

Who Decides: The Impact of Nationalizing Infrastructure Policy

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Who Decides: The Impact of Nationalizing Infrastructure Policy

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Executive Summary:

Projects reliant on state and local funding have several advantages over those predicated on national funding. Driven by greater accountability, locally funded and regulated projects tend to cost less, are delivered faster, and benefit from more sustainable sources of funding. The tendency for national governance to result in sub-optimal project selection and delivery and the practical dilemma of petitioning federal decision-makers are two major concerns of nationalizing infrastructure policy. Thoroughly examining both the benefits and costs of federal involvement would likely result in projects better suited to the needs of the community and less susceptible to overruns in terms of cost and time.

Introduction

Our nation suffers from a nationalization frenzy in which policymakers are increasingly enamored with centralizing decisions of even the most local nature. Typically, the knee-jerk impulse to centralize is accompanied by the promise of federal funding. Yet, ceding areas of traditional state and local authority to the rule of the national government creates long-term challenges to both project quality and citizen participation. Relegating decision-making authority to the federal government for transportation infrastructure often generates hidden increases in costs, delays, and the number of projects exhibiting diminished quality. Furthermore, centralizing authority in a distant and inaccessible federal bureaucracy risks denying citizens the ability to have their needs met by the most responsive level of government—thereby undermining the constitutional right of petition.

The nationalization of decision-making

has imposed unanticipated burdens and diminished quality in a variety of sectors and is particularly observed in transportation infrastructure policy.² The allure of seemingly “free” federal funding has stimulated changes in decision-making, which have dramatically affected project selection, delivery, and maintenance. Although advocates characterize federal aid as additive and easy to raise, it rarely possesses either quality. In fact, federal funding often comes from the same pool of taxpayers and incorporates hidden costs.

These hidden costs are numerous and varied. At the broadest level, federal funding can misalign incentive structures in a manner that leads to poor project selection; a project accomplishing a broad federal policy priority may be ill suited to a specific community. More tangibly, significant regulatory costs and complex compliance requirements accompany every federal dollar. Every dollar of federal highway aid requires compliance

with over 90 requirements. In addition, the fungibility of federal aid enables states to use federal funding as a replacement for state funding, allowing them to reallocate state funding toward other areas viewed as more pressing. This substitution of federal dollars for state dollars prevents new federal funding from having a dollar-for-dollar impact. Finally, as demonstrated by the Infrastructure Investment and Jobs Act (IIJA), a sudden influx of federal funding can trigger inflation, meaningfully reducing the spending power of both federal and non-federal funding.

This paper contrasts projects predicated on national funding with those reliant on state and local funding and identifies several benefits of utilizing non-federal funds. Driven by greater accountability, locally funded and regulated projects tend to cost less, are delivered faster, and benefit from more sustainable sources of funding.

Historically, federalism has enabled the various levels of American government to address the exceptionally diverse sets of policy needs found across our nation efficiently. The sheer size and remarkable diversity of our country create significant barriers to a one-size-fits-all approach to governance. This dynamic is exacerbated by the fact that most citizen interactions with governance relate to localized, basic needs and liberties such as education, personal security, land and utilities use, and transportation. Issues of such a local, regular, and significant character are typically best addressed by the level of government closest to the citizen, as it affords citizens more direct and comprehensive access to their government. As the distance between the governed and the government increases, flexibility, familiarity, and efficacy can lessen. Transferring local decisions to the federal level may impinge citizens' opportunity for a reasonable oppor-

tunity to seek redress, enervating the right of petition.

This paper addresses two major concerns of nationalizing infrastructure policy—the tendency for national governance to result in sub-optimal project selection and delivery and the practical dilemma of petitioning federal decision-makers.

The benefits of short-term funding tend to sway policymakers and those they represent and lead them to forgo the rigor of analyzing the practical and behavioral costs of enabling the federal government to usurp traditionally state and local decision-making. Thoroughly examining both the benefits and costs of federal involvement would likely result in projects better suited to the needs of the community and less susceptible to overruns in terms of cost and time.

Federalism

Any discussion of the appropriate level of government decision-making should begin with an exploration of the concept of federalism. Since the nation's founding, American federalism has undergirded the country's success by fostering a close association between the citizenry and those making decisions. By allowing for state and local decision-making, federalism encourages an environment in which governmental bodies are more likely to be sensitive to local needs and possess the capacity to meet those needs efficiently. As a remarkably diverse country, cognizance of the unique needs of a varied citizenry is typically best realized at the local level for policies not requiring the establishment of truly national priorities, transfer payments between states, or national standardization.

