

The Case Against Transportation Devolution: A Conservative Perspective

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This is a critically important time for federal transportation programs. While many experts argue that we must not only maintain, but substantially increase federal investment in transportation infrastructure, some advocates are now calling for the opposite approach—“devolution” of transportation programs to the States, either in part or in full. This paper assesses those arguments from a conservative perspective and makes the case for continuing the current cooperative federal-state regime. Although devolution may seem superficially appealing, it would conflict with the nation’s long and unbroken history of federal transportation investment, balkanize the nation’s transportation networks, cause a substantial drag on the economy, and bring about a host of other serious problems.

Because this paper assesses the value of federal transportation investments through a conservative lens, it is essential to begin with an understanding of what that means. By “conservative” we mean a commitment to the idea that the Constitution’s original structure and its enduring framework of limited government is the best mechanism for providing economic opportunity, maintaining a strong national defense, establishing religious liberty, and fostering a flourishing society of republican self-government. While government has a role to play, its

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policies must encourage rather than impede free enterprise and private-sector innovation. Being a conservative also means adhering to the same federalism principles that the Framers built into the Constitution, according to which the federal government exercises only narrow powers necessary to address truly national problems. Finally, we believe that conservatism is synonymous with American exceptionalism—that is, an optimistic vision for the future in which the United States is the most prosperous, entrepreneurial, and secure nation on the globe.

Overview

This paper proceeds in six parts.

Part I outlines the tremendous challenges our transportation networks face now and will face in the future, summarizes the debate over the respective roles of the federal and state governments in responding to those challenges, and provides a working understanding of what transportation “devolution” proposals would entail.

Part II provides a brief overview of current federal transportation law, including the significant part state and local governments play in administering it.

Part III then analyzes the constitutional authority for federal involvement in planning, financing, and building transportation corridors as well as the way that authority has been used over the past 225 years. This analysis shows that Congress has consistently played an active role in transportation matters, and that devolution would represent a break from that tradition, rather than a return to it.

Part IV shows that federal investment in transportation infrastructure fosters national prosperity and the common good by directing funds and expertise to the most strategically important bridges, highways, and transit systems. Devolution, in contrast, would drive us apart

as a nation and lead to precisely the sorts of inefficiencies the Constitution's Framers sought to eliminate.

Part V touches on a few additional ways in which federal transportation programs help states solve problems more effectively, and on reforms that could make federal law even stronger from a conservative standpoint.

Finally, Part VI refutes five of the arguments most commonly made in favor of devolution proposals.

I. An Integrated Transportation Network Is Essential To National Prosperity

A. The 21st Century Global Marketplace Presents Significant Challenges For The United States

Chief among these challenges is our ability as a nation to compete in the global marketplace. Imports to the United States have tripled since 1970, and exports have doubled during the same period, to the point that the nation's 20 largest international freight gateways now move more than \$ 2.6 trillion in goods annually. *See Report of the National Surface Transportation Policy and Revenue Study Commission*, Vol. II, at 1-4 ("*Final Report*"). To succeed, businesses must be able to access markets efficiently, reliably, and, in this Internet-connected age, *rapidly*. But that is not possible if the highways connecting ports to manufacturing facilities, distribution centers, and retail outlets are hopelessly clogged, or if transit systems are unable to connect employers with the best-trained and most cost effective employees. We face these challenges right now, and they demand an immediate response. As a leading conservative recently put it, "If America is to assure its future security and prosperity, we need a new grand strategy that harnesses its peoples' spirit, sense of optimism, and

perseverance.” William Martel, *Grand Strategy in Theory and Practice: The Need For an Effective American Foreign Policy* 364 (2015).

Indeed, the competitive challenges we face today will grow substantially in the near future. The United States population is expected to grow by 50 percent over the next 50 years—an increase that is “equivalent to 11 new Los Angeles metropolitan areas spread over a transportation grid already strained by congestion and disrepair.” *Final Report, supra*, at 1-4. All the while, domestic businesses will face ever-increasing pressure from efficient, low-cost rivals in Brazil, Russia, India, China, and other emerging markets. As a nation, we have inherited a transportation network that puts us in a position not only to survive in that environment, but to thrive in it—provided, that is, that we modernize our multi-modal transportation network to meet these 21st century challenges. We must not squander our inheritance.

B. Robust Transportation Networks Are Essential To Preserving National Competitiveness

Designed and built in the 20th century to meet the economic needs of the 20th century, America’s transportation network is inadequate to meet the challenges of the 21st century. *First*, it is aging and in need of repair. As a nation, we are not investing enough at all levels of government to maintain the current transportation network in a state of good repair. The performance of the network is deteriorating and will continue to deteriorate unless changes are made. *Second*, the network cannot keep up with the growth in demand. The huge volumes of freight and passengers predicted for the 21st century will overwhelm our current transportation network. We need additional capacity and greater efficiencies. *Third*, the transportation network

is not as integrated as it needs to be to meet future demands. It is fragmented. We must develop a robust, multi-modal, integrated transportation network.

These transportation deficiencies threaten our national prosperity. They add costs to everything produced or consumed in the United States and make us less competitive and less able to compete in the global marketplace. Addressing these deficiencies will take national leadership. We cannot continue to build a project here and a project there; for every bottleneck eliminated, another develops elsewhere in the network. Instead, we need an overall plan and strategy to make *systemic* improvements to the network across *all* modes. This will require a proactive approach. More specifically, it will require a comprehensive look at how all modes of transportation can be upgraded and integrated into a seamless, efficient network that will allow the United States to be competitive in the 21st century global marketplace. Our future prosperity depends on it.

C. Federal And State Governments Have Roles To Play In The Solution

The debate over whether federal transportation investment is worthwhile is not a new one. Under the Articles of Confederation, the United States was a loosely affiliated set of separate States, with separate agendas, separate trade policies, and, alas, separate and uncoordinated transportation networks. Some preferred to keep things that way. Others opted for a different vision, and advocated for a new Constitution that would bring the nation together, in commerce and in spirit. The Framers cast the debate in these terms, which apply as much today as they did over 200 years ago:

It has until lately been a received and uncontradicted opinion that the prosperity of the people of America depended on their continuing firmly united, and the wishes, prayers, and efforts of our best and wisest citizens have been constantly directed to that object. But politicians now appear, who insist that this opinion is erroneous, and that instead of looking for safety and happiness in union, we ought

to seek it in a division of the States into distinct confederacies or sovereignties. . . . Whatever may be the arguments or inducements which have wrought this change in the sentiments and declarations of these gentlemen, it certainly would not be wise in the people at large to adopt these new political tenets without being fully convinced that they are founded in truth and sound policy.

It has often given me pleasure to observe that independent America was not composed of detached and distant territories, but that one connected, fertile, widespreading country was the portion of our western sons of liberty. . . . A succession of navigable waters forms a kind of chain round its borders, as if to bind it together; while the most noble rivers in the world, running at convenient distances, present them with highways for the easy communication of friendly aids, and the mutual transportation and exchange of their various commodities.

John Jay, Federalist No. 2 (1787).

As shown below, federal transportation investment is an essential ingredient for the national unity and prosperity the founding generation sought to achieve. This is not to say that state and local governments have no part in the matter. On the contrary, state and local bodies ought to play an important role—just as they have throughout our history. Current law makes that possible and can be reformed to promote cooperative federalism to an even greater extent.

D. Definition And Examples Of Transportation Devolution Proposals

Devolution is the process of transferring power or responsibility from a higher level of government to “a lower or more local level.” Black’s Law Dictionary (10th ed. 2014). In the transportation context, devolution means terminating federal highway and transit programs, and thereby leaving the task of funding and planning transportation projects up to the States.

