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THE FEDERAL ROLE IN SOCIAL ORDERING: LESSONS FROM LABOR PROTECTION IN URBAN MASS TRANSIT

*Stephen D. Holt**

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I. Introduction

In contemporary public policy debates, there are two key challenges to the present system of social organization: a desire for private sector provision of many of the services delivered by government, and a desire to remove the federal government from state and local affairs.¹ These challenges are represented, respectively, by the potent ideologies of Libertarianism² and New Federalism.³ The cumulative

1. The central idea is that "nobody believes anymore that government delivers." Sanoff, *Nobody Believes Any More That Government Delivers*, U.S. NEWS & WORLD REP., Dec. 21, 1981, at 74-75 (interview with Peter F. Drucker, Clarke Professor of Social Science, Claremont Graduate School, California) [hereinafter cited as Sanoff].

2. As described in THE LIBERTARIAN MANIFESTO, Libertarianism centers on the absolute inviolability of person and property. It identifies the state as the chief aggressor against these basic rights. It seeks to thwart this through subjecting the state to the moral code applicable to individual actors. In other words, "regardless of popular sanction, War is Mass Murder, Conscription is Slavery, and Taxation is Robbery." In the context of this Article, the libertarian position is to oppose any government actions, such as regulations or subsidies that interfere with private property or the free market economy. M. ROTHBARD, FOR A NEW LIBERTY, THE LIBERTARIAN MANIFESTO 24-25 (rev. ed. 1978) [hereinafter cited as ROTHBARD]. In fact, "[t]he ultimate libertarian program may be summed up in one phrase: the abolition of the public sector, the conversion of all operations and services performed by the government into activities performed voluntarily by the private-enterprise economy." *Id.* at 200. See also Judis, *Libertarianism: Where the Left Meets the Right*, PROGRESSIVE, Sept. 1980, at 36-38 [hereinafter cited as Judis]; *The New Libertarians: Stripping Government of its Powers*, SAT. REV., Mar. 1980, at 21-24.

3. The most recent proposal to earn the label "New Federalism" is President Reagan's concept of assigning responsibility for a number of federal programs to state and local governments in connection with federal relinquishment of various revenue sources. 128 CONG. REC. H51, H54 (daily ed. Jan. 26, 1982) (State of the Union Address). It is motivated by a desire to have the programs be more responsive to their clients and financiers, to strengthen the flexibility of state and local governments, and generally to end the perceived "distortion in the vital functions of government." *Id.* This proposal is merely one specific programmatic initiative in the Reagan Administration's efforts to reduce simultaneously the federal and general governmental roles in American life. The merits of this wide-ranging policy thrust are the subject of contentious debate. See, e.g., *Why the New Federalism May Never Be*, BUS. WK., Feb. 8, 1982, at 27; *Issues in a New Federalism*, NAT'L CIVIC REV., Mar. 1982, at 126; Kinsley, *The Withering Away of the States*, THE NEW REPUBLIC, Mar. 28, 1981, at 17; "New Federalism," *Old Rap*, NEWSWEEK, Feb. 8, 1982, at 28; *Next: State v. State?*, U.S. NEWS & WORLD REP., July 12, 1982, at 76; *Are the States Ready for New Federalism?*, U.S. NEWS & WORLD REP., Mar. 29, 1982, at 54.

It should be noted that "New Federalism" also refers to the programs of the Nixon Administration centering around the general revenue sharing plan adopted as the State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 918 (1972). In this vein, the term means "the replacement of federal categorical programs by relatively discretionary grants to state and local governments." Pressman, *Political Implications of the New Federalism*, in FINANCING THE NEW FEDERALISM 13 (W. Oates ed. 1975).

effect of these forces is to reject the current federal role in social ordering. One means of critically analyzing this concept is to examine the development and character of the federal role in particular areas of social affairs. The purpose of this Article is to highlight lessons that may be learned from the area of labor protection in urban mass transit.

Public transportation is quite relevant to the issues of federal influence on local public service delivery, because the local transit industry is presently governed by the Urban Mass Transportation Act (UMT Act).⁴ This federal statute is representative of Washington's approach to public service delivery problems. Part II of this Article traces the development of federal intervention in the urban mass transit industry. The history of public transportation as an economic sector illustrates the problems of market and governmental failure that motivate and support the involvement of the federal government in this area of service delivery. The mode of involvement—the UMT Act—simultaneously provides badly needed financial assistance and imposes conditions on its receipt. Many of these conditions are extraneous to the policy goals represented by the fiscal redistribution. A particularly striking example is the guarantee of labor protection embodied by section 13(c) of the UMT Act.

The evolution of section 13(c) elucidates one manner in which extraneous conditions on federal financial assistance arise. Part III reviews labor relations in urban mass transit and the policy of federal labor protection. It also examines section 13(c), the law's impact on the industry, and its federalism and publicism⁵ implications. This discussion raises various institutional questions that are reflected in recent judicial activity. The cases and their antecedents illustrate the problems of the mode of social ordering represented by section 13(c).

The rapid rise of governmental, particularly federal, involvement in public transportation⁶ and the resulting complications have moti-

4. Pub. L. No. 88-365, 78 Stat. 302 (1964) (codified at 49 U.S.C. §§ 1601-1618 (1976 & Supp. IV 1980)).

5. The word "publicism" is coined here to refer to the relationship between the public and private sectors and the study of the role of each in our social system, just as "federalism" relates to these aspects of the central government's interaction with other levels of government. "Public" is used synonymously with "government." See also *infra* notes 238-58 and accompanying text. But see Friedman, *Some Pet Peeves*, NEWSWEEK, Jan. 17, 1983, at 58.

6. Kilgour, *The Impact of Section 13(c) of the UMTA on Labor-Management Relations at BART*, 10 TRANSP. L.J. 289, 290 (1978) [hereinafter cited as Kilgour].

vated the development of alternative models of social ordering. Part IV considers these models. A simultaneous development has been a shift in political power toward those espousing theories of Libertarianism and New Federalism. Part IV also reviews federal governmental activities relating to mass transit labor protection in light of this change.

The dynamic context of an industry which has undergone extensive evolutionary change and of proposals aimed at prompting further changes requires an examination of the theoretical foundations that create the parameters for social ordering. This is the purpose of Part V. Part VI applies these concepts to urban mass transit and relates them to the new models that have been presented. Although it is impossible in this forum to provide answers to the questions of the proper federal or other role in social ordering, even in one particular industrial sector, it is possible to delineate the area within which debate and intelligent solutions must lie.

In the legal context, it is important to recognize and develop the role that the judiciary will have in these policy debates and their products. The courts are significantly involved in the issues underlying the federal role in social ordering, and they will continue to be. Part VII addresses this judicial role. It criticizes the current trend of case law and sets forth an alternative framework for future endeavor.

II. Intervention in Urban Mass Transit

A. Historical Perspective

1. *Market and Governmental Failures*

a. Technological Developments

Urban mass transit began in the 1820's and 1830's in the form of horsedrawn omnibuses and street railways. In the mid-nineteenth

During the consideration of the UMT Act, one estimate was that ninety-five percent of transit operations in the United States were privately owned and operated as late as 1963. H.R. REP. No. 204, 88th Cong., 1st Sess. 21 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2569, 2590. By 1967, only ten percent of transit systems were publicly owned, but sixty percent of total operating revenue and sixty-two percent of passenger trips were in public systems. Figures for 1978 indicated forty-eight percent of the systems were under public ownership, and these represented approximately ninety percent of revenues and trips. AMERICAN PUBLIC TRANSIT ASSOCIATION, TRANSIT FACT BOOK 38-39 (1978-79 ed.) [hereinafter cited as TRANSIT FACT BOOK].

century, steam locomotives and cable cars competed with the horse-drawn modes. Eventually, electric traction systems replaced these modes. Rapid transit lines were built in New York, Chicago, Boston, Philadelphia and Cleveland. By 1917, gasoline-powered motor vehicles in the form of five-to-seven passenger jitneys were an important element, and later motorbuses became common. The advent of the internal combustion engine also led to the emergence of the automobile and the present, predominantly private, urban transportation system.⁷

b. Structural Developments Within the Industry

The old street railway companies were private entities that operated on a single thoroughfare,⁸ under a franchise of the state or municipal government.⁹ As the industry converted from animal-labor to centrally-provided forms of locomotion, each city's transit companies consolidated and expanded.¹⁰ Although economically efficient, this created an industry characterized by the market failure situation of natural monopoly.¹¹ Though the franchising system allowed for regulation, governmental efforts to control the industry were largely ineffectual, and fares and other public concerns were regulated through free market competition.¹² In response to the monopoly problem engendered by consolidation, many jurisdictions attempted to increase public influence. This led to a chaotic arrangement in which the transit company and the municipality interacted in an atmosphere of perpetual conflict.¹³ Therefore, although mass transportation was

7. C. BURKE, *INNOVATION AND PUBLIC POLICY: THE CASE OF PERSONAL RAPID TRANSIT* 45-56 (1978) [hereinafter cited as BURKE]; E. SCHMIDT, *INDUSTRIAL RELATIONS IN URBAN TRANSPORTATION* 3-21, 23-24 (1937) [hereinafter cited as SCHMIDT].

8. G. SMERK, *URBAN MASS TRANSPORTATION: A DOZEN YEARS OF FEDERAL POLICY* 135 (1974) [hereinafter cited as SMERK].

9. SCHMIDT, *supra* note 7, at 52.

10. *Id.* at 36-38. Some companies were also consolidated into multi-city conglomerates. *Id.* at 38-39.

11. SMERK, *supra* note 8, at 135. Market failure here refers to occasions when the private market of free competition fails to achieve an efficient outcome. Efficiency in economic theory means a situation in which no person's position may improve without diminishing that of another. It is also known as "Pareto Optimality." See R. LIPSEY & P. STEINER, *ECONOMICS* 235 (6th ed. 1981) [hereinafter cited as LIPSEY & STEINER]; N. BARRETT, *THE THEORY OF MICROECONOMIC POLICY* 42-53 (1974) (identifies four incidences of market failure: failure to achieve equilibrium, monopoly, externalities and public goods) [hereinafter cited as BARRETT].

12. SCHMIDT, *supra* note 7, at 36, 55.

13. *Id.* at 55-62; see K. JENNINGS, J. SMITH & E. TRAYNHAM, *LABOR RELATIONS IN A PUBLIC SERVICE INDUSTRY: UNIONS, MANAGEMENT, AND THE PUBLIC INTEREST IN MASS TRANSIT* 3 (1978) [hereinafter cited as JENNINGS, SMITH & TRAYNHAM]; SMERK,

largely a private sector activity,¹⁴ the structure of the market encouraged significant public involvement.

During World War I, many companies went bankrupt. The industry never fully recovered.¹⁵ After a brief resurgence during World War II, the industry declined precipitously.¹⁶ The cause of this is a subject of debate.¹⁷ It is clear, however, that postwar urban America

supra note 8, at 138; Yago, *Urban Transportation in the Eighties*, in WINTER 1983 DEMOCRACY 43, 44 (1983) [hereinafter cited as Yago].

A key source of both control and conflict was the prescription of fixed fares and levels of service. Even though there was greater flexibility in more "modern" regulatory devices such as terminable permits and service-at-cost franchises, public entities remained involved in the workings of these privately-owned and operated enterprises. See SCHMIDT, *supra* note 7, at 55-62; Wickham, *Section 13(c) Labor Protective Agreements and Paratransit: Rethinking Labor Department Policy*, 27 U. KAN. L. REV. 63, 65 (1978) [hereinafter cited as Wickham].

14. Many of the early transit company franchises permitted public assumption of ownership, but few street railways were taken over by governmental units. Subway construction, with its higher costs and risks, had more public involvement, yet private companies remained in control. See SCHMIDT, *supra* note 7, at 64. The first cities to assume full ownership of their mass transit system were Seattle in 1919 and Detroit in 1922. *Id.* at 63, 69.

15. See BURKE, *supra* note 7, at 57, 60; SCHMIDT, *supra* note 9, at 44.

16. See BURKE, *supra* note 7, at 60; SMERK, *supra* note 8, at 138. Transit ridership reached a peak of 23.3 billion in 1945 and then fell rapidly to a low of 6.6 billion in 1972. TRANSIT FACT BOOK, *supra* note 6, at 26.

17. BURKE, *supra* note 7, at 57. One conspiratorial argument states that the oil, automobile and rubber companies destroyed the urban transit industry. *E.g.*, Snell, American Ground Transportation: A Proposal for Restructuring the Automobile, Truck, Bus, and Rail Industries, in *The Industrial Reorganization Act: Hearings on S. 1167 Before the Senate Subcomm. on Antitrust and Monopoly*, 93d Cong., 2d Sess. Part 4A (1974); Kwitny, *The Great Transportation Conspiracy*, HARPER'S MAG., Feb. 1981, at 13; Yago, *supra* note 14, at 45-46; *cf.* St. Clair, *The Motorization and Decline of Urban Public Transit, 1935-1950*, 41 J. OF ECON. HIST. 579 (Sept. 1981) (economic analysis of thesis that motor buses were part of an organized campaign to eliminate public transit). *But see* Burke, *The Myths of Mass Transit*, USA Today, July 1982, at 25, 26.

Another fault-based theory is that mass transit declined because of the improper pricing structures, arising from governmental funding decisions, of public and private modes. See L. FITCH & ASSOCIATES, URBAN TRANSPORTATION AND PUBLIC POLICY 22-24 (1964) [hereinafter cited as FITCH]. On the other hand, Meyer, Kain and Wohl advance the view that transit's troubles are due to the market's rationally responding to new land use patterns (for which the automobile was not primarily responsible) by turning away from the inappropriate and inadequate transit systems in favor of the car. See J. MEYER, J. KAIN & M. WOHL, THE URBAN TRANSPORTATION PROBLEM 360-62 (1965) [hereinafter cited as MEYER, KAIN & WOHL]. Underlying all of these ideas are the internal problems of the public transit industry that handicapped it in adapting to change; the industry was long subject to financial speculation, corruption, over-capitalization, and lack of innovation. See, *e.g.*, BURKE, *supra* note 7, at 50-51, 62; FITCH, *supra*, at 44; SCHMIDT, *supra* note 7, at 30-34; Yago, *supra* note 13, at 44.

consisted of decentralized metropolises spread over large geographic areas.¹⁸ This type of community is ill-suited for public transit modes, and the individualized transport provided by the automobile became essential to many Americans.¹⁹ Attempts by transit companies to adapt to the changed environment entailed major financial costs;²⁰ at the same time, ridership and fare revenues declined.²¹ To curb these

The federal government played a key role in the decline of transit. In the early 1930's, most of the street railway companies were part of power company trusts. Scandals in these conglomerates led to enactment of the Public Utility Holding Company Act of 1935, ch. 687, tit. I, 49 Stat. 803 (1935). In the divestiture aftermath of this law, the power companies disposed of their unprofitable transit operations and public transit lost the financial support of the trusts. BURKE, *supra* note 7, at 58; Saltzman, *The Decline of Transit*, in PUBLIC TRANSPORTATION: PLANNING, OPERATIONS, AND MANAGEMENT 34-35 (G. Gray & L. Hoel ed. 1979) [hereinafter cited as Saltzman, *The Decline of Transit*]; SMERK, *supra* note 8, at 136-37. New holding companies emerged to take control of these weak firms. The largest was National City Lines. General Motors and other auto-related companies used National City Lines to convert public transit to motor bus systems. BURKE, *supra* note 7, at 57; Saltzman, *The Decline of Transit*, *supra*, at 35-36; SMERK, *supra* note 8, at 137; see FITCH, *supra*, at 46. The federal government succeeded in dismantling National City Lines in an antitrust action, *see* United States v. National City Lines, Inc., 186 F.2d 562 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951), and another source of capital was lost. BURKE, *supra* note 7, at 59; Saltzman, *The Decline of Transit*, *supra*, at 36, 38. This occurred at the same time as federal housing (Veterans' Administration and Federal Housing Administration loans) and transportation (the Interstate Highway System) programs were promoting urban decentralization. *See, e.g.*, FITCH, *supra*, at 48; J. MEYER & J. GOMEZ-IBANEZ, AUTOS, TRANSIT AND CITIES 5, 7-9 (1981) [hereinafter cited as MEYER & GOMEZ-IBANEZ]; Saltzman, *The Decline of Transit*, *supra*, at 37-38.

It is instructive that federal intervention in disparate areas can exert so much influence that it unilaterally distorts a variety of other social systems. The result is that many of the economic and political failures that motivate and justify federal intervention may be federally caused.

18. MEYER & GOMEZ-IBANEZ, *supra* note 17, at 15-20; MEYER, KAIN & WOHL, *supra* note 17, at 36-62. *See* H. GOLDEN, URBANIZATION AND CITIES 302-07, 315, 322-23 (1981) [hereinafter cited as GOLDEN].

19. "In Levittown the automobile is the dominant, perhaps the only, means of transportation to work and the individual's main link to the outside world." GOLDEN, *supra* note 18, at 474. *See* M. DANIELSON, FEDERAL-METROPOLITAN POLITICS AND THE COMMUTER CRISIS 10 (1965) [hereinafter cited as DANIELSON]; MEYER & GOMEZ-IBANEZ, *supra* note 17, at 51-56; OWEN, TRANSPORTATION FOR CITIES 5-6 (1976) [hereinafter cited as OWEN].

20. For example, in 1955, the Urban Traffic and Transportation Board for the City of Philadelphia estimated that \$65 million to \$80 million would be needed to adequately modernize mass transit within the Philadelphia metropolitan area. SMERK, *supra* note 8, at 24.

21. After the 1945 peak of 23.3 billion, ridership fell to 17.3 billion in 1950, 11.5 billion in 1955, and 9.4 billion in 1960. TRANSIT FACT BOOK, *supra* note 6, at 26. In constant 1945 dollars, *see* BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, HANDBOOK OF LABOR STATISTICS, 1978 at 401 (1979), revenue fell from \$1.38 billion

increasing deficits, service frequency and quality were reduced and fares were raised. However, this only accelerated patronage losses, and a destructive cycle emerged. Urban mass transit collapsed as a private endeavor.²²

This postwar collapse evidenced a new situation of market failure.²³ The inadequacies of the private sector forced local government to assume responsibility for maintaining transportation services. The systems were thoroughly urban phenomena,²⁴ and as such were widely regarded as local problems.²⁵ However, the financial resources of cities were not coequal with their new responsibilities.²⁶ Jurisdictional constraints meant an inadequate revenue base for subsidizing opera-

in 1945 to \$1.19 billion in 1955, and to \$.92 billion by 1960. See TRANSIT FACT BOOK, *supra* note 6, at 20.

22. Yago, *supra* note 13, at 46. See BURKE, *supra* note 7, at 59; Saltzman, *The Decline of Transit*, *supra* note 17, at 32-34.

23. There are two main elements to this market failure. Many persons—often referred to as public transit “captives” or “transportation disadvantaged”—are inadequately served by the private market, auto-dominated transportation system, and require some type of government intervention. An additional motivation is that the transportation disadvantaged are often the targets for income redistribution programs. See, e.g., INSTITUTE OF PUBLIC ADMINISTRATION, FINANCING TRANSIT: ALTERNATIVES FOR LOCAL GOVERNMENT 34, 255-57 (1979); MEYER & GOMEZ-IBANEZ, *supra* note 17, at 230-53; Saltzman, *Providing for the Transportation Disadvantaged*, in PUBLIC TRANSPORTATION: PLANNING, OPERATIONS, AND MANAGEMENT 563-70 (G. Gray & L. Hoel ed. 1979) [hereinafter cited as Saltzman, *Transportation Disadvantaged*]. The second market failure element has classic externalities and “public good” characteristics. In terms of the problems underlying governmental assistance for urban mass transit, the automobile imposes costs that are not included in the price of its use, and public transit has social benefits that are not fully realized in a fare-supported financing arrangement. See, e.g., FITCH, *supra* note 17, at 111-18; MEYER & GOMEZ-IBANEZ, *supra* note 17, at 14, 155, 177-79, 206-08; OWEN, *supra* note 19, at 33-34; M. PIKARSKY & D. CHRISTENSEN, URBAN TRANSPORTATION POLICY AND MANAGEMENT 163-64 (1976) [hereinafter cited as PIKARSKY & CHRISTENSEN]. The early assistance program arising from the UMT Act had the production of these coordinate external benefits of public transit as its primary goal. Hilton, *The Urban Mass Transportation Assistance Program*, in PERSPECTIVES ON FEDERAL TRANSPORTATION POLICY 133 (J. Miller III ed. 1975); cf. A. ALTSCHULER, THE URBAN TRANSPORTATION SYSTEM: POLITICS AND POLICY INNOVATION 31-36 (1979) (shift of attitude at federal level from regarding urban mass transit as localized, dying industry to seeing it as means of solving urban problems) [hereinafter cited as ALTSCHULER].

