construction funds for FHWA-approved repairs.⁶³⁸ ERFO funds can also supplement maintenance funds for FHWA-approved repairs, and can be used to repay other funds used on approved ERFO repairs.⁶³⁹ However, the total cost of an ERFO project may not exceed the cost of repair or reconstruction of a comparable facility.⁶⁴⁰

5. Discretionary Public Lands Highway Program (23 U.S.C. § 204)

Any public road providing access to and within federal lands is eligible for public lands highway (PLH) funding. States submit applications for funding in response to an FHWA request for PLH

⁶²⁴ Sec. 1119(l) of SAFETEA-LU.

⁶²⁵ 23 U.S.C. § 144.

⁶²⁶ Sec. 23 U.S.C. § 202 was amended by § 1115(b)(4) of TEA-21, Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

⁶²⁷ 23 U.S.C. § 202(d)(4); *see also* the Interim Final Rule (IFR) on the IRRBP (64 Fed. Reg. 38565 July 19, 1999); 23 C.F.R. pt. 661.

⁶²⁸ S. REP. No. 105-95, at 13, Summary, § 1122; H. R. REP. No. 105-550, at 416–17.

⁶²⁹ *Id.*

⁶³⁰ Sec. 1119(g) of SAFETEA-LU.

⁶³¹ 23 U.S.C. §§ 120 and 125. *See also* 23 C.F.R. § 668.201, *et seq.*

⁶³² FED. HIGHWAY ADMIN., EMERGENCY RELIEF FOR FEDERALLY OWNED ROADS, DISASTER ASSISTANCE MANUAL (Publication No. FHWA-FLH-04-007, 2004).

⁶³³ *Id.*

⁶³⁴ 25 C.F.R. § 170.923(b).

⁶³⁵ *Id.*

⁶³⁶ 25 C.F.R. § 170.926.

⁶³⁷ *Id.*

⁶³⁸ 25 C.F.R. § 170.925.

⁶³⁹ *Id.*

⁶⁴⁰ 23 U.S.C. § 120.

projects.⁶⁴¹ State transportation agencies are to coordinate any application with the appropriate federal land agency or tribal government. Tribes and federal agencies are encouraged to work with states in developing and submitting project applications, which must be submitted through the states. The project selection is discretionary, and selection is made by the FHWA Administrator within available funding. In recent years, this program has been heavily earmarked by Congress.⁶⁴²

6. Tribal Technical Assistance Centers

The Tribal Technical Assistance Program (TTAP) cooperative agreements have statutory authorization for their existence and funding.⁶⁴³ ISTEA provided for research funding for not less than two education and assistance centers designed to provide transportation assistance to Indian tribal governments.⁶⁴⁴ During ISTEA, the FHWA and BIA jointly funded four such Indian Technical Assistance Centers. The centers were provided with 100 percent federal funding to provide training to American Indian tribal governments on intergovernmental transportation planning and project selection, as well as tourism and recreational travel.⁶⁴⁵

TEA-21 repealed Section 326 and amended Title 23 by adding Chapter 5, entitled "Research and Technology."⁶⁴⁶ At present, there are six TTAP centers, all funded through cooperative agreements with educational institutions.⁶⁴⁷ These centers con-

duct workshops, distribute transportation materials, and provide technical training on a continual basis. The 2005 highway legislation reauthorizes the TTAP centers and specifically provides for 100 percent federal funding for the centers.⁶⁴⁸

I. FEDERAL TRANSIT PROGRAMS INVOLVING INDIAN TRIBES

The FTA is one of 11 modal administrations in the U.S. DOT. It functions through a Washington, D.C., headquarters office and 10 regional offices that assist transit agencies in all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. FTA provides financial assistance for public transportation systems, including buses, subways, light rail, commuter rail, monorail, passenger ferry boats, trolleys, inclined railways, and people movers. FTA oversees thousands of grants to hundreds of state and local transit providers, primarily through its 10 regional offices. The grantees are responsible for managing their programs in accordance with federal requirements, and FTA is responsible for ensuring that grantees follow federal mandates along with statutory and administrative requirements.⁶⁴⁹

Prior to SAFETEA-LU, FTA's statutory authority, regulations, and policy guidance did not establish any specific assistance programs for Indian tribes or tribal entities as such, but it was clear that an "Indian tribe" was eligible to become a grant recipient.⁶⁵⁰ However, an Indian tribal government, like a state or local government, must agree to certain conditions if it chooses to receive federal financial assistance from FTA. Acceptance of these conditions is, in effect, a matter of contract between the FTA and the grantee. One particular condition that may be of interest to tribal governments is the requirement that recipients of FTA grants who will let \$250,000 or more in FTA-assisted contracts (exclusive of transit vehicle purchases) must have a DBE program, as mandated by Section 1101(b) of TEA-21. A recipient is "not eligi-

⁶⁴¹ 23 U.S.C. § 202(b).

⁶⁴² Sec. 1101(a)(9)(D) of SAFETEA-LU authorizes \$1.41 billion over 5 years for PLH funding.

⁶⁴³ 23 U.S.C. § 204(b) and 23 U.S.C. § 504(b), Training and Education.

⁶⁴⁴ *Id.* § 6004, which amended 23 U.S.C. chap. 3 by adding a new § 326, "Education and Training Program." TEA-21 continued this funding and there are now six TTAP Centers nationwide.

⁶⁴⁵ ISTEA, § 6004, 23 U.S.C. § 326(b), as amended.

⁶⁴⁶ 23 U.S.C. § 504(b)(2)(D)(ii) authorizes the Secretary to enter into grants, cooperative agreements, or contracts to operate local technical assistance program centers (LTAPs) to provide transportation technical assistance to Indian tribal governments. The Federal Lands Funding for TTAPs is set forth in 23 U.S.C. § 204(b), which provides that the Secretary of Interior may reserve funds from the Bureau of Indian Affairs (BIA) administrative funds associated with the Indian reservation roads (IRR) program to finance the Indian technical centers authorized under 504(b).

⁶⁴⁷ The centers are located at Michigan Tech University; Colorado State University; Eastern Washington University (offices in Spokane and Sitka, Alaska); Oklahoma

State University; Great Plains Tribal College; and in California to serve tribes in Nevada and California.

⁶⁴⁸ Sec. 5204 of SAFETEA-LU.

⁶⁴⁹ http://www.fta.dot.gov/4862_ENG_HTML.htm.

⁶⁵⁰ 49 U.S.C. § 5302(a)(6): Local governmental authority. The term "local governmental authority" includes—

1. a political subdivision of a State;
2. an authority of at least one State or political subdivision of a State;
3. an Indian tribe; and
4. a public corporation, board, or commission established under the laws of a State.

ble to receive financial assistance unless DOT has approved your DBE program and you are in compliance with it....” and the DOT DBE regulation.⁶⁵¹ This requirement remains unchanged with the 2005 reauthorization.

Under the U.S. DOT’s DBE program, Native Americans are presumed to be socially and economically disadvantaged individuals.⁶⁵² This means that a small business owned and controlled by Native Americans is eligible to be certified as a DBE. A small business firm owned by a tribal organization may also be eligible for certification.⁶⁵³

Title III of SAFETEA-LU greatly enlarged the role of public transportation in Indian country.⁶⁵⁴ Significantly, the Act explicitly defines “recipients” to include a state or Indian tribe that receives a federal transit program grant from the federal government.⁶⁵⁵ The Act provides for \$45 million for Indian tribe transit grants for FY 2005–09.⁶⁵⁶ The change of words from “mass” to “public” reflects the broader applicability of transit systems beyond urban areas.⁶⁵⁷ The former planning requirements are

⁶⁵¹ 49 C.F.R. § 26.21, Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

(2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) exceeding \$ 250,000 in FTA funds in a Federal fiscal year;

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

⁶⁵² 49 C.F.R. § 26.5.

⁶⁵³ 49 C.F.R. § 26.73(i).

⁶⁵⁴ Sec. 3001 *et seq.* of SAFETEA-LU, entitled “Federal Public Transportation Act of 2005.”

⁶⁵⁵ SAFETEA-LU § 3013(a)(a)(1).

⁶⁵⁶ SAFETEA-LU § 3013(c)(c)(1).

⁶⁵⁷ House Bill language, § 3001 in Conference Report on H.R. 3.

amended,⁶⁵⁸ and require that the state’s general public transportation planning process consider the concerns of Indian tribal governments and federal land management agencies that have jurisdiction over land within the state boundaries.⁶⁵⁹ The Act further requires the development of a 20-year, long-range transportation plan that provides for the development and implementation of the intermodal transportation system of the state. With respect to an area of the state under the jurisdiction of an Indian tribal government, the statewide long-range plan is to be developed in consultation with the tribal government and the Secretary of the Interior.⁶⁶⁰ Similarly, the statewide public transportation improvement program, which is updated at least every 4 years, also requires appropriate tribal government consultation.⁶⁶¹

Clearly, the Congress recognized the importance of improving public transportation in Indian country. This is in accord with previous regulatory policy. Under the recent Final Rule on Indian Reservation Roads, Policies, and Procedures, “transit” is an eligible activity, i.e., use of IRR funds is very broadly defined.⁶⁶²

J. PLANNING AND PROJECT DEVELOPMENT ACTIVITIES

1. Planning⁶⁶³

a. Transportation Planning to Include Tribal Governments

In view of the sovereign status of the Indian tribes, it is important to recognize during planning and project development that a government-to-government relationship is being entered into when a state or local government plans a highway project on lands under jurisdiction of Indian tribal governments. Congress underscored this feature of transportation planning when it enacted ISTEA,⁶⁶⁴ first by defining “public authority” to include “Indian tribe,”⁶⁶⁵ and second by adding new statewide planning requirements which, *inter alia*, mandate

⁶⁵⁸ 49 U.S.C. § 5304.

⁶⁵⁹ SAFETEA-LU § 3006(9)(e)(2).

⁶⁶⁰ SAFETEA-LU § 3006(e)(2) and (f)(2)(C).

⁶⁶¹ SAFETEA-LU § 3006(g)(1)(C).

⁶⁶² 25 C.F.R. § 170.148–170.152.

⁶⁶³ See FHWA Web site for Tribal Planning, *available at* <http://www.planning.dot.gov/tribal.asp>.

⁶⁶⁴ Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

⁶⁶⁵ *Id.* § 1005, amending 23 U.S.C. § 101: “The term ‘public authority’ means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.”

the development of statewide plans which "shall, at a minimum, consider...[t]he concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State."⁶⁶⁶ In addition, ISTEA required that with respect to areas of the state under Indian tribal government jurisdiction, the long-range transportation plan be developed in consultation with the tribal government and the Secretary of the Interior.⁶⁶⁷ Finally, ISTEA added the requirement that the STIP also be developed in similar consultation for areas of the state under the jurisdiction of an Indian tribal government.⁶⁶⁸ The planning requirements for states and Indian tribal governments coupled with increased funding for the IRR program—\$191 million for years 1991–95—greatly increased the visibility of transportation issues in Indian country.

In light of the requirements of ISTEA and the new emphasis on planning, the U.S. DOT issued new regulations on statewide planning on October 28, 1993,⁶⁶⁹ which significantly amplify the statutory requirements. These regulations, which apply to both FHWA programs and FTA programs, amended the regulations of Title 23, C.F.R., Part 450—Planning Assistance and Standards. Subsection 450.208 prescribes 23 factors that shall be considered, analyzed, and reflected in the planning process products, including "(23) The concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State." Subsection 450(b) provides as follows:

The degree of consideration and analysis of the factors should be based on the scale and complexity of many issues, including transportation problems, land use, employment, economic development, environmental and housing and community development objectives, the extent of overlap between factors and other circumstances statewide or in subareas within the State.

Under Section 450.210, Coordination, each State, in cooperation with participating organizations "such as...Indian tribal governments...shall, to the extent appropriate, provide for a fully coordinated process," including 13 listed categories, such as: "(5) Transportation planning carried out by the State with transportation planning carried out by Indian tribal governments;" and "(12) Transportation planning with analysis of social, economic, employment, energy, environmental, and housing and community development effects of transportation actions."

⁶⁶⁶ *Id.* § 1025(a), amending 23 U.S.C. § 135. Codified at 23 U.S.C. § 135(d)(2).

⁶⁶⁷ 23 U.S.C. § 135(d)(2)(c).

⁶⁶⁸ 23 U.S.C. § 135(f)(B)(iii).

⁶⁶⁹ 58 Fed. Reg. 58040, 23 C.F.R., pt. 450 and 49 C.F.R., pt. 613 (Oct. 28, 1993).

Subsection 450.214(c) provides that in developing the statewide plan, the state shall, *inter alia*, "(2) Cooperate with the Indian tribal government and the Secretary of the Interior on the portions of the plan affecting areas of the State under the jurisdiction of an Indian tribal government;"

Section 450.104 defines the key terms "consultation," "cooperation," and "coordination," as follows:

Consultation means that one party confers with another identified party and, prior to taking action(s), considers that party's views.

Cooperation means that the parties involved in carrying out the planning, programming and management systems processes work together to achieve a common goal or objective.

Coordination means the comparison of the transportation plans, programs, and schedules of one agency with related plans, programs and schedules of other agencies or entities with legal standing, and adjustment of plans, programs and schedules to achieve general consistency.

At present, the FHWA/FTA environmental regulations in 23 C.F.R. Part 771, which prescribe the procedures for compliance with NEPA,⁶⁷⁰ exempt "regional" transportation plans from preparation of environmental analysis.⁶⁷¹ This "exemption" is supported by case law.⁶⁷² While the Statewide Planning Regulations place great emphasis on, and establish requirements concerning, the environmental effects of transportation decisions, they do not mandate a NEPA environmental analysis. However, the Council on Environmental Quality (CEQ) regulations provide that "agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts."⁶⁷³ Given the importance to Indian tribes of reversing the loss of tribal resources and preserving the integrity of tribal lands, state transportation planning and project development will necessitate the use of environmental inventorying. However, since NEPA documents are to be prepared before any irreversible and irretrievable

⁶⁷⁰ Pub. L. No. 91-190, Jan. 1, 1970, 83 Stat. 852, 42 U.S.C. §§ 4321, *et seq.*

⁶⁷¹ See 23 C.F.R. § 109(a)(1) (1993):

The provisions of this regulation and the CEQ regulations apply to actions where the Administration exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation.

⁶⁷² See, e.g., *Atlanta Coalition on Transportation Crisis v. Atlanta Reg'l Comm'n*, 599 F.2d 1333 (5th Cir. 1979).

⁶⁷³ 40 C.F.R. § 1501.2.

commitment of resources, any firm commitments prior to full NEPA compliance must be avoided.⁶⁷⁴

SAFETEA-LU reemphasizes the importance of planning by amending Title 23, U.S.C. §§ 134 and 135.⁶⁷⁵ The requirements to consult with tribal governments are again set forth both for statewide planning and the long-range transportation plan.⁶⁷⁶ Finally, tribal governments are specifically included in the section addressing efficient environmental reviews for project decisionmaking.⁶⁷⁷

b. Executive Initiatives on Government-to-Government Relations

There have been a series of executive branch initiatives on government-to-government relations. These initiatives, beginning with President Reagan in 1984, stemmed from a policy initiated by President Nixon and are listed below.⁶⁷⁸

(1) *Presidential Indian Policy Statement of January 24, 1983*.⁶⁷⁹—Pledged a government-to-government relationship between the U.S. Government and Indian tribes.

(2) *Presidential Memorandum of April 29, 1994: Government-to-Government Relations with Native American Tribal Governments*.⁶⁸⁰—Directed all executive departments and agencies to implement activities affecting Indian tribal rights or trust resources “in a knowledgeable, sensitive manner respectful of tribal sovereignty,” mandating six guiding principles:

- a. Operate within a government-to-government relationship with federally recognized tribal governments;
- b. Consult to the greatest extent practicable and permitted by law with Indian tribal governments before taking actions that affect federally recognized tribes;
- c. Assess the impact of activities on tribal trust resources and assure that tribal interests are considered before the activities are undertaken;
- d. Remove procedural impediments to working directly with tribal governments on activities that affect trust property or governmental rights of tribes;
- e. To the extent permitted by law, design solutions and tailor federal programs as appropriate to address specific or unique needs of tribal communities; and
- f. Cooperate with other agencies to accomplish these goals.

Following issuance of the April 29, 1994, Presidential Memorandum, program development guidance emphasized that FHWA/FTA field offices and the states should take every opportunity to encourage Indian tribes to become involved in the planning process, particularly in development of long-range plans.⁶⁸¹ Subsequent guidance strongly encouraged FHWA Division Administrators to meet with tribal government officials and establish dialogues with tribal governments leading to a better understanding of transportation needs, cultural issues, and resource impacts, and resulting in added benefit to policy, planning, and the project development process.⁶⁸²

(3) *FHWA Indian Task Force Report (February 4, 1998)*.⁶⁸³—The FHWA Indian Task Force Report of February 4, 1998, was issued to provide guidance regarding FHWA’s relationship with federally recognized tribal governments with respect to the Federal Lands Highway and Federal-Aid Highway programs. Paragraph F of the report, entitled “Fed-

⁶⁷⁴ See *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (EA/Fonsi in support of decision granting Makah Indian Tribe authorization to resume whaling was set aside because federal defendants had signed a contract obligating them to make a proposal to the International Whaling Commission for a gray whale quota and to participate in the harvest of those whales; *Held*: In making such a firm commitment before preparing an EA, the federal defendants failed to take a “hard look” at the environmental consequences of their actions and therefore violated NEPA.) See also Todd Miller, *Exercising Cultural Self-Determination: The Mahah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165 (2001).

⁶⁷⁵ SAFETEA-LU § 6001.

⁶⁷⁶ *Id.*

⁶⁷⁷ SAFETEA-LU § 6002.

⁶⁷⁸ “The terminology of a ‘government-to-government’ relationship that is based on a consultation process originated in the 1970s as part of the Tribal Self-Determination Policy initiated by President Nixon...embodied in a series of federal policy documents begun by President Reagan in 1984...,” NCAI/NCSL Models of Cooperation, *supra* note 475, at 33.

⁶⁷⁹ Reagan Administration Indian Policy Initiatives, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983).

⁶⁸⁰ 59 Fed. Reg. 22951 (May 4, 1994).

⁶⁸¹ Memorandum dated Dec. 12, 1994, from FHWA’s Associate Administrators for Program Development, Federal Lands Highway Program and Grants Management, to FHWA Regional Federal Highway Administrators, Regional Federal Transit Administrators and Federal Lands Highway Division Engineers.

⁶⁸² Memorandum of Feb. 24, 1998, from the Federal Highway Administrator Kenneth R. Wykle to the FHWA Leadership Team, Subject: Action: Guidance on Relations with American Indian Tribal Governments, transmitting FHWA Indian Task Force Report dated Feb. 4, 1998. This guidance was updated in 2004.

⁶⁸³ *Id.*

eral-aid Tribal Planning and Environmental Issues,” includes the following statement:⁶⁸⁴

Although traditionally environmental issues and processes have been handled in project development through the FHWA National Environmental Policy Act (NEPA) process, environmental issues are now being addressed to a greater degree in the transportation planning process. The groundwork for consideration of sensitive environmental and community values is laid out during the planning process and continued during the project development process. In light of this, to the greatest extent practical and permitted by law, FHWA will ensure that during the transportation planning and FHWA NEPA processes, tribes are consulted and tribal concerns are considered for federally funded state transportation projects that impact tribal trust resources, tribal communities or Indian interests....

(4) *Presidential Executive Order 13084 of May 14, 1998: Consultation and Coordination with Indian Tribal Governments.*⁶⁸⁵—This first consultation and coordination Executive Order (E.O.) recognized that the United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights. It ordered, among other things, the establishment of regular and meaningful consultation and collaboration with Indian tribal governments in the development of *regulatory practices* on federal matters that significantly or uniquely affect their communities.

(5) *Presidential Executive Order 13175 of November 6, 2000: Consultation and Coordination with Indian Tribal Governments.*⁶⁸⁶—This E.O. revoked and replaced E.O. 13084 and ordered the establishment of regular and meaningful consultation and collaboration with tribal officials in the development of *federal policies that have tribal implications*. “Policies that have tribal implications” refers to regulations, legislative comments or proposed regulation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

(6) *Presidential Executive Order 13336 and Memorandum to Heads of Executive Departments and Agencies Entitled: Government-to-Government Relationships with Tribal Governments, dated September 23, 2004.*—This E.O. adopted a national policy of self-determination for Indian tribes and committed the administration to continuing work

with federally recognized tribal governments on a government-to-government basis.

2. Environmental and Related Issues⁶⁸⁷

a. General

Whether a specific federal statute of general applicability, such as NEPA, applies to activities on Indian lands depends on the intent of Congress.⁶⁸⁸ Certainly, such laws will be held to apply where Indians or tribes are expressly covered, but they will also apply where it is clear from the statutory terms that such coverage was intended.⁶⁸⁹ Where retained sovereignty is not invalidated and there is no infringement of Indian rights, Indians and their property are normally subject to the same federal laws as others.⁶⁹⁰ There were no reported cases found where an Indian tribe had successfully challenged applicability of federal environmental laws to Indian lands. The BIA routinely addresses environmental matters as a part of its trust responsibility.

Federal statutory environmental law has been a fertile field for litigation between states and tribes both as to applicability and jurisdiction.⁶⁹¹ Thus far, state environmental laws have been held not to apply to Indian reservations.⁶⁹² However, while “(s)tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply,”⁶⁹³ the Supreme Court has not established an inflexible *per se* rule precluding state jurisdiction in the absence of express congressional consent.⁶⁹⁴ As the Court said in *New Mexico v. Mescalero Apache Tribe*:⁶⁹⁵ “[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and ...in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of

⁶⁸⁷ See generally DESKBOOK, *supra* note 16, chap. 10, Environmental Regulation, at 263–300.

⁶⁸⁸ COHEN, *supra* note 8, at 282.

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.* at 283.

⁶⁹¹ See generally B. Kevin Gover and Jana L. Walker, *Tribal Environmental Regulation*, 39 FED. B.J. 438 (1989); DESKBOOK, *supra* note 16, chap. 10, at 263–300.

⁶⁹² *State of Wash. Dep’t of Ecology v. U.S. Env’tl. Prot. Agency*, 752 F.2d 1495 (9th Cir. 1985), which addressed the issue of whether the Resource Conservation and Recovery Act (RCRA) authorizes state authority over tribal lands.

⁶⁹³ *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973).

⁶⁹⁴ *California v. Cabazon Band of Mission Indians*, 480 U.S. at 214–15.

⁶⁹⁵ 462 U.S. at 331–32.

⁶⁸⁴ *Id.* at 5.

⁶⁸⁵ 63 Fed. Reg. 27655 (May 19, 1998).

⁶⁸⁶ 65 Fed. Reg. 67249 (Nov. 9, 2000).

tribal members.” But, the Court made clear in *Washington v. Confederated Tribes of the Colville Indian Reservation, supra*,⁶⁹⁶ the tribes have no right “to market an exemption” from state law.

b. NEPA Compliance⁶⁹⁷

NEPA establishes a national policy for the protection and enhancement of the human environment. One of the continuing responsibilities under the Act is to “preserve important historic, cultural, and natural aspects of our national heritage.”⁶⁹⁸ It requires that an agency must prepare an Environmental Impact Statement (EIS) for all “proposals for legislation and other major federal actions significantly affecting the quality of the human environment.”⁶⁹⁹ The CEQ regulations implementing NEPA provide agencies with specific guidelines for compliance.⁷⁰⁰ NEPA is silent on its applicability to Indian country and Indian tribal agencies, and the BIA initially took the position that it was not applicable to Indian country, since only federal approvals were involved. In *Davis v. Morton*,⁷⁰¹ the Court of Appeals for the Tenth Circuit addressed the applicability of NEPA to the BIA approval of a 99-year lease on the Tesuque Indian Reservation in Santa Fe County, New Mexico. The Court of Appeals held as follows: “We conclude approving leases on federal lands constitutes major federal action and thus must be approved according to NEPA mandates. As our court had occasion to consider once before, this Act was intended to include all federal agencies, including the Bureau of Indian Affairs.”⁷⁰²

Subsequent to this ruling, the BIA, in cooperation with the various Indian tribes, began prepar-

ing environmental analyses in compliance with NEPA. BIA has issued a NEPA handbook to provide guidance to BIA personnel and others who seek to use Indian lands that are subject to federal approval. Normally, the BIA would be the jurisdictional agency, but it may also act as a “cooperating agency” with another federal agency, such as FHWA or FTA, who is acting as “lead agency,” under the CEQ regulations.⁷⁰³ The CEQ regulations mandate that the lead agency invite “the participation of...any affected Indian tribe” in the scoping process.⁷⁰⁴ A tribe, although lacking approval authority, may still be a cooperating agency, which would assure its direct involvement throughout the NEPA process.⁷⁰⁵ The Montana Department of Highways started the practice of entering into a memorandum of understanding with FHWA and the jurisdictional Indian tribe regarding the procedures to be followed in preparation of an EIS for highway improvements.⁷⁰⁶

The following cases dealing with NEPA compliance relative to Indian lands are noteworthy:

- *Manygoats v. Kleppe*⁷⁰⁷ determined that individual members of an Indian tribe could challenge the adequacy of an EIS without joinder of the tribe under Rule 19, Fed. R. Civ. P.⁷⁰⁸
- *County of San Diego v. Babbitt*⁷⁰⁹ examined the CEQ regulation requiring agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives.”⁷¹⁰ The County challenged the adequacy of an EIS for construction of a solid waste disposal

⁷⁰³ 40 C.F.R. pt 1500, §§ 1501.5, 1501.6.

⁷⁰⁴ 40 C.F.R. § 1501.7(a).

⁷⁰⁵ See 40 C.F.R. § 1508.5, which provides, *inter alia*: “A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.”

⁷⁰⁶ *E.g.*, the memorandum of understanding (MOU) among the FHWA, Montana Department of Highways, and the Confederated Salish and Kootenai Tribes of the Flathead Nations, dated May 29, 1991, covering improvements to U.S. 93. See 2002 report on this MOU and related activities at <http://www.fhwa.dot.gov/hep/tribaltrans/montsalish.htm>.

⁷⁰⁷ 558 F.2d 556 (10th Cir. 1977).

⁷⁰⁸ The EIS covered the proposed BIA approval of an agreement between the Navajo Tribe and Exxon for mining leases. The Court noted that “dismissal of the action for nonjoinder of the Tribe would produce an anomalous result. No one, except the Tribe, could seek review of an [EIS] covering significant federal action.... NEPA is concerned with national environmental interests. Tribal interests may not coincide with national interests....” (Marygoats, 558 F.2d at 558).

⁷⁰⁹ 847 F. Supp. 768 (S.D. Cal. 1994).

⁷¹⁰ 40 C.F.R. § 1502.14.

⁶⁹⁶ 447 U.S. at 155.

⁶⁹⁷ FHWA/FTA guidance can be found on FHWA’s Web site: <http://www.fhwa.dot.gov/environment/htm>.

⁶⁹⁸ 42 U.S.C. § 4331(b)(4).

⁶⁹⁹ 42 U.S.C. § 4332(2)(c).

⁷⁰⁰ See 40 C.F.R. §§ 1500–1508. As noted in *National Indian Youth Council v. Watt*, 664 F.2d 220, 224–25, (1981), CEQ was created by NEPA to advise the President on environmental policy. See 42 U.S.C. § 4342. A 1970 Presidential Order authorized CEQ to issue “guidelines” for the preparation of statements on proposals affecting the environment. See *Andrus v. Sierra Club*, 442 U.S. 347, 353 n.10, 99 S. Ct. 2335, 2339, 60 L. Ed. 2d 943. These guidelines were advisory. *Id.* at 356–57. A 1977 Presidential Order required CEQ to issue regulations for NEPA procedure. *Id.* at 357. The guidelines thus became mandatory. *Id.* at 357 and 358.

⁷⁰¹ 469 F.2d 593 (10th Cir. 1972).

⁷⁰² *Id.* at 597–98. See also *Nat’l Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971). *Accord*, *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975) (Approval of coal leases constituted a “major federal action” requiring an EIS).

facility on the Campo Band of Mission Indians Reservation for, among other things, the failure to consider alternative sites off the reservation. The district court held that since the purpose of the project was to provide a significant economic development opportunity for the tribe, the range “need not extend beyond those alternatives reasonably related to the purposes of the project.”⁷¹¹ The court found that although the BIA did not consider landfill sites off the reservation, it did properly consider and analyze a reasonable range of alternatives on the reservation for meeting the goals of the project, thus meeting the requirements of NEPA.⁷¹²

• *Muckleshoot Indian Tribe v. U.S. Forest Service*⁷¹³ was a challenge to a land exchange whereby the Forest Service would transfer to the Weyerhaeuser Company land in the area of Huckleberry Mountain in Washington State, used historically and presently by the Tribe for cultural, religious, and resource purposes. The Tribe, *inter alia*, claimed that the EIS failed to consider the cumulative impact of the exchange, as required by CEQ regulation 40 C.F.R. § 1508.7, and failed to consider an adequate range of alternatives. *Held*: “...the cumulative impact statements that are provided in the EIS are far too general and one-sided to meet NEPA requirements...[and] Forest Service violated NEPA by failing to consider a range of appropriate alternatives to the proposed exchange.”⁷¹⁴

• *Colorado River Indian Tribes v. Marsh*⁷¹⁵ was a challenge to the U.S. Army Corps of Engineers’ (COE’s) issuance of a permit to a private developer for placement of riprap along a riverbank without preparing an EIS. The developer proposed to construct single-family homes and commercial facilities on land situated between a major highway and the river and adjacent to land containing several recorded significant cultural and archaeological sites. The COE retracted its Draft EIS, which had found significant impacts to the adjacent land, and limited the scope of its environmental assessment to activities within its defined jurisdiction. *Held*: “In limiting the scope of its inquiry, the Corps acted improperly and contrary to the mandates of NEPA.... The Corps should have analyzed the indirect effects of the bank stabilization on both ‘on site’ and ‘off site’ locations.”⁷¹⁶

⁷¹¹ *Babbitt*, 847 F. Supp. at 776.

⁷¹² *Id.*

⁷¹³ 177 F.3d 800 (9th Cir. 1999).

⁷¹⁴ *Id.* at 811–12.

⁷¹⁵ 605 F. Supp. 1425 (C.D. Cal. 1985).

⁷¹⁶ *Id.* at 1433.

c. Cultural and Religious Concerns of Indians⁷¹⁷

In addition to the specific environmental statutes noted above, the following federal laws and legal issues should also be considered when planning a project on or near Indian lands. Consultation with the Indian tribe is either mandated or recommended in each instance. The U.S. National Park Services, National Center for Cultural Resources, maintains a Native American Consultation Database for identifying consultation contacts for Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations, which provides a starting point for the consultation process by identifying tribal leaders and contacts.⁷¹⁸

(1) *AIRFA*⁷¹⁹ and *First Amendment Free Exercise and Establishment Issues*.⁷²⁰—*AIRFA* provides that

On or after August 11, 1978 it shall be the policy of the United States to protect and preserve for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express, and exercise their traditional religions, including but not limited to access to religious sites, use and possession of sacred objects, and freedom to worship through ceremonies and traditional rites.

John Petoskey notes that “since the late 1970s a new issue in First Amendment law has confronted the federal judiciary [as] American Indians are increasingly making claims to the protection of the First Amendment for their religious practices in opposition to the decisions of federal land managers.”⁷²¹ Canby observes that:

Enforcement of the right of free exercise of religion often takes a distinctive turn when Indians are involved. Many Indian religious beliefs and practices center on particular places or objects. The places may be on federal lands outside of any reservation. The objects may be eagle feathers or peyote. In these

⁷¹⁷ See generally CANBY, *supra* note 8, at 339–45; Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623 (2004); David S. Johnston, *The Native American Pledge: Protection and Preservation of Sacred Sites*, 8 WIDENER L. SYMP. J. 443 (2002). Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RES. & ENV’T 19–78 (1997); JOHN PETOSKEY, *Indians and the First Amendment*, in AMERICAN POLICY IN THE TWENTIETH CENTURY, 221–37 (3d. ed. 1985).

⁷¹⁸ This NACD may be accessed at: <http://web.cast.uark.edu/other/nps/nacd>.

⁷¹⁹ Act of Aug. 11, 1978, Pub. L. No. 95-341; 92 Stat. 469, 42 U.S.C. § 1996, *et. seq.*

⁷²⁰ The Free Exercise Clause of the first Amendment provides that “Congress shall make no law...prohibiting the free exercise [of religion].” U.S. CONST. amend. 1.

⁷²¹ PETOSKEY, *supra* note 717, at 221.

cases, federal management or regulation may interfere substantially with religious uses. In recognition of this problem, Congress in 1978 passed an unusual statute called the “American Indian Religious Freedom Act [AIRFA].”⁷²²

In one of the early cases construing AIRFA, a federal district court concluded that the Act did not create a cause of action in federal courts for violation of rights of religious freedom:

The Act is merely a statement of the policy of the federal government with respect to traditional Indian religious practices.... This court has concluded that with respect to the free exercise rights of plaintiffs, the conduct of defendants complied with the dictates of the first amendment. The American Indian Religious Freedom Act requires no more.⁷²³

In *Wilson v. Block*, the Court of Appeals for the D.C. Circuit further interpreted AIRFA in the context of NEPA compliance.⁷²⁴ There, the Hopi and Navajo Indian Tribes had challenged the Forest Service’s permitted expansion of the government-owned Snow Bowl ski area on the San Francisco Peaks in Coconino National Forest because it would interfere with religious ceremonies and practices of their people. The tribes contended that AIRFA “proscribes all federal land uses that conflict or interfere with traditional Indian religious beliefs or practices, unless such uses are justified by compelling government interests.”⁷²⁵ The court of appeals declined to give such a broad reading to AIRFA, but recognized a duty under NEPA:

Thus AIRFA requires federal agencies to consider, but not necessarily defer to, Indian religious values. It does not prohibit agencies from adopting all land

uses that conflict with traditional Indian religious beliefs or practices. Instead, an agency undertaking a land use project will be in compliance with AIRFA if, in the decision-making process [NEPA], it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices.... [W]e find that the Forest Service complied with AIRFA...[because]...views expressed [by Indian leaders] were discussed at length in the [FEIS] and were given due consideration in the evaluation of the alternative development schemes proposed for Snow Bowl.⁷²⁶

The Supreme Court addressed AIRFA in *Lyng v. Northwest Indian Cemetery Protective Association*,⁷²⁷ a challenge of the Forest Service’s road building and timber harvesting decisions by an Indian organization, individual Indians, a nature organization, and others, for alleged violation of the First Amendment’s Free Exercise Clause. The road project covered a 6-mi paved segment through the Chimney Rock section of the Six Rivers National Forest, situated between two other portions of the road already completed.⁷²⁸ A Forest Service–commissioned study found that the entire area “is significant as an integral and indispensable [sic] part of Indian religious conceptualization and practice.” Specific sites are used for certain rituals, and “successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.” The study concluded that constructing a road along any of the available routes “would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeways of Northwest California Indian peoples.” The report recommended that the road not be completed.⁷²⁹ The Forest Service decided not to adopt this recommendation and prepared a Final EIS for construction of the road, selecting a route that avoided archaeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities.⁷³⁰

Justice O’Connor, writing for the majority, noted that “[e]xcept for abandoning its project entirely, and thereby leaving the two existing segments of road to dead-end in the middle of the National Forest, it is difficult to see how the Government could have been more solicitous,” finding that [s]uch solicitude accords with the policy expressed in AIRFA, and further finding that “[n]o where in the

⁷²² CANBY, *supra* note 8, at 339.

⁷²³ *Crow v. Gullet*, 541 F. Supp. 785, 793 (D.S.D. 1982), (citing *Hopi Indian Tribe v. Block*, 8 ILR at 3076), *affirmed*, 706 F.2d 856 (8th Cir. 1983). CANBY, *supra* note 8, at 340–41, points out that:

Several controversies have involved attempts by government to develop its public lands in a manner that adversely affects Indian religious practices. Initially, the lower courts resolved such controversies by balancing the governmental interest in developing the particular project against the burden it placed on Indian religion. The balancing nearly always came out in favor of the government. The courts rejected, for example, Indian attempts to prevent the government from inundating sacred places upstream from federal dams. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980); *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980). They also rejected attempts to prevent expansion of a ski area on a sacred mountain...*Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), and the establishment of a state park in sacred ground, *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983).

⁷²⁴ *Wilson v. Block*, 708 F.2d 735, 747 (D.C. Cir. 1983).

⁷²⁵ *Id.* at 745.

⁷²⁶ *Id.* at 747.

⁷²⁷ 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).

⁷²⁸ *Id.* at 442.

⁷²⁹ *Id.* at 443.

⁷³⁰ *Id.*

law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.⁷³¹

In addressing the First Amendment challenge, the Court's ruling rejected balancing of interests as inappropriate and "presumably puts an end to free exercise challenges to governmental development projects."⁷³² The Court stated:

[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [cannot] require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." [citation omitted].... Even if we assume that...the G-O road will "virtually destroy the Indians' ability to practice their religion,"...the Constitution simply does not provide a principle that could justify upholding respondent's legal claims.... The first amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.... What ever rights the Indians have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land. *Cf. Bowen v. Roy*, 476 U.S., at 724-727.⁷³³

The Court's decision, despite closing the door on Free Exercise claims, cautioned that

[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to use its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents. *Cf. Sherbert*, 374 U.S., at 422-23.

This statement should reduce any fear of "excessive entanglement" when government officials negotiate with native shamans in attempting to accommodate Native American religious practices.

President Clinton's E.O. No. 13007, "Indian Sacred Sites," issued on May 24, 1996, clearly shared the Court's exhortation. The E.O. directed federal agencies "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, to (1) accommodate access to ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred

sites."⁷³⁴ This E.O. is said to have filled a gap in AIRFA "by requiring federal agencies to avoid harming the physical integrity of such sacred sites."⁷³⁵ One commentator observes that since *Lyng*, "agencies like the Park Service, the Forest Service, and the Bureau of Land Management have all increasingly sought ways to protect many of the Indian sacred sites located on federal lands and to accommodate the religious and cultural practices associated with them."⁷³⁶

Sometimes this protection of Indian cultural and religious sites leads to challenges based on alleged violation of the First Amendment's Establishment Clause. For example, in *Bear Lodge Multiple Use Association v. Babbitt*,⁷³⁷ the Court reviewed a challenge, based on the Establishment Clause, to the order of the District Court of Wyoming, which ruled that the U.S. Secretary of the Interior lawfully approved a National Park Service plan to place a voluntary ban on climbing at Devil's Tower. Devil's Tower is a National Monument, as well as the place of creation and religious practice for many American Indians. The Court upheld the voluntary ban, but dismissed the case for lack of standing by the climber group due to failure to show injury in fact. The district court had properly concluded that a government policy benefiting Native American tribes did not constitute excessive entanglement with religion because "Native American tribes...are not solely religious organizations, but also represent common heritage and culture." 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998).