Transportation devolution proposals vary in their details, but come in two principal types: full and partial. Full devolution involves ending *all* federal transportation programs, or at least all federal programs other than upkeep of a select set of highways. Under these proposals, the federal government would stop collecting all or most of the federal gasoline tax, stop making grants to states, cities, and counties for road, bridge, and transit projects, and stop providing

engineering assistance for those projects. The States would, for all practical purposes, be on their own. Partial devolution, in contrast, generally encompasses proposals that would retain all or most federal *highway* programs while eliminating federal *public transit* programs.² Under partial devolution, the federal government would continue to operate all or most current road construction and rehabilitation programs, and also continue to collect most of the federal gasoline tax to fund those programs, but would stop providing grants and assistance regarding subway, bus, commuter rail, vanpool, and other transit services used by millions of Americans each year.

As of this writing, no transportation devolution proposal has been introduced in the 114th Congress. Last Congress, however, Senator Mike Lee and Congressman Tom Graves jointly introduced legislation that would go most of the way toward full devolution of federal transportation programs. *See* Transportation Empowerment Act, S. 1702, 113th Cong., 1st Sess. (Nov. 14, 2013); Transportation Empowerment Act, H.R. 3486, 113th Cong., 1st Sess. (Nov. 14, 2013). That legislation would eliminate all federal transit programs and most federal road, bridge, and highway programs, but would continue federal maintenance of the Interstate Highway System (IHS) and a small group of other current surface-transportation programs. *See* Emily Goff, The Heritage Foundation, *What Congress and States Can Do to Reform Transportation Policy*, <http://tinyurl.com/nrpje7r> (Feb. 20, 2015). It would also reduce federal fuel taxes to reflect the smaller scope of federal aid; “[o]ver the course of five years, the federal fuel tax rates would decrease, from 18.3 cents per gallon to 3.7 cents per gallon (gasoline) and from 24.3 cents per gallon to 5.0 cents per gallon (diesel).” *Ibid.* These changes would leave a

² Partial devolution can also include elimination of some highway programs in addition to public transit programs.

massive gap—on the order of tens of billions of dollars—in state transportation budgets, which rely on federal funds for roughly half of the capital cost in highway and bridge improvements. And that gap would, as supporters of the Lee/Graves legislation put it, leave States with “the option . . . of funding any programs devolved to them.” *Ibid.* One immediate consequence would be that every state would need to dramatically increase its own fuel tax to replace the lost federal funding. As discussed in greater detail below, these tax increases would average 23.5 cents per gallon by 2020, and would be well above 30 cents per gallon in several states. *See* Transportation Construction Coalition, *Minimum State Gas Tax Increase Necessary to Maintain Current State Highway Program Funding Level*, <http://tinyurl.com/pupyvka> (Mar. 16, 2015).

Other devolution proposals have been offered in the past. These proposals have run the gamut from complete devolution of federal surface-transportation programs, *see, e.g.*, Robert W. Poole, Jr., *Defederalizing Transportation Funding* (1996), to partial devolution proposals, *see, e.g.*, Advisory Commission on Intergovernmental Relations, *Devolution of Federal Aid Highway Programs: Cases in State-Local Relations and Issues in State Law*, at 1 (1988) (“ACIR Study”).

II. A Brief Primer On Current Federal Transportation Law

A. State And Local Governments Are Full Partners In Federal Transportation Programs

The Federal-Aid Highway Program (FAHP) is a federally-funded, state-administered program. It operates through the grant of federal funds to the States to construct and improve certain designated highways, known as federal-aid highways. The program is administered by the Federal Highway Administration (FHWA), an agency of the U.S. Department of Transportation. While the program has evolved over the years, its basic characteristics, put in place by federal legislation a century ago, have been retained.

- A cooperative federal-state partnership is at the core of the program. Unlike its role in waterways transportation, the federal government owns very little surface transportation infrastructure (with some exceptions, primarily roads that provide access to or within federal lands, national parks, and military bases), and, thus, is not extensively involved directly in infrastructure development, operation, or maintenance. Instead, federal assistance is channeled through state transportation departments that are responsible for planning, designing, and constructing federal-aid highways.
- For a project to be eligible for funding, it must generally be on the federal-aid highway system, which is designated jointly by FHWA and state highway departments. There are currently more than four million miles of roads in the United States, but less than a quarter of those road miles are part of this designated federal-aid system. With limited exceptions, the remaining three quarters of the nation's roads are solely the responsibility of state and local governments. *See* Federal Highway Administration, *Highway Statistics 2012*, tbl. 4.3.3 (2012), available at <http://www.fhwa.dot.gov/policyinformation/statistics/2012/> (“2012 *FHA Statistics*”).
- The FAHP is a matching program. Typically the federal government covers 80 percent of a project's cost, while the state normally provides at least 20 percent of the cost.
- The principal focus of the FAHP, in investment terms, is to support capital investment in network development, as distinct from routine maintenance and operations which are a state/local responsibility.
- “Contract authority” is a key element in the FAHP enabling state highway departments to advance multi-year federal-aid projects by making available for obligation the full sum before annual appropriations are approved. The use of contract authority gives the States

advance notice of the size of the federal-aid program and eliminates much uncertainty.

This certainty makes it much easier for states to make administrative and political decisions with regard to major multi-year projects.

Similar to the FAHP, the Federal Public Transportation Program is a federally-funded, locally-administered program. It operates through the grant of federal funds to state, regional, and local agencies, including jointly operated Metropolitan Planning Organizations (MPOs), to construct and improve regular, continuing shared-ride surface transportation services that are open to the general public or to a defined segment of the general public, such as seniors. The main modes of public transportation are bus, heavy rail (subway and elevated), commuter rail, light rail, paratransit (also known as demand response), and ferryboat services. As with highways, federal assistance is focused on capital improvements. The program is administered by the Federal Transit Administration, an agency of the U.S. Department of Transportation. As with the FAHP, states and MPOs must comply with federal transit regulations as a condition of receipt of federal funds, but retain substantial control over project selection, design, and construction.

B. Highways And Transit Funded By A Dedicated Trust Fund

The Federal-Aid Highway Program and the Federal Public Transportation Program are financed mostly through the Highway Trust Fund (HTF). The HTF works on a pay-as-you-go basis, meaning there must be enough money in the Fund to reimburse state and local governments for the costs of each project.

Current federal law imposes an 18.4 cent per gallon tax on gasoline and a 23.4 cent per gallon tax on diesel fuel; these rates were last increased in 1993. *See* 26 U.S.C. § 4081(a). Revenues arising from these taxes are deposited in the Highway Trust Fund (HTF), which may

be used only for transportation projects. Of the 18.4 cent per gallon gasoline tax, 15.54 cents goes toward highway programs, and 2.86 cents goes toward mass transit programs. *See* Congressional Research Service, *Surface Transportation Funding and Programs under MAP-21*, at 3 (2012) (“*Surface Transportation Funding*”).³

The HTF was created as a user-supported fund and has operated that way through most of its existence. Since 2001, however, outlays from the HTF have outpaced tax revenues, and the fund’s balances have decreased through most of that period. The shortfall has been made up by periodic transfers, mostly from the general fund of the Treasury, to the HTF. There are several reasons why this shortfall has occurred, the most significant of which is that user fees have not been adjusted since 1993.

C. Federal Transportation Law Embraces Cooperative Federalism And Puts States In The Driver’s Seat

As mentioned previously, the federal government does not own any roads except those on federal lands. The nation’s highways and roads are owned by state and local governments, including the Interstate Highway System with its distinctive red, white, and blue signs. As the owners of almost all of the nation’s four million miles of roads, state and local governments have full responsibility for the parts of the nation’s transportation network they own.

State and local governments are also solely responsible for construction and maintenance of local roads, which make up three-fourths of the nation’s road network. These roads are generally not eligible for federal funding.