24. See DANIELSON, *supra* note 19, at 9.

25. *Id.* at 24.

26. CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, URBAN MASS TRANSPORTATION: OPTIONS FOR FEDERAL ASSISTANCE 1 (1977) [hereinafter cited as CONGRESSIONAL BUDGET OFFICE]; MEYER & GOMEZ-IBANEZ, *supra* note 17, at 41; see DANIELSON, *supra* note 19, at 100.

tions.²⁷ Major capital expenditure needs—to upgrade existing systems after years of industrial decline and to adjust service to conform with new patterns of geographic distribution—exceeded the cities' financial capacity.²⁸ They therefore sought the necessary financing from the federal government.²⁹

2. Federal Intervention

A significant catalyzing event for proponents of federal aid was passage of the Transportation Act of 1958.³⁰ This Act was intended to aid the position of the railroads in relation to other transport modes.³¹ One measure employed to achieve this goal was the allowance of expedited approval of withdrawal of interstate passenger service.³² Immediately after passage, cities served by commuter railroads, especially those in the New York metropolitan area, faced the threatened withdrawal of a large portion of transit service.³³ This crisis galvanized urban interests.³⁴ The advocates of federal aid for urban mass transit used the crisis as a stimulus in their efforts to build a coalition of support, achieving their ultimate success in 1964.³⁵

27. CONGRESSIONAL BUDGET OFFICE, *supra* note 26, at 2; see DANIELSON, *supra* note 19, at 93.

28. See FITCH, *supra* note 17, at 55-57.

29. See DANIELSON, *supra* note 19, at 93-94. State government, generally dominated by rural interests, had no desire to make what was perceived to be an income redistribution to the cities. See *id.* at 76; SMERK, *supra* note 8, at 32-34.

30. Pub. L. No. 85-625, § 5, 72 Stat. 568 (1958) (codified as amended at 49 U.S.C. §§ 1501, 10524, 10526, 10704, 10908-09, 11501 (Supp. V 1981)). See *infra* notes 33-34 and accompanying text.

31. DANIELSON, *supra* note 19, at 28.

32. *Id.* at 35, 38. This provision now appears at 49 U.S.C §§ 10908, 10909 (Supp. V 1981).

33. See DANIELSON, *supra* note 19, at 47-52.

34. This does not mean that the crisis motivated a coherent or unified blueprint for action: "From the outset, differing perceptions of the problem, and the varied capabilities for action rooted in the fragmented institutional base, prompted responses designed to serve the interests of particular jurisdictions rather than the area as a whole. Consequently, no single plan emerged from the crisis." *Id.* at 52. Danielson identifies three important attempted responses, each advanced by a different political constituency: governmental financial aid aimed at preserving commuter rail service (state (New York)), modification of the statutory changes made by the 1958 Act (suburbs), and federal mass transit assistance (central cities). *Id.* at 52, 55.

35. *Id.* (detailed examination of drive for federal aid for mass transit that ensued after the Transportation Act of 1958); see also SMERK, *supra* note 8, at 26-40 (shorter version of story of 1958 law and its aftermath, drawing heavily on Danielson's work).

B. Urban Mass Transportation Act of 1964

The major direct federal intervention in urban mass transit is the Urban Mass Transportation Act of 1964.³⁶ Initially, this legislation provided funds through a capital grant program to state and local governments for their use in revitalizing the industry. Congress recognized that just as some systems had already been taken over by public entities, the capital funds might be put to that purpose.³⁷ More importantly, however, Congress sought to provide the capital needed for modernization, extension and rehabilitation.³⁸ Operating expenses were left to the private sector and the cities, in accord with the prevailing view that mass transit was a local problem and that a general subsidy would encourage waste.³⁹

C. Conditions on Monetary Assistance in the UMT Act

1. Generally

Monetary assistance provided by the UMT Act is accompanied by a variety of conditions. The requirements for recipients of federal mon-

36. Pub. L. No. 88-365, 78 Stat. 302 (1964) (codified at 49 U.S.C. §§ 1601-1618 (1976 & Supp. IV 1980)). The first direct intervention was the authorization of a capital loan and demonstration project program in the Housing Act of 1961. See Pub. L. No. 87-70, § 501, 75 Stat. 149, 173 (1961). The authorization was small, however, and the program was generally unattractive. MEYER & GOMEZ-IBANEZ, *supra* note 17, at 43.

37. See, e.g., 110 CONG. REC. H14968-70 (1964) (statement of Rep. Gill); S. REP. NO. 82, 88th Cong., 1st Sess. 19 (1963).

38. MEYER & GOMEZ-IBANEZ, *supra* note 17, at 43. See also *Urban Mass Transportation—1963: Hearings on S. 6 and S. 917 Before a Subcomm. on Housing of the Senate Comm. on Banking and Currency*, 88th Cong., 1st Sess. 312 (1963) (statement of Sen. Williams) [hereinafter cited as *1963 Senate Hearings*].

39. MEYER & GOMEZ-IBANEZ, *supra* note 17, at 43. The idea that the bill would not oust the private sector from the urban mass transit industry pervades the legislative history. See *1963 Senate Hearings*, *supra* note 38, at 312 (statement of Sen. Williams); S. REP. NO. 82, 88th Cong., 1st Sess. 29 (1963) ("The committee believes that there are only a few cases where existing private companies will be acquired It is not the intent of this legislation to promote public ownership of urban transportation systems . . ."); H.R. REP. NO. 204, 88th Cong., 1st Sess. 15 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2569, 2583; 110 CONG. REC. 14903-04, 14906-07, 14968-71 (1964) (statements of Reps. O'Neill, Rains and Gill, respectively); 109 CONG. REC. 5320, 5370 (1963). Of course, what has actually occurred is a substantial use of federal funds to acquire private companies and convert local governments into direct providers. See G. HILTON, *FEDERAL TRANSIT SUBSIDIES: THE URBAN MASS TRANSPORTATION ASSISTANCE PROGRAM* 52-53 (1974). Federal involvement has broadened since 1964. The most significant change was the enactment of operating subsidies in 1974. National Mass Transit Assistance Act of 1974, PUB. L.

ies include: no discrimination on the basis of race, color, creed, national origin, sex or age;⁴⁰ use of metropolitan planning organizations for urban areas;⁴¹ reduced fares for elderly and handicapped persons during off-peak hours;⁴² provision for relocation of anyone displaced by a project;⁴³ public notice and hearings on all projects, and consideration of economic and social effects, environmental impact, and consistency with comprehensive development plans;⁴⁴ no changes in fares and no substantial changes in service without public hearings and consideration of public viewpoints, effect on energy conservation, and economic, environmental and social impacts;⁴⁵ making all contracts not competitively bid subject to federal audit;⁴⁶ paying prevailing wage rates on all federally funded construction projects;⁴⁷ and making arrangements to assure that the position of any worker is not worsened as a result of federal aid.⁴⁸

Most of these requirements are not intimately related to the substantive content of the grant-in-aid program.⁴⁹ They represent extraneous policy goals.⁵⁰ These conditions, and their counterparts in other federal interventions, constitute an important and intriguing source of federal power and influence.⁵¹

No. 93-503, § 103, 88 Stat. 1565, 1567 (1974) (codified at 49 U.S.C. § 1604 (1976 & Supp. V 1981)).

40. 49 U.S.C. § 1615 (1976).

41. *Id.* § 1607(b) (Supp. V 1981).

42. *Id.* § 1604(m) (1976).

43. *Id.* § 1606.

44. *Id.* §§ 1602(d), 1610.

45. *Id.* § 1604(l) (1976 & Supp. V 1981).

46. *Id.* § 1608(b)(1) (Supp. V 1981).

47. *Id.* § 1609(a) (1976).

48. *Id.* § 1609(c).

49. *See supra* note 38 and accompanying text.

50. "The federal presence in public transit over the past two decades has . . . evolved from pre-1964 minimal participation, to a federal transit program . . . where other federal agencies are viewing transit as a means of attaining goals other than the mobility-related objectives usually associated with transit investment." Hemily & Meyer, *The Future of Urban Public Transportation: The Problems and Opportunities of a Changing Federal Role*, 12 *TRANSP. L.J.* 287, 289 (1982) [hereinafter cited as Hemily & Meyer]; accord ALTSCHULER, *supra* note 23, at 31-36.

51. Another important area of federal influence not under consideration here is the provision of program guidelines and criteria by federal agencies to grant recipients. These can often turn into de facto regulations that bind localities to a national standard unresponsive to varying conditions. *See* PIKARSKY & CHRISTENSEN, *supra* note 23, at 117 (example of federal equipment guidelines that lead to federal direction of local contract process by becoming specifications).

2. Section 13(c): Guarantee of Labor Protection

The extraneous condition central to this discussion is the labor protection effected by section 13(c).⁵² It provides that no aid may be given under the UMT Act unless “fair and equitable arrangements” are made to “protect the interests of employees affected” by that aid.⁵³ The Secretary of Labor determines the fairness and equity of the arrangements,⁵⁴ and at minimum, these arrangements must implement the section’s specific guarantees.

Section 13(c) specifically provides for five guarantees. Any rights to collectively bargain⁵⁵ must continue. Additionally, all rights, privi-

52. 49 U.S.C. § 1609(c) (1976).

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Id. This provision was enacted in 1964 as § 10(c) of the Urban Mass Transportation Act, *see* 110 CONG. REC. 14,987 (1964), and it had been § 19(c) in the Senate version. *See* 109 CONG. REC. 5688 (1963). It was renumbered as § 13(c) in 1966. Pub. L. No. 89-562, 80 Stat. 715 (1966). For clarity and consistency, all references will be to the commonly used § 13(c).

53. 49 U.S.C. § 1609(c) (1976). *See infra* notes 134-46 and accompanying text.

54. Other than the fairly specific parameters set out in the section’s five specific guarantees, *see infra* notes 55-57 and accompanying text, there is no definition of “fair and equitable” in either the statute or the legislative history. The courts have interpreted it to be within the discretion of the Secretary of Labor. *See Kender v. Wirtz*, 388 F.2d 381 (3d Cir. 1968); *City of Macon v. Marshall*, 439 F. Supp. 1209, 1218-23 (M.D. Ga. 1977); *cf. Congress of Ry. Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971) (finding limited judicial reviewability, if any, of Secretary of Labor’s determination of “fair and equitable arrangements,” in context of similar statutory language and Amtrak’s labor agreements).

55. “Collective bargaining” refers to the “negotiation, drafting, administration and interpretation of written agreements between employers and unions representing their employees setting forth their joint understanding as to wages, hours and other terms and conditions of employment.” R. SMITH, L. MERFIELD & D. ROTHSCHILD,

leges and benefits under existent collective bargaining agreements must be preserved. Workers must be protected against a worsening of their employment positions. These protections cannot be less than those provided by section 5(2)(f) of the Interstate Commerce Act⁵⁶ for railroad employees involved in mergers, acquisitions and consolidations.⁵⁷ Employees affected by acquisitions must be given assurances of employment, and laid-off or terminated workers must be given reemployment priority. Finally, paid training or retraining programs must exist.⁵⁸ The terms and conditions of the section 13(c) arrangement are included in the grant contract between the Department of Transportation and the recipient.

COLLECTIVE BARGAINING AND LABOR ARBITRATION 3 (1970) [hereinafter cited as SMITH, MERFIELD & ROTHSCHILD].

56. 49 U.S.C. § 11347 (Supp. V 1981).

57. The evolution of labor protection standards for railroads is well summarized in *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), a case upholding an Interstate Commerce Commission (ICC) order establishing a general set of conditions as satisfying the statutory directive. *See also* JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 131-34. The seminal protection arrangement was the Washington Job Protection Agreement of 1936. *Id.* at 86. It protected employees involved in consolidations, mergers and similar operations changes by requiring the negotiation of transition agreements, the payment of certain compensatory amounts, and the submission of disputes to binding arbitration. *Id.* at 86-87. The ICC eventually developed the so-called "New Orleans conditions." *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952). These conditions continued the requirements for payment of such items as displacement expenses and dismissal allowances, with both four and five-year protective periods. Notice, negotiation and compulsory arbitration requirements were later explicitly included. *Southern Ry. Co. Control-Central of Ga. Ry. Co.*, 331 I.C.C. 151 (1967). When the Amtrak system was created in 1970, a labor protection guarantee referent to § 5(2)(f) (and similar in language to § 13(c)) was included. *See* 45 U.S.C. § 565 (1972). The Secretary of Labor subsequently certified a labor protection agreement embodying what are now known as the "Amtrak conditions." These conditions increase the benefits provided by the New Orleans conditions by increasing the basic protective period to six years, allowing for upward adjustments in payments due to wage increases, and shifting the burden of proof regarding adverse effect to require proof of absence of effect by the employer. *See* *Congress of Ry. Unions v. Hodgson*, 326 F. Supp. 68, 75-76 (D.D.C. 1971). A 1976 amendment to § 5(2)(f) included these conditions as a floor to the section's protections. *See* Pub. L. No. 94-210, § 403(b)(2), 90 Stat. 31, 65.

58. These guarantees address the two situations which the section's proponents and creators were contemplating: takeover of private companies by governmental bodies and automation. *See* D. BARNUM, *FROM PRIVATE TO PUBLIC: LABOR RELATIONS IN URBAN MASS TRANSIT* 152 (1977) [hereinafter cited as BARNUM]; Wickham, *supra* note 13, at 69; *see also infra* notes 76-86 and accompanying text.

III. Labor Protection in Urban Mass Transit

A. Historical Perspective⁵⁹

1. *Labor Relations Prior to Federal Intervention*

A predicate to understanding section 13(c) is a comprehension of the history of the urban mass transit industry's labor relations. Labor unions have long been a fixture of the mass transit industry, but labor/management relations have never been typical.⁶⁰ As public utilities, transit firms were subject to regular intrusions from the local political machinery. This discouraged an open system of employer/employee countervailing powers synthesizing into negotiated compromises. Disagreements were limited to a range within which they could be settled without outside involvement. The supreme economic weaponry of strikes and lockouts was either unavailable or available only at high costs such as loss of political support, a decrease in ridership, and the encouragement of increased governmental intervention leading to a net worsening of conditions. Additionally, the regulated fare structure sharply curtailed the realistic outcomes of wage and benefit negotiations. These factors all contributed to the presence of binding arbitration as a key feature of the industry's labor relations.

Increasing management dissatisfaction with the results of voluntary arbitration and the general decline of the industry in the immediate postwar period eroded the symbiotic, insular employer/employee relationship.⁶¹ Strikes, which had been rare, began to occur more often.⁶²

59. This section draws heavily on BARNUM, *supra* note 58, at 48-69. Historical material is also found throughout JENNINGS, SMITH & TRAYNHAM, *supra* note 13, and J. STERN, R. MILLER, S. RUBENFELD, C. OLSON, & B. HESHIZER, *LABOR RELATIONS IN URBAN TRANSIT* (1977) [hereinafter cited as STERN & MILLER]. See also SCHMIDT, *supra* note 7.

60.

[T]ransit labor relations have always been and continue to be somewhat atypical of both private and public-sector union-management relationships. Included among its distinguishing characteristics are a political involvement in bargaining which predates public ownership, an established bargaining relationship whose private-sector roots often extend back forty or more years, an industry tradition of voluntary arbitration of interest disputes, and a legal environment which in most cases is somewhat more restrictive than is found in the private sector and, at the same time, more liberal than that which applies to other groups of public employees.

STERN & MILLER, *supra* note 59, at 173-74.

61. It must be noted that despite this erosion and ensuing events, a large degree of insularity remains, as does the preference of both labor and management to retain

Many states passed strike control laws on the ground that transportation was a vital public service.⁶³ These laws normally provided for compulsory interest arbitration.⁶⁴ The Amalgamated Transit Union was successful in invalidating these in 1951.⁶⁵ Having been eligible for coverage under the National Labor Relations Act (NLRA) structure since 1944,⁶⁶ transit employees acquired rights similar to the rights of employees in private industries. Arbitration fell and strikes rose as a method of impasse resolution.⁶⁷ By the late 1950's, the workers possessed impressive legal rights.⁶⁸ To preserve their positions, the unions joined other proponents of federal aid in seeking financial assistance for their ailing employers.

2. Labor Influence in Intervention

a. 1962 Hearings

The AFL-CIO expressed its support of federal intervention at the 1962 hearings for the predecessor bills to the UMT Act.⁶⁹ However,

it. See JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 35, 37; STERN & MILLER, *supra* note 59, at 34, 39.

62. See BARNUM, *supra* note 58, at 70.

63. *Id.* at 60, 63, 67.

64. See, e.g., 1947 Wis. Laws ch. 414 (Wis. Stat. §§ 111.55-111.59 (1947)).

65. See Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am., Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951). The Supreme Court held that the federal labor laws preempted state regulation of peaceful strikes, even in relation to local public utilities or "public emergencies." *Id.* at 389-96.

The Amalgamated Transit Union (ATU), which changed its name from the Amalgamated Association of Street, Electric Railway, and Motor Coach Employees of America in 1963, was founded in 1892. It is the dominant union in the industry. It was the prime force behind the use of voluntary arbitration in mass transit. The other major union, the Transit Workers Union (TWU), has its main strength in New York and Philadelphia, and it has tended to be more militant. BARNUM, *supra* note 58, at 14-23, 50-54. The evolution of the ATU is examined in STERN & MILLER, *supra* note 59, at 108-31.

66. See NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir.), *cert. denied*, 321 U.S. 795 (1944). Since 1958, the NLRB has asserted jurisdiction over all private transit systems within the jurisdiction of the federal labor statutes that have a gross volume of business of at least \$250,000 a year. See Charleston Transit Co., 123 N.L.R.B. 1296 (1959).

67. BARNUM, *supra* note 58, at 70.

68. Cf. C. SUMMERS & R. RABIN, THE RIGHTS OF UNION MEMBERS (1979) (American Civil Liberties Union guide to rights of persons involved in unions within National Labor Relations Act framework).

69. *Urban Mass Transportation Act of 1962: Hearings on H.R. 11158 Before Subcomm. No. 3 of the House Comm. on Banking and Currency, 87th Cong., 2d*

the union emphasized that any legislative action aiding public utilities should include language protecting workers' rights to union representation, collective bargaining, and grievance and dispute resolution procedures. It drew Congressional attention to the "scandalous" and "disgraceful" situation in Dade County, Florida, where workers were striking over the denial of these rights by system management after public assumption of ownership.⁷⁰ The union's representative stressed the importance of private sector involvement or other mechanisms to prevent a recurrence of the Florida debacle.⁷¹ The 1962 transit bill died in the House Rules Committee.⁷² The absence of labor protective language may have contributed to the bill's demise by diluting labor's support.⁷³

b. The UMT Act

i. Initial Proposals

When the bill that eventually became the UMT Act was introduced in 1963, labor's concerns were represented in its proposals.⁷⁴ The problem for the unions was the likelihood that revitalization of the industry through federal assistance would result in greater public ownership. The continuing strike in Dade County and the perception that the practices employed there were spreading⁷⁵ convinced union

Sess. 420-24 (1962) (statement of Andrew J. Biemiller) [hereinafter cited as *1962 House Hearings*]; *Urban Mass Transportation—1962: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 2d Sess. 312-13 (1962) (statement of Andrew J. Biemiller) [hereinafter cited as *1962 Senate Hearings*]; cf. *1962 House Hearings*, *supra*, at 219-21; *1962 Senate Hearings*, *supra*, at 161 (statement of George M. Harrison, representing Railway Labor Executives' Association) (expressing support for proposed legislation and speaking generally to labor relations issues).

70. See *1962 House Hearings*, *supra* note 69.

71. *Id.*

72. SMERK, *supra* note 8, at 54.

73. See STERN & MILLER, *supra* note 59, at 117.

74. In his introductory speech, Senator Williams stated that he had solicited the views of what is now the ATU on specific language for the protection of workers from the ill effects of federal aid. See 109 CONG. REC. 217 (1963); See *1963 Senate Hearings*, *supra* note 37, at 21 (letter from President Kennedy proposing urban mass transit legislation).

75. Union workers also lost bargaining rights in Dallas, San Antonio and Nashville. *Urban Mass Transportation of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 490 (1963) (statement of Andrew J. Biemiller) [hereinafter cited as *1963 House Hearings*]; Nolan, *Public Employee Unionism in the Southeast: The Legal Parameters*, 29 S.C. L. REV. 235,

leaders that federal protection was essential if the rights that had been impressively garnered were to be retained.⁷⁶ The transit unions faced a dilemmatic choice between industrial collapse and public ownership.

