

The Transportation Equity Act for the 21st Century: The Failure of Metropolitan Planning Organizations to Reform Federal Transportation Policy in Metropolitan Areas

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ABSTRACT

Transportation planning decisions in metropolitan areas involving the use of federal funds are made by metropolitan planning organizations (MPOs) in cooperation with state governments and pursuant to federal requirements. This planning system is the result of two federal statutes – the Intermodal Surface Transportation Efficiency Act (ISTEA) and the Transportation Equity Act for the 21st Century (TEA-21) – that sought to reform the pre-existing transportation planning process, which was dominated by state governments and strongly favored automotive transportation, by granting MPOs planning authority over metropolitan areas and by requiring that they consider alternative modes of transportation as well as the impact of their decisions on communities and the environment. This paper argues that these reforms have been unsuccessful because they failed to provide MPOs with sufficient independence from state governments and failed to impose strong planning requirements and

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federal oversight, which could have counteracted the dependence of MPOs on state governments. Finally, this paper will conclude that changes in the current regime that strengthen MPOs and federal planning requirements as well as active federal oversight are necessary if the transportation planning reforms envisioned by ISTEA and TEA-21 are to become a reality.

INTRODUCTION

The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and the Transportation Equity Act for the 21st Century (TEA-21) attempted to reform federal transportation policy by shifting its focus away from unplanned road-building towards an integrated and planned approach that considers alternative modes of transportation as well as the environmental and social impact of transportation decisions. However, this paper argues that these statutes have failed to achieve their purpose because planning authority was delegated to metropolitan planning organizations (MPOs) without granting those organizations sufficient independence from state governments, furnishing strong planning requirements, or providing adequate federal oversight. Because ISTEA and TEA-21 vest final decision-making and funding authority in state governments, which have traditionally favored road-building projects, federal transportation funds have continued to be used for road-building rather than alternative transportation systems that would better meet the environmental and social goals of the statutes as well as the needs of metropolitan areas. This paper will argue that the current metropolitan transportation planning regime under TEA-21 is insufficient to meet the goals of that statute and that the federal government must take a more active role in administering federal transportation funds in order to ensure that the purposes of TEA-21 are implemented.

Transportation planning in metropolitan areas is integral to the continued vitality of America's cities. Transportation policies are intricately intertwined with other policy issues that are central to metropolitan planning: economic development, land use, employment, housing, and pollution.¹ The available modes of transportation in a particular metropolitan area influence to a great degree where people will live,² what jobs they will take,³ and where businesses will locate.⁴ The allocation of transpor-

1. See *infra* notes 29-34.

2. For a discussion of the interrelationship between transportation and housing development, see *infra* footnotes 28-30.

3. Metropolitan-area labor markets have increasingly relocated to suburban communities. See GEORGE E. PETERSON & WAYNE VROMAN, EDS., *URBAN LABOR MARKETS AND JOB OPPORTUNITY* 15-23 (1992) (describing the spatial mismatch separating central-city residents from suburban labor markets); See Intermodal Surface Transportation Efficiency Act, Pub. L. No.

tation funds within a metropolitan area can influence which areas will develop and prosper and which will not.⁵ Transportation planning is also one of the only metropolitan issues that must be addressed at a regional level because most transportation projects cross political boundaries and affect multiple communities.⁶

Congress affirmed the importance of regional transportation planning to the future of metropolitan areas in the landmark ISTEA legislation and the TEA-21 reauthorization when it vested metropolitan planning authority in MPOs.⁷ ISTEA and TEA-21 were intended to reform an inefficient and inequitable transportation system that over-emphasized vehicular transportation and imposed substantial social and environmental costs.⁸ However, this paper will argue that, because both statutes failed to free MPOs from their subordinate relationship to state governments or to provide planning requirements or federal oversight sufficient to mandate changes in a system that has historically preferred road-building, efforts at reform have thus far proven unsuccessful.

Part I of this paper will trace the evolution of federal transportation policy that culminated in ISTEA and TEA-21, focusing on the historical preference for road-building projects over other forms of transportation. This part will also discuss the development of MPOs prior to ISTEA as planning bodies subordinate to state governments, and the extent to which ISTEA and TEA-21 altered the role of MPOs. Part II will discuss the statutory powers and limitations of MPOs *vis-à-vis* state governments under ISTEA and TEA-21. Part III will argue that the existing regime has failed to reform transportation planning in metropolitan areas because ISTEA and TEA-21 failed to provide MPOs with sufficient independence from state governments. This part will further argue that this

102-240, 105 Stat. 1914 (1991); Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3037, 112 Stat. 107, 387-92 (1998) (to be codified at 23 U.S.C. § 5309) (establishing incentives for employers and others to establish transportation programs in support of the Welfare-to-Work initiative); *See also* PETERSON & VROMAN at 16 (arguing that employer demand for low-wage employees is the catalyst for reverse commute programs); *See also* MARK ALAN HUGHES, *THE NEW METROPOLITAN REALITY: WHERE THE RUBBER MEETS THE ROAD IN ANTIPOVERTY POLICY* 33-52 (1993) (citing examples of transportation programs developed in response to spatial mismatches between employees and employers).

4. PETERSON & VROMAN, *supra* note 3, at 15-23 (describing the movement of businesses to the suburbs).

5. *See id.*

6. *See* Sheryll D. Cashin, *Localism, Self-Interest and the Tyranny of the Favored Quarter*, 88 GEO. L.J. 1985, 1987-95 (2000) (describing the problems created by local transportation planning in metropolitan areas).

7. *See* ISTEA, Pub. L. No. 102-240, Title I, §1024(a), 1025(a), 105 Stat. 1914 (1991) (requiring a formal metropolitan transportation planning process conducted by MPOs); TEA-21, Pub. L. No. 105-178, § 1203, 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134) (same).

8. *See infra* notes 38-41 and 47 and accompanying text (describing the intent of ISTEA and TEA-21).

failure was compounded by the lack of strong planning requirements or federal oversight, which could have counteracted the dependence of MPOs on state governments. Finally, this part will conclude that changes in the current TEA-21 regime strengthening MPOs and federal planning requirements as well as active federal oversight of MPOs are necessary if the transportation planning reforms envisioned by ISTEA and TEA-21 are to become a reality.

I. BACKGROUND

A. THE EVOLUTION OF FEDERAL TRANSPORTATION POLICY

Prior to 1991, federal transportation policy was defined by two qualities: first, transportation projects funded with federal dollars have been planned by the states, rather than by the federal government; and second, federal transportation spending has consistently funded highway construction rather than other forms of transportation. From 1916, federal transportation policy amounted to little more than simply responding to increases in vehicular demand by giving money to the states to build roads.⁹ The states, in turn, built highway systems without considering the broad impact that those systems would have on communities and the environment.¹⁰

The federal government began to provide substantial transportation funds to states with the Highway Act of 1916.¹¹ The first Highway Act was Congress' response to pressure from rural agricultural districts for improved postal service and access to markets for their crops.¹² The Highway Act of 1916 essentially subsidized state highway building by providing small amounts of federal funding to projects that had already been planned by the states.¹³ Subsequent federal legislation followed the same pattern of small-scale, mobility-focused road-building, although the amount of federal funds authorized steadily increased.¹⁴

The federal government first began to consider a planned interstate

9. See DANIEL P. MOYNIHAN, *New Roads and Urban Chaos*, The Reporter, Apr. 14, 1960, at 13-15 (describing federal subsidies of state road-building).

10. See DANIEL CARLSON, *AT ROAD'S END: TRANSPORTATION AND LAND USE CHOICES FOR COMMUNITIES* 8-13 (1995) (describing the focus of pre-ISTEA transportation planning on automobile capacity and mobility).

11. See RAYMOND A. MOHL, *RACE AND SPACE IN THE MODERN CITY: INTERSTATE-95 AND THE BLACK COMMUNITY IN MIAMI* 104 (1993).

12. The Highway Act of 1916 was the result of political pressure from agricultural districts for postal routes. See *id.* Until 1939, the Federal Bureau of Public Roads was a small agency within the Department of Agriculture designed to help "get the farmer out of the mud." MOYNIHAN, *supra* note 9, at 13 (quoting unknown source).

13. MOYNIHAN, *supra* note 9, at 13 (describing federal highway allocations as supplements to state transportation budgets).

14. See *id.* Even the early national routes that crossed several state boundaries were not the

highway system during World War I, but the idea did not take hold until President Franklin Roosevelt proposed a 26,700-mile intercity highway system to Congress in 1939.¹⁵ In 1944, after further study, Congress authorized the National Interstate Highway System, which called for the construction of 40,000 miles of highway.¹⁶ However, this project and subsequent attempts to build a national highway system failed because states refused to contribute their own funds to the venture.¹⁷ Construction of the national highway system did not begin in earnest until 1956, when the federal government assumed responsibility for ninety percent of the cost.¹⁸ However, even when the federal government took the lead in funding a national highway system, planning decisions continued to be left in the hands of the states.¹⁹

1. *The Birth of Federal Transportation Policy*

By the mid-1950s, the demand for an interstate highway system among interest groups and the automobile-owning public had galvanized the federal will.²⁰ In 1956, Congress approved a proposal by President Eisenhower which authorized the same national highway system advocated by President Roosevelt fifteen years earlier, but provided federal funds to pay ninety percent of the cost of construction.²¹ Although the provision of more than \$27.5 billion in federal funds ensured that the national highway system would be built, the Highway Act of 1956 did not

result of centralized planning; instead, these routes simply paved and widened trails that had been established during the United States' frontier history. *See id.*

15. *See id.* (describing how President Roosevelt's proposal gained popular support after the unveiling of General Motor's Futurama exhibit at the New York World's Fair).

16. *See id.* This established a tradition: transportation bills have always grown in Congress because they are natural pork carriers. *See, e.g.,* Robert Novak, *GOP Neophytes Get Lesson in Pork*, CHICAGO SUN-TIMES, Apr. 16, 1998, at 31 (describing private letters from fiscally conservative congressional Republicans to Congressman Bud Shuster (R-Pa.), chairman of the House Committee on Transportation and Infrastructure and sponsor of the bill that would eventually become TEA-21, requesting funds for "pork" highway projects in their districts); Jonathan Riskind, *Generous Dole Assures Highway Pork*, COLUMBUS DISPATCH, Apr. 6, 1998, at 7A (describing how Congressman Shuster defeated efforts to block passage of his bill by "buying" the support of other congressmen by adding projects in their districts).

17. MOYNIHAN, *supra* note 9, at 14. The 1944 legislation split the cost fifty-fifty by matching state expenditures dollar for dollar. By 1952, Congress had increased the Federal share to sixty percent but less than one percent of the system had been built.

18. *See id.*

19. *See infra* note 23 and accompanying text.

20. MOYNIHAN, *supra* note 9, at 14. The explosion in automobile ownership after World War II overburdened the existing system and created a public demand for new roads. *See* CARLSON, *supra* note 10, at 5-13 (describing the increased reliance on automobiles among Americans during the 1950s).

21. *See* PETER HALL, CITIES OF TOMORROW 291-94 (1988) (describing the debate over President Eisenhower's proposal).

establish any plan for the construction of that system.²² Rather, in keeping with President Eisenhower's desire that the Highway Act not impose the federal will on the states, decisions on how federal transportation dollars would be expended were left to the state governments.²³ This tremendous allocation of funds without significant federal oversight led to a massive and unplanned period of road-building across the United States as states attempted to spend federal highway funds as quickly as they were made available.²⁴ In sum, the Highway Act of 1956 provided large amounts of federal funds for highway construction while leaving planning decisions almost entirely in the hands of the states,²⁵ thereby establishing a federal transportation policy that would remain essentially unchanged until the passage of ISTEA in 1991.²⁶

While highway-building before 1991 lacked centralized planning, it was remarkably consistent in the way it affected metropolitan areas. In concert with other federal, state, and local policies, highway-building facilitated the suburbanization of metropolitan areas in the post-World War II period by making the regions surrounding cities more accessible.²⁷ States viewed transportation decisions as mobility questions – i.e., how to move individuals from point A to point B – rather than as policy issues that would affect the future development of the metropolitan area.²⁸ However, in many cities, the construction of links between downtowns and interstate highways determined which areas would grow and which would not.²⁹ In addition to encouraging suburbanization and sprawled development patterns by allowing middle- and high-income residents to live further from their jobs,³⁰ the construction of these links also under-

22. MOYNIHAN, *supra* note 9, at 15-16.

23. *See id.* (describing the administration's desire "for Big Government achievements without Big Government").