³ These figures reflect a transfer of the 0.1 cent-per-gallon tax nominally dedicated to the Leaking Underground Storage Tank (LUST) Trust Fund to the Highway Account in the HTF, as under current law. *See* MAP-21, Pub. L. No. 113-159, § 2002(b)(1) (2014).

With respect to the one-fourth of the nation's roads that are designated as federal-aid highways—the nation's most important roads—state and local governments also retain primary responsibility for construction and maintenance. *First*, they may construct or improve any of these highways using their own funds, with no federal involvement. Devolution is not needed to allow this practice to continue. There is nothing that prevents state and local governments today from raising funds by any means for construction and improvement of federal-aid highways.

Second, the fact that a highway is designated as a federal-aid highway does not imply that federal funds have been, or necessarily will be, spent on all portions of that route. The decision on how federal funds are used (that is, which projects are funded on which routes), is the responsibility of state departments of transportation (DOTs) and MPOs. These organizations select the lion's share of the projects funded with HTF dollars, award the contracts, and oversee project development and construction. They also generally put up a local match of 20 percent of the total project cost. *See* Jay Dilger, Congressional Research Service, *Federalism Issues in Surface Transportation Policy: Past and Present*, at 3–4 (2012) (“*CRS Report*”). Conversely, the federal Department of Transportation's role is limited and generally consists of performance evaluation and planning assistance. As under prior statutes, the Moving Ahead for Progress in the 21st Century (MAP-21) Act, enacted in 2012, allows states to develop and execute their own transportation plans and designate which roads are a part of the federal-aid system. *Id.* at 18–19.

D. Exerting The Federal Interest In Transportation

The federal government exerts its interests in transportation primarily through the structure and nature of its funding mechanisms. This is accomplished in a number of ways.

First, the vast majority of federal highway funding is focused on the 5 percent of the nation's roads that make up the National Highway System (NHS). These are the routes that

carry and will continue to carry the bulk of the nation's highway traffic, and serve strategic, economic and trade priorities through connections to military installations, border crossings, airports, seaports, and rail-highway transfer facilities. In other words, the major focus of federal-aid programs—measured by proportion of dollars invested—is on the development of needed network and major facility components that involve scales and costs that are difficult or otherwise not supportable via individual state/local initiatives.

Second, federal investment is focused on capital investment in network development, as distinct from their routine maintenance and operation which remain a state/local responsibility.

Third, federal investment leverages state investment. As noted above, states are generally required to contribute at least 20 percent of the costs of each project, thereby increasing the overall investment.

Fourth, and finally, the fact that the program is funded using contract authority from a user-financed, dedicated trust fund provides sufficient stability and predictability to make it possible for state and local governments to be full partners in constructing and improving surface transportation networks. This is the mechanism that built the Interstate Highway System, America's greatest public works achievement. And if the HTF is put on a sound financial footing, this mechanism can serve to modernize America's surface transportation network for the 21st century.

III. The Federal Government Has Played A Role In Transportation For Over 225 Years

From the time of the founding to the present, the federal government has always played a significant role in planning and funding transportation infrastructure. Thus, devolution would represent a sharp break from our longstanding national tradition, rather than a return to it.

A. The Constitution Expressly Contemplates Federal Involvement In Transportation Planning And Maintenance

The Constitution limits the federal government's powers to a few carefully defined, core areas that are critical to the nation's security and economic prosperity. Transportation is expressly designated as one of those areas.

The Constitution assigns Congress a direct role in addressing the transportation of goods and people in two specific areas. *First*, Article I, section 8 grants Congress “the power [t]o establish post offices and post roads.” This provision marked an expansion of federal responsibility from the Articles of Confederation, which provided authority to establish and regulate post *offices*, but said nothing about post *roads*. See Articles of Confederation Art. 9 § 4. The Framers understood that Congress would use its Post Roads authority to facilitate “public conveniency” and “intercourse between the States,” James Madison, Federalist No. 42 (1788), including by planning, funding, and overseeing the construction of roads that linked cities and post offices together, see Joseph B. Story, *Commentaries on the Constitution of the United States*, 398–400 (1833).⁴

Second, Article I section 8 grants Congress “the power [t]o regulate commerce with foreign nations, and among the several states.” This provision, like the Post Roads Clause, was intended to open up channels for the free flow of commercial goods. As James Madison put it, judicious exercise of the commerce power would facilitate commercial “intercourse throughout the Union” because “[r]oads will everywhere be shortened, and kept in better order;

⁴ Even the Heritage Foundation, which has argued for devolution of federal transportation programs, acknowledges that this is the correct interpretation of the Post Roads Clause. See Heritage Foundation, *The Heritage Guide to The Constitution: Post Office Clause*, <http://www.heritage.org/constitution/#!/articles/1/essays/45/post-office>.

accommodations for travelers will be multiplied and meliorated; an interior navigation on our eastern side will be opened throughout.” James Madison, Federalist No. 14 (1787).

The First Congress relied on these powers when, in 1789, it enacted a law that assumed federal ownership and responsibility for maintaining “all lighthouses, beacons, buoys, and public piers” in United States coastal waters to ensure “easy and safe” navigation. Act of Aug. 7, 1789, § 1, 1 Stat. 53 (“Lighthouses Act”). This program was to be funded out of the federal treasury, and included a directive that federal funds be used to construct a “a lighthouse . . . near the entrance of the Chesapeake Bay.” *Id.* §§ 2–3. The Lighthouses Act is significant because it shows that the federal government was originally understood to have a direct and substantial role in maintaining the nation’s transportation infrastructure—indeed, transportation by waterways was the principal means of moving commercial goods in the founding era. As the Supreme Court has stated many times, the views of the First Congress are entitled to “the greatest weight in the interpretation of” the Constitution because seventeen members of the Constitutional Convention served in the First Congress and were intimately familiar with the document’s purposes and design. *Myers v. United States*, 272 U.S. 52, 174–75 (1926); *see also Marsh v. Chambers*, 463 U.S. 783, 788–790 (1983).

Surface transportation legislation followed just a few years later. Drawing on a consensus that the power “[t]o provide roads and bridges is within the direct purview of the Constitution,” Alexander Hamilton, *Examination of Jefferson’s Message to Congress* (1801), Congress appropriated funds in 1802 and 1803 for construction of “public roads” connecting “the navigable waters emptying into the Atlantic to the Ohio River,” and also for “making roads within” the newly admitted State of Ohio, *see* Act of April 30, 1802, 2 Stat. 175; Act of March 3, 1803, 2 Stat. 226. Thereafter, Congress enacted a series of laws providing for the financing and

construction of a “National Road” from the eastern seaboard to Cumberland, Maryland and points west. *See, e.g.*, Act of March 29, 1806, 2 Stat. 357. These laws were likewise animated by the notion that well-functioning roads and canals were the “great foundations of prosperity and union,” Thomas Jefferson, *Eighth Annual Message to Congress* (1808), and that “[m]any of the improvements contemplated [we]re on too great a scale for the resources for the States” acting “alone,” John C. Calhoun, *Remarks on the National Bank Act* (Feb. 4, 1817). As renowned economist Adam Smith put it, providing transportation infrastructure was one of “only three duties” government had a responsibility to carry out. Adam Smith, *An Inquiry Into The Nature and Causes of the Wealth of Nations* 286 (1776). This “duty of erecting and maintaining certain public works . . . can never be for the interest of any individual, or small number of individuals . . . because the profit would never repay the expense to any individual or small number of individuals, though it may frequently do much more than repay it to a great society.” *Ibid.*

Critically, each of the laws Congress passed between 1806 and 1820 directed that the appropriated funds be used to address local *and* national transportation needs. *See, e.g.*, Act of April 19, 1816, 3 Stat. 290 (setting aside sixty percent of the appropriated funds for local projects in Indiana, and the remaining forty percent for “the making of a road or roads leading to the said state, under the direction of Congress”); *see also Indiana v. United States*, 148 U.S. 148, 149–50 (1893) (cataloguing similar statutes). These laws also required federal officials to collaborate with the state legislatures in selecting the projects and in carrying out their construction.