A week before the congressional hearings began, the AFL-CIO executive council adopted a resolution calling for the inclusion in any transit legislation of a provision requiring "fair and equitable arrangements" for the protection of workers' rights.⁷⁷ At the hearings their representative testified that they would actively oppose the bill if such a provision were not included.⁷⁸

Immediately preceding this testimony, Secretary of Labor Wirtz presented the respective committees with a Kennedy administration proposal for protecting workers' rights.⁷⁹ The union representatives supported the spirit of the Wirtz proposal, but they requested more specific and certain guarantees. A few days later, they presented their own version.⁸⁰ Committee members expressed concern that the labor proposal exceeded reasonable bounds. They felt it created conflicts with state policies and could motivate strong opposition leading to defeat of the larger bill.⁸¹ The Wirtz proposal was substantially ac-

251 n.78 (1978) [hereinafter cited as Nolan]. See generally *ATU, Local Div. 1338 v. Dallas Pub. Transit Bd.*, 430 S.W.2d 107 (Tex. Civ. App. 1968), cert. denied, 396 U.S. 838 (1969); *Dade County v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am.*, 157 So. 2d 176 (Fla. Dist. Ct. App. 1963).

76. See, e.g., *1963 House Hearings*, supra note 75, at 319 (statement of Andrew H. Biemiller); *id.* at 325 (statement of Bernard Cushman). Most states prohibited any union representation, collective bargaining, or other labor activity by public employees. While most previous public takeovers had been accompanied by specific language in the enabling legislation ensuring continuation of workers' rights, see, e.g., 1959 Pa. Laws 1266, Pub. L. No. 1266, § 13.2; 1947 Mass. Acts ch. 544, §§ 18, 19; see also *1963 Senate Hearings*, supra note 38, at 326 (statement of Bernard Cushman); *1962 House Hearings*, supra note 69, at 423-24 (statement of Andrew H. Biemiller), there was little assurance that anti-labor states (such as Florida) would be so accommodating. Additionally, the political power labor had in pro-union areas could not so easily be translated into legislative concessions if substantial unconditional federal aid were available.

77. *1963 Senate Hearings*, supra note 38, at 318 (statement of Andrew Biemiller).

78. *Id.* at 322. The Railway Labor Executives' Association concurred, explicitly reversing their position of the previous year. *Id.* at 380 (statement of George E. Leighty).

79. *Id.* at 308; *1963 House Hearings*, supra note 75, at 476.

80. *1963 Senate Hearings*, supra note 38, at 322-23; *1963 House Hearings*, supra note 75, at 494-95. For the Administration's comparison of the differences between its proposal and labor's proposal, see *1963 Senate Hearings*, supra note 38, at 482-83.

81. See *1963 House Hearings*, supra note 75, at 633-44.

cepted by the respective committees and included in the bills which were reported out favorably.⁸²

ii. Floor Debate

A significant amount of floor debate on the urban mass transit aid bills centered on the labor protection issue. Opponents charged that the concept practically mandated featherbedding.⁸³ They were equally concerned that the particular language constituted a federal usurpation of state and local governments' employment prerogatives by overriding laws prohibiting public employee strikes and collective bargaining.⁸⁴ However, amendments to disallow any protective arrangements inconsistent with state law were defeated in each house.⁸⁵ The purpose of the labor protection section, as expressed by the bills' sponsors, was not to override state law. Its purpose, rather, was to ensure that federal monies were not used to strip transit workers of their rights and benefits and to warrant that automation and other technological modernizations prompted by the aid would not have a harmful effect on workers. The stated motivation thus centered on issues of justice and equity.⁸⁶

iii. Labor's Effectiveness

The importance of labor support for mass transit legislation⁸⁷ is evidenced by the progressive strengthening of the language of section

82. See S. Rep. No. 82, 88th Cong. 1st Sess. (1963); H.R. Rep. No. 204, 88th Cong., 1st Sess. (1963), reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2569.

83. See, e.g., 110 CONG. REC. 14,903 (1964); 109 CONG. REC. 5676, 5677 (1963). "Featherbedding" refers to "employee practices which create or spread employment by unnecessarily maintaining or increasing the number of employees used, or the amount of time consumed, to work on a particular job." BLACK'S LAW DICTIONARY 549 (5th ed. 1979).

84. See, e.g., 110 CONG. REC. 14,903, 14,977 (1964); 109 CONG. REC. 5322, 5415 (1963).

85. See 110 CONG. REC. 14,980 (1964); 109 CONG. REC. 5422, 5582 (1963). This language had been included in the version approved in subcommittee in the Senate. See 109 CONG. REC. 5423 (1963). The bills' sponsors advocated rejecting these amendments on the ground that they were superfluous and would establish a precedent that might lead to the finding of negative implications in the future. Additionally, the sponsors opined that an override of state laws would be unconstitutional anyway. See 110 CONG. REC. 14,980 (1964); 109 CONG. REC. 5417, 5422 (1963).

86. E.g., 110 CONG. REC. 14,976-77 (1964); 109 CONG. REC. 5417, 5670-72 (1963).

87. The final vote for passage in the House was 212-189. 110 CONG. REC. 14,987 (1964).

13(c) as it moved through the floor debates.⁸⁸ The final product resembled more closely the unions' "radical" proposal than the administration's amendment. Final authority over the adequacy of the protection provided was given to the Secretary of Labor.⁸⁹ The five specific categories of protection⁹⁰ were made less discretionary.⁹¹ The guarantee of collective bargaining rights was strengthened from "encouragement of continuation" to "continuation,"⁹² and section 5(2)(f)'s financial protections were inserted as a floor for the labor protection arrangements.⁹³ Finally, the complete arrangements certified by the Secretary of Labor were required to be placed in the grant contract.⁹⁴ The enactment of these extensive protections was a demonstration of labor's effective use of political power in the environment that produced the federal aid measure.⁹⁵

B. Section 13(c): Operational Impact

The effects of section 13(c) implementation on the urban mass transit industry's operations are the subject of heated and confused debate.⁹⁶ Those opposing section 13(c) argue that the efficient operation of the system has suffered from the preoccupation with preserving

88. The only explicit reference in the floor debates to the need to enact labor protection in order to secure the support of the unions was by Senator Morse, speaking of the railroad brotherhoods and their demands for reference to the protections of § 5(2)(f) of the Interstate Commerce Act. 109 CONG. REC. 5676 (1963). Senator Tower then attacked this language as a capitulation to the unions in exchange for their backing. *Id.* at 5679.

89. Pub. L. No. 88-365, § 10(c), 78 Stat. 307 (1964).

90. *See supra* notes 55-57 and accompanying text.

91. Pub. L. No. 88-365, § 10(c), 87 Stat. 307 (1964).

92. *See supra* note 57 and accompanying text.

93. Pub. L. No. 88-365, § 10(c), 78 Stat. 307 (1964).

94. *Id.*

95. *Cf. Kilgour, supra* note 6, at 306 (section 13(c) reflects labor's political power rather than reasoned policy). *But see* PIKARSKY & CHRISTENSEN, *supra* note 23, at 10-11 (section 13(c) is the result of national full employment policy, not unions' strength).

96. Compare, e.g., *Transit Assistance Act of 1982: Hearings on S. 2367 and S. 2377 Before the Subcomm. on Housing and Urban Affairs of the Comm. on Banking, Housing and Urban Affairs, 97th Cong., 2d Sess. 353-62 (1982)* (statement of John Rowland, International President, ATU) [hereinafter cited as *1982 Senate Hearings*] with *The Financial and Productivity Problems of Urban Public Transportation: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transportation, 97th Cong., 1st Sess. 379-83 (1981)* (statement

employee rights.⁹⁷ In fact, the foremost consideration in the debates over section 13(c) is the law's financial impact. Opponents of the provision argue that protecting workers from ill effects of federal aid locks operators into the inefficient pattern of work rules, wage and benefit scales, and service levels that originally necessitated intervention.⁹⁸ Innovation is stifled because savings in labor costs due to system improvements cannot be realized in the environment of section 13(c).⁹⁹ Also, the presence of unions in public sector enterprises, where the governmental employer is unable to engage in arm's length negotiations like its private counterpart is viewed as giving labor an unfair advantage. This leads to excessive wages, luxurious benefits packages, and a system generally more concerned with workers' financial gain than service delivery.¹⁰⁰ Supporters of section 13(c) respond to these

of Arthur E. Teele, Jr., Administrator, UMTA) [hereinafter cited as *1981 House Hearings*].

97. For an extensive analysis of the costs of section 13(c), see F. Siskind & E. Stromsdorfer, *The Economic Cost Impact of the Labor Protection Provisions of Section 13(c) of the Urban Mass Transportation Act of 1964* (Report to the U.S. Department of Transportation, May 1978), which finds inconclusive evidence. See also *1982 Senate Hearings*, *supra* note 96, at 87-107 (General Accounting Office study); BARNUM, *supra* note 58, at 152-57; JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 142, 186; STERN & MILLER, *supra* note 59, at 102, 266; Kilgour, *supra* note 6; Lowenstein, *The Need for Limitations on Federal Mass Transit Operating Subsidies: The Chicago Example*, 12 *TRANSP. L.J.* 265, 272-73, 283 (1982) [hereinafter cited as Lowenstein]; Peirce & Hamilton, *infra* note 263, at 1,636; Verbit, *The Urban Transportation Problem*, 124 *U. PA. L. REV.* 368, 416-17 (1975). The most instructive observation about the operational effects of § 13(c) is that everyone involved has evidence no more convincing than simple apprehensions. STERN & MILLER, *supra* note 39, at 65.

98. See, e.g., *Transit Assistance Act of 1981: Hearings on S. 1160 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 127, 140-48 (1981) (statement of Ray Mundy) [hereinafter cited as *1981 Senate Hearings*]; *1981 House Hearings*, *supra* note 96, at 40 (statement of Alan Altschuler); BARNUM, *supra* note 58, at 152; cf. Resolution of the Board of Directors, *Am. Pub. Transit Ass'n* (Oct. 11, 1981), reprinted in *1982 Senate Hearings*, *supra* note 96, at 289, 290 (section 13(c)'s encouragement of arbitration, with the standards used in it, ignores industry's present character and status).

99. See, e.g., *1982 Senate Hearings*, *supra* note 96, at 96-97 (statement of Gregory J. Ahart); *1981 Senate Hearings*, *supra* note 98, at 128 (statement of Ray Mundy); *1981 House Hearings*, *supra* note 96, at 383 (statement of Arthur E. Teele); PIKARSKY & CHRISTENSEN, *supra* note 23, at 8, 9; Curtis, *Section 13(c) Reconsidered: Is Federal Labor Protection Still Necessary for Mass Transit*, 33 *LAB. L.J.* 622, 627 (1982) [hereinafter cited as Curtis]; Lowenstein, *supra* note 97, at 273.

100. See, e.g., *1982 Senate Hearings*, *supra* note 96, at 90-99 (statement of Gregory J. Ahart); *id.* at 108-13 (statement of John Charles Houston); Kilgour, *supra* note 6, at 306-08; Lowenstein, *supra* note 97, at 282-83.

criticisms by focusing on the inconclusive evidence and questionable motives of their exponents.¹⁰¹

A second major source of dispute is the existence of union veto power,¹⁰² and the particular manner in which section 13(c) is administered. For most transit employees, protective arrangements are the product of negotiations between the local management and the union. The Secretary of Labor certifies the arrangements as "fair and equitable" within the meaning of the statute.¹⁰³ This process, it is argued, gives labor the ability to impose conditions upon acceptance because management must obtain the concurrence of the unions in a section 13(c) agreement before a grant application is approved. The underlying assumption is that a wide range of concessions on wage, benefit, work rule and other demands are obtained in this manner, thus imposing greater costs. Additionally, the delay incurred in negotiations increases project costs and postpones necessary improvements.¹⁰⁴

101. See, e.g., 1982 Senate Hearings, *supra* note 96, at 353-62 (statement of John Rowland).

102. See, e.g., *id.* at 92 (statement of Gregory J. Ahart); 1981 House Hearings, *supra* note 96, at 37 (statement of Alan Altschuler).

103. 29 C.F.R. § 215.3 (1982). See also *infra* note 136 and accompanying text. Although this was not the subject of formal regulations until 1978, see 43 Fed. Reg. 13,558, 13,560 (1978), it has always been the Department of Labor's practice, see JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 140; Wickham, *supra* note 13, at 64, 70, 71, and was in fact anticipated by Congress, S. REP. NO. 82, 88th Cong., 1st Sess. 28 (1963); H.R. REP. NO. 204, 88th Cong., 1st Sess. 16 (1963), reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2564, 2584-85. It must be noted, however, that the flexibility and variability normally to be expected from this type of arrangement is curtailed by the Department's practice of referring applications to the international office of the union(s) involved. See 43 Fed. Reg. 13,558 (1978). This administrative practice has also changed internal union relationships. See STERN & MILLER, *supra* note 59, at 119.

104. See Wickham, *supra* note 13, at 73-74, 76. But see JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 142, 186; STERN & MILLER, *supra* note 59, at 99-100, 107 (surveys indicating no significant use of section 13(c) as a blackmail tool); cf. BARNUM, *supra* note 58, at 151 (unions' good results regarding § 13(c) due not to veto power but rather to unpreparedness of management). A related concern is the possibility that § 13(c) may discourage potential applicants for federal aid. See JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 186. Compare 1981 Senate Hearings, *supra* note 98, at 150 (statement of Clarence Pendleton, Jr.) (section 13(c) and other federal requirements led new San Diego Transit provider to forego federal aid) with 1982 Senate Hearings, *supra* note 96, at 360 (statement of John Rowland) (statements regarding San Diego federal aid decision are self-serving speculation). See generally Sood, *Going it Alone: Why One Small Operator Bought Buses Without Federal Aid*, Fall 1979 TRANSIT J. 15 (1979) (rejection of federal aid because of attached conditions).

Hence, opponents of section 13(c) lament the vivid shift in focus from an emphasis on service to a concentration on labor.¹⁰⁵

C. Section 13(c): Institutional Questions

Congress attempted to rescue urban public transportation with the UMT Act. The means by which this was to become operational posed a conflict between two policy judgments previously enacted in the National Labor Relations Act: (1) the exemption for state and local governments from the statute's coverage,¹⁰⁶ and (2) the programmatic goals of protecting workers' rights, promoting economic democracy and ensuring industrial peace.¹⁰⁷ Section 13(c) represents the determination of precedence.¹⁰⁸ The restraint of the federalism judgment, protecting state and local government prerogative, was set aside. Of course, section 13(c) does not involve the compulsion that would have been present with an assertion of commerce clause or other direct power.¹⁰⁹ Nonetheless, its attachment to an assistance measure passed

105. This is a common complaint. See, e.g., N. HAMILTON & P. HAMILTON, GOVERNANCE OF PUBLIC ENTERPRISE: A STUDY OF URBAN MASS TRANSIT 34 (1981) [hereinafter cited as HAMILTON & HAMILTON]. Many of the operational concerns with § 13(c) may largely be problems of perspective. The attention given to workers' concerns by § 13(c) is undeniably significant. Although our system generally operates to protect everyone from direct harm as a result of public action, C. SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST 70-71 (1977) [hereinafter cited as SCHULTZE], it is unusual for this protection to take such an explicit and unyielding form. It seems fairly unremarkable, however, that in the same legislation there are protections for the owners of private transit companies and other businesses. 49 U.S.C. §§ 1602(e), (f), (g), 1607(e) (1976). A broader conception of equity would see attention to workers' rights as fully legitimate and would mandate protections for employees. Cf. 110 CONG. REC. 14,976 (1964) (equity requires protecting workers as much as owners of private transit companies). The negative impact this would have on profits (or alternative measures of fiscal performance) would be as acceptable as any other necessary cost. This idea is relatively unfamiliar in our system, however, and a provision like § 13(c) is facilely vilified as abnormal, irrational, or wrong.

106. "The term 'employer' . . . shall not include . . . any State or political subdivision thereof . . ." 29 U.S.C. § 152(2) (1976).

107. See *id.* § 151.

108. This extension of the protection of federal labor law concepts to an area where they were previously not applied does create new rights and enhance old ones, contrary to language in Division 580, *ATU v. Central N.Y. Regional Transp. Auth.*, 556 F.2d 659, 662 (2d Cir. 1977).

109. The Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), relied on a variety of assertions in the plaintiffs' complaint relating to the effects of the direct assertion of commerce clause power represented by the extension of the Fair Labor Standards Act to state and local governments: the costs of fire protection in Cape Girardeau, Missouri would double; one California community

at the request of the eventual recipients¹¹⁰ necessarily led to a replacement of the policy prerogatives of these governments.

1. *Direct Conflict with Existent State Law*

The congressional debate over section 13(c) centered on the interfacing of inconsistent federal and state law. Although numerous statements were made regarding the precedence of state law, there was equivocation on the issues of whether inconsistent state laws would have an effect on the availability of funds or would be otherwise affected by administration of the protective language.¹¹¹ Senator Javits made the most direct and detailed statement of the provision's design:

[W]hat it does, by not mentioning the proposition, is to enable the Secretary of Labor and the Housing Administrator [now Administrator, UMTA], to go into a State where a right-to-work law or some other law deprives the municipal employees—that is, employees of the transit system—of collective bargaining rights. Perhaps because the Administrator has money to give out, some States may be induced to make some accommodation on that score by the necessary exemption from the law

had to terminate its affirmative action program and another its program for college interns; the California Highway Patrol cut its training program in half; Arizona estimated an overall added cost of \$2.5 million; and California estimated an increase of between \$8 million and \$16 million. *Id.* at 846-47. The Court also noted that the federal imposition would abrogate local authority to employ teenagers for less than the minimum wage and would compel a complete restructuring of police and fire personnel scheduling because of overtime restrictions. *Id.* at 848, 850.

110. The chief pressure for federal intervention in mass transit came from large metropolitan areas. See DANIELSON, *supra* note 19, at 178; FRICH, *supra* note 17, at 227.

111. The following exchange was referred to by both proponents, 109 CONG. REC. 5418 (1963), and opponents, 109 CONG. REC. 5415 (1963), of § 13(c) during the floor debates:

Senator Tower: Mr. Secretary, would this amendment supercede State laws that prohibit public employees from striking?

Secretary [of Labor] Wirtz: I think . . . that there could be no superceding of State laws by a provision of this kind. That is the assumption on which we are proceeding.

Senator Tower: [I]n my State it is prohibited by law for public employees to strike. And this would not affect that?

Secretary Wirtz: When you say "not affect" it, that would be a somewhat broader question. Surely on the question of superceding—I say "surely"; to the best of my knowledge—that is true. Now, whether there would be an effect I think is a somewhat different question.

Therefore, we have a balanced scheme. We do not override the law; at the same time, we do not compel the Federal Government to go in where the law is adverse to the interest of labor . . . and perhaps also even give encouragement to exempt a situation of this kind where the State desires to give this type of Federal help.¹¹²

Congress made no explicit decision on the extent of the power of the policy it enacted. The apparent assumption was that the Department of Labor would be able to use a combination of financial enticement and flexible arrangements to achieve the objectives of both this particular provision and the larger interventionist program.¹¹³

a. Flexible Arrangements

The idea of flexible arrangements centered on what is known as the "Memphis formula." To save public transportation service in 1960, that city bought the privately owned transit system. The management of the private company was retained to operate the new Memphis Transit Authority. This arrangement was motivated both by administrative concerns and by a desire to maintain the existing system of labor relations and benefit plans. All workers were made employees of the management corporation, which handled personnel and labor relations. All fares were the property of the city, and these revenues were used to reimburse the private company for the costs of operation.¹¹⁴

The Memphis formula exemplifies contract-management service delivery, an important concept in public administration.¹¹⁵ For Con-

1963 Senate Hearings, *supra* note 38, at 312.

The centrality of the right to strike is representative. The obvious congressional concern, the inflammatory nature of public employee strikes, and the history of the industry led to a focus, in the administration of § 13(c), on the broader concept of impasse resolution procedures, with arbitration being the most commonly used. See BARNUM, *supra* note 58, at 81.

112. 109 CONG. REC. 5422 (1963).

113. Accommodating inconsistent federal and state or local policies is provided for in the Department of Labor's formal regulations. 29 C.F.R. § 215.3(a)(2) (1982).

114. J. STERN, R. MILLER, S. RUBENFELD, C. OLSON & B. HESHIZER, *THE LEGAL FRAMEWORK OF COLLECTIVE BARGAINING IN THE URBAN TRANSIT INDUSTRY* 11-24 (1976) [hereinafter cited as STERN & MILLER—LEGAL FRAMEWORK]. The Memphis Transit Authority assumed direct control of the transit system in 1973 when the creators of the hybrid relationship retired or left and their successors were unable to keep the arrangement working. *Id.* at 24.