24. *See id.* at 17. Although the Bureau of Public Roads was responsible for approving all contracts, it was under significant pressure from Congress and the administration to keep the program moving and never exercised significant oversight.

25. *See id.*

26. CARLSON, *supra* note 10, at 8-17 (describing transportation planning pre-ISTEA).

27. MOYNIHAN, *supra* note 9, at 19.

28. *See* Donald H. Camph, *Transportation, the ISTEA, and American Cities* (last visited Mar. 20, 2000) <<http://www.transact.org/mono/city.htm>> (describing how pre-ISTEA transportation decisions were made).

29. *See id.* For a general discussion of the relationship between federal policy and suburbanization, *See* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1068-72 (1996) (describing the factors and policies that led to suburbanization, including federally-insured mortgage policies and federally-funded highway construction).

30. Transportation policy has always played an integral role in the development of suburbs. Along with federally insured mortgages, state and federal spending on highways and beltways spurred suburbanization by creating incentives for the middle-class to leave the central cities. For a discussion of the role of federal policy in the suburbanization of metropolitan areas, HALL, *supra* note 21, at 291-94 (identifying the foundations of the suburban boom as new roads, restric-

mined interest in metropolitan public transportation,³¹ displaced entire urban neighborhoods,³² isolated communities from new job markets,³³

tive zoning, federally-insured mortgages, and the baby boom); KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 203-09, 213-18 (1985) (describing how federal housing policy insured mortgages only for the new, single-family residences of the suburbs, thereby making it less expensive for middle-class families than living in central cities); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 111-12 (1999); and Frug, *supra* note 29, at 1068-72 (describing how federal transportation and housing policies funded suburban growth).

The combination of federally insured mortgages and restrictive zoning ordinances that only allowed detached single-family homes created the inefficient land use patterns in suburbs commonly referred to as "sprawl." See HALL at 293-95; JACKSON at 203-09; See, e.g., Arthur C. Nelson & Jeffrey H. Milgroom, *Regional Growth Management and Central-City Vitality in Urban Revitalization, Policies and Programs* 31-35 (1995) (comparing the unmanaged "sprawl" development of Atlanta, Ga. to the carefully planned centralized development of Portland, Or.). Although "sprawl" development is limited in the older metropolitan areas of the northeastern United States, it is the norm in the rapidly developing metropolitan areas of the South and West. See Buzbee at 59-61 (describing the development of sprawl); Robert Fishman, *America's New City: Megalopolis Unbound*, WILSON Q., Winter 1990, at 24 (discussing the increase in sprawl development in relation to older metropolitan areas).

The inefficient and decentralized building patterns of "sprawl" development place disproportionately high infrastructure demands on metropolitan areas. See, e.g., OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *THE TECHNOLOGICAL RESHAPING OF METROPOLITAN AMERICA* 206-08 (1995) [hereinafter "OTA REPORT"] (finding that "sprawl" development requires dramatically larger infrastructure investments than other types of development); ROBERT W. BURCHELL ET AL., *THE COSTS OF SPRAWL—REVISITED* 46-50 (Transit Cooperative Research Program 1998) (same). Sprawling development requires extensive road construction to enable new suburban residents to reach highway links to employment and commercial centers. See *id.* at 71-74; see also Craig N. Oren, *Getting Commuters Out of Their Cars: What Went Wrong?*, 17 *STAN. ENVTL. L.J.* 141, 168-69 (1998) (describing the effects of changes in workforce demographics on transportation policy); see, e.g., Lawrence D. Frank, *LAND USE IMPACTS ON HOUSEHOLD TRAVEL CHOICE AND VEHICLE EMISSIONS IN THE ATLANTA REGION* 18-19 (City Plan. Program, C. of Architecture, Ga. Instit. of Tech. 1999) (describing the effects of sprawl development on traffic patterns in Atlanta). Therefore, although the availability of roads contributed to "sprawl," increases in the number of sprawled communities now demands more roads to feed growth.

31. "Sprawl" development is not conducive to mass transit systems because such systems are not efficient or convenient for dispersed populations. Buzbee, *supra* note 30, at 74 (describing how mass transit systems are unattractive in sprawled areas); Fishman, *supra* note 30, at 33-35 (same); MOHL, *supra* note 11, at 100 (same); Oren, *supra* note 30, at 169-70 (same); see, e.g., Todd S. Purdum, *A Subway Extends to Hollywood: But in Car-Crazed Los Angeles, Underground Travel Has Its Critics*, N.Y. TIMES, June 12, 1999, at A9 (describing the underusage of subways in Los Angeles).

32. The communities displaced by the construction of highway links in metropolitan areas were almost always those of minority groups. See MOHL, *supra* note 11, at 100-04, 134-42 (describing how highway links were almost uniformly built in neighborhoods housing African-Americans or other minority groups).

33. PETERSON & VROMAN, *supra* note 3, at 15-16 (describing the physical removal of new jobs from inner-cities to the suburbs and the resulting impact on metropolitan labor markets); HUGHES, *supra* note 3, at 33-52 (describing "spacial mismatch" in several metropolitan areas as well as a variety of transportation efforts to alleviate that mismatch). In response to the difficulties faced by many employers in attracting carless, inner-city employees in areas lacking mass

and caused dramatic increases in environmental pollution and congestion.³⁴ Increasing concern over these problems set the stage for federal transportation reform under ISTEA.³⁵

2. *The Intermodal Surface Transportation Efficiency Act of 1991*

In terms of the shift it represented in federal transportation policy, the Intermodal Surface Transportation Efficiency Act of 1991³⁶ (ISTEA) was revolutionary.³⁷ Even though the requirements of ISTEA were far from comprehensive or mandatory, the federal government established for the first time a policy regarding how its transportation dollars would be used.³⁸ ISTEA attempted to break away from the traditional strategy of simply accommodating increases in vehicular demand by requiring a coordinated, long-term transportation planning process that adhered to environmental standards and considered issues such as energy conservation, congestion, land use and development, and the social and economic effects of transportation decisions.³⁹ ISTEA also sought to reduce the preference for highways at the state and local level⁴⁰ as well as promote other modes of transportation.⁴¹ However, despite these innovations, this paper argues that ISTEA allowed the preexisting preference for

transit systems, TEA-21 provides monetary incentives or "competitive grant selections" for employers who provide transportation links. See Pub. L. No. 105-178, § 3037, 112 Stat. 107, 387-92 (1998) (to be codified at 49 U.S.C. § 5309).

34. Because "sprawl" development is by definition inefficient, each new housing development places disproportionate demands on the transportation system and increases congestion and pollution. Buzbee, *supra* note 30, at 71-72.

35. See *infra* notes 39-41 and accompanying text.

36. See Pub. L. No. 102-240, 105 Stat. 1914 (1991).

37. See, e.g., BRUCE D. McDOWELL, IMPROVING REGIONAL TRANSPORTATION: MPOs AND CERTIFICATION 12 (1999) (describing the dramatic shift ISTEA represented in federal transportation policy).

38. See *id.*

39. See Pub. L. No. 102-240, Title I, §1024(a), 1025(a), 105 Stat. 1914 (1991) (requiring formalized state and metropolitan transportation planning processes that consider environmental, quality-of-life, and other issues); See, e.g., H. Rep. No. 102-171(I), at 25 (1991), reprinted in 1991 U.S.C.C.A.N. 1551 (stating that "transportation planning needed to be prioritized, strengthened, integrated, focused, made more uniform, and given tools for better management of decisionmaking").

40. ISTEA sought to accomplish this goal in a variety of ways. See Robert E. Paaswell, *ISTEA: Infrastructure Investment and Land Use*, in TRANSPORT AND URBAN DEVELOPMENT 38-44 (David Banister ed., 1995) (discussing the various methods of the ISTEA).

41. ISTEA funded all transportation projects from a single fund at a single level. Prior to ISTEA, federal funds for highways and mass transit were made available through separate sources and, as discussed above, the federal government matched state highway expenditures at a higher rate than mass transit expenditures. See Paaswell, *supra* note 40, at 38-39 (describing ISTEA's consolidation of federal transportation funding sources); See also Pub. L. No. 102-240, 105 Stat. 1914 (1991) (requiring that ten percent of all federal funds allocated for highway projects be spent on defined transportation "enhancements," including parks, historic preservation, beautification, and bicycle and foot paths).

road-building to continue by leaving decisions regarding the use of federal transportation funds largely in the hands of state governments.⁴²

ISTEA attempted to address the distinct needs of metropolitan areas by requiring a transportation planning process separate from that of the state government.⁴³ Congress intended that MPOs serve as the expert regional planning bodies which would identify the particular transportation needs of metropolitan areas.⁴⁴ As envisioned by ISTEA, MPOs were to be comprised of local elected officials and metropolitan planning experts who would cooperatively develop long-term regional transportation plans in cooperation with community groups and state planners.⁴⁵ Thus, MPOs would not only implement the policies and programs of ISTEA on a metropolitan level, but would also tailor those policies and programs to local transportation concerns and build consensus by including a wide range of community groups in the planning process.

3. *The Transportation Equity Act for the 21st Century*

ISTEA expired at the end of fiscal year 1997.⁴⁶ However, because ISTEA proved to be a political success, Congress reauthorized the transportation planning policies established in ISTEA through the fiscal year 2003 with few substantial changes in the Transportation Equity Act for the 21st Century (TEA-21).⁴⁷ Like ISTEA, TEA-21 is incredibly long

42. See *infra* Part II.A (discussing delegation of federal transportation spending authority in metropolitan areas to state governments rather than MPOs); see, e.g., McDOWELL, *supra* note 37, at 12 (“However, ISTEA allows, accommodates, and encourages most of [the transportation reforms], rather than requires them.”).

43. See H. Rep. No. 102-171(I), at 25 (1991), reprinted in 1991 U.S.C.C.A.N. 1551 (recognizing the “special needs” of metropolitan areas in the transportation planning process).

44. See *id.* at 25-26, reprinted in 1991 U.S.C.C.A.N. 1551-52 (describing the intended role of MPOs under ISTEA).

45. See *id.* at 27, reprinted in 1991 U.S.C.C.A.N. 1553 (describing Congress’ intent to strengthen the role of MPOs in the metropolitan transportation planning process *vis-à-vis* state governments). ISTEA was the result of a concerted attempt by Congress to broaden the range of participants in the planning process beyond the traditional groups, i.e., state departments of transportation and motor vehicle and gasoline lobbyists. See Paaswell, *supra* note 40, at 36.

46. See Dennis C. Gardner, *Transportation Reauthorization: A Summary of the Transportation Equity Act for the Twenty-First Century*, 30 URB. LAW. 1097, 1097 (1998).

47. See *infra* Part II.B. (describing the differences between the planning processes under ISTEA and TEA-21); Pub. L. No. 105-178, 112 Stat. 107 (1998) (to be codified as amended in scattered sections of 16, 28, 40, and 49 U.S.C.). The U.S. Department of Transportation’s summary of TEA-21 states that:

[TEA-21 continues] the proven and effective program structure established for highways and transit under the landmark ISTEA legislation. Flexibility of funds, emphasis on measures to improve the environment, focus on a strong planning process as the foundation of good transportation decisions – all ISTEA hallmarks – are continued and enhanced by TEA-21.

U.S. DEPT. OF TRANSPORTATION, TEA-21: MOVING AMERICANS INTO THE 21ST CENTURY: A SUMMARY (last modified July 25, 1998) <<http://www.fhwa.dot.gov/tea21/sumcov.htm>> [hereinaf-

and complex⁴⁸ and authorizes a massive amount of federal dollars – in this case, \$217 billion – for transportation spending – in fact, TEA-21 has been accurately described as the largest public works measure ever passed by Congress.⁴⁹

TEA-21 did, however, work some important changes in the policies of ISTEA.⁵⁰ In the area of transportation planning, TEA-21 enhanced the autonomy of state and local planning agencies by reducing the number of factors that those agencies must address when making transportation planning decisions.⁵¹ In addition, TEA-21 provided that the failure of a state or MPO to consider one of the planning factors would not be judicially reviewable.⁵² This paper will argue that these two changes significantly weakened the strength of the ISTEA planning requirements by granting state governments and MPOs more discretion and eliminating the threat of judicial review.⁵³ However, TEA-21 also significantly enhanced the public participation requirements of ISTEA, which provides MPOs with some degree of accountability.⁵⁴

ter “TEA-21 SUMMARY”]; *see also* SURFACE TRANSPORTATION POLICY PROJECT, TEA-21 - MORE THAN A FREE REFILL 1 (June 1998) [hereinafter “MORE THAN A FREE REFILL”] (describing the failed efforts of interest groups to reverse the policies of ISTEA in TEA-21); *see, e.g.*, H. Conf. Rep. No. 105-178, at 439-440 (1998), *reprinted in* 1998 U.S.C.C.A.N. 113 (stating that it is the intent of the conference committee to retain the basic structure of the metropolitan planning process under ISTEA)..