The federal government provided not only for the construction of these new transportation corridors, but for their rehabilitation as well. For example, in 1827 Congress appropriated funds “for the purpose of repairing the public road from Cumberland to Wheeling.”

Act of March 2, 1827, 4 Stat. 228; *see also* *Searight v. Stokes*, 44 U.S. 151, 153 (1845) (describing similar statutes enacted in 1832 and 1834). Ultimately, Congress’s efforts led to the completion of a road stretching from Maryland to Missouri that was used by the postal service and the public alike. *See Indiana*, 148 U.S. at 150. The national network of post roads expanded considerably during this early period as well, increasing from 5,642 miles in 1792 to 114,536 miles in 1828. *See* Robert G. Cullen, *Early U.S. Postal Routes and the Communications Infrastructure* 8 (2009). The federal government assisted with other founding era surface transportation projects as well. *See* Paul M. Weyrich & William S. Lind, *Transit Means Business: Ten Reasons Why Conservatives Should Support New TEA Legislation* 13 (2003) (“*Transit Means Business*”) (surveying projects in New York and Pennsylvania).

B. Sustained Federal Involvement Since The Founding Era

The federal government has remained involved in the planning, construction, and rehabilitation of transportation resources since the founding era. Although the States began to play a greater role in transportation matters beginning in the 1830s, Congress continued to appropriate funds for surface transportation—and railroads in particular—in the decades that followed. *See* Federal Highway Administration, *America’s Highways 1776–1976* 23 (1976). At the close of the nineteenth century and again early on in the twentieth, the Supreme Court reaffirmed the consensus described above, stating that Congress possesses the power to construct “artificial highways,” “common roads,” and “railroads,” *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 342 (1893), and that this power was “essential to” the discharge of Congress’s commerce responsibilities, *Wilson v. Shaw*, 204 U.S. 24, 34–35 (1907). During the same period, Congress created the federal agency, then known as the Office of Road Inquiry, that

eventually became today's Federal Highway Administration. *See* Richard Weingroff, *Clearly Vicious as a Matter of Policy: The Fight Against Federal-Aid* 18 n.19 (2012).

Congress returned to highway legislation in 1916 by enacting the Federal Aid Road Act, which appropriated \$75 million for joint federal-state construction projects over a five-year period. *See* Pub. L. No. 64-156, 39 Stat. 355, §§ 1–3. President Woodrow Wilson, who signed the measure, explained that “[t]he happiness, comfort and prosperity of rural life, and the development of the city, [would be] alike conserved by the construction of public highways.” Richard F. Weingroff, *Federal Aid Road Act of 1916: Building the Foundation*, 60 Public Roads 1 (1996). Congress expanded the program in 1921, 1944, and again in 1956; each statute successively broadened the range of projects eligible for federal assistance. *See* Highway Act of 1921, 42 Stat. 212; Federal-Aid Highway Act of 1944, Pub. L. No. 78-521, 58 Stat. 838; Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374. The last of these statutes set the federal-aid highway system on its present course, authorizing construction of the comprehensive Eisenhower Interstate Highway System and cementing a cooperative federal-state planning regime that “elevated the role of federal and state highway department[s] . . . in determining the scope and nature of the nation’s highway system.” *CRS Report, supra*, at 10. Congress has reauthorized the federal transportation program many times since 1956. These statutes have retained the basic federal-aid blueprint, while making incremental reforms to various details and, most notably, increasing federal support for transit projects as well.⁵

⁵ *See, e.g.*, Urban Mass Transportation Act of 1964, Pub. L. 88-365, 78 Stat. 302; Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, 82 Stat. 815; Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, 90 Stat. 425; Federal-Aid Highway Act of 1987, Pub. L. No. 100-17, 101 Stat. 132; Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914; Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. (continued...)

In short, when one looks back over the past 225 years, it becomes clear that throughout our nation’s history the federal government has played an active role in “help[ing] provide the infrastructure private businesses depend on.” *Transit Means Business, supra*, at 13.

C. Devolution Is Inconsistent With This Longstanding Tradition

Devolution proposals are flatly at odds with the longstanding tradition outlined above. Conservatives are quite right to focus on the Constitution’s original meaning, on the Framers’ vision for a limited federal government, and on historical practice reflecting that vision. But those considerations militate in favor of, rather than against, a continued federal role in planning and financing transportation projects—and in particular projects that, like the lighthouses and piers addressed by the First Congress, play a central part in facilitating commerce and tying the nation together as a cohesive whole. Indeed, John C. Calhoun convincingly made the case against devolution nearly two centuries ago:

Let it not be said that internal improvements may be wholly left to the enterprise of the states and of individuals. I know that much may justly be expected to be done by them; but, in a country so new and so extensive as ours, there is room enough for all the general and state governments and individuals in which to exert their resources. But many of the improvements contemplated are on too great a scale for the resources of the states or individuals; and many of such a nature as the rival jealousy of the states, if left alone, would prevent. They require the resources and the general superintendence of this government to effect and complete them.

John C. Calhoun, *Remarks on the National Bank Act* (Feb. 4, 1817).

Partial devolution proposals fare no better when judged in light of the nation’s history. Twenty percent of major transit systems, such as the Washington Metropolitan Area Transit

109-59, 119 Stat. 1937; Moving Ahead for Progress in the 21st Century, Pub. L. No. 112-141, 126 Stat. 405.

Authority and the Bi-State Development Agency in the St. Louis metropolitan area, provide service across state lines and thus serve the same function as the National Road financed by Congress in the early 1800s. And virtually all transit systems link local communities to airports, ferry terminals, and other transportation hubs that facilitate interstate and international flow of goods, labor, and expertise. *See* American Public Transportation Association, *Airport Public Transportation*, <http://www.apta.com/resources/links/Pages/airports.aspx> (listing airports served by rail and bus-based transit systems). Indeed, there is no meaningful difference between a typical bus or rail system and the state-owned public roads and canals Congress repeatedly funded in the nation’s early years.

IV. Federal Aid Brings The Country Together By Fostering An Integrated National Transportation System

A. The Enduring Goal Of National Unity And The Common Good

From the very beginning of the republic, the principal justification for federal government has been its ability to promote national unity and prosperity—or what the Constitution calls “the common defense and general welfare of the United States.” U.S. Const. Art. I, § 8, cl. 1. The Framers repeatedly invoked these ideals and tied them to the construction of roads, canals, and coastal infrastructure that connected the several states to each other and to markets abroad. Thomas Jefferson’s final address to Congress is representative; in it, Jefferson characterized the nation’s roads, canals, and rivers as the “great foundations of prosperity and union.” And national leaders have continued to sound the same theme since. While lobbying for the Interstate Highway System proposal, President Dwight Eisenhower remarked that “[o]ur unity as a nation is sustained by free communication of thought and by easy transportation of people and goods. . . . Together, the united forces of our communication and transportation

