THE CHANGING ENVIRONMENT OF URBAN DEVELOPMENT POLICY—SHARED POWER OR SHARED IMPOTENCE?

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The political systems that govern urban America have always been noteworthy for the high degree to which power and responsibility are dispersed among and within them. The precise nature of this dispersal is in constant flux, however, and the recent period has been one of particularly rapid change. In this Article we highlight five recent trends that have profoundly transformed the "shared power" system of American urban government as it relates to that arena of urban development in which we have been active over the past half-dozen years: transportation.

The trends that we shall examine may be labelled as follows; expansion of the public role; the development of consensual federalism; the extension of citizen participation; the quest for comprehensiveness; and judicial activism and preferred values The developments subsumed under the first of these headings have tended to make publicly sponsored development easier to achieve, even as they have increasingly restrained the private sector. Those contained under the latter four headings, by further dispersing veto opportunities within the shared power system,

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have tended to slow the pace and reduce the volume of both public and private development activity.

These trends are appropriately viewed against the backdrop of a system that has always involved a very widespread sharing of power. Federalism, separation of powers, the national resistance to metropolitan government and to strong executive leadership at the local level, and the inability of American political parties to achieve ideological coherence or discipline their members in office have always made it difficult for the American system to adopt long range or broadly conceived plans.

We shall argue that the range of power sharing is currently undergoing further rapid expansion. In consequence, the opportunities for veto are multiplying, with attendant risks of stalemate and paralysis, but also with attendant possibilities of enhanced amenity, democracy and respect for minority interests.

I. Expansion of the Public Role

It is easy to forget in the current period what a very minor role the public sector played in urban development activity just a few short decades ago. No matter how concentrated power might become in the hands of this or that "boss," local political systems operated within the framework of a culture whose central characteristics included dedication to the right of private ownership, deference to private investors, and a basic acceptance of the "invisible hand" of the market place as the main determinant of urban development patterns.[1]

By world standards, these values still infuse our political culture to an extraordinary degree. But — for better or worse — the recent pace of change has been very rapid. Not only does the public sector directly

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1. Writing in 1961 of the American region in which governments had probably moved farthest in their willingness to constrain property owners and investors, Robert C. Wood concluded as follows:

> Not one of these strategies, then, has important implications for the private sector of the Region taken as an entity. An industry barred from one locality can in all probability find a hospitable reception in another with equivalent economic advantages. . . . With so many different constituencies, many options are open for firms and households alike, and though the process of industrial and population diffusion may occasionally be skewed, the forces are not, in general, thwarted, turned aside, or guided.

R. Wood, 1400 Governments 112 (1961).

account for a higher and higher proportion of economic activity,[2] but the private sector as well is increasingly shaped by government contracts, subsidies, regulations, loan guarantees, tax provisions, and monetary policies.

Transportation is one field in which government has long been active. During the nineteenth century governments assisted in the construction of turnpikes, canals and railroads. The first major effort at economic

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2. The following tables indicate the relative growth of public sector activity in the American economy:

Expenditures

	Expenditures, All Governments (billions)	Gross National Product (billions)	Public Expenditure as percentage of GNP
1929	10.3	103.1	10.0
1949	59.1	256.5	23.0
1969	287.9	930.3	30.9
1973	408.1	1294.9	31.5

TAX FOUNDATION, INC., FACTS AND FIGURES ON GOVERNMENT FINANCE 33 (1975).

Employment

	Civilian Employment, All Governments (millions)	Total Civilian Employment (millions)	Government as Percentage of Total Civilian Employment
1929	2.9	47.6	6.1
1949	5.6	57.6	9.7
1969	11.0	77.9	14.1
1973	12.4	84.4	14.7

Id. at 22, 41.

Since 1960, public sector growth has been most rapid in the area of domestic social programs, including social insurance, income maintenance, health, veterans benefits, and educational activities:

	Social Program Expenditures (billions)	Total Public Expenditures (billions)	Social as Percentage of Total Public Expenditures
1929	3.9	10.3	37.9
1950	23.5	60.8	38.7
1960	52.3	136.1	38.4
1970	145.9	312.7	46.7
1973	215.2	408.1	52.7

Id. at 31, 22

regulation focused on the railroads. Urban transit systems were developed with public franchises. Even in light of this early involvement, the recent growth of government influence in the field of transportation has been striking.

During the early part of this century mass transit and railroading were vigorous private enterprise activities, subject to monopoly regulation but generally able to dominate the regulatory process. Government did not plan, subsidize or conduct research. Aviation, trucking and barge transportation were infant industries, little aided or regulated. Public road activity was confined, with rare exceptions, to the paving and maintenance of long-established rights-of-way. Nearly all road rights-of-way had either evolved from trails or been laid out by private developers. Very few were the product of public initiative. In the area of regulation, however, change has been dramatic since the 1930's; with respect to subsidy and development, since the 1950's. The impact of these latter elements on urban highway and mass transit activity is of particular import.

Large-scale intervention to improve the nation's urban road network commenced with enactment of the federal interstate program in 1956.[3] The federal-aid highway program had been in existence since 1916, but urban roads had not become eligible for assistance until 1944. The states as well had generally confined their highway activity to rural areas.[4] In 1955, combined federal and state expenditures for urban highway construction were $718 million, only twenty-two percent of total federal and state highway expenditures.[5] Constrained by the meagerness of the sums available and by the high cost of improvements in developed areas, state highway departments tended to utilize their urban highway dollars in small municipalities and on the fringes of larger urban areas.[6] Consequently, disruptive highway projects in densely settled areas were extremely rare prior to the interstate program.

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3. Federal-Aid Highway Act of 1956, ch. 462, 70 Stat. 374.

4. For a good general source on highway policy developments to 1960 see P. BURCH, HIGHWAY REVENUE AND EXPENDITURE POLICY IN THE UNITED STATES (1962).

5. FEDERAL HIGHWAY ADMINISTRATION, HIGHWAY STATISTICS, SUMMARY TO 1965, at 75, (1966).

6. P. BURCH, *supra* note 4, at 225-26. Burch found that, prior to the authorization of federal aid for urban highways, state highway expenditures in urban areas had likewise been negligible. Through the decade and a half following 1944, moreover, many states limited their urban highway expenditures to the sums required to match federal aid. *Id.* at 225.

By 1962 federal and state expenditures for urban highway construction had nearly tripled, to $2.07 billion; the urban share of the combined federal-state total had increased to thirty-five percent.[7] Most of the increase involved expressway construction on new rights-of-way, and substantial highway investment was being focused for the first time on the inner, intensely developed portions of large urban areas.

Public investment in mass transit did not begin seriously until the late 1960's and did not achieve truly substantial scale until after enactment of the Urban Mass Transportation Assistance Act of 1970.[8] From fiscal 1970 to 1976, the federal transit program has enjoyed a period of explosive growth. Expenditure obligations have risen by more than 1300 percent, from $133 million to an estimated $1.924 billion.[9]

Before concluding this brief description of recent public sector growth in the field of urban transportation, a word should be said about the automobile industry, as private spending for the purchase and operation of automobile products still accounts for the bulk of total transportation expenditures in the American economy.[10] Until about a decade ago,

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7. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 5, at 76.

8. 49 U.S.C. § 1602 (1970), *as amended,* (Supp. IV, 1974); *see, e.g.,* 23 U.S.C. § 105(d) (1970), *as amended,* (Supp. III, 1973).

9. Telephone interview with Michael Finkelstein, Office of the Deputy Under Secretary for Budget and Program Review, U.S. Dep't of Transp., Feb. 1975. These figures are for the national transit program. Congress has enacted a completely separate program, within the framework of its governance of the District of Columbia, for federal participation in the cost of construction in the D.C. Metro (rail rapid transit) system. National Capital Transportation Act of 1969, Pub. L. No. 91-143, 83 Stat. 320 (1969).

10. As of 1973, total annual spending on passenger cars in the United States totalled $122.9 billion. This figure includes, in addition to all other capital and operating expenditures, taxes and tolls paid by automobile users. It does not include any subsidy that the highway sector may have obtained from other tax sources. Nor does it include highway freight expenditures, which were $103.8 billion in 1973. Because 55% of vehicle miles of travel by automobile were in urban areas, a reasonable estimate of *urban* highway expenditures in 1973 is $67.5 billion. The revenues of local bus, rapid transit, and commuter rail systems in 1973 totalled $2.1 billion. Public operating subsidies added $700 million to this figure. We have been unable to obtain comparable figures on current public expenditures for transit capital improvements, but an estimate in the range of $0.5-$1.0 billion seems reasonable. Thus we judged that overall transit expenditures in 1973 were in the range of $3.3-$3.8 billion (plus or minus ten percent). In sum, combined expenditures for urban passenger travel by private automobile and transit in 1973 were about $71 billion. The transit share of this total was about five percent. AMERICAN PUBLIC TRANSPORTATION ASS'N, '74-'75 TRANSIT FACT BOOK 12 (1975); TRANSPORTATION ASS'N OF

the auto industry was the largest sector of the American economy virtually untouched by regulation. Since then, it has become subject to safety and emission control regulation by the federal government; its prices have become regular subjects for Presidential "jawboning"; and it is now under pressure to direct its innovative efforts toward improved energy efficiency. In short, the innovative priorities of this industry are increasingly set by public policy, and its price decisions are increasingly made in anticipation of intense public scrutiny.

II. The Development of Consensual Federalism

The American pattern of federalism, characterized by state and local administration within a framework of federal aid and generally loose (though time- and energy-consuming) federal supervision, has evolved profoundly over the past several decades. In consequence, virtually all public investment actions in urban areas today require the active cooperation of at least two levels of government, and many require the cooperation of four — federal, state, regional and local. Because this pattern places such a high premium on consensus among the affected parties at all levels of government, it may be labeled "consensual" federalism.