48. *See* MORE THAN A FREE REFILL, *supra* note 47, at 1 (describing TEA-21 as comprising over 800 pages and taking over 3 years to write). In fact, TEA-21 was so complex that Congress was compelled to adopt a technical corrections bill within a month of passing TEA-21. *See* TEA-21 Restoration Act, Pub. L. No. 105-206, 112 Stat. 839 (1998).

49. This amount marks a significant increase over the roughly \$150 billion for seven years authorized by ISTEA. *See* Liam A. McCann, Note, *TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America's Dependence on the Automobile*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 857, 858 (describing the unprecedented size of TEA-21); MORE THAN A FREE REFILL, *supra* note 47, at 1 (describing the amount of funds authorized by TEA-21); CLIFFORD WINSTON & CHAD SHIRLEY, ALTERNATE ROUTE: TOWARD EFFICIENT URBAN TRANSPORTATION 9-10 (1998) (comparing expenditures under ISTEA and TEA-21).

50. Perhaps most importantly, highway and transit programs are now guaranteed a minimum amount of funding for the first time. *See* TEA-21 SUMMARY at OVERVIEW, FUNDING LEVEL, *supra* note 47; MORE THAN A FREE REFILL, *supra* note 47, at 5, 7. This is significant because ISTEA was never funded to its full extent. *See* MORE THAN A FREE REFILL at 5, 7. Under ISTEA and previous legislation, highway funds were taken from the Highway Trust Fund (HTF), which collected receipts from gasoline taxes. However, prior to TEA-21, transportation spending was not tied to HTF receipts so many projects, including much of ISTEA, were underfunded. *See id.*

51. *See infra* notes 93-101 and accompanying text (describing the streamlining of ISTEA's planning factors under TEA-21); H. Conf. Rep. No. 105-550, at 439 (1998), *reprinted in* 1998 U.S.C.C.A.N. 113 (describing the intent of Congress to streamline ISTEA's planning factors in TEA-21).

52. *See infra* note 102 and accompanying text.

53. *See infra* Part III.B.2.

54. *See infra* notes 123-24 and accompanying text.

B. METROPOLITAN PLANNING ORGANIZATIONS

MPOs are the lynchpin of ISTEA and TEA-21's attempts to reform federal transportation policy in metropolitan areas in that both statutes charge MPOs with carrying out federal policy directives in metropolitan transportation planning. In its report on MPO capacity, the United States Advisory Commission on Intergovernmental Relations stated that the "new philosophies [of ISTEA] imply that MPOs will be transformed from weak advisory bodies into strong decisionmaking partners working closely and on equal footing with state departments of transportation, the governors, air quality and land use regulators, and other major stakeholders."⁵⁵ The vision of MPOs under ISTEA and TEA-21 is of one planning body with jurisdiction over an entire metropolitan area comprised of representatives of all affected groups and transportation service providers within that area.⁵⁶ Because of its inclusive planning process and the broader range of issues that must be considered, MPOs are expected to create transportation plans that are diverse both in the use of multiple modes of transportation and in the types of societal needs addressed.⁵⁷ By designating MPOs as the agents of reform, ISTEA and TEA-21 fundamentally altered their historic role and thrust enormous new responsibilities upon them.

MPOs were originally created in the 1950s by state departments of transportation (SDOTs).⁵⁸ Because SDOTs were unfamiliar with the expanding area of metropolitan planning, the original MPOs were designed to specialize in transportation issues particular to metropolitan areas and to advise state governments on the proper course of action.⁵⁹ The original MPOs relied on SDOTs for funds, research data, and policy guidance.⁶⁰ Federal legislation in 1962 required MPOs for all "urbanized areas" with a population over 50,000.⁶¹ As the number of "urbanized areas" in the United States grew, the number of MPOs increased from 218 in 1972 to 300 in 1990.⁶² However, although MPOs grew and changed over time along with the metropolitan areas they monitored,

55. U.S. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *MPO CAPACITY: IMPROVING THE CAPACITY OF METROPOLITAN PLANNING ORGANIZATIONS TO HELP IMPLEMENT NATIONAL TRANSPORTATION POLICIES* 16 (May 1996) [hereinafter "MPO CAPACITY"] (arguing that MPOs must undergo significant changes if they are to live up to ISTEA's vision).

56. The drafters of ISTEA were particularly interested in including groups that had previously been left out of the planning process. MCDOWELL, *supra* note 37, at 13 (describing the expectations of ISTEA and TEA-21).

57. *See id.* at 13-14.

58. *See MPO CAPACITY*, *supra* note 55, at 13 (describing the origins of MPOs).

59. *See id.*

60. *See id.*

61. *See id.* at 33.

62. *See id.*

their subordinate relationship to SDOTs remained essentially unaltered until the passage of ISTEA in 1991.⁶³

Although the make-up and responsibilities of MPOs varies greatly from region to region, MPOs generally consist of four basic components: (1) a policy board of elected local government officials and representatives of affected groups; (2) a technical committee of federal, state, and local transportation staff, as well as staff from other agencies involved in the planning process;

(3) MPO support staff; and (4) members of the public participating in the decisionmaking process.⁶⁴

II. MPOs UNDER ISTEA & TEA-21

Under current federal law, each "urbanized area"⁶⁵ with a population of more than 50,000 must have a MPO.⁶⁶ TEA-21 gives MPOs responsibility for almost all aspects of the metropolitan transportation planning process and requires that MPOs follow certain procedures in that process,⁶⁷ but does not grant them the final say in what projects will actually be funded.⁶⁸

63. See MPO CAPACITY, *supra* note 55, at 13.

64. Over time, power over the appointment of MPO staff has shifted from SDOTs to local governments. See *id.* at 34.

65. TEA-21 defines "urbanized area" or UZA as "an area with a population of 50,000 or more designated by the Bureau of the Census, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary [of Transportation]. Such boundaries shall, at a minimum, encompass the entire urbanized area within a State as designated by the Bureau of the Census." Pub. L. No. 105-178, § 1201, 112 Stat. 168 (1998) (to be codified at 23 U.S.C. § 101(37)).

66. See Pub. L. No. 105-178, § 1203(b)(1)-(3), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(b)(1), (4)-(5)). Because most metropolitan areas had pre-existing MPOs, ISTEA created a formal designation process by which MPOs were brought into line with federal statutory requirements. See Pub. L. No. 102-240, Title I, § 1024, 105 Stat. 1955 (1991). Under TEA-21, the MPO must be established either by agreement between the state governor and local governments representing at least 75 percent of the population within the MPO's proposed jurisdiction, or "in accordance with procedures established by applicable State or local law." Pub. L. No. 105-178, § 1203(b)(1), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(c)).

67. MPOs' statutory powers and duties are divided between two separate titles of the United States Code. MPO responsibility for metropolitan roads and highways is set forth in Pub. L. No. 105-178, § 1203, 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134), and MPO responsibility for metropolitan mass transportation is set forth in multiple sections of Chapter 53 of Title 49 of the United States Code. See 49 U.S.C. § 5301 (1994) (setting forth the purpose of MPOs in regard to mass transportation); Pub. L. No. 105-178, Title III, §§ 3004, 3005, 3006, 3029(b), 112 Stat. 341, 345, 346, 372 (1998) (to be codified as amended at 49 U.S.C. §§ 5303, 5304, 5305).

68. See *infra* notes 73-79 and accompanying text.

A. MPO AUTHORITY

As discussed above, MPOs have historically been subordinate to state governments.⁶⁹ Although ISTEA reenvisioned MPOs as semi-autonomous local policy boards,⁷⁰ neither it nor TEA-21 expressly defines the authority of MPOs and state governments *vis-à-vis* one another. However, TEA-21 does contain some provisions that regulate relations between MPOs and state governments.⁷¹

The most important such provision gives states the final say in select-

69. See *supra* Part I.B.

70. See *supra* notes 56-57. The introductory language of TEA-21's metropolitan planning provisions indicates that MPOs were to have broad planning authority:

[M]etropolitan planning organizations . . . in cooperation with the State and public transit operators, shall develop transportation plans and programs for urbanized areas of the State. . . . The plans and programs for each metropolitan area shall provide for the development and integrated management and operation of transportation systems and facilities . . . that will function as an intermodal transportation system for the metropolitan area and as an integral part of an intermodal transportation system for the State and the United States.

Pub. L. No. 105-178, § 1203(b), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(a)).

71. In addition to the provisions discussed in the text, TEA-21 regulates relations between states and MPOs as follows: First, TEA-21 provides that state agencies shall be free to develop proposed metropolitan transportation plans for adoption by the MPO. See Pub. L. No. 105-178 § 1203(b), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(b)(3)). The Federal Highway Administration (FHWA) defines "coordination" as meaning that "the comparison of the transportation plans, programs, and schedules of one agency with related plans, programs, and schedules of other agencies or entities with legal standing, and adjustment of plans, programs and schedules to achieve general consistency." 23 C.F.R. § 450.104. Because state transportation agencies are required to submit "plans and programs" to MPOs for adoption under TEA-21, the statutory language implies that state agencies may not dictate to MPOs regarding matters within MPO authority during the planning process. However, as will be demonstrated below, states retain plenary authority to reject MPO projects. See *infra* notes 73-79 and accompanying text.

Second, TEA-21 provides that, in situations where a metropolitan area crosses state boundaries, the Secretary of Transportation shall establish "such requirements as the Secretary considers appropriate" to encourage state governors and MPOs to "provide coordinated transportation planning for the entire metropolitan area." Pub. L. No. 105-178 § 1203(d), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(d)).

Third, TEA-21 expressly provides that "[n]othing in this section shall be construed to confer on a metropolitan planning organization the authority to impose legal requirements on any transportation facility, provider, or project not eligible under this title or chapter 53 of title 49." Pub. L. No. 105-178, § 1203, 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(m)). In other words, a MPO's authority is restricted to entities that are eligible to receive federal transportation funds under the statutes.

Finally, the regulations promulgated by the FHWA under Title 23 require that MPOs create "agreements" or "memoranda of understanding" between themselves and any entity in their boundaries with which they share authority, specifically the state, public transit operators, another MPO, or the state agency charged with responsibility for a nonattainment area under the Clean Air Act. See 23 C.F.R. § 450.310. The applicable provisions of the Clean Air Act can be found at 42 U.S.C. § 7504 (1994). FHWA regulations require also that, "[t]o the extent possible, the MPO designated should be established under specific State legislation" giving it "authority to carry out metropolitan transportation planning." See 23 C.F.R. § 450.306(c). By requiring (or, at least, encouraging) state legislatures to pass enabling legislation, the regulations not only

ing which projects will be funded and implemented. Once an MPO has finalized its metropolitan transportation improvement program (TIP),⁷² ISTEA requires that the selection of transportation projects involving federal participation must be “in conformance with” the metropolitan TIP for that area, but shall be carried out “by the State *in cooperation with*” the MPO.⁷³ This provision, which vests in the state the authority to actually select which federally-supported transportation projects will be implemented, is particularly significant because it runs contrary to ISTEA’s stated preference for MPO autonomy.⁷⁴ Although the state is constrained by the requirement that it select “in conformance” with the metropolitan TIP developed by the MPO, the decision on what projects will ultimately be implemented nevertheless rests with the state. Thus, the state could veto any or all of the projects in the metropolitan TIP.⁷⁵

TEA-21 not only reaffirmed this hierarchy, but also further diminished the power of MPOs. TEA-21 added a provision allowing the state or “designated transit funding recipient” to disregard the project “priority list” developed by the MPO in selecting which projects shall be implemented.⁷⁶ This provision allows states to ignore the MPO’s determina-

increase the authority of MPOs, but also encourage elected officials to “buy in” at an early stage to the federal policy of vesting planning authority in MPOs.