As the Obama White House recognized, the interactions between U.S. governmental bodies and the governed typically involve matters of a primarily local nature.³ Simply

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possessing the authority to influence policy should not lead federal legislators and executive branch officials to involve the federal government in primarily local matters. Rather, as policy options are weighed, a threshold question needs to be asked—which level of government is best positioned to address citizens’ needs? Answering this question should involve a careful analysis of both the costs and benefits of federal funding and federal oversight. The lack of robust cost-benefit analysis is likely a contributor to the dramatic increase in federal funding for state priorities. In 1963, federal grants to state governments accounted for 11.6% of the average state’s revenue.⁴ In 2021, federal grants accounted for nearly 37% of state revenue.⁵

In highway policy, the road to nationalization started in 1956 with the institution of the Interstate Highway System. This enormously successful transportation project addressed a thoroughly national need, providing convenient and efficient travel across the continent, financed by the users of the system. The Interstate System would have been practically impossible but for the involvement of the federal government, given the need to coordinate and transfer funds between the states through which the highway passes. Completed over 30 years ago, the Interstate Highway System pursued a unique need, connecting the nation and delivering a national good. This initiative had been a subject of interest from early American history.⁶ Yet, once accomplished, this form of national investment does not find a counterpart in modern infrastructure needs. Adding an

additional lane to address rush hour congestion does not carry the same national import as building a highway across Wyoming. States own and maintain most infrastructure, including Interstate Highways, and ought to have the authority and responsibility to oversee their infrastructure. The federal government, by contrast, owns only 5% of infrastructure, including dams, postal facilities, and other assets.⁷ Nevertheless, this limited ownership is not reflected in the national government’s comprehensive involvement in state and local transportation projects.

Observing the federal government’s assumption of infrastructure oversight in the orgy of spending accompanying the IIJA provides helpful examples of the misallocation of funding that can occur when seeking to address local problems from a national level. Elizabethtown, a village in Illinois with a population of 299, received over \$4,700,000 for its “Clean School Bus Program.”⁸ Over \$445,000 of IIJA funding will serve to rehabilitate a wastewater pond in Montrose, Arkansas, a village with a population under 300.⁹ The IIJA provided over \$260,000 to “install sewer improvements” in Glendora, Mississippi, serving a population of 127.¹⁰ Nearly \$100,000 was allocated to Starkville, Colorado, a village of 55, for installing “smart water meters.” Not surprisingly, these communities have struggled to comply with federal requirements, resulting in delays, massive cost increases, and penalties.¹¹ While admirable and well-meaning goals, these constitute distinctly local issues receiving significant federal funds. Certainly, instances exist wherein the transfer of tax payments

“Many Americans maintain a paradoxical view of government spending. Although most Americans believe that the national government overspends in general, a majority of Americans desire the government to spend more money on a broad range of programs.”

from a wealthier to a poorer state may be appropriate. For example, the Interstate Highway System transferred tax dollars from states with a broader tax base to those with a smaller populace in pursuit of a clear national good. The “national good” derived from purchasing school buses or installing water meters is so attenuated as to make the phrase meaningless. Rather than depend on federal funds, projects pursuing local improvements should logically draw from state or local resources except in the rare circumstances where the need is unaffordable at the state level.

Is the efficiency of local funding and local control of local projects fully offset by the attractiveness of other people’s money or is another dynamic at play? Despite the negative effects of centralization, the perceived benefits of centralization seem intuitive to many and are a reoccurring theme in history. In his 1835 insightful analysis, *Democracy in America*, Alexis de Tocqueville predicted that the desire for equality would tempt Americans to centralize power in the national government. He expressed concern that a desire for uniformity and equality may lead to a prioritization of standardization without consideration of its consequences: “In centuries of equality, men easily perceive the idea of a great central power, one cannot doubt, moreover, that their habits and sentiments predispose them to recognize such a power and to lend it a hand... this naturally disposes citizens constantly to give the central power

new rights, or to allow it to take them.”¹² Modern assessments affirm Tocqueville’s predictions.

Many Americans maintain a paradoxical view of government spending. Although most Americans believe that the national government overspends in general, a majority of Americans desire the government to spend more money on a broad range of programs. In fact, in a 2023 survey from the National Opinion Research Center, Americans only believed federal government spending should be decreased in one of sixteen areas, namely aid to other countries.¹³ 2019 Pew Research Center data similarly reveal that most Americans supported increasing federal involvement in a variety of issues, including education, infrastructure, and environmental protection. While the survey indicated that less than 50% of Americans expressed confidence in the public’s collective political wisdom, the majority of respondents favored increased national spending to resolve traditionally local needs.¹⁴ Americans prefer national over state spending, a prioritization that results in centralizing authority and oversight in the federal rather than state and local governments. Thus, modern Americans seem to exhibit the tendencies presaged by Tocqueville and are seeking solutions through the federal administrative state rather than through local associations.