*Cholla Ready Mix v. Civish*⁷³⁸ was an Establishment Clause challenge in a highway case. The decision upholds the efforts of ADOT to discourage the use of materials from Woodruff Butte, Arizona, in state construction projects because of the Butte's religious, cultural, and historical significance to the Hopi Tribe, Zuni Pueblo, and Navajo Nation (the Tribes). Earlier, ADOT's allowance of materials mined from the Butte to being used in state highway construction projects had led to litigation involving the Tribes, Cholla, ADOT, and FHWA.⁷³⁹ In

⁷³⁴ 61 Fed. Reg. 26771.

⁷³⁵ Johnston, *supra* note 717, at 459, citing Grimm, *supra* note 717.

⁷³⁶ Yablon, *supra* note 717, at 1638.

⁷³⁷ 175 F.3d 814 (10th Cir. 1999).

⁷³⁸ CV-02-01185-FJM (9th Cir. 2004).

⁷³⁹ According to Cholla's complaint, ADOT faced years of controversy about the destruction of Woodruff Butte. A federal district court in previous litigation awarded the Hopi Tribe a preliminary injunction requiring consultation with the tribe before spending federal funds on a construction project using materials from Woodruff Butte because of the Butte's historical and cultural importance. The court did not rule that FHWA must engage in the §

⁷³¹ *Id.* at 455.

⁷³² CANBY, *supra* note 8, at 342. See also Yablon, *supra* note 717, at 1629-30.

⁷³³ *Lyng*, 485 U.S. at 450-52.

1999, ADOT promulgated new commercial source regulations, which require each applicant for a commercial source number to submit an environmental assessment that considers, *inter alia*, adverse effects on places eligible for listing on the National Register of Historic Places (NRHP). Woodruff Butte was declared eligible for listing on the NRHP in or around 1990. On June 26, 2000, ADOT denied Cholla's application for a new commercial source number because of the projected adverse effects on historic property on Woodruff Butte. Cholla filed suit alleging that the policy against using materials from the Butte in state construction projects, *inter alia*, violates Cholla's rights under the Establishment Clause of the First Amendment. The district court granted defendant's motion to dismiss.

On appeal, the court of appeals found Cholla's Establishment Clause claim to be premised on flawed analysis of the governing law. The court then outlined the governing law:

Government conduct does not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect is not to advance or inhibit religion, and (3) it does not foster excessive government entanglement with religion. *See, e.g. Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Particular attention is paid to whether the challenged action has the purpose or effect of endorsing religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989).

As to the issue of "secular purpose," the court found that ADOT's "actions have the secular purpose of carrying out state construction projects in a manner that does not harm a site of religious, historical, and cultural importance to several Native American groups and the nation as a whole."⁷⁴⁰ On

106 process for every possible material source site prior to the authorization of federal funds for an undertaking; however, the court did hold that once it became known that Woodruff Butte would be used as a materials source site, the FHWA was required to comply with the procedures set forth in 36 C.F.R. § 800.11.

⁷⁴⁰ The court of appeals noted that the secular purpose prong "does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 335, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987). The Court added that

carrying out government programs to avoid interference with a group's religious practices is a legitimate, secular purpose. *Id.*; *Kong v. Scully*, 341 F.3d 1132, 1140 (9th Cir. 2003) ("Accommodation of a religious minority to let them practice their religion without penalty is a lawful secular purpose."); *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002).

the "primary effect" issue, the court found that ADOT's policy "does not convey endorsement or approval of the Tribes' religions. *See County of Allegheny*, 492 U.S. at 592; *Buono v. Norton*, 371 F.3d 543, 548-50 (9th Cir. 2004)...."⁷⁴¹ Finally, on the "excessive entanglement" issue, the Court found that the "facts alleged cannot support the conclusion that defendant's actions excessively entangle the government with the Tribes' religions."⁷⁴²

(2) *National Historic Preservation Act of 1966 (NHPA)*.⁷⁴³—NHPA addresses the preservation of "historic properties," which are defined in the Act as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such property."⁷⁴⁴ Section 106 requires federal agencies to take into account the effects of an undertaking on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. In some cases, properties

⁷⁴¹ The court of appeals noted that the

Establishment Clause does not require governments to ignore the historical value of religious sites. Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP, including the National Cathedral in Washington, D.C.; the Touro Synagogue, America's oldest standing synagogue, dedicated in 1763; and numerous churches that played a pivotal role in the Civil Rights Movement, including the Sixteenth Street Baptist Church in Birmingham, Alabama.

⁷⁴² The Court, noting that the "only fact alleged relevant to entanglement is that the Tribes were consulted in the process of evaluating Cholla's application for a commercial source number." The Court found that

some level of interaction between government and religious communities is inevitable; entanglement must be "excessive" to violate the Establishment Clause. *Agonstini v. Felton*, 521 U.S. 203, 233 (1997); *KDM ex rel. WJM v. Reedsport School Dist.*, 196 Fed. 3d 1046, 1051 (9th Cir. 1999) (noting that courts consistently find that routine administrative contacts with religious groups do not create excessive entanglement).... The institutions benefited here, Native American tribes, are not solely religious in character or purpose. Rather, they are ethnic and cultural in character as well. *See, Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998) (concluding that a government policy benefiting Native American tribes did not constitute excessive entanglement with religion because "Native American tribes...are not solely religious organizations, but also represent a common heritage and culture").

⁷⁴³ Pub. L. No. 89-665, 80 Stat. 915, 16 U.S.C. § 470, *et seq.*

⁷⁴⁴ 16 U.S.C. § 470w.

may be eligible in whole or in part because of historical importance to Native Americans, including traditional religious and cultural importance.⁷⁴⁵ The 1992 Amendments to NHPA require all federal agencies to consult with Indian tribes⁷⁴⁶ or Native Hawaiian organizations for undertakings that may affect properties of traditional religious and cultural significance on or off tribal lands.⁷⁴⁷ The Section 106 regulations⁷⁴⁸ implementing the NHPA were last revised on December 12, 2000,⁷⁴⁹ and reflect these requirements. Section 36 C.F.R. § 800.2(c)(2)(ii)(A) provides that

The agency official⁷⁵⁰ shall ensure that consultation in the section 106 process provides the Indian tribe...a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's

⁷⁴⁵ ACHP guidance, "Consulting with Indian Tribes in the Section 106 Review Process," is available at <http://www.achp.gov/regs-tribes.html>. FHWA guidance on historic preservation, "Tribal Issues," is available at <http://environment.fhwa.dot.gov/histpres/tribal.htm>, with valuable links to ACHP sites and other FHWA guidance and information on Native American coordination, including: "Q&As on Tribal Consultation," <http://www.fhwa.dot.gov/hep/tribaltrans/tcqa.htm>.

⁷⁴⁶ NHPA defines "Indian Tribe" as an Indian Tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians (16 U.S.C. § 470w).

⁷⁴⁷ ACHP guidance, "Consulting with Indian Tribes in the Section 106 Review Process," (<http://www.achp.gov/regs-tribes.html>) provides that:

NHPA and ACHP's regulations require Federal agencies to consult with Indian tribes when they attach religious and cultural significance to a historic property regardless of the location of that property. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance. It is also important to note that while an Indian tribe may not have visited a historic property in the recent past, its importance to the tribe or its significance as a historic property of religious and cultural significance may not have diminished for purposes of Section 106.

⁷⁴⁸ 36 C.F.R. pt. 800.

⁷⁴⁹ 65 Fed. Reg. 7775.

⁷⁵⁰ 36 C.F.R. § 800.2(a) provides that "The agency official may be a State, local, or tribal government official who has been delegated responsibility for compliance with section 106...."

effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes...that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolved concerns about the confidentiality of information on historic properties.

The following cases dealing with NHPA compliance relative to Indian lands are noteworthy:

- *Apache Survival Coalition v. United States*⁷⁵¹ was an action to halt construction of several telescopes on Mount Graham, Arizona, within the Coronado National Forest, based upon, *inter alia*, violation of NHPA's obligation to undertake an additional Section 106 process when new and significant information is brought to the attention of the federal agency.⁷⁵² The court of appeals ruled that the laches standard used in NEPA cases applied to this NHPA claim.⁷⁵³ It concluded "that the six year period between 1985 when the Tribe first was solicited for input, and the date of filing suit constitutes unreasonable delay," barring the claim for laches.⁷⁵⁴ The decision noted that "the very information that the Coalition now wants the Forest Service to consider—the asserted importance of Mount Graham to San Carlos Apache religious practices and culture—would have been brought to the agency's attention by the Tribe had it not consistently ignored the NHPA process."⁷⁵⁵

- *Pueblo of Sandia v. United States*⁷⁵⁶ involved the issue of whether the Forest Service made a "reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register."⁷⁵⁷ The challenge was to the Forest Service undertaking to realign and reconstruct Las Huerfano Canyon Road, which lies in the Cibola National Forest, New Mexico, near the Sandia Pueblo reservation. The canyon is visited by tribal members to gather evergreen boughs, herbs, and plants used in cultural ceremonies and traditional healing practices, and it contains many shrines and ceremonial paths of religious and cultural significance to the Pueblo.⁷⁵⁸ The Pueblo alleged that the Forest Service failed to comply with NHPA when it refused to evaluate the canyon as a traditional cultural prop-

⁷⁵¹ 21 F.3d 895 (9th Cir. 1994).

⁷⁵² 36 C.F.R. § 800.11(b)(2).

⁷⁵³ *Apache*, 21 F.3d at 906.

⁷⁵⁴ *Id.* at 910.

⁷⁵⁵ *Id.* at 911–12.

⁷⁵⁶ 50 F.3d 856 (10th Cir. 1995).

⁷⁵⁷ 36 C.F.R. § 800.4(b).

⁷⁵⁸ *Pueblo of Sandia*, 50 F.3d at 857.

erty eligible for inclusion on the NRHP.⁷⁵⁹ The State Historic Preservation Officer (SHPO) initially concurred in the Forest Service's conclusion of ineligibility for the National Register, but later, upon learning that the Forest Service had withheld important information, withdrew his concurrence, recommending further evaluation.⁷⁶⁰

The court of appeals noted that the Forest Service requested information from the Sandia Pueblo and other local Indian tribes, but stated that

[A] mere request for information is not necessarily sufficient to constitute the 'reasonable effort' section 106 requires. Because communications from the tribes indicated the existence of traditional cultural properties and because the Forest Service should have known that tribal customs might restrict the ready disclosure of specific information, we hold that the agency did not reasonably pursue the information necessary to evaluate the canyon's eligibility for inclusion in the National Register.... We conclude...that the information the tribes did communicate to the agency was sufficient to require the Forest Service to engage in further investigations, especially in light of the regulations warning that tribes might be hesitant to divulge the type of information sought.⁷⁶¹

The decision stated that by "withholding relevant information from the SHPO during the consultation process...the Forest Service further undermined any argument that it had engaged in a good faith effort," holding that "the Forest Service did not make a good faith effort to identify historic properties in Las Huertas Canyon."⁷⁶²

• *Hoonah Indian Association v. Morrison*⁷⁶³ deals with the issue of what constitutes a historic "site" under NHPA. The NHPA issue had to do with whether the route or routes one clan of the Tlingits Indians, the Kiks.adi, followed when retreating from a battle with Russia in 1804 should have been listed by the Forest Service as a cultural site on the NRHP.⁷⁶⁴ The SHPO determined that the Survival

March Trail (designated in the record as the "Kiks.adi Survival March") was not eligible because it did not meet established criteria that "it have identified physical features" and that it be "a location where the people regularly returned to."⁷⁶⁵ The court of appeals found that the Forest Service followed the regulations and used the National Register criteria...and] [t]hose criteria do not support the Tribe's position."⁷⁶⁶ The decision noted: "That important things happened in a general area is not enough to make the area a 'site.' There has to be some good evidence of just where the site is and what its boundaries are, for it to qualify for federal designation as a historical site."⁷⁶⁷

• *Muckleshoot Indian Tribe v. U.S. Forest Service* involved a challenged land exchange in the area of Huckleberry Mountain.⁷⁶⁸ The NHPA issue was whether the Forest Service had adequately mitigated the adverse effect of transferring intact portions of the Divide Trail, a 17.5-mi historic aboriginal transportation route.⁷⁶⁹ The regulations offer three options to mitigate adverse effects, two of which were available to the Forest Service on this trail: (1) Conduct appropriate research "[w]hen the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research...."⁷⁷⁰ (2) An adverse effect becomes "not adverse" when the undertaking is limited to the "transfer, lease, or sale of a historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features."⁷⁷¹ The Forest Service selected option 1, the tribe disagreed, and the court of appeals agreed with the tribe: "We conclude that documenting the trail did not satisfy the Forest Service's obligations to minimize the adverse effect of transferring the intact portions of the trail."

(3) *Section 4(f) of the Department of Transportation Act of 1966*.⁷⁷²—Provides for a policy of making special effort to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites, mandating that transportation programs and projects may use such land, where determined by state

⁷⁵⁹ *Id.* at 858.

⁷⁶⁰ *Id.* at 858–59.

⁷⁶¹ *Id.* at 860. The court of appeals noted that the Forest Service received communications clearly indicating why more specific responses were not forthcoming. "At the meeting with the San Felipe Pueblo, tribal members indicated that 'they did not want to disclose any specific details of the site locations or activities.'" The Court went on to note that "this reticence to disclose details of their cultural and religious practices was not unexpected. National Register Bulletin 38 warns that 'knowledge of traditional cultural values may not be shared readily with outsiders' as such information is 'regarded as powerful, even dangerous' in some societies." *Id.* at 861.

⁷⁶² *Id.* at 862.

⁷⁶³ 170 F.3d 1223 (9th Cir. 1999).

⁷⁶⁴ *Id.* at 1230.

⁷⁶⁵ *Id.* at 1231. See 36 C.F.R. § 800.4(c)(3).

⁷⁶⁶ *Id.*

⁷⁶⁷ *Id.* at 1232.

⁷⁶⁸ *Muckleshoot*, 177 F.3d at 804.

⁷⁶⁹ *Id.* at 808.

⁷⁷⁰ 36 C.F.R. § 800.9(c)(1).

⁷⁷¹ 36 C.F.R. § 800.9(c)(3).

⁷⁷² Pub. L. No. 89-670, revised and recodified by Pub. L. No. 97-499, Jan. 12, 1983, 96 Stat. 2419, and amended by Pub. L. No. 100-17, tit. I, § 133(d), Apr. 2, 1987, 101 Stat. 173, 49 U.S.C. § 303 (1994).

or local officials to be significant, only if there is no feasible and prudent alternative and all possible planning to minimize harm has taken place.

(4) *Archaeological Resources Protection Act of 1979*.⁷⁷³—Provides for the protection and management of archaeological resources and sites that are on public lands or Indian lands, and specifically requires notification of the affected Indian tribe if archaeological investigations proposed would result in harm to or destruction of any location considered by the tribe to have religious or cultural importance. A permit is required, and permits for excavation or removal of any archaeological resource located on Indian lands require consent of the Indian or Indian tribe owning or having jurisdiction over the land. This Act directs consideration of AIRFA in the promulgation of uniform regulations. ARPA “is clearly intended to apply specifically to purposeful excavation and removal of archeological resources, not excavations which may, or in fact inadvertently do, uncover such resources.”⁷⁷⁴

(5) *Native American Grave Protection and Repatriation Act (NAGPRA)*.⁷⁷⁵—Enacted in 1990, NAGPRA safeguards the rights of Native Americans by protecting tribal burial sites and rights to items of cultural significance to Native Americans.⁷⁷⁶ Cultural items protected include Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.⁷⁷⁷ NAGPRA has two distinct schemes governing the return of Native American cultural items to tribes, with the analysis turning upon whether the item is presently held by a federal agency or museum or was discovered on federal lands after November 16, 1990, NAGPRA’s effective date. First, the Act addresses items excavated on federal lands after November 16, 1990, and enables Native American groups affiliated with those items to claim ownership. Second, NAGPRA provides for repatriation of cultural items currently held by federal agencies, including federally funded museums.

NAGPRA’s site protection measures only apply to remains and objects located on tribal, Native Hawaiian, or federal lands. The statute defines “federal lands” as “any land other than tribal lands which are controlled or owned by the United States.” FHWA has addressed the question of

whether FHWA “controls” the land on which Federal-aid projects are built so as to invoke NAGPRA’s site protection requirements.⁷⁷⁸ The agency advised that “FHWA’s position is that NAGPRA does not apply in the normal Federal-aid situation; i.e., where the State owns both the right-of-way and...is responsible for operation and maintenance.” This was based upon the fact that “FHWA takes no property interest, and has extremely limited contractual interests, in Federal-aid right-of-way.” The one possible exception to this position noted was “where the excavation or inadvertent discovery takes place on land that was transferred to the State under 23 U.S.C. § 317, since the Federal government retains a reversionary property interest.”

The FHWA memorandum cites in support of its position the decision in *Abenaki Nation of Missisquoi v. Hughes*.⁷⁷⁹ There the district court examined the meaning of “control” of federal land relative to the issuance of a permit by the COE for expansion of a hydroelectric project. In addressing the NAGPRA claim, the decision stated:

Plaintiffs urge a broad construction of “control” to include the Corps’ regulatory powers under the CWA and its involvement in devising and supervising the mitigation plan. Such a broad reading is not consistent with the statute, which exhibits no intent to apply the Act to situations where federal involvement is limited as it is here to the issuance of a permit. To adopt such a broad reading of the Act would invoke its provisions whenever the government issued permits or provided federal funding pursuant to statutory obligations.⁷⁸⁰

d. Tribal Enforcement Authority for Federal Environmental Statutes Other than NEPA

In *State of Washington Department of Ecology v. United States Environmental Protection Agency*,⁷⁸¹ involving RCRA, the Court of Appeals for the Ninth Circuit noted:

The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policy making or program administration or both...The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters.

⁷⁷³ Pub. L. No. 96-95, 93 Stat. 721, 16 U.S.C. § 470aa-470mm.

⁷⁷⁴ *San Carlos Apache Tribe v. United States* (DOI), 272 F. Supp. 2d 860, 888 (D.C. Ariz. 2003), citing *Attakai v. United States*, 746 F. Supp. 2d 1395, 1410 (D.C. Ariz. 1990).

⁷⁷⁵ Pub. L. No. 101-601, 104 Stat. 3048 (25 U.S.C. §§ 3001-3013).

⁷⁷⁶ See 43 C.F.R. § 10.1.

⁷⁷⁷ 25 U.S.C. § 3001(3).

⁷⁷⁸ Memorandum from FHWA Chief Counsel, Application of NAGPRA to FHWA (Mar. 28, 1995), available at <http://www.environment.fhwa.dot.gov/guidebook/chapters/v2ch10.asp>.

⁷⁷⁹ 806 F. Supp. 234 (1992).

⁷⁸⁰ *Id.* at 252.

⁷⁸¹ 752 F.2d at 1470.

In that case, and in the earlier Ninth Circuit case of *Nance v. Environmental Protection Agency*,⁷⁸² which involved EPA delegations to a tribe under the Clean Air Act, the court of appeals approved EPA's development of regulations and procedures authorizing the treatment of Indian tribes on a government-to-government basis, encouraging Indian self-government on environmental matters, notwithstanding the fact that none of the major federal environmental regulatory statutes at that time provided for delegation to tribal governments.

Subsequently, as these and other environmental statutes came before Congress for amendment or reauthorization, Congress expressly provided tribal governments various degrees of jurisdictional authority. Major environmental statutes granting such tribal authority, which may be involved in the development or maintenance of a highway project on an Indian reservation, are as follows:

1. *Clean Air Act*⁷⁸³ (eligible tribes may assume primary responsibility for all assumable programs);
2. *Safe Drinking Water Act*⁷⁸⁴ (eligible tribes may assume primary responsibility for all assumable programs);
3. *Federal Water Pollution Control Act (Clean Water Act)*⁷⁸⁵ (eligible tribes, *inter alia*, allowed to establish water quality standards, and nonpoint source management plans, and issue National Pollutant Discharge Elimination System and Section 404 dredge/fill permits, allowing tribes to be treated as states); and
4. *Comprehensive Environmental Response, Compensation, and Liability Act*⁷⁸⁶ (Section 9626 provides that tribes are to be treated as states for certain purposes, including notification of release, consultation on remedial actions, access to information, and cooperation in establishing and maintaining national registries).

Another environmental statute, which has not been amended to provide for tribal primacy, is RCRA.⁷⁸⁷ This statute was construed in *Washington Department of Ecology v. EPA*⁷⁸⁸ to not allow state enforcement on tribal lands, but rather EPA enforcement.

⁷⁸² 645 F.2d 701 (9th Cir. 1981).

⁷⁸³ 42 U.S.C. § 7401, *et seq.* See § 7601.

⁷⁸⁴ 42 U.S.C. § 300f, *et seq.* See §§ 300j-11, 300h-1(e).

⁷⁸⁵ 33 U.S.C. § 1251, *et seq.* See § 1377(e).

⁷⁸⁶ 42 U.S.C. § 9601, *et seq.*

⁷⁸⁷ 42 U.S.C. § 6901, *et seq.*

⁷⁸⁸ 752 F.2d 1495 (9th Cir. 1985).

K. CONSTRUCTION ACTIVITIES

1. Indian Employment Preferences and Contracting

a. General

Section 7(b) of the ISDEAA⁷⁸⁹ provides authority for Indian preference in awarding contracts and Indian employment preference in the administration of such contracts. Section 7(b) provides:

(b) Preference requirements for wages and grants

Any contract, subcontract, grant, or sub-grant pursuant to this subchapter, the Act of April 16, 1934 (48 Stat. 596), as amended [25 U.S.C. 452 *et seq.*] or by any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 1452 of this title.

The Section 7(b) preference applies to all grants or contracts made pursuant to statutes or implementing regulations that expressly identify Indian organizations as potential grant recipients or contractors.⁷⁹⁰ It also applies to contracts or grants made for the benefit of Indians even when the authorizing statute and regulations do not expressly identify Indian organizations as potential recipients.... One court of appeals' decision in this area has interpreted "to the greatest extent feasible" within the context of Section 7(b) to mean the maximum, "to take every affirmative action they could."⁷⁹¹

The BIA and the Indian Health Service are required to utilize the Section 7(b) preferences in ad-

⁷⁸⁹ Pub. L. No. 93-638; 25 U.S.C., *et seq.*

⁷⁹⁰ See also 48 C.F.R. § 1426.7003(a)(3), which provides that the § 7(b) preference clause be inserted in contracts awarded by: the Bureau of Indian Affairs; A contracting activity other than the Bureau of Indian Affairs, when the contract is entered into pursuant to an act specifically authorizing contracts with Indian organizations; and a contracting activity other than the Bureau of Indian Affairs where the work to be performed is specifically for the benefit of Indians and is in addition to any incidental benefits that might otherwise accrue to the general public.

⁷⁹¹ Alaska Chapter, Associated Gen. Contractors of America v. Pierce, 694 F.2d 1162 (9th Cir. 1982).

ministering their respective programs. The FHWA does not extend the 7(b) preference to the Federal-Aid Highway Program. When the IRR program is administered by the BIA, the Section 7(b) preference is required. In a 1982 Ninth Circuit case, the applicability of Section 7(b) was expanded.⁷⁹² However, that case, which involved the construction of Indian housing by the U.S. Department of Housing and Urban Development (HUD) can be readily distinguished. Indeed, it would be difficult to find a more precise example than Indian housing where the contract is "for the benefit of Indians."⁷⁹³ Similar to the Indian Health Service requiring proof of eligibility, it is clear that the housing in question required some sort of tribal (Alaska Native) affiliation.⁷⁹⁴ Public roads are simply not analogous to Indian housing. By definition, "public roads" are open to all and, with limited exception, closed to none. Indeed, the FHWA has consistently refused to fund any roads through the IRR program that were not open to the general public.⁷⁹⁵ By its very definition, an IRR must be a public road.

In January 2001, the Department of Justice, Office of Legal Counsel, issued a memorandum to the General Counsel for the Department of Agriculture.⁷⁹⁶ The memorandum was in response to a request for an opinion concerning the applicability of Section 7(b) of the ISDEAA.⁷⁹⁷ A number of statu-

⁷⁹² *Id.* The case did not limit § (7b) to the Bureau of Indian Affairs and the Indian Health Service. However, that case involved the construction of HUD Indian housing.

⁷⁹³ See 25 C.F.R. § 256, Housing Improvement Program (HIP) for Indians, which has strict tribal enrollment criteria for eligibility. See also 24 C.F.R. pt. 1000 [Native American Housing Activities]. These regulations were promulgated after enactment of the Native American Housing Assistance and Self-Determination Act (NAHASDA) at 25 U.S.C. § 4101, *et seq.* The § 7(b) requirements in the NAHASDA regulations are found at 24 C.F.R. §§ 1000.48, 1000.50, 1000.52, 1000.54. The most cursory reading of these regulations shows the procedures of enforcement.

⁷⁹⁴ *Pierce*, 694 F.2d 1162 (9th Cir. 1982), was decided before "tribal" status was officially conferred upon more than over 200 Alaska Native villages.

⁷⁹⁵ There are some limited exceptions to this "open to the public" requirement such as certain tribal cultural events, weather, and other emergencies. However, in the one instance where a tribe wanted to close an IRR to the public in general, the road was removed from the IRR Inventory for any future public funding of any sort.

⁷⁹⁶ Memorandum from Randolph Moss, Assistant Attorney General, to Charles Rawls, General Counsel, Department of Agriculture (Jan. 17, 2001) (available at the Office of the General Counsel, USDA) (hereinafter "Justice Memorandum").

⁷⁹⁷ 25 U.S.C. § 450, *et seq.*

tory interpretation issues were addressed as well. At the outset, the memorandum set forth the clear 7(b) parameters. First, Section 7(b) applies to statutes that make Indians or Indian organizations the sole eligible recipient. Second, Section 7(b) applies where the statute expressly provides that Indians and Indian organizations are one of many eligible recipients. The more difficult issues addressed and answered in the affirmative were that section 7(b) applies (1) where the statute does not expressly provide that Indian or Indian organizations are eligible recipients, but the implementing regulation expressly identifies Indian or Indian organizations as eligible recipients; and (2) where neither the statute nor the implementing regulations expressly provide that Indians or Indian-owned organizations are eligible recipients, but both support activities that will in fact principally benefit Indians.

For FHWA, the Indian employment preference in Section 7(b)(1) is already statutorily allowed in 23 U.S.C. § 140(d) and 23 C.F.R. § 635.117(d). Training opportunities are usually encompassed within "Indian preference." And, additional opportunities for training tribes and tribal contractors are set forth in 23 U.S.C. § 504(b)(2)(A). One of the lingering issues that has caused questions involves both tribal and Indian organization and enterprise-owned "subcontractor preference" in the Federal-Aid Highway Program.⁷⁹⁸

Title 25, U.S.C., includes the following definitions for "Indian organization" and "Indian enterprise." Title 25, U.S.C. § 1452(e), provides: "*Economic Enterprise* means any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: *Provided*, That such Indian ownership shall constitute not less than 51 per centum of the enterprise." Title 25, U.S.C. § 1452(f), provides: "*Organization* as unless otherwise specified, shall be the governing body of any Indian tribe..., or entity established or recognized by such governing body for purposes of this chapter."⁷⁹⁹

It is clear that the definition set forth above encompasses a tribal government or tribal entity as an "Indian organization." However, as stated previously, the FHWA considers "tribes" or "tribal enti-

⁷⁹⁸ While the practical effects of Indian preference (individually or as subcontractors) favor the particular tribe where a project is located, tit. 25 U.S.C. § 450e(c) does not allow tribal preference except when the self-determination contract is for the benefit of a specific tribe (also known as the § 7(c) preference).

⁷⁹⁹ The ISDEAA's definition of "tribal organizations" ensures that the contractor is tied to tribal life and is likely to be devoted to economic development on a reservation. See Justice Memorandum, *supra* note 796, at 9.

ties” to be within the definition of “public agency.”⁸⁰⁰ This is buttressed by the fact that “Indian tribes” are specifically included in the definition of “public authority” set forth in 23 U.S.C. § 101(23). FHWA does not treat tribes as “public agencies,” i.e., a public authority; any tribal preference in subcontracting would contradict 23 C.F.R. § 635.112(e). The preference for “Indian-owned economic enterprises,” outside of the department’s DBE program, conflicts with FHWA’s longstanding view on competitive bidding.

The purpose of the ISDEAA is to promote Indian self-government through strengthening the administrative capacities of tribes and tribal organizations.⁸⁰¹ The Justice Memorandum states:

Preferences for Indians in training and employment connected to the administration of federal grants to or contracts with Tribes and tribal organizations and in grants and contracts for the benefit of Indians help foster the administrative capacities of Tribes by enabling their members to gain the experience and develop the expertise necessary to handle projects and run institutions previously overseen by Federal officials and staffed with Federal employees.⁸⁰²

There are a number of statutes where Indians and Indian organizations are not expressly identified as recipients or beneficiaries, yet the Section 7(b) preference has been used.⁸⁰³ While conceding that the issue is not free from doubt, the Justice Memorandum concludes that the central purpose of the ISDEAA is served by reading Section 7(b) as

⁸⁰⁰ The issue of tribal contracting was among those clarifications in the 1998 Guidance, *See* pt. H. Pt. H is incorrect in allowing tribes to compete.

⁸⁰¹ The term “administrative capacity” is also used in 23 U.S.C. § 202(d)(2)(D)(ii) as one of the factors to be considered by the Negotiated Rulemaking for the Indian Reservation Roads Program in developing a new funding formula.

⁸⁰² Justice Memorandum, *supra* note 796, at 8.

⁸⁰³ For example, 7 U.S.C. § 1926, which authorizes the Secretary of Agriculture to make “rural business opportunity grants,” and its implementing regulations include tribes as eligible recipients; 7 U.S.C. § 343(d) (Smith-Lever Act), which authorizes the Secretary of Agriculture to expend sums for “administrative, technical and other services and for coordinating the extension work of the Department and several States, Territories, and possessions.” The latter statute has no implementing regulations but Agriculture has made many grants to state extension services for programs to benefit Indians in the area of food and water safety. In addition, 7 U.S.C. § 2034 (Food Stamp Act) makes no mention of Indians, has no implementing regulations, but authorizes Agriculture to make grants to certain nonprofit entities. The Justice Department concludes that § 7(b) applies to each of these programs.

applicable to grants or contracts for the benefit of Indians because of their status as Indians.⁸⁰⁴ This reading is supported by a recent Ninth Circuit decision,⁸⁰⁵ where the court of appeals affirmed both the administrative and district court decision that certain activities under the Trinity River Mainstream Restoration Program were not subject to the ISDEAA because they were designed to benefit the public as a whole rather than “Indians because of their status as Indians.”

It is an incomplete analysis to argue that the DOT has established Indian preferences in certain grants made under the Federal Highway Act.⁸⁰⁶ However, many of the references are not complete in their analysis. This is because there is specific statutory authority to administer the FLHP IRR program pursuant to the ISDEAA with its Section 7(b) requirements.⁸⁰⁷ Likewise, the Emergency Relief Program⁸⁰⁸ and the IRRBP⁸⁰⁹ are two further examples where Indians, by virtue of the IRR requirements, are the intended recipients. Using Title 23 as an example, the memorandum states that if grants or contracts are for the benefit of Indians and they are authorized pursuant to a particular statute, then that statute necessarily is one “authorizing Federal contracts...or grants...for the benefit of Indians.”⁸¹⁰ The only limitation is that the contract must not be of incidental benefit; it must be intended to benefit Indians because of their Indian identity.⁸¹¹ This interpretation fits squarely within the FHWA and BIA’s current administration of the IRR program.

There is a further rationale not to apply the 7(b) preference to the Federal-Aid Highway Program.

⁸⁰⁴ Of course, the Department of Interior and Department of Health and Human Services, both of which have primary responsibility to implement the ISDEAA, require § 7(b) preferences in any contract awarded by the Bureau of Indian Affairs and to those where the work performed is specifically for the benefit of Indians. 48 C.F.R. § 426.7003; 48 C.F.R. § 1452.226-70; 48 C.F.R. § 370.202(a). The memorandum also cites Environmental Protection Agency and Housing and Urban Development regulations that also provide for § 7(b) preferences in grant programs if the “project benefits Indians” (citations omitted).

⁸⁰⁵ *Hoop Valley Indian Tribe v. Ryan*, 415 F.3d 986 (9th Cir. July 2005).

⁸⁰⁶ Justice Memorandum, *supra* note 796, at 9, n.8.

⁸⁰⁷ 23 U.S.C. § 202(d)(3).

⁸⁰⁸ 23 U.S.C. § 125. Sec. 7(b) has been applied in emergency relief situation administered by the BIA.

⁸⁰⁹ 23 U.S.C. § 144(c)(3). This program is authorized under 23 U.S.C. § 202(d)(4), with an increase in funding under SAFETEA-LU.

⁸¹⁰ Justice Memorandum, *supra* note 796, at 10.

⁸¹¹ *Id.* at 11.

This is because, with few exceptions, full and open competition is the basis of government contracts.⁸¹² While the Federal-Aid Highway Program is not a government contract program, it does contain the requirement for competition. And, 23 U.S.C. § 112(b), with its competitive bidding requirements, is the statutory basis that requires competition in highway construction. Competition is considered so important that 23 C.F.R. § 635.112(f) requires that a statement of noncollusion accompany each bid. Moreover, the FHWA has enacted numerous collateral regulations designed to protect the competitive bidding process.⁸¹³ There are exceptions to the competitive bidding process,⁸¹⁴ but these exceptions are narrow in scope⁸¹⁵ and still require a finding that the organization undertaking the work is equipped and staffed to perform the work satisfactorily and cost-effectively. Although none of the above provisions specifically address subcontracting, 23 C.F.R. § 635.112(e) prohibits any public agency from bidding in competition or entering into subcontracts with private contractors. While tribes are not specifically identified as a “public agency” in 23 C.F.R. § 635.101, a fair reading would encompass tribes, i.e., “any organization with administrative or functional responsibilities which are directly or indirectly affiliated with a governmental body of any nation, State, or local government.”⁸¹⁶ Finally, tribes are specifically listed as a “public authority” in 23 U.S.C. § 101(23), “The term public authority means a Federal, State, county, town, or township, Indian

tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.”⁸¹⁷

In short, the FHWA does not apply the Section 7(b) subcontractor preference to the Federal-Aid Highway Program. In contrast, the Federal Lands Highway IRR program is designed to benefit Indians because of their status as Indians. There is statutory authority to apply the ISDEAA and its requirements of Indian preference to all Federal Lands IRR projects. While the Federal-aid program includes Indian tribal governments and Indian reservation roads in many of its statutory requirements such as planning,⁸¹⁸ rural technical assistance,⁸¹⁹ bridge inventory,⁸²⁰ and emergency relief,⁸²¹ the Federal-aid program is not, in general, directed to benefit Indians because of their status as Indians. A number of states have entered into Section 132 agreements with the BIA regarding a particular project.⁸²² This provision allows a state and the BIA to enter into an agreement to carry out a Federal-aid project under which the state provides cash equal to the federal share and any applicable non-federal match to the BIA and is immediately reimbursed by FHWA based upon such payment. This specific statutory authority allows the BIA to “carry out,” i.e., administer, the project whereby ISDEAA and Section 7(b) applies. However, this section relies on the state *requesting* and the BIA *agreeing* to carry out the project. The latter would only be done if the project were such that the BIA would normally administer it under the IRR program.

b. In the Federal Highway Program

(1) *Indian Employment and Contracting Preference, 23 U.S.C. § 140.*—Section 122 of STURAA⁸²³ amended the antidiscrimination provisions contained in Title 23, U.S.C. § 140, to make them consistent with certain provisions of Title VII of the Civil Rights Act of 1964. The Indian preference provisions are codified at 23 U.S.C. § 140(d).

The 1987 amendment expressly permits (but does not require) employment preference of Indians living on or near a reservation on projects and con-

⁸¹² See Federal Acquisition Regulation pt. 6, 48 C.F.R. § 6000, *et seq.*

⁸¹³ See, for example, 23 C.F.R. § 635.104(a) requiring actual construction contracts by competitive bidding; 23 C.F.R. § 635.110(b), which prohibits procedures or licenses that restrict competitive bidding; 23 C.F.R. § 635.110(c), which prohibits prequalification requirements to affect submission of bids; 23 C.F.R. § 635.112(d) nondiscriminatory bidding procedures; 23 C.F.R. § 635.114(a) requiring award only on the basis of the lowest responsive bid; 23 C.F.R. § 635.117(b) prohibiting local hiring preferences; 23 C.F.R. § 635.409 prohibiting restrictions on materials.

⁸¹⁴ See 23 U.S.C. § 112(b) requiring a cost-effective or emergency determination by the state transportation department; see also 23 C.F.R. § 635.104(b).

⁸¹⁵ In order to utilize noncompetitive procedures, 23 U.S.C. § 112(b) requires the state transportation department to demonstrate that an emergency exists or that another method is more cost effective. See also 23 C.F.R. § 635.104(a). While 23 C.F.R. § 635.201 subpt. B sets forth the regulations on Force Account work under 23 U.S.C. § 112(b), the regulations specifically refer to a state or subdivision thereof; the section does not reference tribes.

⁸¹⁶ This section was adopted in 56 Fed. Reg. 37004 (Aug. 2, 1991). “Public agency” was not defined in the previous regulation, 39 Fed. Reg. 35152 (Sept. 30, 1974).

⁸¹⁷ SAFETEA-LU is replete with sections that specifically list tribal governments in the same defining paragraphs as states and local governments.

⁸¹⁸ 23 U.S.C. § 134, 135.

⁸¹⁹ 23 U.S.C. § 504(b)(2)(D).

⁸²⁰ 23 U.S.C. § 144(c)(3).

⁸²¹ 23 U.S.C. § 125(e).

⁸²² 23 U.S.C. § 132.