By way of illustration, most key urban highway and transit investment decisions require explicit initiative by the state highway department and/or the regional transit authority. Increasingly, it is required that the local governments directly affected share in this initiative.[11] The proposals are subject to advisory, but virtually binding, review by the regional planning agency. Increasingly, it must be demonstrated that they merit priority within the framework of a comprehensive regional transportation plan and schedule of capital improvements.[12] Approvals by

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America, Transportation Facts and Trends, Quarterly Supplement— March 1975, at 4, 5 (1975); U.S. Dep't of Transportation, Summary of National Transit Statistics, 1973, at 22 (U.S. Government Printing Office Nov., 1973).

11. The Federal-Aid Highway Act of 1973, §§ 109(a), (b), 121(a), 137(b), 23 U.S.C. §§ 103(d), (e)(4), 105(d), 142(c) (Supp. III, 1973), for example, requires local initiative before any urban systems highway (or transit substitute) project may be undertaken and before any interstate highway project may be withdrawn under the interstate transfer provision. The House version of the National Mass Transportation Assistance Act of 1974 would have given individual localities absolute veto power over transit construction projects within their boundaries, no matter what their regional significance. H.R. 6452, 93d Cong., 1st Sess. (1974).

12. *See* note 27 and accompanying text *infra*.

one or more federal agencies are required for each decision to allocate funds, to award a contract, or to approve a substantive product at every stage on the long path from planning, to environmental analysis, to preliminary engineering, to final engineering, and lastly, to actual construction. At some of these stages, advisory reviews are sought from a wide variety of state and federal agencies whose activities might conceivably be affected by the action contemplated. Finally, the procedural requirements are so complex, and they have evolved so rapidly in recent years, that parties left out of the emerging consensus on a project can nearly always find some plausible ground for legal challenge.

What all this adds up to is shared power with a vengeance — and a near guarantee of the graveyard for any project that arouses significant controversy.

III. Extension of Citizen Participation

If our system is less and less characterized by unrestrained capitalism, it is increasingly characterized by widespread private participation in public sector planning and decisionmaking. This may, indeed, be a case of a private-public equilibrium of power striving to maintain itself. The government as a whole has a greater impact than does the private sector, but the officials responsible for each program are compelled to seek far broader and more informed consent than was necessary as recently as a decade ago.

They are compelled to do so, moreover, in an atmosphere of severe citizen distrust for government, and with only minimal assistance at best from ongoing institutions able to cultivate and deliver political support. American political parties have become empty labels, and other major institutions such as labor unions, corporations, and churches generally have little ability to influence the political behavior of their members.

From the 1930's through the 1950's political scientists reported consistently that private interest group participation in policymaking was the norm of the American system, but that the participants were mainly paid officials of well-organized institutions. Edward Banfield, for example, in his book *Political Influence*,[13] reported on the major political issues that arose in Chicago during a two-year period in the late 1950's. He found that all were initiated by institutions, including public agencies,

13. E. Banfield, Political Influence 263 (1961).

a university, a newspaper, and a private hospital as well as major business enterprises.

An important recent phenomenon, however, has been the growth in political significance of popular movements that do not have major institutional bases. The two such movements that have had the greatest impact on urban development policy in recent years are the anti-highway movement and the environmental movement. Both depend predominantly for their success on a small core of voluntary and meagerly paid activists, supported by a far wider base of inactive but highly interested supporters.

These movements are most effective in opposition to development proposals, even though many of their leaders and members are extremely anxious to be constructive. The fact is that the major source of mobilizing energy for such movements, almost inevitably, is indignation. Further, the stopping of a highway or power plant is a clear-cut objective with which a broad constituency of ordinary citizens can identify. By contrast, persuading the American people to buy fewer cars, to ride transit, or to consume less electricity is far more frustrating and esoteric work. The actual development of improved mass transit and non-polluting sources of power, moreover, are long-term tasks for major institutions with great technical and financial resources at their disposal.

The movements have, however, enjoyed remarkable successes in some areas. They have helped shape major portions of the recent agenda of American politics, bring about important alterations in the processes of development planning and decisionmaking, and shape the climate of public opinion within which urban planning and development now occur.[14]

In at least two very important ways, however, the growth of participation has been an important *conservative* influence.[15] Established institutions participate in politics as much to serve their expansion needs as

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14. A comprehensive study of the recent influence of voluntaristic movements in American urban affairs would have to consider the impact of the civil rights movement, the welfare rights movement, and a variety of other popular movements along with the anti-highway and environmental movements. We have chosen to keep the focus of this piece, however, confined to urban physical development. *Cf. generally* Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction,* 122 U. PA. L. REV. 1 (1973).

15. The term "conservative" is here employed in its original sense, denoting resistance to change.

to avert threats. In the fields of land use and transportation, for example, business and labor interests typically press for increased construction activity, and seek to head off regulatory actions that might hinder their freewheeling activities. The popular movements, however, tend to oppose any construction that is likely to have significant disruptive impact and to support increasingly severe regulation of private investment activity. Their recent successes have tended to render disruptive or environmentally harmful projects virtually impossible to implement, insofar as they are public or require public approval.

At the same time, the successes of these movements challenge development bureaucracies to devise means of achieving their objectives *without* disrupting neighborhoods or harming the environment. Certain questions must increasingly be addressed: How can urban mobility needs be met *without* the construction of new expressways through developed areas and open space reserves? How can cities be kept vital and renewed *without* large-scale slum clearance? How can energy needs be met *without* fouling the air, stripping the countryside, or exposing large population concentrations to the risk of radioactive leaks?

It is extremely healthy that such questions are being posed. The troubling issue is whether anyone can answer them — or, rather, whether the standards of success in coping with these challenges are being set at reasonable levels. Regardless of one's normative evaluation, it is clear that the participatory movement has been a major conservative influence in its resistance to disruptive development activity, yet a major spur to innovation in its establishment of new constraints upon successful development.

IV. The Quest for Comprehensiveness

Since 1962 federal law has required that highway projects be developed within the framework of a comprehensive and continuing planning process carried on cooperatively by states and local communities.[16] During the years immediately following enactment of this requirement, millions of dollars were invested by the Federal Highway Administration (FHWA) in highly sophisticated and data-hungry traffic forecasting exercises. Though the studies were conducted under the nominal direction of policy committees that involved regional and local agency participation, in practice they were dominated almost everywhere by state

16. *See* 23 U.S.C. § 134(a) (1970).

highway departments institutionally, and by highway engineering professionals intellectually.[17]

There were four central constraints and assumptions that guided these studies — federal highway statutes and regulations that required regional highway plans to strive to accommodate predicted travel demand twenty years ahead;[18] the ongoing trends of rapidly rising motor vehicle use and declining transit patronage; the predominant highway engineering view that transportation planning should serve rather than seek to alter observed behavioral trends; and the availability of large-scale federal aid for highway but not for transit investment.

Not surprisingly, these FHWA-funded studies universally concluded that urban regions required massive expressway investment.[19] Some included transit investment recommendations as well — particularly to serve recently developed suburban areas—but resources and strong institutions were generally lacking in the mid-1960's to move expensive transit proposals forward. Thus even when paper plans had some claim of being modally "balanced," implementation consisted overwhelmingly of highway investment. The major function of this transportation planning was to help highway engineers determine the precise capacity to build into their designs.

Following the initial burst of activity after 1962, transportation planning became relatively dormant in most regions for half a decade or so. During the past several years, however, a new burst of intense planning activity has commenced. It has been shaped significantly by new planning assumptions and requirements. Culturally, it has had to accommodate the anti-highway, environmental and citizen participation movements—seeking immediately to protect local neighborhood and environmental values, but also expressing a more diffuse yearning for qualitative improvement, as opposed to quantitative growth, in our national life. Legally, this planning activity has been inspired by the transit acts of 1970

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17. *Cf.* R. GAKENHEIMER, TRANSPORTATION PLANNING AS RESPONSE TO CONTROVERSY: THE BOSTON CASE (1975); A. LUPO, F. COLCORD & E. FOWLER, RITES OF WAY 139-53, 188-203 (1971).

18. *See* 23 U.S.C. § 109(b) (1970); 23 C.F.R. pt. 625 (1975).

19. Several papers dealing with planning for transportation systems are contained in HIGHWAY RESEARCH BD., HIGHWAY RESEARCH RECORD No. 238 (1968). This book contains discussions of the development of the transportation systems in the Chicago and Seattle metropolitan regions. *Id.* at 103-22. *See also* Gakenheimer, *The Transition in Urban Transportation Planning*, 7 HIGH SPEED GROUND TRANSP. J. 129 (1973).

and 1971,[20] which marked the coming of age of urban transit as a major federal priority, and by the National Environmental Policy Act of 1969 (NEPA),[21] which requires a comprehensive analysis of alternatives (including intermodel and no-build alternatives) before definitive public investment decisions are made.[22]

Working within this framework of public sentiment and law the U.S. Department of Transportation, with an enlarged and increasingly self-confident transit component, has pressed successfully over the past several years for major change in federal planning requirements. Myriads of new regulations have been promulgated,[23] the basic aims of which include comprehensive planning in practice, including at least transit and land use planning on a par with highway planning; strict compliance with all environmental requirements; full opportunity for citizen participation at all planning stages; and enhancement of the local government and regional planning agency role in urban transportation planning, while reducing the state role insofar as possible to the provision of funds and construction services.

Except for certain apects of this last aim, these are clearly appropriate objectives. In practice, however, compliance with the new regulations requires an enormous amount of staff effort and frequently entails very substantial delay in moving even the most clearly desirable and consensual projects forward. The federal effort to alter institutional relationships at the regional level, moreover, has added new opportunities for conflict and confusion and has tended to sap the decisionmaking process

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20. *See, e.g.*, Urban Mass Transportation Assistance Act of 1970 § 1, 49 U.S.C. § 1601(a) (1970); National Mass Transportation Assistance Act of 1974 § 2, 49 U.S.C. § 1601(b) (Supp. IV, 1974).