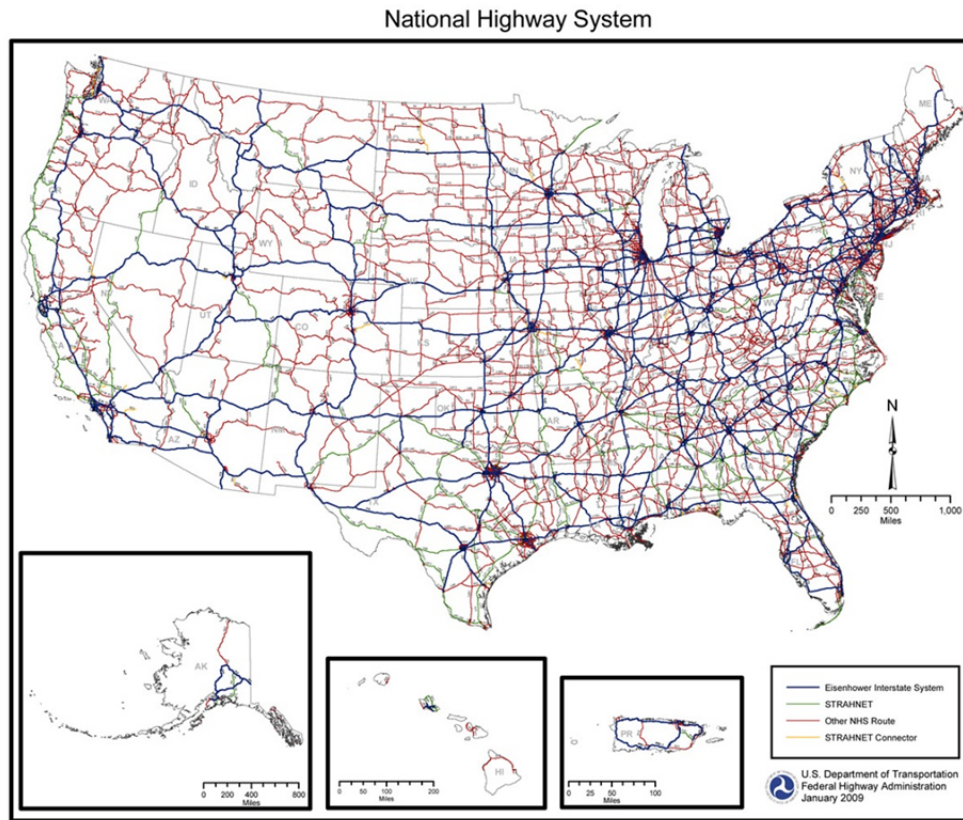
systems are dynamic elements in the very name we bear—United States. Without them, we would be a mere alliance of many separate parts.” Dwight D. Eisenhower, *Special Message to the Congress Regarding a National Highway Program* (Feb. 22, 1955).

B. Federal Investment Serves The Common Good By Improving The Most Strategically Important Roads, Bridges, And Transit Systems

Federal transportation programs advance the common good by directing investment to the most strategically important elements of the nation’s infrastructure. As mentioned above, the federal-aid system encompasses only 25 percent of all road miles in the United States, with the remaining seventy-five percent being the sole responsibility of state and local governments. *See 2012 FHA Statistics, supra*, at tbl. 4.3.3. The National Highway System is even smaller; it represents just over five percent of the nation’s road network. *Ibid.*

Despite its small relative size, the federal-aid system carries the overwhelming bulk of the traffic on the nation’s roads. Measured in terms of vehicle-miles traveled, federal-aid roads handle nearly 85 percent of traffic, and the National Highway System handles 55 percent of all traffic. *See 2012 FHA Statistics, supra*, at tbl. 5.4.2. Put differently, more than half the vehicle traffic in the United States is handled by just five percent of the roads. Those high-volume corridors are the arteries that are critical to the movement of raw materials, finished goods, employees, and families; without them, the nation’s economy would grind to a halt.

Federal law sensibly allocates a majority of federal funding to the roads that get the most use. For instance, approximately three quarters of federal funds go to the National Highway System—a System that is made up primarily of routes that run through the rural and exurban areas that connect major cities, as the following map illustrates.



Federal-aid roads also serve a key national-defense function. The Strategic Highway Network (STRAHNET) is a 61,000-mile system of public roads, designated by the Federal Highway Administration in partnership with the Department of Defense, that is specially designed for deployment of military assets. The system is comprised of 45,000 miles of Interstate and Defense highways and 15,000 miles of other public highways; together with an additional 1,700 miles of connector roads, it links together more than 200 military installations and ports. Every mile of the STRAHNET is part of the National Highway System, and is therefore eligible for federal funding.

Transit networks likewise play an important role in disaster response efforts. When emergencies such as natural disasters and terrorist attacks strike urban areas; transit systems assist with evacuation of at-risk citizens and positioning of relief workers and supplies. See Federal Transit Administration, *Emergency Relief Manual* 4–5 (2015). These capabilities are

particularly important when a large number of people need to evacuate in a short period of time, as doing so by automobile alone “result[s] in almost immediate gridlock.” *Transit Means Business, supra*, at 12. “Only transit can move the volume of people [necessary] in the short amount of time available” in these scenarios. *Ibid*.

Finally, an integrated transportation network drives economic growth. “The American economy works, in large measure, because shippers, manufacturers, and service providers have a transportation system that provides many ways to access labor and move raw materials and finished products.” *Final Report, supra*, at 1-3. The network also gives individuals the freedom to choose where they work, shop, vacation, and worship. These are just a few of the reasons why the Chamber of Commerce and the National Association of Manufacturers support fully funded highway and transit programs. See U.S. Chamber of Commerce, *2015 Jobs, Growth, and Opportunity Agenda: Transportation*, <https://www.uschamber.com/transportation>; National Ass’n of Mfrs., *A Growth Agenda: Four Goals for a Manufacturing Resurgence in America*, at 5 (2015). As one Chamber official recently put it:

[T]ransit gets people to their jobs and helps grow the economy. It transports people to health care appointments, school, recreation and shopping. It gives businesses the opportunity to reach customers. And it creates jobs - for those who build and maintain infrastructure, and across other sectors of the economy. Simply put, transit helps to relieve traffic congestion and links together neighborhoods, communities and regions.

Janet Kavinsky, *Hill Spotlight Shines on Transit in the Real World* (Apr. 23, 2015), <https://www.uschamber.com/blog/hill-spotlight-shines-transit-real-world>. Data regarding transit use backs up that view; one recent study determined that a majority of transit trips are “work trips” to or from the rider’s workplace. See American Public Transportation Association, *A Profile of Public Transportation Passenger Demographics and Travel Characteristics Reported in On-Board Surveys* 49–50 (2007). These trips not only get people to their jobs, they also

predominately occur during rush hours when highways are most congested. Indeed, transit systems “greatly reduc[e] the number of motorists on the Nation’s highways, [thus] lessening the impact of congestion” and opening up space on roads for commercial deliveries that would not otherwise be possible. *Final Report*, Vol. II, at 3-5; *see also* Michael C. Genest, *Meeting Our Transportation Funding Challenges: We Must Build A New Consensus*, at 17 (2014), available at http://www.freecongress.org/wp-content/uploads/2014/07/Transportation-New-Consensus_-3.pdf.

C. Devolution Would Balkanize The Nation’s Transportation System And Cause A Drag On The National Economy

Devolution of federal transportation programs would undermine the benefits described above, while giving rise to a host of other serious problems.

First, without any federal coordination the states would be incentivized to serve purely local, rather than national interests. Funds currently used to build and maintain a network that links markets together across state borders, and to serve the busiest and most strategically important corridors, would instead be diverted to whatever local needs each state legislature thought were most pressing. After all, what interest do states like Virginia or Ohio have in catering to the needs of motorists who are just passing through from elsewhere in the country *to* somewhere else in the country? Very little, really.