⁸²³ Pub. L. No. 100-17, 101 Stat. 160 (1987). The provision was contained in the Senate Bill and in the Administration’s Bill; no provision in the House Bill. The Conferees adopted the Senate amendment.

tracts on Indian reservation roads.⁸²⁴ The legislative history of that provision specifically notes the goal of more Indian labor when building on or near reservations.⁸²⁵ And the Indian hiring preference set forth in 23 U.S.C. § 140(d) and 23 C.F.R. §§ 635, 117(d) and (e) refers to the employment of individual Indians, rather than contractor or subcontractors. Title 23, U.S.C. § 140(d), was further amended in 1991. Section 1026(c) of ISTEA⁸²⁶ added a new sentence to § 140(d): “States may implement a preference for employment of Indians on projects carried out under this title near Indian reservations.”

Again, the legislative history of that provision specifically notes the goal of more Indian labor when building on or near reservations.⁸²⁷ Hence, the 1987 amendment was directed at Indians living on or near reservations; the 1991 amendment was directed at projects near reservations. After the enactment of STURAA, the then-FHWA Administrator issued a memorandum dated May 8, 1987, on Indian preference. A clarifying memorandum on this subject, dated October 6, 1987, was distributed shortly thereafter. This latter memorandum contained language that the singular intent of the STURAA amendment was to permit and encourage Indian preference in employment on Indian reservation roads and that the only contracting preference that could be recognized in a Federal-aid highway contract was that authorized by the DBE statutory provisions. The memorandum continued this view by stating, “The availability of certified Indian owned businesses should be considered in setting contract DBE goals.”⁸²⁸ These FHWA memoranda reference the Federal-Aid Highway Program where, as stated previously, the only contracting preference allowed is that authorized by highway legislation and in regulations such as 23 C.F.R. § 635.107, which affirmatively encourages DBE participation in the highway construction program.⁸²⁹ This position was reiterated in a 1994 TRB

⁸²⁴ Sec. 122 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURRA), Pub. L. No. 100-17 (Apr. 2, 1987).

⁸²⁵ “[T]his bill extends Indian employment preferences so that more Indian labor will be used when building on or near reservations.” 137 CONG. REC. E-3566 (Oct. 28, 1991).

⁸²⁶ Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

⁸²⁷ “[T]his bill extends Indian employment preferences so that more Indian labor will be used when building on or near reservations.” 137 CONG. REC. E-3566 (Oct. 28, 1991).

⁸²⁸ *Id.* Item 4, at 2 and 3.

⁸²⁹ The Disadvantaged Enterprise Program was first authorized in § 105(f) of the Surface Transportation Assistance Act of 1982 (STAA). Pub. L. No. 97-424 (Jan. 6, 1983), and has been in every highway reauthorization

paper⁸³⁰ and again recently in FHWA’s Guidance on Relations with American Indian Tribal Governments.⁸³¹

(2) *FHWA Notice 4720.7 (1993), Indian Preference in Employment on Federal-Aid Highway Projects on and Near Reservations*—In 1993, FHWA issued a Notice entitled, “Indian Preference in Employment on Federal-aid Highway Projects on and near Indian Reservations.” Its purpose was to consolidate all previous guidance for FHWA field officials, State highway agencies, and their subrecipients and contractors regarding the allowance for Indian employment preference on Federal-aid projects on and near Indian reservations. This Notice, implementing regulations,⁸³² and subsequent legal guidance have all been consistent in the approach that the 23 U.S.C. § 140(d) Indian employment preference provision was permissive, not mandatory. The purpose of the preference in amending Title 23 was to conform 23 U.S.C. § 140 with 42 U.S.C. § 2000e-2(i) (Section 703(i) of the Civil Rights Act of 1964), which allowed private businesses or enterprises on or near reservations to grant employment preference to Indians living on or near reservations. However, despite the “permissive,” not mandatory, interpretation, FHWA’s policy has been to encourage states to implement Indian employment preference in applicable contracts; the agency has never required a state to follow Indian employment preference. Indeed, the State of Alaska has explicitly rejected Indian preference as violating its State Equal Protection statute.⁸³³

thereafter, most recently in § 1101(b) of TEA-21, Pub. L. No. 105-178 (June 9, 1998). The DBE regulations are found at 49 C.F.R. pt. 26. *See* 40 C.F.R. §§ 26.5 and 26.67, where “Native Americans” are presumed disadvantaged.

⁸³⁰ RICHARD JONES, LEGAL ISSUES RELATING TO THE ACQUISITION OF RIGHT OF WAY AND THE CONSTRUCTION AND OPERATION OF HIGHWAYS OVER INDIAN LANDS, pt. C, at 11. (NCHRP 1994). (Exhibit 5).

⁸³¹ This 1998 guidance was recently updated by the FHWA’s Native American Coordinator, a position created in 2000.

⁸³² 23 C.F.R. § 635.117(d) is the implementing regulation on Indian employment preference.

⁸³³ ALASKA CONST. art. I, § 3. *See also* Alaska v. Native Village of Venetie, 522 U.S. 520 (1998) and Malabed v. North Slope Borough, 42 F. Supp 2d 927 (D. Alaska 1999) affm mem., 335 F.3d 864 (9th Cir. 2003), regarding status of Alaska Native Claims Settlement Act land status (neither Indian Country nor Reservations). *Malabed* specifically rejected a 1988 EEOC Notice equating Alaska’s Native Villages to reservations for employment preference purposes.

The 1993 FHWA Notice has been in effect for more than 10 years. The Notice's recitation on Indian employment preference and the use of the words "near" and "reasonable commuting distance" are taken directly from the statute, as well as the Office of Federal Contract Compliance Program regulations that further define "work on or near reservations."⁸³⁴ The Notice was recently the subject of litigation, discussed, *infra*.

c. State DOTs: Employment Preferences, Restrictions on National Origin, State Constitutional/Statutory Constraints

As noted above, the Alaska Supreme Court, in *Malabed v. North Slope Borough*,⁸³⁵ held "that the borough's hiring preference violates the Alaska Constitution's guarantee of equal protection because the borough lacks a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference enacted is not closely tailored to meet its goals."⁸³⁶ It should be noted that this rejection of Indian hiring preference was preceded in November 1996 by California's passage of Proposition 209,⁸³⁷ prohibiting preferential treatment in public employment, public education, or public contracting. This quickly evolved into a national trend, spawning passage of Initiative 200 in Washington in 1998, banning affirmative action in higher education, public contracting, and hiring.⁸³⁸ For example, in 1997, 33 anti-affirmative action bills and/or resolutions were introduced in 15 states, followed in 1998 by 16 bills proposed in 9 states, and in 1999 by 20 bills introduced in 14 states. However, of the 102 bills and resolutions introduced during 1997–2004, only 6 have been enacted (in Alaska, Colorado, Florida, Iowa, Missouri, and Utah).⁸³⁹

⁸³⁴ 41 C.F.R. § 60-1.5(a)(6). And 25 C.F.R. § 20.100 defines "near reservation" as those areas or communities designated by the Assistant Secretary that are adjacent or contiguous to reservations where financial assistance and social service programs are provided.

⁸³⁵ 70 P.3d 416 (Alaska 2003).

⁸³⁶ The equal protection clause of the Alaska Constitution art. I, § 1, provides:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people of the State.

⁸³⁷ CAL. CONST. art. I, § 31. See text at American Civil Rights Institute Web page: <http://www.acri.org/209/290text.html>.

⁸³⁸ See <http://www.dailybruin.ucla.edu/DB/issues/98/11.18/view.editorial.html>.

Florida, Iowa, Missouri, and Utah).⁸³⁹ Efforts to pass initiatives banning affirmative action at the state level continue, usually based on the form of the ballot initiative sponsored by Ward Connerly, former University of California Regent, who led the Proposition 209 initiative in California.

The state constitution changes in California and Washington, as well as the E.O. in Florida, may have caused the DOTs of those states to be cautious, even to take a hands-off approach regarding Indian hiring preference on projects on or near Indian reservations. However, due to the permissive guidance by FHWA, the state practices relative to contractors using Indian hiring preference do not appear to have been altered up to this time. Faced with the issue of tribal sovereignty and the mandating of Indian hiring preference and quotas by TEROs, it seems unlikely that states would prohibit contractors from TERO compliance.

2. Tribal Employment Rights Ordinances

a. Background

As stated earlier, since 1987, it has been the policy of FHWA to support Indian employment preference on Federal-aid highway projects on or near reservations. It has also been FHWA's policy to support the use of TERO⁸⁴⁰ offices to assist with Indian employment and to participate in TERO fees on applicable projects as an allowable cost as long as these fees do not discriminate or otherwise single out Federal-aid highway construction contracts for special or different tax treatment. While the employment preference and payment of TERO fees are not statutory requirements imposed upon

⁸³⁹ *Alaska*, in 1997, passed and signed into law Resolutions HJR 34 and SJR 29, asking the North Pacific Fishery Management Council to reject an Affirmative Action (AA) program; *Colorado*, in 1999, passed and signed into law HB 1076 prohibiting consideration of race, gender, color, creed, religion, or disability in appointments and promotions of state employees; In *Florida*, in 1999, Governor Jeb Bush signed Executive Order 99-281, the "One Florida Initiative," giving direction to the governor's office and executive agencies to dispense with certain practices regarding the use of racial or gender set-asides, preferences, or quotas in government employment, contracting, and education; *Iowa*, in 2001, enacted and signed into law HB 579 relating to the administration and management of the State Department of Personnel, requiring AA reports to be filed with the governor's office; *Missouri*, in 1999, enacted and signed into law HB 568 eliminating AA for firefighters and law enforcement officers; *Utah*, in 2003, enacted and signed into law HB 16 requiring the Department of Human Resource Management to use an equal opportunity plan instead of an AA plan.

⁸⁴⁰ Tribal Employment Rights Office or Ordinance.

the states, this longstanding FHWA policy has been successful in addressing high unemployment on Indian reservations, has brought more Indian people into the workforce of highway construction, and has helped tribal TERO offices in their training and employment goals.

TERO began in the early 1970s as a result of the failure of construction contractors to live up to Indian hiring commitments that had been made to the Navajo Nation in connection with the Salt River generating plant.⁸⁴¹ The EEOC became involved and conducted a study that concluded that tribes had the sovereign right to enforce employment requirements on employers conducting business on the reservation. While the original TERO focus was on employment, it also addressed the imposition of fees for doing business on the reservation. In past years, one of the strongest TERO advocates has been the Council on Tribal Employment Rights.⁸⁴²

Although the Indian preference provisions are silent on TERO, the legislative history is helpful because it formed the basis of the agency's guidance on TERO. It provides in part:

Many tribes have a tax of one-half to one percent on contracts performed on the reservation to provide job referral, counseling, liaison, and other services to contractors. Because the tax is used for specific services that directly benefit a highway project, Congress approves of the Secretary's current practice of reimbursing such costs incurred.... The Secretary is instructed to cooperate with tribal governments and States to ensure that contractors know in advance of such tribal requirements. For the purpose of Federal-aid highway contracts, the TERO tax shall be the same as imposed on other contractors and shall not exceed one percent. In order to develop workable and acceptable employment agreements covering affected projects, highway agencies are encouraged to meet with TEROs and contractors prior to bid letting on a project to set employment goals.⁸⁴³

After the enactment of STURAA, FHWA issued a clarifying memorandum on both Indian Preference and TERO fees. FHWA used the legislative history as guidance; hence the memorandum contains similar language as in the Senate Report. It provides:

The TERO-Tax—Many tribes have established a TERO tax which is applied to contracts for projects performed on the reservation. The proceeds are used by the tribes to fund job referral, counseling, liaison, and other services relating to the employment of In-

dians. It has been FHWA's longstanding policy to participate in State and local taxes which do not discriminate or otherwise single out Federal-aid highway construction contracts for special or different tax treatment. Thus, if the TERO tax rate on Federal-aid highway contracts is the same as imposed on other projects such costs are eligible for Federal-aid reimbursement.

The legislative history on Indian employment preference clearly supports FHWA's current practice of reimbursing TERO fees on Federal-aid contracts as long as the TERO fee rate on highway construction contracts is the same as that imposed on other contracts on the reservation. FHWA has maintained its strong support of Indian employment preference, use of TERO offices, and reimbursing TERO fees on applicable Federal-aid projects. This positive approach on TERO fees has been successful with many tribes and in many states. As intended, it has assisted in the hiring of more Indians in highway construction and in providing tribes necessary funds for services and activities related to employment and training. And it is expected that based on prior practice or other agreements, many states and tribes will continue to agree on TERO matters. It is FHWA's present position to allow a TERO fee assessed on a Federal-aid project to be treated as an eligible cost; FHWA will not determine whether its imposition on a particular project is within the tribe's jurisdiction. Of note, neither STURAA, ISTEA, TEA-21, or the most recent highway reauthorization, SAFETEA-LU, have addressed TERO ordinances or fees.

b. Problems Encountered Under TERO Agreements

There is frequently confusion over Indian employment preference, Section 7(b) preference, and tribal preference. The Indian employment preference provisions in Title 23 do not permit "tribal employment preference" on Federal-aid projects.⁸⁴⁴ Even the Section 7(b) preference does not recognize tribal preference. The ISDEAA does permit tribal preference where there is a contract or agreement under the ISDEAA that is intended to benefit one tribe.⁸⁴⁵

A further TERO issue is the amount of the TERO fee. There is no statute dictating the amount or percentage a tribe can set with respect to a TERO fee; this is a sovereignty issue, as is the tribe's ex-

⁸⁴¹ For a thorough discussion, see JONES, *supra* note 830.

⁸⁴² The CTER was utilized by FHWA in developing and conducting courses on TERO for state contractors.

⁸⁴³ Senate Committee on Environment and Public Works, S. REP. NO. 100-4 (1987).

⁸⁴⁴ 23 C.F.R. § 635.117(d).

⁸⁴⁵ 25 U.S.C. § 450e79(c), also known as the § 7(c) preference. Note that Justice recognizes that the practical effect of a general Indian preference under § 7(b) will be the same as a TERO tribal preference because the Indians who benefit will largely be members of the tribe whose TERO would otherwise govern the operations of the contractor or grant recipient.

penditure of TERO receipts. On the other hand, there is no separate source of Highway Trust Fund money to pay TERO fees. For Federal-aid highway projects, the cost of TERO is paid out of the state's highway money as an allowable cost. The fact that FHWA has determined a nondiscriminatory TERO fee to be allowable does not mean a state receives additional funds to pay this cost.

c. *Litigation of TEROs*

(1) *FMC v. Shoshone-Bannock Tribes, et al.*⁸⁴⁶— This case, which affirms TEROs, presented the question of the extent of power Indian tribes have over non-Indians acting on fee land located within the confines of a reservation. The district court held that the tribes did not have such power, but the Ninth Circuit reversed the decision and upheld the tribe's jurisdiction, affirming the decision of the Tribal Appellate Court.

FMC operated its plant on fee land, manufacturing elemental phosphorus. It was the largest employer on the reservation, with 600 employees. At the time, FMC got all of its phosphate shale (one of three primary raw materials required) from mining leases located within the reservation and owned by the tribes or individual Indians. Upon notification of the passage of the TERO, FMC objected to the ordinance's application to its plant. However, after negotiations with the tribe, FMC entered into an employment agreement, based on a 1981 TERO, that resulted in a large increase in the number of Indian employees at FMC. In late 1986, the tribes became dissatisfied with FMC's compliance and filed civil charges in tribal court. FMC immediately challenged the tribal court's jurisdiction in federal district court and got an injunction from enforcement of any order against FMC until the tribal court had an opportunity to rule on the tribe's jurisdiction over FMC. The tribal court then found that the tribes had jurisdiction over FMC, based upon *Montana v. United States*,⁸⁴⁷ and held that the company had violated the TERO. The Tribal Appellate Court affirmed those rulings and entered into a compliance plan that required 75 percent of all new hires and 100 percent of all promotions to be awarded to qualified Indians, mandated that one-third of all internal training opportunities be awarded to local Indians, and levied an annual TERO fee of approximately \$100,000 on FMC. The federal district court preliminarily enjoined enforcement of this compliance order, and, in April 1988, it reversed the Tribal Appellate Court.

The court of appeals noted that the standard of review of a tribal court decision regarding tribal

jurisdiction "is a question of first impression among the circuits." It further noted that the leading case on the question of tribal court jurisdiction is *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,⁸⁴⁸ which established that a federal court must initially "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made," allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed.⁸⁴⁹ After further reviewing the opinion in *National Farmers Union*, the court of appeals determined that the standard of review would be one of "clearly erroneous" as to factual questions and *de novo* on federal legal questions, including the question of tribal court jurisdiction.

In its review of tribal jurisdiction, the court of appeals cited *Montana* as the leading case on tribal jurisdiction over non-Indians and quoted the two circumstances in which the Supreme Court said Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands:

[1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.

[2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.⁸⁵⁰

The court of appeals found that FMC had entered into "consensual relationships" with the tribe or its members and that *Montana's* first test was met:

FMC has certainly entered into consensual relationships with the Tribes in several instances. Most notable are the wide ranging mining leases and contracts FMC has for the supply of phosphate shale to its plant. FMC also explicitly recognized the Tribes' taxing power in one of its mining agreements. FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the TERO's goal of increased Indian employment and training. There is also the underlying fact that its plant is within reservation boundaries, although, significantly, on fee and not on tribal land. In sum, FMC's presence on the reservation is substantial, both physically and in terms of the money in-

⁸⁴⁶ 905 F.2d 1311 (9th Cir. 1990).

⁸⁴⁷ 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

⁸⁴⁸ 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985).

⁸⁴⁹ *Id.* at 856–57.

⁸⁵⁰ *Shoshone-Bannock Tribes*, 905 F.2d 1314, citing *Montana*, 450 U.S. at 565–66.

volved.... FMC actively engaged in commerce with the Tribes and so has subjected itself to the civil jurisdiction of the Tribes. *See, e.g., Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983).

The court of appeals disagreed with the district court and FMC that these connections between the company and the tribes, although substantial, did not provide a sufficiently close "nexus" to employment to support the TERO, citing *Cardin v. De La Cruz*,⁸⁵¹ and pointed out that *Cardin* contained no explicit requirement of a nexus.⁸⁵² The case was remanded to the tribal court to "give FMC an opportunity to challenge the application of the TERO under the Indian Civil Rights Act, 25 U.S.C. § 1302."

In October 2002, the State of South Dakota filed suit against the Secretary of Transportation in federal district court seeking declaratory relief that the language in FHWA's Notice, Section (4), was without legal authority on State-owned rights-of-way.⁸⁵³ The Notice language is as follows:

(4) TERO Tax—many tribes have established a tax which is applied to contracts for projects performed on the reservation. Tribes may impose this tax on reservations, but they have no tax authority off reservations. In off reservation situations, TERO's can bill contractors at an agreed upon rate for services rendered, i.e., recruitment, employee referral and related supportive services. The proceeds are used by the tribes to develop and maintain skills banks to fund job referral, counseling, liaison, and other services and activities related to the employment and training of Indians.⁸⁵⁴ It has been FHWA's long-standing policy to participate in State and local taxes which do not discriminate against or otherwise single out Federal-aid highway construction contracts for special or different tax treatment. Therefore, if the TERO tax rate on highway construction contracts is the same as that which is imposed on other contracts on the reservation, such costs are eligible for Federal-aid reimbursement. [emphasis added]

The language that in part prompted the lawsuit is as follows: "[T]ribes may impose this tax on reservations, but they have no tax authority off reservations." An issuance by FHWA's Office of Civil Rights concerning a discrimination complaint prompted the State to file the lawsuit.⁸⁵⁵ The South

Dakota lawsuit was later dismissed by the Federal District Court on the grounds that the Department of Transportation had not taken any final agency action against the State and thus South Dakota's lawsuit was not ripe for adjudication.⁸⁵⁶ Importantly, the court did not address the merits of South Dakota's claim that FHWA cannot require the State (or the State's contractors) to pay TERO fees. The court ruled that this issue was not ripe "at this time." Moreover, without litigation, the New Mexico State Highway and Transportation Department issued a policy in December 2002 that takes a similar position regarding State highway rights-of-way and TERO fees,⁸⁵⁷ namely, that non-Indian-owned contractors would not be reimbursed for any tribal government taxes for contract activities on State highway rights-of-way.

Following the South Dakota case, FHWA examined the questioned language in the 1993 Notice. The agency determined that it will continue to participate in nondiscriminatory TERO fees as an allowable cost but will not get involved in the jurisdictional aspects of TERO, i.e., whether or not a tribe has authority to assess the TERO on a particular right-of-way, which is a judicial determination. However, FHWA continues to encourage both tribes and states to confer and address both TERO issues and Indian employment preference on Federal-aid projects on and near reservations⁸⁵⁸ and encourages states to utilize Tribal Employment Rights Office (TERO or TECRO) representatives to set Indian employment goals. Indeed, following dismissal of the South Dakota lawsuit, the State and the tribe entered into a comprehensive TERO agreement.

⁸⁵¹ 671 F.2d 363 (9th Cir.).

⁸⁵² *Shoshone-Bannock Tribes*, 905 F.2d at 1315.

⁸⁵³ *South Dakota v. Mineta*, 278 F. Supp. 2d 1025 (D.S.D. 2003).

⁸⁵⁴ The language directing a Tribe's use of TERO fees is taken from the legislative history surrounding 23 U.S.C. § 140(d). There is no statutory requirement addressing the use of TERO fees.

⁸⁵⁵ The Rosebud Sioux Tribe filed a discrimination complaint against the State because of the State's refusal to

negotiate with the tribe over its TECRO tax on a Federal-aid project on the reservation. After investigating the complaint, the FHWA Office of Civil Rights found the State to be in noncompliance with FHWA policy reflected in the Notice. The Civil Rights letter of findings was withdrawn before the State initiated the lawsuit. After further review, in December 2003, an official determination of nondiscrimination by the State was made by FHWA's Office of Civil Rights.

⁸⁵⁶ The case was dismissed on August 20, 2003.

⁸⁵⁷ Letter from Arthur Waskey, General Counsel, New Mexico State Highway and Transportation Department to former Chief Counsel Jim Rowland (dated Jan. 16, 2003) (available at the Office of the Chief Counsel of FHWA).

⁸⁵⁸ See language in Judge Kornmann's Order in *South Dakota v. Mineta*, 278 F. Supp. 2d 1025, 1029 (2003).

L. LEGAL ISSUES RELATING TO THE OPERATION AND MAINTENANCE OF HIGHWAYS ON INDIAN LANDS

1. State Enforcement of Highway Laws

State enforcement of traffic and motor vehicle statutes was previously discussed at Section D.9.b., *supra*. In addition, see the discussion at Section E.2., *supra*, on the judicial construction of highway right-of-way grants.

2. Jurisdictional Issues Carrying Out Federal Programs

a. Sign Control on Indian Lands Under the Highway Beautification Act

(1) 23 U.S.C. § 131(a) provides: “The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the safety and recreational value of public travel, and to preserve natural beauty.”

The focus of the program is the segregation of signs to areas of similar land use (i.e., commercial and/or industrial areas) so that areas not having commercial or industrial character would be protected for safety, recreational value, and preservation of natural beauty. In order to accomplish this purpose, the states, using their police power and their power of eminent domain,⁸⁵⁹ were required to

⁸⁵⁹ 23 U.S.C. § 131(g) provides, *inter alia*, as follows:

Just compensation shall be paid upon the removal of any outdoor advertising sign, display or device lawfully erected under State law and not permitted under subsection (c) of this section whether or not removed pursuant to or because of this section.... Such compensation shall be paid for the following: (A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and (B) the taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

In addition, § 401 of the Act, 79 Stat. 1033, provided, “Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act.”

In November 1966, Acting Attorney General Ramsey Clark issued his opinion “that section 131 is to read as requiring each State to afford just compensation as a condition of avoiding the 10% reduction of subsection (b).” (42 Op. Atty. Gen. No. 26 (1966)). See also Roger A. Cunningham, *Billboard Control Under the Highway Beautification*

enact laws that would provide the “effective control” prescribed in federal law⁸⁶⁰ and as set out in agreements to be entered into with the Secretary of Commerce (now with the Secretary of Transportation).⁸⁶¹ While legally the states can choose not to

Act of 1965, 71 MICH. L. REV. 1295, 1309–26 (1973).

⁸⁶⁰ 23 U.S.C. § 131(c) provides, *inter alia*, that:

Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, ...if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection the term “free coffee” shall include coffee for which a donation may be made, but is not required.

⁸⁶¹ 23 U.S.C. § 131(d) provides, *inter alia*, that:

In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained...within areas adjacent to the...[highway]...which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the states in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning

provide such effective control of outdoor advertising, as a practical matter they must comply or become subject to a penalty equal to 10 percent of their Federal-aid highway funds.⁸⁶²

(2) *Subsection 131(h) and Its Interpretation*—Subsection 131(h) of Title 23, U.S.C., remains unchanged from its original enactment by Congress in 1965: “(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.”⁸⁶³ (Emphasis added). Subsection 131(h) is written in the passive voice, making it unclear who has the responsibility and authority for compliance: the states or the federal jurisdictional agencies. In addition, it is not clear as to its applicability to Indian reservations. The legislative history of Subsection 131(h) is of little help in clarifying these issues. The language originated in the Senate bill (S. 2084) and was revised in House Report 1084 to add the phrases (1) “of the United States,” and (2) that the national standards be “promulgated by the Secretary.” There were no floor amendments or discussion during debate in either the Senate or the House, and no executive communications, relative to this subsection. The only statement relating to Subsection 131(h) appears in the House Report, and makes no reference to who has the responsibility to enforce on public lands or reservations, or whether such lands include Indian reservations:

This section simply extends to all public lands and reservations of the United States which are adjacent to any portion of the Interstate System or primary system the same controls covering other roads which are subject to this legislation. The committee expects

authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreements in the zoned commercial and industrial areas within the geographical jurisdiction of such authority....

⁸⁶² 23 U.S.C. § 131(b):

Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices...shall be reduced by amounts equal to 10 percent of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control....

⁸⁶³ 79 Stat. 1029 (23 U.S.C. § 131(h)). See *South Dakota v. Goldschmidt*, 635 F.2d 698 (8th Cir. 1980), where the Act was held constitutional; See also *Vermont v. Brinegar*, 379 F. Supp. 606 (D.C. Vt. 1974), upholding 10 percent reduction in federal highway aid.

in the case where portions of public lands or reservations are leased for commercial operations that such portions will have the same exception from control as are given by this legislation to areas zoned or used for commercial or industrial purposes in a State.

(3) *Synopsis of NCHRP Legal Research Digest No. 41 (LRD No. 41)*.⁸⁶⁴—Reference is made to LRD No. 41 for detailed coverage of 23 U.S.C. § 131(h), federal agency interpretations/positions, and relative case law. This report concluded that the failure of Congress to expressly cover Indian reservations and the lack of legislative history indicating such coverage have left the Act open to varying interpretations by courts and administrative agencies as to whether Indian country is covered. Another problem of interpretation is what governmental entities have jurisdiction to enforce the Act on “public lands or reservations.” The rule that laws of general applicability apply to all persons throughout the United States, including Indians and non-Indians in Indian country,⁸⁶⁵ would appear not to apply because the HBA is structured so as to leave enforcement up to the states, using their inherent police power and eminent domain authority. However, federal case law does not permit states to use eminent domain on Indian reservations without express congressional authority, which is missing in the HBA.

FHWA, the federal agency with jurisdiction to implement the HBA, concluded in 1976 that failure of the Act to delegate either to FHWA or DOI the explicit authority to implement the Act on Indian reservations resulted in the HBA not being applicable to Indian reservations, due in part to the lack of delegation of state authority. Attempts to obtain control through DOI, using its general regulatory powers, proved unsuccessful. The BIA follows the 1979 ruling of the Interior Board of Indian Appeals (IBIA), which held that Congress did not intend to cover Indian reservations under the HBA and that the states could not control outdoor advertising on Indian reservations without express authority.⁸⁶⁶ The California Supreme Court, in a 1985 decision, found the IBIA interpretation “debatable,” but found it unnecessary to resolve that issue because

⁸⁶⁴ RICHARD O. JONES, APPLICATION OF OUTDOOR ADVERTISING CONTROLS ON INDIAN LAND (NCHRP Legal Research Digest No. 41, 1998).

⁸⁶⁵ See *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116, 80 S. Ct. 543, 553, 4 L. Ed. 2d 584, 596 (1959).

⁸⁶⁶ See *Appeal of the Morongo Band of Mission Indians v. Area Director, BIA*, 7 IBIA 299, 86 I.D. 680 (1979), which held that “Absent clear congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into ‘the right of reservation Indians to make their own laws and be ruled by them’ is without sanction.” 86 I.D. 687.

“it does not follow that Congress has authorized state enforcement of the act on such reservations.”⁸⁶⁷ FHWA attempted to amend the HBA in 1986, to provide that “effective control” of outdoor advertising on Indian reservations would be a federal responsibility.⁸⁶⁸ Later, the U.S. Senate unanimously agreed to this approach in the 99th Congress (S. 2405), but Congress failed to make it law in passing STURAA.

In 1995, FHWA issued a legal memorandum that again addressed the issue of state regulation of outdoor advertising on Indian reservations pursuant to the HBA. The memorandum acknowledged that since 1976 FHWA had taken the general position that states cannot be penalized for failure to enforce the HBA on federal Indian reservations because they lack authority to condemn Indian reservation land. The opinion, which was limited to regulation of outdoor advertising on land owned by non-Indians within Indian reservation land and

based upon *Brendale v. Confederated Tribes and Bands of Yakima Nation*,⁸⁶⁹ concluded as follows:

[As] a general rule the States have the legal authority to enforce the HBA on land within an Indian Reservation owned in fee by non-Indians. The actual extent of their enforcement will vary due to the facts of the situation, but the States have to make a good faith effort to maintain effective control of outdoor advertising on such land to be in compliance with the HBA. If a State believes that it does not have the legal authority to enforce zoning on land within an Indian Reservation owned in fee by non-Indians...an opinion from the State Attorney General on the question [would be required].

The early administrative opinions, decisions, and case law dealing with 23 U.S.C. § 131(h) focused primarily on outdoor advertising controls on Indian reservation lands, but more recent jurisdictional conflicts have involved attempts to control outdoor advertising on Indian lands that are off the reservation but held in “trust status” by the United States. The authority, policy, and procedures for trust acquisition were previously discussed at Section C.4., *supra*. As noted there, BIA regulations clearly reflect that state and local law shall not be applicable to such trust property.⁸⁷⁰ LRD No. 41 discussed the then pending litigation in U.S. District Court of Utah, *Shivwits Band of Paiute Indians and Kunz Outdoor Advertising v. State of Utah, Utah Department of Transportation and St. George City, Utah*.⁸⁷¹ The issue for resolution was whether the defendant governmental agencies have the authority to impose restrictions on the placement of billboards on land owned by the United States in trust for the tribe. There, the land in trust was being used by a non-Indian sign company for billboard display. The district court ruled adversely to the defendants in denying preliminary injunctive relief in a 1995 bench ruling. A final judgment, issued on October 22, 2003, ruled against the defendants and in favor of the tribe. This court’s decision will be discussed in more detail in paragraph d.(1), *infra*.

Also discussed in LRD No. 41 was the *City of Fife v. George*,⁸⁷² involving the placement of a sign 20 by 60 ft, rising approximately 80 ft above the ground, on land in Fife, Washington, held in trust by the United States for the Puyallup Tribe of Indians. This case did not involve issues under the HBA or state outdoor advertising control laws, but related to the interpretation of a 1988 settlement agreement between the parties.

⁸⁶⁷ See *People v. Naegele Outdoor Adver. Co. of Cal.*, 38 Cal. 3d 509, 213 Cal. Rptr. 247, 698 P.2d 150 (1985). The court held:

It appears logically imperative that, had Congress intended the states to enforce the provisions of the Highway Beautification Act against nonconforming advertising displays located on Indian tribal lands, it would have empowered the relevant state authorities to condemn reservation lands, to regulate tribal land use, and to sue Indian tribes. No such authorization can be found in the Highway Beautification Act. We therefore conclude that, even if Congress intended the outdoor advertising standards of the [HBA] to apply on Indian reservations, it did not intend that these standards be enforced through assertion of state power. Thus, we reject the Department’s argument that the [HBA] authorizes state regulation of outdoor advertising on Indian reservation lands.... In our opinion, Congress may have intended the act’s provisions to apply on Indian reservations. But if so, it reserved to federal authorities the responsibility for enforcing the act’s provisions upon federal lands and reservations. For this reason, we conclude that the state’s regulatory authority in this area is preempted by the operation of federal law and the judgment in favor of the Department must be reversed. (Emphasis supplied)

⁸⁶⁸ A memorandum dated March 7, 1986, from the FHWA Chief Counsel to the Federal Highway Administrator advised that “FHWA has long recognized that the requirement of 23 U.S.C. 131(h) that outdoor advertising on public lands and reservations be controlled was unclear with respect to enforcement,” and advised that pending legislation to amend 131(h) would vest authority to control outdoor advertising on Indian lands in the federal agency with jurisdiction of those lands.

⁸⁶⁹ 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 29, 343 (1989).

⁸⁷⁰ See 25 C.F.R. § 1.4(a).

⁸⁷¹ No. 2:95CV 1025S (D. Utah, filed Nov. 17, 1995).

⁸⁷² No. C96-6008 FDB, W.D. Wash., filed Dec. 6, 1996.

Noteworthy on the issue of outdoor advertising control is the decision in *Washington v. Confederated Tribes*,⁸⁷³ which established that the principles of preemption and tribal self-government did not authorize Indian tribes to “market an exemption” from state law for non-Indians in Indian country.⁸⁷⁴ In the later case of *California v. Cabazon Band of Mission Indians*,⁸⁷⁵ the Court, while rejecting the contention, recognized that a state’s claim of jurisdiction may be stronger where a tribe is merely marketing an exemption from state laws. In *the Shivwits Band* case, the State of Utah argued that the tribe was “marketing an exemption” to state and local laws when it leased billboard space to Kunz Outdoor Advertising.

(4) *Recent Case Law.*—(a) *Shivwits Band of Paiute Indians, et al. v. State of Utah, et al.* In an unreported decision of October 22, 2003, U.S. District Judge Zimmer held:

Like the *Naegele* Court [*People v. Naegele Outdoor Advertising Company of California, supra.*], this court concludes that even if the HBA applies to the trust land at issue here, the Act is subject to federal (not state) enforcement, and the Act does not expressly authorize the regulation intended by Utah and St. George.... 25 C.F.R. § 1.4 (2003) provides additional support for the argument that the State Defendants do not have authority to regulate the subject property.... [In addition,] the court finds that the Shivwits have not marketed an exemption by obtaining the subject land and leasing it to Kunz.... The court holds that the State Defendants have no authority, express or implied, to regulate Kunz’s placement of billboards on the subject property, held in trust for the Shivwits.⁸⁷⁶

This decision has been appealed by the State of Utah to the U.S. Court of Appeals for the Tenth Circuit, and the matter was submitted on argument in early 2005.

(b) *Blunk v. Arizona DOT*⁸⁷⁷—This was a suit to challenge the right of the State of Arizona to regulate Plaintiff Blunk’s commercial use of nonreservation fee land owned by the Navajo Nation. He had a permit from the tribe to erect billboards on the land, but failed to obtain a State permit from ADOT. ADOT told Blunk he would have to take down the billboards and apply for a permit. Blunk refused and sued, seeking declaratory judgment that ADOT’s attempted regulation violated federal preemption and Navajo sovereignty. The court held:

⁸⁷³ 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980).

⁸⁷⁴ *Id.* at 155.

⁸⁷⁵ 480 U.S. 202, 219–20, 94 S. Ct. 1083, 1094, 94 L. Ed. 2d 244, 262 (1987).

⁸⁷⁶ *Shivwits Band of Paiute Indians v. State of Utah*, No. 2:95cv1025 TC (D. Utah 2003), at 7, 9, 15.

⁸⁷⁷ 177 F.3d 879 (9th Cir. 1999).

In sum, the requirements for the Navajo Fee Land to be “Indian country” are not met in this case. Because the land is not “Indian country,” the ADOT is not preempted by the federal preemption prong of the Indian preemption doctrine from regulating Blunk’s erection of billboards on the land. We need not consider the *White Mountain* balancing test.... Finally, our holding that the state may impose regulations on a non-Indian’s use of the Navajo Fee Land is consistent with Justice Steven’s opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 106 L. Ed. 2d 343, 109 S. Ct. 2994 (1989), a case involving zoning of fee lands owned by nonmembers of the Tribe’s reservation....

b. Application of the Federal Motor Carrier Safety Regulations (FMCSRs) to Indian Tribes

An FHWA memorandum in 1993 concluded that the FMCSRs applied to Indian tribal entities, that the Federal Hazardous Materials Regulations (FHMRS) applied to Indians living on tribal lands and involved in interstate commerce, that the FHMRS apply when the “interstate transportation is conducted solely within the tribe’s reservation,” and that the FMCSRs apply in the same manner in similar situations. It advised that:

[T]he FMCSRs generally apply to the various Indian tribes as they do not interfere with purely intramural affairs of the tribe, and there is no evidence in the Congressional history of the act that Congress intended to exclude the Indian tribes from regulation under the act. Lastly, although it is doubtful that a treaty would exclude enforcement of the act, every treaty with each specific tribe MUST be consulted before a definite answer can be given. Treaties with specific Indian tribes may limit the ability of Federal agents entering Indian lands without the tribes’ prior consent.

c. Application of Preemption Provisions of HMTA⁸⁷⁸ to Indian Tribes⁸⁷⁹

The HMTA provides for the regulation of the transportation of hazardous materials. Section 5125(a), with certain exceptions, provides for the preemption of state, local, and tribal requirements that are inconsistent with federal laws, regulations, and directives:

[A] requirement of a State, political subdivision of a State, or Indian tribe is preempted if—(1) complying with [such] a requirement and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible, or (2) the re-

⁸⁷⁸ 49 U.S.C. § 5125 (2005) (formerly 49 U.S.C. § 1811).

⁸⁷⁹ SAFETEA-LU addresses Indian tribes and hazardous material transportation in its re-authorizing language in §§ 7102, *et seq.*

quirement...as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

Procedures for securing decisions on preemption are set forth in Section 5125(d), which provides, in part:

(1) A person (including a State, political subdivision of a State, or Indian tribe) directly affected by [such] a requirement...may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted.... The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for a determination within 180 days.

* * *

(3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

The statute goes on to provide in Section 5125(f) for judicial review “in an appropriate district court of the United States...of the decision of the Secretary not later than 60 days after the decision becomes final.”