21. 42 U.S.C. §§ 4321-47 (1970), *as amended*, 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975).

22. *See, e.g.*, Friends of the Earth, Inc. v. Coleman, 518 F.2d 323, 327 (9th Cir. 1975); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 761 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (1970), *as amended*, 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975). *See also* note 63 *infra*.

23. *E.g.*, Final FHWA Regs. §§ 450.100-.122, 40 Fed. Reg. 42,975-84 (1975) (joint Federal Highway and Urban Mass Transportation Administration regulations on the Urban Transportation Planning Process); URBAN MASS TRANSP. ADMINISTRATION, UMTA EXTERNAL OPERATING MANUAL, URBAN MASS TRANSPORTATION PLANNING REQUIREMENTS GUIDE, app. 2 (1972) (UMTA Order 1000.2); C.F.R. pt. 771 (1975) (environmental impact and related statements); *id.* pt. 795 (1975) (environmental action plan requirement).

of its capacity for strong executive leadership. These negative consequences will now be briefly considered.

Time and effort required for compliance

Before a region can receive federal aid for urban transportation planning, let alone capital investment, four documents must be prepared (with opportunity for citizen participation), approved and annually revised. The first such required document is a prospectus, or "operations plan" as it was known formerly. The regulations require it to provide a broad overview of the planning process sufficiently detailed to describe currently valid organizational responsibilities, operating procedures, and a general planning program overview.[24] In principle, it should be a simple matter to provide such a description of institutional responsibilities and relationships. When three levels of government are seeking to evolve acceptable working relationships, however, and when agency mandates significantly overlap, clear-cut delineation of leadership roles and responsibilities may indeed be difficult.

A second requirement is a unified transportation planning work program that will provide a comprehensive description of all specific planning activities that are anticipated over the next one to two years. In addition to covering transportation planning for all modes, it must include support planning activities related to land use, social, economic and environmental factors.[25]

Thirdly, a transportation plan must be prepared. This document must include two "elements" — a "transportation systems management element" providing a comprehensive plan for managing both the existing and proposed transportation systems (including, for example, preferential treatment for car pools, bus lanes, parking policies, automobile travel restrictions where required to comply with federal environmental standards, and transit management improvements); and a "long range element" providing a twenty to thirty year planning analysis of future transportation needs as a function of shifts in travel demand and public policy objectives.[26]

The final requirement for a region to receive federal aid for urban transportation planning is a transportation improvement program. This

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24. *See* Final FHWA Reg. § 450.114(b) (1974), 40 Fed. Reg. 42,977 (1975).
25. *See id.* §§ 450.114(c), 450.120, 40 Fed Reg. 42,977-78.
26. *See id.* § 450.116, 40 Fed. Reg. 42,978.

document must describe the specific capital improvements that are recommended for advancement by the region during the next year or two and set forth an adequate planning analysis to justify assigning them such priority.[27]

Satisfying these requirements — annually, with full citizen participation, by means compatible with state and local law — is in many respects a highly salutary exercise. It can, however, crowd out most other planning activity. Producing the required documents must be the first priority of the planning process. Even if the process of preparing these documents tends over time to become bureaucratic and pro forma, to drive away elected officials and citizens who are impatient of voluminous "plans for planning" and who are anxious to deal with substantive controversies, or to breed impatience with the planning process on the part of all those anxious to see progress in implementing transportation improvements, such considerations must be viewed as secondary, because funds do not flow for anything until all these documents have been submitted and approved.[28]

In short, the proliferation of planning requirements, each admirable in and of itself, has tended to impose very substantial cost and delay upon the development process. Projects well along in the "pipeline" have been most severely affected, because most of the new regulations have been applied retroactively to all projects previously authorized to move forward (to subsequent planning or design stages) on the basis of federal regulations then in effect. In our frustration over such delays we have wondered at times whether the federal transportation bureaucracy has found a new and relatively low-visibility method of "impoundment" in its authority to issue planning regulations. While explicit impoundment is now regulated by Congress,[29] development officials throughout the nation can become so tangled in planning regulations that the flow of projects ready to move into construction is substantially slowed.

A more likely explanation, however, is simply that the quest for comprehensiveness has become engulfed in the normal bureaucratic

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27. *See id.* §§ 450.300-.320, 40 Fed. Reg. 42,982-83.

28. The Greater Boston region experienced a 20 month hiatus in federal transit planning assistance during 1973 and 1974. The delay was due in part to controversies over federal administrative policies that state officials considered unwise and/or at odds with Massachusetts law. *See* notes 39-47 and accompanying text *infra*.

29. Congressional Budget and Impoundment Control Act of 1974 §§ 1011-17, 31 U.S.C. §§ 1401-07 (Supp. IV, 1974).

tendency to elevate form over substance. Federal administrators are naturally reluctant to make substantive judgments about transportation projects and priorities in urban areas across the nation.[30] In consequence, they have concentrated their energy on developing and enforcing procedures. The numerous procedural checkpoints through which a project must pass on the path to implementation can be defended as substantively neutral. They enable administrators to avoid becoming caught in the middle of local controversies, to limit demand for the scarce resources at their disposal, and to require both statutory compliance with comprehensive planning requirements and the highest standards of professional practice without appearing to impose their own values upon urban regions.

These are eminently reasonable bureaucratic objectives. And there is a great deal to be said for this bureaucratic concentration on form rather than substance. The key question, of course, is whether the federal thrust toward perfecting comprehensive planning form has passed the point at which it contributes to good decisionmaking — by driving off lay participants, by greatly delaying the governmental response to emerging problems and public priorities, and by diverting available planning energy from substance to satisfying procedural requirements. The answer is not yet clear, but we do know that we are far from alone among those with recent experience in urban transportation planning who strongly suspect that this point has been passed.

Institutional arrangements

A key objective of recent federal planning regulations has been to secure adoption of a single institutional model for urban transportation planning throughout the nation. When they can possibly induce state and local officials to accept their preferred pattern, federal officials insist that governors, state legislatures, state departments of transportation, state highway agencies, regional transit authorities, and even local governments retire to a subordinate role in the urban transportation planning

30. *Cf., e.g.,* James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority, 359 F. Supp. 611 (E.D. Va. 1973). The Commissioner of the Virginia Highway Department stated in *James River* that "wherever possible in Virginia, federal funds are used on rural rather than urban projects because there is likely to be more environmental controversy over urban projects and the federal law requirements may thus be more difficult to meet than they would be in a rural area." *Id.* at 631.

process. The lead role in transportation planning is to be played by the metropolitan "A-95" land use planning agency.[31] When state and local officials are adamant in refusing to accept this pattern, federal officials reluctantly accept alternative arrangements, but they continue to press for "progress" toward the preferred pattern over time.[32]

From the federal standpoint, the recommended institutional pattern is a natural component of the broader procedural thrust toward comprehensive regional planning. Regional planning agencies have metropolitan jurisdiction, and they have been established to conduct comprehensive planning. Moreover, given the diversity and complexity of institutional arrangements that exist for transportation planning in urban regions across the country, one can easily empathize with the federal impulse to forge a simpler, more uniform pattern — and to deal with a single lead agency that can be held accountable for "management" of the planning process in each region.[33]

The most striking characteristics of the American federal pattern, however, are its diversity and its complex patterns of interaction among the levels of government. Most students of American democracy consider these characteristics to be strengths, not weaknesses, of the system.[34] Moreover, the federal administrative effort to establish its preferred institutional pattern leans against Congressional policy as articulated since 1962 and most recently affirmed in 1974.[35] Congress has provided that comprehensive transportation planning shall be carried out "cooperatively by States and the governing bodies of local communities."[36] The "A-95" planning agencies that current federal regulations seek to place in the lead role, however, are neither states nor localities.

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31. Final FHWA Reg. § 450.106, 40 Fed. Reg. 42,977 (1975). "A-95" agencies are those planning bodies and councils of governments that have been designated to perform the regional advisory review functions with respect to federal-aid project applications set forth in Office of Management and Budget Circular A-95, "Evaluation, Review, Coordination of Federal Assistance Programs and Projects," dated November 13, 1973.

32. *See* note 46 and accompanying text *infra*.

33. *See* 39 Fed. Reg. 29,660 (1974).

34. *See* text at note 16 *supra*.

35. National Mass Transportation Assistance Act of 1974 § 102(4), 49 U.S.C. § 1602(a)(2) (Supp. IV, 1974), *amending* 49 U.S.C. § 1602(a) (1970).

36. *Id.*

We hasten to add that by stopping short of making the preferred pattern an absolute requirement, the federal regulations do stay within the the letter of the law.[37] As noted above, state and local officials can, if they insist long and firmly enough, secure approval of patterns that involve co-equal participation by state, regional and local officials.[38] Thus, although a serious question may be raised about the propriety of federal pressure on behalf of the preferred pattern, the more significant issue is what the impact of this pattern is likely to be upon policy outcomes.

A major goal of state and local officials in some areas has been to strengthen executive leadership, to establish clear responsibility for key decisions by elected officials, and to maintain strong ties between planning and the capacity to implement—even while broadening the transportation planning process to achieve greater comprehensiveness and citizen participation. These objectives tend to run into headlong conflict with the idea of placing regional planning agencies at the summit of the transportation planning process.

We will illustrate these themes with reference to the Greater Boston region. The Massachusetts legislature has enacted major statutory provisions dealing with regional transportation planning in the past several years.[39] The clear direction it has charted is for transportation planning

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37. Final FHWA Reg. § 450.106, 40 Fed. Reg. 42,977 (1975). The regulations qualify the requirement that the agency designated to manage the regional transportation planning process should be the "A-95" agency by providing that this must be done "to the extent possible." *Id.* § 450.106(c), 40 Fed. Reg. 42,977. *But cf. id.* § 450.122(b)(2)(i), 40 Fed. Reg. 42,978, which provides that the FHWA and Urban Mass Transportation Administrators (UMTA) may certify a region on the condition that certain "corrective" actions be taken to bring the region into more perfect conformance with the policies set forth in the regulation. Given that designation of the "A-95" agency is a central policy set forth in the regulation, the regulation may reasonably be construed as giving the federal officials responsible for transportation planning certification authorization to require regions that cannot conform immediately to move toward the preferred pattern on pain of possible decertification at some future time.

