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THE FEDERAL HIGHWAY SAFETY ACT OF 1966: NHSB DRIVER LICENSING STANDARD—POWER NOT USED

BY JOHN H. REESE*

This article is concerned with the Highway Safety Act of 1966 and the administration of the provisions of that Act by the National Highway Safety Bureau (NHSB). After a discussion of the coverage of the Act, Professor Reese assesses its constitutionality along with a consideration of the pre-emptive intent of Congress as evidenced by the enactment. The focus of the article then shifts to the NHSB and its philosophical approach in administering the Act. The effects of this approach are exemplified in the "Driver Licensing Standards." Although this is only one of the NHSB's areas of responsibility, Professor Reese points out that the philosophy has led to "non-standards" in this area, partially thwarting the intent of Congress.

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INTRODUCTION

Traditionally, highway safety has been viewed as a local problem, primarily subject to state authority. Some groups contended that highway safety was a local concern as a matter of "states' rights" and seemed to give little attention to analysis of the nature of the problem to determine how governments — state and federal — could best attack it.¹

¹ See, e.g., Foreword to National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code (1962):
   It is generally agreed that achieving uniformity in traffic laws across the Nation is properly a task of the States, not the Federal government. Numerous national conferences on street and highway safety, many Federal and State officials, and informed laymen in the traffic safety field, have taken the position that centralization of highway traffic control in the Federal government is undesirable; that under our constitutional concepts, this control is primarily the responsibility of the States, and that uniform traffic regulation should have its foundation in uniform State laws. A basic tenet of the Uniform Vehicle Code is its approach through voluntary cooperative State action.

However, this "local problem" premise has been rejected, and highway safety is now viewed as a national problem; for in 1966, Congress lost patience with the attempts of state governments to create effective highway safety programs. After at least forty years of exhortation to cooperate and to structure uniform and comprehensive safety programs, the states remained divided in their approaches to the problem. State highway safety programs were extremely diverse as to intervention as an improper intrusion. See Hearings on S. 3052 Before the Subcomm. on Public Roads of the Comm. on Public Works, 89th Cong., 2d Sess. 148-50 (1966) (statement of Charles F. Schwab, Jr., Director, Washington Office of Council of State Governments); Compare Hearings on S. 1467 supra referring to implied consent standard promulgated:

The specificity of this particular standard severely limits the options available to a State legislature and practically dictates what the State legislature must do. In effect the National Highway Safety Agency is telling the state legislature what it must do in order to comply — pass implied consent legislation and also reduce blood alcohol percentage . . . I am saying here you are limiting very much the area in which a State legislature may want to operate. . . .

Id. at 288 (statement of David J. Allen, Administrative Assistant to the Governor of Indiana) with statement of John De Lorenzi, Managing Director, Public and Government Relations, American Automobile Association. Id. at 222.

The congressional attitude is subtly revealed in the Hearings on S. 3052 Before the Subcomm. on Public Roads of the Comm. on Public Works, 89th Cong., 2d Sess. (1966) [hereinafter cited as Hearings on S. 3052]. It is stated, for example: "Our survey of present highway safety efforts throughout the Nation clearly shows that Federal, State, and local efforts have proceeded separately with little or no coordination and that major gaps and weaknesses exist in present programs. Id. at 7 (statement of John T. Connor, Secretary of Commerce). More specific is H.R. REP. No. 1700, 89th Cong., 2d Sess. (1966) (Highway Safety Act of 1966):

The Committee on Public Works maintained diligent contact with the Department of Commerce, anxious to learn what progress the Secretary was making in his conferences with the States for the development of standards for the voluntary highway safety programs the amended section 135 encouraged the States to establish. [Baldwin Amendment] There was no real progress . . . For 40 years the various safety-related organizations, both public and private, have been trying to persuade the several State legislatures to adopt at least minimum uniform regulatory statutes, with lamentable lack of success.

Id. at 4, 6.