A tribal ordinance to control shipment of nuclear materials was held to be preempted under HMTA and enjoined in *Northern States Power Company v. The Prairie Island Mdewakeanton Sioux Indian Community*.⁸⁸⁰ The tribal nuclear radiation control ordinance required transporters to obtain a tribal license for each shipment of nuclear materials across the reservation land. The ordinance also required that license applications be filed 180 days in advance of each shipment, accompanied by a fee of \$1,000. The tribal council was authorized to determine whether to issue a license, and to impose a \$1 million civil fine for willful violations of the ordinance. Northern States Power Company’s (NSP’s) Prairie Island plant, in operation since 1974, was located near the reservation, and the only ground access to the plant was provided by a railroad line and a county road, both of which crossed the reservation. NSP moves approximately 70 shipments of nuclear materials in and out of the plant each year.⁸⁸¹

NSP brought this suit for declaratory judgment following a ruling by the IBIA that it lacked authority to enjoin a tribe from enforcing a tribal

ordinance.⁸⁸² The tribe and tribal officials appealed the district court’s granting of preliminary injunction against enforcement of the tribal ordinance, arguing, *inter alia*, that the district court failed to recognize and apply principles of tribal sovereignty, including the tribe’s immunity from suit pending exhaustion of tribal court remedies, which “precludes the suit and protects the tribal officers.”⁸⁸³ The circuit court affirmed the district court, holding as follows:

We conclude that the [HMTA] preempts the tribal ordinance. In resolving to enforce the ordinance, the member of the Tribal Council were acting to enforce an ordinance that the tribe had no authority to enact. The Council members acted beyond the scope of their authority and placed themselves outside the tribe’s sovereign immunity.... Indian tribes are expressly subjected to the Act’s preemption rules.... The Act’s plain language indicates that, sovereign immunity notwithstanding, states and Indian tribes are subject to the preemption rules, including the provision that allows preemption cases to be brought in “any court of competent jurisdiction.” 49 U.S.C. § 1811(c)(2) [now 49 U.S.C. § 5125(d)(3)].⁸⁸⁴

As previously noted at Section D.8.c., the U.S. Ninth Circuit Court of Appeals, in *Public Service Co. of Colorado v. Shoshone-Bannock Tribes*,⁸⁸⁵ also held that the HMTA abrogates tribal immunity from suit in federal court.

d. Traffic Safety

The NCSL report entitled, *Traffic Safety on Tribal Lands*,⁸⁸⁶ states that the leading cause of death for American Indians between the ages of 1 and 44 years is from injuries sustained in motor vehicle crashes and pedestrian-related crashes. It further reports that although many tribal governments have adopted strict laws to address traffic safety, there is difficulty in effectively enforcing such laws due to limited police resources.⁸⁸⁷ In addressing traffic safety issues, the NHTSA has established a Safe Communities Service Center with the goal of creating and promoting community-based solutions for solving problems arising from traffic crashes. This program is also dedicated to establishing Safe Community programs for tribal lands.⁸⁸⁸ The NCSL report highlights several exam-

⁸⁸² *Id.* at 459–60.

⁸⁸³ *Id.*

⁸⁸⁴ *Id.* at 462–64.

⁸⁸⁵ 30 F.3d 1203, 1207 (9th Cir. 1994).

⁸⁸⁶ MELISSA SAVAGE, NAT’L CONFERENCE OF STATE LEGISLATURES, *TRAFFIC SAFETY ON TRIBAL LANDS 1* (2004).

⁸⁸⁷ *Id.* at 3.

⁸⁸⁸ *Id.* at 6. See *Traffic Safety and Native Americans*, available at <http://www.nhtsa.dot.gov/safecommunities/>

⁸⁸⁰ 991 F.2d 458 (8th Cir. 1993).

⁸⁸¹ *Id.* at 459.

ples of tribal communities that have adopted and are effectively using the Safe Communities program. Federal funding for Safe Communities and other traffic safety programs is available to tribal governments through NHTSA. NHTSA reports that 25 tribes submitted project proposals for FY 2005 funding. A selection committee comprised of the BIA, NHTSA, Indian Health Service, BIA Law Enforcement, and a State Traffic Safety Coordinator met to score proposals in June 2004. The nine tribes selected for funding for FY 05 include Turtle Mountain (North Dakota); Fort Peck (Montana); Rocky Boy (Montana); Crow (Montana); Fort Belknap (Montana); Rosebud (South Dakota); Ramah Navajo (New Mexico); Jemez Pueblo (New Mexico); and Pyramid Lake (Nevada). The BIA Indian Highway Safety Program sponsored the first ever Tribal Traffic Safety Judicial Summit in September 2005.⁸⁸⁹

e. Highway Maintenance Responsibility

Maintenance of state highways is a statutory responsibility of the states and political subdivisions of the states not the federal government. Title 23, U.S.C. § 116 (2005), provides as follows:

(a) It shall be the duty of the State transportation department to maintain, or cause to be maintained, any project constructed under the provisions of this chapter [23 U.S.C.S. § § 101 et seq.] or constructed under the provisions of prior Acts. The State's obligation to the United States to maintain any such project shall cease when it no longer constitutes a part of a Federal-aid system.

(b) In any State wherein the State transportation department is without legal authority to maintain a project constructed on the Federal-aid secondary system, or within a municipality, such highway department shall enter into a formal agreement for its maintenance with the appropriate officials of the county or municipality in which such project is located.

This maintenance responsibility extends to state, county, and municipal roads on the BIA system, including roads on Indian lands, if the state or local entity owns the road or has agreed to maintain the road. The extent of this maintenance responsibility is reflected in the previously discussed IRR inventory, consisting of approximately 63,000 mi of road. Approximately one-half of these miles are state- and county-owned roads and the other half are BIA or tribal roads, all of which are public roads. With respect to BIA and tribal roads, the BIA has a Road Maintenance Program currently funded out of the annual Department of the Interior Appropriations.

servicecenter.

⁸⁸⁹ See <http://www.nhtsa.dot.gov/safecommunities/ServiceCenter/scnews/features7.html>.

BIA road maintenance facilities are eligible for these maintenance funds. In addition, public tribal transportation facilities are eligible, as are non-BIA transportation facilities if public health and safety issues are involved.⁸⁹⁰ Finally, SAFETEA-LU allows a tribe to use up to 25 percent of its IRR program funds for maintenance. This allowance is in addition to any DOI funds a tribe may receive for maintenance purposes.⁸⁹¹

M. CONCLUSION

From the outset of the European settlement of North America, the Indian tribes were treated as

⁸⁹⁰ 25 C.F.R. § 170.803 (2005) provides as follows:

§ 170.803 What facilities are eligible under the BIA Road Maintenance Program?

(a) The following public transportation facilities are eligible for maintenance under the BIA Road Maintenance Program:

(1) BIA transportation facilities listed in paragraph (b) of this section;

(2) Non-BIA transportation facilities, if the tribe served by the facility feels that maintenance is required to ensure public health, safety, and economy, and if the tribe executes an agreement with the owning public authority within available funding;

(3) Tribal transportation facilities such as public roads, highway bridges, trails, and bus stations; and

(4) Other transportation facilities as approved by the Secretary.

(b) The following BIA transportation facilities are eligible for maintenance under paragraph (a)(1) of this section:

(1) BIA road systems and related road appurtenances such as signs, traffic signals, pavement striping, trail markers, guardrails, etc.;

(2) Highway bridges and drainage structures;

(3) Airport runways and heliport pads, including runway lighting;

(4) Boardwalks;

(5) Adjacent parking areas;

(6) Maintenance yards;

(7) Bus stations;

(8) System public pedestrian walkways, paths, bike and other trails;

(9) Motorized vehicle trails;

(10) Public access roads to heliports and airports;

(11) BIA and tribal post-secondary school roads and parking lots built with IRR Program funds; and

(12) Public ferry boats and boat ramps.

⁸⁹¹ SAFETEA-LU § 1119(i).

sovereign nations by the English crown. Federal congressional and executive policy from the beginning recognized and protected separate status for tribal Indians in their own territory. Indian law is best understood in historical perspective because it reflects national Indian policy, which has been constantly changing, never consistent. Federal policy has shifted from regarding tribes as sovereign equals, to relocating tribes, to attempts to exterminate or assimilate them, and currently to encouraging tribal self-determination. The current federal policy of “self-determination” for Indians and tribal governments began in 1969. President Nixon, building on President Johnson’s rejection of the termination policy, is credited with changing the direction of the federal government and its treatment of Indian tribes and Indians, urging Congress to undertake a program of legislation that would permit the tribes to manage their own affairs. The bipartisan consensus that resulted has remained ever since, producing a significant number of legislative enactments to benefit Indians and Indian tribes and recognize or extend tribal sovereignty. The validation and advancement of self-determination for Indian tribes has now been officially supported by the Congress and eight consecutive Presidents.

Running on a parallel track with the legislative and executive policies, but not always consistent with such policies, were the opinions of the federal judiciary. Chief Justice John Marshall’s Indian trilogy of opinions established the foundation principles of American Indian law, with the primary principle being conquest rendered the Indian tribes subject to federal plenary power in Indian affairs. The enduring principles of these opinions are (1) Indian tribes, because of their original political/territorial status, retain incidents of preexisting sovereignty; (2) this sovereignty may be diminished or dissolved by the United States, but not by the states; (3) because of this limited sovereignty and the tribe’s dependence on the United States, the government has a trust responsibility relative to Indians and their lands.⁸⁹²

For over 100 years the federal judiciary held close to the principles of Chief Justice Marshall’s opinion in *Worcester v. Georgia*,⁸⁹³ excluding states from power over Indian affairs. As late as 1959, in the unanimous decision in *Williams v. Lee*, the U.S. Supreme Court noted that

Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them...this Court [has] consistently guarded the authority of Indian

governments over their reservations.... If this power is to be taken away from them, it is for Congress to do it.⁸⁹⁴

But, in 1973, the Court would recognize that Chief Justice Marshall’s view

has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together affect the respective rights of State, Indians, and the Federal Government...[and that] even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.⁸⁹⁵

In 1978, the Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*⁸⁹⁶ went significantly further, reducing tribal sovereignty by denying tribal criminal jurisdiction over nonmembers. It established a new “inherent limitation” on tribal sovereignty. The Court ruled that by submitting to the overriding sovereignty of the United States, Indian tribes necessarily gave up their power to exercise criminal jurisdiction over nonmembers except in a manner acceptable to Congress.⁸⁹⁷ This inherent limitation doctrine was extended to civil jurisdiction over nonmembers by the Supreme Court’s 1981 landmark decision in *Montana v. United States*, where the Court stated: “*Oliphant*...principles...support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁸⁹⁸ The Court held that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation.”⁸⁹⁹ Two basic exceptions were established allowing inherent sovereign power to be exercised by some forms of civil jurisdiction over nonmembers on their reservations, even on non-Indian fee lands:⁹⁰⁰

1. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements;
2. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political

⁸⁹² DESKBOOK, *supra* note 16, at 4.

⁸⁹³ 31 U.S. (6 Pet.) 515 (1832).

⁸⁹⁴ 358 U.S. 217, 220, 223 (1959).

⁸⁹⁵ *Mescalero Apache Tribe*, 411 U.S. at 148.

⁸⁹⁶ *Oliphant*, 435 U.S. 191 (1978).

⁸⁹⁷ *Id.* at 210.

⁸⁹⁸ *Montana*, 450 U.S. at 565.

⁸⁹⁹ *Id.* at 554.

⁹⁰⁰ *Id.* at 565–66.

integrity, the economic security, or the health or welfare of the tribe.

Subsequent Supreme Court decisions to date have strongly adhered to the *Montana* principle concerning tribal civil authority over nonmembers, but narrowly construed the two exceptions. For example, one of the most significant of these decisions for state DOTs and their contractors is *Strate v. A-1 Contractors*,⁹⁰¹ which arose out of a collision between two non-Indians on a North Dakota state highway running through a reservation. In a unanimous decision, the Court found that the state's federally granted right-of-way over tribal trust land was the "equivalent, for nonmember governance purposes, to alienated, non-Indian land," rejecting tribal court jurisdiction over tort litigation involving nonmembers.⁹⁰² The Court rejected assertions that either of the *Montana* two exceptions applied. Another example relevant to state DOTs is the decision in *Montana Department of Transportation v. King*,⁹⁰³ which held that the State and its officials were outside the regulatory reach of the TERO for work performed on the right-of-way owned by the State. The recent Supreme Court decision in *Nevada v. Hicks*⁹⁰⁴ is the culmination of a series of cases since *Montana* that has limited tribal sovereign power and extended state power in Indian country, holding that *Montana* applies regardless of land status and making clear that tribal jurisdiction over nonmembers is extremely limited, even on tribal land.

While the federal judiciary was significantly reducing the breadth of tribal sovereignty during the last quarter century, the Congress and Executive Branch, in contrast, have broadened and strengthened tribal authority. For example, Congress in enacting ISTEA mandated that statewide planning requirements include consultation, cooperation, and coordination with Indian tribal governments on a government-to-government basis. Executive initiatives during this period also established requirements for government-to-government relationships that respected tribal sovereignty. Congress also enacted legislation designed to protect natural, religious, and cultural assets important to Indians and Indian tribes. For example, the 1992 amendments to the NHPA require consultation with Indian tribes or Native Hawaiian organizations for undertakings that may affect properties of traditional religious and cultural significance on or off tribal lands. More recently, Congress has ex-

pressly provided for tribal governments to exercise degrees of jurisdictional authority under the Clean Air Act, Safe Drinking Water Act, Clean Water Act, and Comprehensive Environmental Response, Compensation, and Liability Act.

Core uncertainties and distrust resulting from these contrasting actions, discussed above, have led to continuous and expensive litigation between the tribes and the states. But this litigation has done little to resolve the core uncertainties and distrust. Both parties jealously guard jurisdiction over areas that affect the other. It would be in the best interests of the tribes and states to expend time and money on lasting solutions. Both tribes and states are now recognizing that negotiation leading to cooperative agreements may be the best solution. There are many examples of cooperative solutions to mutual problems, including gaming compacts, environmental agreements, hunting and fishing shared regulation, water agreements, and law enforcement agreements. Many states have enacted enabling legislation authorizing state-tribal cooperative agreements. Several state DOTs have taken a leadership role in developing state-tribal compacts on transportation issues. Only time will tell whether such cooperation, including the sharing of jurisdiction, will truly resolve the core uncertainties and distrust and reduce the litigation.

⁹⁰¹ 520 U.S. 438, 1175 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

⁹⁰² *Id.* at 445.

⁹⁰³ 191 F.3d 1108 (9th Cir. 1999).

⁹⁰⁴ 533 U.S. 353, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001).

SECTION 4

MOTOR VEHICLE LAW

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A. TRANSPORTATION IN AMERICA

Hundreds of millions of motor vehicles traverse America's roads and highways, providing individual mobility and linking distant markets and consumers in a vibrant economy. The roads and highways are the circulatory system of the nation. The automobile is mobility for Americans; the truck is the beast of burden of commercial goods.

But there is a dark side to transportation as well. Not only are motor vehicles the most significant source of carbon emissions, more than 40,000 Americans die annually in motor vehicle crashes, and nearly 3 million are seriously injured.¹ Motor vehicle deaths account for 95 percent of all transportation-related deaths and 99 percent of all transportation injuries. They are the leading cause of death for Americans in every age group from 5 to 55.² The financial cost exceeds \$200 billion.³ Large motor vehicles make up only 3 percent of registered vehicles, yet they account for 11 percent of fatal crashes. In 2003 (the last year for which data is available), large motor vehicles were involved in more than 430,000 crashes, killing approximately 5,000 people; there were also 289 fatal crashes involving buses.⁴ When large commercial trucks collide with automobiles, the occupants of the passenger vehicles are 15 times more likely to be killed than are the drivers of the large trucks.⁵

¹ The highest number of traffic fatalities was recorded in 1979, when 51,100 Americans died. Between 1995–2003, the number of deaths remained relatively constant, averaging 41,900 annually. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: BETTER GUIDANCE COULD IMPROVE OVERSIGHT OF STATE HIGHWAY SAFETY PROGRAMS 2 (2003). See also U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: RESEARCH CONTINUES ON A VARIETY OF FACTORS THAT CONTRIBUTE TO MOTOR VEHICLE CRASHES (2003); U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: RELIABILITY AND VALIDITY OF DOT CRASH TESTS (1995).

² Statement of J. Richard Capka, Administrator, Federal Highway Administration, before the Subcommittee on Highways Transit & Pipelines, Committee on Transportation and Infrastructure. U.S. House of Representatives, Implementation of SAFETEA-LU (June 7, 2006), <http://testimony.ost.dot.gov/test/Capka1.htm>.

³ U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: IMPROVED MONITORING AND OVERSIGHT OF TRAFFIC SAFETY DATA PROGRAM ARE NEEDED 1 (Nov. 2004).

⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: FURTHER OPPORTUNITIES EXIST TO IMPROVE DATA ON CRASHES INVOLVING MOTOR VEHICLES 1 (Nov. 2005).

⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, TRUCK SAFETY: SHARE THE ROAD SAFELY PROGRAM NEEDS BETTER EVALUATION OF ITS INITIATIVES 1 (May 2003). PAUL DEMPSEY, THE SOCIAL AND ECONOMIC CONSEQUENCES OF DEREGULATION 120–25 (1989).

Most motor vehicle accidents have multiple causes. Three factors have been identified as the principal causes of crashes—human (the driver's actions or condition, such as speeding and violating traffic laws or the effects of drugs, inattention, and driving errors); roadway environment (including hazards and roadway conditions); and vehicle factors (the failure of the vehicle or its design).⁶ Alcohol-related crashes account for more than 40 percent of all motor vehicle fatalities.⁷ The roadway environment is the second most prevalent contributing factor. Only about 2 percent of crashes are caused by a vehicle-related failure.⁸

Though there are many motor vehicle regulations promulgated by the various administrations of the U.S. DOT (including those adopted by NHTSA and the Federal Motor Carrier Safety Administration (FMCSA)), this study emphasizes those programs administered by FHWA in cooperation and coordination with the state DOTs. The purpose of this study is to comprehensively examine the broad subject of motor vehicle and driver laws, but also to focus more specifically on certain aspects of this broad topic that have not been as thoroughly addressed in other NCHRP research papers, particularly, FHWA oversight of vehicles and vehicular behavior, such as size and weight limits, vehicle safety programs, and driver safety programs.

This section examines the historical evolution of the federal and state relationship over highways, and describes the evolution of federal law as it progressed to a concern over infrastructure and to safety, environmental, and security concerns. It emphasizes federal laws addressing vehicles and vehicle behavior (e.g., size and weight limits, vehicle safety programs, driver safety programs), and the programs administered by FHWA, though the programs administered by the FMCSA and NHTSA will be mentioned for context.

B. MOTOR VEHICLE: STATUTORY DEFINITIONS

We begin this study with an examination of what constitutes a “motor vehicle.” There are a number of alternative definitions in federal law. This section compares and contrasts those alternative definitions. Generally speaking, the U.S.C. has two alternative references that have been developed over time: (1) motor vehicles, and (2) commercial motor vehicles (CMVs).⁹

⁶ See generally Howard Latin & Barry Kasolis, *Bad Designs and Lethal Profits: The Duty to Protect Other Motorists Against SUV Collision Risks*, 82 B.U. L. REV. 1161 (2002).

⁷ Young, male drivers are also responsible for a disproportionate number of automobile accidents. U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHWAY SAFETY: FACTORS CONTRIBUTING TO TRAFFIC CRASHES AND NHTSA'S EFFORTS TO ADDRESS THEM 5–8 (May 2003).

⁸ *Id.* at 5–9.

⁹ See U.S. GEN. ACCOUNTING OFFICE, COMMERCIAL MOTOR VEHICLES: EFFECTIVENESS OF ACTIONS BEING TAKEN TO

For DOT transportation policy purposes, Title 49 of the U.S.C. defines the term "motor vehicle" as a

vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.¹⁰

This definition must have been developed at a time when electric trolleys dominated city streets in America; they were explicitly excluded from the definition. Also for DOT transportation policy purposes, Title 49 defines a "motor vehicle" as a "vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line."¹¹ Thus, cars, trucks, and buses are motor vehicles, but trains and trolleys are not.

A similar definition is included in the National Driver Register program, which defines a "motor vehicle" as a "vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on public streets, roads, or highways, but does not include a vehicle operated only on a rail line."¹²

CMVs tend to be defined by their weight and capacity or type of goods transported. The Motor Carrier Safety Act of 1984¹³ defined a CMV as "any self-propelled vehicle in interstate commerce to transport passengers or property" having a gross vehicle weight rating (GVWR) of 10,001 lb or more, designed to transport 15 or more passengers (including the driver),¹⁴ or transporting hazardous materials in sufficient quantities that placarding is required.¹⁵ The Commercial Motor Vehicle

Safety Act of 1986,¹⁶ which required implementation of a single commercial driver's license program, limited motor vehicles subject to its requirements to those transporting more than 15 passengers, including the driver.¹⁷

The ICC Termination Act of 1994¹⁸ (ICCTA) amended the passenger-vehicle component of CMV, in part, to one

designed or used to transport passengers for compensation, but exclude vehicles providing taxicab service and having a capacity of not more than 6 passengers and not operated on a regular route or between specified places [or] designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation.¹⁹

ICCTA authorized, but did not require, FHWA to amend the FMCSRs accordingly. The "designed or used" language would make a vehicle designed for 12 passengers, but actually carrying 16 passengers, subject to the act.²⁰

TEA-21²¹ further amended the CMV definition to make it clear that the 10,001-lb requirement referred to either gross vehicle weight (GVW) or the gross vehicle weight rating (GVWR). TEA-21 allowed the agency to exercise jurisdiction based on GVW or GVWR, whichever is greater. Thus, a vehicle operating in interstate commerce having a GVWR of 9,800 lb would be subject to the regulations if it were loaded to 10,200 lb.²²

Thus, under the Commercial Motor Vehicle Safety Program, a commercial motor vehicle is a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or freight if it (1) has a GVR or GVWR of more than 10,000 lb; (2) transports more than a designated number of passengers; or (3) transports hazardous materials.²³ The Commercial Mo-

IMPROVE MOTOR CARRIER SAFETY IS UNKNOWN (2000); U.S. GOV'T ACCOUNTABILITY OFFICE, COMMERCIAL MOTOR VEHICLES: SIGNIFICANT ACTIONS REMAIN TO IMPROVE TRUCK SAFETY (Mar. 2000).

¹⁰ 49 U.S.C. § 13102(14). See 49 U.S.C. § 14301 for the definition for security interests.

¹¹ 49 U.S.C. § 30102(6).

¹² 49 U.S.C. § 30301(4). Elsewhere in the Motor Vehicle and Driver Program, 49 U.S.C. § 32101(7) defines a "motor vehicle" as a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line.

¹³ 49 U.S.C. § 2311(c), Pub. L. No. 98-554, 98 Stat. 2832 § 204 (1984).

¹⁴ CMVs that transport between 9 and 15 passengers (including the driver) for compensation must file a motor carrier identification report, mark their vehicles with a DOT identification number, and maintain an accident register. 49 C.F.R. pt. 390 (1999). 66 Fed. Reg. 2756 (Jan. 11, 2001).

¹⁵ 49 U.S.C. § 31132(1); 49 C.F.R. § 390.5. Since the definition applies to interstate commerce, intrastate transit vehicles do not fall under it.

¹⁶ Pub. L. No. 99-570; 100 Stat. 3207-170.

¹⁷ 49 U.S.C. § 31301(4)(B). See also 49 U.S.C. § 32304 (passenger motor vehicle country of origin labeling).

¹⁸ Pub. L. No. 104-88, 109 Stat. 803.

¹⁹ 49 U.S.C. § 31132(1).

²⁰ 64 Fed. Reg. 48510 (Sept. 3, 1999).

²¹ Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

²² 64 Fed. Reg. 48510 (Sept. 3, 1999).

²³ For purposes of the CMV Safety Program: 49 U.S.C. § 31101(1):

"commercial motor vehicle" means (except in section 31106) a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 lb, whichever is greater;

(B) is designed to transport more than 10 passengers including the driver; or

(C) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

tor Vehicle and Driver Program extends to a larger class of commercial motor vehicles: (1) those with a GVW or GVWR of at least 26,001 lb or lesser if prescribed by regulation, but not less than 10,001 lb; (2) those that transport at least 16 passengers including the driver; and (3) those that transport certain hazardous materials.²⁴ FHWA regulations promulgated thereunder define a CMV as one “designed or regularly used to carry freight, merchandise, or more than ten passengers, whether loaded or empty, including buses, but not including vehicles used for vanpools, or vehicles built

Elsewhere in the CMV Safety Program, 49 U.S.C. § 31132(1) provides:

"commercial motor vehicle" means a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 lb, whichever is greater;

(B) is designed or used to transport more than 8 passengers (including the driver) for compensation;

(C) is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(D) is used in transporting material found by the Secretary of Transportation to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

49 C.F.R. § 390.5.

²⁴ 49 U.S.C. § 31301(4) provides:

"commercial motor vehicle" means a motor vehicle used in commerce to transport passengers or property that—

(A) has a gross vehicle weight rating or gross vehicle weight of at least 26,001 lb, whichever is greater, or a lesser gross vehicle weight rating or gross vehicle weight the Secretary of Transportation prescribes by regulation, but not less than a gross vehicle weight rating of 10,001 lb;

(B) is designed to transport at least 16 passengers including the driver; or

(C) is used to transport material found by the Secretary to be hazardous under section 5103 of this title, except that a vehicle shall not be included as a commercial motor vehicle under this subclause if—

(i) the vehicle does not satisfy the weight requirements of subclause (A) of this clause;

(ii) the vehicle is transporting material listed as hazardous under section 306(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 42 U.S.C. 9656(a) and is not otherwise regulated by the Secretary or is transporting a consumer commodity or limited quantity of hazardous material as defined in section 171.8 of title 49, Code of Federal Regulations; and

(iii) the Secretary does not deny the application of this exception to the vehicle (individually or as part of a class of motor vehicles) in the interest of safety.

and operated as recreational vehicles.”²⁵ Thus recreational and vanpool vehicles are excluded from federal regulation.²⁶

At this writing, a CMV is defined as a self-propelled or towed vehicle used in interstate commerce to transport passengers or property if the vehicle (1) has a GVW or GVWR of 10,001 lb or more,²⁷ whichever is greater; (2) is designed or used to transport more than eight passengers (including the driver) for compensation; (3) is designed or used to transport more than 15 passengers (including the driver) and is not used to transport passengers for compensation; or (4) is used to transport hazardous material in such quantity as to require placarding.²⁸ Moreover, the Motor Carrier Safety Improvement Act of 1999²⁹ added commercial vans known as “camionetas” and commercial vans operating in interstate commerce outside of commercial zones that have been determined to pose serious safety risks.

C. EVOLUTION OF STATUTORY MOTOR VEHICLE LAW AND HISTORY OF THE FEDERAL/STATE RELATIONSHIP

Early roadways were little more than Indian traces, widened for local travel. The first major road on the American continent was built by the British government for military purposes.³⁰ The first improved roads were chiefly constructed through private enterprise and therefore took the form of turnpikes or toll roads to provide a return on investment. By the 1800s, hundreds of turnpike companies were collecting tolls on the roads they had built.

The first post roads came along in the 1770s, subsequent to Congress receiving power in 1789 under Article I, Section 8, of the U.S. Constitution “to lay and collect taxes,” and, amongst other responsibilities, “to establish Post Offices and post roads.” The Post Office Act of 1792 authorized the creation of post roads. Though there were only 6,000 mi of post roads in 1792,

²⁵ 23 C.F.R. § 658.5.

²⁶ 69 Fed. Reg. 11,994 (Mar. 12, 2004).

²⁷ There are three classes of CMVs: Class A (any combination of vehicles with gross weight of 26,001 or more lb, provided the vehicle(s) towed exceed 10,000 lb); Class B (vehicles with gross weight of 26,001 or more lb, provided the vehicle towed is less than 10,000 lb in weight); and Class C (any vehicle other than a Class A or B vehicle that is either designed to transport 16 or more passengers, including the driver, or is placarded for hazardous materials). It is the Class C vehicle that is relevant for transit operators.

²⁸ 49 U.S.C. § 31132.

²⁹ Pub. L. No. 106-159, 113 Stat. 1748 (1999).

³⁰ TOM LEWIS, *DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE* 56 (1997). ARTHUR TWINING HADLEY, *RAILROAD TRANSPORTATION: ITS HISTORY AND ITS LAWS* 24 (1903).

by 1829 there were 114,780 mi.³¹ A number of stagecoach trails were improved into post roads, and became arteries of commerce.³²

The states also began building roads in the 18th century. For example, the hard-surfaced, 60-mi Lancaster Pike³³ linking Philadelphia and Lancaster, Pennsylvania, was built between 1792 and 1795.³⁴ New York and southern New England followed Pennsylvania in road building. Many states (notably Pennsylvania and Kentucky) subsidized private turnpikes.³⁵

In 1797, the federal government began construction on the National Pike. It was to follow the old Cumberland Road to the West. The first segment of the National Pike was completed in 1818, from Cumberland, Maryland, to Wheeling, (West) Virginia,³⁶ with additional extensions made from year to year over the next 20 years reaching as far as Vandalia, Illinois.

The National Pike came to a halt when Andrew Jackson became President in 1832. A champion of states' rights, Jackson was opposed to federal involvement in construction projects within any of the individual states. As a result, the National Pike was abandoned as a federal project and turned over to the states. Jackson's actions would establish the basis for the highway development policy that exists today. Thus, the federal-state cooperative relationship on road building has deep historic roots.

The first federal agency addressing roads was the Office of Road Inquiry, established in 1893 in the U.S. Department of Agriculture. From 1893 until 1916, the federal government focused on disseminating scientific,

engineering, and economic information to assist in the design and construction of proper roads.³⁷ Because of Jacksonian Era policy, ownership, maintenance, and administration of roads and highways remained a state and local responsibility.

Recognizing the potential importance of motor carriage,³⁸ Congress began to promote its growth with federal matching grants for highway construction, first with the Federal-Aid Road Act of 1916,³⁹ which established the Bureau of Public Roads. It set the basic pattern for development of a national highway system which prevails to this day, whereby the federal government subsidizes planning and the funding of capital improvements, but the states remain responsible for ownership, the actual construction, and maintenance of their highways. In other words, the federal government funds and establishes standards, while the states and local governments actually build and maintain the highways.

The 1916 legislation got off to a poor start, with only \$5 million in federal money available during the first year. The United States entered World War I in April of 1917, compounding shortages of road-building material and causing road deterioration because of increased traffic. When the war ended in November 1918, it was apparent that significant changes were needed in several areas: (1) the definition of "rural post road"; (2) the \$10,000 per mi limitation, and (3) the decision to leave project selection in the hands of state highway officials leading to disconnection of improvements with other states.⁴⁰ These problems were partly remedied by the Federal Highway Act of 1921.

During World War I, the nation's highways were improved and many companies went into the inter-city trucking business and the operation of motorized bus lines. Further highway improvements came as a result of the Great Depression and work projects designed to keep people employed. The Franklin Roosevelt years were marked by strong marketplace intervention. The

³¹ Joseph Belluck, *Increasing Citizen Participation in U.S. Postal Service Policy Making: A Model Act to Create a Post Office Consumer Action Group*, 42 BUFF. L. REV. 253, 257 (1994).

³² Nancy K. McKenzie, *Commercial Speech and the First Amendment: Ambiguity, Commercial Speech and the First Amendment*, 56 U. CIN. L. REV. 1295 (1988).

³³ The first improved roads were primarily constructed through private enterprise, and therefore took the form of turnpikes or toll roads to provide a return on investment. Blocking access to these roads was a pole on a hinge. The pole was referred to as a pike, and once payment was made, the pike would be swung or turned (either upward or outward) to allow passage. Hence, derivation of the word "turnpike." By the 1800s, there were hundreds of turnpike companies.

PAUL DEMPSEY, LAURENCE GESELL, & L. WELCH PAGUE, *AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY* 9 (2d ed. 2005).

³⁴ RUSSELL BOURNE, *AMERICANS ON THE MOVE: A HISTORY OF WATERWAYS, RAILWAYS AND HIGHWAYS* 27 (1995).

³⁵ HADLEY, *supra* note 30, at 26. Pennsylvania paid about \$1,000 a mile, about a third of the total cost.

³⁶ In 1818, Wheeling was a part of the Commonwealth of Virginia. In 1861, after Virginia seceded from the Union, West Virginia seceded from Virginia, and was admitted into the Union in 1863. Thus, today Wheeling is in West Virginia.

³⁷ ROSS NETHERTON, *FEDERALISM AND THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991* 7 (NCHRP Legal Research Digest No. 32, 1995).

³⁸ The early 20th century saw the emergence of a new form of competition, the motor carrier. In 1904, there were but 700 trucks operating in the United States, most powered by steam or electrical engines. The following year, the first scheduled bus service began in New York City. But still, growth of this important means of transport was hampered by poor roads and the economic dominance of the railroad industry.

³⁹ Pub. L. No. 64-156, 39 Stat. 355 (July 11, 1916). WALTER MCFARLANE, *STATE HIGHWAY PROGRAMS VERSUS THE SPENDING POWER OF CONGRESS* (NCHRP Research Results Digest No. 136, 1982).

⁴⁰ 60 RICHARD WEINGROFF, *FEDERAL HIGHWAY ADMIN., U.S. DEPT OF TRANSP., FROM 1916 TO 1939: THE FEDERAL-STATE PARTNERSHIP AT WORK* 1 (1996), <http://www.tfhr.gov/pubrds/summer96/p96su7.htm>.

1930s were an era of increasing economic regulation in all sectors of industry, including transportation.

From the time the Act to Regulate Commerce was passed in 1887, the ICC had been given increasing authority to regulate the railroads and other forms of transportation. To support efficiency, economy, and safety in the burgeoning motor carrier industry⁴¹—and with the support of the ICC, most of the State public utility commissions (PUCs); the truck, bus, and rail industries; and many shippers—Congress promulgated the Motor Carrier Act of 1935, adding bus and trucking companies to the jurisdiction of the ICC.⁴² It gave the ICC jurisdiction over motor carrier safety, entry, rates, and business activities. The new legislation gave the ICC power to establish requirements for the qualifications of common, contract, and private carrier drivers, maximum hours of service, and standards of equipment.⁴³ By 1940, all five modes of public transportation (rail, water, highway, pipeline, and air) were under some form of governmental regulation.⁴⁴

The Transportation Act of 1940 added a national statement of transportation policy to the Interstate Commerce Act.⁴⁵ In it, Congress provided for “the impartial regulation of the modes of transportation” and in regulating those modes:

- To recognize and preserve the inherent advantage of each mode of transportation;
- To promote safe, adequate, economical, and efficient transportation;
- To encourage sound economic conditions in transportation, including sound economic conditions among carriers;
- To encourage the establishment and maintenance of reasonable rates for transportation without unreasonable

⁴¹ *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 538–39, 60 S. Ct. 1059, 1061–62, 84 L. Ed. 1345, 1348–49 (1940); *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 412 (3d Cir. 1992).

⁴² Daniel W. Baker & Raymond A. Greene, Jr., *Commercial Zones and Terminal Areas: History, Development, Expansion, Deregulation*, 10 *TRANSP. L.J.* 171, 176 (1978).

⁴³ 1 WILLIAM KENWORTHY, *TRANSPORTATION SAFETY LAW PRACTICE MANUAL* § 4.1 (1989).

⁴⁴ The 1938 Civil Aeronautics Act (as amended by government reorganization in 1940) created the Civil Aeronautics Board to regulate air transportation. It was passed during a period of strong governmental regulation in all modes of transportation.

⁴⁵ The 1940 Act also extended the jurisdiction of the ICC to water carriers and relieved the land-grant railroads of giving the federal government a discount on nonmilitary traffic, provided they surrendered their claims to unpatented lands. KEITH BRYANT, JR., *HISTORY OF THE ATCHISON, TOPEKA & SANTA FE RAILWAY* 270–71 (1982). Freight forwarders were brought under the ICC's jurisdiction with the Transportation Act of 1942. Act of May 16, 1942, 56 Stat. 285. Congress again regulated freight forwarders with the Act of Dec. 20, 1950, 64 Stat. 1113.

discrimination or unfair or destructive competitive practices;

- To cooperate with each State and the officials of each State on transportation;
- To encourage fair wages and working conditions in the transportation industry.⁴⁶

Thus, cooperation with the states, and the regulation of safety, were major national transportation policy objectives. For much of U.S. history, the relationship between the federal and state governments can be described as one of “dual federalism,” in which the national and state governments functioned independently as parallel sovereigns. By the 1940s, however, “cooperative federalism”—a blended program in which federal funding is used to support state and local action and federal goals are achieved indirectly through state and local action—began to take hold.⁴⁷

World War II had mobilized the rail, motor carrier, and airline industries to supply the logistical needs of the nation. After the War, the nation had some seven million trucks and a healthy transportation industry. World War II also accelerated highway development with the authorization in 1944 of the National System of Interstate Highways. What evolved were high-speed, quality-engineered, limited-access expressways much like the autobahns in Germany. Because tolls were collected for use of some of the limited access highways in the East, they were described as “turnpikes” (e.g., the Pennsylvania Turnpike or the New Jersey Turnpike). Conversely, because limited-access highways in the West were open to public use at no charge they became known as “freeways” (e.g., the San Bernardino Freeway).

Several major separated highways were built before World War II. Notable among them were the Pennsyl-

⁴⁶ 49 U.S.C. § 10101 (Supp. IV 1980) (emphasis supplied).

⁴⁷ One source described cooperative federalism in the context of transportation:

[I]n the case of federal highway aid, it was the states that set the goal of “getting the farmer out of the mud” through improved rural road networks. State and local bodies decided where, when, and how their roads would be built. Federal oversight was chiefly to ensure that funded work was carried out efficiently and economically. In the process, federal influence also worked to improve standards of design and construction and preserve the system's engineering integrity by preventing deprivation as a result of local political pressure....

In the 1960s, cooperative federalism entered a new phase, with dramatic increases in national programs directly addressing activities that previously had been the responsibility of state and local governments.... In the field of surface transportation, grants of federal-aid funds for highways, mass transit, and highway traffic safety were made conditional on the recipient's compliance with national standards and regulations laid down by Congress and the Administration for achieving the goals of other nontransportation programs.