38. *See* text at note 32 *supra.*

39. *See, e.g.,* MASS. ANN. LAWS ch. 161A §§ 1, 3, 5, 6, 7, 8, 23 (Supp. 1974), *amending* MASS. ANN. LAWS ch. 161A §§ 1, 3, 5, 6, 7, 8, 23 (1973); *id.* ch. 180, § 17H (Supp. 1974). The effect of the cited provisions is to vest in the Massachusetts Executive Office of Transportation and Construction, MASS. ANN. LAWS ch. 6A, §§ 19-30 (1973), *as amended,* MASS. ANN. LAWS ch. 6A, § 19 (Supp. 1974), responsibility for transit capital investment planning in the Greater Boston region. Previously, this authority had been exercised by the Massachusetts Bay Transportation Authority (MBTA), within the framework of comprehensive regional transportation planning conducted by the Massachusetts

to be directed by the Governor, subject to fiscal and legal guidlines provided by the legislature itself,[40] and carried out by the agencies with line authority for finance and implementation. The latter include, particularly, the Massachusetts Department of Public Works (MDPW),[41] the Massachusetts Bay Transportation Authority MBTA,[42] and the Executime Office of Transportation and Construction (EOTC),[43] which serves as the coordinating arm of the Governor.

The regional planning agency, the Metropolitan Area Planning Council (MAPC),[44] does not claim the leadership role. It has no responsibility for implementation, is constituted under its enabling legislation as an advisory council to both state and local government,[45] and is governed by a 133 member council which generally meets four evenings a year. With the exception of Boston each locality in the region, regardless of population, has one vote. The City of Boston has three votes, roughly one-tenth the number to which its population would entitle it if the council were constituted on the basis of one man, one vote. Finally, the MAPC has no capacity for strong executive leadership to overcome the extraordinary obstacles that currently stand in the path of any development project.

After nearly two years of difficult negotiation, Greater Boston recently secured federal approval of a governing structure for transportation planning that differs from the federally preferred pattern. The governing body, or Metropolitan Planning Organization, is a "committee of signa-

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Department of Public Works and the Executive Office of Transportation and Construction. The Executive Office, since its creation in 1971, has had effective line control of the comprehensive and highway planning activities conducted by the Department of Public Works. *See generally id.* chs. 29, 30, 31, *as amended,* (Supp. 1974). The MBTA retains responsibility for the engineering and construction of transit capital projects planned by the Executive Office. *Id.* ch. 161A § 5 (1973), *as amended,* (Supp. 1974).

40. *See, e.g., id* § 23 (1973), *as amended,* (Supp. 1974); ch. 765, [1972] Mass. Acts. 687-91 (accelerated highway program).

41. MDPW is the Commonwealth's highway department. *See* MASS. ANN. LAWS ch. 16 (1973), *as amended,* (Supp. 1974).

42. MBTA is the transit agency servicing the Greater Boston region. *See id.* ch. 161A (1973), *as amended,* (Supp. 1974).

43. *Id.* ch. 6A, §§ 19-30, *as amended,* MASS. ANN. LAWS ch. 6A, § 19 (Supp. 1974). *See* note 39 *supra.*

44. *See generally* MASS. ANN. LAWS ch. 40B, §§ 24-29 (1973).

45. *See id.* ch. 40B, § 25.

tories" to an interagency agreement.[46] The committee consists of five members — the chief executives of EOTC, MAPC, DPW, MBTA and the MBTA Advisory Board. The latter is a regional council, established by state law and composed of local elected officials, that has final power of approval over MBTA budgets and capital investment plans.[47]

We recognize that in many urban areas it has proven feasible, and been deemed desirable by state and local officials, to assign all responsibility for transportation planning to the regional planning agency. Indeed, in the smaller regions of Massachusetts, whose transportation problems are far simpler than those of Boston, this approach has been adopted. Thus our quarrel is not with the idea that regional planning agencies should ever play the lead role in urban transportation planning; it is rather with the idea that uniform adoption of this pattern should be a national objective. The regional planning agencies, with rare exceptions, have no authority to implement; they tend to be incapable of making controversial decisions, and they are far removed from the centers of political action where executive leadership is exercised, where

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46. The Metropolitan Planning Organization (MPO) was not finally established as a formal entity under federal regulations until late 1975, when the urban transportation planning regulations were officially promulgated. *See* Final FHWA Regs. §§ 450.104-.112, 40 Fed. Reg. 42,977 (1975). Interim federal guidelines published in early 1975, however, required state governors to designate an MPO for each urbanized region eligible for federal transit operating assistance, and required the MPO to take certain actions, in order for the region to be eligible for such assistance. 40 Fed. Reg. 2534-39 (1975). In response to these interim regulations, Governor Michael Dukakis of Massachusetts designated the Greater Boston "committee of signatories" as the region's MPO. Letter from Michael Dukakis, Governor of Mass. to Norbert Tiemann, Federal Highway Administrator and Frank Herringer, Urban Mass Transportation Administrator, March 4, 1975. The Federal Highway Administrator briefly acknowledged receipt of the Governor's letter, but no formal substantive response was forthcoming. Letter from Norbert Tiemann, Federal Highway Administrator to Governor Dukakis, March 18, 1975. Federal highway and transit officials privately expressed displeasure with the Governor's designation, which paralleled a similar designation under earlier regulations by Governor Francis W. Sargent in 1974, but they did not attempt to withhold federal assistance. It remains unclear whether their acceptance of the designation is temporary or long-term. In the only written substantive comment by a federal official on the Greater Boston designation to date, the Associate Federal Highway Administrator for Planning expressed his view that the Governor's designation "runs the potential risk of being unable to provide a responsive management structure for the planning process." Letter from William L. Mertz, Associate Administrator for Planning, FHWA to Robert W. Curry, Aug. 7, 1975.

47. *See* MASS. ANN. LAWS ch. 161A, §§ 3, 5, 7 (1973), *as amended,* (Supp. 1974).

funds are appropriated, and where statutory authority to carry out projects is secured. Thus, in situations of high controversy and/or complexity, when strong leadership is likely to be required for plan implementation, they tend to be inappropriate lead agencies.

The federal motives are good, but the federal actions in seeking to mandate new institutional arrangements at the regional level add up to an infringement upon the freedom of states and localities to shape their own governmental systems. Even more to the point of this Article, they seem likely over time to generate lengthy indecision and weak implementation in urban areas across the nation.

As such indecision and lack of implementation progress become apparent, learned observers will comment upon the deficiencies of local institutions and actors. But a system designed for paralysis greatly enhances the probability that they will *not* be able to operate effectively.

V. Judicial Activism and Preferred Values

Within the last decade we have witnessed the enactment of a host of new laws designed to protect the public health,[48] preserve and improve the environment,[49] improve the quality of governmental planning,[50] guarantee opportunities for citizen participation,[51] and secure the rights and benefits of those who may be adversely affected by development projects undertaken in the name of a broader public interest.[52]

The purpose of this new legislation was to underscore values that development agencies were thought to be neglecting in their zeal to carry out their central development missions. It has been substantially, though far from completely, successful in furthering this purpose. Perhaps

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48. *E.g.*, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (Supp. II, 1972); Clean Air Act, 42 U.S.C. §§ 1857a-*1* (1970), *as amended, id.* (Supp. IV, 1974).

49. *E.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970), *as amended*, 42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975); Noise Control Act of 1972, 42 U.S.C. § 4901-18 (Supp. II, 1972).

50. *E.g.*, 23 U.S.C. § 109(h) (1970) (highway planning process guidelines to insure consideration of social, economic and environmental factors); *id.* § 134 (1970) (urban transportation planning process).

51. *E.g.*, *id.* § 128 (1970) (hearings process for federally-aided highways); 49 U.S.C. § 1602(d) (1970) (public hearings for the federally-aided transit projects).

52. *E.g.*, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4621-55 (Supp. I, 1971).

inevitably, it has at the same time severely clouded the once clear-cut mandates of such agencies as the FHWA,[53] the Atomic Energy Commission,[54] and the Army Corps of Engineers.[55] In doing so, it has invited a rash of litigation and brought about a significant shift of policymaking responsibility from the executive branch to the courts. In addition, by calling into play certain "preferred" judicial values, this legislation has perhaps brought about an even greater substantive change in policy emphasis away from development objectives than was intended by those who enacted the new laws.

When legislatures impose statutory mandates upon executive agencies, they are also implicitly — within our system of government and jurisprudence — imposing a mandate on the courts to oversee proper implementation by the executive. And, when legislative directions are numerous, vague and/or contradictory, the potential for litigation and the role afforded the judiciary to set policy is necessarily increased.

It is our thesis that if judicial activism in the review of agency action is primarily a product of legislative mandates in tension with one another, it is secondarily a product of the judiciary's own priorities. The values protected by the new laws also occupy a favored place in the current framework of judicial priorities. This has led, we believe, to a very special judicial zeal in ensuring that they are protected and promoted when administrative decisions are made. It has contributed substantially to different judicial treatment being accorded agency regulatory action in pursuit of environmental values than is given to agency action in pursuit of developmental values. Finally, this judicial priority, together with other factors, has operated in such fashion as to call into question whether key balancing judgments in the effort to reconcile competing objectives of the American people are being made too often or too pervasively by the judiciary.