72. TIPs are the short-term projects that comprise the larger LRPs. TEA-21 requires that MPOs, in cooperation with the state and “affected transit operators,” must develop or update TIPs “at least once every 2 years.” Pub. L. No. 105-178, § 1203(h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(h)(1)). TIPs are ultimately incorporated into the state transportation improvement program (STIP) for submission to the FHWA and FTA for joint approval. Pub. L. No. 105-178, § 1203(h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(h)(1)); *see also* 23 C.F.R. §§ 450.206-10, 450.214-16, 450.328.

TIPs must contain: (1) a “priority list of proposed federally supported projects and strategies”; (2) a “financial plan” that demonstrates “how the [TIP] can be implemented,” “indicates resources from public and private sources that are reasonably expected to be available to carry out the program,” “identifies innovative financing techniques to finance projects, programs, and strategies,” and “may include, for illustrative purposes, additional projects that would be included in the approved transportation improvement program if reasonable additional resources beyond those identified in the financial plan were available.” Pub. L. No. 105-178, § 1203(h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(h)(2)).

73. Pub. L. No. 102-240, § 1024, 105 Stat. 1955 (1991) (emphasis added).

74. *See supra* notes 56-57 and 70 and accompanying text.

75. However, an actual confrontation resulting in a “veto” between a state government and a MPO is unlikely to occur. *See infra* note 163 (arguing that MPOs and SDOTs are unlikely to reach the point of confrontation because MPOs will rationally avoid such an occurrence under the existing planning regime).

76. *See* Pub. L. No. 105-178, § 1203(h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(h)(5)(B)). The text of the added provision is as follows:

(B) Notwithstanding any other provision of law, action by the Secretary [of Transportation] shall not be required to advance a project included in the approved transportation improvement program in place of another project in the program.

In other words, states need no longer seek the permission of the Secretary of Transportation to disregard the MPO priority list.

tion of which projects within its jurisdiction should take priority over others. However, TEA-21 also provides that all projects taking place within a transportation management area (TMA)⁷⁷ that receive TEA-21 funds must be selected by the TMA's MPO, in consultation with the state, and in conformance with the metropolitan TIP for that area.⁷⁸

Thus, MPOs have broad authority to make and implement plans for the metropolitan area, but states retain the ability to disregard MPO plans and determine which projects will actually be funded and implemented. As will be shown below, this balance of power effectively precludes MPOs from pursuing transportation projects not favored by the state government.⁷⁹

B. MPO PLANNING REQUIREMENTS

As discussed earlier, ISTEA and TEA-21 intended to create a planning process that was inclusive and considered alternative modes of transportation as well as the environmental and social impact of transportation decisions.⁸⁰ ISTEA and TEA-21 impose their policy goals on the metropolitan planning process by placing a variety of planning requirements on MPOs.

1. Planning Factors

ISTEA set forth 16 factors which MPOs were required, "at a minimum," to consider in developing transportation plans and programs.⁸¹ This list of factors is illustrative of the general policies Congress sought to implement *via* MPOs:

In developing transportation plans and programs pursuant to this section, each metropolitan planning organization shall, at a minimum, consider the following:

1. Preservation of existing transportation facilities and, where practi-

TEA-21 also added a provision that, if the project was a mass transit project, the "designated transit funding recipients," rather than the state, would make the selection "in cooperation" with the MPO. Pub. L. No. 105-178, § 1203(h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(h)(5)). Mass transit projects in metropolitan areas are governed by Pub. L. No. 105-178, § 3004, 3029(b), 112 Stat. 341, 372 (1998) (to be codified as amended at 49 U.S.C. § 5301 et seq.).

77. For a discussion of transportation management areas, see *infra* notes 112-17 and accompanying text.

78. See Pub. L. No. 105-178, § 1203(i), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(i)(4)).

79. See *infra* Part III.B.1.

80. See Pub. L. No. 105-178, § 1203(b), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(a)); see *supra* Part I.A.2.

81. See Pub. L. No. 102-240, § 1024, 105 Stat. 1955 (1991).

- cal, ways to meet transportation needs by using existing transportation facilities more efficiently.
2. The consistency of transportation planning with applicable Federal, State, and local energy conservation programs, goals, and objectives.
 3. The need to relieve congestion and prevent congestion from occurring where it does not yet occur.
 4. The likely effect of transportation policy decisions on land use and development and the consistency of transportation plans and programs with the provisions of all applicable short- and long-term land use and development plans.
 5. The programming of expenditures on transportation enhancement activities as required in section 133.
 6. The effects of all transportation projects to be undertaken within the metropolitan area, without regard to whether such projects are publicly funded.
 7. International border crossings and access to ports, airports, intermodal transportation facilities, major freight distribution routes, national parks, recreation areas, monuments and historic sites, and military installations.
 8. The need for connectivity of roads within the metropolitan area with roads outside the metropolitan area.
 9. The transportation needs identified through use of the management systems required by section 303 of this title.
 10. Preservation of rights-of-way for construction of future transportation projects, including identification of unused rights-of-way which may be needed for future transportation corridors and identification of those corridors for which action is most needed to prevent destruction or loss.
 11. Methods to enhance the efficient movement of freight.
 12. The use of life-cycle costs in the design and engineering of bridges, tunnels, or pavement.
 13. The overall social, economic, energy, and environmental effects of transportation decisions.
 14. Methods to expand and enhance transit services and to increase the use of such services.
 15. Capital investments that would result in increased security in transit systems.
 16. Recreation[,] travel[,] and tourism.⁸²

This list reflects Congress' desire to broaden the scope of metropolitan transportation planning beyond narrow questions of vehicular demand and road capacity.⁸³ ISTEA's planning factors emphasize eight general policies for metropolitan transportation planning: creating a more

82. Pub. L. No. 102-240, § 1024, 105 Stat. 1955 (1991).

83. See *supra* notes 39-41.

2000] *The Transportation Equity Act for the 21st Century* 163

holistic or integrated transportation system,⁸⁴ establishing a forward-looking planning process,⁸⁵ maintaining and improving existing transportation systems,⁸⁶ increasing commerce,⁸⁷ improving safety,⁸⁸ protecting the environment,⁸⁹ reducing congestion,⁹⁰ and promoting sound regional development.⁹¹ However, because these planning factors are vaguely worded and are not mandatory – i.e., MPOs need only *consider* them – they arguably provide little restraint on MPOs in the planning process.⁹²

Although it retained the vague wording of ISTEA, TEA-21 completely rewrote the planning factors, reducing their number to seven.

The metropolitan transportation planning process for a metropolitan area under this section shall provide for consideration of projects and strategies that will:

1. support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;
2. increase the safety and security of the transportation system for motorized and nonmotorized users;
3. increase the accessibility and mobility options available to people and for freight;
4. protect and enhance the environment, promote energy conservation, and improve quality of life;
5. enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;
6. promote efficient system management and operation; and
7. emphasize the preservation of the existing transportation system.⁹³

Essentially, TEA-21's planning factors maintain five of the eight general policies of ISTEA: creating a more holistic or integrated transportation system,⁹⁴ maintaining and improving existing transportation systems,⁹⁵ increasing commerce,⁹⁶ improving safety,⁹⁷ and protecting the environment.⁹⁸ TEA-21 eliminated ISTEA's emphasis on establishing a

84. Factors (6) and (8).

85. Factors (4) and (10).

86. Factors (1) and (14).

87. Factors (7), (8), (11), (13), and (16).

88. Factor (15).

89. Factors (2) and (13).

90. Factor (3).

91. Factors (4) and (6).

92. See *infra* Part III.B.2 (arguing that the planning factors do not force MPOs to pursue the policies of ISTEA and TEA-21).

93. Pub. L. No. 105-178, § 1203(f), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(f)).

94. Factors (C), (E), and (F).

95. Factor (G).

96. Factors (A) and (C).

97. Factor (B).

98. Factor (D).

forward-looking planning process, reducing congestion, and promoting sound regional development.⁹⁹ This reduction was part of a larger attempt to create uniform requirements for SDOTs and MPOs so that their performances could be better evaluated in relation to one another.¹⁰⁰ Because the transportation programs established by MPOs must be included in the state-wide transportation program submitted to the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) for approval, the drafters of TEA-21 determined that state and local planning bodies should be judged by the same criteria, even though the subject matter of their programs differs greatly.¹⁰¹

In addition, TEA-21 added a provision that the failure of a MPO to consider any of the listed factors is not subject to judicial review.¹⁰² When combined with vague and non-mandatory nature of the planning factors, TEA-21's reduction of the number of planning factors and removal of the MPO decision-making process from judicial review indicate a step back from ISTEA's modest attempts at establishing a centralized federal transportation policy because, under this new regime, MPOs have more discretion and are less accountable for their decisions.¹⁰³

2. Public Participation in the Planning Process

TEA-21 requires that MPOs incorporate their consideration of the planning factors into transportation improvement programs (TIPs)¹⁰⁴ and long-range transportation plans (LRPs),¹⁰⁵ which must be submitted to

99. Arguably, the "promot[ing] efficient system management and operation" language of factor (C) could be interpreted to address concerns about congestion. Pub. L. No. 105-178, § 1203(f), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(f)).

100. See McDowell, *supra* note 37, at 10 (describing the changes made to the required planning factors for both SDOTs and MPOs).

101. See *id.*; *infra* note 104 for a discussion of the relationship between state and MPO transportation programs.

102. See *id.*; see also *Southwest Williamson County Community Ass'n v. Slater*, 976 F. Supp. 1119 (M.D. Tenn. 1997) (providing no private right of action under ISTEA but ISTEA does not preclude judicial review all together), *aff'd in part, vacated in part*, 173 F.3d 1033 (6th Cir.). For an argument that TEA-21 would be more effective if it allowed citizen suits, see Buzbee, *supra* note 30, at 115-16.

103. See *infra* Part III.B.2.

104. See *supra* note 72.

105. See Pub. L. No. 105-178, § 1203(g), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(g)). The FHWA, the agency to whom the Secretary of Transportation delegated responsibility for promulgating regulations, requires that LRPs be reviewed and updated every 5 years in most areas. See 23 C.F.R. § 450.322.

LRPs must "at a minimum" (1) identify "transportation facilities . . . that should function as an integrated metropolitan transportation system. . . ."; (2) explain the MPO's consideration of the planning factors; (3) preserve and "make the most efficient use" of the existing transportation system; (4) "indicate as appropriate proposed transportation enhancement activities"; (5) include a "financial plan that demonstrates how the [LRP] can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to

the FHWA and FTA for joint approval.¹⁰⁶ The TIPs and LRPs are another central component of the reforms sought by ISTEA and TEA-21 because they require that MPOs create and follow comprehensive, forward-looking plans instead of simply responding piecemeal to demands for new roads.¹⁰⁷

In order to encourage an inclusive planning process and to make MPOs more accountable to the citizens of metropolitan areas, TEA-21 imposes substantial public participation requirements on both the TIP and LRP formulation processes.¹⁰⁸ TEA-21 requires that TIPs and LRPs be “published or otherwise made available for public review” and that, before an MPO approves a TIP or LRP, it must provide the following parties with “a reasonable opportunity to comment” on the plan: “citizens, affected public agencies, representatives of transportation agency employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transit, and other interested parties.”¹⁰⁹ Finally, TEA-21 strengthened the public participation requirements of ISTEA by adding a requirement that MPOs “publish or otherwise make readily available” for public review an annual listing of projects “for which Federal funds have been obligated in the preceding year.”¹¹⁰ However, as discussed below, although these provisions have been the most successful of the attempts at planning reform because they provide interested parties with the information necessary to participate in the planning process, the preclusion of judicial review severely hampers the ability of citizens’ groups to truly assert themselves in the planning process.¹¹¹

carry out the plan, and recommends any innovative financing techniques to finance needed projects and programs”; and (6) may include, “for illustrative purposes, additional projects that would be included in the adopted [LRP] if reasonable additional resources beyond those identified in the financial plan were available.” Pub. L. No. 105-178, § 1203(g), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(g)).

106. See Pub. L. No. 105-178, § 1203(g), (h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(g), (h)).

107. See *supra* note 72 and 105.

108. See Pub. L. No. 105-178, § 1203(g), (h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(g), (h)); see also Kristina Younger, *Public Involvement* in ISTEA PLANNERS’ WORKBOOK 9-14 (1994) (describing the public participation requirements under ISTEA).