NETHERTON, *supra* note 37, at 3.

vania Turnpike and Robert Moses's network of parkways on Long Island.⁴⁸ During the 1950s, it was President Dwight Eisenhower who saw the need to build a national system of interstate highways to link the country for, *inter alia*, purposes of national defense. In 1919, as a young Army officer, Eisenhower had participated in a transcontinental caravan of cars and trucks from the White House in Washington, D.C., to Union Square in San Francisco. Averaging only 5 mph an hour, the trip took 62 days. As the leader of Allied Forces in Europe, General Eisenhower became acquainted with one of the great public works project of the Third Reich—the autobahns—highways that facilitated the expeditious movement of the Wehrmacht to invade nearly every nation that bordered Germany, a transport network relatively impervious to air attack.⁴⁹

As President, Eisenhower championed the Federal Highway Act of 1956, which launched the largest public works project ever undertaken—the 43,000-mi National System of Interstate and Defense Highways. The companion Highway Revenue Act of 1956 created the Highway Trust Fund comprised of revenue from user charges (sales of gasoline, diesel, tires and a weight tax for heavy trucks and buses)—the first time Congress had earmarked taxes for specific purposes.⁵⁰ As the Interstate highways grew, the market share of freight transported by trucking companies enjoyed a corresponding growth.

The Interstate highway system took more than four decades to complete. The network of expressways connected the nation's larger cities and provided unprecedented access between centers of production and their primary markets. While vast stretches of the Interstate system can be crossed without encountering delays, the same is not so near major cities.

By the 1960s, environmental pollution had become a national policy concern. The Motor Vehicle Air Pollution Control Act of 1965⁵¹ required the Secretary of the Department of Health, Education, and Welfare to promulgate automotive emission standards.⁵²

Discussions about creating a federal DOT began as early as 1940.⁵³ In the 1960s, the Landis Report⁵⁴ cited

⁴⁸ LEWIS, *supra* note 30, at 38, 59–62.

⁴⁹ *Id.* at 89–90.

⁵⁰ Mark Solof, History of Metropolitan Planning Organizations—Part II, Section III, Federal Legislation on Transportation Planning; A Chronological Review 4 (1998), http://www.du.edu/transportation/Resources/pdfs/Vol_II_Sec_II_I.pdf.

⁵¹ Pub. L. No. 89-272, 79 Stat. 992 (1967).

⁵² Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. ENVTL. L.J. 156, 160 (1994); John Dwyer, *Environmental Federalism: The Practice of Federalism Under the Clear Air Act*, 54 MD. L. REV. 1183 (1995).

⁵³ DONALD WHITNAH, U.S. DEPARTMENT OF TRANSPORTATION: A REFERENCE HISTORY 6 (1998).

the need for an office to coordinate and develop a national transportation policy, which led President Kennedy to ask his aides to offer suggestions concerning transport policy. Legislation passed by Kennedy in 1961 provided the first federal program of urban transit support.⁵⁵ With Kennedy's assassination, the task force on transportation advised President Lyndon Johnson that no focal point for transportation existed in the Executive Branch, and that therefore a cabinet-level department of transportation should be created.⁵⁶ The bill creating the U.S. DOT was signed on October 15, 1966, and the agency was established on April 1, 1967.⁵⁷ The U.S. DOT was created pursuant to the Department of Transportation Act of 1966 to coordinate national transportation programs and to facilitate safe, expeditious, efficient, economical, and convenient transportation. The U.S. DOT was essentially created from an amalgamation of several preexisting governmental agencies. From the ICC came the Bureau of Railroad Safety (which formed a part of the Federal Railroad Administration (FRA)), and the Bureau of Vehicle Safety (which formed a part of the FHWA), including the ICC's jurisdiction over safety regulation of motor vehicle drivers and equipment, and motor carriers.⁵⁸ Specifically, the DOT Act provided that FHWA would perform the "functions, powers and duties" of the Secretary of Transportation over motor carrier safety.⁵⁹ The independent Federal Aviation Agency (which had earlier been split off from the Civil Aeronautics Board) became the U.S. DOT's FAA. The Commerce Department gave U.S. DOT the St. Lawrence Seaway Development Corporation, surrendered to the FHWA the National Highway Safety Bureau, and gave the FRA the Office of Groundspeed Transportation. The Treasury Department gave U.S. DOT the Coast Guard. The Department of Interior gave the FRA the Alaska Railroad. A new quasi-independent agency, the National Transportation Safety Board, was also housed within U.S. DOT.⁶⁰

⁵⁴ Report on Regulatory Agencies to the President Elect (1960), http://www.sechistorical.org/collection/papers/1960/1960_1221_Landis_report.pdf.

⁵⁵ Congress created a comprehensive program of transit assistance in the Urban Mass Transit Act of 1964. H.R. REP. NO. 88-204 (1963). The first long-term commitment for transit was the Urban Mass Transportation Assistance Act of 1970. The Federal Highway Act of 1973 opened the highway trust fund to transit, while the National Mass Transportation Assistance Act of 1974 made operating expenses eligible for federal funding.

⁵⁶ WHITNAH, *supra* note 53, at 9–10.

⁵⁷ *Id.* at 11.

⁵⁸ *Owner-Operators Indep. Drivers Ass'n v. Skinner*, 931 F.2d 582, 585 (9th Cir. 1991).

⁵⁹ *Oil Chemical and Atomic Workers v. Skinner*, 724 F. Supp. 1264, 1267 (N.D. Cal. 1989).

⁶⁰ WHITNAH, *supra* note 53, at 11.

The National Traffic and Motor Vehicle Safety Act of 1966 is the basic safety statute administered by NHTSA.⁶¹ It was promulgated to “reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.”⁶² The Vehicle Safety Act created the core safety grants program, consistently reauthorized since as the Section 402 State and Community Grants program, which allows states to use funds flexibly for a variety of safety programs.⁶³ It also required the establishment of federal safety regulations for vehicles and tires. The Vehicle Safety Act granted to U.S. DOT the authority to (1) “prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce” and (2) “carry out needed safety research and development.”⁶⁴ The U.S. DOT Secretary was required to establish Federal Motor Vehicle Safety Standards that “shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.”⁶⁵ In response, in 1967, the U.S. DOT’s NHTSA promulgated Standard 208 to address two types of problems: (1) vehicle defects that cause accidents (e.g., brakes, lights, tires), and (2) vehicle defects that aggravate injuries to passengers involved in accidents (also known as vehicle “crashworthiness”).⁶⁶

Safety also became a major policy objective in the mid-1960s. The Highway Safety Act of 1970 established NHTSA within U.S. DOT, as the successor to the National Highway Safety Bureau.⁶⁷ The Clean Air Act Amendments of 1970 authorized the EPA to set ambient air quality standards, set emission standards for new automobiles, and ban lead in gasoline.⁶⁸

The Motor Vehicle Information and Cost Savings Act of 1972 promoted safer automobiles, less prone to re-

pair, and required stronger auto bumpers and vehicles better able to withstand collisions.⁶⁹ The Motor Vehicle and School Bus Safety Amendments of 1974 required mandatory seat belt–ignition interlock systems. It also required manufacturers to notify and remedy consumers of any defects in their vehicles at no cost to the consumer. The remedy must take one of three forms: (1) repair the vehicle; (2) replace the vehicle; or (3) refund the purchase price.⁷⁰ The Hazardous Materials Transportation Act of 1974⁷¹ provided for federal preemption of any state or local law affecting the carriage of hazardous materials unless it was at least as stringent as relevant federal statutes and regulations.⁷²

The Clean Air Act Amendments of 1977⁷³ fortified the automobile emission strategies by requiring an automobile emissions inspection program in areas failing to meet ozone or carbon monoxide standards.⁷⁴ The Motor Carrier Act of 1980 eliminated economic entry regulation of interstate motor carriers, but retained fitness regulation.⁷⁵

STAA, in 1982, comprehensively addressed the subject of highway safety and motor carriers. It established a program of federal grants for state agencies to develop rules and regulations compatible with federal CMV standards.⁷⁶ Though imposing significantly higher fees and excise taxes on heavy trucks, STAA also improved motor carrier efficiency by establishing uniform size and weight standards for trucks operating on the National Network, and authorized the use of twin trailers or tandem trailers.⁷⁷ STAA required states to permit commercial motor vehicles consisting of 48-ft semitrailers or 28-ft twin trailers on the National Network, and prohibited states from restricting CMV semitrailer and

⁶¹ Kevin McDonald, *Don't TREAD on Me: Faster Than a Tire Blowout, Congress Passes Wide-Sweeping Legislation That Treads on the Thirty-Five Year Old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163 (2001).

⁶² 15 U.S.C. § 1381.

⁶³ U.S. GEN. ACCOUNTING OFFICE, *HIGHWAY SAFETY: BETTER GUIDANCE COULD IMPROVE OVERSIGHT OF STATE HIGHWAY SAFETY PROGRAMS* 4–5 (2003).

⁶⁴ Kevin McDonald, *Federal Preemption of Automotive Recalls: A Case of Too Many Backseat Drivers?*, 71 TENN. L. REV. 471, 477 (2004).

⁶⁵ 15 U.S.C. § 1392(a). Samuel Elswick, *Geier v. American Honda Motor Company: Airbags, Federal Preemption, and the Viability of a Regulatory Compliance Defense*, 28 N. KY. L. REV. 135 (2001).

⁶⁶ *Wood v. Gen. Motors Corp.*, 865 F.2d 395, 397 (1st Cir. 1988).

⁶⁷ Kevin McDonald, *Shifting Out of Neutral: A New Approach to Global Road Safety*, 38 VAND. J. TRANSNAT'L L. 743 (2005).

⁶⁸ Thomas McGarity, *Regulating Commuters to Clean the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521 (1996); Craig Oren, *How a Mandate Came from Hell: The Making of the Federal Employee Trip Reduction Program*, 28 ENVTL. L. 267, 280 (1998).

⁶⁹ Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REG. 87, 105 (1985).

⁷⁰ McDonald, *supra* note 67, at 471, 479–80.

⁷¹ Pub. L. No. 93-666; 88 Stat. 2156 (1975).

⁷² Christopher Baum, *Banning the Transportation of Nuclear Waste: A Permissible Exercise of the State's Police Power?*, 52 FORDHAM L. REV. 663 (1984); William Banks & Kirk Lewis, *Article Federalism Disserved: The Drive for Deregulation*, 45 MD. L. REV. 141, 143–44 (1986).

⁷³ Pub. L. No. 95-95, 91 Stat. 685 (1977).

⁷⁴ Craig Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141 (1998).

⁷⁵ Paul Dempsey, *Congressional Intent and Agency Discretion—Never the Twain Shall Meet: The Motor Carrier Act of 1980*, 58 CHI.-KENT L. REV. 1 (1982); Paul Dempsey, *The Interstate Commerce Commission: Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1 (1984).

⁷⁶ RICHARD JONES, APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS (NCHRP Legal Research Digest No. 43, 2000).

⁷⁷ KENWORTHY, *supra* note 43 § 17.1.

trailer lengths that had previously been operated legally in the state.⁷⁸

The National Driver Register Act of 1982⁷⁹ required the DOT Secretary to establish a National Driver Register to assist the states in exchanging motor vehicle driving records of individuals.⁸⁰ The Bus Regulatory Reform Act of 1982 partially preempted state economic regulation of bus carriers.⁸¹

The Tandem Truck Safety Act and Motor Carrier Safety Act of 1984⁸² amended the size and length restrictions, attempted to achieve state compliance with federal standards, and froze the length of commercial trucks and trailers.⁸³ The Motor Carrier Safety Act required the DOT Secretary to “prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles.”⁸⁴ The regulations must ensure that:

- (1) Commercial motor vehicles are maintained, equipped, loaded and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.⁸⁵

The Safety Act imposed carrier record retention requirements, owner and operator safety fitness requirements, and employee maximum service hour requirements.⁸⁶ To fulfill the Act’s mandate to advance CMV safety, the FHWA amended the Motor Carrier Safety Regulations.⁸⁷ The Act also required states to file their laws and identify whether they were as stringent as federal standards, and established a Commercial Motor Vehicle Safety Regulatory Review Panel to review state regulatory and enforcement activities.⁸⁸ The governor of a state may request the U.S. Secretary of Transporta-

tion to exempt certain portions of the Interstate system from the preemptive provisions of STAA.⁸⁹

The Commercial Motor Vehicle Safety Act of 1986⁹⁰ (Title XII of the Anti-Drug Abuse Act of 1986), established a single,⁹¹ uniform, classified commercial driver’s license (CDL) information program.⁹² The Act prohibited CMV operators from holding more than a single driver’s license, and encouraged states to issue commercial licenses only to persons domiciled within them.⁹³ The 1986 Safety Act also included a commercial driver’s license information system as a clearinghouse for the licensing and disqualification of drivers.⁹⁴ The Act required U.S. DOT to “issue regulations to establish minimum Federal standards for testing and ensuring the fitness of persons who operate commercial motor vehicles,”⁹⁵ and forbade anyone from operating a CMV unless he “has taken and passed a written and driving test to operate such vehicle which meets the minimum Federal standards established by the Secretary....”⁹⁶

STURAA,⁹⁷ in 1987, established national uniformity in size and weight standards for the previously established CMVs; federal weight laws apply only to the Interstate highway system.⁹⁸ An amendment to the omnibus drug bill, the Truck and Bus Regulatory Reform Act of 1988, imposed federal safety regulations on all carriers, even those operating within a commercial zone. The Act also required the U.S. DOT to promulgate regulations addressing the maintenance and inspection of brake systems and to conduct a study of the hours-of-service regulations and their impact on driver fatigue and accidents.⁹⁹

The Clean Air Act Amendments of 1990¹⁰⁰ established stricter auto emission standards, requiring all cars and

⁷⁸ *Continental Can Co. v. Yerusalum*, 854 F.2d 28–29 (3d Cir. 1988).

⁷⁹ Pub. L. No. 97-364, 96 Stat. 1738.

⁸⁰ KENWORTHY, *supra* note 43 § 4.4.

⁸¹ DEMPSEY, *supra* note 5, at 106, 162, 195.

⁸² Pub. L. No. 98-554, 98 Stat. 2829.

⁸³ KENWORTHY, *supra* note 43 §§ 4.5, 17.103.

⁸⁴ *Radio Ass’n on Defending Airwave Rights v. U.S. Dep’t of Transp.*, 47 F.3d 794, 797 (6th Cir. 1995).

⁸⁵ 49 U.S.C. § 31136(a).

⁸⁶ *Truckers United for Safety v. Fed. Highway Admin.*, 139 F.3d 934, 936 (D.C. Cir. 1998); *Truckers United for Safety v. Mead*, 86 F. Supp. 2d 1, 14 (D.D.C. 2000).

⁸⁷ *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 413 (3d Cir. 1992). However, its effort to establish safety rating determinations to determine carrier fitness were vacated because they were not promulgated through notice and comment rule-making. *MST Express v. Dep’t of Transp.*, 323 U.S. App. D.C. 347, 108 F.3d 401 (D.C. Cir. 1997).

⁸⁸ KENWORTHY, *supra* note 43 § 4.5.

⁸⁹ 49 U.S.C. § 31111(f). See *N.Y. State Motor Truck Ass’n v. City of N.Y.*, 654 F. Supp. 1521 (S.D.N.Y. 1987).

⁹⁰ Pub. L. No. 99-570, 100 Stat. 3207 (1986).

⁹¹ No longer could a driver hold a license from more than one state.

⁹² It required that DOT establish and maintain a “National Driver Register to assist chief driver licensing officials of participating States in exchanging information about the motor vehicle driver records of individuals.” 49 U.S.C. § 30302 (2000). Before this legislation was passed, persons licensed to drive automobiles could drive tractor-trailers.

⁹³ *Int’l Bhd. of Teamsters v. Pena*, 301 U.S. App. D.C. 125, 17 F.3d 1478, 1481 (D.C. Cir. 1994).

⁹⁴ KENWORTHY, *supra* note 43 § 4.6.

⁹⁵ 49 U.S.C. App. § 2704(a); *Int’l Bhd. of Teamsters v. Pena*, 305 U.S. App. D.C. 125, 17 F.3d 1478, 1484 (D.C. Cir. 1994).

⁹⁶ 49 U.S.C. App. § 2704(b)(1).

⁹⁷ Pub. L. No. 100-17; 101 Stat. 132. See 23 C.F.R. pt. 658.

⁹⁸ KENWORTHY, *supra* note 43 §§ 4.3, 17.2.

⁹⁹ KENWORTHY, *supra* note 43 § 4.7.

¹⁰⁰ Pub. L. No. 101-549, 104 Stat. 2399.

engines meet federal emission standards.¹⁰¹ The Hazardous Materials Transportation Uniform Safety Act of 1990¹⁰² established uniform, national rules for the transportation of hazardous materials and created a comprehensive regulatory scheme for the designation, handling, packaging, labeling, and shipping of hazardous materials.

ISTEA, in 1991, embraced intermodalism as a national policy goal, created new transportation planning procedures that facilitated closer state and local cooperation, and allowed greater funding flexibility.¹⁰³ ISTEA also mandated that air bags be installed in new vehicles.

The Omnibus Transportation Employee Testing Act of 1991¹⁰⁴ (Testing Act) directed U.S. DOT to promulgate regulations requiring motor carriers to perform pre-employment, reasonable suspicion, random, and post-accident drug and alcohol tests on their drivers.¹⁰⁵

The Energy Policy Act of 1992¹⁰⁶ promoted alternative fuels for motor vehicles. The Federal Aviation Authorization Act of 1994 preempted state regulation of intrastate motor carriers of property (except household goods carriers) regarding prices, routes, and services, but allowed continuation of state safety enforcement.¹⁰⁷ The National Highway System Designation Act of 1995 repealed the national 55 mph speed limit.

The ICC Termination Act of 1996¹⁰⁸ (ICCTA) eliminated the ICC and replaced it with the Surface Transportation Board. It also required FHWA to promulgate rules addressing fatigue-related issues affecting motor carrier safety¹⁰⁹ and rules imposing sanctions and penalties on CMV drivers who violate railroad-highway grade crossing laws.¹¹⁰

TEA-21¹¹¹ authorized approximately \$2.3 billion for highway safety grant programs for FYs 1998–2003,¹¹²

and reauthorized the core federally funded highway safety program. It also authorized seven additional incentive grant programs¹¹³ designed to encourage use of seat belts and child passenger seats, as well as to prevent drinking and driving.¹¹⁴ In addition to the seat belt and occupant protection program of incentive and educational grants and the incentive alcohol program, TEA-21 established a state highway safety data improvement incentive grant program and created a consolidated behavioral and roadway State and Community Highway Safety formula grant program. TEA-21 also gave states and local governmental institutions significant funding flexibility.

The Department of Transportation and Related Agencies Appropriations Act¹¹⁵ prohibited the expenditure of DOT-appropriated funds “to carry out the functions and operations of the Office of Motor Carriers within the Federal Highway Administration.”¹¹⁶ However, such funds could be spent if the functions and operations of the Office of Motor Carriers were redelegated outside FHWA. Ten days later, the DOT extricated the Office of Motor Carriers from FHWA.¹¹⁷ To remove any doubt, Congress promulgated the Motor Carrier Safety Improvement Act of 1999,¹¹⁸ which formally established the Federal Motor Carrier Safety Administration,¹¹⁹ and directed it to “consider the assignment and maintenance of safety as the highest priority” in CMV transportation.¹²⁰ That legislation also established a program to improve CMV crash data collection and analysis.¹²¹ It also authorized additional funding to states to assist compliance with federal and state motor carrier safety rules (principally through roadside inspections and compliance reviews), improved the CDL program, and imposed requirements on states to produce a long-term strategic plan and progress reports.¹²²

¹⁰¹ Philip Weinberg, *Public Transportation and Clean Air: Natural Allies*, 21 ENVTL. L. 1527 (1991).

¹⁰² 49 U.S.C. § 5101 *et seq.*

¹⁰³ Paul Dempsey, *The Law of Intermodal Transportation: What It Was, What It Is, What It Should Be*, 27 TRANSP. L.J. 367 (2000); Andrew Goetz, Paul Dempsey & Carl Larson, *Metropolitan Planning Organizations: Findings and Recommendations for Improving Transportation Planning*, 32 PUBLIS: THE JOURNAL OF FEDERALISM 87 (2002).

¹⁰⁴ Pub. L. No. 102-143, 105 Stat. 917.

¹⁰⁵ See PAUL DEMPSEY, *Transit Law*, SELECTED STUDIES IN TRANSPORTATION LAW, vol. 5 § 7-15 (2004).

¹⁰⁶ Pub. L. No. 102-486, 106 Stat. 2776 (1992).

¹⁰⁷ PAUL DEMPSEY & LAURENCE GESELL, *AIR COMMERCE AND THE LAW* 208 (2004).

¹⁰⁸ Pub. L. No. 104-88, 109 Stat. 803.

¹⁰⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, *COMMERCIAL MOTOR VEHICLES: EFFECTIVENESS OF ACTIONS BEING TAKEN TO IMPROVE MOTOR CARRIER SAFETY IS UNKNOWN* 6 (2000).

¹¹⁰ ICCTA § 403, 49 U.S.C. § 31310(h). The regulations were promulgated by FHWA at 64 Fed. Reg. 48,104, 49 C.F.R. pts. 383, 384 (Sept. 2, 1999).

¹¹¹ Pub. L. No. 105, 112 Stat. 107–78.

¹¹² Dempsey, *supra* note 103, at 367.

¹¹³ See tbl. 3, p. 38.

¹¹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 1, at 1.

¹¹⁵ Pub. L. No. 106-69, 113 Stat. 986.

¹¹⁶ *Id.* § 338.

¹¹⁷ 64 Fed. Reg. 56,270, 49, pt. 1 (Oct. 19, 1999); 64 Fed. Reg. 58,355, 49 C.F.R. ch. III (Oct. 29, 1999).

¹¹⁸ Pub. L. No. 106-159, 113 Stat. 1748.

¹¹⁹ See James Flint, *Highway Safety in the 21st Century*, 1 TRANSP. L. 20 (Feb. 2000); Bernard Haggerty, “TRU” *Cooperative Regulatory Federalism: Radioactive Waste Transportation Safety in the West*, 22 J. LAND RESOURCES & ENVTL. L. 41, 61 (2002).

¹²⁰ *Fezekas v. Fed. Motor Carrier Safety Admin.*, 2004 U.S. Dist. LEXIS 4397 (E.D. La. 2004).

¹²¹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4, at 2, 9.

¹²² U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 5. See Osman Nowaz, *You Are Not a Lawyer: Does Representation of Carriers by Non-Lawyers in Federal Motor Carrier Safety Administration Enforcement Cases Constitute the Unauthorized Practice of Law?*, 32 TRANSP. L.J. 21, 28 (2004).

The Transportation Recall Enhancement, Accountability and Documentation Act of 2000 (TREAD Act) required improvements in tire safety and strengthened manufacturer notification and recall requirements.¹²³ Additional reporting requirements were imposed upon manufacturers, including notification of (1) overseas recalls or other foreign safety campaigns, (2) “early warning” information, and (3) sales of defective or non-compliant tires.¹²⁴ For the first time, it amended the Vehicle Safety Act to include criminal penalties.¹²⁵

Shortly after the tragic events of 9/11, Congress passed the Aviation and Transportation Security Act of 2001 (ATSA),¹²⁶ which included 91 new measures, 55 of which had designated implementation deadlines. The most significant of ATSA’s mandates included federalizing the airport security function (which had theretofore been performed by the airlines, under FAA regulations), imposing minimum job qualifications upon security employees, imposing background checks on airport employees, and requiring impregnable cockpit doors.¹²⁷ Having concluded that the FAA had been historically slow to implement its wishes, Congress created a new multimodal Transportation Security Administration (TSA) within U.S. DOT.

Fourteen months after the terrorist attacks on the World Trade Center and the Pentagon, Congress passed the Homeland Security Act of 2002 (HSA),¹²⁸ which established a new cabinet-level executive branch agency, the Department of Homeland Security (DHS),¹²⁹ headed by a Secretary of Homeland Security.¹³⁰ It was the most

sweeping overhaul of federal agencies since President Harry Truman asked Congress to create the Central Intelligence Agency and unify the military branches under the Department of Defense in 1947.¹³¹

In creating DHS, Congress consolidated 22 existing agencies that had combined budgets of approximately \$40 billion and employed some 170,000 workers.¹³² Several of the agencies historically have been involved in airport and airline passenger and cargo review, including the Customs Service, Immigration and Naturalization Service, Animal and Plant Inspection Service of the Department of Agriculture, and the nascent TSA.¹³³ Given its multimodal emphasis, TSA also has jurisdiction over security in motor vehicles, particularly CMVs crossing the borders from Canada and Mexico.

SAFETEA-LU elevated the Highway Safety Improvement Program (HSIP) to a core, separately funded, Federal-aid highway safety program.¹³⁴ More than \$5 billion is allocated to the program during 2006–2009.¹³⁵ The HSIP requires states to develop Strategic Highway Safety Plans that annually identify at least 5 percent of their most hazardous venues, their progress in implementing safety projects, and their effectiveness in reducing injuries and fatalities. The legislation provides increased flexibility for state funding of transportation safety projects.

D. FEDERAL GOVERNMENTAL INSTITUTIONS

This section describes the major federal governmental institutions that oversee motor vehicles, and their jurisdictions. The U.S. DOT is the parent executive branch agency over all modes of transportation.

In cooperation with the states, the FHWA coordinates construction of federal highways and oversees the Federal-Aid Highway Program, which provides grants to

¹²³ See McDonald, *supra* note 61, at 1163, 1187–88.

¹²⁴ Kevin McDonald, *Separations, Blow-Outs and Fallout: A Treatise on the Regulatory Aftermath of the Ford-Firestone Tire Recall*, 37 J. MARSHALL L. REV. 1073, 1077, 1105 (2004).

¹²⁵ *Id.* at 1170.

¹²⁶ The Aviation and Transportation Security Act of 2001 established the Transportation Security Administration (TSA).

¹²⁷ In order to ensure intragovernmental communication and cooperation, a Security Oversight Board (comprised of the cabinet secretaries or their designees from the National Security Council, the Office of Homeland Security, the Central Intelligence Agency, and the Secretaries of Defense and Treasury, and chaired by the Secretary of Transportation) was established to oversee TSA.

¹²⁸ Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002) (hereinafter Homeland Security Act of 2002). In November 2002, legislation approving creation of the Department of Homeland Security (DHS) passed in the House of Representatives, 299-121, and in the Senate 90-9.

¹²⁹ Homeland Security Act of 2002 § 101 (2002). The Homeland Security Act of 2002 expanded federal power on security and reorganized TSA as an Administration within the newly created DHS. See Paul Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT’L L. 649–733 (2003).

¹³⁰ Several Under Secretaries were created as well, including an Under Secretary for Border and Transportation Security. Homeland Security Act of 2002 § 103 (2002).

¹³¹ Mimi Hall, *Deal Set on Homeland Department*, USA TODAY, Nov. 13, 2002, at 1.

¹³² *Id.*

¹³³ Homeland Security Act of 2002 § 402 (2002). See Dempsey, *supra* note 129, at 649.

¹³⁴ 23 U.S.C. § 148.

¹³⁵ SAFETEA-LU significantly increases the national policy emphasis on safety and the resources available to reduce traffic fatalities and injuries on all public roads. SAFETEA-LU authorizes a new core Highway Safety Improvement Program (HSIP) and provides States more than \$5 billion over four years to implement the HSIP—almost double the amount of funds available for infrastructure safety under the Transportation Equity Act for the 21st Century (TEA-21). SAFETEA-LU also creates new safety programs such as the Safe Routes to School (SRTS) program to enable and encourage children, including those with disabilities, to walk and bicycle to school. SRTS is separately funded at \$612 million over 5 years. <http://testimony.ost.dot.gov/test/Capka1.htm> (visited June 21, 2006).

states for highway construction and improvements.¹³⁶ As part of the grant conditions, the FHWA administers the federal size and weight program and other federal laws relevant to operation of the road system.

The FHWA is headed by an Administrator. The Assistant Federal Highway Administrator is the chief engineer of the Administration. The Assistant Administrator carries out the highway safety programs, and in particular, Chapter 4 of Title 23.¹³⁷ That title requires each state to maintain a highway safety program approved by the DOT Secretary designed to reduce highway accidents and death, in accordance with uniform guidelines promulgated by DOT.¹³⁸ These guidelines shall include programs to

- Reduce injuries and deaths from motor vehicles traveling at excessive speeds;
- Encourage the use of occupant protection devices;
- Reduce deaths and injuries caused by drivers driving under the influence of alcohol or controlled substances;
- Prevent accidents and deaths and reduce injuries resulting from accidents involving motor vehicles and motorcycles;
- Reduce injuries and deaths resulting from accidents involving school buses; and
- Improve law enforcement in the areas of motor vehicle accident prevention, traffic supervision, and post-accident investigations.¹³⁹

23 U.S.C. § 109 authorizes DOT control of federal highway standards. Highway system standards shall be developed in cooperation with the states.¹⁴⁰ No federal funds may be expended on any federal highway unless proper safety protective devices established by DOT have been installed.

State programs must be administered by the governor of the state through a state highway safety agency with sufficient authority to carry out such responsibilities.¹⁴¹ Local jurisdictions may be subdelegated to perform such functions if the local highway safety programs are approved by the governor and in accordance with the minimum DOT standards.¹⁴²

The DOT Secretary may promulgate rules to identify highway safety programs that are effective in reducing motor vehicle crashes, deaths, and injuries. However, such rulemaking must “take into account the major role of the States in implementing such programs.”¹⁴³ Hence,

¹³⁶ *Sierra Club v. U.S. Dep’t of Transp.*, 310 F. Supp. 2d 1168, 1203 (D. Nev. 2004).

¹³⁷ 49 U.S.C. § 104(3).

¹³⁸ 23 U.S.C. § 402.

¹³⁹ 23 U.S.C. § 402(a).

¹⁴⁰ 23 U.S.C. § 103(b).

¹⁴¹ 23 U.S.C. § 402(b)(1)(A).

¹⁴² 23 U.S.C. § 402(b)(1)(B).

¹⁴³ 23 U.S.C. § 402(j).

the role of the states is primary in implementing the federal highway safety program

Established in 1970, NHTSA is the successor to the National Highway Safety Bureau. It is responsible for reducing deaths, injuries, and economic losses caused by motor vehicle crashes.¹⁴⁴ NHTSA carries out safety programs under the National Traffic and Motor Vehicle Safety Act of 1966¹⁴⁵ and the Highway Safety Act of 1966.¹⁴⁶ NHTSA investigates safety defects in motor vehicles, establishes and enforces safety performance standards for motor vehicles and equipment, and provides grants to state and local governments to support local highway safety programs.¹⁴⁷ NHTSA also sets and enforces fuel economy standards; helps states reduce alcohol-related injuries; and promotes the use of safety belts, child safety seats, and air bags.¹⁴⁸

Formerly a part of FHWA, the FMCSA was established within U.S. DOT on January 1, 2000, pursuant to the Motor Carrier Safety Improvement Act of 1999.¹⁴⁹ The U.S. General Accounting Office had this to say about its creation:

The establishment of the motor carrier administration within DOT enhances accountability and visibility of motor carrier safety because its primary function is safety and it has been placed on a par with other modal administrations within the Department. Moreover, the agency’s new structure...supports a greater emphasis on enforcement and compliance. In contrast to its predecessor organization, which was within the Federal Highway Administration, field operations now receive instructions from the Association Administrator for Enforcement and Program Delivery, increasing accountability and reducing the potential for conflict instructions. In addition, ...the agency will have attorneys and support staff in four regional centers whose sole responsibility will be to enforce compliance with truck safety regulation. Previously, these attorneys performed legal work, including truck safety work, for the Federal Highway Administration as a whole.¹⁵⁰

¹⁴⁴ <http://www.dot.gov/summary.htm>.

¹⁴⁵ 49 U.S.C. ch. 301.

¹⁴⁶ 23 U.S.C. ch. 4.

¹⁴⁷ Jerry Marshaw & David Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443 (1990). U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7.

¹⁴⁸ <http://www.dot.gov/summary.htm>.

¹⁴⁹ Pub. L. No. 106-159, 113 Stat. 1748.

¹⁵⁰ U.S. GEN. ACCOUNTING OFFICE, *supra* note 9, at 13. *See also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 9, at 6–7. The GAO noted that the U.S. DOT had “increased the number of compliance reviews of motor carriers, taken a harder line on enforcement, undertaken efforts to improve the data on which it makes decisions, and has moved quickly to put a new organization in place to carry out the requirements of the 1999 Motor Carrier Safety Improvement Act.” *Id.* at 9.

U.S. DOT has been given wide-ranging jurisdiction to address highway safety.¹⁵¹ In order to promote the safe operation of CMVs, to minimize dangers to CMV operators and other employees, and to ensure increased compliance with traffic laws and CMV safety and health regulations,¹⁵² CMVs and their driver qualifications and certifications are regulated by the FMCSA.¹⁵³

The FMCSA provides oversight of motor carrier, driver, and vehicular safety. Its principal mission is to reduce the number and severity of crashes, injuries, and fatalities involving large trucks and buses.¹⁵⁴ Its regulations govern motor vehicles with GVWR or gross combination weight rating (GCWR), or gross combination weight (GCW) exceeding 10,000 lb and operating in interstate commerce. FMCSA also regulates passenger vehicles with more than 15 occupants (including the driver), as well as interstate passenger vehicles that transport between 9 and 15 passengers more than 75 mi from the driver's normal work-reporting location. FMCSA also has jurisdiction over carriers of hazardous materials in interstate commerce in sufficient quantities to require placards. For-hire carriers falling into any of these categories must comply with the FMCSRs,¹⁵⁵ and the Financial Responsibility Requirements.¹⁵⁶ FMCSA performs compliance reviews of motor carriers and safety audits of new entrants.¹⁵⁷ SAFETEA-LU authorizes grants to states and local governments to conduct audits of new entrant carriers.¹⁵⁸

Insofar as is relevant here, the Office of Hazardous Materials Safety in the Pipeline and Hazardous Materials Safety Administration has jurisdiction over hazardous materials transportation. The NTSB investigates transportation accidents and recommends regulatory improvements. Created after the 9/11 attacks, the TSA is housed within the DHS, and regulates the security of all modes of transport, including motor vehicles.

¹⁵¹ U.S. DOT has jurisdiction to conduct and make contracts for inspections and investigations; compile statistics; make reports; issue subpoenas; require production of documents and property; take depositions; hold hearings; prescribe record keeping and reporting; conduct and make contracts for studies, development, and testing evaluation and training; and perform such other acts it deems appropriate. 49 U.S.C. § 31133(a).

¹⁵² 49 U.S.C. § 31131(a).

¹⁵³ General driver qualifications are set forth in 49 C.F.R. § 391.11. See 63 Fed. Reg. 33254 (June 18, 1998). See also FEDERAL AND STATE LICENSING AND OTHER SAFETY REQUIREMENTS FOR COMMERCIAL MOTOR VEHICLE OPERATORS AND EQUIPMENT (TCRP Legal Research Digest No. 19, 2001). They are discussed in Paul Dempsey, *Transit Law* § 7-26, in 5 SELECTED STUDIES IN TRANSPORTATION LAW (2004).

¹⁵⁴ <http://www.fmcsa.dot.gov/about/aboutus.htm>.

¹⁵⁵ 49 C.F.R. pts. 40, 325, 350–399, 571, and 658.

¹⁵⁶ 49 C.F.R. § 387.7.

¹⁵⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 4, at 6.

¹⁵⁸ SAFETEA-LU sec. 4107, amending 49 U.S.C. § 31104.

E. THE FEDERAL/STATE RELATIONSHIP

1. Federal Regulatory Programs

This section describes the contemporary relationship between the federal and state governments over motor vehicles. Though the focus of this study is on federal law, it must be recognized that most motor vehicle law originates at the state level. There are also various Interstate Compacts,¹⁵⁹ International Registration Plans,¹⁶⁰ and International Fuel Tax Agreements¹⁶¹ (and reciprocity agreements that precede them) that apply. The federal government attempts to persuade, and coerce, the states to adopt federal standards in three principal ways: (1) through the carrot of federal financial support for state programs that comply with federal standards; (2) through the stick of a withdrawal of federal funds for state programs that do not so comply; and/or (3) through federal preemption of inconsistent state law. For example, most state governments have adopted all or most of FMCSA's motor carrier safety regulations and have focused major state efforts toward implementing programs to enforce those federal rules. This process has been driven by the availability of federal funding for these state programs, provided through the Motor Carrier Safety Assistance Program (MCSAP) administered by FMCSA.

Title 23 of the U.S.C. directs the Secretary of Transportation to assist and cooperate with, *inter alia*, state and local governments, to increase highway safety.¹⁶² Each state is required to have a highway safety program, approved by U.S. DOT, "designed to reduce traffic accidents and deaths, injuries, and property damage

¹⁵⁹ Pub. L. No. 85-684, 72 Stat. 635, as amended by Pub. L. No. 88-466, 78 Stat. 564, provides:

The consent of Congress is hereby given to any two or more of the several States...to enter into agreements or compacts—

(1) for cooperative effort and mutual assistance in the establishment and carrying out of traffic safety programs, including, but not limited to, the enactment of uniform traffic laws, driver education and training, coordination of traffic law enforcement, research into safe automobile and highway design, and research programs of the human factors affecting traffic safety, and

(2) for the establishment of such agencies, joint or otherwise, as they deem desirable for the establishment and carrying out of such traffic safety programs.

¹⁶⁰ 49 U.S.C. §§ 31701–31706. The 48 contiguous U.S. states, the District of Columbia, and 10 Canadian provinces (i.e., Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan) participate in the International Registration Plan; the Plan authorizes registration of over 1.7 million commercial vehicles. http://www.ncdot.org/dmv/vehicle_services/registrationtitling/commercialIRP.html#IRP%20About (visited June 15, 2006).

¹⁶¹ 49 U.S.C. §§ 31701–31708.