To illustrate these points, we explore briefly here two statutory mandates to executive agencies and the treatment they have been accorded

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53. *See, e.g.*, Swain v. Brinegar, 517 F.2d 766 (7th Cir. 1975), *rev'g* 378 F.Supp. 753 (S.D. Ill. 1974); Daly v. Volpe, 350 F.Supp. 252 (W.D. Wash. 1972).

54. *See, e.g.*, Scientist's Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

55. *See, e.g.*, Environmental Defense Fund, Inc. v. Corps of Eng'rs 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

by the courts: section 4(f) of the Department of Transportation Act,[56] and the Clean Air Act.[57]

Section 4(f) provides that the Secretary of Transportation shall not approve the use of publicly-owned parkland, recreational open spaces, or historical sites for federally-aided transportation development purposes unless he finds that "no feasible and prudent alternative" is available. From a common sense point of view, this provision appears to require the Secretary to consider fully all "feasible" alternatives to transportation proposals that require the use of section 4(f) land and to balance prudently the environmental cost of such proposals against the dislocation impact, dollar cost, and other factors militating against technically feasible alternatives.

In the leading case of *Citizens to Preserve Overton Park, Inc. v. Volpe*,[58] however, the United States Supreme Court rejected this view and read the "prudent" aspect of the statutory standard in the broadest possible manner, thereby placing the greatest possible constraint on the transportation agencies.[59] Moreover, in reaching this interpretation of the statute, the Court overturned long-standing judicial precedents and ex-

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56. 23 U.S.C. § 138 (1970); 49 U.S.C. § 1653(f) (1970).

57. 42 U.S.C. §§ 1857a-*1* (1970), *as amended*, (Supp. IV, 1974).

58. 401 U.S. 402 (1971).

59. Counsel for Secretary Volpe had argued, along the "common sense" lines described in the text, that the Secretary was afforded discretion under the statute to balance a wide range of factors in determining whether alternative routes would be "prudent." *Id.* at 411. The Court declared, however, that,

> [N]o such wide-ranging endeavor was intended. It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible. . . . [T]here will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business. . . .
>
> Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But *the very existence of the statutes indicates that protection of parkland was to be given paramount importance.* The few green havens that are public parks were not to be lost unless there were *truly unusual* factors present in a particular case or the cost of community disruption resulting from alternative routes reached *extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.*

Id. at 411-13 (emphasis added).

tended the frontiers of judicial review of "informal" agency action;[60] it discounted a reasonably strong legislative history in support of the interpretation giving the Secretary wide discretion in making balancing judgments under section 4(f);[61] and, finally, it avoided giving effect to another portion of the statutory language that implies, if not requires, that the Secretary defer to the judgment of the officials responsible for administering the section 4(f) land as to its "significance."[62]

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60. The Court held that § 4(f) does not require the Secretary to hold hearings or make formal findings based on such hearings in support of his determination. *Id.* at 409. His required determination falls into the category of "informal agency action"—*i.e.* action that is neither rulemaking nor adjudication under the Administration Procedure Act, 5 U.S.C. §§ 551-59 (1970), and which is therefore not required to be taken on the basis of formal hearings under that Act.

The courts have held over the years that informal agency action should be reversed if it is clearly arbitrary, capricious or otherwise not in accordance with law. *See, e.g.*, Maryland-Nat'l Capital Park and Planning Comm'n v. Lynn, 514 F.2d 829 (D.C. Cir. 1975); Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973); 5 U.S.C. § 706(2)(A) (1970). *Overton Park*, however, represents the first time that the Court saw fit to establish guidelines for the review by lower courts of such action, and it set especially stringent guidelines. *See The Supreme Court, 1970 Term*, 85 HARV. L. REV. 315 (1971). For example, the Court expressly limited a rule of 30 years' standing that administrators should not—even in the review of formal agency proceedings—be examined as to their mental processes in making decisions. 401 U.S. at 420-21. *See* United States v. Morgan, 313 U.S. 409, 422 (1941). Moreover, it authorized the lower court to probe the entire record in analyzing the Secretary's action, thereby applying a provision of the Administrative Procedure Act (the "whole record" requirement, 5 U.S.C. § 706 (1970)) that the Court had previously held to apply only to formal agency proceedings. 401 U.S. at 419-20.

Following the Supreme Court directive, the district court on remand developed elaborate procedures for enabling the plaintiffs to discover and expose the full administrative record, to probe the mental process of the decisionmakers, and to offer expert testimony about the merits of the various alternative routes. Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F. Supp. 873 (W.D. Tenn. 1972). It held 25 trial days of plenary hearing, followed by extensive posttrial briefings. As U.S. Circuit Judge Harold Leventhal has commented, "This is the 'hard look' doctrine in spades." Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 514 (1974).

61. The Court conceded in a footnote that both House and Senate Reports tended to support Secretary Volpe's view of the meaning of § 4(f). 401 U.S. at 412 n.29. It decided that it could safely ignore this history, however, because a Senate report in a previous Congress indicated "that the Secretary was to have limited authority." *Id.* Having thus found "ambiguity" in the legislative history, the Court determined that it should rely exclusively on its reading of the statutory language.

62. Section 4(f) provides explicitly that it applies to land "of national, State or local significance as determined by the Federal, State or local officials

We are personally in sympathy with the policy result reached by the Court in *Overton Park*. Moreover, it cannot be said that the Court's decision was "unreasonable" within the framework of judicial canons of statutory interpretation. The controversial features of the case stem largely, if not mainly, from the ambiguity of the statutory language and its legislative history. Nevertheless, the case also reveals a very special solicitousness on the part of the Court for environmental values, with the clear result that litigation is invited whenever use of section 4(f) land is authorized. Given that the courts have found the "no build" alternative to be one requiring evaluation,[63] that it is always "feasible," and that a strong case can always be made by environmental litigants that it is "prudent," the uncertainty facing officials who contemplate 4(f) takings can hardly be overestimated.[64]

In contrast to the treatment given section 4(f) is that accorded the Clean Air Act. Though enacted in 1970, the Act was a paper tiger to all but the automobile manufacturers until 1973, when it became apparent that a number of large metropolitan areas would have to impose significant restrictions upon automobile travel if they were to meet the

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having jurisdiction thereof . . . ." (In *Overton Park,* the affected park was municipal, and the taking was approved by the Memphis City Council, which had jurisdiction over it.) The Court chose to ignore this statutory language, as well as a strong legislative history supporting deference to clearly expressed local preferences, thus effectively requiring application of the feasible and prudent standard regardless of local approval. *See The Supreme Court, 1970 Term, supra* note 60, at 324.

63. *See, e.g.,* D.C. Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1030 (1972).

64. This uncertainty was apparently so great in the *Overton Park* case itself that Secretary Volpe ultimately decided that he was unable to determine conclusively that no feasible or prudent alternative, within the meaning of the Court, existed. He made this decision after an exhaustive review that included the preparation of a voluminous environmental impact and § 4(f) statement and a finding by the Federal Highway Administrator that the parkland route should be approved under § 4(f). Citizens to Preserve Overton Park, Inc. v. Volpe, 357 F. Supp. 846 (W.D. Tenn. 1973), *rev'd sub nom.* Citizens to Preserve Overton Park, Inc. v. Brinegar, 494 F.2d 1212 (6th Cir. 1974), *cert. denied sub nom.* Citizens to Preserve Overton Park, Inc. v. Smith, 421 U.S. 991 (1975). Nor apparently could he determine that such alternatives did exist. In any event, his judgment to *dis*approve the § 4(f) route was also overturned by the district court because he did not find affirmatively that there were feasible and prudent alternatives and he did not describe such alternatives. *Id.* For a detailed discussion of § 4(f) see Gray, *Section 4(f) of the Department of Transportation Act,* 32 MD. L. REV. 327 (1973).

Act's air quality standards by the deadlines imposed under the law.[65] As early as 1972, however, the Regional Office of the U.S. Environmental Protection Agency (EPA) in Boston came out publicly against further expressway construction in the Greater Boston area, on the ground that the trend toward increased motor vehicle travel in the region would have to be firmly reversed in the years ahead in order to comply with the Clean Air Act.[66]

In addition, courts have to date interpreted the Act as requiring "non-gradation" of existing air quality in areas where that quality is presently superior to the standards set by the Act.[67] As it is impossible to build a new highway or a transit station, or even a new building without degrading air quality in the immediate vicinity of the project, it is conceivable that the Clean Air Act, as so interpreted, may eventually halt most major construction activities in urban areas. EPA does not wish to interpret the Act so strictly,[68] but to date it has lost the major suit on this point brought by an environmental organization.[69]

This serves to highlight a key point. In construing the new environmental legislation, courts have not sought to curtail the role of government. As illustrated by the non-degradation case,[70] they have continued to extend the range of public *regulatory* authority over private sector activity. The major change of recent years is that legislatures have enacted and courts have vigorously enforced a wide variety of statutes that strengthen the hand of those who would oppose new *development* projects, whether proposed by public agencies or private developers.[71]

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65. *See* 38 Fed. Reg. 7323-30 (1973).

66. Letter from John McGlennon, Regional Environmental Protection Administrator, to Francis Sargent, Governor of Mass., Oct. 31, 1972.

67. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973).

68. EPA noted its concern over the social and economic impacts of the holding in Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), and stated that it has submitted legislation designed to eliminate the requirement that EPA enforce provisions of state implementation plans that provide for non-degradation of existing clean air. 39 Fed. Reg. 42,510 (1974).

69. Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973).

70. *Id.*

71. Under the Guidelines of the Council on Environmental Quality, 40 C.F.R. § 1500.5(a)(2) (1975), which implement NEPA, an "action" subject to the Act's environmental impact statement requirement includes federal projects or program activities that involve a "lease, permit, license, certificate or other entitlement for use." Private actions are thus covered when there is federal involve-

Moreover, judicial review of agency regulatory action has been characterized by the wide latitude afforded such agencies when they are in pursuit of environmental or health-related objectives. The recent First Circuit decision, *South Terminal Corp. v. United States Environmental Protection Agency*,[72] upholding EPA's transportation control strategy for the Greater Boston region, is a dramatic example of this tendency and merits brief exploration here.