115. For an overview of contract-management service delivery and the general "contracting-out" phenomenon from a variety of perspectives, see Cowden, *California Local Government Contracting After Proposition 13*, 4 INT'L. J. OF PUB. AD. 395

gress in 1964, it provided a solution to a potential dilemma. Both labor representatives testifying before the committees and proponents of the bills speaking on the floor referred to the Memphis arrangement as a desirable way to preserve collective bargaining and other rights in publicly-owned systems when a state law against public employee collective bargaining existed and no special legislation could be obtained.¹¹⁶

There was passage of special legislation, however. As some states had done for internal political reasons prior to 1964,¹¹⁷ legislatures included union representation, collective bargaining, and impasse resolution procedures in the enabling acts for public mass transit systems. Many of these laws include the exact (or similarly stated) guarantees of section 13(c).¹¹⁸ Others authorize transit services to "take all actions necessary" to meet the requirements of the UMT Act and administra-

(1982); Fisk, *Issues in Contracting for Public Services from the Private Sector*, MGMT. INFO. SERV. REP., May 1982, at 1; Florestano, *Contracting with the Private Sector*, 71 NAT'L CIVIC REV. 350 (1982); *La Mirada: A City with a Different View*, GOV'T EXEC., May 1981, at 47; Hughes, *Contracting Services in Phoenix*, PUB. MGMT., Oct. 1982, at 2; Lowery, *The Political Incentives of Government Contracting*, 63 Soc. SCI. Q. 517 (1982); Shulman, *Alternative Approaches for Delivering Public Services*, URB. DATA SERV. REP., Oct. 1982, at 2-3; *Why Cities Farm Out Work to Private Firms*, U.S. NEWS & WORLD REP., Dec. 22, 1980, at 65. The relatively institutionalized use of contract-management in urban mass transit, under the Memphis formula, is reviewed briefly in HAMILTON & HAMILTON, *supra* note 105, at 108-09; JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 26-28. For an overview of the present state of contract-management in the urban mass transit industry, see HAMILTON & HAMILTON, *supra* note 105, at 108-09.

116. *E.g.*, 109 CONG. REC. 5684 (1963); 1963 *House Hearings*, *supra* note 75, at 326 (statement of Bernard Cushman); 1962 *House Hearings*, *supra* note 69, at 220-21 (statement of George M. Harrison). The Memphis formula presents a publicism issue in that its encouragement by the federal government motivated the private performance of tasks that have been adjudged appropriate for public intervention. This effect of § 13(c) shows how—as a synthesis of labor policy, federalism judgments, and a program to aid the provision of a public service—it has had results caused by, but fully independent of, these individual components. *Cf. supra* note 17. This is certainly a tribute to the power of the extraneous condition. It should also serve as an admonition to federal policy makers.

117. *See, e.g.*, 1961 Conn. Pub. Acts 507, §§ 8, 9; 1945 Ill. Laws 1171, §§ 28a, 29; 1947 Mass. Acts ch. 544, §§ 18, 19; 1957 Neb. Laws ch. 23, § 25; 1959 Pa. Laws 1266, § 13.

118. *See, e.g.*, Urban Mass Transportation Act of 1965, 1965 Ind. Acts ch. 337, § 23 (codified at IND. CODE ANN. § 36-9-4-42 (Burns 1981)); 1964 La. Acts No. 127, §§ 1-7 (codified at LA. REV. STAT. ANN. § 23:890 (West Supp. 1982-1983)); 1965 Me. Laws ch. 488 (codified at ME. REV. STAT. ANN. tit. 30, § 4979 (1978)); Utah Pub. Transit Dist. Act, 1969 Utah Laws 1st Spec. Sess. ch. 12, §§ 30-33 (codified at UTAH CODE ANN. §§ 11-20-30, -33 (1973)).

tive actions under it.¹¹⁹ The influence of the federal statute is shown not only in the words of these state laws, but in their effect. They carve out a small piece of state and local governmental activity within which workers possess rights of collective endeavor greatly in excess of those allowed most public employees.¹²⁰

b. Mootness of Conflict

The federalism conflicts anticipated by Congress involved the loss of employee rights arising from the application of pre-existing state

The Utah law has an explicit relationship to the federal statute: The rights, benefits and other employee protective conditions and remedies of section 13(c) of the Urban Mass Transportation Act of 1964 . . . as determined by the Secretary of Labor, shall apply to the establishment and operation by the district of any public transit service or system and to any lease, contract, or other arrangement to operate such system or services.

Id. § 11-20-30.

119.

The authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its subdivisions It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter.

1964 Mass. Acts ch. 563, § 18 (codified at MASS. ANN. LAWS ch. 161A, § 29 (Michie/Law. Coop. 1979) (amended by 1980 Mass Acts ch. 581, § 12). *Accord, e.g.*, 1975 Wash. Laws, 1st Exec. Sess. ch. 270, § 8 (codified at WASH. REV. CODE ANN. § 35.58.2794 (1983)); *see also* 1970 Ky. Acts ch. 243, § 10(3) (codified at KY. REV. STAT. § 96A.090(3) (1982) (may enter into any agreement required in connection with federal grants); 1967 Mich. Pub. Acts No. 204, § 6(e) (codified at MICH. COMP. LAW § 124.406(e)(Supp. 1981-1982)) (do any and all things necessary or desirable to secure federal financial aid).

An "all things necessary" clause has been interpreted by a California court to resolve conflict between state and federal law in favor of the federal requirements. *Stockton Metropolitan Transit Dist. v. Division 276, ATU*, 132 Cal. App. 3d 203, 213-15, 183 Cal. Rptr. 24, 29-30 (1982). A similar clause was used in Louisville to authorize collective bargaining by the transit authority. Nolan, *supra* note 75, at 253 n.87.

Another means of state compliance involving special legislation was the creation of mass transit public benefit corporations. These are treated as private entities, with the municipality involved being the sole member of the corporation. Examples of this form may be found in San Diego, Richmond, Roanoke, and Lynchburg. *See City of Macon v. Marshall*, 439 F. Supp. 1209, 1216 (M.D. Ga. 1977); 1981 *Senate Hearings, supra* note 98, at 150-51 (statement of Clarence Pendleton, Jr.). *See also 1963 House Hearings, supra* note 75, at 483 (statement of W. Willard Wirtz) (reference to availability of this form as a means of compliance).

120. *See, e.g.*, BARNUM, *supra* note 58, at 78-84.

policies.¹²¹ Conflict in the form of stubborn retrenchment never occurred, however. The enactment of the labor protection condition effectively achieved its purpose.¹²² Congressional optimism in envisioning compromise and seemingly voluntary compliance was validated. Although the theoretical federalism issue remains, it has no practical vitality.

2. *Direct Conflict with Subsequent State Enactments*

Subsequent state enactments impairing the collective bargaining and impasse resolution rights guaranteed by section 13(c) pose a more difficult conflict that was not considered by Congress. In *Local Division 589, ATU v. Massachusetts*,¹²³ the First Circuit rejected a union's claims that subsequent state laws which were inconsistent with an existent section 13(c) agreement were violative of the supremacy clause.¹²⁴ Inconsistency arose in July 1978, when the Massachusetts legislature enacted a law mandating an impasse resolution method slightly different from that provided in a 1974 section 13(c) agreement that had enabled the Massachusetts Bay Transportation Authority (MBTA) to obtain capital and operating assistance grants.¹²⁵ The legislature aggravated the conflict in 1980 by passing a "management rights" bill restricting the negotiating freedom of the MBTA.¹²⁶ This

121. See *supra* notes 111 & 112 and accompanying text.

122. The collective bargaining and related rights of workers in publicly-owned and privately-owned systems are roughly the same, with the substitution of arbitration methods for the right to strike being the major difference. Section 13(c) is undoubtedly the most important reason. BARNUM, *supra* note 58, *passim*; see STERN & MILLER, *supra* note 59, at 62. The success of § 13(c) has prompted Barnum to recommend it as a means of executing a broad federal labor policy concerning state and local governmental employees. Barnum, *National Public Labor Relations Legislation: The Case of Urban Mass Transit*, 27 LAB. L.J. 168, 175-76 (1976).

123. 666 F.2d 618 (1981), *cert. denied*, 457 U.S. 1117 (1982).

124. 666 F.2d at 636.

125. The 1974 agreement utilized the interest arbitration procedures of the current contract. Agreement Pursuant to Section 13(c) of the Urban Mass Transportation Act of 1964, as Amended ¶ 1 (Dec. 10, 1974), *reprinted in* Local Div. 589, ATU v. Massachusetts, 511 F. Supp. 312, 337 (D. Mass. 1981), *vacated*, 666 F.2d 618 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982) [hereinafter cited as Agreement Pursuant to Section 13(c)]. In 1978, this procedure consisted of three arbitrators using unspecified but presumably customary (previous local practice plus national and regional comparisons) standards. 666 F.2d at 622. The new law, 1978 Mass. Acts ch. 405, required pre-arbitration mediation, a single local arbitrator with experience in state and local finance, and a written decision, relying primarily on nine factors, including the Authority's financial ability, the effect of any award on property tax rates, and the wages, hours, and conditions of other workers in Massachusetts.

126. 1980 Mass. Acts ch. 581, § 8. The law forbids the MBTA to enter into wage and benefit agreements providing for automatic cost-of-living adjustments or the

law also limited the “all actions necessary” clause¹²⁷ of the enabling act.¹²⁸

The First Circuit assumed that a conflict between the agreement and the statutes existed and looked to the legislative history to ascertain whether Congress intended to prevent the enactment of inconsistent state laws. It analyzed the testimony, reports, and debates and, although recognizing that the effect of section 13(c) on post-award enactments is less clear,¹²⁹ it concluded that Congress did not intend to supercede state law.¹³⁰ In the court’s view, a preemption of inconsistent subsequent law would: (1) federalize mass transit labor relations, a result not inferable without a clear indication of intent; (2) run counter to the express congressional recognition of the local character of public transportation; (3) contradict the transitional purpose of section 13(c); (4) deny the Secretary of Labor the discretion of determining whether a change affecting workers was actually harmful; and (5) replace the congressionally envisioned enforcement mechanism of withholding funds.¹³¹

3. *Indirect Federalization: The Post-Certification Federal Role*

Section 13(c) was not accompanied by the creation of a structure for regulating urban mass transit labor relations. A direct federalization of this type was never considered. Special protections contained in the transit system enabling acts provided their own enforcement structure,¹³² and the appeal of the Memphis formula was its retention of transit systems under the NLRA umbrella.¹³³

inclusion of overtime earnings in the calculation of pension payments. The “management rights” portion of the legislation enumerates eight items about which the MBTA is not authorized to bargain. They include staffing requirements, service levels, overtime, employment standards, hiring, firing (subject to a negotiated grievance procedure that may include binding arbitration) and the use of part-time workers. Another recent example of “management rights” legislation, involving the metropolitan Atlanta transit system, is 1982 Ga. Laws 5101, 5104, § 3.

127. See *supra* note 119 and accompanying text.

128. 1980 Mass. Acts ch. 581, § 8. The MBTA no longer has the authority to unilaterally subordinate state law in seeking federal assistance, and any inconsistency between state and federal law threatening the receipt of funds must be reported to the governor and the legislature. Mass. Ann. Laws ch. 161A, § 29 (Michie/Law. Coop. Supp. 1983).

129. 666 F.2d at 627-33.

130. *Id.* at 633.

131. *Id.* at 633-35.

132. See BARNUM, *supra* note 58, at 79-80, 82-84.

133. See *id.* at 81. See also *supra* note 103 and accompanying text. Only recently has the Memphis strategy in fact had any assurance of validity, however. Subsequent

Special legislation¹³⁴ and the Memphis formula¹³⁵ are merely avenues, however, by which states may make the accommodations that are the necessary predicates to executing "fair and equitable arrangements." These arrangements are the focus of section 13(c), and the means by which the Secretary of Labor warrants the protection of transit employees from harm resulting from federal assistance.¹³⁶ Through their certification and inclusion in the grant contract, the federal government becomes involved in determining contract terms. Section 13(c) thus necessarily "federalizes" urban mass transit labor relations to some extent.

a. Scope of "Fair and Equitable" Arrangements

To properly appreciate the federalism issue, it is essential to understand the dimensions of the "arrangements" required by section 13 (c).

to the UMT Act's passage, the NLRB declined jurisdiction in a number of cases involving municipal services (including public transportation) provided under a contract-management scheme. Its rationale was that the statutory exemption for state and local governments, *supra* note 106, extended to private companies working on their behalf. It applied a two-prong test: (1) whether the "degree of control" possessed by the private entity is such that it is sufficiently independent of the governmental unit to bargain effectively on its own; and (2) whether there is an "intimate connection" between the services provided by the private company and the functions of the exempt government. *Rural Fire Protection Co.*, 216 N.L.R.B. 584 (1975). Private management companies operating publicly-owned transit systems were held to fail the second prong. *See, e.g., Mississippi City Lines*, 223 N.L.R.B. 11 (1976); *Transit Systems, Inc.*, 221 N.L.R.B. 299 (1975).

This did not become a big problem for Memphis formula jurisdictions as there was no incentive for either labor or management to challenge the NLRB's jurisdiction. NLRA coverage is the standard underlying § 13(c), so the rights it provides are what the unions are seeking. The management company's existence depends upon being within the NLRA, in that the rights protected by § 13(c) are then assured and federal funds remain available. The cases that did arise involved representation disputes between rival unions, where the incentive for passivity does not exist. *See Transit Systems, Inc.*, 221 N.L.R.B. 299 (1975); STERN & MILLER—LEGAL FRAMEWORK, *supra* note 114, at 4. The situation was nonetheless unstable, and the Memphis formula could have fallen apart if the unions had become dissatisfied. *See id.* at 51-52.

This potential was eliminated in 1979, when the Board abandoned the "intimate connection" test, choosing to rely solely on the independence of the private employer. *National Transp. Serv., Inc.*, 240 N.L.R.B. 565 (1979). Under this standard, the Board asserted jurisdiction over the company managing the Brockton, Massachusetts bus system. *Baystate Bus Corp.*, 240 N.L.R.B. 862 (1979). *But cf. MTL, Inc.*, 223 N.L.R.B. 1071 (1976) (on essentially identical facts, finding of insufficient degree of control by private company). The Memphis formula is thus a valid means not only of meeting the guarantees of § 13(c), but also of providing an enforcement structure for the underlying rights.

134. *See supra* notes 117-20 and accompanying text.

135. *See supra* notes 114-15 and accompanying text.

136. 49 U.S.C. § 1609(c) (1976).

The statute requires arrangements “to protect the interests of employees affected by” federal transit aid.¹³⁷ The five essential guarantees¹³⁸ are easily applied using this standard when the aid is a grant for acquisition of a private operation. A grant to purchase a fleet of new subway cars “affects” workers less obviously, yet it is possible to ascertain the resulting change in fleet operations.

Actual transactions are seldom this simple, however. For example, in 1973 and 1974, the Massachusetts Bay Transportation Authority (MBTA) applied for capital grants to finance general plant and facility improvements, acquisition and installation of machinery and equipment, power and signal system improvements, acquisition and installation of bus radios, purchase of new buses and track support structure restorations.¹³⁹ Delimiting those “affected” by requested funds in this type of situation is extremely difficult. The section 13(c) agreement reached by the Authority and the unions described the “affected” concept in terms of events occurring “as a result of the Project.” This was broadly defined:

The phrase “as a result of the Project” shall . . . include events occurring in anticipation of, during, and subsequent to the Project; provided, however, that fluctuations and changes in volume or character of employment brought solely by other causes are not within the purview of the Agreement. The term “Project” . . . shall not be limited to the particular facility assisted by federal funds, but shall include any changes, whether organizational, operational, technological or otherwise, which are traceable to the assistance provided, whether they are the subject of the grant contract, reasonably related thereto, or facilitated thereby.¹⁴⁰

This problem of scope was exacerbated by the creation of operating assistance grants in 1974.¹⁴¹ These general subsidy monies apply to no identifiable segment of the system’s operations. In fact, the apparent effect of protecting those “affected” by such funds is to lock the recipient into the entire array of practices involving employees that are existent at the time of the initial grant.¹⁴²

137. *Id.*

138. *See supra* notes 55-57 and accompanying text.

139. Agreement Pursuant to section 13(c), *supra* note 125, at 332.

140. *Id.* at 332-40.

141. *See supra* note 39.

142. The lack of a distinct and identifiable “project” is a key source of displeasure among transit management regarding the scope of labor protection. STERN & MILLER, *supra* note 59, at 92-93. *See also* PIKARSKY & CHRISTENSEN, *supra* note 23, at 8-9

The problems of creating arrangements to accomplish the statutory task in this context prompted the Department of Labor to take actions eventually resulting in the development of a Model Section 13(c) Agreement by national representatives of labor and management.¹⁴³ This was adopted by the Department in 1978 as presumptively "fair and equitable" for operating assistance grants.¹⁴⁴ The Model Agreement is a long and complicated document,¹⁴⁵ culminating in the transformation of section 13(c) from a device to protect workers from the ill effects of public takeovers and automation to a federal imprimatur on a contract regulating every aspect of mass transit operation. The result is a pervasive federal intrusion into what are at least arguable zones of prerogative of state and local governments and their agents.¹⁴⁶

b. Judicial Analysis

The use of conditions on the receipt of financial assistance regularly operates to impose national policies on subnational governments.¹⁴⁷ This displacement of decision making involves Congress and the rest of the federal apparatus in many aspects of state and local affairs, yet it does not necessarily have the pervasiveness suggested by section 13(c) arrangements. These arrangements have the potential of recurrently enmeshing urban mass transit systems with a federal presence. Ascertaining the amount of federal involvement engendered by the congressional mandate is therefore critical. The inquiry is whether section 13(c) is a "one-shot" or a continuing guarantor of collective bargaining and other employee rights.

i. Expanding the Federal Judicial Forum

The post-certification federal role regarding section 13(c) arrangements has received federal judicial attention recently in the context of

(citing pervasive labor protection agreements as significant constraint on management flexibility and innovation).

143. See Curtis, *supra* note 99, at 628; Reed, *The Urban Mass Transportation Act and Local Labor Negotiation: The 13-C Experience*, Spring 1979 *TRANSP. J.* 56, 58-64 (1979); Wickham, *supra* note 13, at 71. The Model Agreement is structured around the "Amtrak conditions" developed by the Secretary of Labor in 1971. See *supra* note 56 and accompanying text; BARNUM, *supra* note 58, at 147.

144. 43 Fed. Reg. 13,558, 13,560 (1978) (codified at 29 C.F.R. § 215.6 (1982)).

145. A copy of the Model Agreement may be found in JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 265-80.

146. See 1981 *Senate Hearings*, *supra* note 98, at 126 (statement of Ray Mundy).

147. See C. VANHORN, *POLICY IMPLEMENTATION IN THE FEDERAL SYSTEM 3* (1979) [hereinafter cited as VANHORN]; Neiman & Lovell, *Federal & State Mandating*, 14 *AD. & SOC'Y passim* (1982).

union suits seeking enforcement. In 1974, the City of LaCrosse completed arrangements to acquire the system from its private owners.¹⁴⁸ Through the Municipal Transit Utility, it entered into a section 13(c) agreement with the local union which provided for collective bargaining and arbitration procedures, including interest arbitration.¹⁴⁹ A separate agreement, not providing for interest arbitration, set out the actual terms and conditions of employment during the period of transition to public ownership. Negotiations held after the expiration of this "conversion agreement" reached an impasse, the union demanded interest arbitration, and arbitrators awarded a new collective bargaining contract. After the contract expired and negotiations again fell to impasse, the union again called for interest arbitration. LaCrosse refused the request, however, and the union sued under the section 13(c) agreement.¹⁵⁰

The threshold legal issues in *Local Division 519, ATU v. LaCrosse Municipal Transit Utility*¹⁵¹ were the existence of subject matter juris-

148. See *Local Div. 519, ATU v. LaCrosse Mun. Transit Util.*, 445 F. Supp. 798, 802 (W.D. Wis.), *aff'd*, 585 F.2d 1340 (7th Cir. 1978).

149. Two general types of labor arbitration exist. "Grievance" arbitration involves disputes about interpretation or application of a provision of a collective bargaining agreement or some other dispute arising under the agreement. "Interest" arbitration involves disputes about what terms should be included in a collective bargaining agreement. SMITH, MERFIELD, & ROTHSCHILD, *supra* note 55, at 103-04.