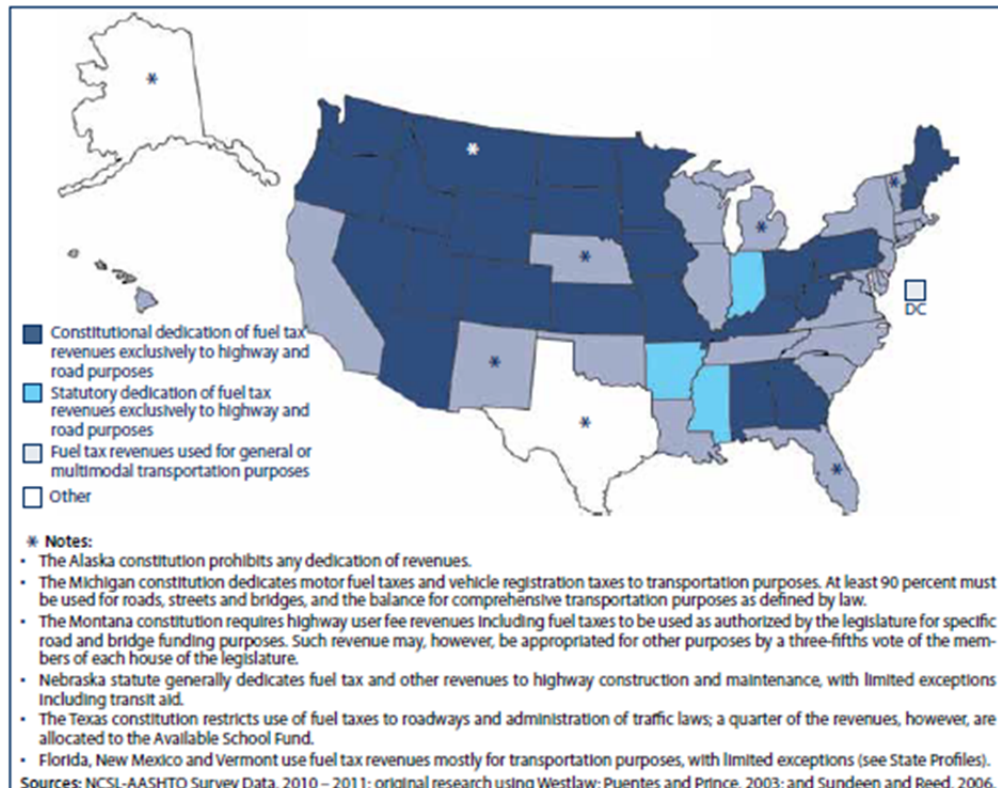
To the extent States would consider out-of-state travelers, experience under the Articles of Confederation suggests that States would find ways to tax—and therefore burden—interstate commerce at every turn. Toll gates would be placed at locations where they would have the greatest effect on interstate travelers and the least possible impact on local residents. Replicas of the bottleneck at Breezewood, Pennsylvania—“that odd little strip of gas stations and restaurants

that anyone wanting to get from the Pennsylvania Turnpike to Interstate 70 (or vice versa) must drive through”—would multiply as states sought to capture revenue from out-of-staters, thereby adding “huge delays for travelers” and shippers alike. Doug Mataconis, *Everybody Hates Breezewood, Pennsylvania, Outside the Beltway* (Aug. 6, 2012).

Second, under devolution states would have a difficult time maintaining the existing level of transportation investment. No one disagrees that the nation needs more capacity right now, or that the strain on the transportation network will be even greater as the population grows in the future; the only question is how those objectives should be accomplished. Yet if Congress got out of the transportation business, and if states picked up the entire 18.4 cent federal gas tax (a doubtful proposition in itself), nothing would require states to put their newfound revenues into a trust fund dedicated solely to transportation projects. Funds that currently go to high priority corridors could instead be “used to fund non-highway or even non-transportation programs.” *ACIR Study, supra*, at 6. State legislatures would also be free to earmark transportation funds at will, whereas Congress has—at long last—finally vanquished that vice by banning earmarks. (The most recent federal transportation bill, MAP-21, contains no earmarks.)

In fact, while devolution advocates insist that their approach would “ope[n] opportunities to develop new mass-transit solutions,” Rep. Tom Graves, *Transportation Empowerment Act*, <http://tomgraves.house.gov/tea/> (“*TEA Summary*”), devolution would have precisely the opposite effect. As shown below, 23 state constitutions require all transportation funds to be used on highway projects, thus making it impossible for these states to develop *any* “mass-transit solutions,” much less new ones. Another three states have similar “highway-only” statutes on the books, and several other states have laws that make it quite difficult to use transportation funds for transit purposes. See National Coalition of State Legislatures, *Transportation*

Governance and Finance: A 50-State Review of State Legislatures and Departments of Transportation, at 29 (2011) (“*Transportation Governance*”); see also Robert Puentes & Ryan Prince, Center on Urban and Metropolitan Policy, *Fueling Transportation Finance: A Primer on the Gas Tax*, at 11 (2003). Simply stated, it is legally impossible to use transportation funds for transit projects in 26 states, and practically impossible to do so in several more:



Graphic Source: *Transportation Governance*, *supra*, at 29.

Congress could theoretically preempt the 23 state constitutions and 3 state statutes as part of a devolution law, but it hardly serves the ends of federalism and limited central government to demolish the laws of a majority of the States. This defect is but one reason why even partial devolution is inconsistent with conservative ideals.

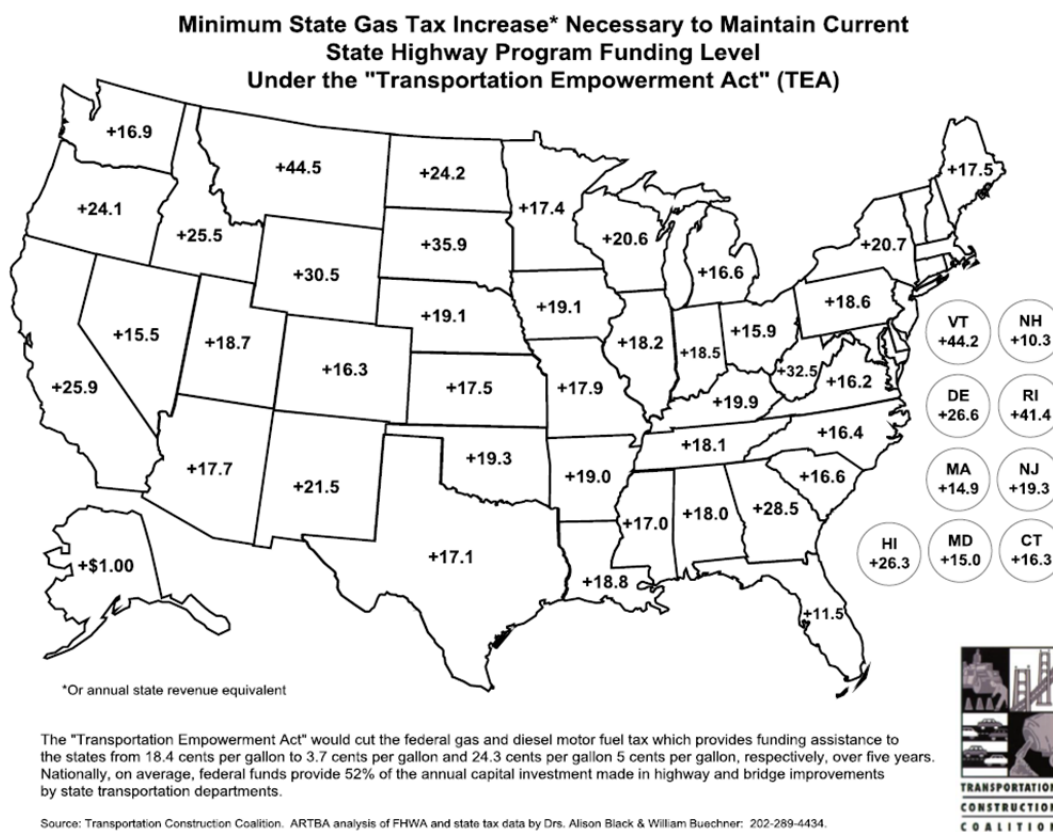
Third, even if the States could overcome all the obstacles outlined above, they would still lack the ability and political will to take on expensive projects that provide widely distributed national benefits. Some projects are so expensive that their cost overwhelms the capacity of

nearly any state’s budget; the recently constructed 12-lane Woodrow Wilson Bridge that carries I-95 across the Potomac River between Maryland and Virginia is a prime example. That project took 13 years to complete and cost more than \$2.3 billion—an amount equal to more than half of the annual budget of a state like West Virginia. *See* Katherine Shaver, *Final Tally: Wilson Bridge Project \$86 Million Under Budget*, Washington Post (Mar. 31, 2015); West Virginia State Budget Office, *General Revenue Fund Appropriations for Fiscal Year 2015*, <http://tinyurl.com/p7drbz9>. The Long Beach Freeway in Southern California (I-710), which connects the ports of Los Angeles and Long Beach to inland rail yards and interstate highways, is of the same nature. It is now so crowded with truck traffic that state officials are considering spending between \$4 and \$8 billion to improve a segment of road that extends just 18 miles—i.e., at a cost of nearly *half a billion dollars per mile*. *See* Dan Weikel, *2 Options Considered For Reconstruction Part of Congested 710 Freeway*, Los Angeles Times (Mar. 17, 2015).