Such desire for centralization is not limited to issues denoted in the Pew survey.¹⁵ The desire spans across a variety of sectors and

the resulting inefficiencies have raised concerns. In healthcare, one of the most complex policy issues, costs from wasted funds and regulation have mounted significantly. The *Journal of the American Medical Association* estimates waste in the U.S. healthcare system at an estimated \$935 billion, nearly 25% of overall health spending. Over \$250 billion of this unused or misused funding derives from administrative burdens due to overcomplexity. When translated into financial burden, time spent addressing bill-related matters amounts to \$68,000 annually per physician.¹⁶

The costs of federalizing a policy go beyond additional paperwork. Dr. Steven Teles, a political scientist and professor at Johns Hopkins University, describes the tendency for national government involvement to generate overcomplexity with the novel term “kludgeocracy.” He has used this word to describe a system in which the “complexity and incoherence of our government often make it difficult for us to understand just what the government is doing.” This complexity often generates a “hidden, indirect, and frequently corrupt distribution” of costs, while enabling “those seeking to extract rents from government because it makes it hard to see just who is benefitting and how... The complexity of our grant-in-aid system makes the actual business of governing difficult and wasteful.”¹⁷

Nationalization of infrastructure policy carries costs and benefits. The alleged benefits are typically easily measured in terms of the dollars that can be deployed, but the cost of bypassing our traditionally federalist approach to prioritizing and building infrastructure are opaque and in some cases, as evidenced in kludgeocracy, virtually impossible to measure. Federal policy makers would be providing our nation a great service by asking whether the infrastructure

problem they are trying to solve is one of national import and whether the costs of nationalizing the decision have been accurately assessed. While “free money” and the desire for uniformity and equality render nationalization attractive at first glance, policymakers should explore the full costs of nationalization alongside its alternatives. And while the Interstate Highway System is an excellent example of the invaluable role the federal government can play, it may be an outlier and no longer reflective of our nation’s current infrastructure needs.

The Interstate Highway System

Inaugurated in the late 1950s, the Interstate Highway System (IHS) met a critical American need by nationalizing the endeavor and making the federal government primarily responsible for funding and overseeing the project. While the states would be responsible for designing and building the highways, they would do so under the guidance of the federal government. The nationalization of the project effectively addressed several needs, including national coordination on siting, development of federal centers of excellence for design, the ability to transfer funds from high-population states to those more sparsely populated, and the development of a consistent design and signage so users of the facility would have a similar experience. The project was widely viewed as a phenomenal success and a key contributor to our nation’s rapid economic expansion. However, the IHS is an outlier and not representative of U.S. transportation projects. Notwithstanding its somewhat bespoke status, the IHS has encouraged the U.S. to centralize the decision-making for project selection and the design, procurement, construction, operations, and maintenance of our nation’s transportation infrastructure. The siren song of “free money” possesses

a commanding call over state and local governments, leading many to abdicate their historic authority and oversight over transportation projects in exchange for federal funds. Press releases announcing federal funding for a project never include the attendant costs of those funds. The most recent list of the regulatory burden accompanying federal highway funding can be found in guidance for the IJIA's Rebuilding American Infrastructure with Sustainability and Equity Program (RAISE). Federal aid highway projects must comply with over 90 distinct regulations regarding climate and the environment, procurement, labor, equity, and performance.¹⁸ Each of these obligations requires extensive and complex reporting, which yield costs and delays incurred by the state or local government responsible for delivering the project.

Some dismiss the cost of the federal regulatory burden under the assumption that federal funds with a burden are better than no federal funds at all. Ironically, while federal funding appears appealing to reduce state and local burdens, all federal funding derives from state and local taxpayers. The true difference between funding strategies rests on whether taxpayers make payments locally, to their state, or to the federal government. All funding for transportation infrastructure comes from local taxpayers and ratepayers. Yet many supporters of increased federal infrastructure spending seem to hold the mistaken assumption that federal funds come as a genuinely additive funding source.

This dynamic was on full display during a meeting I hosted in the White House for mayors from across the country. The mayors explained that their budget constraints were such that their governments were incapable of paying for infrastructure needs without federal assistance. I explained the zero-sum nature of federal revenue raising and under-

scored the fact that it was mathematically impossible for every community to receive back more federal funds than are collected from that community. I tried to illustrate this by asking for a show of hands. When I asked, "Who would like to receive more federal funding for infrastructure?" unsurprisingly, every mayor's hand went up. After I explained that their cities could only receive more federal funding if other communities were willing to receive less, I asked which mayors would be willing to receive less funding so another community could have more. Unsurprisingly, no hands were raised. Mayors and governors have incentives to choose the politically easier path of turning to federal government funding rather than raising taxes on their constituents. And while many consider it politically easier to raise funds federally, history would indicate the opposite. The federal gas tax was last raised in 1993. In the interim, dozens of states, cities, and counties have increased funding for transportation infrastructure.¹⁹

The Hidden Costs of Federal Funding

Ungrounded perceptions surrounding federal funding are not limited to the mistaken belief that they are always additive; as noted above, advocates of increased federal funding often ignore the hidden costs of concentrating decision-making authority for transportation infrastructure at the national level. The issues range from highly burdensome regulatory costs to flaws in the nature of the funding itself and its influence on spending behavior.