The EPA plan before the court in *South Terminal* called, in part, for a twenty-five percent rollback in free parking provided by employers throughout Greater Boston, a freeze on new for-hire parking development in the regional core, elimination of on-street parking in the core area, except for residents, from seven to ten o'clock each weekday morning, and the maintenance of a forty percent vacancy rate in existing core area parking facilities until ten o'clock each weekday morning.[73]

Though the EPA data base was admittedly weak with respect to the nature, magnitude and public health consequences of the Greater Boston air pollution problem; though the magnitude of the effects of the proposed transportation controls on air pollution was predicted by EPA in a most imprecise fashion; though the impact of the plan upon the social and economic life of the region was generally unknown; and though the plan imposed major new restrictions upon existing uses of private

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ment through the means just described. *See, e.g.*, Friends of Mammoth v. Board of Supervisors, 500 P.2d 1360 (1972), in which the applicability of the California Environmental Quality Act to private developer proposals and the corresponding applicability of NEPA to such actions is discussed. *See also* Hagman, *NEPA's Progeny Inhabit the States—Were the Genes Defective?*, 7 URBAN L. ANN. 3 (1974).

The Massachusetts Environmenal Policy Act (MEPA), as originally enacted in 1972, was thought to apply to private developmental proposals that required any form of state governmental "work, project or activity" covered by the law, such as the granting of building permits or permits for curb cuts. MASS. ANN. LAWS ch. 30, §§ 61, 62 (1973). In 1974 the Massachusetts General Court enacted legislation that sought to amend MEPA to foreclose the requirement of extensive environmental impact reports under that law for private actions. *Id.* § 62 (Supp. 1974), *amending* MASS. ANN. LAWS ch. 30, § 62 (1973). The amendment, however, did not expressly limit the broad provisions found in other parts of MEPA, which call for consideration of a wide range of environmental issues connected with any proposed work, project or activity. *Id.* It may very well be, then, that the 1974 amendment will generate still greater confusion in the implementation of MEPA and litigation over its applicability to private activities. *Cf.* note 107 and accompanying text *infra.*

72. 504 F.2d 646 (1st Cir. 1974).

73. *See generally* 40 C.F.R. § 52.1128 (1974).

property rather than simply upon proposed future uses, the court held that, assuming the agency could satisfy "minimal standards of rationality" in establishing the technical basis for its plan,[74] every portion of the EPA plan was lawful.

The court did express some doubt that, on the record before it, EPA had satisfactorily established that the magnitude of the air pollution problem in Boston was what it had contended. Citing the "clear error of judgment" test articulated in *Overton Park*,[75] the court remanded to EPA for a further hearing and for improved technical documentation of the need for the control plan in order to achieve the statutory standards.[76] Nevertheless, the "minimal standard of rationality" test described by the court for review of EPA's decision was the least demanding possible.[77] Any developmental agency would today be delighted if its environmental impact statements could be evaluated on the basis of such a standard.[78]

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74. 504 F.2d at 655.

75. *Id.*

76. *Id.* at 681-82.

77. The court states further that in ascertaining whether the EPA plan is "arbitrary or capricious,"

> [W]e must bear in mind that Congress lodged with EPA, not the courts, the discretion to choose among alternative strategies. Unless demonstrably capricious—such as much less costly but equally effective alternatives were rejected or the required technology is unavailable—the Administrator's choices may not be overturned. . . . Of course, neither EPA nor this court has any right to decide that it is better to maintain pollutants at a level hazardous to health than to require the degree of public sacrifice needed to reduce them to tolerable limits.

Id. at 655-56. There is some doubt as to the scope of the *Overton Park* rule and its application in litigation reviewing EPA rulemaking. *See* Note, *Review of EPA's Significant Deterioration Regulations: An Example of the Difficulties of the Agency-Court Partnership in Environmental Law*, 61 VA. L. REV. 1115, 1141-50 (1975).

78. The Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1970), standing alone, might provide something closer to the restrained level of judicial review desired by the development agencies. Under the doctrine articulated by Judge Wright in Calvert Cliffs' Coordinating Comm. Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), however, the effect of the addition of NEPA is to require a "particular sort of careful and informed decisionmaking process" that creates substantive duties on the courts to strike down any agency's decision on the merits if it is shown that "the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values." *Id.* at 1115. This standard, coupled with the freedom afforded to judges under the "clear error of judgment" test to give more or less weight to preferred values permits a correspondingly "particular sort of" judicial review of decisions

In upholding the EPA proposals as valid within the "arbitrary and capricious" test,[79] the court of appeals emphasized the great reach of governmental power to protect the public health and the need for legislative and administrative bodies to be permitted the reasonable exercise of judgment in determining how far to exercise this power. In rejecting petitioners' constitutional objections based on "excessive delegation" and other claims, the court made clear that when information is necessarily imperfect, the requirements of public health, as long as they are determined "rationally," must prevail.[80]

South Terminal, in brief, appears to rest on the following tenets. First, courts should be particularly loathe to substitute their judgment for that of an environmental agency like EPA. They should grant far more than the usual lip service paid to the principle of "deference" to administrative agencies under the "arbitrary and capricious" doctrine in other contexts. Second, the objective of preserving the public health is of overriding public importance and should be recognized as such by the courts. A related ground for the decision is that EPA has been instructed by Congress simply to protect the public health, not to balance this objective against the social and economic costs of achieving it.[81]

In sum, *regulatory* activity, particularly that in pursuit of environmental or health-related objectives, by comparison with public *development* activity, does not bring most of the new constraints upon public action into play. In rough order of significance, we believe that the following are the reasons for this differential judicial treatment: the more straightforward nature of the statutory mandates guiding the

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by development agencies affecting the environment. *See The Supreme Court, 1970 Term, supra* note 60, at 318; Comment, Citizens to Preserve Overton Park, Inc. v. Volpe: *Environmental Law and the Scope of Judicial Review,* 24 STAN. L. REV. 1117 (1972); *cf.* Duquesne Light Co. v. EPA, No. 72-1542 (3d Cir., Aug. 21, 1975). *See generally* Note, *Evolving Judicial Standards Under the National Environmental Policy Act and the Challenge of the Alaska Pipeline,* 81 YALE L.J. 1592 (1972).

79. 504 F.2d at 671.

80. *Id.* at 676.

81. *Id.* at 675. The court remarked that "[m]inimum public health requirements are often, perhaps usually, set without consideration of other economic impact" and held that EPA was not required to consider social or economic costs in establishing its air pollution implementation plans. *Id. But cf.* Daly v. Volpe, 514 F.2d 1106, 1110 (9th Cir. 1975) (balancing interstate highway traffic-moving goals with environmental goals); Natural Resources Defense Council, Inc. v. TVA, 502 F.2d 852, 854 (6th Cir. 1974) (balancing benefits of a coal purchasing policy with environmental goals).

regulatory agencies; the special protectiveness that courts bring to the substantive values entrusted to the regulatory agencies; and the differing nature of the unintended side-effects of regulatory as compared with development activities. These bases for judicial distinction will now be briefly considered.

The nature of the statutory mandates

Congress has, in effect, instructed developmental agencies to build, but has erected a complex web of qualifiers around this basic instruction. For example, FHWA has a mandate to bring about construction of the interstate highway systems.[82] It is not to build interstate highways through parkland, however, unless there is "no feasible and prudent alternative,"[83] and one alternative that must be considered is *not* to build.[84] Nor can federally assisted highways be constructed through developed areas unless the stringent requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 can be satisfied.[85]

Similarly, FHWA is enjoined from building until it has conducted a thorough analysis of all discoverable environmental consequences of its proposed action and of the reasonable alternatives to it, including the "no build" alternative. This analysis, required by NEPA, must be carried out with wide opportunity for public comment and in accord with elaborate procedures that have continuously evolved over the past several years in response to judicial decisions.[86]

Such Congressional qualifications (and we have merely scratched the surface) to the development mandate of FHWA open up broad opportunities for judicial policymaking. Indeed, courts have no choice but to ensure as best they can that the restraints imposed by Congress are respected by the developmental agency, even as it continues to emphasize its central mission. The right balance to be drawn, however, is anything but obvious.

By contrast, the Clean Air Act instructs EPA to prevent air quality degradation and levels of air pollution that may endanger public health.

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82. 23 U.S.C. § 101(b) (1970).

83. *Id.* § 138.

84. *See, e.g.,* Appalachian Mountain Club v. Brinegar, 394 F. Supp. 105 (D.N.H. 1975). *See also* note 63 and accompanying text *supra.*

85. *See* 42 U.S.C. §§ 4601-55 (Supp. I, 1971).

86. *See* 23 C.F.R. pt. 771 (1975).

When it develops air quality implementation plans to implement this Congressional directive,[87] EPA is not subject to any qualifying substantive mandates. It is not, for example, required to balance its public health mission against a mission to build anything or to promote the economy.[88] Its mission is absolutely clear-cut. It is restrained only by the standards of judicial review found in the Administrative Procedure Act,[89] which require that its decisions be within the scope of its authority and substantively within the zone of "rationality."[90]

Clearly, then, Congress has provided far less opportunity for judicial activism in qualifying the Clean Air Act mandate than it has with respect to the development mandate of the FHWA.

Preferred judicial values

Congressional clarity does not tell the entire story, however. As Circuit Judge Harold Leventhal has recently written, the courts have "shared the public sense of urgency reflected in the new [environmental] laws."[91] Citing a recent decision by the court of which he is a member, he writes as follows:

> The solicitude which has generally characterized judicial review of environmental issues was perhaps most openly expressed in the January 1971 opinion of our court in *Environmental Defense Fund, Inc. v. Ruckelshaus.* Chief Judge Bazelon states:
>
> "We stand on the threshhold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. . . .
>
> [C]ourts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. *These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.*"[92]

Leventhal himself devotes substantial attention to "the ultimate question . . . whether there should be judicial review of decisions by environmental

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87. 42 U.S.C. § 1857c-5 (1970).