H.R. Rep. No. 1700, 89th Cong., 2d Sess. 6 (1966) (Highway Safety Act of 1966). It should also be noted that when he was Secretary of Commerce, Herbert Hoover called a large number of interested groups to attend a National Conference on Street and Highway Safety. Eight study committees were at work on the problem for six months in advance of the Conference. Findings and a consolidated report were prepared by the Conference after its deliberations. In 1926, the Conference was convened again to consider interim work of committees. The 1926 Conference approved a suggested model for a "uniform vehicle code," which had been prepared by the Committee on Uniformity of Laws and Regulations. This "code" consisted of three separate acts covering (1) registration and certificate of title, (2) licensing of operators and chauffeurs, and (3) rules governing the operation of vehicles on highways. The three acts were recommended to the states for adoption. These documents were later combined into a Uniform Vehicle Code, likewise recommended to the states. It has been maintained and amended through the years and is currently in the custodianship of the National Committee on Uniform Traffic Laws and Ordinances. It was last revised in 1968. H.R. Doc. No. 93, 86th Cong., 1st Sess. 12-13 (1959) (The Federal Role in Highway Safety). In the interim, in 1926 the National Conference of Commissioners on Uniform State Laws approved the act covering licensing of operators and chauffeurs under the title "Uniform Motor Vehicle Operators' and Chauffeurs' License Act" and recommended it to the states. It was revised in 1930. However, in 1943 the Conference of Commissioners declared it "obsolete" and "no longer recommended for adoption." Handbook of the National Conference 69 (1943). For its text, see 11 Uniform Laws Annotated 75-97 (1938).
areas of coverage; and where coverage was similar, standards were often different.\textsuperscript{4}

In his 1966 Transportation Message to the Congress,\textsuperscript{5} the President described motor vehicle accident losses in lives, personal injury, and property damage as a national problem, second in magnitude only to the Viet Nam War.\textsuperscript{6} His characterizations seemed to provide the catalyst which quickly produced a congressional consensus that the federal government should intervene. Congress recognized that it was fallacious to perceive highway accidents as merely local problems and concluded that the existing piecemeal methods of regulation were not a sensible manner in which to attack the highway safety problem, even if the problem is arguably local in nature.\textsuperscript{7} Hence, Congress concerned itself with developing legislation which would combine two premises: (1) that highway safety is a national concern and (2) that all facets of the highway transportation system having a safety implication must be dealt with systematically. Therefore, vehicle, roadway, and driver would receive attention in terms of their relation to the safety aspects of "highway transportation."\textsuperscript{8}

I. THE HIGHWAY SAFETY ACT OF 1966

The most extensive federal involvement in the highway safety field occurred with the passage of the Highway Safety Act of 1966.\textsuperscript{9}

\textsuperscript{4} The diversity as to both coverage and standards is apparent upon cursory examination of the volumes in the series entitled TRAFFIC LAWS ANNUAL, published by the National Committee on Uniform Traffic Laws and Ordinances. See also H.R. REP. No. 1700, 89 Cong., 2d Sess. 2 (1966) (Highway Safety Act of 1966).
\textsuperscript{5} N.Y. Times, Mar. 3, 1966, at 20.
\textsuperscript{6} Id.; accord, Hearings on S. 3052, supra note 2, at 82 (statement of Howard Pyle, President, National Safety Council).
\textsuperscript{8} I.d. See also Hearings on S. 3052, supra note 2, at 63-64 (statement of Herbert J. Bingham, Executive Secretary, Tennessee Municipal League); 65 (statement of J.O. Mattson, President, Automotive Safety Foundation); 81-82 (statement of Howard Pyle, President, National Safety Council); 116 (statement of William G. Johnson, General Manager, National Safety Council); 162-63 (statement of William Randolph Hearst, Jr., Chairman, The President's Committee for Traffic Safety); 233 (statement of Senator Randolph, Committee Chairman).
\textsuperscript{9} 23 U.S.C. § 402 (Supp. 1970). At the federal level, the Bureau of Public Roads has for years participated in creating and prescribing standards of highway design and construction for federal-aid highways (initiated by the Federal Road Aid Act of July 11, 1916, ch. 241, 39 Stat. 355). However, its historical responsibility does not include control of human factors; hence, its operations are not to be considered. According to 49 U.S.C. § 1652(f)(4) (Supp. 1970), the Federal Highway Administrator is also made Director of Public Roads. As such he controls human factors to the extent he exercises the authority transferred to him from the Interstate Commerce Commission to promulgate qualifications requirements of motor carrier operators. Until this transfer, the Bureau had no human factors control power.