Financing projects of that magnitude requires a great deal of working capital, a reliable stream of income, and flexible borrowing authority. The federal HTF offers all of those qualities and hence helps transportation officials make multi-year commitments with confidence. But most states are not similarly equipped. Some states have laws that prohibit debt financing of highway projects, while others “impose specific constitutional or statutory restrictions on the volume of debt permitted in any one year or on total debt outstanding,” and still others have laws that strictly circumscribe the state’s ability to raise taxes or increase expenditures. *ACIR Study*, *supra*, at 7–9. What’s more, because a major project would invariably represent a larger share of a single state’s transportation budget than of the federal transportation budget, the risk of default would be greater—thus leading to increased borrowing costs and difficulty in securing financing.

In other words, devolution would not, as its proponents contend, result in “a faster response to the transportation problems Americans face.” *TEA Summary, supra*, at 2.

Fourth, and finally, devolution would cause a serious drag on the national economy. Just to keep up with the current level of funding, every state would need to increase its gasoline tax. *See TCC Study, supra*. Some states—the so-called donee states that receive more from the HTF than they contribute—would need to increase their taxes substantially; Montana, for instance, would need to add 44.5 cents more per gallon just to replace the lost federal funding, West Virginia would need 32.5 cents per gallon, and Wyoming would need to add 30.5 cents per gallon. *Id.* These increases, expressed in cents per gallon, are depicted in the following graphic:



Suffice to say, legislation that would force all 50 states to enact substantial tax increases is not a favorable outcome from a conservative perspective.

Devolution would have other deleterious economic effects as well. Interstate and international shipment of goods would slow considerably as states steered funds away from national arteries, thereby hindering the ability of domestic businesses to compete with foreign firms and increasing the prices of goods sold by U.S. retailers. *See Final Report, supra*, Vol. II, at 1-4, 1-5. Weakest-link problems would arise as well; if even one state along a critical supply route failed to invest adequately in its nationally significant highways, that state would create a bottleneck that would slow down transportation along the entire route. Further, as transit options declined, employers would face difficulties hiring the employees that offer the best talent. That is no trivial matter: according to the Federal Reserve Bank of New York, the ability to access large and dynamic labor pools enables companies in large urban centers to specialize and thereby double their economic productivity. Rae Rosen, *Testimony Before The National Surface Transportation Policy and Revenue Study Commission* (2006). This “agglomeration benefit” has been a major driver in the nation’s economic growth over the past half-century. *See id.*

V. Federal Aid Helps Solve Transportation Problems Effectively, But There Is Still Plenty Of Room For Reform

A. Federal Aid Helps States Solve Transportation Problems Effectively

Conservatives rightly recognize that government usually works best when it is closest to the governed. Most of the time, that means leaving matters to the States. *See* U.S. Const. amend. X (“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.”). But this subsidiarity principle has its limits. Few people, for instance, advocate that each state should operate its own air-traffic control system or fend for itself in terms of national defense. Those issues present cross-border problems that, in practice, require national solutions. So too for strategically

important transportation infrastructure. Indeed, federal investment and planning helps solve many difficult transportation problems more effectively than if each state were on its own.

For starters, federal involvement improves disaster preparedness and response. Hurricanes, earthquakes, tornadoes, floods, and other disasters do not recognize state boundaries. When they strike, entire cities or counties often must be evacuated across state lines—as was the case in the aftermath of Hurricane Katrina in 2005. Those efforts work best when evacuees can follow pre-determined evacuation routes with adequate capacity. Under devolution, however, inland states would have little or no incentive to build large-capacity evacuation routes simply for the convenience of their coastal neighbors.

Federal expertise helps in other areas as well. The Federal Transit Administration partners with the Veterans Administration, the Department of Defense, and other agencies to operate the Veterans Transportation and Community Living Initiative, a program that helps “veterans, military families, and others connect to jobs and services in their communities by improving access to local transportation options.” See FTA, *Veterans Transportation and Community Living Initiative*, http://www.fta.dot.gov/grants/12305_13540.html. It would be difficult, perhaps impossible, for individual states to replicate that degree of combined expertise. By like token, programs such as the Federal Highway Administration’s Congestion Mitigation and Air Quality Improvement Program assist states in complying with state and federal environmental regulations by designing efficient, less congestion-prone transportation networks. See 23 U.S.C. § 149.⁶

⁶ While there is a strong argument that many of these environmental rules should be reformed or abolished, devolving federal transportation programs won’t accomplish that result. Instead, it will merely leave the states to deal with compliance issues on their own, without any federal assistance or expertise.

B. Federal Programs Can Be Reformed To Better Align With Conservative Principles

Devolution advocates are absolutely right about one thing: There is plenty of room for further reforms to federal transportation programs. But it does not follow that Congress should get out of the transportation business altogether. Instead, the solution is to reform the problematic parts of the law while keeping the beneficial ones. So which reforms are necessary? Five particular areas provide a worthwhile starting point:

1. Earmarks. For most of the nation's history, federal transportation legislation contained few if any earmarks and left the overwhelming majority of projects to be selected based on merit. That began to change in the 1980s: the number of earmarks in federal transportation authorization measures increased from 10 in 1983 to a whopping 5,634 in the 2005 SAFETEA-LU bill. *See Final Report, supra*, Vol. II, at 6-5. The percent of funds absorbed by earmarks also rose sharply, going from one percent in 1983 to eleven percent in 2005. *Ibid.* Congress properly abolished the practice of earmarking in the 2012 MAP-21 Act and should continue to adhere to that policy in future legislation.
2. Federal Mandates. It is no secret that federal transportation programs could be made more efficient by reducing the cost and complexity of federal mandates. For example, many conservatives believe that Congress should reform environmental impact surveys required for new starts, or remove Davis-Bacon wage set-asides. These provisions, and the latter in particular, are relics of "a bygone era, one that conservatives do not remember fondly," Paul M. Weyrich & William S. Lind, *Conservatives and Mass Transit: Is It Time for a New Look?*, at 22, and they should therefore be reexamined when Congress crafts the next

transportation reauthorization measure. MAP-21 took some important steps in streamlining the approval process, but more can be done in future reauthorization acts. Congress should also look at the possibility of delegating major aspects of the approval process to the States. This is a far better approach than devolution.

3. Public/Private Partnerships. Federal law already takes some steps to promote partnerships between public agencies and private-sector investors, but it could go further. “Because quality transit stimulates economic development in the areas it serves, it is reasonable to expect those will benefit to help fund the transit system.” *Id.* at 21. In fact, requiring or promoting such partnerships is really just an extension of the user-fee model that is already in place for the HTF.
4. Fair Formulas. One of the most contentious highway issues over the past three decades has been the so-called “donor-donee” issue. Donor states, i.e., states whose highway users that pay more into the Highway Trust Fund than they receive, have felt that the underlying formulas used to distribute funds from the HTF are biased toward the donee states, i.e., the states whose users receive back more than they pay in. MAP-21 went a long way toward resolving this problem by guaranteeing every state at least a 95 percent rate of return. Nevertheless, the underlying formulas should continue to be scrutinized to ensure that they are fair and reflect the national interest.
5. Budgetary Priority. There is no doubt that the Interstate Highway System played a significant role in making the United States the most prosperous, entrepreneurial, and secure nation on the globe. Federal leadership and investment—in partnership with the states and private sector—made this happen.