88. Note 78 *supra.*

89. 5 U.S.C. §§ 551-59 (1970).

90. This is not to say that EPA has never been subjected to the "searching and careful" review called for in *Overton Park. See* note 60 *supra,* note 98 *infra.*

91. Leventhal, *supra* note 60, at 510.

92. *Id.* at 512 (emphasis added).

agencies at all."[93] He is extremely troubled by the cost and delay that can be imposed upon environmental agencies by litigation. He concludes that judicial review cannot be eliminated entirely, but rather that inquiry should focus on how to simplify and speed judicial review, as well as how to increase the proficiency of judges in dealing with environmental issues.[94]

Strikingly, in his argument Judge Leventhal never considers the *possibility* that a streamlining of judicial procedures for the review of developmental agency decisions may be warranted. His agreement with Judge Bazelon on the value priorities of the judicial branch appears to have shaped the entire mind set that he brings to analysis of these issues.

This is not to say, of course, that courts are unaware of the extraordinary challenge posed by the new environmental laws for developmental agencies.[95] In a brief aside Leventhal writes that, "One may muse on whether the judicial construction of NEPA would be as broad if the courts were subject to the requirements of the Act . . . ."[96] Similarly, of course, one may speculate on whether the environmental regulatory agencies would propose plans as strong as the transportation control plan

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93. *Id.* at 541.

94. *Id.* at 554-55.

95. The court in Environmental Defense Fund v. Froehlke, 368 F. Supp. 231 (W.D. Mo. 1973), *aff'd sub nom.* Environmental Defense Fund v. Callaway, 497 F.2d 1340 (8th Cir. 1974), warning that Congress is becoming disenchanted with NEPA and the alleged "insipid and multitudinous" suits being filed under the law, expressed concern that the statute not be interpreted in a manner that permits the "views of plaintiffs in environmental cases [to] prevail over the considered judgments of the ultimate decisionmakers." *Id.* at 238-39. The court also described the standard of review it would give to environmental impact statements under NEPA:

> "Chronic faultfinding" by itself will not invalidate an EIS, and if a detailed study has been made in accord with the requirements of NEPA, the duty of the court will then be to determine whether the decision to proceed was arbitrary or capricious, and not whether another scientific study should be made.

Id. at 235, *quoting* Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va. 1973). *See also,* Note, D.C. Federation of Civic Associations v. Volpe: *Blessing or Burden,* 27 STAN. L. REV. 125 (1974), in which the appropriateness and efficacy of the preferred-value judicial review presumably given in the noted case is discussed. *But see Legislation Under NEPA: Plaintiff's Pyrrhic Victories Draw Congressional Fire, Judicial Warnings,* 39 MO. L. REV. 415, 428-29 (1974), in which one commentator responds to the *Froehlke* warning by urging more litigation and greater education of Congress and the public regarding the merit of suits under NEPA.

96. Leventhal, *supra* note 60, at 523 n.59.

for Greater Boston[97] if *they* were subject to NEPA or to a comparable requirement for economic and social impact statements.[98]

Differing side effects of regulatory and developmental activities

Finally, regulatory activity, by comparison with development activity, does not bring most of the new constraints upon public action into play.

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97. *See* 40 C.F.R. § 52.1123 (1974).

98. In recent months, at least one court has indicated concern with the economic implications of EPA's regulatory actions and, when arguably justified under a particular provision of the Clean Air Act, has held EPA to a rigorous standard of "rationality" on judicial review. Ethyl Corp. v. EPA, No. 73-2205 (D.C. Cir., Jan. 28, 1975), *as reported in* 5 ENVIRONMENTAL L. RPTR. 20,096 (1975). EPA had sought to impose a phased reduction of the lead content of gasoline, pursuant to § 211(c)(A) of the Clean Air Act, 42 U.S.C. § 1857-6c (c)(1)(A) (1970). The statute authorized EPA to "control or prohibit" such additives "if any emission products of such fuel or fuel additive will endanger the public health or welfare," *id.* at 20,098, but only after "consideration," pursuant to 42 U.S.C. § 1857-6c(c)(2)(A) (1970), of "all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 1857f-1," which calls for setting of standards for motor vehicle engines. *Id.* at 20,099. The latter is one of the few provisions of law requiring EPA to consider economic factors in making its health regulatory judgments. In a lengthy opinion, Judge Wilkey, writing for the majority, rejected EPA's reasoning that led it from the premise that lead is emitted from motor vehicles using leaded fuel to the conclusion that such emissions "will endanger" health or welfare within the meaning of the Act. In making this finding, the court noted its concern over the economic impact of EPA's regulatory judgment on the refining industry and on the national consumption of fuel at a time when conservation was extremely important. Ethyl Corp., *supra* at 30,103. In an even more lengthy dissent, Judge Wright asserted that, "I suspect that the rigor of the majority's review and its hostility to these regulations are related to the energy crisis." *Id.* at 20,146. He declared,

> The majority tells us that the Administrator, the environmental expert installed and staffed by Congress, has, Hamlet-like, stabbed blindly "through a curtain of ignorance, inflicting anguish, but in our judgment, not rationally solving the problem." . . . I suggest, to the contrary, that it is the majority that, without scientific background or access to expertise, is stabbing blindly through a curtain of ignorance. And, with due deference to the "anguish" the Administrator has inflicted on the suppliers of lead for the petroleum industry, it is the anguish of children and urban adults who must continue to breathe our lead-polluted air that moves me.

Id. The thrust of Judge Wright's strenuous dissent is that a very restrained standard of review should be given EPA in this instance. His assertion of a preferred value motivation of the majority is the converse of the thesis being presented in this Article, and further demonstrates the freedom that the "clear error of judgment" test affords the judiciary in setting policy according to its own priorities. On March 18, 1975, the D.C. Circuit Court of Appeals voted 6-3 to rehear the case *en banc*. *Id.* at 10,052.

The regulatory agency itself does not threaten public open space, displace residents, or pollute the air. On the contrary, its mission is to restrain those who would bring about such consequences.

Nor does regulatory activity intrude among the values cited by Judge Bazelon as having "always had a special claim to judicial protection."[99] Its purposes are generally to protect life and health. What it frequently threatens are economic values and interests. It is these, however, that Judge Bazelon explicitly cites as meriting secondary consideration.[100]

This set of judicial priorities is well illustrated by the established rule that environmental agencies can be sued for *in*action,[101] whereas developmental agencies can in general be sued only for decisions *to* act. The justification for this rule is reasonable. Public health and safety can be severely compromised by regulatory inaction. The interesting point in the present context, of course, is that economic values can be compromised by the failure of a development agency vigorously to carry out *its* mandate. But the courts clearly view this as a less serious problem.[102] As a result courts are disinclined to elevate the priority of a development mandate when it must be balanced against mandates for environmental protection, public health, citizen participation, or the rights of citizens to avoid being put out of their homes.

For all these reasons, judicial activism on behalf of the environment, operating within a framework of new legislative mandates and a favorable climate of public opinion, has tended—from the standpoint of urban physical development—to be a profoundly conservative force. By "conservative," of course, we do not mean pro-business, anti-liberal, or resistant to the extension of public authority. We use the term, rather, as defined earlier in its original and strict sense, denoting resistance to change.

On the whole, we view the recent environmental, relocation and citizen participation legislation as long overdue. As a nation, we have long had a tendency toward uncritical enthusiasm about investment activity, little tempered by concern about its harmful external impacts.

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99. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971).

100. *Id.*

101. Environmental Defense Fund, Inc. v. EPA, 465 F.2d 528 (D.C. Cir. 1972) (remand for failure to prohibit use of aldrin and dieldrin pesticides). *See generally* Leventhal, *supra* note 60, at 530.

102. *See* note 92 and accompanying text *supra.*

During the 1950's and 1960's we embarked for the first time on highly ambitious exercises in public development activity, most notably the urban renewal and highway programs. By the mid-sixties, the highway program alone was displacing 35,000 people a year from their homes, while also destroying parks, fostering urban sprawl, and undermining the strength of mass transit throughout urban America.[103]

There is a serious structural question, however, as to how the competing objectives of the American people should be balanced in our governmental system. We have recognized here that when legislatures articulate numerous objectives, criteria and procedural mandates, a great many judgments and policy decisions must inevitably be made by other public officials. The key question for any governmental system, however, is the extent to which such decisions should be made by the executive as opposed to the judiciary.

The executive branch clearly has the main responsibility for program implementation. It possesses a high degree of expertise, and, most importantly, it is tied closely into the democratic process by its hierarchical responsibility to an elected chief and its dependence upon legislative favor both for funds and for renewals and extensions of its programmatic mandates.

The judicial branch, by contrast, is more remote and in most respects less expert. Its expertise lies in the balancing of public imperatives with private rights. It is highly sensitive to the rights of minorities as well as to the enthusiasms of majorities,[104] and it is less likely than specific executive agencies to be carried away by the requirements of narrow, specialized public missions to the exclusion of other important societal values.[105]

The need, clearly, is for a healthy balance between the governmental roles of the executive and judicial branches as well as among the many values entrusted to their joint care. The issue is whether the scales in recent years have not tipped too far toward allowing courts to make the key balancing decisions.

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103. For recent statistics on human displacement and relocation necessitated by government projects, including highways, urban renewal and public housing see Leary & Turner, *The Injustice of "Just Compensation" to Fixed Income Recipients — Does Recent Legislation Fill the Void?*, 48 TEMPLE L. Q. 1 (1974).

104. *See generally* Cox, *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91 (1966).