The first challenge to providing additional federal funding is trying to ensure the funding is truly additional. Labeled "substitution," non-federal recipients of federal funding have engaged in the practice of using federal funds as a substitute for already programmed non-federal funding and spend-

“Since the entire economy experienced inflation, the IIJA cannot be held to account for a net decrease in real funds available for highway infrastructure, but the IIJA was likely a meaningfully large contributing factor.”

ing that freed up non-federal funding on other priorities. Analyzing two decades of federal highway funding, the Congressional Budget Office indicated that “state and local governments reduce their own per capita spending on highway capital by 26 cents for an additional dollar of annual federal formula grants.”²⁰ As a result, a dollar of additional highway funding resulted in 74 cents of new funding available, an amount that could drop to less than 50 cents when the compliance costs of those funds are taken into account.

Substitution is not the only problem facing those trying to calculate the net positive benefit of new federal funding. Sudden influxes of federal funding can produce more revenue than state and local governments are capable of spending, resulting in some creative and unintended responses to the unexpected additional revenue. In a November 2023 article, *The Economist* indicated that almost all states, regardless of political make-up, had responded to the sudden influx of federal funding by lowering their citizens’ tax bills since 2021, resulting in an approximate \$30 billion decline in states’ tax revenues. Some states have moved to even more permanent changes by cutting income taxes.²¹ Twenty-four states sought income-tax cuts and lawmakers proposed a flat tax rate in Kansas, North Dakota, and Ohio.²² This dynamic takes substitution to a whole new level as state and local governments use additional federal funding to reduce both their spending and their revenues.

The magnitude of spending on infrastructure has also contributed to inflation, actually reducing highway spending in real terms. Pouring a historically large amount of funding into an industry that is equipment and labor constrained unsurprisingly increased the cost of delivering projects. What was unforeseen was that the increase in costs would exceed the increase in funding. *The Economist’s* evaluation of funding before and after the implementation of the IIJA indicates a 3% decline in actual funding.²³ In other words, after devoting a “once in a generation” investment of hundreds of billions of dollars to infrastructure spending, those spending gains were more than offset by the inflation that followed. Since the entire economy experienced inflation, the IIJA cannot be held to account for a net decrease in real funds available for highway infrastructure, but the IIJA was likely a meaningfully large contributing factor. Comparing consumer and construction inflation is suggestive of this impact. The Consumer Price Index (CPI) has risen by approximately 10% from November 2021 to November 2023.²⁴ Yet, over the same period, the FHWA’s National Highway Construction Cost Index (NHCCI) rose by 44%.²⁵

Commenting on this phenomenon, Jeff Davis with the Eno Transportation Center indicated that despite nearly \$30 billion in new project agreements (which is \$5.6 billion more than the September 2021 quarter) real obligations actually amounted to \$3.5 billion less, constituting a 17% reduction in

real spending. To compare buying power over this period, Davis contrasted the CPI and NHCCI, rebasing the indexes in 2020. **Figure 1** simplifies his comparison.

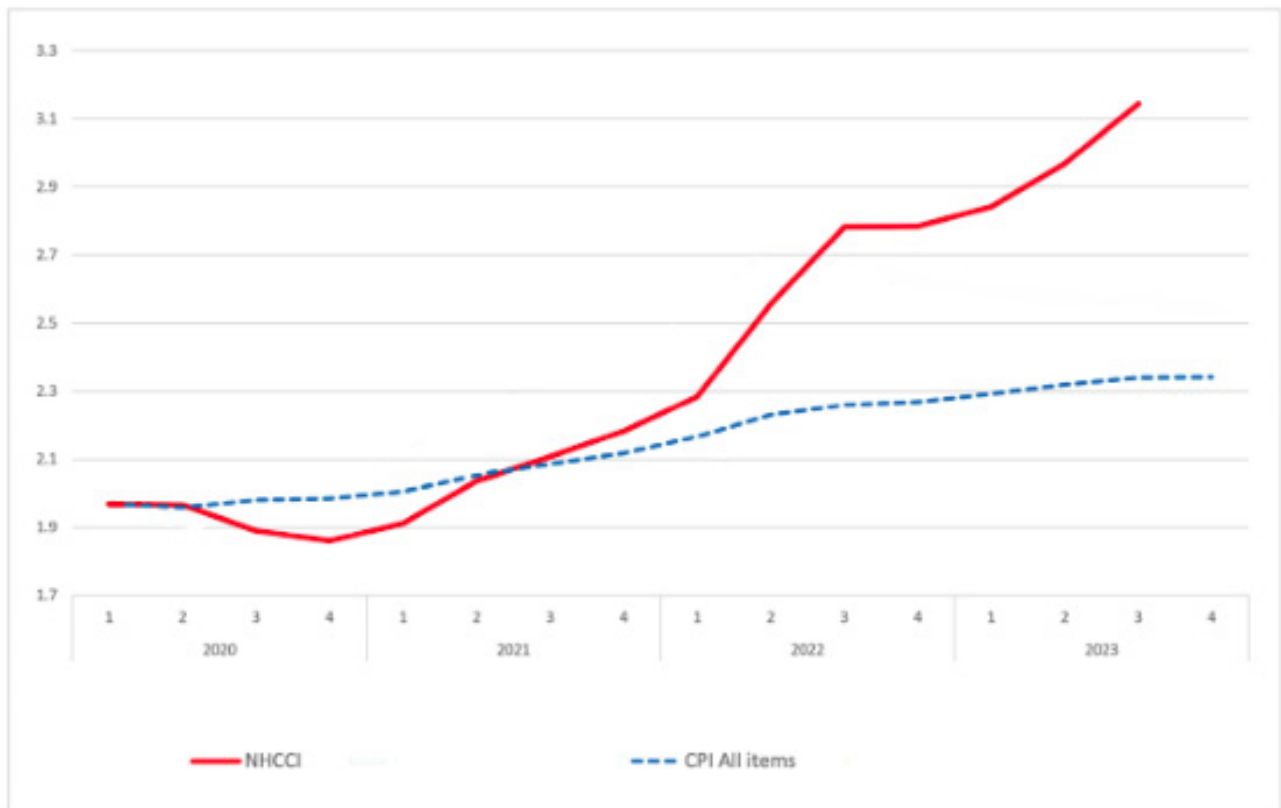
Comparing the buying power the FHWA currently has to what it possessed in October-December 2020 indicates the contracts signed by FHWA have lost \$47 billion in real buying power.²⁶ While the impetus for such monumental inflation undoubtedly arose from many sources, one can reasonably infer from a comparison of the CPI with construction inflation that the latter was substantially influenced by IIJA funding.