109. Pub. L. No. 105-178, § 1203(g), (h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(g), (h)). The FHWA has set the minimum public comment period at 45 days and required that access be provided to technical and policy information so that public participation could be meaningful. See 23 C.F.R. § 450.316 (2000). The FHWA further required that MPOs “[s]eek out and consider the needs of those traditionally underserved by existing transportation systems, including but not limited to low-income and minority households.” *Id.* Finally, the FHWA required that MPOs expressly consider and address “significant written and oral comments.” *Id.*

110. Pub. L. No. 105-178, § 1203(h), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(h)(4)).

111. See *infra* Part III.B.2.

CMPO Certification

Under TEA-21, a two-tiered system exists in which MPOs are subject to more federal requirements if they have authority over areas designated by the Secretary of Transportation as “transportation management areas” (TMAs).¹¹² Because TEA-21 requires that all urbanized areas with populations greater than 200,000 be so designated,¹¹³ most major metropolitan areas are TMAs.¹¹⁴ While non-TMA urbanized areas are only subject to the requirements of TEA-21 that are discussed above, MPOs responsible for TMAs are subject to additional requirements, including provisions regarding membership,¹¹⁵ coordination with state officials,¹¹⁶ and congestion management.¹¹⁷

The most significant of these additional requirements is that of certification. TEA-21 requires that the Secretary of Transportation certify every three years that all MPOs are carrying out their “responsibilities under applicable provisions of Federal law.”¹¹⁸ The Secretary of Transportation has delegated joint certification authority to the FHWA and FTA, both of whom must approve the planning process in order for it to

112. See Pub. L. No. 105-178, § 1203(i)(1), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(i)(1)).

113. See *id.*

114. For a complete listing of those areas currently designated as TMAs, see 57 Fed. Reg. 21,160 (1992).

115. TEA-21 requires that the membership of TMA MPO “policy boards” include “local elected officials, officials of public agencies that administer or operate major modes of transportation in the metropolitan area . . . and appropriate State officials.” Pub. L. No. 105-178, § 1203(b)(1), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(b)(2)). TEA-21 does not define the term “policy board.” However, the FHWA regulations require that, for the MPO to be designated, it must “clearly identify the policy body . . . that will be taking the required approval actions as the MPO.” 23 C.F.R. § 450.306(b)(2000). The FHWA’s regulations state that the term “officials of agencies which administer or operate major modes of transportation in the metropolitan area” includes, but is not limited to, transit operators, rail operators, and operators of maritime ports and major local airports. See 23 C.F.R. § 450.306(i)(2000). The regulations also state that MPOs should continue to add to the membership of their policy boards to reflect the areas they manage and that such additions to membership do not require redesignation. See *id.* at § 450.306(k).

116. TEA-21 provides that all projects taking place within a TMA must be selected by the TMA’s MPO, in consultation with the state, and in conformance with the metropolitan TIP for that area. See Pub. L. No. 105-178, § 1203(i), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(i)(4)).

117. See Pub. L. No. 105-178, § 1203(b), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(b)). FHWA regulations require that MPOs in TMAs develop additional plans in cooperation with the State and public transit operators that specifically address air quality, congestion, and other issues affecting the area. See 23 C.F.R. § 450.314(2000). This plan must meet the requirements for a “unified planning work program” or “UPWP.” See *id.* Those requirements are set forth at 23 C.F.R. § 420, subpart A(2000).

118. Pub. L. No. 105-178, § 1203(i), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(i)(5)).

2000] *The Transportation Equity Act for the 21st Century* 167

be certified.¹¹⁹ Under TEA-21, the FHWA and FTA may make such certification only if: “(1) a [MPO] is complying with the requirements of this section and other applicable requirements of Federal law, and (2) there is a [TIP] for the area that has been approved by the [MPO] and the Governor.”¹²⁰

ISTEA provided for mandatory sanctions for failures to meet the certification requirements, including the mandatory withholding of federal funds in certain circumstances.¹²¹ However, TEA-21 significantly weakened these sanctions in two ways: first, by making any withholding of funds discretionary rather than mandatory; and second, by allowing the Secretary to withhold amounts less than 20 percent.¹²² Finally, TEA-21 requires that FHWA and FTA allow participation in the certification process by parties from the metropolitan areas under review.¹²³ As with the public participation requirements discussed above, this provision also allows interested parties to obtain the information necessary to participate in the planning process; however, unlike the public participation

119. McDOWELL, *supra* note 37, at 5, 8-11 (describing the basic certification process for metropolitan planning processes). In addition to the coercive power of withholding funds for non-compliance, the FHWA and FTA also have the ability to target certain aspects or programs in a planning process for improvement through “conditional certification” or “limited certification.” “Conditional certification” or “certification subject to specified corrective actions being taken” is essentially a temporary certification, which allows all projects to proceed while specific corrective actions are taken by the MPO. “Limited certification” allows some projects to proceed while others must wait until full certification is granted. *See id.* at 6.

It should be noted that the FHWA’s regulations place some annual certification requirements on all metropolitan transportation planning processes, regardless of whether they are in TMAs or not. These regulations simply require that each MPO state that its planning process is in compliance with the applicable statutory requirements of TEA-21, the Federal Transit Act, the Clean Air Act, the Civil Rights Act of 1964, and the Americans with Disabilities Act of 1990. *See* 23 C.F.R. § 450.334 (2000); *see also* McDOWELL at 5-6 (describing the self-certification process). However, because this process is essentially self-certification, it does not provide the same degree of oversight as does the statutory certification process.

120. Pub. L. No. 105-178, § 1203(i), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(i)(5)).

121. *See* Pub. L. No. 102-240, Title I, § 1024, 105 Stat. 1955 (1991). If a MPO failed to become certified within two years of passage of ISTEA (September 30, 1993), the Secretary could withhold some or all of the funds apportioned to that MPO. Further, if a MPO remained uncertified for more than two consecutive years after September 30, 1993, the Secretary was *required* to withhold 20 percent of funds. *See id.*

122. *See* Pub. L. No. 105-178, § 1203(i), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(i)(5)(D)). The amended text reads as follows: “If a metropolitan planning process is not certified, the Secretary *may* withhold *up to 20 percent* of the apportioned funds attributable to the transportation management area under this title and chapter 53 of title 49.” One commentator has suggested that this amendment was made because the complete cut-off of federal funds was too politically difficult an issue. *See* McDOWELL, *supra* note 37, at 23 (arguing that cut-offs are not politically viable and were not imposed even when allowed under ISTEA).

123. *See* Pub. L. No. 105-178, § 1203(i) 112 Stat. 170 (1998) (to be codified at 23 U.S.C. § 134(i)(5)(D)).

process for TIP and LRP formulation, there is no statutory preclusion of judicial review so citizens' groups may be able to assert themselves more in the certification process than in the TIP or LRP processes.¹²⁴

Certification is the primary means of federal oversight of MPOs and could be an effective tool to counteract the influence of state governments on the metropolitan planning process; however, as discussed below, the FHWA and FTA have not aggressively exercised their oversight authority.¹²⁵

III. ANALYSIS

As one commentator has observed, the burden placed on MPOs by ISTEA and TEA-21 has stretched them "almost to the breaking point. Most MPOs now have responsibilities that far exceed their authority."¹²⁶ This paper argues that, because ISTEA and TEA-21 charge MPOs with working radical change in a system of established interests and patterns without granting them the power or independence to effect meaningful reform, metropolitan transportation decisions continue to be made at the state level and transportation funds for metropolitan areas continue to be spent disproportionately on road-building for outer-ring suburban communities.¹²⁷ Although ISTEA and TEA-21 have created a more comprehensive, planned process for making transportation decisions in metropolitan areas, this paper argues that they have failed to alter the fundamental aspects of the decision-making and funding processes, thereby ensuring that substantive outcomes will remain the same.

Pre-ISTEA, the combination of sprawled development requiring high levels of road-building and a federal transportation policy that focused on responding to increases in vehicular demand created a preference for road-building in metropolitan transportation planning.¹²⁸ ISTEA sought to reform this system by placing planning in the hands of MPOs and requiring that they create long-term plans that consider the social and environmental impact of proposed transportation systems.¹²⁹ However, MPOs have been unsuccessful in reforming transportation planning and federal funds continue to be used on new road-building

124. Although there have not yet been any legal challenges under the certification requirements of TEA-21, citizens' groups in many metropolitan areas have become involved in the certification process when they felt the composition of the MPO's policy board or its public participation procedures were inadequate. See McDOWELL, *supra* note 37, at 26 (describing the successful efforts of one citizens' group to obtain remedial action against their MPO).

125. See *infra* Part III.B.3.

126. McDOWELL, *supra* note 37, at 14.

127. See *infra* Part III.A.

128. See *supra* note 30 and accompanying text (describing how "sprawl" development creates continuing demand for more road-building).

129. See *supra* Part II.B (describing ISTEA's planning requirements).

projects to satisfy the demands of outer-ring suburban communities.¹³⁰ This paper will argue that this failure has occurred because MPOs lack institutional independence to resist state and local preferences for road-building, because the planning requirements under TEA-21 are insufficient to counterbalance the weakness of MPOs, and because the federal agencies responsible for overseeing MPOs have been lax in enforcing these planning requirements when MPOs are not in compliance.

This paper proposes that, in order to truly implement transportation planning reform in metropolitan areas, the federal government will have to play a more active role in the planning process. Because efforts to increase the independence of MPOs *vis-à-vis* state governments will not ensure reform if federal planning requirements and oversight are not strengthened, TEA-21 must be amended to make application – rather than mere consideration – of the planning requirements mandatory, and the FHWA and FTA must take a more aggressive role in ensuring that federal transportation planning mandates are observed by MPOs.

A. THE EXISTING SYSTEM HAS FAILED TO REFORM FEDERAL TRANSPORTATION POLICY IN METROPOLITAN AREAS

Precise determinations of where federal transportation funds are going are difficult to make for a number of reasons: the complexity of ISTEA and TEA-21,¹³¹ the number of projects funded under those acts,¹³² the variance between the funds authorized by the acts and those actually appropriated by Congress and then obligated to specific projects at the state level,¹³³ and, most importantly, the general refusal of federal and state transportation agencies to make relevant information available.¹³⁴

130. See *infra* Part III.A (describing how federal funds continue to be used predominantly on roads to the exclusion of alternative modes of transportation).

131. See SURFACE TRANSPORTATION POLICY PROJECT, *GETTING A FAIR SHARE: AN ANALYSIS OF FEDERAL TRANSPORTATION SPENDING 1-5* (1996) [hereinafter “GETTING A FAIR SHARE”] (describing the difficulties involved in analyzing transportation expenditures); *supra* note 48 and accompanying text (describing the size and complexity of TEA-21).

132. Because of the discretionary nature of much of the ISTEA and TEA-21 funding and the emphasis placed on multimodal transportation systems under those acts, it has proven extremely difficult to determine how many projects are being funded under ISTEA and TEA-21. See *GETTING A FAIR SHARE*, *supra* note 131, at 1-5 (describing the variety of projects funded under ISTEA and TEA-21).

133. See *id.* (describing the process of tracking federal funds through each step of the funding process).

134. See *id.* (describing the difficulties involved in analyzing transportation expenditures, particularly in light of the FHWA’s refusal to make relevant information available to the public); SURFACE TRANSPORTATION POLICY PROJECT, *ISTEA YEAR FOUR* (last visited Mar. 19, 2000) at <http://www.transact.org/yf/money.htm> [hereinafter “ISTEA YEAR FOUR”] (describing the provision of incorrect information and the necessity of filing a Freedom of Information Act request to obtain the relevant information from the US Dept. of Transportation).

Consequently, there is some disagreement over the success of ISTEA and TEA-21 in reducing automobile dependency and road-building.¹³⁵ However, even assuming that ISTEA and TEA-21 funds have found their way to a significant number of alternative transportation programs, studies have nevertheless determined that states continue to subvert the intent of federal transportation policy reform by directing federal transportation dollars towards road-building projects that encourage “sprawl” development in relatively unpopulated spaces within the metropolitan area and increase automobile traffic and environmental pollution.¹³⁶

MPOs and state governments have continued to frustrate the intent of ISTEA and TEA-21 in three ways. First, a substantially smaller percentage of federal transportation funds continues to be spent on urbanized areas than the percentage of the population those areas represent.¹³⁷ By directing transportation funds towards the least populated portions of the metropolitan area, MPOs and state governments encourage development of those areas rather than addressing the transportation needs of

135. Compare GETTING A FAIR SHARE, *supra* note 131, at 6-7 (1996) (finding that, 5 years after ISTEA, most federal transportation dollars continued to be spent on road-building projects far from the core of metropolitan areas), and ISTEA YEAR FOUR, *supra* note 134 (finding that, in fiscal year 1994, states have continued to obligate between 76 and 86% of available federal funds to road-building and road-maintenance projects while only obligating between 26 and 64% to alternative transportation projects), with SURFACE TRANSPORTATION POLICY PROJECT, FIVE YEARS OF PROGRESS: 110 COMMUNITIES WHERE ISTEA IS MAKING A DIFFERENCE (last visited Mar. 19, 2000) at <http://www.transact.org/5yrs/ch5.htm> [hereinafter “FIVE YEARS OF PROGRESS”] (citing improvements in transit systems in 16 metropolitan areas under ISTEA), and Cynthia J. McNabb, *Viability of a Sustainable and Feasible National Transportation System*, 26 TRANSP. L.J. 133, 134-35 (1998) (citing examples of non-vehicular transportation systems funded by ISTEA).