The inclusion of provisions for interest arbitration in § 13(c) agreements may be the section's most important effect on mass transit labor relations. See 1982 *Senate Hearings*, *supra* note 96, at 83 (statement of Gregory J. Ahart). One provision of some § 13(c) agreements is that any labor dispute must be submitted to binding arbitration at the request of either party. "Labor dispute" is then defined to include the "making or maintaining of collective bargaining agreements" and "the terms to be included in such agreements." *Local Div. 589, ATU v. Massachusetts*, 511 F. Supp. 312, 337 (W.D. Mass. 1980). Paragraph 4 of the Model Section 13(c) Agreement preserves whatever arbitration rights exist under existing collective bargaining agreements, "subject to any changes in such agreements as may be agreed upon or determined by interest arbitration proceedings." JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 266. The meaning of this rather cryptic language and other contract interpretation questions involving these provisions have been the subject of dispute and litigation. See *Curtis*, *supra* note 99, at 627. For further discussion, see *Division 1447, ATU v. Louisville & Jefferson County Transit Auth.*, 659 F.2d 722 (6th Cir. 1981); *Division 580, ATU v. Central N.Y. Regional Transp. Auth.*, 556 F.2d 659 (2d Cir. 1977); *Division 1212, ATU v. Chattanooga Area Regional Transp. Auth.*, 483 F. Supp. 37 (E.D. Tenn. 1979); *Division 1235, ATU v. Metropolitan Transit Auth.*, 477 F. Supp. 1027 (M.D. Tenn. 1979), *aff'd*, 650 F.2d 1389 (6th Cir. 1981); *Stockton Metropolitan Transit Dist. v. Division 276, ATU*, 132 Cal. App. 3d 203, 183 Cal. Rptr. 24 (1982).

150. 445 F. Supp. at 802-03.

151. 445 F. Supp. 798 (W.D. Wis.), *aff'd*, 585 F.2d 1340 (7th Cir. 1978).

diction and a federal cause of action.¹⁵² The court held that federal question jurisdiction existed because the controversy was one "arising under" the laws of the United States.¹⁵³ The success of the union's claims would therefore depend upon an interpretation of the UMT Act,¹⁵⁴ and whether a federal cause of action for the union could be inferred in section 13(c).¹⁵⁵

Preliminarily, the court found that contracts under the section must be enforceable at the insistence of the contractual parties.¹⁵⁶ The uneven availability of state administrative mechanisms and the nature of the dispute resolution task mandate the implication of judicial enforcement.¹⁵⁷ A test established in the landmark case of *Cort v. Ash*¹⁵⁸ was then applied to determine whether a private cause of action could be judicially inferred under the federal statute. The court found that the union was within the protected class; the legislature was silent on the existence of a remedy; such a suit was consistent with the purposes of section 13(c), and; a national concern exists regarding urban mass transit labor relations. Therefore, implication of a federal remedy was appropriate.¹⁵⁹

Upon appeal, the Seventh Circuit upheld the district court's findings.¹⁶⁰ It stated that federal subject matter jurisdiction must exist, because the section 13(c) agreement is intertwined with the UMT Act.¹⁶¹ The statute not only requires the making of the contract; it

152. 445 F. Supp. at 804, 811.

153. *Id.* at 809. See 28 U.S.C. § 1331(a) (Supp. V 1981).

154. 445 F. Supp. at 804-09.

155. *Id.* at 811. The court made this analysis despite its belief that once the jurisdictional question was decided the question was irrelevant. *Id.*

156. *Id.*

157. *Id.* at 812.

158. 422 U.S. 66, 78 (1975). In *Cort*, the Supreme Court set out four factors that are relevant in determining whether a private remedy should be inferred in a statute such as the UMT Act that is silent on the issue: (1) whether plaintiff is of the class for whose especial benefit the statute was enacted; (2) whether the legislature indicated any intent to create or to deny a remedy; (3) whether a private remedy is consistent with the underlying purposes of the legislation; and (4) whether a federal cause of action is inappropriate because the area is traditionally a state concern. *Id.* Cf. *infra* note 297 (Supreme Court's limiting of implied private rights of action).

159. 445 F. Supp. 798, 812-20. In the discussion of the last factor—traditional relegation to state law—the court noted the tension between state and federal law in this area. It interpreted the legislative history as showing an awareness of the conflict and an assertion of federal power to protect workers' rights and the stability of urban mass transit systems. *Id.* at 817-19.

160. 585 F.2d 1340 (7th Cir. 1978).

161. *Id.* at 1346.

further requires the parties to abide by it. The agreement is not a mere private contract once the Secretary of Labor's approval places it within the statutory scheme. Section 13(c) is thus at the heart of any enforcement controversy.¹⁶²

Four other courts of appeal held similarly in analogous cases. Enforcement of the interest arbitration provisions of section 13(c) agreements was the remedy sought in suits involving transit systems in Portland, Maine,¹⁶³ Kansas City, Missouri,¹⁶⁴ Nashville, Tennessee,¹⁶⁵ and Seattle, Washington.¹⁶⁶ The issue in a suit against the Jackson, Tennessee transit authority was the alleged breach of a section 13(c) agreement's obligation to continue collective bargaining in the authority's repudiation of a collective bargaining contract and unilateral reduction of benefits.¹⁶⁷ In each case, the court found the suit to be one over which the federal judiciary has subject matter jurisdiction and one that represents a claim upon which relief could be granted.¹⁶⁸

ii. Resistance

The Eleventh Circuit subsequently disagreed.¹⁶⁹ The Metropolitan Atlanta Regional Transit Authority (MARTA) had terminated certain cost-of-living adjustments during the arbitration of the terms of a new collective bargaining agreement. The union sought an injunction on the ground that the current section 13(c) agreement prohibited any alteration in contract conditions during interest arbitration.¹⁷⁰ MARTA defended by arguing that the court lacked subject matter jurisdiction to hear the suit,¹⁷¹ and the court agreed.¹⁷²

162. See *infra* notes 318-19.

163. Local Div. 714, *ATU v. Greater Portland Transit Dist.*, 589 F.2d 1 (1st Cir. 1978).

164. Division 1287, *ATU v. Kansas City Area Transp. Auth.*, 582 F.2d 444 (8th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979).

165. Division 1235, *ATU v. Metropolitan Transit Auth.*, 650 F.2d 1389 (6th Cir. 1981).

166. Division 587, *ATU v. Municipality of Metropolitan Seattle*, 663 F.2d 875 (9th Cir. 1981).

167. Local Div. 1285, *ATU v. Jackson Transit Auth.*, 650 F.2d 1379 (6th Cir. 1981), *rev'd*, 457 U.S. 15 (1982).

168. *Portland*, 589 F.2d at 11-15; *Kansas City*, 582 F.2d at 449-50; *Nashville*, 650 F.2d at 1391-92; *Seattle*, 663 F.2d at 878; *Jackson*, 650 F.2d at 1382, 84-87.

169. Local Div. 732, *ATU v. Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327 (11th Cir. 1982).

170. *Id.* at 1329.

171. *Id.* at 1330. MARTA also argued that the union failed to state a claim upon which relief could be granted and that the Norris-La Guardia Act precluded issuance of the injunction. *Id.*

172. *Id.* at 1346.

The court rejected the idea that a breach of a section 13(c) agreement is a statutory violation, preferring to frame the inquiry as whether the statute gives a private party the right to seek a remedy for breach of contract in federal court.¹⁷³ In other words, the issue is solely jurisdictional, for a private cause of action—a common law contract claim—obviously exists.¹⁷⁴ Nonetheless, the private right of action doctrine, focusing on legislative intent, provides a proper analytical framework. Using this, the court could find no intent to open the federal courts to these suits.¹⁷⁵ In the court's view the questions involved do not ask for interpretation of the federal statute but only for a determination of the meaning and applicability of the particular agreement.¹⁷⁶ The remedy is based solely on the contract, and the contract is not mandated by federal law.¹⁷⁷ As a regular contractual dispute, there is nothing requiring the special competence or perspective of the federal judiciary.¹⁷⁸

iii. Supreme Court Retrenchment

The Supreme Court settled these issues in June, 1982. On an appeal in *Local Division 1285, ATU v. Jackson Transit Authority*,¹⁷⁹ the Jackson, Tennessee case, a unanimous Court reversed the decision of the Court of Appeals for the Sixth Circuit.¹⁸⁰ The court held that section 13(c) does not permit a union suit in federal court based on violation of the protective arrangements.¹⁸¹ It agreed with the court of appeals that federal subject matter jurisdiction existed.¹⁸² Additionally, it found reasonable the conclusion that Congress anticipated enforcement of the section 13(c) arrangements by private suits.¹⁸³ The issue thus became the presence of a federal cause of action that would enable the union to seek a remedy in federal court.¹⁸⁴ The relevant

173. *Id.* at 1332.

174. *Id.* at 1333.

175. *Id.* at 1334-45.

176. *Id.* at 1338.

177. *Id.* at 1341, 1344.

178. *Id.* at 1344-45.

179. *Jackson Transit Auth. v. Local Div. 1285, ATU*, 457 U.S. 15 (1982), *rev'g*, 650 F.2d 1379 (6th Cir. 1981).

180. 457 U.S. at 29. Justices Powell and O'Connor concurred, emphasizing that the Court's reasoning appropriately limits access to the federal courts in the absence of unambiguous legislative intent to create jurisdiction. *Id.* at 30.

181. *Id.* at 29.

182. *Id.* at 21 n.6.

183. *Id.* at 20-21.

184. *Id.*

inquiry was whether the agreement envisioned by Congress was to be a "creation of federal law," so that its content is federal in nature.¹⁸⁵ Analyzing the legislative history, the Court determined that section 13(c) was to be a means of accommodating state law to the labor relations structure existent in mass transit.¹⁸⁶ There was no intent to invent a federal law of public transportation labor relations. State policy, as affected by section 13(c), remained fully applicable. The Court concluded that the section 13(c) agreement occupies the same position as the collective bargaining contract; a breach of either is not a violation of the statute or a deprivation of the federal rights secured by it.¹⁸⁷

IV. New Approaches

This Article began by identifying two key challenges to the present system of social organization: a desire for private sector provision of many of the services delivered by government, and a desire to remove the federal government from state and local affairs. These ideas are based on a preference for private over public and local over federal. The motivation for this preference stems from a perception that private actors are more efficient and effective.¹⁸⁸ Tales of governmental failures such as wastefulness and unresponsiveness are indeed commonplace.¹⁸⁹ Many persons assume that any government task can be

185. *Id.* at 23.

186. *Id.* at 24-28.

187. *Id.* The result would be the same even if a breach of the arrangements contract is interpreted as a violation of § 13(c) itself. *Id.* at 29 n.12.

188. See J. BENNETT & M. JOHNSON, *BETTER GOVERNMENT AT HALF THE PRICE: PRIVATE PRODUCTION OF PUBLIC SERVICES* 19 (1981) ("[a]s every taxpayer knows, government is wasteful and inefficient; it always has been and always will be"). The authors, Bennett and Johnson, rely heavily on the "Bureaucratic Rule of Two" posited by Thomas Borcharding: "Removal of an activity from the private to the public sector will double its unit costs of production." *THE SOURCES OF GROWTH IN PUBLIC EXPENDITURES IN THE U.S. 1902-1970*, in *BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH* (T. Borcharding ed. 1977). Cf. Sanoff, *supra* note 1, at 74 (describing government as "obese," "muscle-bound," "senile," and "incontinent," "having lost its capacity to perform"). *But see* Judis, *supra* note 2, at 138. For a look at public sentiment in this area when the issue is given specific implications, see The Gallup Opinion Index, Dec. 1978, at 22-24 (results of poll on public versus private provision of community services).

189. See W. PROXMIRE, *THE FLEECING OF AMERICA* (1980) (famous exposition of government waste). See also D. LAMBRO, *FAT CITY: HOW WASHINGTON WASTES YOUR TAXES* (1980); *Bureaucratic Bungling Hits Epidemic Levels*, U.S. NEWS & WORLD REP., Mar. 24, 1980, at 68.

better performed by the business community with the aid of the free market's invisible hand.¹⁹⁰ With respect to the activities that nonetheless remain governmental, the desire to localize them is indicative of a suspicion of the federal government which has been present since the inception of the republic.¹⁹¹ It is from these perspectives that people are developing new approaches to social organization, approaches which may be seen in models for the urban mass transit industry.

A. The Models

1. *The Transit-Corporation Model*

A comprehensive concept indicative of current trends calling for reduced government activity, particularly at the federal level, is the transit-corporation model.¹⁹² This model attempts to change the roles of federal, state and local governments as well as that of the private sector so that a more effective and efficient system may evolve.

The model is directed at six problems generally present in current systems of governmental service provision.¹⁹³ First, policies are made that attempt to perform tasks not within the purview of general policy making.¹⁹⁴ Second, there are no standards by which good performance may be gauged, and there are no incentives to ensure efficiency.

190. See ROTHBARD, *supra* note 2, at 194-96 (Libertarian idea that appropriate free market exists for everything). *But cf.* Main, *Why Government Works Dumb*, FORTUNE, Aug. 10, 1981, at 146, 156 (despite merits of private enterprise, it is not whole answer); BARNUM, *supra* note 58, at 164 (publicly-owned transit systems tend to be more productive than private ones).

191. Our constitutional concepts of popular sovereignty may be found in the political philosophies of the Enlightenment. See J. LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government*, reprinted in SOCIAL CONTRACT 3 (1960); D. HUME, *Of the Original Contract*, reprinted in SOCIAL CONTRACT 147; J. ROUSSEAU, *The Social Contract*, reprinted in SOCIAL CONTRACT 168. Viable popular sovereignty must be rooted in community. See Ramney & Kendall, *Basic Principles for a Model of Democracy*, in EMPIRICAL DEMOCRATIC THEORY 46-49 (C. Cnudde & D. Neubauer ed. 1969). A concern with centralized power is that it diminishes popular sovereignty because of particular special interest groups to exploit their influence in such an environment. *Cf.* HAMILTON & HAMILTON, *supra* note 105, at 34-35 (citing effects of the power of labor, elderly, and handicapped interest groups at the national level).

192. HAMILTON & HAMILTON, *supra* note 105.

193. *Id.* at 10-11.

194. Four categories of policy are identified: (1) "general policies," which are ambiguous goals providing no guidance for implementation; (2) "operating objectives," which are implementation guides with flexibility for expert discretion; (3) "stipulations," which are very specific, inflexible implementation directives; and (4) "constraints of the absurd," which are obvious requirements that neither guide nor

Third, both political and operational responsibility are diffused and confused because of multi-level policy making. Fourth, this structure also impairs planning capabilities through the creation of additional uncertainty. Fifth, the removal of policy formation from the local level often enables interest groups that have more power at other levels to create imbalances and inefficiencies in programs. Finally, this removal also leads to inattention to variations existing among different systems and changes in single systems over time. The brief overview of urban mass transit presented here reveals instances of these problems.¹⁹⁵

The basic tool for alleviating these problems is the separation of matters of broad policy from matters of daily operations.¹⁹⁶ Policy making is given to the public sector and managerial decisions are reposed in private entities.¹⁹⁷ The centerpiece is a transit-corporation board¹⁹⁸ which has full responsibility for translating general policy¹⁹⁹ into clear and unconflicting operating objectives.²⁰⁰ Management, which is hired by the board, has full autonomy to operate the system within the confines of these objectives.²⁰¹

Public/private interfacing is an important part of the transit-corporation model. Public ownership with social-marginal-cost pricing²⁰² is seen as the most viable corrective action for responding to the existence of various types of market failure in urban mass transit.²⁰³ The corporation board, with its policy making functions, is designed to provide the accountability necessary for any public operation.²⁰⁴ To achieve adequate incentives for efficiency, the transit system's management is forced to operate under conditions of "economic darwin-

constrain, such as a mandate for "integrity." *Id.* at 9. One of the book's themes is that stipulations and constraints of the absurd are both useless and harmful, that general policies are overused, and that operating objectives should be utilized more. *Id.* at 18-24, 32-33, 36, 47-56, 96, 98, 141.

195. This model views § 13(c) as a special example of the increased influence particular political subgroups can have when policy making is removed from the local level. *Id.* at 34.

196. *See id.* at 79-84.

197. *Id.* at 93-129.

198. *See id.* at 114-29.

199. *See id.* at 96.

200. *See id.* at 100.

201. *See id.* at 100, 110-11.

202. Social-marginal-cost pricing seeks to include all costs and benefits of an economic activity, especially the external effects typically ignored in a regular market environment, in the marginal cost calculations that serve as the output regulator for profit-maximizing providers. *See id.* at 64-67, 70.

203. *Id.* at 61-62, 71.

204. *See id.* at 96-100.

ism.”²⁰⁵ The model advocates competition among private firms for the management contract, in which are embodied the operating objectives.²⁰⁶ The private entities would work under the market accountability regime of profit maximization.²⁰⁷

The first two problems of contemporary governmental service provision identified by the model²⁰⁸ are dealt with by the basic public/private-policy/operations structure; the other four are addressed in the streamlining of the governmental participants. The local legislature may, of course, enact policy in creating the corporation.²⁰⁹ Other agencies (regional planning bodies, for example) may have input, but they are constrained to an advisory role.²¹⁰ The model further limits federal and state governments. It contemplates their ascertaining the adequacy of the legal structure created, monitoring civil rights compliance, and providing financial and technical assistance. Only block grants are allowed, and no subsidies may be tied to compliance with implementation directives or other operational policies.²¹¹ Policy making is to be the domain of the local corporation board, which has ultimate political authority and responsibility.²¹²

2. *The Brokerage Concept*

The concerns addressed in the transit-corporation model and the balancing recommended are consonant with a contemporary idea known as the brokerage concept.²¹³ The UMTA recently defined transportation brokerage as “a market-oriented transportation strategy wherein an entity identifies various transportation markets and needs, facilitates the development of an efficient market environment, and matches the most appropriate services and providers to individual markets.”²¹⁴ Once again, as in the transit-corporation model, reliance

205. *Id.* at 101-02.

206. *Id.* at 103, 105-09.

207. *Id.*

208. See *supra* note 193 and text following.

209. See *id.* at 96, 141.

210. *Id.* at 142.

211. *Id.* The model attempts to “repudiate” the tying of financial aid to stipulations. *Id.*

212. *Id.*

213. See Fox & O'Neill, *Transportation Brokering*, PUB. MGMT., July, 1982, at 15; Orski, *The Changing Environment of Urban Transportation*, 48 J. AM. PLAN. A. 309 (1982) [hereinafter cited as Orski, *Changing Environment*]; Orski, *Urban Transportation: The Role of Major Actors*, 34 TRAFFIC Q. 33 (1980) [hereinafter cited as Orski, *Major Actors*]; Wickham, *supra* note 13.

214. 47 Fed. Reg. 46,410-11 (1982).

is placed on the private sector,²¹⁵ due to the belief that the profit motive and competitive drive will lead to lower costs, greater efficiency, and better service. Conventional bus and rapid transit systems have proven to be either inadequate or inappropriate for many transportation needs.²¹⁶ The brokerage concept is designed to facilitate a more diverse and market-responsive transit system.²¹⁷ It challenges traditional ideas by distinguishing public provision of a service from public production.²¹⁸

B. Paratransit

1. Generally

Central to the brokerage concept is the development of paratransit,²¹⁹ “a family of transportation services, generally provided in small vehicles, which are tailored to individual travel needs through flexible scheduling or routing of vehicles. Services include carpooling, vanpooling, dial-a-ride, shared-ride taxi, jitney, airport limousine, and subscription and route-deviated bus services.”²²⁰ These intermediate transport modes combine elements of the individualistic automobile and traditional mass transit and operate in the hybrid publicism environment of brokerage.²²¹ Additionally, paratransit has a special

215. See Kemp, *Improving Public Transportation in a Changing Financial Environment*, PUB. MGMT., July 1982, at 2-3.

216. *Id.* at 2 (“[i]n 1975 public transit accounted for less than 3 percent of the nation’s total urban passenger miles of travel, and the evidence suggests a further decline in market share since then”). See generally *Rumbling Toward Ruin*, TIME, Mar. 30, 1981, at 12 (overview of problems besetting urban mass transit).

217. See Orski, *Changing Environment*, *supra* note 213, at 311; Orski, *Major Actors*, *supra* note 213, at 42-43.

218. Regarding advocacy of separation of provision and production, see, e.g., Wechsler, *Four Approaches to the Use of the Private Sector in the Production of Local Government Services*, in PUBLIC-PRIVATE COLLABORATION IN THE DELIVERY OF LOCAL PUBLIC SERVICES 42 (Univ. of Cal.-Davis, Inst. of Gov’t Affairs 1980); Spann, *Public versus Private Provision of Government Services*, in BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 89 (T. Borchering ed. 1977).