In addition to potentially exacerbating inflation, federal funding imposes another hidden cost by providing a less reliable source of infrastructure funding. While difficult to quantify, encouraging the move-

ment of funding from the state and local level to the federal level makes little sense. Infrastructure requires long-dated, stable forms of revenue, prompting state and local sources of infrastructure funding to draw on gas taxes, sales taxes, and user fees. Contrarily, current federal funding comes from relatively short-term appropriations or authorization laws (legislation with 1-5-year horizons), and national debt serves as the source of this funding. As a result, transitioning funding responsibility to the federal government results in a shift from stable, reliable sources to more episodic funding, drawn primarily from future generations of taxpayers.

The challenges attending the transfer of authority to the national government are not solely limited to project costs. Federal funding incentivizes states to rely on national aid and disincentivizes innovation, poten-

Figure 1. Comparison of NHCCI with PPI, CPI, and ECI (rebased to NHCCI 2020 Q1)



Source: FHWA and BLS Data*
*Simplified Chart

tially leading to poor project selection.²⁷ To lower the perceived state funding burden, states will look to pursue and prioritize federally encouraged projects. This proves problematic as the federal government prioritizes projects which may not be the most appropriate for a community, arguably degrading infrastructure quality and making cities poorer.²⁸ Economists have noted that a steady flow of federal money incentivizes states to pursue unneeded projects that they will struggle to maintain when funding dissipates.²⁹

Finally, reliance on federal aid also incentivizes states to wait for promised or potential funding, increasing project delays. If a community or a state anticipates federal funding, it is rational for that government to avoid raising its own funds and to instead focus its energies on aggressively pursuing federal funding. New York and New Jersey's Hudson Tunnel illustrates this dynamic. For over a decade, project proponents argued that the project, primarily moving commuters from New Jersey to Manhattan, was the most important project in the country, but they would not pursue it without federal funding, i.e. funding from other states. In this case, however, the long wait for federal funding may have proved superficially successful as the project is slated to receive a record amount of funding from the federal government.

In sum, despite the common perception that federal spending lessens state burdens and provides an additive funding source, the slate of hidden costs possesses the potential to include substitution, irresponsible budgeting, increased inflation, unreliable funding, and misaligned incentives. Novel federal funding enables states to substitute interchangeable dollars for state funds originally allocated for the targeted project, diluting and diminishing the impact of federal funds by approximately 25 cents on each dollar. An

inundation of federal funds has also led several states to lessen income taxes, lowering state revenue by approximately \$30 billion.

The IJA exacerbates costs in the construction sector while inflation turned a historic investment into a 3% decline in real funding. When states shift reliance from gas taxes, sales taxes, and use taxes to episodic federal grants, they severely diminish the stability of their funding model. Furthermore, ceding authority to the national government misaligns state incentives impinging innovation and lowering infrastructure quality. Finally, dependence on federal aid encourages states to prioritize federal over state funding models, generating long delays. As exemplified by the Hudson Tunnel project, federal funding for transportation infrastructure tends to carry with it several serious hidden costs.