But our surface transportation network is at a crossroads. If America is to remain the most prosperous, entrepreneurial, and secure nation on the globe in the 21st century, then the federal government and its partners must take decisive action now to create and sustain the pre-eminent multi-modal transportation system in the world. Just as was the case with the Interstate Highway System, all must do their part. There are no free lunches. Once again, the federal government must provide the leadership and its fair share of the investment make this happen. Fixing the Highway Trust Fund would be a good first step. American exceptionalism deserves no less.

VI. A Refutation Of The Arguments Most Commonly Made In Support Of Devolution

A. Myth #1: The Interstate Highway System is complete, so there's nothing left for the federal government to do.

This assertion is wrong for two reasons. *First*, there is still a need for a strong federal role in ensuring that the Interstate Highway System achieves a state of good repair and has sufficient capacity to meet future challenges. The IHS, like a home or a car, has a design life and will eventually wear out. It will require extensive rehabilitation and reconstruction to stay in a state of good repair. Construction of the IHS began nearly 60 years ago, and many of the nation's bridges and highways are past or nearing the end of their life span. Some 64 percent of bridges listed in the National Bridge Inventory were built in the 1960s or 1970s, and nearly a quarter of all bridges are either structurally deficient or functionally obsolete. *See Final Report*, Vol. II, at 3-12. Moreover, many of the components that haven't yet reached the end of their planned use are now "buckling under levels of traffic that were unforeseen by the engineers who designed them." *Id.* at 3-11. Similar problems are plaguing transit systems; a 2004 survey

revealed that rail transit vehicles are 20 years old on average, and that a majority of the nation's urban rail passenger stations are in substandard condition. *Id.* at 3-12. In short, considerable maintenance needs exist that require immediate attention. That order grows even taller when one factors in the capacity upgrades that are necessary to keep pace with population growth and rising overseas competition.

Second, the federal interest in surface transportation goes beyond the IHS. As mentioned previously, the 25 percent of the nation's roads that are designated as federal-aid highways and are eligible for federal funding. At the heart of this network is the National Highway System, which carries and will continue to carry a large percentage of the nation's highway traffic, and serves strategic, economic and trade priorities through connections to military installations, border crossings, airports, seaports, and rail-highway transfer facilities.

B. Myth #2: Devolution will result in “less traffic and more time enjoying life.”

This assertion has been made in support of devolution proposals. *See TEA Summary, supra*, at 2. As explained above, however, devolution would leave states struggling just maintaining the current level of transportation investment. It is highly unlikely that states would be able politically to increase revenues sufficient to replace current federal assistance. States would also have a more difficult time making the kind of long-term funding commitments for major improvements that are possible under current law. The collective effect of these limitations would lead to slower and less new project construction, less scheduled maintenance, and thus *more* time spent in traffic and *less* time enjoying life. The effect would be particularly severe for transit systems, since most states have constitutional or statutory provisions that prohibit use of state transportation funds for transit purposes.

C. Myth #3: Current law prevents states and localities from managing their own transportation policies.

As outlined in parts II and III.B above, states are the prime movers under the current transportation regime. Only a quarter of all U.S. roads are eligible for federal aid, and just five percent are on the National Highway System, which receives close to 75 percent of all federal highway funding. FHWA and the States are full partners in selecting which roads are eligible for federal aid and are responsible (together with local governments and MPOs) for managing the remainder of the nation's network of roads, bridges, tunnels, and transit systems. In all, 88 percent of current federal transportation funding passes through to states and MPOs via formula allocations. Joshua L. Schank, Eno Center for Transportation, *Myths Surrounding Devolution of Federal Transportation Programs* (2015) ("Myths"). Additionally, states oversee the contracting and construction processes for federal-aid projects, and have a free hand under federal law to shape their surface transportation plans and statewide transportation improvement programs as they choose. Thus, contrary to devolution supporters, the federal government currently has a limited hand in administering transportation programs funded with HTF dollars.

D. Myth #4: Devolution will result in less "pork" and more merit-selection.

MAP-21, the current federal transportation statute, contains zero earmarks. Logically, it is impossible for state legislatures to do better than that. Practically speaking, we know to a certainty that states sometimes do worse. A 2013 transportation measure adopted by Utah's legislature, for example, contained over \$40 million in earmarks. See Lee Davidson, *Transportation Earmarks Coming to Utah Cities—After Controversy*, Salt Lake Tribune (Mar. 28, 2013). And in 2012, Massachusetts's legislature enacted a transportation bond bill "loaded with" over 200 "election year earmarks." See Paul Tuthill, *Massachusetts Legislature Approves*

Transportation Earmarks, WAMC Northeast Public Radio (Aug. 1, 2012). While these bills are exceptions rather than the norm, and state legislatures generally have an excellent track record of using transportation funds efficiently, the point remains: devolution will not put an end to earmarks or reduce the number of them. Complicating matters further, many states have no legal mechanism to ensure that transportation funds are used solely for transportation.

E. Myth #5: Devolution will allow “more projects to be completed at a lower cost,” and “would actually add dollars available for road construction.”

As established in Part IV.C above, devolution would lead to less funding nationwide for highway and transit projects (indeed, a *lot* less for transit projects) than current federal law provides. Some states would find it impossible to increase their gasoline taxes by enough to offset the loss of federal funds, while others would be unable to borrow or spend enough to complete major projects, and still others would be barred by the state constitution from spending the money they do have on transit. *See ACIR Study, supra*, at 6–9. One recent survey found that states “would only be able to replace approximately 60 percent of the lost federal funding.” *Myths, supra*, at 2. The projects that do go forward would face increased funding uncertainties as well. And even then, a considerable number of states have their own versions of the Davis-Bacon wage law, meaning that eliminating the federal mandate would have no real-world effect. *See Defederalizing Transportation Funding, supra*, at 5. Finally, while it is true that devolution might theoretically allow “more projects to be completed,” that means nothing if the projects in question are locally oriented instead of regionally and nationally significant freeway lanes and bridge repairs. When it comes to the nation’s transportation needs, quantity *and* quality both matter in ways devolution advocates fail to account for.

Conclusion

Three salient conclusions emerge from the foregoing analysis. *First*, the Constitution expressly grants Congress the power to invest in transportation infrastructure, and Congress has consistently carried out that responsibility from the time of the founding through the current day. Hence, devolution would mark a sharp break from tradition rather than a return to it. *Second*, the data makes clear that robust, interconnected, and modern transportation networks are essential to America's prosperity. Our transportation networks are under great strain today due to age and insufficient capacity, and those pressures will grow substantially in the decades ahead as our population grows and as competition from foreign nations stiffens. Current federal transportation programs respond to those challenges by channeling the overwhelming majority of funding to the most strategically important corridors, and by ensuring that and local governments play a vital role in administering federal-aid programs. *Third*, devolving federal transportation programs, either in whole or in part, would make matters worse by reducing the amount of funding available for rehabilitation and construction projects, eliminating transit options, and encouraging states to pursue parochial goals rather than national priorities. Together, those changes would result in increased highway congestion and reduced commuter choice. And, while devolution would cut the federal fuel tax, it would inevitably result in corresponding (and significant) tax *increases* at the state level. In short, the changes devolution would bring about—reduced economic competitiveness, increased traffic congestion, and new tax increases—are not hallmarks good government from a conservative perspective.