The Beamer Resolution of 1958 (Act of August 20, 1958, Pub. L. No. 85-684, 72 Stat. 635) constituted advance Congressional consent to the creation of interstate compacts between States in the field of highway and traffic safety, including driver
This Act vests authority in a federal administrative agency to assert control over human factors relevant to highway accidents.\textsuperscript{10}

A. Powers of the Secretary of Transportation and the National Highway Safety Bureau

The provisions of the Act are to be administered by the Secretary of Transportation acting through the National Highway Safety Bureau (NHSB).\textsuperscript{11} Although the Highway Safety Act deals with roadway and driver factors, it does not confer upon the Secretary direct regulatory authority over individuals who operate motor vehicles. His power is directed to the states as political entities.\textsuperscript{12} Thus, the Secretary and the NHSB do not engage in issuing or withdrawing drivers' licenses. As will be seen, however, the manner in which the statutory program is structured and the available sanctions imply that the Secretary's power will be felt ultimately by individual licensees.

The essence of the Secretary's authority is contained in the following expression:

Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary.\textsuperscript{13}


\textsuperscript{13} Id.
Acting through the NHSB, he is further directed to address the "uniform standards" to these goals:

[A] [T]o improve driver performance [including but not limited to education, testing, examinations, and licensing and]

[B] [t]o improve pedestrian performance."14

More specifically the uniform standards are to include, but are not limited to:

[1] [A]n effective record system of accidents (including injuries and deaths resulting therefrom),

[2] accident investigations to determine the probable causes of accidents, injuries and deaths,

[3] vehicle registration, operation, and inspection,

[4] highway design and maintenance (include lighting, markings, and surface treatment),

[5] traffic control,

[6] vehicle codes and laws, [and]

[7] surveillance of traffic for detection and correction of high or potentially high accident locations...."15

Although these goals have been legislatively determined, the Secretary's (NHSB) power to promulgate uniform standards on any subject believed to be relevant to highway "safety" may render these goals, in fact, illusory. To illustrate: There is abundant commentary indicating that current highway "safety" knowledge is based upon research which is nonempirical, or out-of-date, or both.16 Therefore, it is submitted that the word "safety" is not precise and can mean many things to many people. It is essentially a normative term which is defined administratively, according to the NHSB's sense of values and its conception of how much safety restriction is compatible with efficient movement. If this analysis is correct, the NHSB effectively determines the goals of the legislation as well as the standards by which they are to be achieved.

In addition to the Secretary's authority to promulgate uniform standards, he is empowered to "amend or waive standards" on a "temporary basis" for the purpose of evaluating new or different programs instituted by one or more states on an "experimental, pilot, or demonstration basis" if he finds that such amendment or waiver

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14 Id.
15 Id.
16 For a sample of such comments, examine H.R. Doc. No. 93, 86th Cong., 1st Sess., 8, 121, 141, 142, 147 (1959) (THE FEDERAL ROLE IN HIGHWAY SAFETY):

Through enlargement and orderly refinement of the body of fundamental knowledge concerning highway accidents will come opportunities for deeper insight, for formulation and testing of accident causes by hypothesis, and for practical development of means for safer street and highway travel.

would serve the "public interest." The lack of descriptive content in the subjective phrase "public interest" means the Secretary (NHSB) may approve or disapprove experimental, pilot, and demonstration programs without running afoul of the statute.