¹⁶² 23 U.S.C. § 401.

resulting therefrom.”¹⁶³ These state programs must be provided by a highway safety agency having adequate powers that is sufficiently equipped to be able to carry out a satisfactory program and approved by the governor of the state. Local subdivisions may carry out the state highway safety program if they are approved by the governor and meet minimum U.S. DOT standards. The state must also certify that it will implement “national highway safety goals to reduce motor vehicle related fatalities.”¹⁶⁴ One source summarized U.S. DOT oversight of state highway safety programs, and its interaction with the states:

In 1998, NHTSA adopted a “performance-based” approach to its oversight of highway safety programs. Under this approach, a state develops an annual performance plan and establishes traffic safety goals and performance measures. In addition, the performance plan must describe the process the state used to identify problems, establish goals, and select projects. Based on the performance plan, the state prepares an annual highway safety plan, which identifies projects to be funded that address the state’s goals. In addition, at the end of the year, the state is required to prepare an annual report that describes (1) the state’s progress in meeting its highway safety goals, using the measures described in its performance plan and (2) the contribution of funded projects to meeting the state’s highway safety goals. Under the performance-based approach, NHTSA does not approve the state’s highway safety plan or projects. Instead, it focuses on whether the state is achieving the goals it set for itself in its plans. However, if the state is not making progress toward meeting its goals, NHTSA regulations state that the NHTSA region and state should develop an improvement plan to address the shortcomings.¹⁶⁵

Much of federal oversight over safety is coupled with funding—the allocation of economic resources collected in the Highway Trust Fund for programs designed to improve motor vehicle safety, for example. U.S. DOT Administrations principally are funding agencies, implementing congressional power under the spending clause of the Constitution.¹⁶⁶ The spending power includes the ability to impose requirements on state and local governments as a condition of receiving federal funds. Often, federal appropriation statutes condition the receipt of federal funds on the state’s enactment of prescribed legislation.¹⁶⁷ For example, at various times, federal funds for highway safety have been conditioned on state promulgation of a motorcycle helmet law,¹⁶⁸ on

a state’s promulgation of laws setting the drinking age at 21, or on the enactment of a 55-mph speed limit.¹⁶⁹

TEA-21 funded a series of highway safety programs. Administered by NHTSA, these programs increased state funding for activities designed to encourage, *inter alia*, the use of seat belts¹⁷⁰ and to prevent drinking and driving. For example, economic incentives exist for states that have enacted and are enforcing a law declaring that any person driving with a blood alcohol concentration of 0.08 or more is guilty of a per se offense of driving while intoxicated.¹⁷¹ As of January 2003, 17 states had set the blood alcohol concentration threshold at 0.10 percent, while the remaining states had set it at 0.08.¹⁷² Economic incentives also exist for states promulgating repeat intoxicated driver laws¹⁷³ and those adopting and implementing “effective programs to reduce traffic safety problems resulting from individuals driving while under the influence of alcohol.”¹⁷⁴ States that do not adopt either the open container or repeat offender requirements must transfer a specified percentage (initially 1.5 percent, and in 2002, 3 percent) to their Section 402 State and Community Highway Safety grant program.¹⁷⁵ Table 1 summarizes the seven Highway Safety Incentive grant programs established by TEA-21.

¹⁶³ 23 U.S.C. § 402(a).

¹⁶⁴ 23 U.S.C. § 402(b).

¹⁶⁵ U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 7.

¹⁶⁶ *San Antonio Metro. Transit Auth. v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983).

¹⁶⁷ *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 438, 122 S. Ct. 2226, 2235, 1532 Ed. 2d 430, 943 (2002).

¹⁶⁸ 23 U.S.C. § 153.

¹⁶⁹ 23 U.S.C. § 158. See generally *Speed Management Program*; MARGARET HINES, JUDICIAL ENFORCEMENT OF VARIABLE SPEED LIMITS (NCHRP Legal Research Digest No. 47, 2002); DANIEL GILBERT, NINA SINES & BRANDON BELL, PHOTOGRAPHIC TRAFFIC LAW ENFORCEMENT (NCHRP Legal Research Digest No. 36, 1996).

¹⁷⁰ 23 U.S.C. §§ 405, 406.

¹⁷¹ 23 U.S.C. § 163. U.S. GEN. ACCOUNTING OFFICE, HIGHWAY SAFETY: EFFECTIVENESS OF STATE .08 BLOOD ALCOHOL LAWS (1999). *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (state sobriety checkpoints are consistent with the Fourth Amendment). *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979) (stopping a motorist to check his driver’s license and auto registration was improper under the Fourth Amendment, and marijuana seized could not be introduced as evidence at trial).

¹⁷² U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 7.

¹⁷³ 23 U.S.C. § 164.

¹⁷⁴ 23 U.S.C. § 410.

¹⁷⁵ U.S. GEN. ACCOUNTING OFFICE, *supra* note 172, at 13.

TABLE 1—HIGHWAY SAFETY INCENTIVE GRANT PROGRAMS¹⁷⁶

Incentive Category	Title of Incentive	Description
Seat belt/occupant protection incentives	Section 157: Safety Incentive Grants for the Use of Seat Belts	Creates incentive grants to states to improve seat belt use rates. A state may use these funds for any highway safety or construction program.
	Section 157: Safety Innovative Grants for Increasing Seat-Belt Use Rates	Provides that unallocated Section 157 incentive funds be allocated to states to carry out innovative projects to improve seat belt use.
	Section 405: Occupant Protection Incentive Grant	Creates an incentive grant program to increase seat belt and child safety seat use. A state may use these funds only to implement occupant protection programs.
	Section 2003(b): Child Passenger Protection Education Grants	Creates a program designed to prevent deaths and injuries to children, educate the public on child restraints, and train personnel on child restraint use.
Alcohol incentives	Section 163: Safety Incentives to Prevent the Operation of Motor Vehicles by Intoxicated Persons	Provides grants to states that have enacted and are enforcing laws stating that a person with a blood alcohol concentration of 0.08 or higher while operating a motor vehicle has committed a per se driving-while-intoxicated offense. A state may use these funds for any highway safety or construction program.
	Section 410: Alcohol Impaired Driving Countermeasures	Revises an existing incentive program and provides grants to states that adopt or demonstrate specified programs or to states that meet performance criteria showing reductions in fatalities involving alcohol-impaired drivers.
Data incentives	Section 411: State Highway Safety Data Improvements	Provides incentive grants to states to improve the timeliness, accuracy, completeness, uniformity, and accessibility of highway safety data.

¹⁷⁶ Adapted from U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 17; and U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 6.

The states established highway safety goals and initiated projects to achieve those goals, while NHTSA provided advice, training, and technical assistance. For example, federal grants are available for the development of state traffic safety information systems¹⁷⁷ and to make state highway safety data improvements.¹⁷⁸ TEA-21 allocated about \$2 billion to support state highway safety programs for 5 years in the following ways:

- \$729 million was provided for behavioral highway safety programs under the core Section 402 State and Community Highway Safety grants program;
- \$936 million was provided under seven incentive programs (see Table 1), funds from two of which could be used for behavioral highway safety programs or highway construction, of which the states allocated \$789 million for behavioral programs and \$147 million for construction; and
- \$361 million in penalty transfer programs (in FY 2001 and 2002) whereby funds were transferred from highway construction to highway safety programs for states not passing laws prohibiting open container laws and establishing specific penalties for individuals convicted of repeat drinking and driving offenses.¹⁷⁹

Chart 1¹⁸⁰ reveals the subject matter allocation of these funds.

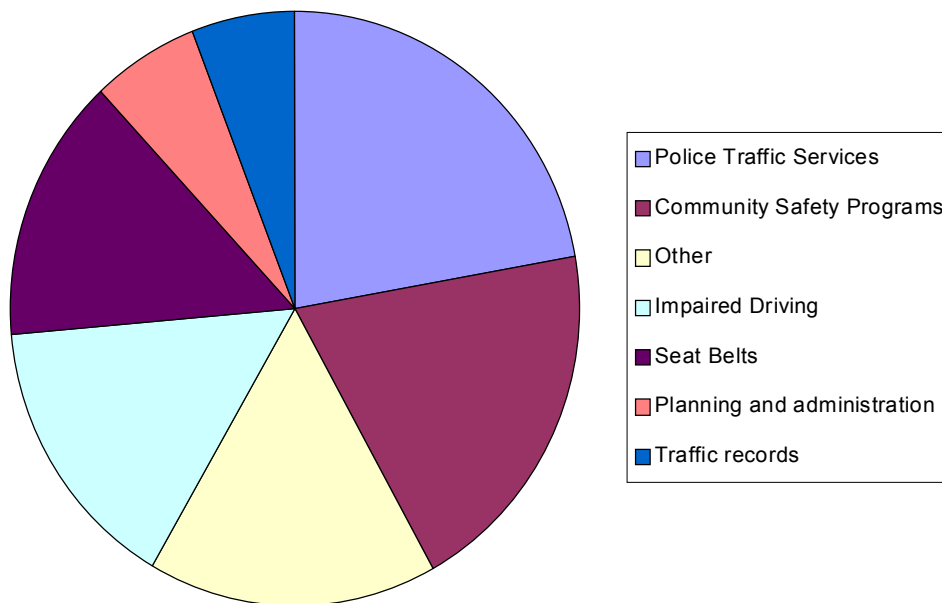
¹⁷⁷ 23 U.S.C. § 408.

¹⁷⁸ 23 U.S.C. § 411. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 157.

¹⁷⁹ U.S. GEN. ACCOUNTING OFFICE, *supra* note 172, at 10. Open container laws were addressed in 65 Fed. Reg. 55532 (Aug. 24, 2000); 23 C.F.R. pt. 1270.

¹⁸⁰ U.S. GEN. ACCOUNTING OFFICE, *supra* note 172, at 12; U.S. GEN. ACCOUNTING OFFICE, *supra* note 165, at 16.

CHART 1 - USES OF STATE AND COMMUNITY GRANTS FUNDS, FY 1998-2002



MCSAP provides financial assistance to states to reduce accidents and hazardous materials incidents involving CMVs. The program is designed to reduce motor vehicle accidents, fatalities, and injuries. FHSA provides grants-in-aid up to 80 percent of the cost of enforcing federal and compatible state motor carrier safety and hazardous materials requirements.¹⁸¹ MCSAP promotes the adoption and enforcement of uniform safety rules, regulations, and standards compatible with the FMCSRs and FHMRs for interstate and intrastate motor carriers and drivers.¹⁸² Some states merely incorporate the federal requirements in their statutes and regulations by reference, and enforce the requirements through state DOTs, PUCs, and highway patrol and municipal police officers.¹⁸³

¹⁸¹ RICHARD JONES, APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS (NCHRP Legal Research Digest No. 43, 2000).

¹⁸² 23 U.S.C. § 402; 49 C.F.R. pts. 350, 355.

¹⁸³ Pennsylvania is such a state. See <http://www.dot.state.pa.us/Internet/Bureaus/pdBOMO.nsf/infoRMCPAssistance?>

An example of how the federal and state governments cooperate in the area of motor vehicle safety is the CMV data program. The FMCSA oversees two major initiatives to assist states in their reporting of CMV crash information: (1) a commercial vehicle crash data improvement program; and (2) a data quality rating system. Between 2002 and 2005, FMCSA issued almost \$21 million in discretionary grants to states to improve their CMV crash data. The grant program requires states to complete three activities: (1) establish a coordinating committee of stakeholders to provide guidance in developing traffic safety data; (2) conduct an assessment of the existing system; and (3) develop a strategic plan that prioritizes data needs and establishes goals.¹⁸⁴ With the Volpe National Transportation Systems Center, the FMCSA has also developed a State Safety Data Quality map—a color-coded display that categorizes data quality for each state—which encourages states to

OpenForm.

¹⁸⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 8–9.

improve their safety data.¹⁸⁵ One source summarized the federal/state relationship on these issues as follows:

FMCSA works in partnership with states to reach commercial motor vehicle safety goals. States are the gatekeepers for the collection and reporting of commercial motor vehicle crash information. They receive crash reports completed by law enforcement personnel in local jurisdictions, compile them, and then submit crash reports to FMCSA. At the federal level, FMCSA manages a database which provides data that is used in rating motor carriers according to various safety indicators. Based on this rating, motor carriers are selected for safety inspections and reviews as part of FMCSA's enforcement efforts. While the data collected is primarily for federal use, states use the information to assist overall crash safety efforts and in setting commercial motor vehicle safety goals for themselves.¹⁸⁶

SAFETEA-LU reaffirms the duty of states to provide U.S. DOT with "accurate, complete, and timely motor carrier safety data,"¹⁸⁷ and authorizes U.S. DOT to make grants to states covering 80 percent of the cost of programs or activities designed "to improve the accuracy, timeliness, and completeness of commercial motor vehicle safety data reported to the Secretary."¹⁸⁸ FMCSA compiles state data in its Motor Carrier Management Information System (also known as SafeStat) to target motor carriers for safety compliance audits. FMCSA also trains state inspectors to conduct safety audits of truck and bus companies. This federal-state partnership results in approximately 3 million motor carrier inspections, between 7,000 and 13,000 compliance reviews, and over 19,000 new entrant safety audits.¹⁸⁹

SAFETEA-LU also replaced the single-state registration system¹⁹⁰ with a new Unified Carrier Registration System, a central depository and clearinghouse of information on all foreign and domestic motor carriers, private carriers, brokers, freight forwarders, and other transportation providers.¹⁹¹ It includes information on

¹⁸⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 157, at 5.

¹⁸⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 157, at 1-2. U.S. GEN. ACCOUNTING OFFICE, *supra* note 165.

¹⁸⁷ SAFETEA-LU sec. 4106, amending 49 U.S.C. § 31102.

¹⁸⁸ SAFETEA-LU sec. 4128.

¹⁸⁹ U. S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 157, at 6-7.

¹⁹⁰ 49 U.S.C. § 14504.

¹⁹¹ On May 12, 2006, FMCSA announced the establishment of a Board of Directors for the Unified Carrier Registration Plan mandated by SAFETEA-LU. The Board will be responsible for issuing rules to govern the Unified Carrier Registration (UCR) Agreement. The UCR Agreement will replace the Single State Registration System (SSRS), which expires on January 1, 2007. The UCR Agreement will govern the collection of fees paid by private and for-hire motor carriers, brokers, freight forwarders, and leasing companies. Including private motor carriers, brokers, freight forwarders, leasing companies, and exempt for-hire motor carriers in the UCR Agreement will lower the registration costs of for-hire motor carriers and ensure that SSRS states do not lose essential funding for safety

their motor carrier safety rating and compliance with their financial responsibility requirements.¹⁹² It is anticipated that the new system will require less paperwork and be less costly than the single-state registration system it replaces.¹⁹³

As an example of state implementation of the registration program, the State of New York implements the program under the following guidelines:

All motor carriers authorized to engage in interstate transportation of passengers or property as a common or contract carrier by the Federal Highway Administration (formerly the Interstate Commerce Commission) shall register in the motor carrier's registration state for all states of travel.

The "registration state" means the jurisdiction where the registrant maintains its principal place of business. If the applicant's principal place of business is located in a jurisdiction that is not a participating state, the applicant shall apply for registration in the state in which the applicant will operate the largest number of motor vehicles during the next registration year. If the motor carrier will operate the largest number of vehicles in more than one state, the applicant or registrant shall choose which participating state will be the carrier's registration state. Once the registration state is determined, this designation shall be effective until the registrant changes its principal place of business.

The applicant shall file annually an application for registration of Federal Highway Administration regulated interstate operations with the registration state only.¹⁹⁴

Other states provide guidance as to how motor carriers may comply with the federal registration system on their Web sites.¹⁹⁵ Some state PUCs have asked their legislatures to grant them authority to administer the new Unified Carrier Registration System.¹⁹⁶

If an owner or operator of a CMV maintains its principal place of business in a state, and that state concludes the carrier is unfit to operate in intrastate commerce, the U.S. DOT shall prohibit the owner or operator from operating in interstate commerce until the state determines it is fit.¹⁹⁷

We shall review FHWA regulation of the National Network, and the motor vehicle size, length, and weight restrictions below. But in addition to the NHTSA and FMCSA oversight of motor vehicle safety, FHWA also funds and oversees transportation safety projects. For

services. Currently, 39 states participate in SSRS and use this registration system to generate revenues to supplement state general fund accounts and conduct safety-related activities. <http://testimony.ost.dot.gov/test/Capka1.htm>.

¹⁹² SAFETEA-LU sec. 4304, amending 49 U.S.C. § 13908.

¹⁹³ http://www.buses.org/government_affairs/legislative_regulatory_affairs/1916.cfm.

¹⁹⁴ <http://www.dot.state.ny.us/ts/license.html#ssrs>.

¹⁹⁵ See, e.g., Kentucky Division of Motor Carrier's Web site: <http://transportation.ky.gov/dmc/ssrs.htm#FHWAauthority>.

¹⁹⁶ See, e.g., Colorado Public Utilities Commission Web site: <http://www.dora.state.co.us/puc/about/AboutTrends.htm>.

¹⁹⁷ SAFETEA-LU sec. 4114, amending 49 U.S.C. § 31144.

example, its Hazard Elimination program provides financial support for construction of safety improvements on public roads, surface transportation facilities, or bicycle and pedestrian pathways or trails. States that suffer penalty transfer requirements may use those funds for safety construction projects under the Hazard Elimination program.¹⁹⁸ During FY 1998–2003, \$579 million was authorized from the Highway Trust Fund to subsidize up to 80 percent of state development and implementation of programs to improve CMV safety and enforce CMV regulations.¹⁹⁹

Section 202 of the Motor Carrier Safety Improvement Act of 1999 addresses requirements for state participation. It requires that the states adopt and carry out a program of CMV licensing and ensuring driver fitness.²⁰⁰ States are required to adopt regulations governing the fitness of CMV operators consistent with the U.S. DOT standards,²⁰¹ to issue a CDL only to individuals who pass written and driving tests for the operation of a CMV that satisfy those minimum federal standards, and to have in effect and enforce blood alcohol concentration prohibitions at least as stringent as those adopted by U.S. DOT.²⁰² Failure to comply results in a withholding of federal funds.²⁰³ Here again, federal funding and the threat of its loss for noncompliance result in widespread state adoption of federal motor vehicle standards. Failure requires DOT to withhold 5 percent of state transportation funding under 23 U.S.C. § 104 during the first fiscal year of noncompliance, and 10 percent thereafter.²⁰⁴ SAFETEA-LU also allocates \$880 million for the elimination of rail–highway grade crossings in an effort to improve railroad efficiency and reduce highway facilities.

2. Preemption of State Laws

The states have exerted their police powers over a wide array of motor vehicle activities. For example, the

¹⁹⁸ U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 8.

¹⁹⁹ 49 U.S.C. §§ 31103, 31104.

²⁰⁰ 49 U.S.C. § 31311.

²⁰¹ A state that enacts a law or regulation affecting CMV safety must submit a copy to U.S. DOT immediately after its enactment or issuance. 49 U.S.C. § 31141(b). If the U.S. DOT Secretary determines it is not as stringent as that prescribed by U.S. DOT, the state regulation may not be enforced. 49 U.S.C. § 31141(c)(3). Moreover, a state may not enforce a CMV law or safety regulation that the U.S. DOT Secretary decides may not be enforced. 49 U.S.C. § 31141(a). The state may, however, petition for a waiver, which the Secretary may grant if it is “consistent with the public interest and the safe operation of commercial motor vehicles.” 49 U.S.C. § 31141(d).

²⁰² 49 U.S.C. § 31311.

²⁰³ Sec. 203 of the Motor Carrier Safety Improvement Act of 1999 (State noncompliance). 49 U.S.C. § 31314. Sec. 221 of the Motor Carrier Safety Improvement Act of 1999 provided for state-to-state notification of violations data. 49 U.S.C. § 31111(c).

²⁰⁴ 49 U.S.C. § 31314.

State of Minnesota authorizes its Commissioner of Transportation to

[P]rescribe rules for the operation of motor carriers, including their facilities; accounts; leasing of vehicles and drivers; service; safe operation of vehicles; equipment, parts, and accessories; hours of service of drivers; driver qualifications; accident reporting; identification of vehicles; installation of safety devices; inspection, repair, and maintenance; and proper automatic speed regulators if, in the opinion of the commissioner, there is a need for the rules.²⁰⁵

Before Congress promulgated statutes addressing motor vehicle size and weight restrictions, states regulated these issues under their police powers.²⁰⁶ The states were deemed to have a legitimate interest in regulating the size and weight of vehicles in order to protect their highways from unnecessary wear and tear and to protect their citizens from the hazards of safety.²⁰⁷ Federal acts are not deemed to supercede state police power unless it was “the clear and manifest purpose of Congress” to do so.²⁰⁸ However, such a “manifest purpose” does not require explicit statutory language preempting the state law. Various federal safety statutes have been held to preempt inconsistent state law, either explicitly or implicitly.

In recent decades, Congress has passed laws intruding upon the state police powers in the area of motor vehicle law. We will discuss the substance of these requirements below. But we address their preemption here. Though highway safety is often described as falling within the police powers of the states, federal regulation of interstate roads and highways has been upheld under the Commerce Clause. In *United States v. Lopez*,²⁰⁹ the U.S. Supreme Court noted that the Commerce Clause conferred upon Congress the power to “regulate the use of the channels of interstate commerce.” The power of the federal government under the Commerce Clause is vast, and its preemptive force is equally vast.²¹⁰

²⁰⁵ <http://www.revisor.leg.state.mn.us/stats/221/031.html>.

²⁰⁶ Lorrie Marcil, *State Statutes That Exempt Favored Industries from Meeting Highway Weight Restrictions: Constitutionality Under the Equal Protection Clause*, 1984 DUKE L. REV. 963 (1984).

²⁰⁷ See, e.g., *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932); 52 S. Ct. 581, 76 L. Ed. 1167, *Kassel v. Consol. Freightways*, 450 U.S. 662, 101 S. Ct. 1309, 67 L. Ed. 2d 580 (1981); J. Michael Ivens, *Recent Development: Constitutional Law—Commerce Clause—Validity of State Regulation of Truck Lengths to Promote Highway Safety*; *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), 49 TENN. L. REV. 389 (1982).

²⁰⁸ Jennifer Andrews, *Saving Preemption: A Conflict Preemption Quandary Resolved in Geier v. American Honda Motor Co., Inc.*, 32 TRANSP. L.J. 221, 229 (2005).

²⁰⁹ 514 U.S. 549, 558 (1995).

²¹⁰ “The power of the federal government to displace state law in those areas in which Congress has the ability to legislate is a potent one; it divests states of the ability to regulate in an

The Supremacy Clause²¹¹ of the U.S. Constitution “invalidates any state law that contradicts or interferes with an Act of Congress.”²¹² Although state highway regulation historically has fallen within the traditional police powers of the states, three circumstances exist under which state police power regulation of a matter of local concern will be deemed preempted by federal law: (1) *Explicit preemption*—where Congress explicitly preempted the states;²¹³ (2) *Occupy the field*—where the scheme of federal regulation is so pervasive as to leave no room for the states to supplement it;²¹⁴ or (3) *Same purpose covered*—where the object to be obtained by the federal law and the character of the obligations imposed by it reveal the same purpose as the state regulation.²¹⁵ The second and third of these categories (i.e., field preemption and conflict preemption) are instances of implicit preemption.²¹⁶

Sometimes, preemption is avoided via the technique of “cooperative federalism,”²¹⁷ whereby Congress offers the states the choice of either implementing the federal regulations or losing federal funding.²¹⁸ Thus, under the

area within the state’s domain.” Susan Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 88, 90 (1995).

²¹¹ Article VI of the Constitution (the Supremacy Clause) provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding....

U.S. CONST. art. VI.

²¹² *Hayfield N. R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 627; 104 S. Ct. 2610, 2614 (1984); 81 L. Ed. 2d 527, 533.

²¹³ *See Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977).

²¹⁴ *Fidelity Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153, 102, S. Ct. 3014, 3022, 73 L. Ed. 2d 664, 675 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

²¹⁵ *Pacific Gas & Elec. v. State Energy Res. Conservation Comm’n*, 461 U.S. 190, 204, 103 S. Ct. 1713, 1722, 75 L. Ed. 2d 752, 765 (1983).

²¹⁶ *Andrews*, *supra* note 208, at 221, 228–29.

²¹⁷ Some commentators have observed that cooperative federalism is evolving into “interactive federalism,” whereby negotiated compromises are resulting from informal give-and-take federal/state relationships. With the promulgation of ISTEA, regional MPOs were empowered to help coordinate regional transportation, land use, and environmental issues. ROSS NETHERTON, *FEDERALISM AND THE INTERMODAL SURFACE TRANSPORTATION EFFICIENCY ACT OF 1991* (NCHRP Legal Research Digest No. 32, 1995); Dempsey, *supra* note 105 §§ 1-13–1-14, 2-3–2-4, 2-25–2-26 (2004).

²¹⁸ Craig Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 KAN. L. REV. 463, 520 (2000).

Spending Clause, Congress sometimes ties state compliance with federal standards to funding.²¹⁹ For example, a state’s failure to adopt a seatbelt law results in a loss of federal funds, but the state is not compelled to adopt a seatbelt law. On the other hand, a state’s efforts to limit truck size and weights have been deemed directly preempted by federal law promulgated under the Commerce Clause.

The most obvious case for federal preemption exists when Congress has expressly declared its intent to do so, and it has legitimately exercised its authority under the Commerce Clause.²²⁰ But Congress is rarely so pre-

²¹⁹ FHWA and other DOT administrations also have promulgated a wide variety of regulations and other legal obligations contractually (through the Master Agreement and various compliance statements), with the possibility of suspending or terminating funds for noncompliance.

²²⁰ *See, e.g., Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31, 116 S. Ct. 1103, 1108, 134 L. Ed. 2d 237, 244 (1996); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 822 (1st Cir. 1992). *See also Nat. Freight v. Larson*, 760 F.2d 499 (3d Cir. 1985) (state statute imposing overall truck trailer lengths conflicted with a federal statute, and was therefore preempted under the Supremacy Clause).

Three broad areas have since been identified that Congress may legitimately regulate:

1. Congress may regulate the use of the channels of interstate commerce, *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964);
2. Congress may regulate instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the concern arises from intrastate activities, *See Shreveport Rate Cases*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); and
3. Congress may regulate those activities having a substantial relation to, or substantial effect on, interstate commerce, *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 575 S. Ct. 615, 81 L. Ed. 893 (1937).

In *English v. Gen. Elec. Co.*, 496 U.S. 72, 78, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65, 74 (1990), the U.S. Supreme Court observed:

Our cases have established that state law is pre-empted under the Supremacy Clause, in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation...so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress touches “a field in which federal interest is so dominant that the federal system will be assumed to

cise in demarking the jurisdictional lines between the federal and state spheres. The form of preemption that has generated the most litigation is where, under the “dormant” Commerce Clause (or negative Commerce Clause doctrine),²²¹ a court holds that state action is preempted. Under the judicially created dormant Commerce Clause analysis, preemption is appropriate where (1) the federal scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”;²²² (2) the field of regulation has a federal interest “so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject”;²²³ or (3) the prospect of a conflict between the federal and state regimes creates “a serious danger of conflict with the administration of the federal program.”²²⁴

With promulgation of the STAA, Congress sought to impose uniformity of state length and width requirements on CMVs using the National Network. STAA

preclude enforcement of state laws on the same subject.” Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: “Where...the field which Congress is said to have pre-empted” includes areas that have “been traditionally occupied by the States,” congressional intent to supersede state laws must be ‘clear and manifest.’ ”

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Id. [citations omitted].

In order for Congress to preempt state activity under the Commerce Clause, two requirements must be met: (1) there must be a rational basis for Congress’s conclusion that the activity has a substantial impact on interstate commerce; and (2) the means chosen must be reasonably adapted to a constitutional end. *Hodel v. Va. Surface Min. & Recl. Ass’n*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981). See Robert McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor and Rail Carriers*, 24 TRANSP. L.J. 155, 167 (1997).

²²¹ In his concurring opinion in *Amer. Trucking Ass’n v. Smith*, 496 U.S. 167, 200, 110 S. Ct. 2323, 2343, 110 L. Ed. 2d 148, 174 (1990), (a case holding that a flat tax on interstate commerce offended the Commerce Clause because it imposed a greater burden on out-of-state vis-à-vis in-state motor carriers), Justice Scalia described negative Commerce Clause jurisprudence as a “quagmire,” “arbitrary, conclusory, and irreconcilable with the constitutional text,” “inherently unpredictable,” and “has only worsened with age.” *Am. Trucking Ass’n*, 496 U.S. at 202–24 (Scalia, J., concurring).

²²² *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447, 1459 (1947).

²²³ *Id.*

²²⁴ *Pennsylvania v. Nelson*, 350 U.S. 497, 505, 76 S. Ct. 477, 482, 100 L. Ed. 640, 654 (1956).

preempted the states in two ways: (1) it preempted state limitations on the size of vehicles using the National Network; and (2) it preempted state restrictions on federally approved vehicles’ use of, or access to, the National Network.²²⁵ Much litigation has arisen under STAA’s preemption provisions.

Before 1982, the Commonwealth of Pennsylvania permitted the use of tractor–trailer combinations with trailers up to 53 ft in length, but with an overall combination length of no more than 60 ft. STAA permitted CMVs consisting of 48-ft semitrailers or 28-ft twin trailers on the National Network, and prohibited states from restricting CMV semitrailer and trailer lengths that had previously been lawfully operated in the state. Pennsylvania responded by passing legislation retaining an overall length limit of 60 ft on semitrailer combinations with trailers of more than 48 ft. In *National Freight v. Larson*,²²⁶ the U.S. Court of Appeals for the Third Circuit held that Pennsylvania’s overall length restrictions (of 60 feet on semi-combinations with trailers in excess of 48 feet on the National Network) conflicted with STAA, and could not be imposed on vehicles using the National Network.²²⁷ The Third Circuit observed, “In including within the federal statute a prohibition against the use of overall length limitations, Congress apparently desired to reduce the use of the dangerous ‘short tractors’ that had been developed in response to the various state overall length limitation laws.”²²⁸

STAA also established a uniform width requirement of 102 in., except for Hawaii. Pennsylvania’s effort to impose a 96-in. width requirement failed in *Continental Can Co. v. Yerusalim*.²²⁹ The Third Circuit held, “the uniform width standard does apply, at least as a maximum width, to vehicles covered by the grandfather clause.”²³⁰

The State of Connecticut attempted to ban tandem trailers from all its highways (including those in the National Network) in 1983. In *United States v. Connecticut*,²³¹ a federal district court found that the state statute directly conflicted with Section 411(c) of STAA, which prohibited states from restricting tandem trailers, and was therefore preempted under the Supremacy Clause. Though the state challenged the constitutionality of STAA, the court found the statute was supported by a rational purpose—facilitating interstate

²²⁵ *N.Y. State Motor Truck Ass’n v. City of N.Y.*, 654 F. Supp. 1521, 1524 (S.D.N.Y. 1987).

²²⁶ *Nat’l Freight v. Larson*, 760 F.2d 499 (3d Cir. 1985).

²²⁷ *Id.* at 507.

²²⁸ *Id.* at 505.

²²⁹ *Continental Can Co. v. Yerusalim*, 854 F.2d 28 (3d Cir. 1988).

²³⁰ *Id.* at 30.

²³¹ 566 F. Supp. 571 (D. Conn. 1983).

trucking—and was therefore a proper exercise of federal power under the Commerce Clause.²³²

In 1983, the State of Florida passed a statute and promulgated emergency rules: (1) vesting in the Florida DOT the authority to designate the state primary system highways to be included in the tandem truck network; (2) granting to the department the power to designate which highways may be used by truck tractor-semitrailer combinations that are longer than 55 ft; and (3) restricting the days and hours of operation of tandem trucks. In *United States v. Florida*,²³³ a federal district court found all three provisions were preempted by STAA and void under the Supremacy Clause. The court found that STAA vests in the U.S. Secretary of Transportation the power to designate which Federal-Aid Primary Highways will constitute the tandem truck network. STAA also prohibits the states from imposing any restrictions on overall lengths of CMVs, and prohibits the states from prohibiting CMV tractor trailer combinations from the National Network.²³⁴

In order to protect the health and safety of its residents, in 1999, the New Jersey DOT issued regulations seeking to reduce the number of large CMVs on non-National Network roads. Under the regulations, a large CMV with neither an origin nor destination in the state was required to stay on the National Network routes except to access terminals, food, fuel, or repairs. The American Trucking Associations and a motor carrier brought a Commerce Clause challenge against the New Jersey regulation on grounds that intrastate trucking companies were favored over interstate motor carriers. But the regulation survived a summary judgment motion in *American Trucking Associations v. Whitman*,²³⁵ where the federal district court could find no facial discriminatory purpose or effect. Said the court:

State regulation in the field of highway safety traditionally is accorded great deference and the Supreme Court often has articulated its reluctance to invalidate such statutes. A strong presumption of validity is given to highway safety regulations that do not discriminate on their face or in effect. Challengers may overcome the presumption by showing that the purported safety benefits are slight, problematic, or illusory. Absent such a showing, the court should uphold uniform safety statutes.²³⁶

The preemption provisions of STAA have also reached local restrictions on CMV operations. In *New York State Motor Truck Ass'n v. City of New York*,²³⁷ a federal dis-

trict court struck down a city ordinance that sought to restrict CMV length and use restrictions on certain Interstate highways flowing through it. Though the court conceded that a local government could legitimately exercise its police power to protect public safety on state roads, it was prohibited by STAA from denying tandems the use of Interstate highways and reasonable access thereto. Nor could a state impose time of day curfews on such vehicles.²³⁸ According to the court, “Congress’ primary objective in enacting the STAA was to relieve commercial trucking operators of the burden inherent in planning and operating a multi-state haul of tandems through states with conflicting regulations of tandem operations.”²³⁹ Moreover, FHWA was not authorized to allow, by regulatory fiat, that which the statute prohibited. Said the judge, “even deferring to the Secretary’s construction of § 411(d) as allowing her to require FHWA approval of state tandem regulations, I am not constrained to accord any weight to her conclusion that these particular regulations do not violate the congressional objectives behind the STAA.”²⁴⁰ He therefore enjoined the city from implementing or enforcing its regulations.²⁴¹

Local restrictions fared better in *New Hampshire Motor Transport Ass’n v. Town of Plaistow*,²⁴² which assessed whether enforcement of a city zoning ordinance that prohibited nuisances against CMVs was preempted by federal legislation and the Commerce Clause of the U.S. Constitution.²⁴³ The city issued a cease and desist order limiting operations at a local trucking terminal as follows:

6:00 a.m. to 9:00 p.m.	No restrictions.
9:00 p.m. to 11:00 p.m.	Two trucks may arrive or depart.
11:00 p.m. to 5:00 a.m.	No trucks may arrive or depart.
5:00 a.m. to 6:00 a.m.	Three trucks may arrive or depart.

Most of the traffic at the terminal came from I-495, about 6 mi from the terminal. The First Circuit observed that the STAA (“the Surface Act”), as amended by the Tandem Truck Safety Act of 1984 (“the Tandem Act”),²⁴⁴ establishes uniform, national standards governing the maximum size and weight of trucks and trailers used in interstate commerce, and prohibits

²³² *Connecticut*, 566 F. Supp. at 577. However, in *Ga. Dep’t of Transp. v. Dole*, 561 F. Supp. 1024 (N.D. Ga. 1983), a federal district court concluded that regulations promulgated by the DOT under STAA exceeded the statutory authority of the agency and violated the Administrative Procedure Act.

²³³ 585 F. Supp. 807 (N.D. Fla. 1984).

²³⁴ *Florida*, 585 F. Supp. at 809–11.

²³⁵ 136 F. Supp. 2d 343 (D.N.J. 2001).

²³⁶ *Am. Trucking*, 136 F. Supp. 2d at 349 (citations omitted).

²³⁷ *N.Y. State Motor Truck Ass’n v. City of N.Y.*, 654 F. Supp. 1521, 1524 (S.D.N.Y. 1987).

²³⁸ *Id.* at 1535.

²³⁹ *Id.* at 1536.

²⁴⁰ *Id.* at 1537.

²⁴¹ *Id.* at 1541.

²⁴² 67 F.3d 326 (1st Cir. 1995), *cert. denied*, 517 U.S. 1120 (1996).

²⁴³ U.S. CONST. art. 1, § 8.

²⁴⁴ 49 U.S.C. § 31111 *et seq.*

states from enacting or enforcing laws that restrict trucks and trailers from operating on the National Network.²⁴⁵ The court conceded that the restriction on reasonable access to the National Network extends beyond the Interstate highways:

The "prohibition on denying access," 49 U.S.C. § 31114, extends far beyond the operation of interstate highways or federally funded state roads that are designated parts of the national network. Local roads and other facilities are also covered by the provision to the extent needed to assure reasonable access to the national network. 23 C.F.R. § 658.19. The guarantee of reasonable access thus has a formidable reach, extending to local regulatory measures that operate miles away from any interstate or national network highway.²⁴⁶

The First Circuit held that the statutory language allowing a local government to impose "reasonable restrictions, based on safety considerations, on a truck tractor–semitrailer combination in which the semi-trailer has a length of not more than 28.5 feet" was not limited to circumstances where the restrictions were based on safety considerations, and could include reasonable curfew restrictions predicated on residential concerns about noise, odor, dust, and vibration. Although three federal district courts had held to the contrary,²⁴⁷ the First Circuit held that although safety was a paramount reason justifying a reasonable restriction limiting access, "it is not the only reason permitted by Congress."²⁴⁸

In *Plaistow*, the First Circuit also rejected a challenge to the city's ordinance on grounds that it conflicted with the "federal speedy-transport mandate" of the Hazardous Materials Transportation Uniform Safety Act of 1990.²⁴⁹ The court distinguished its decision in *National Tank Truck Carriers, Inc. v. Burke*,²⁵⁰ in which it struck down a Rhode Island statewide prohibition of the transportation of liquefied natural gas:

A general, state-wide restriction is obviously more vulnerable to attack both because its impact is likely to be much greater and because it treats alike all situations regardless of need or danger. Quite possibly a local restriction might also unjustifiably interfere with hazardous shipment movements, either standing alone or in combination with restrictions in other communities. But the burden is upon those who attack the restriction to show the impact.²⁵¹

The court also concluded that the enforcement of the ordinance did not conflict with the Noise Control Act of

1972²⁵² since the city was not regulating the decibel levels of the trucks.²⁵³ In assessing whether the ordinance ran afoul of the Commerce Clause itself, the First Circuit weighed the burden on interstate commerce against the local benefit of the curfew. As to the burden, the court characterized it as a curfew that "prevents arrivals and departures at one terminal, at one location in the state, during six late-night hours (from 11 p.m. to 5 a.m.) with lesser restrictions for three hours (from 5 a.m. to 6 a.m. and from 9 p.m. to 11 p.m.)." The benefit was sparing local residents the nuisance imposed by trucks operating in their community late at night. The court found the ordinance akin to local traffic and safety restrictions traditionally applied on a local level, for which there is no alternative federal protection. The burden on interstate commerce was not shown to outweigh the local benefits, and thus, the curfew withstood the Commerce Clause preemption challenge.²⁵⁴

However, the City of Portsmouth's ordinance attempting to prohibit the continuous running of truck engines and refrigeration units for more than 15 minutes at a truck stop 1 mi from I-95, was enjoined by a federal district court in *Hanscom's Truck Stop v. City of Portsmouth*.²⁵⁵ The court found unpersuasive the city's argument that its ordinance did not restrict "access" to the truck stop. The court found that the ordinance did indeed restrict access because it effectively prohibited most trucks from using the stop. In balancing the competing interests of the local government and the truck stop, the court found the facts distinguishable from *Plaistow*, discussed above. Here, the truck stop had been in operation for 30 years on a through truck route within a mile of a noisy Interstate highway. The ordinance's 15-minute time limitation bore no relationship to the need of trucks to refuel or be repaired, or for their drivers to use the facility for resting. The ordinance was enforced only at the truck stop, and at no other service station on the highway. Hanscom's was the only 24-hour truck stop on 100 mi of an Interstate highway, and therefore provided critical service for highway safety.²⁵⁶ As to the city's interest in reducing noise and odor, the judge concluded:

While an interest in controlling noise and odors by limiting diesel engine operation may be within the police powers, the Ordinance, as adopted and enforced, is not a "reasonable" restriction on access in light of all the evidence. Of particular weight in my analysis is the potential impact of the Ordinance on access to Hanscom's late-night services or resting facilities during bad weather, and the attendant highway safety risks. On balance, I find that Hanscom's has demonstrated that the Ordinance is an

²⁴⁵ *Plaistow*, 67 F.3d at 329.