Two Case Studies

Comparing the funding, projects, and performance of New York and New Jersey's Hudson Tunnel and Virginia's Hampton Roads Bridge Tunnel (HRBT) provides some useful, real-world insights into the differences between federal and local funding for local projects. Delays and precipitously increasing cost projections have characterized the history of the Hudson Tunnel project from its initial proposal. When New Jersey Governor Chris Christie halted its predecessor in 2010, he cited an inability to meet the state's financial obligations for the project. After the cancellation, Amtrak proposed the Hudson Tunnel Project in 2011 with a \$13.5 billion budget, which was later increased to \$14.1 billion. After Hurricane Sandy hit the East Coast, the tunnel project was prioritized, but funding sources remained uncertain. After additional setbacks in 2017, John Porcari, founding executive director, attributed delays to a lack of federal funding and indicated each additional year delayed could increase costs by hundreds of millions of dollars.³⁰ The project was delayed

again when refused Capital Investment Grants (CIG) during the Trump administration in 2018. In January 2024, the Gateway Development Commission indicated the cost of the Hudson River Tunnel project had climbed to \$16.04 billion,³¹ an estimate nearly 14% higher than its 2021 projection, which is reasonable given inflation.³² However, waiting on federal funding has finally elicited an unprecedented investment of national aid. The federal share of the Hudson Tunnel Project funding now has reached 73% of the total project cost, an unparalleled distribution of costs.³³ To date, construction on the tunnels has not begun, the timeline has been extended by at least fifteen years, and the cost has grown by over \$3.5 billion.

The construction of the Hampton Roads Bridge Tunnel (HRBT) project, a tunnel boring and lane expansion project in South-Eastern Virginia, used an alternative funding strategy. After an initial environmental review, construction began in 2020

with a projected completion of 2025 and a budget of \$3.9 billion. The project, Virginia’s largest highway project in state history, is approximately at 50% completion.³⁴ Comprised of bridges, trestles, artificial islands, and tunnels, the 3.5-mile-long HRBT passes under the main shipping channels in the Hampton Roads harbor. This endeavor also involves widening 10 miles of I-64 from four to eight lanes.³⁵ Funding strategy separates this project from many infrastructure investments of this scale and provides a counterexample to the reliance on federal funding for the Hudson Tunnel Project.

Funding for the HRBT derives primarily from the Hampton Roads Transportation Accountability Commission (HRTAC), which is funded through regional sales and fuel taxes.³⁶ The Commonwealth’s SMART SCALE program is providing \$200 million in additional financing and the Virginia Department of Transportation is providing \$108 million. Primary funding sources for HRTAC derive from fuel taxes (7.6 cents on

Table 1. Project Comparison: Hudson Tunnel vs. Hampton Roads Bridge Tunnel

Project	Hudson Tunnel Project	Hampton Roads Bridge Tunnel
Tunnel Length/ Diameter	4.5 miles / 25 ft	1.5 miles / 46 ft
Approximate Tunnel Volume	431,956 yd ³	487,477 yd ³
Cost	\$17.18 billion	\$3.9 billion
Length of Construction	Estimated 11 years	5 years
Total/Current Delays	15 years / 7 years	10 years / ~2 years
State/Local Contribution	23% / 0%* <i>*Source of Funds TBD</i>	8% / 92%
Total Retail Sales (2017)⁴⁰	\$133,345,546,00	\$22,145,751,000

gas and 7.7 cents on diesel) and additional regional sale and use taxes of 0.7%.³⁷

The HRBT is not immune to the common challenges of megaprojects and the impact of inflation. In September 2023, VDOT staff asked the Commonwealth Transportation Board for a 600-day extension on the project, and the board voted in favor of allowing the state highway commissioner to change the project agreement.³⁸ In October 2023, Ryan Banas, project director for the expansion, attributed these delays to “the complexity of a project of this magnitude.”³⁹

Table 1 summarizes the project comparison between the Hudson Tunnel and the HRBT.

Although the Hudson Tunnel is longer, the actual volume of the HRBT surpasses the Hudson Tunnel by approximately 12%. Hence, while tunneling significantly more, the HRBT is projected to cost approximately 75% less than the Hudson Tunnel project. While the local and long-term funding sources are unclear for the Hudson tunnel, HRBT has clearly defined means for maintenance and localized support through HRTAC. In 2019, when costs for the Hudson Tunnel were estimated at \$12.1 billion, the CIG share was 44%. In early 2024, the Gateway Development Commission indicated that the federal share would increase to 73%.⁴¹ The search for this federal liberality is at least partially responsible for 15 years of delays and increasing the project cost by at least \$3.5 billion, a 42% increase.

While federal aid is often sought because of an alleged lack of local means for funding, observing the differences between the total retail sales tax base in the respective areas indicates that the Hudson Tunnel has a significantly larger base to draw from. Comparing the 2017 retail sales from Essex County, Hudson County, and New York City to the Hampton Roads District indicates a

startling 143% difference. While the Hudson Tunnel project can draw on over \$130 billion in retail sales for taxation, the HRBT has reached 50% completion through retail, sales, and use taxes drawn from only \$22 billion in regional sales.