The Secretary (NHSB) is given yet another power, one involving the expenditure of federal highway safety funds. To insure that local (urban) highway safety programs would not suffer at the expense of the state programs, the Congress provided that at least 40 percent of all federal safety funds apportioned to a state for any fiscal year would be expended by the political subdivisions of the state on such programs, if the local program is approved by the governor of the state and if it is in accord with the promulgated uniform standards. However, the Secretary is given the power to waive the 40 percent requirement in whole or in part for a fiscal year for any state. The only control on this authority is the requirement that the Secretary determine that "there is an insufficient number of local highway safety programs to justify the expenditure" of 40 percent of federal funds locally during that year. He decides how few local programs are an "insufficient number," and he determines what is a justified expenditure of federal funds.

B. Limitations on the Power of the Secretary of Transportation and the National Highway Safety Bureau

Despite the broad power grants to the Secretary (NHSB), the Congress did provide some effective limitations in its legislation. These limitations take the form of threshold requirements which must be met by the states. In evaluating state highway safety programs, there are certain program requirements over which the Secretary (NHSB) has no control and, hence, no power of choice. Specifically, a state highway safety program must: (1) provide that the governor of the state is responsible for its administration; (2) authorize political subdivisions of the state to carry out local highway safety programs as part of the state program, if they are approved by the governor and meet the Secretary's uniform standards; (3) provide that at least 40 percent of the federal funds received will be expended on local programs, subject to waiver of this requirement by the Secretary; (4) provide that the aggregate expenditure of state and local funds for such programs will be maintained at a level equal to the average level of such expenditures for the two fiscal years preceding enactment of the statute; (5) provide for comprehensive driver training programs including

18 Id. §§ 402(b)(1)(B)-(C).
19 Id. § 402(b)(2).
20 Id.
driver education in schools, training of qualified school instructors, appropriate regulations of other driver training schools, adult driver training programs and retraining programs for selected drivers, and development of practice driving facilities, simulators, and similar teaching aids.\(^{21}\)

C. Sanctions Applicable to Noncomplying States

As one sanction applicable to noncomplying states after December 31, 1968, the statute provides that "the Secretary shall not apportion any [safety] funds . . . to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section."\(^{22}\) Further, after January 1, 1969, states not "implementing" an approved program will lose 10 percent of the federal-aid highway funds they otherwise would have received, until such time as they are implementing an approved program.\(^{23}\) The responsibility to determine what constitutes "implementing" is in the Secretary (NHSB).\(^{24}\) Furthermore, whenever he determines it to be in the "public interest," the Secretary may suspend — for such periods as he deems necessary — the application of this 10 percent reduction of federal-aid highway funds.\(^{25}\) Apparently, he has almost complete authority to waive this sanction, for the vague term "public interest" does not limit his discretion and there is no statutory control on the time period which he might deem "necessary."

Such potentially powerful financial sanctions put the Secretary and the NHSB in a persuasive position vis-a-vis recalcitrant states. They have available "carrot and stick" techniques to secure compliance with the uniform standards. However, the existence of this awesome power to secure compliance by the withholding of funds does not necessarily mean that it should or will, in fact, be used.\(^{26}\)

II. The Federal-State Power Balance

The authority of the NHSB to establish driver performance standards and grant exceptions, to approve or disapprove state programs, and to impose financial sanctions on noncomplying states suggests the NHSB program may result in a modification of the current power balance between the state and federal governments in an area in which

\(^{21}\) Id. §§ 402(b)(1)-(2).

\(^{22}\) Id. § 402(c).

\(^{23}\) Id. Federal-aid highway funds are administered under authority of the provisions of 23 U.S.C. § 104 (1964).

\(^{24}\) This arises from the fact that the statute does not provide any suggestion as to how "implementing" should be interpreted. The Secretary (NHSB) must, therefore, make the determinations on whatever basis he deems appropriate.