²⁴⁶ *Id.* at 330.

²⁴⁷ *A.B.F. Freight System v. Suthard*, 681 F. Supp. 334, 341 (E.D. Va. 1988); *N.Y. State Motor Truck*, 654 F. Supp. 1521, 1539 (S.D.N.Y. 1987); *Consol. Freightways Corp. of Delaware v. Larson*, 647 F. Supp. 1479, 1483–84 (M.D. Pa. 1986).

²⁴⁸ *Plaistow*, 67 F.3d at 331.

²⁴⁹ 49 U.S.C. § 5101.

²⁵⁰ 698 F.2d 559 (1st Cir. 1983).

²⁵¹ *Plaistow*, 67 F.3d at 331–32 (citations omitted).

²⁵² 42 U.S.C. § 4901 *et seq.*

²⁵³ *Plaistow*, at 332.

²⁵⁴ *Id.* at 333.

²⁵⁵ Civ. No. 98-488-B, 1998 U.S. Dist. LEXIS 18059 (D.N.H. Nov. 10, 1998).

²⁵⁶ *Id.* at 20.

unreasonable restriction, prohibited by 49 U.S.C. § 31114(a).²⁵⁷

The issue of federal preemption also has arisen in products liability litigation.²⁵⁸ In *Geier v. American Honda Motor Co.*,²⁵⁹ the U.S. Supreme Court was confronted with conflicting provisions in the National Traffic and Motor Vehicle Safety Act of 1966—one a preemption provision, while the other was a savings clause. The former provided: “Whenever a Federal motor vehicle safety standard...is in effect, no State or political subdivision of a State shall have any authority...to establish...any safety standard applicable to the same aspect of performance...which is not identical to the Federal standard.”²⁶⁰ The latter provided that “compliance with” a federal safety standard “does not exempt any person from any liability under the common law.”²⁶¹ In a close decision, the Supreme Court found that although the explicit preemption provision did not preclude the common law lawsuit, neither provision precluded implicit conflict preemption.²⁶² The Court found that Congress intended to apply ordinary conflict preemption where an actual conflict with federal objectives arose.²⁶³ Applying ordinary conflict analysis, the Court concluded that a state common law “no-airbag” action was preempted since it would have been an obstacle to the implementation of the Federal Motor Vehicle Safety Standard regarding passive automobile re-

straints.²⁶⁴ A number of law review articles have criticized the majority’s decision in *Geier*.²⁶⁵

Other situations in which federal preemption has arisen in a torts context include CMV tractor-trailer design cases,²⁶⁶ seatbelt requirements,²⁶⁷ fuel content,²⁶⁸ and hazardous materials transportation.²⁶⁹

The issue of preemption also has arisen in the context of state economic regulation of intrastate motor and bus carriers. The Federal Aviation Administration Authorization Act of 1994, in part, preempted state economic regulation of intrastate trucking. The legislation included a savings clause preserving state regulation of certain functions (including safety regulation) to the “authority of a State,”²⁷⁰ while other clauses conferred it to the “authority of a State or a political subdivision of a State.”²⁷¹ The U.S. Supreme Court addressed the preemption issue head in *City of Columbus v. Ours Garage and Wrecker Service*,²⁷² a case in which a tow-truck op-

²⁵⁷ *Id.* at 21.

²⁵⁸ See, e.g., Ralph Nader & Joseph Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415 (1996); Susan Raeker-Jordan, *The Pre-Emption Presumption That Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998).

²⁵⁹ 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000). Samuel Elswick, *Geier v. American Honda Motor Company: Airbags, Federal Preemption, and the Viability of a Regulatory Compliance Defense*, 28 N. KY. L. REV. 135, 140 (2001).

²⁶⁰ 80 Stat. 718, now codified at 49 U.S.C. § 30103(b)(1). See Ellen Theroff, *Preemption of Airbag Litigation: Just a Lot of Hot Air?*, 76 VA. L. REV. 577 (1990).

²⁶¹ 49 U.S.C. § 30103(e).

²⁶² *Geier*, 529 U.S. at 869.

²⁶³ *Geier*, 529 U.S. at 871. Andrews, *supra* note 208, at 221, 222.

²⁶⁴ *Geier*, 529 U.S. at 886. The Court concluded:

the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of all state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost and occasional risk to safety itself that too many different safety-standard cooks might otherwise create.... This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict....

Id. at 894.

²⁶⁵ See, e.g., Theroff, *supra* note 260, at 577; Alexander Haas, *Chipping Away at State Tort Remedies Through Pre-emption Jurisprudence: Geier v. American Honda Motor Co.*, 89 CAL. L. REV. 1927 (2001); Joseph Mulherin, *Geier v. American Honda Motor Co.: Has the Supreme Court Extended the Pre-emption Doctrine Too Far?*, 21 NAT’L ASS’N ADMIN. L. JUDGES 173 (2001); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1 (2002).

²⁶⁶ *Freightliner v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995) (tort negligence action for design of tractor-trailers not preempted).

²⁶⁷ *Griffith v. GMC*, 303 F.3d 1276 (11th Cir. 2002) (negligence suit brought for selecting a vehicle restraint system authorized by federal regulation preempted). See Kurt Chadwell, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 BAYLOR L. REV. 141 (1994).

²⁶⁸ *Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246 (9th Cir. 2000) (the Clean Air Act does not preempt state requirements of minimum oxygen content of fuel).

²⁶⁹ *Massachusetts v. USDOT*, 320 U.S. App. D.C. 227, 93 F.3d 890 (D.C. Cir. 1996) (DOT ruling that the Massachusetts hazardous material law’s requirement of uniformity was preempted was erroneous).

²⁷⁰ 49 U.S.C. § 14501(c)(2)(A).

²⁷¹ 49 U.S.C. § 14501(c)(2)(C), (3)(A).

²⁷² 536 U.S. 424, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002).

erator and its trade association sought an injunction against a municipality's tow-truck regulations on grounds of preemption.²⁷³ The Supreme Court concluded that the statute did not manifest a clear intent that Congress sought to supplant local authority over the traditional state function of highway safety.²⁷⁴ Congress's purpose in promulgating this statute was to ensure that federal preemption of state motor carrier economic regulation did not interfere with "the preexisting and traditional state police power over safety."²⁷⁵ That power includes the discretion of a state to subdelegate motor vehicle safety regulation to local governments.²⁷⁶ Nevertheless, where local safety regulation conflicts directly with a federal safety statute, the local law is preempted.²⁷⁷

In the Bus Regulatory Reform Act of 1982 (the Bus Act), partial preemption of state licensing and market entry regulations also led to a series of notable lawsuits, which pitted newer bus companies, seeking competitive access to expanding passenger markets, in litigation against state regulatory agencies and established bus companies whose lucrative intrastate bus routes had been protected from competition by restrictive state entry standards and procedures.²⁷⁸ These lawsuits showcased the success enjoyed by these upstart bus companies in using the Bus Act's preemptive provisions as a wedge to pry open the "closed door" of state regulatory barriers to competitive entry in the bus industry. They also involved interesting questions about the interplay of federal and state powers and procedures for adjudicating disputes over intrastate bus operations by interstate common carriers, in which the primary jurisdiction of the former ICC, and its use of "declaratory orders," ultimately prevailed over contrary state administrative factfinding.

²⁷³ *City of Columbus v. Ours Garage & Wrecker Service*, 536 U.S. 424, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002) (municipalities may regulate safety of tow truck operators). See also *Cole v. City of Dallas*, 314 F.3d 730 (5th Cir. 2002) (local regulation of tow truck operators not preempted).

²⁷⁴ *City of Columbus*, 536 U.S. at 434.

²⁷⁵ *Id.*, 536 U.S. at 438.

²⁷⁶ *Id.*, 536 U.S. at 438.

²⁷⁷ See *CSX Transp. v. City of Plymouth*, 86 F.3d 626 (6th Cir. 1996) (municipal ordinance that limited the time that trains could disrupt local traffic preempted by the Federal Railway Safety Act); *Stucky v. City of San Antonio*, 260 F.3d 424 (5th Cir. 2001) (the federal statute demonstrates congressional intent not to include political subdivisions of a state within the exception to preemption).

²⁷⁸ See, e.g., *Holland Indus. v. Div. of Transp. of the State of Mo.*, 763 S.W.2d 666 (Mo. 1989); *Funbus Sys. v. Cal. Pub. Utilities Comm'n*, 801 F.2d 1120 (9th Cir. 1986); *Trailways, Inc. v. Interstate Commerce Comm'n*, 727 F.2d 1284 (D.C. Cir. 1984); *Airporter of Colo., Inc. v. I.C.C.*, 866 F.2d 1238, 1240 (10th Cir. 1989); *Gray Lines Tour Co. of S. Nev. v. I.C.C.*, 824 F.2d 811 (9th Cir. 1987); *Aspen Limousine Serv. v. Colo. Mountain Express*, 891 F. Supp. 1450, 1455 (D. Colo. 1995).

In *Funbus Systems v. California PUC*,²⁷⁹ the Ninth Circuit addressed the preemptive provisions of the Bus Act in a case involving an intrastate airport shuttle service from Los Angeles International Airport to various points in Orange County, California. The issue before the court was whether the ICC could issue certificates authorizing intrastate service wholly independent of interstate service. The salient provision of the Bus Act provided that the ICC "shall issue a certificate... authorizing...regular-route transportation entirely in one state as a motor common carrier of passengers if such transportation is to be provided on a route over which the carrier has been granted authority...to provide interstate transportation of passengers."²⁸⁰ The court agreed with the petitioner and the California PUC that if the "Congress had intended to preempt state authority to regulate purely intrastate operations, it would have said so."²⁸¹ Noting that the U.S. Supreme Court has held that "the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,"²⁸² the Ninth Circuit concluded that the statutory language quoted above was not explicit preemptive language, and therefore turned to the legislative history of the Bus Act to ascertain intent.²⁸³ In order for the ICC to issue intrastate authority, there had to be actual, bona fide, interstate services over the route.

In *Funbus*, the Court observed that the Bus Act was not intended to effectuate total deregulation and complete preemption of state authority over the bus industry, but instead was a case-by-case preemption promulgated as a compromise between the interests of the industry and the interests of the state.²⁸⁴ The Court concluded that there had to be a nexus between a carrier's interstate and intrastate operations in order for the ICC to legitimately exercise jurisdiction over the intrastate operations,²⁸⁵ and the ICC abused its discretion in attempting to confer intrastate operating authority to *Funbus* disconnected to its interstate operations.²⁸⁶

After the *Funbus* decision, Congress added a provision to the Interstate Commerce Act limiting a carrier's intrastate operations over a certificated interstate route to those circumstances where "the carrier provides

²⁷⁹ 801 F.2d 1120 (9th Cir. 1986).

²⁸⁰ 49 U.S.C. § 10922(c)(2)(B).

²⁸¹ *Funbus*, 801 F.2d at 1126.

²⁸² *Pacific Gas*, 461 U.S. at 206, *Santa Fe Elevator*, 331 U.S. at 230.

²⁸³ *Funbus*, 801 F.2d at 1126.

²⁸⁴ *Id.* at 1127.

²⁸⁵ *Id.* at 1128.

²⁸⁶ *Id.* at 1129. However, in *Trailways v. Interstate Commerce Comm'n*, 727 F.2d 1284 (D.C. Cir. 1984), the D.C. Circuit took a more expansive view of a different provision of the Bus Act, holding that the ICC could issue intermediate intrastate authority over both certificated routes and superhighway and deviation routes created by rulemaking and letter notice proceedings.

regularly scheduled interstate transportation service on the route.²⁸⁷ Interpreting this provision, the Tenth Circuit, in *Airporter of Colorado v. Interstate Commerce Commission*,²⁸⁸ concluded that the ICC had failed to assess whether a bus company to which intrastate authority had been granted was operating over a route that actually, substantially, and in a bona fide way involved interstate operations by it.²⁸⁹

State courts are split on the issue of whether the ICC has primary jurisdiction to first determine whether there is a bona fide relationship between the intrastate authority and interstate operations under the Bus Act and its amendments. The Missouri Supreme Court concluded the issue had to be first determined by the ICC.²⁹⁰ With the sunset of the ICC, these responsibilities were transferred to the FMCSA. In a recent decision upholding the jurisdiction of its PUC to exert jurisdiction over the issue, the Colorado Supreme Court summarized the law as follows:

[I]t is well settled that intrastate transportation of passengers under an FMCSA certificate is only authorized if the interstate transportation of passengers meets certain criteria. Specifically, the “interstate traffic ‘must be a regularly scheduled service, it must be actual, it must be bona fide and involve service in more than one State, and it must be substantial.’” While the interstate and intrastate services need not be identical or offered in the same vehicle, the mere holding out to perform interstate transportation services on a particular route is not enough to support intrastate transportation on that route. Rather, “the interstate traffic must be substantial in relation to the interstate traffic in that same operation.”²⁹¹

We now turn to a discussion of the federal size, weight, and route restrictions that were at issue in several of the preemption decisions discussed above.

F. SAFETY REGULATION—MOTOR VEHICLE, HIGHWAY, AND ROUTING REQUIREMENTS

1. Vehicle Route and Size Restrictions

a. The National Network of Highways

Under its regulations, FHWA is obliged to “provide a safe and efficient National Network of highways that can safely and efficiently accommodate the large vehicles authorized by the STAA. This network includes the Interstate system plus other qualifying Federal-Aid

Primary System Highways.”²⁹² Federal regulation applies to the National Network and reasonable access thereto. It does not, however, apply to other highways, where the states may impose size and weight limits, so long as they do not restrict reasonable access to the National Network.²⁹³ Sometimes states use other terminology for their National Network highways. New York, for example, identifies them as “Qualifying Highways,” and state roads that can be used by STAA vehicles²⁹⁴ not on the National Network are known as “Access Highways.”²⁹⁵

Federal vehicular size and length standards prevail on the National Network of highways.²⁹⁶ The National Network of highways was established by the Tandem Truck Safety Act of 1984, and is available to vehicles authorized by the STAA.²⁹⁷ Consisting of about 200,000 mi of highways,²⁹⁸ the National Network includes the Interstate Highway System²⁹⁹ plus other qualifying Federal-Aid Primary System highways. Routes on the National Network and to and from terminals must be available to large, tandem trucks. States may apply their size and weight limits to other highways except where they would deny reasonable access³⁰⁰ to the National Network.³⁰¹ The following criteria govern designation of highways as parts of the National Network:

- The route is a geometrically typical component of the Federal-Aid Primary System, linking major cities and densely developed areas of the state;

²⁹² 23 C.F.R. § 658.3.

²⁹³ 23 C.F.R. § 658.7.

²⁹⁴ STAA vehicles consist of the following types of vehicles: 48 ft (L) x 102 in. (W) trailers, twin 28 ft-6 in. (L) tandem trailers, maxicubes, triple saddlemounts, conventional auto carriers, stinger-steered auto carriers boat transporters and beverage semitrailers. In New York, STAA vehicles are a subset of a class of vehicles called special dimension vehicles. Special dimension vehicles include the above list plus one additional vehicle combination: 53 ft trailers with a 41 ft kingpin distance, available at http://www.dot.state.ny.us/traffic/desig_hwy.html.

²⁹⁵ http://www.dot.state.ny.us/traffic/desig_hwy.html.

²⁹⁶ The National Network is the network of highways of each state on which vehicles are authorized to operate under the Surface Transportation Assistance Act of 1982. It includes the Interstate system, except those portions excepted under 23 C.F.R. §§ 653.11(d), or 658.11(f). 23 C.F.R. pt. 658 app. A. 67 Fed. Reg. 48,821 (July 26, 2002).

²⁹⁷ 23 C.F.R. pt. 658; 49 C.F.R. pt. 658.

²⁹⁸ 23 C.F.R. § 658.3. The Interstate Highway System and the Federal-Aid Primary System are described in 23 U.S.C. §§ 103(b), 139(a). The National Network criteria are set forth in 23 C.F.R. § 658.9.

²⁹⁹ Interstate highways are those designed to connect the nation’s “principal metropolitan areas, cities and industrial centers” and “serve the national defense.” 23 U.S.C. § 103.

³⁰⁰ Reasonable access is defined in 23 C.F.R. § 658.19.

³⁰¹ 23 C.F.R. §§ 658.7, 658.21, and pt. 658 app. A.

²⁸⁷ 49 U.S.C. § 10922(c)(2)(J).

²⁸⁸ 866 F.2d 1238 (10th Cir. 1989).

²⁸⁹ *Airporter of Colo.*, 899 F.2d at 1239.

²⁹⁰ See *Holland Indus. v. Div. of Transp.*, 763 S.W.2d 666 (Mo. 1989). Federal supremacy over the issue was also recognized in *Tri-State Coach Lines v. Ill. Commerce Comm’n*, 559 N.E.2d 869 (Ill. 1990).

²⁹¹ *Trans Shuttle v. Pub. Utilities Comm’n*, 89 P.3d 398, 405 (Co. 2004) (citations omitted).

- The route is of high volume, used extensively by large vehicles in interstate commerce;
- The route has no restrictions precluding the use of conventional combination vehicles;
- The route can support safe operations considering sight distance, severity and length of grades, width, curvature, bridge clearances and load limits, traffic volumes, and vehicular mix;
- The lanes are 12 ft or wider or otherwise consistent with highway safety; and
- The route has no unusual characteristics creating safety problems.³⁰²

States typically post designated routes for Class I, Class II, and Class III vehicles³⁰³ and vehicle weight limits³⁰⁴ on their Internet Web sites. FHWA rules on all proposed additions or deletions to the National Network.³⁰⁵ FHWA has acknowledged the concern that “the fact that Federal weight law applies only to Interstate highways, with Federal size laws applying on the National Network (NN), has resulted in an unintended diversion of overweight violators onto non-Interstate and often non-NN State and local highways.”³⁰⁶

Table 2 summarizes the federal size restrictions on CMVs operating on the National Network.

³⁰² 23 C.F.R. § 658.9.

³⁰³ See, e.g., Illinois’ routes available at <http://www.dot.state.il.us/road/destruckroute.html>. Illinois state roads where permit loads are restricted due to dimensional restrictions, closed bridges, <http://www.dot.state.il.us/road/nopermits.pdf>.

³⁰⁴ See, e.g., Nebraska’s vehicle weight limits, depending on the number of axels, <http://www.dor.state.ne.us/intermodal/pdfs/weights.pdf>.

³⁰⁵ 23 C.F.R. § 658.11.

³⁰⁶ 67 Fed. Reg. 48,821, 23 C.F.R. pt. 657 (July 26, 2002) (citations omitted).

TABLE 2—FEDERAL COMMERCIAL VEHICLE SIZE LIMITS ON THE NATIONAL NETWORK³⁰⁷	
Overall vehicle length	<p>No federal length limit is imposed on most truck tractor–semitrailers’ operation on the National Network</p> <p>Exception: On the National Network, combination vehicles (truck tractor plus semitrailer or trailer) designed and used specifically to carry automobiles or boats in specially designed racks may not exceed a maximum overall vehicle length of 65 ft, or 75 ft, depending on the type of connection between the tractor and trailer.</p>
Trailer length	<p>Federal law provides that no state may impose a length limitation of less than 48 ft (or longer if provided for by grandfather rights) on a semitrailer operating in any truck tractor–semitrailer combination on the National Network. (Note: A state may permit longer trailers to operate on its National Network highways.)</p> <p>Similarly, federal law provides that no state may impose a length limitation of less than 28 ft on a semitrailer or trailer operating in a truck tractor–semitrailer–trailer (twin-trailer) combination on the National Network.</p>
Vehicle width	<p>On the National Network, no state may impose a width limitation of <i>more or less</i> than 102 in. Safety devices (e.g., mirrors, handholds) necessary for the safe and efficient operation of motor vehicles may not be included in the calculation of width.</p>
Vehicle height	<p>No federal vehicle height is imposed. State standards range from 13.6 ft to 14.6 ft.</p>

³⁰⁷ www.ops.fhwa.dot.gov/freight/sw/overview.

b. Federal Weight Restrictions

The federal government did not impose truck size and weight restrictions until 1956, when a maximum grossweight limit of 73,280 lb (along with maximum weights of 18,000 lb on single axles and 32,000 lb on tandem axles) was imposed on vehicles operating on the Interstate Highway System; states had theretofore regulated sizes and weights of vehicles. Higher state restrictions were grandfathered in by the 1956 legislation. The federal maximum vehicle width was set at 96 in. Congress increased gross weight and axle weight limits in 1975, and in 1982, required that states adopt federal weight limits on Interstate highways and allow vehicles with specified minimum dimensions on the National Network, including tractor-semitrailer combinations with 48-ft long semitrailers, and twin-trailer combinations with trailers up to 28 ft.³⁰⁸ However, under the grandfather clause, 14 states elected to retain their preexisting size and weight requirements, and therefore can exceed federal axle weight or gross weight limits without federal permits; for divisible loads, 30 states also permit exceptions to the Interstate system axle load or gross weight limits.³⁰⁹

Today, FHWA weight limitations apply to the Interstate highways and reasonable access thereto. The maximum gross weight per vehicle is 80,000 lb unless lower gross weight is dictated by the Bridge Gross Weight Formula specified in the regulations, depending on the number and spacing of the axle.³¹⁰ The maximum gross weight per axle is 20,000 lb, and on tandem axles is 34,000 lb.³¹¹ States also may not limit tire loads to less than 500 lb per inch of tire width, nor may they limit steering axle weights to the lesser of 20,000 lb or the axle weight established by the manufacturer.³¹² A state that imposes weight restrictions different from the federal restrictions risks losing its entire National Highway System funds.³¹³

c. Federal Length Restrictions

FHWA has established minimum *length* provisions that prohibit the states from imposing the following length limitations for vehicles on the National Network:

- 48 ft on a semitrailer operating in a truck tractor–semitrailer combination;

³⁰⁸ U.S. DEPT OF TRANSP., COMPREHENSIVE TRUCK SIZE & WEIGHT STUDY (Aug. 2000), <http://www.fhwa.dot.gov/reports/tswstudy/Vol2-Chapter1.pdf>.

³⁰⁹ U.S. DEPT OF TRANSP., COMPREHENSIVE TRUCK SIZE AND WEIGHT STUDY I-16 (Aug. 2000), *available at* <http://www.fhwa.dot.gov/policy/otps/truck/finalreport.htm>.

³¹⁰ See 23 C.F.R. § 658.17(e) for the Bridge Gross Weight Formula.

³¹¹ 23 C.F.R. § 658.17(c)(d).

³¹² 23 C.F.R. § 658.17(f).

³¹³ 23 U.S.C. § 127(a); 23 C.F.R. § 658.21.

- 28 ft on any semitrailer or trailer operating in a truck tractor–semitrailer–truck combination; and
- Any overall length limitations on commercial vehicles operating in truck tractor–semitrailer or truck tractor–semitrailer–trailer combinations.³¹⁴

States are also prohibited from prohibiting CMVs operating in truck tractor–semitrailer–trailer combinations. Trucks having a length up to 65 ft engaging in lawful operation as of December 1, 1982, were grandfathered.³¹⁵ Specific rules have been promulgated for various types of specialized vehicular equipment, including automobile transporters, boat transporters, truck–tractor semitrailer–semitrailer combination vehicles, maxicube vehicles, beverage semitrailers, and munitions carriers using dromedary equipment.³¹⁶

d. Federal Width Restrictions

FHWA regulations also prohibit minimum CMV *width* limitation of more or less than 102 in.³¹⁷ However, a state may grant special use permits, or allow certain larger recreational vehicles without a special use permit.³¹⁸ Certain fixtures on the vehicle (e.g., bumpers, mirrors, aerodynamic devices) are to be excluded in calculating length or width compliance.³¹⁹ However, such fixtures may not extend more than 3 in. beyond the sides of a CMV.³²⁰ A state that subjects vehicles to size standards different from the federal standards may be subject to a civil action in federal court for injunctive relief.³²¹

e. State Size and Weight Restrictions

Size and weight restrictions constitute an integral part of CMV safety oversight.³²² FHWA regulations prescribe requirements for vehicle size and weight restrictions on Federal-aid highways, requiring an annual certification by the state.³²³ States are obliged to enforce

³¹⁴ 23 C.F.R. § 658.13.

³¹⁵ 23 C.F.R. § 658.13.

³¹⁶ 23 C.F.R. § 658.13(e).

³¹⁷ 23 C.F.R. § 658.15(a). A statutory exception of 108 in. exists for Hawaii under STAA § 416(a).

³¹⁸ 23 C.F.R. § 658.15(c). These rules were amended in 2004 to remove recreational vehicles from consideration as CMVs, allowing the states the discretion to regulate their width and allow them to be exempt from any over-width permit requirements. 69 Fed. Reg. 11,994 (Mar. 12, 2004).

³¹⁹ 23 C.F.R. § 658.16.

³²⁰ A proposal to extend the width exclusive devices to 4 in. so as to harmonize the rules with Canada and Mexico was rejected in 2004. 69 Fed. Reg. 62,426 (Oct. 26, 2004).

³²¹ 49 U.S.C. § 31115.

³²² 67 Fed. Reg. 48,821 (July 26, 2002). WATSON ARNOLD, TRIAL STRATEGY AND TECHNIQUES IN ENFORCING LAWS RELATING TO TRUCK WEIGHTS AND SIZES (NCHRP Research Results Digest No. 154, 1986).

³²³ 23 U.S.C. § 141; 23 C.F.R. § 657.1. Truck Size and Weight, Length, Width, and Weight Limitations, 23 U.S.C. §§ 127, 315;

vehicle size and weight restrictions to ensure that vehicles using Federal-aid highways do not exceed the limits designed to prevent premature deterioration of the pavement and structures and provide a safe driving environment.³²⁴ SAFETEA-LU expands state flexibility in the use of highway grants to allow enforcement of CMV size and weight restrictions at locations other than fixed weight facilities, such as at steep grades or mountainous terrains or at ports.³²⁵ Each state plan must describe the procedures, resources, and facilities it intends to dedicate to enforcement of the size and weight restrictions. The state plan shall address the following areas:

- *Facilities and resources.* The state program shall include at least two of the following—fixed platform scales, portable wheel weigher scales, semiportable or ramp scales, or weigh-in-motion (WIM) equipment; if more than one agency has weight enforcement responsibility, the lead agency must be designated;
- *Practices and procedures.* The plan of operation and its geographic coverage and hours of operation must be designated generally. Policies and practices with respect to overweight violators, penalties, and special permits for overweight vehicles must be included; and
- *Updating.* The state plan should be modified based on experience and new developments in the enforcement program.³²⁶

Each state must submit its enforcement plan or its annual update to the FHWA Office of Motor Carriers annually. The state will be advised of any deficiencies in and necessary changes to the plan by FHWA.³²⁷ Each state must also annually certify to FHWA that it is enforcing all state laws relevant to maximum size and weight restrictions.³²⁸ Should a state fail to provide such certification, or should the U.S. DOT Secretary conclude that the state is not adequately enforcing its size and weight laws, federal highway funds to the state shall be reduced by 10 percent.³²⁹ Table 3 reveals the similarities and differences in federal and state truck size and weight limits:

23 C.F.R. pts. 657, 658; 49 U.S.C. §§ 31111, 31112, 31114; 49 C.F.R. § 1.48(b)(19). See http://ops.fhwa.dot.gov/freight/size_weight.htm.

³²⁴ 23 C.F.R. § 637.5.

³²⁵ SAFETEA-LU sec. 4106, amending 49 U.S.C. § 31102. It also allows federal grants to states that share land borders with another country to carry out border CMV safety programs and related enforcement activities and projects. SAFETEA-LU sec. 4110, amending 49 U.S.C. § 31107.

³²⁶ 23 C.F.R. § 657.9.

³²⁷ 23 C.F.R. § 657.11.

³²⁸ 23 C.F.R. § 657.13.

³²⁹ 23 C.F.R. § 657.19. The procedures for reduction of funds are set forth in 23 C.F.R. § 657.21.

TABLE 3—TRUCK SIZE AND WEIGHT LIMITS SPECIFIED IN LAW³³⁰		
AREA	FEDERAL LAW	STATE LAW
VEHICLE WEIGHT LIMITS		
Number of Tires	No	Some
Tire Load Limit	No	Some
Load Distribution Between Tires	No	No
Load Limits by Axle Type	Yes	All
Load Distribution Between Axles in a Group	No	Some
Suspensions	No	No
Lift Axles	No	No
Gross Vehicular Weight (GVW) Bridge Formula	Yes	All
GVW Cap	Yes	All
VEHICLE DIMENSION LIMITS		
Height	No	All
Width	Yes	All
Single Unit Length	No	All
Semitrailer Length	Yes	All
Trailer Length	Yes	All
Combination Length	Yes	Some
VEHICLE SPECIFICATIONS		
Configurations	No	Some
Body Type	No	No
EQUIPMENT SPECIFICATION		
Safety-Related Hitching	Yes	No
Safety-Related Weight Distribution	No	Some
Safety-Related Power/Weight	No	Some
Kingpin	No	Many
Hitching	No	No

³³⁰ Adapted from U.S. DEPT OF TRANSP., COMPREHENSIVE TRUCK SIZE AND WEIGHT STUDY, tbl. 1-5 (2000) available at <http://www.fhwa.dot.gov/reports/tswstudy>.

Several states have aligned their CMV size and weight permitting procedures to facilitate through transportation of non-reducible loads. Thus, 12 western and Sunbelt states³³¹ have adopted a common permit, allowing a motor vehicle permitted in any of the 12 states to move on through them all.³³² California is not a part of this consortium of states, and has its own size and weight and permitting requirements.³³³

2. Mexican Vehicles, Carriers, and Drivers

With the exception of cross-border transportation of passengers in charter and tour bus service, prior to conclusion of the North American Free Trade Agreement (NAFTA), operations of Mexican motor vehicles were limited to the commercial zones (a zone extending from 3 to 20 mi of a city's limits, depending upon population) of U.S. border communities. In the commercial zone, Mexican carriers would deliver trailers to U.S.-based,

³³¹ Ariz., Colo., Idaho, La., Mont., Nev., N.M., Okla., Or., Tex., Utah, and Wash.

³³² See http://www.wsdot.wa.gov/commercialvehicle/pdf/Permit_Brochure.pdf.

³³³ The following is a list of requirements for legal, unpermitted vehicles to operate in California.

Width—The maximum allowable vehicle width is 102 in. (some exceptions apply).

Height—The maximum allowable vehicle height is 14 ft.

Length (California Legal)—The maximum allowable lengths for vehicles that can travel throughout California are as follows (some exceptions apply):

- Single vehicle length is 40 ft.
- Combination length is 65 ft.
- Trailer length is not specified.
- KPRA (kingpin-to-rear-axle) is 40 ft maximum.
- Doubles—75 ft for combination of vehicles consisting of a truck tractor and two trailers, provided neither trailer length exceeds 28 ft, 6 in.
- Doubles—65 ft for combination of vehicles consisting of a truck tractor and two trailers, if one trailer length exceeds 28 ft, 6 in.

Length (STAA)—The maximum allowable lengths for vehicles that are limited to the National Network and Terminal Access routes are as follows:

- Combination length is unlimited.
- Maximum trailer length is 53 ft.
- KPRA is unlimited if trailer is no more than 48 ft.
- KPRA is 40 ft maximum if trailer is more than 48 ft.
- Doubles—unlimited length for combination of vehicles consisting of a truck tractor and two trailers, but *neither* trailer length can exceed 28 ft, 6 in.

Weight—The maximum allowable lengths are as follows:

- Gross combination weight is 80,000 lb.
- Single-axle weight is 20,000 lb.
- Maximum weight on a tandem axle with a 4-ft spread is 34,000 lb.

<http://www.dot.ca.gov/hq/traffops/trucks/trucksize/ops-guide/legalsize.htm>.

long-haul trucks, which slowed the movement of goods and increased the cost. These limitations applied to Mexican common carriers and private carriers and to carriers of both regulated and exempt commodities. Prior to NAFTA, U.S. carriers were barred totally from operating in Mexico, even though Mexican carriers were able to operate within U.S. commercial zones.

Under the terms of NAFTA, which became effective in January 1994, most restrictions against Mexican carriers operating in the United States were to have been phased out in the 1990s. Under NAFTA, beginning December 18, 1995, Mexican trucking companies were to have been allowed to obtain licenses to perform cross-border operations into the four U.S. border states (i.e., California, Arizona, New Mexico, and Texas), and U.S. carriers were to have been allowed entry into the six northern border states of Mexico. On January 1, 2000, NAFTA provided for cross-border access for Mexican carriers, in foreign commerce only, throughout the United States, and for U.S. carriers throughout Mexico.

Foreign ownership restrictions were also to be lifted under NAFTA. Under it, on December 18, 1995, Mexican investors were to be permitted to invest in 100 percent of a U.S. carrier providing international service, while U.S. investors were allowed to invest up to 49 percent in Mexican carriers. On January 1, 2001, the percentage increased to 51 percent; complete ownership is to be permitted in 2004.³³⁴

The provisions allowing Canadian carriers, vehicles, and drivers were dutifully implemented by the United States. Canada has a truck inspection program similar to that of the United States. But on December 17, 1995, only 1 day before the U.S.–Mexican border was scheduled to open, President Clinton issued a safety proclamation for unilaterally closing the border to Mexican trucks beyond the commercial zones, thereby failing to implement NAFTA. The Mexican government responded by placing a similar restriction on U.S. vehicles.

President Clinton's suspension of implementation of NAFTA led the Mexican government to file a formal complaint in 1998 requesting arbitration under the treaty's dispute resolution provisions. The Mexicans alleged protectionism. The U.S. counterclaimed, accusing Mexico of improper retaliation by sealing off its borders to U.S. carriers. The process was to take 6 years to run its course.

While the arbitration panel was being formed, Congress passed the Motor Carrier Safety Improvement Act of 1999, which created the FMCSA within U.S. DOT and increased the penalties for Mexican carriers operating outside the commercial zones. Under the Act, foreign domiciled carriers must carry a copy of their registration, and if a vehicle operates beyond the scope of its registration, it may be placed out of service; the carrier

³³⁴ Eric Benton, Update on Mexican Trucking Before the Annual Meeting of the Transportation Lawyers Association (May 13, 2000).

is liable for a civil penalty and, depending on whether the violation is intentional, may be suspended from operating anywhere in the United States for a period of time.

On February 6, 2001, the five-member arbitration panel unanimously concluded that the U.S. decision to block Mexican trucks from entering the United States was in breach of the NAFTA agreement, as was its refusal to allow Mexican companies to invest in U.S. international cargo companies. It gave the United States 30 days to conclude a plan identifying a timetable and action steps the U.S. will take or face possible sanctions.³³⁵ If negotiations to implement NAFTA were unsuccessful, Mexico had the right to levy compensatory duties equal to the economic damage it incurred as a result of a closed border since 1995, which some estimate to be around \$200 billion.³³⁶ President George W. Bush promised to implement the arbitration decision expeditiously. As Governor of Texas, Mr. Bush had signed a letter with the governors of Arizona, California, and New Mexico, insisting, "This transborder trucking delay robs the entire U.S.-Mexico border region of the full economic benefits that NAFTA promises."³³⁷

Mexican drivers typically drive 20 hours per day in Mexico. When they crossed the border, they would be subjected to the 10-hour safety requirements of U.S. drivers. However, they would not be subject to U.S. labor laws, such as minimum wage requirements.³³⁸ There is also some concern about the ability of the United States to police Mexican vehicles to assure they meet U.S. safety standards. Border crossings are notoriously understaffed. The U.S. DOT Inspector General found that, although the number of federal border inspectors increased to 60 from 40 in 2000, and 7 in 1995, an additional 126 inspectors are needed.³³⁹ For example, California gave full safety inspections to only 2 percent of the 920,000 short-haul trucks that entered from Mexico in 2000.³⁴⁰ In 1999, the Texas Department of Public Safety inspected only about 1 percent of the trucks crossing the U.S.-Mexico border; half the Mexican trucks were turned away for safety and other violations.³⁴¹

Though the U.S. DOT inspected fewer than 1 percent of Mexican trucks in 2000, it estimated that 35 percent

of Mexican trucks were put out of service due to significant safety violations, compared to a national average of 25 percent.³⁴² But these statistics have improved. More than 40 percent of Mexican trucks that were inspected were taken out of service in 1997-98, compared with 25 percent for U.S. trucks and 17 percent for Canadian trucks. In 1995, 54 percent of Mexican trucks were pulled out of service.³⁴³

By 2001, some 184 Mexican trucking companies had applied to transport goods in the United States.³⁴⁴ Applications from 190,000 trucks were waiting to be processed.³⁴⁵ But several safety issues required resolution:

- Road sign standardization;
- Drug and alcohol testing procedures;
- Medical examinations;
- Safety inspection and inspector training standards; and
- Database of Mexican trucking companies.³⁴⁶

³³⁵ Alexandra Walker, *No Easy Solutions to Mexican Truck Safety Issues*, STATES NEWS SERVICE (Feb. 22, 2001).

³³⁶ Daniel McCosh, *Mexico Talk Trucks*, J. COM. (Mar. 22, 2001).

³³⁷ Steven Greenhouse, *Bush to Open Country to Mexican Truckers*, N.Y. TIMES, Feb. 7, 2001, at A12.

³³⁸ Robert Collier, *Long-Distance Haulers are Headed into U.S. Once Bush Opens Borders*, S.F. CHRON., Mar. 4, 2001, at A1.

³³⁹ *Mexico's Truckers Detoured By Legal, Safety Barriers*, TULSA WORLD, Mar. 4, 2001.

³⁴⁰ Collier, *supra* note 338, at A1.

³⁴¹ Charlene Oldham, *U.S. Aid Sought for Truck Inspections*, DALLAS MORNING NEWS, Mar. 6, 2001, at 1D.