Federal funding may also disincentivize states from addressing inefficiencies in project delivery and their attendant costs. By some accounts, New York City (NYC) has the world’s most expensive system for building subways, spending five times as much on a mile of subway as a similar project in Paris.⁴² In fact, construction costs for the 1.8-mile Phase 1 of the Second Avenue Subway were 8 to 12 times more expensive than similar subway projects in Italy, Istanbul, Sweden, Berlin, and Spain.⁴³ The same study discovered several issues increasing costs for New York projects. Among the challenges are the insistence of unions on overstaffing, problems in New York’s procurement law, and a revolving-door relationship between the MTA and specific contractors.⁴⁴ When the Hudson Tunnel Project was struggling for federal funding, I asked the proponents if they really needed additional funding. They were seeking 50% federal funding at the time, and my point was a relatively simple one: if New York City could manage to build a tunnel with transportation infrastructure for only 2.5 times the second most expensive city in the world (as opposed to 5 times), they would effectively cut project costs in half and eliminate the need for federal funds and attendant regulations. At the same time, I reached out to tunnel contractors and labor unions and discovered an interesting dynamic. Disrupting common practices in public infrastructure is not rewarded. Contractors working in the New York City market were not interested in undercutting the pricing in that market, and no one without

New York City experience was willing to enter the market on a project of this scale. The unprecedented amount of federal funding flowing to the Hudson Tunnel project will likely continue to suppress the incentives for the city to bring its infrastructure costs into line with those found around the rest of the world.

In summary, these comparable projects illustrate the dichotomy between reliance on federal rather than state and local funding sources, suggesting that the obligations attending national aid result in significant delays, increased costs, and less sustainable maintenance. While New York and New Jersey spent a decade striving to procure federal funding, Hampton Roads developed a sustainable funding model that has enabled efficient planning and delivery for a cost 75% less than the Hudson River Tunnel. Funding for these projects also differs regarding future maintenance. While Hampton Roads has pursued a model allowing for reliable support via gas, sales, and use taxes, New York and New Jersey have consistently asserted that their tax bases could not sustain the construction costs of the Hudson Tunnel. This assertion delayed construction for over a decade, generating a concern that maintenance of the Tunnel may be characterized by similar delays. Furthermore, transferring authority to the national government disincentivizes states from addressing project inefficiencies and costs. When states can shift their costs to the federal government, and thereby to other states, they have less incentive to pursue the most efficient and frugal means for project delivery. Nevertheless, beyond the practical implications observed in increased costs, delays, and inefficiencies, transferring infrastructure authority to the national government may facilitate the erosion of Americans' constitutional right

to petition.

The Right to Petition

The most daunting impact of concentrating decision-making authority in the federal government may have nothing to do with project delays, cost overruns, misaligned incentives, or a host of other inefficiencies. An even more concerning issue facing our nation is the extent to which we can continue to transfer local decisions to the federal level without unduly impinging citizens' First Amendment right to petition the government. Moving decisions from a local or state decision-maker to one at the federal level likely restricts the ease and quality of communication and persuasion. While courts have not opined directly on this point, and it has received little scholarly attention, it would be reasonable to conclude that if the distance between the citizen and decision-making agency grows too wide or the opportunity for redress too onerous, the constitutional right to petition may be effectively denied.

The right to petition has a long and distinguished history. The first legal articulation of the right to petition occurred in the Magna Carta, which in 1215 exemplified the right to seek redress from the King for the protection of English liberties and elimination of onerous obligations.⁴⁵ This fundamental right sprang from citizens' concerns that the crown's unheeding demands "infringed or damaged" their privileges.⁴⁶ At the time, rights violations surrounded fees for inheritance, over-taxation, and the usurpation of rights and customs traditionally held by cities. In addition to limiting the power to tax by requiring common consent, the Magna Carta also ensured the Crown could not strip localities of traditional authorities and customs: "the city of London shall have all its old liberties and free customs as

well by land as by water. Moreover we will and grant that other cities and burroughs, and town and ports, shall have all their liberties and free customs.”⁴⁷ The Crown had threatened the ability of local officials to govern the local commercial activities of these cities and had directed magistrates’ accountability to the Crown rather than the governed citizens.⁴⁸ Hence, the Magna Carta preserved cities’ authority to elect a mayor and county magistrates to oversee local needs and initiatives, preventing the undue centralization of authority.⁴⁹

After eight hundred years of incorporation into English common law, the right to petition found expression in colonial American governments. The need for a right to petition was explicitly articulated in America’s Declaration of Independence, recounting that at “every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.”⁵⁰ In the Declaration’s lengthy list of grievances, not a few were references to the administrative burden imposed and the de facto abridgement of the right to petition. Not surprisingly, the desire to be able to readily address those in government led to the inclusion of the right in the First Amendment to the U.S. Constitution, which protects the right to “petition the Government for a redress of grievances.”⁵¹