136. See GETTING A FAIR SHARE, *supra* note 131, at 2 (finding that, 5 years after ISTEA, state officials continued to control which metropolitan transportation projects were implemented and continued to favor building “large roadways at the fringes of metropolitan areas”); ISTEA YEAR FOUR, *supra* note 134 (finding that, in fiscal year 1994, states have continued to spend federal funds on highways at a much higher level than on alternative modes of transportation); see, e.g., Marla Donato, *Bias in Transit Spending: Assailed U.S. Official Meets Inner-City Leaders*, CHI. TRIB., Aug. 13, 1998, at 5 (describing complaints by inner-city communities about the failure of MPOs to include them in the planning process and to fund projects benefiting their areas); Jane Holtz Kay, *Paving America First*, THE NATION, July 27, 1998, at 7 (arguing that TEA-21 continues the prevailing trend of primarily funding new highway building); Preston Schiller, *Transportation Equity Promised But Hasn't Arrived at the Station*, SEATTLE POST-INTELLIGENCER, June 24, 1998, at A11 (same); Jonathan Walters, *The Highway Revolution That Wasn't*, GOVERNING, May 1995, at 30 (same); cf. Kevin L. Siegel, *Discrimination in the Funding of Mass Transit Systems*, 4 HASTINGS J. ENVTL. L. & POL'Y 107, 107 (1997) (arguing that even successful mass transit systems favor white suburban areas over minority inner cities). But see FIVE YEARS OF PROGRESS (citing improvements in transit systems in 16 metropolitan areas under ISTEA), and McNabb, *supra* note 135, at 134-35 (citing examples of non-vehicular transportation systems funded by ISTEA).

137. See GETTING A FAIR SHARE, *supra* note 131, at 6-7 (finding that urbanized areas represented 64% of the nation's population in 1995, but received only 46% of fiscal year 1995 federal roadway dollars).

the more densely populated inner-cities and the developed suburban areas.¹³⁸ This practice goes against ISTEA and TEA-21's purpose of making transportation decisions that addressed the needs of existing communities rather than encouraging development of new areas.¹³⁹

Second, MPOs and state governments have continued to favor the funding of large road-building projects on the fringes of metropolitan areas.¹⁴⁰ By building roads in relatively undeveloped portions of the metropolitan areas, MPOs and state governments are using federal funds to encourage "sprawled" development patterns.¹⁴¹ Because "sprawl" development requires automobile-based transportation systems to accommodate its inefficient use of land, the construction of new roads in undeveloped areas facilitates inefficient land use patterns in metropolitan areas,¹⁴² a practice which ISTEA and TEA-21 sought to discourage.¹⁴³

Third, states have continued to withhold funds from programs targeted to urbanized areas. Under ISTEA and TEA-21, the Surface Transportation Program (STP) was specifically designed to provide federal funds for metropolitan areas.¹⁴⁴ However, state governments have severely underspent the funds provided under STP in relation to spending rates of other funds.¹⁴⁵ While state governments have been spending an average of 96 percent of the funds provided under other federal transportation programs, many states are spending STP funds at rates less than 70 percent.¹⁴⁶ The impact of state underspending of STP funds on non-

138. *See id.* (finding that federal transportation funds are not being directed to the needs of inner-cities and already developed suburban areas).

139. *See* Pub. L. No. 105-178, § 1203(g), 112 Stat. 170 (1998) (to be codified at 23 U.S.C. §134(g)). (requiring under § 1203(g) of TEA-21, that MPOs preserve existing infrastructure).

140. *GETTING A FAIR SHARE*, *supra* note 131, at 6-7.

141. *See supra* note 30 and accompanying text (describing the relationship between road-building and "sprawl" development).

142. *See id.* (describing the land use patterns of "sprawl" development).

143. *See supra* notes 39-41 and 47 and accompanying text (describing ISTEA and TEA-21's intent to promote efficient land use in transportation planning).

144. *GETTING A FAIR SHARE*, *supra* note 131, at 8-11. The Surface Transportation Program (STP) is a funding program created by ISTEA for metropolitan areas. In keeping with ISTEA's desire to promote multimodal transportation systems, STP funds can – at the discretion of state governments – be used for transit system construction and rehabilitation, bicycle and pedestrian facilities, and scenic and historical transportation facilities, as well as roadway construction and rehabilitation. *See* MARGARET FRANCO, ED., *ISTEA PLANNER'S WORKBOOK* 168 (1994) (defining STP); *cf.* McCann, *supra* note 49, at 860-69 (arguing that, because the use of STP funds is discretionary, states are simply directing STP funds to road-building). In contrast to STP, the National Highway System (NHS) – the largest funding program under ISTEA – is devoted primarily to highway construction and rehabilitation, although some funds are provided for bicycle facilities and park-and-ride lots. *See* FRANCO at 163 (defining NHS).

145. *GETTING A FAIR SHARE*, *supra* note 131, at 8-11.

146. The states with the 15 lowest STP obligation rates are, in descending order, California, Virginia, South Carolina, Missouri, Texas, Michigan, Alabama, Tennessee, Kentucky, Nevada, Minnesota, New Hampshire, Massachusetts, Iowa, and Mississippi. *See id.* at 9 (comparing the

vehicular forms of transportation in metropolitan areas is exacerbated by dramatic cuts in direct federal transit assistance since 1994.¹⁴⁷ Because metropolitan areas relied heavily on these funds, the result has been an overall reduction in federal funding of mass transit systems.¹⁴⁸ Thus, state governments have undermined ISTEA and TEA-21's purpose of promoting mass transit as an alternative to vehicular transportation by refusing to spend the funds appropriated by Congress for that purpose.

B. FLAWS IN THE TEA-21 REGIME PREVENT FEDERAL TRANSPORTATION PLANNING REFORM FROM BEING IMPLEMENTED

Both ISTEA and TEA-21 established MPOs as the focal point for transportation planning reform in metropolitan areas by vesting them with planning authority over the entire metropolitan area and imposing planning requirements that demand that MPOs diversify the planning process by considering the impact of their decisions on communities and the environment and by including a wider variety of participants.¹⁴⁹ However, because this transportation planning regime fails to adequately ensure that MPOs can and will fulfill their duties, ISTEA and TEA-21 have been unsuccessful in implementing federal transportation planning reform.

1. MPOs Lack Institutional Independence

MPOs have been unable to fulfill their statutory role under ISTEA and TEA-21 in part because they are dominated by state governments, which generally prefer highway projects.¹⁵⁰ Under ISTEA, Congress en-

STP obligation rates of the 15 highest and 15 lowest states). Although some of these states lack major metropolitan areas, others – most notably Texas, California, and Massachusetts – do not. *See id.* at 8 (stating that the Houston and Dallas-Ft. Worth metropolitan areas received less than 60% of the federal funds authorized to them under ISTEA).

147. Although Congress intended that these cuts would be compensated by the provision of funding under STP, state governments have undermined this intent as described above. *See id.* (describing the 50% or \$400 million cut in federal mass transit funding since 1994).

148. *See id.*

149. *See supra* Part II.B (describing the planning requirements under ISTEA and TEA-21).

150. *See* Robert Jay Dilger, *TEA-21: Transportation Policy, Pork Barrel Politics, and American Federalism*, 28 *PUBLIUS* 49, 51 (1998); McCann, *supra* note 49, at 869 (stating that SDOTs have been historically known to favor highway-building projects); *see, e.g.*, Schiller, *supra* note 136, at A11 (stating that Washington's SDOT has traditionally favored highways to the exclusion of all other modes of transportation).

It is unclear precisely *why* state governments prefer road-building projects to other forms of transportation. However, this preference is likely the result of a convergence of factors: First, road-building has been the established norm for transportation projects since the 1950s, so SDOTs have greater familiarity and expertise with roads than with other modes of transportation. *See* Carlson, *supra* note 10, at 5-9, 48 (describing the emergence and eventual dominance of automotive transportation modes; citing the narrow expertise of the Georgia Dept. of Trans-

2000] *The Transportation Equity Act for the 21st Century* 173

visioned MPOs as independent planning organizations with sufficient power to develop transportation plans in cooperation with state governments.¹⁵¹ Although MPOs continue to be actual state agencies in a few areas,¹⁵² in most regions they are at least technically legally independent entities.¹⁵³ However, a variety of factors combine to prevent MPOs from acting as independent entities and render them susceptible to domination by state governments.

First, MPOs have traditionally been dominated by state governments.¹⁵⁴ As described earlier, most MPOs began as creations of SDOTs and have never lost their subordinate relationship to state transportation agencies.¹⁵⁵ Also, because transportation planning has traditionally been synonymous with highway-building and highway projects have been considered state level issues, state governments have always taken the lead

portation); McCann at 876 (citing the Georgia Dept. of Transportation's refusal to consider alternatives to road-building). In addition, this status quo is bolstered by the still prevalent belief that increases in road capacity can solve congestion problems. See TERRY MOORE & PAUL THORSNES, *THE TRANSPORTATION/LAND USE CONNECTION* 37 (1994) (describing the belief of most transportation planners that congestion problems could be alleviated through more road-building). Second, highway- and road-building projects have the strong support of established interest groups and powerful actors in the state political process, namely motor vehicle manufacturers, gasoline producers, contractors, and – perhaps most importantly – suburban voters and developers who need roads to facilitate existing and future “sprawl” development. Cf. Moynihan, *supra* note 9, at 14 (describing the influence of automobile manufacturers and other interest groups in the development of the highway system); Margaret Weir, *Central Cities' Loss of Power in State Politics*, 2 *CITYSCAPE* 23, 23-24 (1996) (arguing that suburbs have become more powerful than cities in state legislatures). Third, road-building is a traditional source of pork barrel projects and political patronage in legislatures. See Dilger at 51; *supra* note 16 (describing pork barrel practices in the drafting of TEA-21). Fourth and last, many state governments and SDOTs believe that, because transportation funds are generally raised through gasoline taxes, those funds should be used only on road-building projects that will benefit those paying the tax. See McCann at 876 (citing the Georgia Dept. of Transportation's belief that taxes on drivers should be used on roads); *How to Avoid the Road to Ruin*, *supra* note 50, at 24 (describing the belief of Rep. Shuster that HTF funds should not be used to mask the national deficit); *Quit Looting Highway Funds With Budget Schemes*, *supra* note 50 (same); *Let's Pass BESTEA Now*, *supra* note 50, at 20 (same).

151. See H. Conf. Rep. No. 102-404, at 320-21 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1700-01 (stating the conference committees intent that MPOs prepare and update transportation plans in cooperation with state governments); H. Rep. No. 102-171(I), at 27-28 (1991), *reprinted at* 1991 U.S.C.C.A.N. 1553-54 (stating the intent of ISTEA was to strengthen the role of MPOs in metropolitan planning by making them independent entities so that they would no longer face dismissal of their plans by state governments). Nothing in TEA-21 or its legislative history contradicts this intent. See, e.g., H. Conf. Rep. No. 105-178, at 439-440 (1998), *reprinted in* 1998 U.S.C.C.A.N. 113 (stating that it is the intent of the conference committee to retain the basic structure of the metropolitan planning process under ISTEA).

152. See McDOWELL, *supra* note 37, at 15 (listing New York, Boston, and Chicago as metropolitan areas where MPOs continue to be state agencies).