³⁴² TULSA WORLD, *supra* note 339; *Unions Aim to Block Trucks*, USA TODAY, Mar. 13, 2001, at 11A.

³⁴³ Brendon Case, *Mexican Truckers Challenge Image*, DALLAS MORNING NEWS, Mar. 7, 2001, at 1D.

³⁴⁴ Ciro Rodriguez, *Safety on the NAFTA Superhighway* (Congressional Press Release, Feb. 17, 2001).

³⁴⁵ Diane Lindquist, *Driving Controversy: NAFTA and Mexico's Trucks*, COPLEYS NEWS SERVICE, Feb. 12, 2001.

³⁴⁶ TULSA WORLD, *supra* note 339.

Table 4 summarizes the differences in the regulatory regimes at the time of the arbitration decision:

TABLE 4—TRUCK AND DRIVER SAFETY REQUIREMENTS³⁴⁷		
SAFETY STANDARDS	UNITED STATES	MEXICO
Hours of Service	10 hours consecutive driving; 15 hours consecutive duty; 8 hours consecutive rest; maximum 70 hours driving in 8 days	No
Licensure	2 to 6 years	10 years
Age of Driver	21 years minimum interstate	18 years old
Skills Test	Yes, for all drivers	Yes, for new drivers
Medical Card	Yes	No—medical qualifications on license
Automatic Medical Dis- qualification	Yes	No
National Monitoring System	Yes, to detect violations	Information system in infancy
Drug Testing	Testing and documentation	Documentation lax
Logbooks	Standardized logbooks with date graphs required	Standardized logbooks in dif- ferent format, unenforced
Gross Vehicle Weight Limits	80,000 lb	135,360 lb
Roadside Inspections	Yes	Discontinued; new program to be phased in over 2 years
Out-of-Service Rules	Yes	New program to be phased in over 2 years
Hazmat Regulation	Strict standards, training, licen- sure, and inspections	Covers fewer chemicals and substances and has fewer licen- sure requirements
Vehicle Standards	Standards for antilock brakes, un- derride guards, night visibility of ve- hicle	Voluntary inspections
Safety Rating System	Yes	No

³⁴⁷ Robert Collier, *Mexico's Trucks on Horizon*, S.F. CHRON., Mar. 4, 2001, at A1.

Only 50 federal motor carrier safety inspectors were then assigned to police the entire U.S.–Mexican border. Texas has only 353 inspectors, and the state legislature has denied the Department of Public Safety’s request for 171 more.³⁴⁸ In May 2001, the U.S. DOT inspector general reported that the FMCSA was inadequately staffed to handle the influx of Mexican drivers and vehicles.³⁴⁹

President Bush proposed spending \$88 million for new truck inspectors and stations, and threatened to veto legislation that would delay implementing the NAFTA provisions allowing Mexican trucks to operate on U.S. highways. Meanwhile, U.S. DOT Secretary Norman Mineta anticipated that the administration’s January 1 deadline for the entry of Mexican trucks into the United States might have to be postponed. Final U.S. DOT rules governing the issue were anticipated to be released in September 2001; they would insure that Mexican trucking companies satisfy the same safety, driver training, licensing, insurance, and drug-testing requirements as those imposed on U.S. and Canadian companies.³⁵⁰ The President finally lifted the moratorium on Mexican motor carriers in November 2002, after which FMCSA issued governing safety regulations. Mexican carriers are under special certification requirements.³⁵¹

In 2004, in *DOT v. Public Citizen*,³⁵² the U.S. Supreme Court held that the FMCSA did not violate NEPA by failing to consider environmental consequences of Mexican trucks entering the United States.³⁵³ SAFETEA-LU requires the FMCSA to conduct a study “to determine the degree to which Canadian and Mexican commercial motor vehicles, including motor carriers of passengers...comply with the Federal motor vehicle safety standards.”³⁵⁴ Also in 2004, a federal district court held it lacked subject matter jurisdiction to entertain tort claims against the United States brought by aggrieved Mexican motor carriers unable to penetrate the U.S. transportation market as promised under NAFTA.³⁵⁵ NAFTA explicitly prohibits any person from filing suit to challenge “any action or inaction by any department, agency, or other instrumentality of the United States...on the ground that such action or inaction is inconsistent with...NAFTA.”³⁵⁶

³⁴⁸ Molly Ivins, *NAFTA Trucks Are in Traffic Jam*, DES MOINES REGISTER, Aug. 21, 2001, at 7.

³⁴⁹ *Teamsters Use DOT Facts*, FT. LAUDERDALE SUN-SENTINEL, Aug. 20, 2001, at 20A.

³⁵⁰ David Hendricks, *U.S. May Delay Mexican Trucks*, SAN ANTONIO EXPRESS-NEWS, Aug. 23, 2001, at 1A.

³⁵¹ 49 C.F.R. § 365.101(h).

³⁵² 541 U.S. 752, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004).

³⁵³ See generally Paul Dempsey, *Free Trade But Not Free Transport: The Mexican Standoff*, 30 DENV. J. INT’L L. & POL’Y 91 (2002).

³⁵⁴ SAFETEA-LU sec. 4139, amending 49 U.S.C. § 31100 note.

³⁵⁵ *Lopez v. United States*, 309 F. Supp. 2d 22 (D.D.C. 2004).

³⁵⁶ 19 U.S.C. § 3312(c).

3. Federal Motor Vehicle Safety Standards

Congress has passed a number of laws requiring that motor vehicles be designed and fitted with safety devices.³⁵⁷ These statutes, and the regulations promulgated thereunder, include requirements that vehicles be equipped with bumpers³⁵⁸ having certain specifications. Also required, for consumer protection reasons, are laws requiring odometers and prohibiting tampering therewith.³⁵⁹

Examples of such safety requirements are seat belt and air bag requirements. Seat belt requirements were first imposed by NHTSA in 1967. Originally, seat belts were required to be installed in all automobiles.³⁶⁰ In 1972, NHTSA amended the regulations to require full passive protection of front seat occupants for automobiles manufactured after August 15, 1975.³⁶¹ Between August 1973 and 1975, manufacturers were given the option of either installing a passive restraint system such as seatbelts or airbags or installing seatbelts with an interlock ignition device to prohibit the car from starting if the seat belts are not buckled.³⁶² The unpopularity of these requirements with drivers led Congress to pass the Motor Vehicle and School Bus Safety Amendments of 1974,³⁶³ which forbade NHTSA from imposing them. The statute required that any seat belt standard had to be submitted to Congress prior to its effective date, and that Congress might veto the standard by a concurrent resolution of both Houses.³⁶⁴

In 1976, NHTSA suspended the passive restraint requirement, and substituted therefore a demonstration plan involving up to half a million automobiles with passive restraints. However, the following year, the demonstration project was terminated, and passive restraint requirements were pushed back to 1982 for large vehicles, and to 1984 for all vehicles.³⁶⁵ These amendments were challenged before the U.S. Supreme Court, which concluded that NHTSA had failed to pro-

³⁵⁷ See, e.g., 49 U.S.C. §§ 30122–30147; 49 C.F.R. pt. 571. See, e.g., Stephen Holley, *The Relation Between Federal Standards and Litigation in the Control of Automobile Design*, 57 N.Y.U. L. REV. 804 (1982); Jerry Marshaw & David Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987); Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REG. 87 (1985); McDonald, *supra* note 61, at 1163.

³⁵⁸ 49 U.S.C. § 32502.

³⁵⁹ 49 U.S.C. § 32705. See *Mitchell v. White Motor Credit Corp.*, 627 F. Supp. 1241 (M.D. Tenn. 1986).

³⁶⁰ 49 C.F.R. § 571.208.

³⁶¹ 37 Fed. Reg. 3911 (1972).

³⁶² 37 Fed. Reg. 3911 (1972); Samuel Elswick, *Geier v. American Honda Motor Company: Airbags, Federal Preemption, and the Viability of a Regulatory Compliance Defense*, 28 N. KY. L. REV. 135, 138 (2001).

³⁶³ Pub. L. No. 93-492, 88 Stat. 1482.

³⁶⁴ Elswick, *supra* note 362, at 135, 138.

³⁶⁵ 42 Fed. Reg. 34,289 (1977).

vide clear and convincing reasons why it abandoned rules requiring new cars to have seat belts; remanded to reconsider rules.³⁶⁶

In 1984, the rules were again amended, requiring a gradual phase-in of passive restraints in three annual stages, whereby all new automobiles would have automatic occupant crash protection after September 1, 1989.³⁶⁷ The rules gave manufacturers the option to install airbags, automatic seat belts, or other passive restraint technologies.³⁶⁸ All automobiles manufactured after September 1, 1997, were required to have an airbag at the driver and front passenger positions.³⁶⁹ Under current law, all passenger vehicles manufactured after October 31, 1997, must have an airbag at the driver and front passenger positions.³⁷⁰

U.S. DOT has promulgated regulations addressing safety requirements for CMVs.³⁷¹ Motor carriers must conform to FMCSA regulations addressing motor vehicle inspection, maintenance, and repair.³⁷²

4. Notification and Recalls

The National Traffic and Motor Vehicle Safety Act of 1966 requires vehicle manufacturers to notify both NHTSA and owners when their vehicles possess a safety-related defect, and then to remedy those defects at no charge to the owners (also known as the “notification and remedy duty”).³⁷³ A “defect” is “any defect in performance, construction, a component, or material of

a motor vehicle or motor vehicle equipment,” and a “safety-related” defect is one that presents an “unreasonable risk of accidents.”³⁷⁴ The U.S. DOT Secretary holds broad power to investigate, to order the manufacturer to take remedial action, and to bring an enforcement action in federal court.³⁷⁵

The Transportation Recall Enhancement, Accountability, and Documentation Act of 2000³⁷⁶ imposes new reporting requirements.³⁷⁷ A manufacturer of a vehicle or replacement equipment must notify NHTSA if it “Learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety.”³⁷⁸ A manufacturer must submit to NHTSA all “notices, bulletins, and other communications...regarding any defect of its vehicles or items of equipment (including any failure or malfunction beyond normal deterioration in use, or any failure of performance, or flaw or unintended deviation from design specifications), whether or not such defect is safety related.”³⁷⁹

G. SAFETY REGULATION—PERSONNEL REQUIREMENTS

1. Driver Fitness and Testing Requirements

No person may operate a CMV without a properly authorized CDL.³⁸⁰ The U.S. DOT prescribes CMV driver fitness and testing requirements.³⁸¹ The FHWA promulgated regulations requiring that operators of CMVs have a CDL in 1992.³⁸²

CDLs are issued by states³⁸³ under minimum uniform standard regulations³⁸⁴ promulgated by U.S. DOT re-

³⁶⁶ Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 29 443 (1983).

³⁶⁷ 49 Fed. Reg. 28,962 (July 17, 1984).

³⁶⁸ *Id.* Elswick, *supra* note 362, at 135, 139–40.

³⁶⁹ 49 C.F.R. § 571.208.

³⁷⁰ 49 C.F.R. § 571.208. 49 C.F.R. pt. 571; final rule published at 69 Fed. Reg. 51598 (Aug. 20, 2004). *See* U.S. GEN. ACCOUNTING OFFICE, MOTOR VEHICLE SAFETY: COMPREHENSIVE STATE PROGRAMS OFFER BEST OPPORTUNITY FOR INCREASING USE OF SAFETY BELTS (1996); Patrick Norton, *What Happens When Air Bags Kill: Automobile Manufacturers’ Liability for Injuries Caused by Air Bags*, 48 CASE W. RES. L. REV. 659 (1998); Lauren Pacelli, *Asleep at the Wheel of Auto Safety? Recent Air Bag Regulations by the National Highway Traffic Safety Administration*, 15 J. CONTEMP. HEALTH L. & POL’Y 739 (1999); Public Citizen v. Nat. Highway Traffic Safety Admin., 374 F.3d 1251 (D.C. Cir. 2004) (air bag regulations reasonable).

³⁷¹ In 1993, FHWA promulgated regulations banning the use of radar detectors in CMVs. Radio Ass’n on Defending Airwave Rights v. U.S. Dep’t of Trans., 47 F.3d 794, 800 (6th Cir. 1995). More recently, the U.S. DOT issued a notice of proposed rulemaking announcing the potential requirement of event data recorders aboard CMVs in 69 Fed. Reg. 32932 (June 14, 2004), which would create a new 49 C.F.R. pt. 563.

³⁷² 49 U.S.C. § 31142; 49 C.F.R. pt. 396. *See* RICHARD JONES, APPLICATION OF THE FOURTH AMENDMENT TO THE INSPECTION OF COMMERCIAL MOTOR VEHICLES AND DRIVERS (NCHRP Legal Research Digest No. 43, 2000).

³⁷³ 49 U.S.C. § 30118(c).

³⁷⁴ 49 U.S.C. § 30102(a)(8).

³⁷⁵ 49 U.S.C. § 30163-66.

³⁷⁶ Pub. L. No. 106-414, 114 Stat. 1800.

³⁷⁷ *See* Note, Eric McCallum, *Rearranging the Deck Chairs on the Titanic: Will the Early Warning Requirement Required by the TREAD Act Uncover Deadly Defects Soon Enough?*, 44 ARIZ. L. REV. 939 (2002); McDonald, *supra* note 61, at 1163, 1187–88.

³⁷⁸ 49 U.S.C. § 30188(c)(2).

³⁷⁹ 49 C.F.R. § 573.8. *See* Kevin McDonald, *Judicial Review of NHTSA-Ordered Recalls*, 47 WAYNE L. REV. 1301 (2002); Teresa Schwartz & Robert Adler, *Product Recalls: A Remedy in Need of Repair*, 34 CASE W. RES. L. REV. 401 (1984); U.S. GEN. ACCOUNTING OFFICE, MOTOR VEHICLE SAFETY: NHTSA’S ABILITY TO DETECT AND RECALL DEFECTIVE REPLACEMENT CRASH PARTS IS LIMITED (2001).

³⁸⁰ 49 U.S.C. § 31302.

³⁸¹ Commercial driver fitness and testing requirements are set forth in 49 U.S.C. § 31305; 49 C.F.R. pt. 391.

³⁸² *Sys. Bd. 46 v. Burlington N. R.R. Co.*, 838 F. Supp. 1342 (D. Minn. 1993).

³⁸³ 49 U.S.C. § 31301(3); 49 C.F.R. pt. 384.

³⁸⁴ Registration requirements are set forth in 49 U.S.C. § 30302. State compliance obligations are set forth in 49 C.F.R. pt. 384.

quiring written and driving tests ensuring that the operator understands applicable U.S. DOT safety regulations³⁸⁵ and has adequate physical qualifications for the position.³⁸⁶ A passenger driver must pass a specific knowledge³⁸⁷ and skills³⁸⁸ test in order to secure a “P” (passenger) endorsement on his or her CDL.³⁸⁹ An individual may hold only a single CDL. Typically, the states issue different classes of drivers’ licenses depending upon vehicle size and weight.³⁹⁰

Once licensed, CMV drivers must notify their employer of violations of state or local motor vehicle laws; driver’s license suspension, revocation, or cancellation; and any previous employment as a CMV operator.³⁹¹ The carrier may not knowingly allow its drivers to operate a CMV while their CDLs are suspended, revoked, or cancelled, or when they have lost the right to operate a CMV in a state, have been disqualified from operating a CMV, or have more than a single driver’s license.³⁹²

The U.S. DOT maintains a clearinghouse and depository of information about the licensing, identification, and disqualification of CMV operators.³⁹³ Under its National Driver Register program, states must notify U.S.

³⁸⁵ 49 U.S.C. §§ 31305(a), 31308. 49 C.F.R. § 383.71. 49 C.F.R. pt. 393.

³⁸⁶ 49 C.F.R. pts. 383, 391.

³⁸⁷ 49 C.F.R. § 393.111 app. A. The general knowledge test is comprised of at least 30 questions, and the applicant must answer 80 percent of them correctly.

³⁸⁸ 49 C.F.R. § 383.113 app. B. The applicant must also pass a skills test in a vehicle of the type he or she is expected to operate.

³⁸⁹ Motor Carrier Safety Improvement Act of 1999 § 214 created a special CDL school bus endorsement.

³⁹⁰ There are three classes of vehicles that require a North Carolina CDL:

Commercial Class A—Any combination of vehicles with a gross vehicle weight rating (GVWR) of 26,001 lb or more, provided the GVWR of the vehicle or vehicles being towed is in excess of 10,000 lb.

Commercial Class B—Any single vehicle with a GVWR of 26,001 lb or more, and any such vehicle towing a vehicle not in excess of 10,000 lb.

Commercial Class C—Any vehicle not described in Class A or B above but is:

- Designed to transport 16 or more passengers, including the driver; or
- Used in the transportation of hazardous materials that require the vehicle to be placarded under C.F.R. pt. 172, subpt. F.

http://www.ncdot.org/dmv/driver_services/commercialtrucking/requirements.html. For the requirements for a CMV drivers’ license in Michigan, see http://www.michigan.gov/documents/Section_1_-_Introduction_109896_7.pdf. For Minnesota’s, see <http://www.dps.state.mn.us/dvs/Commercial%20Drv/cdlmanual.pdf>.

³⁹¹ 49 U.S.C. § 31303.

³⁹² 49 U.S.C. § 31304.

³⁹³ 49 U.S.C. §§ 31106, 31309(a).

DOT of any individual who is denied a motor vehicle operator’s license, or has had it revoked, for cause, or who is convicted of operating a motor vehicle under the influence of alcohol or a controlled substance; for being involved in a fatal traffic accident, reckless driving, or racing on the highways; for failing to give aid or information when involved in an accident resulting in death or personal injury; or for engaging in perjury or knowingly making a false affidavit or statement to officials regarding activities governed by law involving the operation of a motor vehicle.³⁹⁴

The ICC first promulgated regulations requiring “good eyesight in both eyes either without glasses or by correction with glasses”³⁹⁵ in 1937. In 1939, the regulations were amended to require 20/40 (Snellen) in one eye, and 20/100 (Snellen) in the other. They were amended again in 1952 to require 20/40 (Snellen) in each eye, either corrected or uncorrected.³⁹⁶ In 1964, requirements were added for “field of vision” and ability to distinguish colors.³⁹⁷ Today, the regulations require that commercial truck drivers have visual acuity of at least 20/40 in each eye, have a field of vision of at least 70 degrees, and not be color blind.³⁹⁸ In 1992, the FHWA began a program of waiver issuance for visually impaired drivers who failed to meet the vision requirements but had a history of operating a CMV.³⁹⁹ Waivers may be granted so long as they are “consistent with the public interest and safe operation of motor vehicles.”⁴⁰⁰ The FHWA may grant a waiver to vision requirements if it would likely “achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver.”⁴⁰¹

Motor carriers and their employees must comply with the FMCSA regulations.⁴⁰² Section 4007 of ISTEA directed the U.S. DOT to promulgate safety regulations for entry-level training of drivers in the heavy truck, motor coach, and school bus industries.⁴⁰³ SAFETEA-LU established a grant program to train CMV operators in the safe use of such vehicles.⁴⁰⁴ No one may operate a

³⁹⁴ 49 U.S.C. § 30304(a).

³⁹⁵ 49 C.F.R. § 192.3 (1938).

³⁹⁶ 17 Fed. Reg. 4424 (1952).

³⁹⁷ *Rauenhorst v. U.S. Dep’t of Transp.*, 95 F.3d 715, 719 (8th Cir. 1996).

³⁹⁸ 49 C.F.R. § 391.41(b).

³⁹⁹ 57 Fed. Reg. 23370 (June 3, 1992). *Rauenhorst v. U.S. Dep’t of Transp.*, 95 F.3d 715, 716 (8th Cir. 1996); *Buck v. U.S. Dep’t of Transp.*, 56 F.3d 1406, 1409 (D.C. Cir. 1995).

⁴⁰⁰ 49 U.S.C. § 31136.

⁴⁰¹ 49 U.S.C. § 31315.

⁴⁰² U.S.C. §§ 31131, 31135.

⁴⁰³ 49 C.F.R. pt. 380.

⁴⁰⁴ SAFETEA-LU sec. 4134, amending 49 U.S.C. § 31301 note. Driver training requirements are set forth in 49 C.F.R. pt. 380. See 69 Fed. Reg. 29384 (May 21, 2004).

In March [2006], FMCSA published a Final Rule to implement the SAFETEA-LU provision concerning school bus driver qualifications. As a result, States that had not previously

CMV in interstate commerce without a valid CDL issued pursuant to federal regulations.⁴⁰⁵

Several cases have addressed various physical requirements of drivers and the issue of whether the failure to grant waivers thereto constitutes arbitrary and capricious agency conduct.⁴⁰⁶ In *Rauenhorst v. Department of Transportation*,⁴⁰⁷ the U.S. Court of Appeals for the Eighth Circuit held that “until the administrative standards for waivers to monocular drivers is revised to reflect the current knowledge the administrator must grant separate, individually tailored waivers.”⁴⁰⁸

In *Anderson v. Department of Transportation*,⁴⁰⁹ that same Circuit addressed the failure of the FHWA to grant a waiver to a driver who had suffered a retinal detachment that resulted in the total loss of vision in that eye. Though he was granted a waiver from the State of Minnesota to operate as a commercial driver in intrastate commerce, the FHWA denied him a waiver, concluding that at least 3 years of driving with the impairment are required before a waiver will be granted. The Eighth Circuit concluded that the denial was not arbitrary and capricious because (1) it takes time for a person with a vision deficiency to recover from that deficiency; (2) the best predictor of future performance of a driver is his past record of accidents and violations; and (3) the 3-year standard conforms to the longest period of time that states uniformly maintain driving records.⁴¹⁰

But FHWA fared worse in the Sixth Circuit, where its denial of a waiver was deemed arbitrary and capricious. In *Parker v. Department of Transportation*,⁴¹¹ the court addressed FHWA’s denial of a waiver to Jerry Parker, who suffered from monocular vision and was missing part of his left arm. Parker proved he had driven more

than 1.2 million mi safely in a CMV over several years. Despite his stellar driving record, the FHWA denied him a waiver on grounds that there was insufficient evidence that someone with multiple impairments (here, vision and amputation) could operate a CMV with the same degree of safety as an unimpaired driver.⁴¹² The FHWA argued that it has insufficient data on the performance of drivers with multiple disabilities to determine whether a person having them would achieve an equal or greater level of safety than if the waiver was denied, as the statute requires.⁴¹³ The court concluded:

By failing to assess Parker’s actual capabilities, the DOT has in essence created a per se rule against granting vision waivers to individuals with multiple disabilities, thereby limiting such individuals’ employment opportunities. This stands in direct contradiction to the goals and purpose of the rehabilitation Act which is to provide equal opportunities for disabled individuals, including assisting such individuals with substantial employment.⁴¹⁴

2. Employee Health and Medical Standards

The U.S. DOT establishes minimum health and medical standards for drivers of CMVs⁴¹⁵ and also prescribes alcohol and controlled substances testing requirements.⁴¹⁶ In 1988, FHWA promulgated drug testing requirements for CMV drivers, to be administered prior to employment, biennially, randomly, upon reasonable cause to believe a driver has used a controlled substance, and immediately after an accident.⁴¹⁷ The purpose of the regulations was “to detect and deter the use of drugs by bus and truck drivers.”⁴¹⁸ FHWA concluded that “the clear public interest in assuring that commercial motor vehicle drivers perform their duties free of prohibited substances”⁴¹⁹ outweighed the individual interest in privacy.

In 1994, the U.S. DOT and several of its operating administrations, including FHWA, promulgated regulations implementing the requirements of the Omnibus Transportation Employee Testing Act of 1991.⁴²⁰ The Testing Act required regulations that imposed obliga-

adopted rules to satisfy FMCSA’s requirement for certain testing of applicants for a school bus endorsement were provided with additional time to achieve compliance with the Federal CDL standards. On May 2, [2006,] FMCSA announced its plans in the Federal Register to modernize the Commercial Driver’s License Information System (CDLIS) in response to SAFETEA-LU.

<http://testimony.ost.dot.gov/test/Capka1.htm>.

⁴⁰⁵ 49 U.S.C. §§ 31302–31304. Motor Carrier Safety Improvement Act of 1999 § 204 required background checks before issuance of driver’s licenses.

⁴⁰⁶ Vision requirements and waivers therefrom have been addressed in *Anderson v. USDOT*, 213 F.3d 422 (8th Cir. 2000); *Parker v. USDOT*, 207 F.3d 359 (6th Cir. 2000); and *Rauenhorst v. USDOT*, 95 F.3d 715 (8th Cir. 1996). Colorblindness was addressed in *Shannon v. N.Y. City Transit Auth.*, 189 F. Supp. 2d 55 (S.D.N.Y. 2002). Hearing requirements and waivers therefrom were addressed in *Buck v. USDOT*, 312 U.S. App. D.C. 56 F.3d 1406 (D.C. Cir. 1995).

⁴⁰⁷ 95 F.3d 715 (8th Cir. 1996).

⁴⁰⁸ *Id.* at 723.

⁴⁰⁹ 213 F.3d 422 (8th Cir. 2000).

⁴¹⁰ *Id.* at 424.

⁴¹¹ 207 F.3d 359 (6th Cir. 2000).

⁴¹² *Id.* at 362.

⁴¹³ *Id.* at 362–63.

⁴¹⁴ *Id.* at 363.

⁴¹⁵ 49 U.S.C. §§ 31305 note, 31502; 49 C.F.R. §§ 383, 384, 391; 49 C.F.R. pt. 399. Motor Carrier Safety Improvement Act of 1999 § 215 (Medical certificate).

⁴¹⁶ 49 U.S.C. § 31306. 49 C.F.R. pts. 40, 382.

⁴¹⁷ 49 C.F.R. §§ 391.81–391.23. *Owner-Operators Indep. Drivers Ass’n v. Skinner*, 931 F.2d 582, 584 (9th Cir. 1991).

⁴¹⁸ 53 Fed. Reg. 47,151 (Nov. 21, 1988).

⁴¹⁹ 53 Fed. Reg. at 47,317 (1988). These regulations were upheld in *Int’l Bhd. of Teamsters v. Dep’t of Transp.*, 932 F.2d 1292 (9th Cir. 1991).

⁴²⁰ Pub. L. No. 102-143, 105 Stat. 951.

tions of preemployment, reasonable suspicion, random, and post-accident drug and alcohol testing of drivers.⁴²¹

3. Operational Requirements

U.S. DOT prescribes maximum driving requirements.⁴²² Federal drivers' hours of service regulations first were imposed by the ICC in the late 1930s, and remained virtually unchanged until 2003, except for a significant amendment in 1962 that changed the 24-hour requirement from a noon-to-noon or midnight-to-midnight cycle to one that focused on minimum 8-hour off-duty periods.⁴²³ Changes in the regulations promulgated in 2003 were struck down by the U.S. Court of Appeals for the D.C. Circuit because FMCSA failed to consider the impact of the rules on the health of drivers, as required by statute,⁴²⁴ and therefore the rules were arbitrary and capricious.⁴²⁵ The rules were readopted by the FMCSA in 2006.⁴²⁶ They impose restrictions on driving, duty and off-duty time, a recovery period, and sleeping berths.⁴²⁷

H. SECURITY AND HAZARDOUS MATERIALS REGULATION

1. Personnel Requirements

The TSA issues and administers the security regulations under Title 49 of the U.S. C.F.R.⁴²⁸ As a part of its

⁴²¹ 59 Fed. Reg. 7302 (Feb. 15, 1994). These regulations were upheld in *Int'l Bhd. of Teamsters v. FHWA*, 312 U.S. App. D.C. 278, 56 F.3d 242 (D.C. Cir. 1995). They are discussed in detail in Dempsey, *supra* note 105 § 7-15.

⁴²² 49 U.S.C. § 31502. Driving requirements are set forth in 49 C.F.R. pt. 392.

⁴²³ 70 Fed. Reg. 49978 (Aug. 25, 2005).

⁴²⁴ 49 U.S.C. § 31136(a)(4).

⁴²⁵ *Pub. Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004) (failure of FMCSA to consider the health of drivers in promulgating duty time regulations violated the statute). *See* R. Clay Porter, *The Hidden Cost of Non-Compliance: Another Reason to Synchronize the Trucking Industry and the Hours of Service Regulations*, 2 *TRANSP. L.* 28 (Oct. 2002); James Flint, *Rooting Out Fatigue Isn't the Only Road to Improved Highway Safety*, 2 *TRANSP. L.* 24 (Dec. 2002).

⁴²⁶ 70 Fed. Reg. 49978 (Aug. 25, 2005). 49 C.F.R. pt. 395.

⁴²⁷ The courts have generally upheld such requirements. *See, e.g., A.D. Transp. Express v. United States*, 290 F.3d 761 (6th Cir. 2002) (requiring toll receipts to be maintained with individual drivers' records rather than stored in bulk was a reasonable requirement for verifying driver duty status).

⁴²⁸ 49 C.F.R. pts. 1400–1699. *See, e.g.,* Transportation of Explosives from Canada to the United States via Commercial Motor Vehicle and Railroad Carrier, 68 Fed. Reg. 6083 (Feb. 6, 2003). Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 68 Fed. Reg. 23852 (May 5, 2003). Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 68 Fed. Reg. 63033 (Nov. 7, 2003). Security Threat Assessment for

Hazmat Threat Assessment Program mandated under the USA PATRIOT Act,⁴²⁹ the TSA requires that applicants who seek an HME on their state-issued CDL submit to fingerprinting and the submission of biographical information.⁴³⁰ Applicants must undergo a security threat assessment,⁴³¹ which includes an FBI criminal history check, an intelligence-related check, and an immigration status verification.⁴³² States may not issue an HME without approval from TSA that the individual does not pose a security threat, and must revoke any HME issued whenever TSA informs the state that the individual fails a security threat assessment.⁴³³

2. Hazardous Materials Transportation

Comprehensive federal regulations govern the movement of hazardous materials transportation.⁴³⁴ Federal hazardous materials transportation law was enacted "to provide adequate protection against the risks to life and

Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 69 Fed. Reg. 17969 (April 6, 2004). Hazardous Materials: Enhancing Hazardous Materials Transportation Security, 68 Fed. Reg. 23832 (May 5, 2003), Research and Special Programs Administration (RSPA). Limitations on the Issuance of Commercial Driver's Licenses with a Hazardous Materials Endorsement, 68 Fed. Reg. 23844 (May 5, 2003) (FMCSA).

⁴²⁹ Section 1012 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act (Pub. L. No. 107-56, 115 Stat. 272) of 2001 amended 49 U.S.C. ch. 51 by adding a new § 5103a titled "Limitation On Issuance of Hazmat Licenses." Section 5103a(a)(1) provides that, "A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of Transportation has first determined, upon receipt of a notification under subsection (c)(1)(B), that the individual does not pose a security risk warranting denial of the license." FMCSA and TSA share responsibility for implementing § 1012 of the USA PATRIOT Act. *See* Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License—Final Rule, 69 Fed. Reg. 17969 (Apr. 6, 2004); 68 Fed. Reg. 23844 (May 5, 2003).

⁴³⁰ 49 C.F.R. pt. 1570. *See* 14 C.F.R. pt. 1572—Credentialing and Background Checks for Maritime and Land Transportation Security.

⁴³¹ These rules were adopted at 68 Fed. Reg. 23852 (May 5, 2003).

⁴³² http://www.tsa.gov/public/interapp/editorial/editorial_multi_image_with_table_0219.xml (visited Dec. 17, 2005). Immigration status requirements are set forth in 49 C.F.R. § 1572.105. Disqualifying criminal offenses are set forth in 49 C.F.R. § 1572.103. *See* Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 68 Fed. Reg. 23852 (May 5, 2003).

⁴³³ 49 C.F.R. § 1472.13.

⁴³⁴ *See, e.g.,* Hazardous Materials Transportation; Driving and Parking—49 C.F.R. pt. 397.

property inherent in the transportation of hazardous material in commerce.⁴³⁵ The FMCSA is responsible for implementing Section 5105(e), addressing inspections of motor vehicles transporting certain material; Section 5109, addressing issuance of motor carrier safety permits for the transportation of hazardous materials; and Section 5119, addressing uniform forms and procedures.⁴³⁶

Hazardous materials may not be moved without a U.S. DOT safety permit.⁴³⁷ Permits are required for the movement of the following commodities:

- *Radioactive Materials*: A highway route-controlled quantity of Class 7 material;⁴³⁸ and
- *Explosives*: More than 25 kg (55 lb) of a Division 1.1, 1.2, or 1.3 material, or an amount of a Division 1.5 material requiring a placard.⁴³⁹

- *Toxic by Inhalation Materials*:

- a. *Hazard Zone A*: More than 1 L (1.08 qt) per package of a "material poisonous by inhalation," that meets the criteria for "hazard zone A." 49 C.F.R. §§ 171.8, 173.116(a), 173.133(a).

- b. *Hazard Zone B*: A "material poisonous by inhalation," as defined in 49 C.F.R. § 171.8, that meets the criteria for "hazard zone B," as specified in 49 C.F.R. §§ 173.116(a), 173.133(a) in bulk packaging (capacity greater than 450 L (119 gal)).

- c. *Hazard Zones C and D*: A "material poisonous by inhalation," as defined in Section 171.8 of this title, that meets the criteria for "hazard zone C," or "hazard zone D," as specified in 49 C.F.R. § 173.116(a), in a packaging having a capacity equal to or greater than 13,248 L (3,500 gal).

- *Methane*: A shipment of compressed or refrigerated liquid methane or natural gas or other liquefied gas with a methane content of at least 85 percent in a bulk packaging having a capacity equal to or greater than 13,248 L (3,500 gal) for liquids or gases.

Part 177 of the Hazardous Materials Regulations⁴⁴⁰ requires that motor carriers that transport hazardous materials comply with Part 383 of the FMCSRs, which

establish CDL requirements.⁴⁴¹ TSA published regulations to establish procedures for making determinations as to whether an individual poses a security threat warranting denial of a hazardous materials endorsement for a CDL.⁴⁴² Part 383 sets forth CDL requirements. FMCSA amended Part 383 to prohibit states from issuing a CDL with an HME unless the Attorney General has conducted a background records check of the applicant and TSA has determined that the applicant does not pose a security threat warranting denial of the HME.⁴⁴³ Special regulations have been promulgated addressing motor vehicle transportation to and from Canada and Mexico.⁴⁴⁴

I. OTHER MOTOR VEHICLE REGULATORY REQUIREMENTS

Beyond the general requirements of NEPA, which govern all major federal actions significantly impacting the quality of the human environment,⁴⁴⁵ a number of specific federal environmental statutes have targeted the automobile and other motor vehicles. The Clean Air Act requires states to adopt federal environmental standards for motor vehicle emissions, unless they adopt the more stringent California standards.⁴⁴⁶ Fuel

⁴⁴¹ See Interim Final Rule: Limitations on the Issuance of Commercial Driver's Licenses with a Hazardous Materials Endorsement, 68 Fed. Reg. 23844 (May 5, 2003), FMCSA; Interim Final Rule: Hazardous Materials: Enhancing Hazardous Materials Transportation Security, 68 Fed. Reg. 23834 (May 5, 2003) (RSPA).

⁴⁴² 68 Fed. Reg. 23851 (May 5, 2003).

⁴⁴³ See the interim final rule at 68 Fed. Reg. 23844 (May 5, 2003).

⁴⁴⁴ See Interim Final Rule: Transportation of Explosives from Canada to the United States via Commercial Motor Vehicle and Railroad Carrier, 68 Fed. Reg. 6083 (Feb. 6, 2003); Jan Morris & Marc McClean, *Explosives Transportation Security: US/Canada Immigration Issues*, 4 TRANSP. L. 19 (Feb. 2003); Notification Requirements of the U.S. Bureau of Customs and Border Protection and FDA; Mark Andrews, *Logistical Impacts of the "Bioterror" Rules Issued by the U.S. Food and Drug Administration*, 5 TRANSP. L. 35 (Feb. 2004); Richard Furman, *Advance Filing of Manifests: Customs' New Cargo Security Initiative*, 4 TRANSP. L. 20 (Feb. 2003); Richard Furman, *Advance Filing of Customs Manifests, The Twenty-Four Hour Rule Updated*, 4 TRANSP. L. 16 (Apr. 2003).

⁴⁴⁵ Because these general environmental requirements have been extensively explored elsewhere, they are not discussed here. For a comprehensive examination of federal environmental law in the transportation context, see Dempsey, *supra* note 105 § 3.

⁴⁴⁶ 42 U.S.C. § 7543. For a good description of the Clean Air Act and its amendments, see *Motor Vehicle Mfrs Ass'n v. N.Y. State Dep't of Env'tl. Conservation*, 79 F.3d 1298 (2d Cir. 1996). The case discussed whether New York could adopt a requirement for a fixed percentage of zero emission automobiles, and whether it could adopt emission standards without adopting clean fuel requirements.

⁴³⁵ 49 U.S.C. § 5101.

⁴³⁶ See John Ruhl, *Federal Liability for Transporters of Hazardous Waste*, 18 TRANSP. L.J. 1 (1989).

⁴³⁷ 49 U.S.C. § 5109.

⁴³⁸ 49 C.F.R. § 173.403; Steven Goldberg, *State Nuclear Transportation Routing Laws*, 18 TRANSP. L.J. 15 (1989). Special licensing requirements for the transportation of hazardous and radioactive materials are set forth in 49 U.S.C. §§ 5103a, 5105, 5108, 5110, 5112.

⁴³⁹ 49 C.F.R. pt. 172 subpt. F. However, farmers are exempted on the transportation of ammonia nitrate for distances up to 150 mi.

⁴⁴⁰ 49 C.F.R. pt. 177. See also 49 C.F.R. pt. 1570: Land Transportation Security.

economy standards for motor vehicles are prescribed by U.S. DOT.⁴⁴⁷ Noise emission standards for interstate motor carriers have been promulgated by the U.S. EPA.⁴⁴⁸

Congress has also mandated disclosure requirements on the transfer of motor vehicles,⁴⁴⁹ and theft prevention requirements.⁴⁵⁰ Since the emphasis of this study is on the programs administered by FHWA, they are only briefly mentioned here.

⁴⁴⁷ 49 U.S.C. § 32902; 68 Fed. Reg. 74931 (Dec. 29, 2003).

⁴⁴⁸ 40 C.F.R. pt. 202; 49 C.F.R. pt. 325.

⁴⁴⁹ 49 U.S.C. § 32705.

⁴⁵⁰ Anti-Theft Car Act of 1992; 49 U.S.C. §§ 33103–33118; 49 C.F.R. pt. 541. National Stolen Passenger Motor Vehicle Information System; 28 C.F.R. pt. 8.

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