Fundamentally, the right of petition protects access to the courts and also guarantees a right to petition state and federal governments and administrative agencies. In fact, each state has incorporated a right to petition in its constitution, sometimes broadening this to a right to instruct.⁵² The Supreme Court has recognized that “to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their represen-

tatives... The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”⁵³ The Court has further indicated that congressional acts must not be used to unduly restrain the right of petition which aims to safeguard the communication between the government and the governed. Indeed, for the government to limit such a right would “deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.”⁵⁴ Individual citizens and groups of citizens possess the right to seek to persuade the government to take or refrain from a particular action.⁵⁵ Congress must approach this right with deference, acknowledging citizens’ right to effectively engage government to seek or prevent an action.⁵⁶

In the case of transportation infrastructure, centralization of traditionally local decisions may have resulted in a de facto abridgement of this right. Concentrating funding, regulation, and oversight in the national government effectively diminishes political participation by reducing the extent, significance, and authority of state and local government involvement—the governments most accessible to petitioners. Locating regulative authority almost entirely in the national government enervates the power and true significance of petitions directed to local and state governments. Current practice in Congress and most states has reduced the right to petition to a formality. Legal scholars have suggested that “an energized right to petition might link modern legislators more closely to the entire electorate they are pledged to serve.”⁵⁷ Unfortunately, federal involvement has continued to expand into expressly local areas, continuing the estrangement of citizens and the agencies implementing and overseeing projects.

Aggressive federal encroachment into local decision making has highlighted the misalignment between the local nature of citizens' needs and their opportunity to petition. Crosswalks provide a clear example of the intrusive nature of federal regulations. In the determination of how to best design a street crosswalk in Iowa, the ultimate decision-maker has moved from local officials to the U.S. Secretary of Transportation. For nearly a decade, several cities across the United States have painted multicolored stripes within traditional crosswalks. After Ames, Iowa, introduced similar crosswalks, the local government received a notice from the Federal Highway Administration (FHWA) indicating such crosswalk art "diminishes the contrast between the white lines and the pavement, potentially decreasing the effectiveness of the crosswalk markings and the safety of pedestrian traffic."⁵⁸ The letter continued to request that Ames remove the crosswalk art and return them to standard form. In 2015, when Seattle painted 11 crosswalks with multicolored stripes, the city received a similar letter from the government, noting a potential diminution in funding attached to this local aesthetic choice.⁵⁹ The FHWA's Manual for Uniform Traffic Control Devices (MUTCD) governs markings that can be made on a federal aid highway, and the MUTCD does not permit non-conforming markings in a crosswalk. As a result, the ultimate decision maker on this shockingly benign local policy decision was not the mayor of a city, but a member of the president's cabinet.

The Courts have not furnished precedent expressly adjudicating the impingement of the right of petition due to a transfer of authority from local and state governments to the national government. Nevertheless, the framework supported by a history of defer-

ence for maintaining clear communication between the governed and the government fosters a reasonable concern with the onerous processes required to exercise this right when authority for such local matters is moved to the federal government.

While courts have not established precedent expressly regarding this diminution of the right to petition, federal government involvement in a concern as local as the aesthetics of city crosswalks creates an unnecessary gap between those governing and the governed. Transferring local decisions to the federal government is not only inefficient, but it also has the potential to weaken one of our fundamental democratic rights. Regrettably, local decisions far more impactful than crosswalk art are steadily made every day at the federal level by those effectively out of reach.

Conclusion

The extension of the national government into areas of historic state and local governance has raised serious concerns about the inability of the federal government to efficiently meet the needs of citizens wrestling with issues of local governance. Federal aid comes with heightened regulatory burdens that delay projects and increase costs. Although perceived as additive, these funds ultimately derive from the states receiving the funding. Likely unaware of the deleterious consequences of centralization, Americans continue to seek additional federal aid and view the national government as responsible for many areas traditionally overseen by the state and local governments. Local and state politicians seek to garner political approval through capitalizing on this misplaced assumption or may fail to appreciate the necessarily local origin of funding. Contrasting the financing, governance, and outcomes of the Hudson

Tunnel and the Hampton Roads Bridge Tunnel illustrates the benefits of local oversight for local needs. While New York and New Jersey anticipate 73% of the funding from the federal government, projected construction will begin after the states' citizens have waited through 15 years of delay and the project now faces \$3.5 billion in increased costs in addition to a variety of hidden costs. Perhaps most significantly, the gradual elimination of state and local authority across the nation has ultimately led to the diminution of the opportunity for, and significance of, the right to petition, creating a growing distance between the governing and the governed.

By nature, the national government provides standardized regulations that lack the sensitivity of levels of government located close to citizens. Yet, the vast majority of America's diverse needs are local and are best met through local and state means. Federalism provides an avenue to meet manifold needs and protect the freedoms of the American people otherwise endangered by the national government's encroachment.

Endnotes

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on January 9th that the renewal application was incomplete and Montrose submitted an updated form on January 17th. Because the permit renewal application was not received by January 1st, Montrose was required to pay a \$1,000 fine (See <https://www.jdsupra.com/legalnews/wastewater-enforcement-arkansas-7933209/>).

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