219. See Wickham, *supra* note 13, at 63. For a general introduction to paratransit, see, e.g., R. KIRBY, K. BHATT, M. KEMP, R. MCGILLIVRAY, & M. WOHL, *PARATRANSIT: NEGLECTED OPTIONS FOR URBAN MOBILITY* (1974) [hereinafter cited as KIRBY & BHATT]; Transportation Research Board, Nat’l Research Council, Nat’l Academy of Sciences (Special Report 164), *Paratransit* (1976) [hereinafter cited as Transportation Research Board].

220. 47 Fed. Reg. 46,410 (1982).

221. Paratransit modes may be grouped into three categories: those that are hired and driven, those that are hailed or phoned, and those that are prearranged and shared with others. KIRBY & BHATT, *supra* note 219, at 7. For a table summarizing the various delivery approaches actually employed for paratransit services, see URBAN DATA SERV. REP., Oct. 1982, at 11.

attractiveness for transit agencies because it can meet the transportation needs of elderly and handicapped persons.²²² Many in the urban mass transit field, including the Urban Mass Transportation Administration itself, are relying on paratransit in its various manifestations.²²³ However, labor is not among its advocates.²²⁴

2. Section 13(c) as an Obstacle

The federal government and its conditions, particularly section 13(c), is a major obstacle to the institution of paratransit and the concepts it represents. A critique of section 13(c)'s applicability to paratransit identifies two problems.²²⁵ First, the provision extends work rules and wage rates developed in conventional transit to an environment to which they are inapplicable. For example, the common restrictions on the use of part-time employees and split-shifts thwart the efficient development of alternative modes.²²⁶ The second problem is the conflict between the restrictions imposed by the protections of section 13(c) and the brokerage concept's open bidding between suppliers.²²⁷ The inclusion of paratransit within the scope of section 13(c) has led to the development of a "fence" concept that provides for no competition with or replacement or displacement of established conventional service.²²⁸ This has diminished the flexibility of the brokerage approach and limited the development of alternative modes.²²⁹

222. See KIRBY & BHATT, *supra* note 219, at 41-42. See generally U.S. Dep't of Transp., *Handicapped & Elderly Market for Urban Mass Transit* (1973).

223. See, e.g., KIRBY & BHATT, *supra* note 219, at 41-42; Hemily & Meyer, *supra* note 50, at 297; BURKE, *supra* note 7, at 60-61, 80; cf. MEYER & GOMEZ-IBANEZ, *supra* note 17, at 55, 73-74 (envisioning a role for paratransit, as long as its inherent limitations are recognized).

Regarding the use of paratransit modes in non-urban areas, see *Public Transit in Small Cities and Counties*, URB. DATA SERV. REP., May 1982, at 1.

224. The ATU supported paratransit from the mid-1960's to the mid-1970's, on the ground that it would stimulate and capture new ridership. STERN & MILLER, *supra* note 59, at 142. The ATU now sees paratransit as a threat to workers in its role as a competitive or substitutive service. *1982 Senate Hearings*, *supra* note 96, at 359 (statement of John Rowland). For an overview of labor issues in paratransit, see KIRBY & BHATT, *supra* note 219, at 257-59; Smith, *Labor Implications for Paratransit Service*, in Transportation Research Board, *supra* note 219, at 127.

225. Wickham, *supra* note 13, at 64.

226. *Id.* at 73-74. Transit industry work rules often require premium pay for employees who work during both morning and evening peak ridership periods of the day, guarantee certain employees a full week's pay regardless of whether forty hours are worked, and closely prescribe job categories so that idle workers often may not be utilized. *Id.*

227. *Id.* at 64, 75-78.

228. *1982 Senate Hearings*, *supra* note 96, at 359 (statement of John Rowland).

229. See *id.* at 84-85 (statement of Gregory J. Ahart). For a review of the contro-

C. Curtailment of Section 13(c)

The Transit Assistance Act of 1982, proposed by the Reagan Administration, but not passed by Congress, would have dramatically curtailed if not in fact eliminated section 13(c).²³⁰ It advocated ending all operating subsidies after 1984. Ninety percent of the capital monies that would have been available were in a new block grant program to which section 13(c) was not applicable. Privately provided paratransit would have been excluded from the reach of the provision. Finally, administration of labor protection would have been shifted from the Department of Labor to the Department of Transportation.²³¹

Other efforts are being made to curtail section 13(c). The Urban Mass Transportation Administration has expressed its distaste for the law.²³² The Department of Labor has been pressured to change its policies so that the provision is weakened and new regulations are expected.²³³ Department actions, with apparent judicial approval,

versy over the applicability of § 13(c) to the paratransit services offered by small towns and rural areas under the Surface Transportation Act of 1978, see Stanfield, *Labor Protection Clause Gives Rural Transit Operators Fits*, 11 NAT'L J. 1127 (1979) [hereinafter cited as Stanfield].

230. S. 2367, 97th Cong., 2d Sess. (1982), printed in 1982 Senate Hearings, *supra* note 96, at 6-27. Conflict between President Reagan and unions became evident early in his term and intensified dramatically after the air traffic controllers' strike. See, e.g., *Barbs for an Old Union Man*, TIME, Sept. 14, 1981, at 14-15. State and local government employees have been directly and adversely affected by the administration's budget cuts. See, e.g., *The Reagan Cuts Hit Local Workers*, BUS. WK., Nov. 23, 1981, at 51-52.

231. *Id.* The unions see a shift of § 13(c) certification out of the Department of Labor as a major diminution of the section's protection. See Resolution No. 67, adopted by Fourteenth Constitutional Convention of the AFL-CIO (Nov. 17, 1981), reprinted in 1982 Senate Hearings, *supra* note 96, at 365-66. There is a perception that the UMTA and the Department of Transportation are allies of transit management and that the Department of Labor is predisposed to the interests of the unions. M. Rothenberg, Public Transportation: An Element of the Urban Transportation System 170 (Report to the Department of Transportation, Feb. 1980); see Stanfield, *supra* note 229, at 1128; see also JENNINGS, SMITH & TRAYNHAM, *supra* note 13, at 37.

232. 1981 House Hearings, *supra* note 96, at 379-83 (statement of Arthur E. Teele, Jr., Admin'r, UMTA); cf. 47 Fed. Reg. 46,410-11 (1982) (presence of labor protection arrangements inconsistent with "free market" approach to paratransit will be considered in determining project funding).

233. See Curtis, *supra* note 99, at 628-29. Regulations are expected to provide that the five specific statutory guarantees will be the only prerequisites for certification, with anything additional subject to mandatory local negotiation. Curtis, *supra* note 99, at 630. In addition, the character of the statutory guarantees is uncertain because of Labor Department interpretations. See *infra* note 170. Even though the Departments of Labor and Transportation have a very uneasy relationship, see Stanfield, *supra* note 229, at 1128, the transfer of administration of these new guidelines to Transportation would win its adherence. 1982 Senate Hearings, *supra* note 96, at 383

already indicate an approach more accommodating to management interests.²³⁴ Additionally, the Supreme Court's ruling in *Jackson Transit Authority*²³⁵ and the First Circuit's holding in *Local Division 589, ATU v. Massachusetts*²³⁶ provide an avenue for the states to circumvent section 13(c) through the enactment of contrary laws (or application of existing laws²³⁷), the effect of which on labor protection arrangements could then be ignored by federal authorities, with the judiciary powerless to interdict.

(answers to questions submitted to the Department of Transportation by Senators Riegle and Dixon).

234. See *ATU v. Donovan*, 554 F. Supp. 589 (D.D.C. 1982). In *Donovan*, the central dispute was the Secretary of Labor's conditional certification of grants to three transit authorities despite the lack of an agreed method of impasse resolution. In each case, management refused to agree to the usual provision for the submission of impasses to binding interest arbitration. Certification was given on the condition that negotiations would continue. The unions involved sued for review of the Secretary's action as an abuse of discretion and for a temporary injunction to prevent disbursement of the grant funds. *Id.* at 591-93. A Labor Department official, in an affidavit submitted to the court, interpreted § 13(c) to not require any particular form of impasse resolution, and he stated that certification without any such procedure would be allowed in some circumstances. In fact, the affidavit indicated an abandonment of the concept that some form of mandatory, binding impasse resolution process was required by at least the spirit of § 13(c) as a *quid pro quo* for the last right to strike. *Id.* at 593, n.6. The court, relying on *Local Div. 589, ATU v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982), and the legislative history, stated that § 13(c) does not require any mandatory or enforceable form of impasse resolution. *Donovan*, 554 F. Supp. at 597-99. Accordingly, it denied the preliminary injunction (while expressing severe doubt on the merits of the unions' primary case). *Id.* at 599-600.

235. 457 U.S. 15 (1982).

236. 666 F.2d 618 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). Although the Court in *Jackson* makes only one brief reference to the First Circuit's case, 457 U.S. at 20 n.5, its reasoning is fully consistent with that of the lower court. See *id.* at 26-28.

237. An example of this occurred in Atlanta after the MARTA decision, see *supra* notes 144-151 and accompanying text, and the Supreme Court's ruling in *Jackson*, see *supra* notes 152-59 and accompanying text. MARTA was engaged in interest arbitration with the local union pursuant to the governing § 13(c) agreement when the Eleventh Circuit issued its opinion. MARTA's governing board voted to withdraw from the arbitration, and the Georgia Supreme Court upheld the vote. *Local Div. 732, ATU v. Metropolitan Atlanta Rapid Transit Auth.*, 251 Ga. 15, 303 S.E.2d 1, 3 (1983). The Georgia court interpreted *Jackson* to dictate the application of state law to both enforceability and revocability of mass transit arbitration agreements. *Id.* at 4. Georgia law permits such a revocation of an agreement to arbitrate, *id.* at 5; therefore the federal protection provided by § 13(c) was nullified. Whether the union can force the Secretary of Labor to declare that the "fair and equitable" arrangements governing MARTA have been infringed upon is being litigated now. *Id.* at 5 n.2. See also *Office & Professional Employees Int'l Union v. Mass Transit Admin.*, 453 A.2d 1191, 1194 n.4 (Md. 1982) (interpreting *Jackson* to mandate state law supercession of any federal rights possibly protected by § 13(c) agreement).

V. Theoretical Foundations

A. A Theory of Publicism

The present pattern of social ordering and the complaints which follow from it are best understood by constructing theories of publicism and federalism.²³⁸ A theory of publicism must begin with the realization that ours is a privately-oriented system in which there is a rebuttable presumption in favor of individual, voluntary effort, to the extent that most public activities are called "intervention."²³⁹ This does not preclude governmental activity, however, for when the private market fails,²⁴⁰ society must utilize an alternative regulatory scheme to achieve its goals. The increased activity of the public sector indicates that society has diagnosed numerous situations in which free competition results in an inefficient allocation of resources.

Non-allocational problems with the competitive system, chiefly maldistribution of income, also lead to market failure.²⁴¹ More broadly, society often desires policy outcomes that are not amenable to the price regulator utilized by the individually-oriented private market and which cannot be reached through decentralized consensus due to the absence of a total congruity of value hierarchies.²⁴² As the instrument for collective action, government intervenes in the market to achieve these outcomes.

B. A Theory of Federalism

Once public intervention is justified, the question becomes what level(s) of government should undertake it. Actually, the inquiry is whether the presumption in favor of state activity (with local levels subsumed within this) has been rebutted. As with public endeavor generally, federal actions are termed interventionist and are justifiable only if necessary.²⁴³

238. See generally *supra* note 5.

239. See SCHULTZE, *supra* note 105, at 13-15.

240. See *supra* note 11 and accompanying text.

241. See BARRETT, *supra* note 11, at 53-56. See also P. SAMUELSON, *ECONOMICS* 801-22 (9th ed. 1973) (inequality of income distribution under laissez-faire leads to programs to establish equality).

242. See generally LIPSEY & STEINER, *supra* note 11, at 427-28 (neglect of nonmarket goals as a source of market failure).

243. See Wechsler, *The Political Safeguards of Federalism: The Role of the State in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543, 544-46 (1954) [hereinafter cited as Wechsler].

1. *Structural Necessity*

The central justification for the exercise of federal power is the inability of other levels of government to properly perform a task. This is what gave birth to a central government in 1789.²⁴⁴ A unified nation must have a national government to address those matters outside the scope of control of the various subnational units. If there is to be effective public sector activity, some amount of federal intervention is inevitable.

2. *Federal Supremacy*

This theory of federalism embodies a restrictive theory of federal power. Nonetheless, to implement federal actions taken for reasons of subnational structural impotency, the dominion effected by the supremacy clause²⁴⁵ is essential.²⁴⁶ This inevitable constitutional concession proves fatal to the barriers erected by "limited government" and "delegated powers" because allowing federal law to take precedence automatically forces a capitulation to any federal power exercised. Relief through extra-constitutional states' rights may have once been viable, yet this avenue is now precluded by the Civil War's reiteration of national supremacy.²⁴⁷ Even the limitations presupposed by a restrictive theory of federal power effectively require federal acquiescence through the concurrence of that level's courts. The only source of state or local autonomy is thus the self-restraint of the federal

244. Arising from the pre-revolutionary British scheme for division of powers between the central, imperial government and the colonial government, D. HUTCHINSON, *THE FOUNDATIONS OF THE CONSTITUTION* 83-85 (1928), "[t]he delegated powers were merely the concrete embodiment in terms of the political experience of the eighteenth century of the principle that the new national government was to have the powers necessary to deal with all truly national problems." Cushman, *Social and Economic Control Through Federal HELP! Taxation*, 18 MINN. L. REV. 759, 760 (1934). In other words, the federal legislative power was formulated to be triggered by the incompetency of the states to act. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1337-45 (1934) [hereinafter cited as Stern]. See also *THE FEDERALIST* No. 23, at 152 (C. Rossiter ed. 1961); *Id.* (A. Hamilton); *Id.*, No. 41, at 255 (J. Madison); *Id.*, No. 42, at 264 (J. Madison) (concerning war, coinage and similar powers).

245. "[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

246. See *THE FEDERALIST* No. 34, at 204 (A. Hamilton) (C. Rossiter ed. 1961) (supremacy clause merely declares the necessary truth arising from institution of national government; furthermore, "law" inherently means supremacy).

247. See Note, *Section 1983 and Federalism* (Developments in the Law), 90 HARV. L. REV. 1133, 1181 (1977) [hereinafter cited as *Section 1983 and Federalism*].

government. The significance of this fact is amplified by the de facto supremacy concept of the publicism realm, in which properly taken governmental actions, carrying the power of the sovereign, usurp contrary private prerogatives.²⁴⁸ Therefore, the federal government, in its various manifestations, is the key actor in the social system.²⁴⁹

248. There are, of course, limits on governmental intrusions upon personal rights and freedoms. See U.S. CONST. amends. I-IX, XIV.

249. The malignancy of the supremacy concept is illustrated by the commerce clause. U.S. CONST. art. I, § 8, cl. 3 (“[t]he Congress shall have power . . . [t]o regulate Commerce . . . among the several States . . .”). The existence of this legislative power is so clearly within the restrictive model that it is one of the most commonly cited examples of the structural inadequacies of a confederacy of states. See Stern, *supra* note 244, at 337 (“[t]he Constitutional Convention was called because the Articles of Confederation had not given the Federal Government any power to regulate commerce”). The development of a nationwide economic system destroyed any self-limiting value possessed by the clause, however. See, e.g., *United States v. Darby*, 312 U.S. 100 (1941) (the Court recognized that, “in present-day industry,” various small economic units could have a large cumulative effect on the national order, so that they must be amenable to federal influence. *Id.* at 123. See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). As advocated by Stern, *supra* note 244, at 1364-65, and others, the Supreme Court eventually characterized the extent of federal commerce clause power as being determined by economic circumstances. In this environment, it is difficult to draw a line between legitimate federal power and the gratuitous usurpation of state and local (and private) policy choices arising from normative disagreements. The Civil Rights Act of 1964, Pub. L. No. 88-352 tit. II, § 201, 78 Stat. 243 (1964) (codified at 42 U.S.C. § 2000a (1976)), however desirable, shows the extremes to which the supposedly limited commerce clause may be extended. See *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964). The attempt to revitalize judicially a federalism limitation through use of other constitutional provisions must employ distinctions between the legitimate and the illegitimate that appear as insincere and contrived as the concept attacked. For example, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court held that federal legislative power could not reach attributes of sovereignty relating to functions essential to the states’ separate and independent existence. *Id.* at 845. It then concluded that regulation of the wages and hours of state and local employees engaged in certain activities—fire, police, sanitation, public health, parks and recreation, hospitals and schools, but not railroads—encroached on this zone of immunity. *Id.* at 851, 854 n.18, 855. Since then, the Court has ruled that federal delineation of the collective bargaining and strike rights of workers on a commuter railroad and application of federal age discrimination laws to state parks employees are not prohibited as infringements on state sovereignty. See *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983). Cf. *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) (setting out four-prong test for traditional governmental function and finding municipal airport to be within it); 29 C.F.R. §§ 775.3-775.4 (1982) (Wage and Hour Administrator’s determination of traditional and non-traditional functions for purposes of administration and enforcement of Fair Labor Standards Act).

3. Federal Government as Financier

The rapid expansion of the federal government is attributable in large part to growth in monetary aid programs, most all of which flow to or through subnational jurisdictions.²⁵⁰ The variety of avenues for the federal provision of money is staggering.²⁵¹ A legitimate federal role as financier is within the contemplation of the restrictive model because states and localities are limited in their territorial jurisdiction. They are also competitive.²⁵² These characteristics result in a fiscal system racked with externalities and involuntary adherence to the

250. Federal domestic expenditures—consisting largely of assistance under the “social security” rubric and aid to state and local governments—rose from 1.5 percent of the gross national product in 1929 to 15.9 percent in 1980. In 1972 constant dollars, this was a rise from \$37 per capita in 1929 to \$1,025 in 1980. U.S. Advisory Comm’n on Intergovernmental Relations, *Significant Features of Fiscal Federalism* 12-13 (1981-82 ed.) [hereinafter cited as *Significant Features of Fiscal Federalism*]. The proportion represented by outlays for state and local governmental assistance rose significantly in the Great Society period and was nearly one-quarter of gross national product by 1975, with the inclusion of general revenue sharing. See U.S. Comptroller General, *Fundamental Changes are Needed in Federal Assistance to State and Local Governments* 5 (1975) [hereinafter cited as *Fundamental Changes*]. These outlays totaled \$51.2 billion in 1980. *Significant Features of Fiscal Federalism*, *supra*, at 66. Overviews of these intergovernmental transfers may be found in J. BOLLENS & H. SCHMANDT, *THE METROPOLIS: ITS PEOPLE, POLITICS, AND ECONOMIC LIFE* 224-27 (3d ed. 1975) [hereinafter cited as *BOLLENS & SCHMANDT*]; J. HANUS, *THE NATIONALIZATION OF STATE GOVERNMENT* 9-11 (1981).

251. Included here are loans, loan guarantees, insurance arrangements, tax expenditures, and the like, all of which are proliferating as tools of governmental (generally federal level) activity. See Salamon, *Rethinking Public Management: Third-Party Government and the Changing Forms of Government Action*, 29 *PUBLIC POLICY* 255, 257 (1981); see also Weidenbaum, *The Use of Government’s Credit Power*, in *REDISTRIBUTION THROUGH THE FINANCIAL SYSTEM* 211-26 (K. Boulding & T. Wilson ed. 1978).

252. A central feature of metropolitan areas is a plethora of local governmental units. BOLLENS & SCHMANDT, *supra* note 250, at 42-47. Various districts, municipalities, and the like compete for scarce resources as they seek to provide adequate services, engaging periodically in jurisdictional battles. *Id.* at 35. In the wake of New Federalism and other programs designed to revivify the states, the issue of their competitive environment is garnering increased attention. Severance taxes and water rights are particular items of contention. Additionally, in an effort to attract or retain businesses and produce more tax revenues, states have been employing such competitive tools as industrial development loans and selective regulatory relief. See P. PASSELL & L. ROSS, *STATE POLICIES AND FEDERAL PROGRAMS: PRIORITIES AND CONSTRAINTS* 8-12 (1978); *Now Energy is What Counts in the War Between the States*, *BUS. WK.*, July 19, 1982, at 166; Stone, *Next: State vs. State?*, *U.S. NEWS & WORLD REP.*, Feb. 8, 1982, at 76; *Tax Cuts—and More—to Woo Business*, *U.S. NEWS & WORLD REP.*, Feb. 8, 1982, at 26; *The Withering Away of the States*, *THE NEW REPUBLIC*, Mar. 28, 1981, at 17.

least common denominator.²⁵³ Central cities are unable to tax suburban residents who use or benefit from the cities' services.²⁵⁴ The states may interject to equalize costs and benefits,²⁵⁵ yet they must also keep their spending at levels that are low enough to avoid creating inter-jurisdictional imbalances.²⁵⁶ The metropolitan area may even lie in more than one state, so that the inequities are extremely difficult to mitigate in any manner.²⁵⁷ Only the federal government, with no interstate economic barriers, has the authority and ability to exercise power over the full geographic scope of individual decision-making systems. Therefore, it plays an essential role in raising the revenues deemed necessary to finance a variety of governmental endeavors.²⁵⁸ Even under the minimalist model of federal authority, there are far-reaching federal powers of fiscal redistribution.