105. *See id.*; Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

Whether one believes that the pendulum has recently swung too far will generally depend on one's attitudes toward the substantive values that tend to be favored by each branch.[106] Those dissatisfied with the strong recent trend toward judicial review of developmental decisions—most notably business and labor interests—tend to be those who accord high priority to economic growth and infrastructure development. Those most pleased are the groups that give highest priority to environmental and neighborhood preservation.

For those who stand somewhere in the middle—who value all of these objectives—the choices are very difficult indeed. It may be noted that, without judicial prodding, the Boston region inside State Route 128 has witnessed a halt of all major expressway construction and has shifted from a highway to a transit dominant policy, including plans for major rapid transit extensions and other transit service improvements. Yet, even as the responsible state and regional officials have chosen this course, they have encountered the extraordinary sources of delay that now seem to be built into all of the nation's developmental processes. Personal experience suggests that much of this delay is rooted in the scores of internal administrative reviews and mountains of red tape that are routinely erected in the path of implementing a transit project. Much of this is explicitly attributed by federal transit officials to their anticipation of judicial review.

We conclude that the pendulum *has* swung a bit too far, and that we must at least find a way to simplify procedures, accelerate the decision process, and enable democratically elected officials to make more of the key balancing decisions.

If changes are to occur, they must come primarily from the Congress and the executive branch. Given the nature of the statutory language that Congress has enacted, the complex web of administrative regulations that have been developed around this language, and the judiciary's "preferred values," the courts are performing their role on judicial review quite predictably.

The questions are, first, whether Congress is capable of clarifying its priorities or setting more precise standards for judicial review that will encourage forbearance when the issues posed and impacts threatened are relatively minor; and, second, whether the executive branch is capable

106. *Cf.* Wright, *supra* note 105, at 803.

of simplifying its regulatory requirements with or without such Congressional action.

As for Congress, there are numerous, extremely difficult obstacles to the enactment of clarifying environmental legislation, and indeed, if worded poorly, such legislation might create more problems than it solves.[107] Moreover, the environmental regulations of the executive agencies are in large part a response to judicial decisions that found earlier, less complicated procedures inadequate. To analyze the law as

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107. A recent product of a pro-development effort to amend NEPA may offer an example of this point. After the Second Circuit's decision in Conservation Soc'y v. Secretary of Transp., 508 F.2d 927 (2d Cir. 1974), which held that FHWA must prepare its own NEPA impact statement rather than delegate the task to the Vermont Highway Department, FHWA, together with development interests, pressed Congress to amend the statute to permit delegation. 121 CONG. REC. 3000 (daily ed. Apr. 21, 1975). What emerged from this effort, however, was not a simple amendment that spoke in terms of the administrative law language of "delegation." Rather, Congress enacted a lengthy and involved addition to NEPA that provides that an EIS,

> Shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:
> (i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
> (ii) the responsible Federal official furnishes guidance and participates in such preparation,
> (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
> (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.
>
> The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

42 U.S.C.A. § 4332(2)(D) (Pamphlet No. 5, 1975).

In our view, it is likely that the amendment will spawn still another round of litigation testing the attempts of agencies to apply this new law. It is interesting to note that the various qualifiers to the original purpose — authorization of "delegation" — were added mainly at the urging of environmental groups; their explicit purpose was to create legislative history as well as statutory language that would blunt the impact of the amendment in terms of reducing environmental litigation under NEPA. *See* Comment, *Congress under Pressure to Amend NEPA to Allow State Participation in Impact Statement Preparation*, 5 ENVIRONMENTAL L. RPTR. 10,081, 10,084 n.7 (1975). *See generally* Note, *HUD's NEPA Responsibilities under the Housing and Community Development Act of 1974: Delegation or Derogation?* 10 URBAN L. ANN. 179 (1975).

it now stands on the basis of the Congressional mandates and the judicial policysetting that has occurred in their name, to distill from this law the basic and essential ingredients necessary to implement the statutes through regulations, and to devise simplified procedures that effectively promote the law while reducing the number of procedural hurdles, are formidable tasks indeed.

In sum, there are no easy answers to this dilemma of governmental balance. The need for a resolution is vital, however, and it increasingly preoccupies both those public officials in agencies who are entrusted with developmental responsibilities and those private sector leaders who are concerned about the continued vigor of our economic system.

Conclusion

The American system has always been characterized by the multiple opportunities it provides for veto. It remains very much a veto group system today, but one of rapidly changing configuration. Fifty years ago, the governmental system was weak but the private sector was extremely vigorous, free-wheeling, and unrestrained by regulation. Over time, however, the private sector has increasingly been domesticated and has seen its role reduced. During the fifties and sixties, government moved boldly into the development arena—most notably, in the urban renewal and interstate highway programs.

These programs were highly disruptive, and they quickly generated countervailing movements. The urban renewal program began as slum clearance and redevelopment. Within a decade, its emphasis shifted to rehabilitation and then to broader social and economic improvement programs for the *current* slum residents. The interstate highway program, enacted several years later, did not easily translate into a program that minimized disruption of existing patterns. It was, by its very nature, a highly disruptive program with enormous and relatively inflexible land requirements. Its base of support, however, was far broader and more powerful than that of the urban renewal program, and its ninety-percent matching formula, provided by an ever-full trust fund granary, provided an overwhelming temptation for state and local officials.

Even the interstate highway program has had to adapt in recent years, however. Planned expressways have been halted in locales as diverse as Phoenix, Miami, Minneapolis, Atlanta, Harrisburg, New Orleans, Portland and Hartford—not to mention such more familiar cases as Boston, Philadelphia, Chicago and the District of Columbia.

In a recent canvass of fifty-five urbanized areas, one of the authors and a colleague found only one such area that had not experienced intense controversy about planned expressways during the past several years. Typically, the controversy was still current unless the project in question had been abandoned or significantly modified to reduce community impact.[108]

In the Federal-Aid Highway Act of 1973,[109] Congress authorized the use of urban interstate allocations for alternative highway[110] or transit purposes.[111] The alternative highway uses may be anywhere in the same state as the abandoned expressway segment; alternative transit uses may be anywhere in the same metropolitan area. The availability of these new options, particularly the latter, effectively eliminated the greatest incentive for state and local officials to proceed with urban interstate projects in the face of intense local opposition: fear of being charged with the loss of large amounts of federal aid.[112]

We have, in short, decisively entered a new era with respect to urban physical development, one in which the private sector is regulated as never before, in which public agencies with developmental mandates are hemmed in by a dense forest of qualifiers and restrictions, and in which federal aid policy is being revised to offer state and local officials attractive alternatives to disruptive public works programs in urban areas.

As a result of these changes, a great deal of mindless development has been properly stalled in its tracks, and enormous progress has been made toward guaranteeing key societal values—most notably, environmental quality, neighborhood security (from disruption by public works, if not

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108. This canvass was conducted by phone between July and September, 1975, in order to select sites for closer investigation as part of a study of citizen participation in urban regional transportation planning, sponsored by FHWA. The prime contractor for this study is the firm of Parsons, Brinckerhoff, Quade & Douglas, Inc. The principal project investigator is Ms. Julie Hoover; Mr. Altshuler is senior project consultant.

109. Pub. L. No. 93-87, 87 Stat. 250 (codified in scattered sections of 23, 49 U.S.C.).

110. 23 U.S.C. § 103(e)(2) (1974).

111. *Id.* § 103(e)(4).

112. This provision was enacted primarily at the request of, and to accommodate, Massachusetts, and as of October, 1975, the largest interstate transfer approval — $671 million — has been for the abandoned Greater Boston expressways. Transfers have also been approved for the District of Columbia and Philadelphia, however, and as of this writing applications are expected shortly from Hartford and Portland. Possible transfers are also under serious consideration in Denver, Los Angeles, and Minneapolis-St. Paul.

by private vandalism), and participatory democracy. For environmentalists and planners, moreover, there is great satisfaction to be taken from the growing insistence on comprehensive planning,[113] rooted in the spreading perception that we live in a great ecological system, one in which nothing is truly isolated from anything else.

A significant danger remains, however, and its name is paralysis. The points of potential veto are proliferating at a remarkable rate. Increasingly they affect private as well as public development activity, and threaten nearly all projects that arouse any significant controversy with endless delay, if not with definitive rejection. Our system of shared power, in short, threatens to become a system of shared impotence—except for those whose entire mission is to block the initiatives of others.

The problem, of course, far more easily articulated than resolved, is how to achieve the right balance: a governmental system that will stop most undesirable development while permitting most desirable development to go forward with reasonable dispatch. More feasibly, perhaps, one can call upon planners to design courses of action that ingeniously and sensitively balance the manifold values that command priority in contemporary urban society. And one can seek governmental leaders who will take on the task of mobilizing widespread support for such conceptions, and who are capable of steering them—with patience, in a spirit of compromise, but with a clear and constant sense of purpose—through the shifting and infinitely complex shoals of our shared power system.

To articulate such job qualifications for planners and elected officials is to risk being labelled utopian. Our purpose, however, is less to exhort than to highlight the systemic biases of the emerging governmental system. Development has by no means become impossible, or come in practice to a halt. The probability that any given development idea will reach maturity, however, has been greatly reduced. The combination of energy, expertise, vision, judgment and tact required to conceive feasible new projects and to shepherd them through to implementation in the current environment is bound to be extremely rare. It must generally be sustained, moreover, for very long periods of time—periods that seem to become longer with every passing year.

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113. *Compare* Sullivan & Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement,* 9 URBAN L. ANN. 33 (1975), *with* Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Review: The Case Against,* 9 URBAN L. ANN. 69 (1975).

If the obstacles are daunting, the developments that finally emerge should be far less prone to have harmful side effects than those carried out in a more free-wheeling atmosphere. The hope, of course, must be that they can be accomplished in sufficient volume to keep our urban areas functioning effectively, in sufficient time to serve the needs that originally caused them to be planned, and without being so severely compromised along their paths to implementation that their effectiveness is lost.