153. See *id.*

154. See *supra* notes 58-63 and accompanying text.

155. See *id.*

on transportation issues.¹⁵⁶ For these reasons, many MPOs continue to act as subordinate agencies within SDOTs rather than as equal or arms'-length partners in the metropolitan planning process.¹⁵⁷

Second, most MPOs continue to rely on the state to provide the information needed to make planning decisions.¹⁵⁸ Because ready access to accurate information regarding the transportation needs of areas is essential to the planning process, the inability of MPOs to obtain their own information severely undercuts their independence.¹⁵⁹ Indeed, the failure of a state to make information regarding future funding available can severely limit the ability of a MPO to plan effectively.¹⁶⁰

Third, and most importantly, although the language of both ISTEA and TEA-21 describes MPOs as independent entities, ultimate funding and decision-making authority is left to the states, thus relegating MPOs to a largely advisory capacity.¹⁶¹ Under TEA-21, once an MPO has finalized its TIP, the state has the power to choose which of the projects listed in the TIP will be implemented and is free to disregard the MPO's decision to give priority to any particular project.¹⁶² By allowing states to retain the power to disburse federal transportation funds, TEA-21 leaves the state in almost complete control over which projects will be imple-

156. See PAUL Kantor, *The Dependent City Revisited* 127 (1995) (describing the traditional domination of local governments by the state in transportation planning).

157. See MPO CAPACITY, *supra* note 55, at 7-14 (finding that, if MPOs are to fulfill their statutory role under ISTEA as independent planning organizations, then they must cease to view themselves as subordinate organs of SDOTs). This report has found that, while some MPOs have significant independence, some are still largely dependent on SDOTs. See *id.* (arguing that MPOs cannot fulfill their statutory responsibilities in their current form and that capacity-building efforts are necessary to perform their planning functions).

158. See *id.* at 45.

159. See *id.* (describing the difficulty for MPOs in making planning decisions in the face of SDOT refusal to provide relevant information).

160. McDOWELL, *supra* note 37, at 15-16 (describing MPO reliance on states for information on future funding estimates and the status of current transportation projects); MPO CAPACITY, *supra* note 55, at 45 (same).

161. See *supra* Part II.A; see, e.g., McDOWELL, *supra* note 37, at 15-16 (describing the SDOT and state governor as holding "veto authority" over MPO decisions); MPO CAPACITY, *supra* note 55, at 17 (stating that the passage of all federal funds through SDOTs creates the belief among MPOs that they are not independent organizations).

Although MPOs within transportation management areas (TMAs) do have the statutory authority to effectively veto state transportation programs within their jurisdiction by not placing them in the metropolitan TIP, this power is largely ineffectual in light of the fact that the state receives and disperses federal funds and, in many states, the legislature is free to determine transportation priorities without regard to MPO plans. See Highways 23 U.S.C. § 134(i)(4) (1998) (stating that, in TMAs, only transportation projects contained in the metropolitan TIP may receive federal funds); see also McDOWELL at 15-16; MPO CAPACITY at 17. Thus, a TMA MPO would be unlikely to exercise its ability to force the hand of the state by, for example, only placing mass transit projects on its TIP, because the state could simply refuse to disperse federal funds to that metropolitan area.

162. See *supra* Part II.A (describing the power of the state in the project selecting process).

mented in metropolitan areas.¹⁶³

Thus, because TEA-21 failed to give MPOs the power to obtain information necessary to plan effectively or the power to select which projects will be implemented within their jurisdiction, the current metropolitan transportation planning regime has failed to alter the traditionally dependent and subordinate relationship of MPOs to state governments. By assuring MPOs that they will lose any disagreement with the state government, TEA-21 effectively ensures that MPOs will not pursue plans that conflict with those of the SDOTs.¹⁶⁴ Because state governments generally favor highway projects, the result of this dependence is a continuation of the use of federal funds on road-building.

2. *TEA-21's Planning Requirements Are Weak*

The planning factors of TEA-21 embody many of the policy goals that statute sought to achieve.¹⁶⁵ However, as discussed above, the planning factors of TEA-21 are not mandatory.¹⁶⁶ Thus, MPOs need only *consider* the requirements to be in compliance with TEA-21.¹⁶⁷ In addition, the planning requirements are so broadly worded that consideration is not a particularly difficult task.¹⁶⁸ Finally, TEA-21's express provision that the failure of a MPO to consider any of the planning factors shall not be subject to judicial review further weakens the planning requirements

163. However, for many of the reasons discussed above, an actual confrontation between a state government and a MPO is unlikely to occur. First, because MPOs continue to occupy to a subordinate position to SDOTs – and, perhaps more importantly, continue to *believe* that they are subordinate entities – MPOs are not likely to formulate plans that are unpalatable to the SDOT. See MPO CAPACITY, *supra* note 55, at 13, 45 (arguing that MPOs must be encouraged to believe they are no longer subordinate to SDOTs). Second, the inability of many MPOs to acquire information that SDOTs do not want to give them leaves little alternative but to reach the same conclusion as the SDOT. See *supra* notes 158-60 and accompanying text. Third, because MPOs are aware that state governments have the final say in what projects will be funded, there is no incentive to take a position contrary to that of the state because they cannot win. See *supra* notes 161-63 and accompanying text. Fourth and finally, the transportation planning process – both before and after ISTEA's innovations – has been a cooperative, rather than a confrontational, endeavor, so MPOs and states are more likely to come to a consensus than to push forward to the point of a state government "veto" of a MPO plan. See MPO CAPACITY, *supra* note 55, at 23 (describing the cooperative planning process between MPOs and SDOTs); *supra* note 71-78 and accompanying text (describing the cooperative planning process under ISTEA and TEA-21). For these reasons, a MPO will not rationally choose to take a course of action contrary to that of an SDOT under the existing planning regime.

164. See *supra* note 163.

165. See *supra* Part II.B.1 (describing the intent of ISTEA and TEA-21 in regard to the planning requirements).

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

167. See *id.*

168. See DANIEL CARLSON & STEPHEN KING, LINKING TRANSPORTATION AND LAND USE BY FOSTERING INTER-JURISDICTIONAL COOPERATION 1 (1998) (arguing that ISTEA's planning requirements are insufficient to force MPOs to reform transportation policy).

by assuring the MPO that its consideration of the factors – or lack thereof – will not be overturned by a court.¹⁶⁹

The result is that the statutory planning requirements do not force MPOs to make politically difficult decisions. In light of the fact that MPOs are already dependent on SDOTs, TEA-21's requirement that MPOs merely *consider* the broad planning factors is insufficient to force MPOs to take the difficult step of challenging SDOTs when the preferences of the state government conflict with the needs of the metropolitan area. Without the threat of judicial review, MPOs are more likely to disregard the planning factors than to confront the SDOT.¹⁷⁰

3. Federal Oversight of MPOs Is Insufficient

The primary statutory means of federal oversight under TEA-21 is the certification process.¹⁷¹ TEA-21 requires that the Secretary of Transportation certify every three years that each MPO is carrying out its responsibilities under federal law.¹⁷² The Secretary has delegated this responsibility jointly to the FHWA and FTA.¹⁷³ If exercised properly, the certification process could alleviate some of the problems of MPO dependence by ensuring that MPOs utilize independent judgment and adhere to the planning requirements. However, this has not occurred because the FHWA and FTA have failed to sufficiently exercise this authority.

The amount of available data regarding federal oversight of MPOs is limited; however, several community and planning organizations have argued that oversight is lax.¹⁷⁴ In addition, one study of the initial round of certifications under ISTEA indicates that, while the certification process has been successful in the gathering and sharing of information among MPOs, the FHWA and FTA have been reluctant to withhold full certification for noncompliance.¹⁷⁵ This study found that, in 1996, 127 of 129 MPOs examined received full certification and no MPO was actually denied certification.¹⁷⁶ In addition, the General Accounting Office's review of 55 of the MPOs granted certification determined that three MPOs had

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

170. See *supra* note 163 (arguing that MPOs are very unlikely to disagree with state governments under the existing planning regime).

171. See *supra* Part II.C (describing the statutory elements of the certification process under TEA-21).

172. See *supra* note 118 and accompanying text.

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

174. See McDowell, *supra* note 37, at 24 (stating that many citizen groups and organizations believe that the FHWA and FTA have been overly lax in the certification process and pushing for stricter enforcement).

175. See *id.* at 9-11.

176. See *id.* at 9 (analyzing the first round of MPO certifications under ISTEA).

2000] *The Transportation Equity Act for the 21st Century* 177

“serious deficiencies,” and that the certification criteria were not set forth “clearly and uniformly” by the FHWA and FTA.¹⁷⁷

Thus, by providing lax oversight and enforcement of federal requirements, the FHWA and FTA have not forced MPOs to act independently.¹⁷⁸ This failure is the result of both the “new federalist” objective of minimal federal interference with state activities and the concerted efforts of SDOTs to prevent extensive federal involvement in state transportation policy.¹⁷⁹ Even were the FHWA and FTA required to move more aggressively to enforce federal requirements, TEA-21 significantly weakened the sanction provisions of ISTEA by making the withholding of funds discretionary and allowing FHWA and FTA to withhold amounts less than 20 percent.¹⁸⁰

However, one provision added by TEA-21 does create the possibility that the certification process may become an effective oversight tool. TEA-21 requires that FHWA and FTA must allow the participation of parties from the metropolitan areas under review in the certification process.¹⁸¹ This addition appears to have had significant initial results in that citizen groups in many metropolitan areas have become involved in the certification process when they felt the composition of the MPO’s policy board or its public participation procedures were inadequate.¹⁸²

Nevertheless, because MPOs are dependent on SDOTs and federal statutory requirements and oversight are insufficient to counterbalance the influence of SDOTs, MPOs will likely continue to favor those transportation projects favored by SDOTs and will not fulfill their statutory role as independent transportation planners.¹⁸³

C. THE FEDERAL GOVERNMENT MUST BECOME MORE INVOLVED IN METROPOLITAN TRANSPORTATION PLANNING

The failure of ISTEA and TEA-21 to create transportation planning

177. *See id.* (citing U.S. GENERAL ACCOUNTING OFFICE, URBAN TRANSPORTATION: METROPOLITAN PLANNING ORGANIZATIONS’ EFFORTS TO MEET FEDERAL PLANNING REQUIREMENTS 3-4 (1996)).

178. *See* MPO CAPACITY, *supra* note 37, at 23 (describing the lack of federal involvement as part of the larger movement away from invasive regulation of state activities). Another factor weighing against federal enforcement is the reorganization of the FHWA at the request of Congress, during which the FHWA’s multi-state regional field offices were disbanded. *See id.* at 27.

179. *See supra* note 179 (describing the efforts of the American Association of State Highway and Transportation Officials to dissuade the U.S. Dept. of Transportation from becoming more involved).

180. *See supra* notes 122-23 and accompanying text.

181. *See* Highways 23 U.S.C. § 134(i)(5)(D) (1998).

182. *See* McDOWELL, *supra* note 37, at 26 (describing the successful efforts of one citizens’ group to obtain remedial action against their MPO).

183. *See supra* note 163 (arguing that MPOs have not challenged SDOTs because the existing planning regime makes such challenges irrational).

processes in metropolitan areas that adequately consider the needs of the metropolitan area, alternative modes of transportation, and the impact of its decisions on communities and the environment is the result of a lack of involvement by the federal government in the planning process. If the goals of TEA-21 are to be implemented, MPO dependence on SDOTs must be reduced, federal planning requirements must be strengthened, and the FHWA and FTA must take a more active role in overseeing MPOs.

However, as a preliminary matter, any reform of federal transportation policy will be impossible unless federal and state transportation agencies make transportation funding information available to the public. Past refusals have hindered the evaluation of the effectiveness of ISTEA and TEA-21 in reforming state and local transportation policy.¹⁸⁴ Without such information, meaningful evaluation of the results of reform efforts will be extremely difficult, if not impossible.

1. MPO Dependence On SDOTs Must Be Reduced

The dependence of MPOs on state transportation agencies undermines their ability to serve as independent transportation planners. If MPOs are to fulfill their statutory duties and develop metropolitan transportation plans in cooperation with SDOTs rather than in subordination to them, TEA-21 must be amended as follows to grant MPOs greater institutional independence.

First, federal law must require state transportation agencies to share information with MPOs so that MPOs may make accurate predictions about transportation needs and funding availability in its TIPs and LRPs. Without this requirement, MPOs will be unable to meet even the bare minimum of TEA-21's planning requirements because their plans will not be based on adequate information.