VI. Theoretical Applications

A. Urban Mass Transit

1. *The Need for Federal Financing*

The history of urban mass transit evidences the concepts of these models.²⁵⁹ The changes in public transportation, radical as they may

253. See, e.g., BOLLENS & SCHMANDT, *supra* note 250, at 214-16; J. HEILBRUN, *URBAN ECONOMICS AND PUBLIC POLICY* 343-47 (1974) [hereinafter cited as HEILBRUN].

254. For a brief summary of the differing viewpoints on the issue, see HEILBRUN, *supra* note 253, at 342-43.

255. See, e.g., J. MAXWELL & J. ARONSON, *FINANCING STATE & LOCAL GOVERNMENTS* 77-86 (3d ed. 1977); U.S. Advisory Comm'n on Intergovernmental Relations, *State Aid to Local Government* 5-12 (1969).

256. Sound economic and fiscal policy compels the maintenance of a competitive tax climate relative to other states so that inadequate financing of necessary public services often results. R. THOMPSON, *REVENUE SHARING: A NEW ERA IN FEDERALISM?* 5 (1973) (statement of Gov. Milliken of Michigan) [hereinafter cited as THOMPSON]; see also M. REAGAN & J. SANZONE, *THE NEW FEDERALISM* 42-52 (2d ed. 1981) (many state and local governments are unable to fully utilize tax capacities because of the practical need to attract businesses) [hereinafter cited as REAGAN & SANZONE]; *supra* note 252.

257. See U.S. Advisory Comm'n on Intergovernmental Relations *Toward More Balanced Transportation* 76 (1974).

258. In addition to its jurisdictional attributes, the federal government has possessed superior ability to raise money because of the inherent qualities of the revenue mechanisms it utilizes. It has relied primarily on the relatively flexible and progressive income tax while state and local governments have depended on sales and property taxes. This is an integral feature of this model, for the state and local tax structure is tied to the fact that sales and property taxes are less vulnerable to the jurisdictional problems outlined above. See REAGAN & SANZONE, *supra* note 256, at 33-52; THOMPSON, *supra* note 256, at 18-36.

259. See *supra* notes 6-39 and accompanying text.

be, can be analyzed within the basic models of publicism and federalism. The nature of transit technology progressively reduced the number of firms the market could support. Natural monopoly soon resulted.²⁶⁰ In response to this failure of the market, public entities intervened in an attempt to achieve through regulation the goals a functioning system would have provided through competition. Governmental involvement increased as the private sector became an inadequate service provider.²⁶¹ As the need for massive public intervention rose, however, the limitations of state and local governmental units became evident. The chief problem was fiscal incapacity, and a call for federal intervention as a financier was made.²⁶²

2. Attached Conditions

The perniciousness of federal aid for those who wish to restrict federal power arises from the fact that the funds flowing from Washington to programs such as urban mass transit do not come unaccompanied. Conditions are attached to the prodigality.²⁶³ Governmental activities are political, and include the bargaining and compromise connoted by that adjective.²⁶⁴ Before Congress approves an expenditure, a majority of the individual decision makers, theoretically each representing a larger set, must agree on its desirability. Power exists in money like potential energy in a resting object, and this repository is tapped in return for each vote. The result is that federal expenditures come with strings attached.

3. Results

The placement of conditions on the receipt of federal aid is not presumptively illegitimate. Appropriations are not given to state or local governments without assurances that they will be used in accordance with national principles of equality and in furtherance of a

260. See *supra* notes 8-11 and accompanying text.

261. See *supra* notes 12-23 and accompanying text.

262. See *supra* notes 24-29 and accompanying text.

263. This has been termed "flypaper federalism." Peirce & Hamilton, "Flypaper Federalism"—States, Cities Want to Shed Rules that Accompany Aid, 13 NAT'L L.J. 1636 (1981) [hereinafter cited as Peirce & Hamilton]. The most basic concern with it is the threat it poses to the concept of self-governing local governments. See C. ADRIAN & C. PRESS, GOVERNING URBAN AMERICA 307 (1977). See also notes 37-49 and accompanying text.

264. Cf. DANIELSON, *supra* note 19, at 132 (alteration of original proposal for an urban mass transportation assistance act to broaden its appeal).

public purpose.²⁶⁵ Even the most general revenue sharing will contain certain basic conditions.²⁶⁶ An intermediate line delimiting permissibility is virtually impossible to draw. For example, support for a requirement that local mass transit projects be approved by the state department of transportation may arise either from a concern with municipal profligacy or from the influence of national highway lobbyists.²⁶⁷ No tribunal to ascertain the motivations behind a member of Congress' vote, and no standards of "right" and "wrong" representation exist. Conditions thus legitimately range from the obvious and unquestionable to requirements attached in furtherance of extraneous objectives.

Present controversy concerning urban mass transit stems from the realization that the system's configuration is not based on a rational theory or plan.²⁶⁸ Governments have become too active in the delivery of services, replacing an efficiency-directed market with a politics-centered monopoly.²⁶⁹ The involvement of federal and state governments has especially worsened the situation; whatever incentives for good performance localities have are thwarted by imposed policies not linked to the service delivery goal.²⁷⁰ The result of these various gov-

265. Cf. REAGAN & SANZONE, *supra* note 256, at 74.

[B]oth constitutionally and politically, we have as a nation accepted the notion that it is appropriate for the national community to embed its scale of values (*i.e.*, those values that a majority of national legislators can agree upon) in programs that offer state and local governments inducements to be persuaded that the national scale of values should also be the local priorities.

Id.

266. The Nixon-era general revenue sharing plan, enacted as the State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, §§ 121-23, 86 Stat. 919, 931-34 (1972), imposed a number of conditions on recipient governmental units. Each was required to submit a report on the planned and actual use of funds. No program or activity funded in whole or in part with revenue sharing funds could involve any discrimination on account of race, color, national origin, or sex. The Act required certain fiscal procedures, including the establishment of a trust fund and the use of regular audits. Certain governmental employees and all laborers and mechanics employed on construction projects of which twenty-five percent or more of the costs were paid with revenue sharing funds were guaranteed wages not below the prevailing rates. *Id.*

267. See generally D. Taebel & J. Cornehl, *THE POLITICAL ECONOMY OF URBAN TRANSPORTATION* 81-93 (1977).

268. See HAMILTON & HAMILTON, *supra* note 105, at 2 ("[i]t appears that American politics has shaped government enterprise haphazardly to fit specific practical problems or perchance simply to reach an end without much regard to the means . . .").

269. See, *e.g.*, *id.* at 9-11, 18-36, 93-94, 111.

270. See *id.* at 32-36.

ernmental endeavors is, unsurprisingly, an inadequately operating system.²⁷¹

B. The Transit-Corporation Model

The transit-corporation model²⁷² exhibits an understanding of the basic publicism issues of social ordering. It acknowledges the existence of market failure and the manner in which market failure justifies public action.²⁷³ This is unavoidable, for the presumption of government inaction is readily rebuttable in a variety of areas.²⁷⁴ Recognizing the legitimacy of intervention, the model carefully analyzes the methods.²⁷⁵ It moves away from the traditional "all-or-nothing" philosophy that rejects all market-style approaches once some type of failure is diagnosed.²⁷⁶ The model is thus centered in the area within which meaningful publicism debate may occur.

From this foundation, however, the desire for rational social policy becomes an unfortunate obstruction. The model fails to recognize the indivisibility of involvement and power. This is evident in the rather detached manner with which local governments are envisioned to establish the transit-corporation board and construct conditions of economic darwinism.²⁷⁷ The excessive reliance on altruism and trust is even more manifest in the federalism context. The model mentions a federal monetary role only briefly, and this is in the context of emphasizing the need to restrict aid to minimally-conditioned block grants.²⁷⁸ Although the model thus implicitly acknowledges the inevitability and rationality of federal financial involvement in contemporary public interventions, it fails to confront squarely the attendant inevitability and rationality of extraneous conditions on the receipt of federal aid.

271. *Id.* at 143 ("In mass transit . . . concern with governance has not progressed much beyond hoping for the best by appointing public-spirited officials and by utilizing financial audits to prevent outright fraud.").

272. *See supra* notes 192-212 and accompanying text.

273. *See* HAMILTON & HAMILTON, *supra* note 105, at 61-64.

274. If libertarian-style abdication is viable, it must be because the relevant market failure is tolerable or because any public involvement is inevitably worse. At least for urban mass transit, the history of governmental intervention, *see supra* notes 11-35 and accompanying text, reflects a *contrary* social judgment.

275. *See* HAMILTON & HAMILTON, *supra* note 105, at 63-84.

276. *See* SCHULTZE, *supra* note 105, at 46, 66.

277. *See* HAMILTON & HAMILTON, *supra* note 105, at 93-129.

278. *Id.* at 142.

C. The Verdict on Conditions: Inefficient, Inevitable, Rational

The desire to separate the dollars from the attached strings is not surprising. There is no obvious justification for using categorical, programmatic, or general assistance as a vehicle for the achievement of extraneous policy goals, particularly when they are merely concessions arising from coalition building. Concurrently, few can avoid advocating some use of extraneous conditions. The transit-corporation model permits federal overview of the legal frameworks and federal monitoring of civil rights compliance.²⁷⁹ This is contrasted with a strong prohibition on the use of federal money to achieve policy direction.²⁸⁰ The model thus utilizes the usual technique of drawing an intermediate line of permissibility.

The line drawn by the model is a defensible one. Assuring an efficacious legal structure may be intimately and directly related to the program of aiding urban mass transit. The federal role in the protection of civil rights has constitutional roots.²⁸¹ These facts notwithstanding, the essence of line-drawing is the executing of a value judgement. Normative prescriptions made without the full consent of the governed are suspect in a pluralistic and relativistic society. The acceptability of the particular conditions of the transit-corporation model cannot imply that others are not equally legitimate.²⁸² One set of standards is not and cannot be the referent for all decision makers. The central theme of the federalism model is that even restrictive conceptions of federal power are incapable of imposing limits other than those voluntarily undertaken by federal policy makers. The Constitution does not exact Mr. Herbert Spencer's *Social Statics*,²⁸³ and it does not establish the means by which the federal government will intervene in the urban mass-transit industry. It cannot and it should not.

279. *Id.* at 94, 142. The Transit Assistance Act of 1982, S. 2367, 97th Cong., 2d Sess. (1982), adopted a similar course, relying on self-certification by grant recipients of compliance with all aid conditions except for Title VI of the Civil Rights Act and the private enterprise protections of the UMT Act. See 1982 Senate Hearings, *supra* note 96, at 3 (statement of Secretary of Transportation Lewis). See also *supra* notes 230-31 and accompanying text.

280. See HAMILTON & HAMILTON, *supra* note 105, at 94, 142.

281. See U.S. CONST. amend. XIV, § 5.

282. For example, Congress is empowered to provide for and may be expected to act in furtherance of the "common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. Conditions directed toward this end thus possess legitimacy.

283. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

VII. The Judicial Role

A. Constitutionally Imposed Restraint

There are two mechanisms available for those who wish to impose order on the irrationality of extraneous conditions. One is the conscious development by the Supreme Court of a constitutional federalism doctrine containing a generally acceptable standard that limits federal power yet preserves the necessary implications of a restrictive theory.

The area between patently illegitimate exercises of federal power and undeniably permissible imposition is a narrow one which defies clear definition.²⁸⁴ Whatever its precise parameters, its narrowness

284. The present state of the limitation of federal power on federalism grounds is contained in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and its possibly nullifying progeny. *E.g.*, *FERC v. Mississippi*, 456 U.S. 742 (1982); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). These cases, each of which upheld the challenged exercise of federal power, presaged the evisceration of *National League of Cities* in *EEOC v. Wyoming*, 103 S. Ct. 1054 (1983). *National League of Cities* remains a timely subject for analysis, however, for it has yet to be overruled, and it exists as the only operative utilization of a tenth amendment or related limitation on federal power (to the viability of which four justices continue to adhere, *see id.* at 1058 (Burger, C.J., dissenting)). The Court in *National League of Cities* does not explicitly base its holding on the reserved sovereignty concept of the tenth amendment. It refers to the potential for a less restrictive result for federal exercises of the spending and civil rights' enforcement powers. 426 U.S. at 852 n.17. *Cf.* *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 n.13 (1981) (there are limits on congressional power to impose conditions on states through use of spending power). Because differences in the strength of federal powers must be tied to the nature of the relevant delegation, this indicates that it was the commerce clause basis for the FLSA amendments that precluded their attempted reach. *Cf.* *Fullilove v. Klutznick*, 448 U.S. 448, 476 (1980) (avoiding *National League of Cities* limitations through analysis of powers of civil rights' enforcement). The Court's analysis avoids any discussion of the scope of the commerce power, however, relying instead on arguments of sovereignty:

We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id. at 845. This would necessarily apply to all exercises of federal power. The only way in which the limitation on federal power could apply differentially without reference to the nature of the delegation would be through interpreting *National League of Cities* as instituting a balancing test. *Id.* at 856 (Blackmun, J., concurring); *cf.* *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 684 n.9 (even if federal law impairs state sovereignty, federal interest may be sufficiently great to justify it). For conditions based on the spending power, this would measure the

indicates that a constitutional bar on federal aid conditions will certainly not affect the full breadth and depth of their reach.²⁸⁵ If the federal government is overreaching, it must be because the government is using the grant relationship to achieve a policy objective not otherwise within its powers. If the federal policy executed through a condition is one that could be enacted directly, there is no room for invalidation.²⁸⁶ Only a few extremely intrusive conditions on receipt of federal aid—such as moving the state capital—are left amenable to abrogation.²⁸⁷

infringement on state autonomy against the federal interest promoted. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 293-94 (1977).

285. Professor Tribe asserts that the Court has settled the question of the reach of *National League of Cities* to the spending power, holding it inapplicable, in its summary affirmation in North Carolina *ex rel. Morrow v. Califano*, 435 U.S. 962 (1978), *aff'g*, 445 F. Supp. 532 (E.D.N.C. 1977). L. TRIBE, AMERICAN CONSTITUTIONAL LAW 18 (1979 Supp.). It is clear that section 13(c) is unassailable constitutionally, for it does not impermissibly impose on the states. The 1974 amendments to the Fair Labor Standards Act (FLSA) that were the subject of *National League of Cities* also fully repealed the exemption for urban mass transit employees. Pub. L. No. 93-259, § 21, 88 Stat. 68 (1974). Although not ruling directly on the question, the Supreme Court has indicated that the principles of *United Transp. Union*—that operation of a railroad is not an integral part of traditional state activity, so that regulation of it does not impair the state's role or endanger its separate and independent existence, 455 U.S. at 684-86—are applicable to mass transit, thus removing it from the reach of the state sovereignty limitation and permitting the FLSA extension. *Donovan v. San Antonio Metropolitan Transit Auth.*, 457 U.S. 1101 (1982), *vacating* 25 W & H Cases 274 (W.D. Tex.); *accord* *Dove v. Chattanooga Regional Transp. Auth.*, 701 F.2d 50, 52-53 (6th Cir. 1983); *Alewife v. City Council of Augusta*, 699 F.2d 1060, 1069 (11th Cir. 1983); *Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308, 310 (3d Cir. 1982). *But see* *San Antonio Metropolitan Transit Auth. v. Donovan*, 557 F. Supp. 445 (W.D. Tex. 1983) (on remand from Supreme Court, declining to read *United Transp. Union* as a bar to mass transit's immunity from FLSA). This validates the federal power to effect mass transit regulation through use of a condition. *Cf. City of Macon v. Marshall*, 439 F. Supp. 1209, 1217-18 (M.D. Ga. 1977) (no violation of tenth amendment because participation in assistance program is voluntary).

286. This issue is often framed as a measuring of the free will of the grant recipient in accepting the terms of the condition. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17, 21 (1981); *Fullilove v. Klutznick*, 448 U.S. 448, 479 (1980) (Burger, C.J.); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-90 (1936). Free acceptance of a condition will be inferred when a state or one of its political subdivisions accepts aid to which Congress has attached a condition that is set forth unambiguously. *Pennhurst*, 451 U.S. at 17. Free will is irrelevant, however. If the desired effect of the condition is within federal power, there need not be any consent. If it is *ultra vires*, no acquiescence can authorize it. Only through the vehicle of the Constitution may the states delegate power to the federal government.

287. *See National League of Cities v. Usery*, 426 U.S. 833, 845 (1976); *Coyle v. Oklahoma*, 221 U.S. 559, 565-66, 574 (1911). *Cf. Steward Machine Co. v. Davis*, 301 U.S. 548, 597 (1936) (states may contract in any manner with Congress so long as the "essence of statehood" is "maintained without impairment").

B. Federal Self-Restraint

The impotence of legal formulae for limiting federal power mandates a second approach. Reliance must be placed upon appeals to federal legislative and executive self-restraint.²⁸⁸ This is certainly neither hopeless nor useless. Those who hold power must be conscious of its nature, uses and effects.²⁸⁹ As part of the governing republic, the courts must perform their role in a manner that encourages appropriate self-restraint. They must draw the attention of legislative and executive actors to publicism and federalism issues.

C. The Current Judicial Approach: Imposition

Just as there are two mechanisms available for judicial limitation of federal power, there are two means by which the courts may effectuate federal self-restraint. The recent judicial response to section 13(c) is one of these.²⁹⁰ This approach is misguided, however, for it imposes self-restraint. In fact, it relies on judicial supersession of the democratic process.

1. Massachusetts and Jackson Transit Authority

The case law evidences a thwarting of legislative will. In *Local Division 589, ATU v. Massachusetts*,²⁹¹ the First Circuit relies on five points it finds in legislative history and the character of the statute to hold that subsequent inconsistent state enactments may override the provisions of an existent section 13(c) agreement.²⁹² Each of the court's conclusions is a questionable interpretation of the legislative action. Any congressional recognition of the local character of public transportation is contravened by the fact that the federal government nonetheless intervened. Federal involvement in the form of monetary assistance, with the inevitable accompaniment of conditions, necessarily affects the local character of the relevant activity through the

288. See, e.g., Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 GEO. WASH. L. REV. 159, 172 (1978). Implicit acknowledgment is seen in proposals such as the transit-corporation model, where policy arguments are employed in an effort to influence legislative and executive actors. See HAMILTON & HAMILTON, *supra* note 105, *passim*. But cf. Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871, 1885 (1976) (need exists for judicial resolution of federalism conflicts).

289. See, e.g., *supra* note 116.

290. See *supra* notes 123-31, 147-87 and accompanying text.

291. 666 F.2d 618 (1981), *cert. denied*, 457 U.S. 1117 (1982).

292. See *supra* notes 129-31 and accompanying text.

introduction of regulatory requirements and the involvement of national interest groups.²⁹³ Congressional focus on the protection of workers involved in public takeovers does suggest a transitional role for section 13(c), yet its continued existence without limitation through substantial changes in urban mass-transit intervention indicates more permanence.²⁹⁴ The need to preserve the Secretary of Labor's discretion assumes a post-certification role that is not at all obvious from the statute or the legislative history. Finally, there is simply too much equivocation in the legislative history to permit an inference that any particular enforcement mechanism was intended or even considered.²⁹⁵

The problems with the recent judicial response to section 13(c) are also evident in *Jackson Transit Authority*.²⁹⁶ The case is marred by strained reliance on legislative history. Congress was inexplicit in its perceptions of the long-term operation of section 13(c). Moreover, the general direction ascertainable from the congressional deliberations is misinterpreted by the Court.²⁹⁷ It is *not* absolutely clear whether Congress intended to create a body of federal law applicable to local

293. Cf. VANHORN, *supra* note 147, at 3 (state and local governments being viewed as conduits through which national goals may be accomplished).

294. Section 13(c)'s impact was dramatically increased by the provision of operating subsidies beginning in 1974. See *supra* notes 141-45 and accompanying text.

295. See, e.g., 1963 Senate Hearings, *supra* note 38, at 314-15, 317 (statement of Willard Wirtz); 1963 House Hearings, *supra* note 75, at 481-82 (statement of Willard Wirtz); S. Rep. No. 82, 88th Cong., 1st Sess. 28 (1963); 109 CONG. REC. 5416-18, 5422 (1963).