Second, MPOs must be given the final say on project selection within their jurisdiction so that they can best meet the transportation needs of their community. Although this requirement could create problems in that MPOs would now have the authority to ignore state transportation initiatives, thereby undermining TEA-21's goal of an integrated transportation system, it will provide MPOs with sufficient independence and power to negotiate compromises with SDOTs that will best serve both state and local interests. In addition, the fact that MPO policy boards contain a number of elected officials makes MPOs more accountable to

184. See, e.g., GETTING A FAIR SHARE, *supra* note 131, at 1-5 (describing the importance of public access to government transportation data and the burdens of attempting to evaluate transportation policy when access is denied).

the electorate than state transportation agencies;¹⁸⁵ therefore, the balance of power should be struck in favor of MPOs.

Third, federal funds should be appropriated directly to MPOs rather than through the state governments so that the threat of a state “vetoing” MPO projects by refusing to obligate federal funds will not dissuade MPOs from formulating plans that incorporate alternative modes of transportation. Although channeling all funding through the state governments promotes the integrated planning goals of TEA-21 and serves basic principles of federalism, the practice also undermines TEA-21’s emphasis on regional transportation planning in metropolitan areas. Again, a more independent and powerful MPO will be in a better position to negotiate an acceptable compromise with the state government.

However, although making MPOs more institutionally independent will reduce their dependence on SDOTs, such changes would not ensure that the environmental and social goals of TEA-21 will be implemented because MPOs would remain free to pursue the status quo.¹⁸⁶ The argument could be made that MPOs are simply representative institutions implementing the will of the local populace so that increasing their institutional independence is sufficient to allow them to carry out their purpose and any additional restraints defeats that purpose. However, if MPOs are institutions charged with implementing federal transportation policy as embodied in the planning factors of TEA-21 – as the text of ISTEA and TEA-21 indicates they are¹⁸⁷ – then stronger federal controls must be imposed in order to make MPOs responsive to federal policies instead of state policies. Therefore, additional federal controls are necessary to ensure that the goals of TEA-21 are implemented.

2. *The Statutory Planning Requirements Must Be Strengthened*

TEA-21’s planning factors are insufficient to achieve MPO compli-

185. See *supra* note 115 and accompanying text (describing the membership of MPOs).

186. This is a valid concern because high-income “sprawled” suburban communities tend to prefer road-building projects and may exert more influence on MPOs than urban communities who might favor alternative modes of transportation. See *supra* note 30 (describing the preference of “sprawled” communities for road-building projects); OTA REPORT, *supra* note 30, at 206-08 (finding that “sprawl” development requires an investment that exceeds its own contributions to the metropolitan area); Cashin, *supra* note 6 (arguing that outer-ring suburban communities exert a disproportionate amount of political power in local metropolitan government); Sheryll D. Cashin, *Federalism, Welfare Reform and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 Colum. L. Rev. 552, 585-86 nn. 141-42 (1999) (same); see also MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 2-8 (1997) (describing the large political influence and infrastructure demands of newer suburban communities versus that of older suburban and urban communities); GETTING A FAIR SHARE, *supra* note 131, at 6 (finding that outer-ring suburban communities received more than twice the amount of federal funds received by urban communities).

187. See *supra* Part II.B.1.

ance with the statute's policy goals because of their broad language and non-mandatory nature as well as the lack of judicial review. TEA-21 should be amended to impose strong and clear federal requirements that allow less discretion to MPOs in order to foster greater independence from SDOTs and prevent MPOs from simply paying lip service to TEA-21's policy goals.

To those ends, TEA-21's prohibition of judicial review must be repealed and Congress should make an express grant of a private right of action to sue when a MPO fails to consider any of the required planning factors.¹⁸⁸ If the planning factors are to have any meaning in the planning process, then there must be some form of judicial review to ensure that the MPOs are actually giving each factor serious consideration.¹⁸⁹ Allowing such suits will also promote TEA-21's goal of increased public participation in the planning process by making MPOs more accountable and responsive to the concerns of the public.¹⁹⁰ Finally, allowing judicial review would maintain the flexibility allowed MPOs under the non-mandatory planning requirements while ensuring that MPOs do not abuse this discretion.

3. *FHWA and FTA Must Take More Active Roles in Overseeing Transportation Planning*

The current level of federal oversight of the metropolitan transportation planning process provided FHWA and FTA is inadequate to ensure that MPOs are in compliance with the statutory requirements. While judicial review can resolve specific disputes over the adequacy of MPO procedures, strong federal oversight is necessary to ensure that the entire metropolitan transportation planning process complies with federal law. Therefore, the FHWA and FTA should not only take a more aggressive approach in the certification process in order to determine which MPOs are not in compliance, but should also assist those MPOs towards compliance through information sharing with the FHWA and FTA as well as between MPOs.¹⁹¹

188. See, e.g., Buzbee, *supra* note 30, at 115-16 (arguing that MPOs and SDOTs would be more accountable and responsive to public concerns if citizen suits were permitted).

189. Although the argument could be made that allowing such suits would open the "flood-gates" of litigation and clog the courts, this paper argues, first, that such an occurrence is unlikely because courts should be able to determine relatively easily whether a MPO has given "consideration" to the planning factors, and, second, the risks of such an occurrence are outweighed by harm of rendering the planning requirements useless by denying judicial review.

190. Buzbee, *supra* note 30, at 115-16.

191. See, e.g., McDOWELL, *supra* note 37, at 30-33 (advocating using the certification process to promote information sharing through the development of "good practices" research to fill the gaps in MPO procedures).

CONCLUSION

To the extent that they impose substantial procedural requirements that demand that states and MPOs actually create long-range transportation plans for metropolitan areas, ISTEA and TEA-21 have been successful in reforming the pre-existing federal transportation policy of unplanned, federally-funded road-building. However, to the extent that they substantively change what kinds of transportation projects are funded and who makes the decision to fund them, ISTEA and TEA-21 have largely failed because metropolitan transportation planning continues to focus on road-building in response to increased vehicular demand and metropolitan transportation policy decisions continue to be made by the state governments, just as they were before ISTEA. In order to give effect to TEA-21, the federal government must take an active role in metropolitan transportation policy in order to ensure that federal funds are used on multimodal transportation systems and that TEA-21 is not rendered an empty promise.

APPENDIX A
CORRESPONDING PROVISIONS OF TITLE 23 AND TITLE 49*

<u>Metropolitan Highways & Roads</u>	<u>Metropolitan Mass Transportation</u>
23 U.S.C.A. § 134	49 U.S.C.A. Chapter 53
§ 134(a)(1) General findings	§ 5301(a) Development of trans. sys.
§ 134(a)(2) Dev. of plans & programs	§ 5303(a)(1) Dev. of plans & programs
§ 134(a)(3) Contents (of plans & programs)	§ 5303(a)(2) Contents (of plans & programs)
§ 134(a)(4) Process of dev.	§ 5303(a)(3) Process
§ 134(b)(1) In general (designation)	§ 5303(c)(1) Designating MPOs
§ 134(b)(2) Structure (membership)	§ 5303(c)(2) Membership
§ 134(b)(3) Limitation on statutory construction	§ 5303(c)(6) No effect on authority. . .
§ 134(b)(4) Continuing designation	§ 5303(c)(4) Continuing desig. & revocation
§ 134(b)(5) Redesignation	§ 5303(c)(5) Redesignation
§ 134(b)(6) Designation of more than 1 MPO	§ 5303(c)(3) Designation of more than 1 MPO
§ 134(c)(1) Agreement re boundaries	§ 5303(d)(1) Agreement re boundaries
§ 134(c)(2) Included area (boundaries)	§ 5303(d)(2) Included area (boundaries)
§ 134(c)(3) Existing areas in nonattainment	§ 5303(d)(3) Existing areas in nonattainment
§ 134(c)(4) New areas in nonattainment	§ 5303(d)(4) New areas in nonattainment
§ 134(d)(1) Coordination in multistate Areas	§ 5303(e)(1) Coord. in multistate areas
§ 134(d)(2) Interstate compacts	§ 5303(e)(2) Interstate compacts
§ 134(d)(3) Lake Tahoe region	§ 5303(e)(6) Lake Tahoe region
§ 134(d)(4) Recipients of other assist. (coord.)	§ 5303(e)(4) Recipients of other assist. (coord.)
§ 134(e)(1) Coord. of MPOs in nonattain. Areas	§ 5303(e)(3) Coord. of MPOs in nonattain.
§ 134(e)(2) Coord. of projects w/ mult. MPOs	§ 5303(e)(5) Coord. of projects w/ mult. MPOs
§ 134(f)(1) Scope of planning process (factors)	§ 5303(b)(1)(A) Planning factors
§ 134(f)(2) Failure to consider factors	§ 5303(b)(2) Failure to consider factors
§ 134(g)(1) Req. to prepare long-range plan	§ 5303(f)(1) Req. to prepare long-range plan
§ 134(g)(2) Contents of long-range plan	§ 5303(f)(1) Contents of long-range plan
§ 134(g)(2)(A) Identification of facilities	§ 5303(f)(1)(A) Identification of facilities
§ 134(g)(2)(B) Financial plan	§ 5303(f)(1)(B), (E) Financial plan
§ 134(g)(2)(C) Measures necessary	§ 5303(f)(1)(C) Measures necessary
§ 134(g)(2)(D) Proposed enhancements	§ 5303(f)(1)(D) Proposed enhancements
§ 134(g)(3) Coord. w/ Clean Air Act	§ 5303(f)(3) Coord. w/ Clean Air Act
§ 134(g)(4) Public participation	§ 5303(f)(4) Public participation
§ 134(g)(5) Publication	§ 5303(f)(5) Publication
§ 134(g)(6) Selection from illustrative list	§ 5303(f)(6) Selection from illustrative list
§ 134(h)(1)(A) Req. to prepare TIP	§ 5304(a)(1) Dev. & update of TIPs
§ 134(h)(1)(B) Public participation (initial)	§ 5304(a)(1) Dev. & update of TIPs
§ 134(h)(1)(C) Funding estimates	§ 5304(a)(2) Funding estimate
§ 134(h)(1)(D) Updating TIP	§ 5304(a)(1) Dev. & update of TIPs
§ 134(h)(2) Contents of TIP	§ 5304(b) Contents of TIP
§ 134(h)(3) Included projects	§ 5304(c)(2), (6) Included projects
§ 134(h)(4) Public participation (final)	§ 5304(d) Public participation (final)
§ 134(h)(5)(A) Selection of projects	§ 5304(c)(1) Selection of projects
§ 134(h)(5)(B) Modification of priority list	§ 5304(c)(3) Modification of priority list
§ 134(h)(6) Selection from illustrative list	§ 5304(c)(4) Selection from illustrative list
§ 134(h)(7) Publication of TIP	§ 5304(c)(5) Publication of TIP
§ 134(i)(1) Designation of TMAs	§ 5305(a) Designation of TMAs
§ 134(i)(2) Req. of comprehensive process	§ 5305(b) Req. of comprehensive process
§ 134(i)(3) Req. of congestion manag. sys.	§ 5305(c) Req. of congestion manag. sys.

2000] *The Transportation Equity Act for the 21st Century* 183

<u>Metropolitan Highways & Roads</u>	<u>Metropolitan Mass Transportation</u>
§ 134(i)(4)(A) MPO selection of projects	§ 5305(d)(1)(A) MPO selection of projects
§ 134(i)(4)(B) Exception for NHS projects	§ 5305(d)(1)(B) Exception for NHS projects
§ 134(i)(5)(A) Certification required	§ 5305(e)(1) Certification
§ 134(i)(5)(B) Reqs. for certification	§ 5305(e)(1) Certification
§ 134(i)(5)(C) Sanctions for failure to certify	§ 5305(e)(2) Sanctions for failure to certify
§ 134(i)(5)(D) Public participation	§ 5305(e)(4) Public participation
§ 134(j)(1) Abbreviated plans (generally)	§ 5305(g)(1) Abbreviated plans (generally)
§ 134(j)(2) Abbreviated plans in nonattain. Areas	§ 5305(g)(2) Abbrev. plans in nonattain. Areas
§ 134(k) Transfer of funds	§ 5303(h) Sec. of Transp. management of funds
§ 134(l) Additional reqs. for nonattain. Areas	§ 5305(f) Additional reqs. for nonattain. Areas
§ 134(m) Limitation on statutory construction	
§ 134(n) Funding	§ 5303(h) Sec. of Transp. management of funds
§ 134(o) Continuation of current review practice	§ 5305(h) Contin. of current review practice

* This chart cites to the current state of the law as amended by TEA-21 and the TEA-21 Restoration Act.