296. 457 U.S. 15 (1982).

297. It must be noted that *Jackson* is one of a series of cases in which the Supreme Court has limited the implication of private rights of action in federal statutes. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 17-18 (1981); *California v. Sierra Club*, 451 U.S. 287, 297-98 (1981); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 767-69 (1980); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569-71 (1979). This trend represents a distinct policy perspective of the Court. See generally Hazen, *Implied Private Remedies under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulations, and Beyond*, 33 VAND. L. REV. 1333 (1980); Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1 (1978); Comment, *Implied Rights of Action in Federal Legislation: Harmonization Within the Statutory Scheme*, 1980 DUKE L.J. 928; Comment, *The Implication Doctrine After Touche Ross and Transamerica: The State of Implied Causes of Action in Federal Regulatory Statutes*, 26 VILL. L. REV. 433 (1981); Note, *Implied Private Rights of Action Under Federal Statutes: Congressional Intent, Judicial Deference, or Mutual Abdication?* 50 FORDHAM L. REV. 611 (1982); Note, *Implied Private Actions Under Federal Statutes—The Emergence of a Conservative Doctrine*, 18 WM. & MARY L. REV. 429 (1976).

governmental transit labor relations.²⁹⁸ The background of section 13(c) shows that Congress intended "voluntary" state compliance with the principle it was enacting. A federalization of labor relations in the manner of the Railway Labor Act²⁹⁹ was thus clearly not effected. This nevertheless does not define the parameters of federal involvement in the arrangements made pursuant to section 13(c).

2. Options Under Section 13(c)

a. Reliance on Executive Remedies

The parameters of federal involvement may be found only through a logical analysis of the process created by section 13(c). A key question is the nature of the avenues of relief available to a union within the executive branch. *Jackson* and its predecessors³⁰⁰ give only tangential consideration to the question of post-certification federal administrative involvement. The Supreme Court stated it was expressing no view on the ability of the federal government to sue a grant recipient in federal court for a violation of section 13(c), because this would involve the grant contract and the contract between the recipient and the union.³⁰¹ The Sixth Circuit dismissed a mandamus action to compel a determination by the Secretaries of Labor and Transportation that the transit authority was in breach of its section 13(c) obligations. It held such an administrative action could not be compelled.³⁰² The First Circuit stated that the Secretary of Transportation could bring a federal suit for enforcement because the terms are contained in the grant contract.³⁰³ It further called it "plausible" that an Administrative Procedure Act³⁰⁴ remedy exists for forcing action by the federal officials.³⁰⁵ The Eleventh Circuit advanced the middle ground that the Secretaries have the authority but not the duty to act.³⁰⁶

298. *Contra* 457 U.S. at 26-28.

299. 45 U.S.C. §§ 151-188 (1976).

300. *See supra* notes 126, 136, 138-42, 152 and accompanying text.

301. 457 U.S. 15, 29 n.13 (1982).

302. Local Div. 285, *ATU v. Jackson Transit Auth.*, 650 F.2d 1379, 1388 (6th Cir. 1981).

303. Local Div. 714, *ATU v. Greater Portland Transit Dist.*, 589 F.2d 1, 13 (1st Cir. 1978). *Accord* Division 587, *ATU v. Municipality of Metropolitan Seattle*, 663 F.2d 878 (9th Cir. 1981).

304. 5 U.S.C. §§ 551-58, 701-06 (1976).

305. 589 F.2d 1, 14 (1st Cir. 1978).

306. Local Div. 732, *ATU v. Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327, 1339 n.26 (11th Cir. 1982).

The factual contexts within which these cases arise indicate the infeasibility of federal administrative action. The procedure enacted by section 13(c) and implemented by the Departments of Labor and Transportation is activated only at the moment of an application for financial assistance. The suits by the unions arise long after the underlying grant is made.³⁰⁷ To rely on agency policing of the numerous section 13(c) arrangements presently in effect is to vitiate the statutory guarantee.

b. Judicial Pressure on Executive Actors

An alternative that would scale this information barrier would be to rely on mandamus-type actions to compel some sort of action on the grant contract.³⁰⁸ This is thoroughly problematic, however. The actions contemplated would be within the purview of the Secretary of Transportation, but the obvious intent of Congress was to lodge the worker-protective function in the chief federal labor official.³⁰⁹ The sanction of fund withdrawal is of questionable value because the intended beneficiaries would be harmed as much as or even more than the alleged offenders.³¹⁰ If a contract enforcement suit is envisioned, it would entail a circuitry that is both harmful and unnecessary. The relevant agreement is clearly segregated in the contract between the recipient and the union. After certification, it involves nothing requiring the special

307. In the *MARTA* case, the agreement was entered into on February 14, 1977, and the union's suit upon it was filed on June 29, 1981. *Id.* at 1329-30. The Secretary of Labor approved the *LaCrosse* § 13(c) agreement on May 1, 1974, and the suit was brought in July, 1977. Local Div. 519, *ATU v. LaCrosse Mun. Transit Util.*, 585 F.2d 1340, 1343-44 (7th Cir. 1978). The original agreement in *Jackson*, Tennessee was certified in 1966, and it was not until 1975 that the controversy arose that necessitated legal action upon it. Local Div. 1285, *ATU v. Jackson Transit Auth.*, 650 F.2d 1379, 1381 (6th Cir. 1981).

308. The union in *Jackson* asked the court to order the Secretary of Transportation "to take 'appropriate action to enforce compliance.'" Local Div. 1285, *ATU v. Jackson Transit Auth.*, 447 F. Supp. 88, 91 (1981). The district court could not find any congressional intent to make the Secretary a continuing monitor of compliance with § 13(c) agreements and refused to issue a mandamus. *Id.* at 91-92.

309. See 110 CONG. REC. 15,453 (1964). *Cf.* Local Div 1258, *ATU v. Jackson Transit Auth.*, 650 F.2d 1379, 1388 (6th Cir. 1981) (unreasonable to imply that Secretary of Transportation has responsibility for labor policy).

310. See, e.g., Reagan, *Accountability and Independence in Federal Grants-in-Aid*, in *THE NEW POLITICAL ECONOMY; THE PUBLIC USE OF THE PRIVATE SECTOR* 206 (B.L.R. Smith ed. 1975) [hereinafter cited as *PUBLIC USE*]; Mansfield, *Independence and Accountability for Federal Contractors and Grantees*, in *PUBLIC USE*, *supra*, at 333.

expertise of the Secretary of Transportation. Legal action is more easily instituted by the original parties to the contract.³¹¹

c. Traditional Judicial Remedies

The reductionist approach employed by the Eleventh Circuit, which regards these cases merely as common law contract disputes³¹² thus has merit insofar as it captures the essential judicial character of the post-certification federal role. The specific language of section 13(c) should be seen as an initiator. Once the arrangements it mandates have been developed and certified, section 13(c) is replaced by the arrangements for that grant to that system.³¹³

The expertise and discretion³¹⁴ of the Secretary of Labor upon which the section relies is fully utilized. No other benefit can be obtained from section 13(c) and its role is fulfilled. The contract embodying the arrangements becomes the vehicle for ensuring that no employee is harmed as a result of federal aid.³¹⁵ This contract will be geared to the particularities of the grant, the recipient, and the work-

311. See Division 587, *ATU v. Municipality of Metropolitan Seattle*, 663 F.2d 875, 878 (9th Cir. 1981); Local Div. 714, *ATU v. Greater Portland*, 589 F.2d 1, 15 (1st Cir. 1978); Local Div. 519, *ATU v. LaCrosse Mun. Transit Util.*, 445 F. Supp. 798, 811 (W.D. Wis. 1978). One of the factors leading to this conclusion is the volume of § 13(c) paperwork that must be handled by the Department of Labor in the absence of any continuing enforcement duties. For example, over 1,000 certification requests were expected in fiscal year 1980 (only 612 of which were to be closed, in the Department's own estimation). *Supplemental Appropriation Bill, 1980: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 97th Cong., 2d Sess., Part 4, 555 (1980) (statement presented by Labor-Management Services Administration).

312. Local Div. 732, *ATU v. Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327, 1332-33 (11th Cir. 1982).

313. See Local Div. 714, *ATU v. Greater Portland Transit Auth.*, 589 F.2d 1, 11-12 (1st Cir. 1978).

314. See *Kendler v. Wirtz*, 388 F.2d 381 (3d Cir. 1968); *City of Macon v. Marshall*, 439 F. Supp. 1209, 1218-24 (M.D. Ga. 1977); cf. *Congress of Ry. Unions v. Hodgson*, 326 F. Supp. 68 (D.D.C. 1971) (in the context of similar statutory language, finding limited, if any, judicial review of Secretary of Labor determination of "fair and equitable arrangements" in connection with Amtrak's labor agreements).

315. Although there is indeed no requirement in the statute for such a contract, see Local Div. 732, *ATU v. Metropolitan Atlanta Rapid Transit Auth.*, 667 F.2d 1327, 1344 (11th Cir. 1982), it is reasonable to infer it, considering the contemplation of local negotiations and the existing contractual relationship under the NLRA framework. See Division 587, *ATU v. Municipality of Metropolitan Seattle*, 663 F.2d 875, 878 (9th Cir. 1981); Local Div. 1285, *ATU v. Jackson Transit Auth.*, 650 F.2d 1379, 1385 (6th Cir. 1981); Local Div. 519, *ATU v. LaCrosse Mun. Transit Util.*, 445 F. Supp. 798, 820 (W.D. Wis. 1978).

ers. Certification will have established its peculiar equity and suitability.³¹⁶ Because the interpretation and enforcement of contracts are regular judicial activities, the courts have a special aptitude for the post-certification tasks.³¹⁷

d. The Federal Courts

Section 13(c) agreements are not mere common law contracts, however. Contracts for the purpose of ensuring protection of employee rights in the context of federal financial assistance were nonexistent at common law. Their existence results from section 13(c).³¹⁸ They are the means by which the statutory objective becomes operational.³¹⁹ To breach these contracts must be to breach the statute.³²⁰ Consequently, the agreements and section 13(c) are so intertwined that contractual interpretation necessarily involves issues of federal statutory construction.³²¹ This is a uniquely federal task.³²²

A federal judicial role is inherent in the process created by section 13(c); it is the sole technique for ensuring labor protection. This role may be realized only if unions are given a federal cause of action to enforce section 13(c) arrangements. The judgement in *Jackson* is, therefore, inconsistent with congressional intent and purpose.

3. *The Model of Judicial Imposition*

The recent response of the courts to section 13(c) represented in *Massachusetts* and *Jackson Transit Authority* represents judicially-imposed federal self-restraint. After the legislative branch has acted,

316. This exposes an error in the analysis of Local Div. 519, *ATU v. LaCrosse Mun. Transit Util.*, 445 F. Supp. 798 (W.D. Wis. 1978), where the court found two of three claims presented by the union's complaint to be whether federal law required the agreement and if it further required the particular provisions of the agreement involved there. *Id.* at 805. These issues are obviated by certification.

317. *See id.* at 812.

318. *See* Division 587, *ATU v. Municipality of Metropolitan Seattle*, 663 F.2d 875, 878 (9th Cir. 1981).

319. *See* Local Div. 714, *ATU v. Greater Portland Transit Dist.*, 589 F.2d 1, 15 (1st Cir. 1978); Local Div. 1285, *ATU v. Jackson Transit Auth.*, 650 F.2d 1379, 1385 (6th Cir. 1981); Local Div. 519, *ATU v. LaCrosse Mun. Transit Util.*, 445 F. Supp. at 817.

320. Local Div. 1285, *ATU v. Jackson Transit Auth.*, 650 F.2d 1379, 1392 (6th Cir. 1981).

321. *See* Local Div. 519, *ATU v. LaCrosse Mun. Transit Auth.*, 585 F.2d 1340, 1346 (7th Cir. 1978).

322. *See* Local Div. 714, *ATU v. Greater Portland Transit Auth.*, 589 F.2d 1, 13 (1st Cir. 1978).

judges intervene to curtail the resulting reaches of federal power.³²³ Unless Congress is explicit in intending otherwise, conditions on the receipt of federal funds are given limited effect after fulfillment of their initial purpose. In the context of section 13(c), the role of the legislative enactment is to require the negotiation of protective arrangements that are reviewed and approved by the Department of Labor. Once this approval is given and the grant is made, no further federal labor protection role of any type arises under the provision. This approach enables the judiciary to allow the use of conditions as a prerogative associated with the spending power yet to also limit the conditions' intrusive reach through the exercise of the judicial powers.

The basic problem with this approach is its legitimation of a broad policy-making role for the judiciary. This role is inconsistent with basic precepts of our socio-political system.³²⁴ Any call for a more "sensible" public policy illuminates the fundamental conflict between democracy and efficiency. Collective decision making lacks clear and consistent direction, and it often borders on abject irrationality.³²⁵ In response, more technocratic approaches to policy making are advocated, such as the transit-corporation model and the brokerage concept. The goal of these approaches is to perform governmental tasks in

323. *Jackson* and *Massachusetts* may be seen as examples of one model for the judicial role in addressing the question of federal self-restraint. Each case uses the power of the courts to limit the legislative and executive branches and thus closely circumscribe the effective federal activity. Underlying each must be a perception of the pervasiveness of § 13(c) and maybe even a sense that the provision is a monster of sorts, abandoned by its creators and exploited by its benefactors. This looks like policy elaboration, not the clearly sinful policy substitution of *Lochner v. New York*, 198 U.S. 45 (1905). *Jackson* cuts off an avenue of exploitation and goes on to deny any special protective aura to the § 13(c) arrangements. *Massachusetts* gives leeway to states that want to take affirmative action and impose order on the crazed system. The close attention to legislative history in each case may show a further concern with the depth of support for labor's demands. The courts may be utilizing a common sense approach that discounts provisions added only to meet the extraneous demands of a temporarily significant voting bloc.

324. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Nebbia v. New York*, 291 U.S. 502 (1934); Mendelson, *The Case for Judicial Restraint*, in *BASIC ISSUES OF AMERICAN DEMOCRACY* 123-31 (S. Hendel 8th ed. 1976).

325. HAMILTON & HAMILTON, *supra* note 105, at 2 ("[i]t appears that American politics has shaped government enterprise haphazardly to fit specific practical problems or perchance simply to reach an end without much regard to the means . . ."); PIKARSKY & CHRISTENSEN, *supra* note 23, at 77-78 (policy development in urban mass transit has been characterized by occurrence of changes primarily during times of stress or crisis, application of existing policies to greatly changed situations, and ignoring of model interaction through independent treatment).

a more efficient or "business-like" environment.³²⁶ The core effect is to shift from popular decision making to an arrangement in which decisions are made outside of the established republican system.³²⁷ The judicial approach taken in *Massachusetts* and *Jackson Transit Authority* contains this element and suffers from its illegitimacy.

D. A New Judicial Approach: Encouragement

Another model for judicial action, in which this is recognized, must be developed. The appropriate level of federal self-restraint in our system of government cannot be periodically divined by the courts. Though it may be trite, the only legitimate response to the problems of a democratic system is more democracy. The judiciary must encourage this response.

A first step would be to give extraneous conditions their fullest effect. This approach forces Congress to realize its full responsibility for legislative policy. If conditions on federal aid are excessive, this will then become apparent. The role of the judiciary must be to effectuate the costs and benefits of legitimately made policy judgments, not to interpose judicial values. In the process, one of the effects of conditions may be the potentially intrusive involvement of the federal courts in state and local affairs. If this and other results are undesirable and constitute bad law, that must become apparent to Congress. As long as the legislative action that is the cause is within the confines of the Constitution,³²⁸ there is no restraint to place upon it. It is not the judicial role to save the system from itself.³²⁹

326. See, e.g., HAMILTON & HAMILTON, *supra* note 105, at 52, 79-83, 98-103.

327. What occurs is a delegation of power unaccompanied by means of reciprocal control. Although the Hamiltons maintain that proper structuring enables a delegation to relatively autonomous businesses (with the achievement of efficiency) to coexist with political accountability, *see id.* at 79-114, there is an unavoidable and real conflict between the vesting of public functions in these entities and the preservation of responsiveness to the citizenry and its institutions. Colcord, *Public Transit and Institutional Change*, in PUBLIC TRANSPORTATION: PLANNING, OPERATIONS, AND MANAGEMENT 587 (C. Gray & L. Hoel ed. 1979).

328. A good corollary to this model is to prohibit judicial intervention regarding federalistic questions of federal power, relying on the political system to monitor the ordering of affairs along federal/state lines as it does along public/private lines. See Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); cf. REAGAN & SANZONE, *supra* note 256, at 157 (states and localities have sufficient political strength at the national level to protect themselves); Wechsler, *supra* note 243, at 558-60 (Congress has ultimate authority for managing federalism); *Section 1983 and Federalism*, *supra* note 247, at 1186-87 (noting absence of political safeguards of federalism in judiciary, in context of § 1983 suits). *But see* Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, COLUM. L. REV. 847, 858-68 (1979) (political safeguards of federalism are no longer reliable).

329. The judicial rule of deferential enforcement confronts a dilemma when executive branch conduct thwarts the apparent legislative purpose. The recognition

VIII. Conclusion

The current state of federalism—federal government dominance, most audaciously evidenced in the use of extraneous conditions on the receipt of federal funds—emanates from the necessities of such a governmental structure. The powers essential to a central government do not have inherent self-limitations and it is folly to attempt to

of the full breadth of federal power that accompanied the reconciliation of constitutional doctrine with social reality, *see supra* note 324 and accompanying text, also legitimized the modern administrative state and its broad delegations of policy making authority to non-legislative entities. The executive, therefore, does not suffer the disability of the judiciary. The courts' role as intermediary, forced upon it by the citizens affected by the relevant actions, is problematic.

This problem has surfaced in relation to § 13(c) and may be seen in *ATU v. Donovan*, 554 F. Supp. 589 (D.D.C. 1982). *See supra* note 252. The underlying dispute in that case is the Secretary of Labor's utilization of the discretion given to him by the statute (to determine "fair and equitable arrangements") to eliminate the now traditional provision for binding interest arbitration procedures in projects funded by UMTA grants. *See* 554 F. Supp. at 592, 593 n.6, 598. As seen above, the discretion bestowed by § 13(c) is broad and the authority reposed in the Secretary great. It may well be that the Secretary, in his expert judgment, saw the problems perceived by the courts and decided that absence of the usual impasse resolution procedures was not necessary to the existence of fair and equitable arrangements. In this light, the executive action is due to the deference Congress itself provided for in the Administrative Procedure Act, and the court's decision was entirely proper. On the other hand, our political system does not equate delegation with the power to eviscerate the delegator's intent. As the union pointed out in this case, the delegation to the Secretary of Labor is not standardless, for five guarantees are specified, *id.* at 592-93, 597. Furthermore, collective bargaining rights are illusory without legally binding impasse resolution procedures. BARNUM, *supra* note 58, at 77. Considering the political predispositions of the present administration, it is hard not to question the true concern with the fairness and equity of the conditionally certified arrangements to the workers involved. At the same time, the tenets of a checked and balanced republican system necessarily allow for some kind of variation among the branches. An accommodation consistent with constitutional precepts must be fashioned. As part of the new model being advocated here, the best approach may be a revival of the constitutional nondelegation doctrine to ensure legislative direction of policy making. *See* *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685-87 (1980) (Rehnquist, J., concurring); J. ELY, *DEMOCRACY AND DISTRUST* 131-34 (1980); Wright, *Beyond Discretionary Justice* (Book Review), 81 *YALE L.J.* 575, 582-87 (1972). *But see* Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1669, 1693-97 (1975) (recognizing possible utility of a policy of narrow construction of statutory delegations but characterizing a revival of the nondelegation doctrine as unwise). *See generally* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In lieu of this, the courts must be extremely sensitive to legislative intent and the parameters of discretion enacted. The strained interpretation of legislative history employed in this case—implying positive disapproval by Congress in its non-adoption of certain language in the unions' proposal for what became § 13(c), *see ATU v. Donovan*, 554 F. Supp. 589, 597-98 (D.D.C. 1982)—does not evidence appropriate sensitivity.

rationally discern any. The nature of the extraneous conditions that represent the extent of federal power may be seen in section 13(c) of the Urban Mass Transportation Act of 1964. Both its genesis and implementation show the ramifications of federal power. They point to the need for at least an awareness of the problems associated with unbridled federal activity. Recognizing this explicitly and implicitly acknowledging the fact that self-restraint is the only limit on the central government, the federal courts have circumscribed section 13(c). This is an illegitimate use of the judicial power, however. It is the policy makers themselves who must exercise restraint, and it is to them that we must now turn.