\(^{26}\) Safety Hassle, The Wall Street Journal, June 17, 1969, at 1, wherein Secretary Volpe indicated he might withhold funds from recalcitrant states.
power has been traditionally left to the states. This thought leads to a consideration of both the legality and the extent of the federal involvement in the field of highway safety.

A. Constitutionality

There is little doubt that the Congress possesses, on several grounds, the authority to assert itself in the area of driver control. The evolution of the Commerce Clause as a power base from *Gibbons v. Ogden* through *Champion v. Ames* to *Darby Lumber Company*, *Wickard v. Filburn*, *Heart of Atlanta Motel*, and *Katzenbach v. McClung* need not be described in detail. The United States Supreme Court's broad reading of the Commerce Clause — as demonstrated in these cases — lays to rest any serious doubt that the Court would not sustain highway safety legislation based on the commerce power. Furthermore, the Court impliedly recognized latent power in Congress in the highway safety area in the early case of *Hendrick v. Maryland*. It was held therein that the State of Maryland had the authority to require a District of Columbia resident temporarily using its highways to register his vehicle or secure permission to operate it as a non-resident. In the course of its opinion, the Court suggested the existence of a paramount but unexercised power of Congress to enter the field: "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles — those moving in interstate commerce as well as others." By this language the Court implied not only power in Congress to legislate but also power to pre-empt the area and supplant the regulations of the various states with its own. However, unless the Congress acts affirmatively, state regulation is permitted so long as its measures do not unduly burden or discriminate against interstate traffic.

28 188 U.S. 321 (1903).
29 United States v. Darby, 312 U.S. 100 (1941).
30 317 U.S. 111 (1942).
33 235 U.S. 610 (1915).
34 Id. at 622. The Court reaffirmed this position in *Kane v. New Jersey*, 252 U.S. 160, 167-68 (1916).
36 Id.

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28 188 U.S. 321 (1903).
29 United States v. Darby, 312 U.S. 100 (1941).
30 317 U.S. 111 (1942).
33 235 U.S. 610 (1915).
34 Id. at 622. The Court reaffirmed this position in *Kane v. New Jersey*, 252 U.S. 160, 167-68 (1916).
36 Id.
Congress may rely upon, in addition to the Commerce Clause, other constitutionally granted powers to intervene in the field of highway safety. For example, Congressional power to spend for the general welfare has been approved by the United States Supreme Court in such broad, unlimited terms as to allow comprehensive federal programs in a multitude of areas of national concern.\(^8\) The only limitation on this power is that its use must relate to some national, as distinguished from local, purpose or problem.\(^8\) Congress could also use the technique of attaching conditions to federal grant-in-aid funds, so long as the conditions bear a relation to a national purpose or problem;\(^4\) and the power to "establish post offices and post roads,"\(^4\) might also be employed by implication to support federal highway safety legislation.

In summary, it is reasonable to assume that any one or a combination of these formal Congressional power bases would indeed support federal legislation injecting the national government into the highway safety field.

B. Federal Pre-emption in Law

If the federal involvement of 1966 is assumed to be legitimate, the next question is whether the legislation has, in fact, changed the federal-state power balance in the field of highway safety. If some change in the balance is presumed, the extent of the change should be considered. The most extensive change would occur if the legislation had the effect of pre-empting the field as was implied to be permissible in *Hendrick v. Maryland*.*\(^4\)

1. General Pre-emption

Congressional hearings, committee reports, presidential statements, and later testimony of officials indicate reservations on the part of Congress to entirely supplant the states as policy makers in the field of highway safety. There are several statements to the effect that the

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\(^8\) Helvering v. Davis, 301 U.S. 619, 640-41 (1937); see *Steward Machine Co. v. Davis*, 301 U.S. 548, 593-98 (1937); *United States v. Butler*, 297 U.S. 1, 67 (1936); U.S. CONST. art. I, § 8. "The Congress shall have Power: (1) To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . ." Id.


\(^4\) Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). Despite an argument that such legislation violated the Tenth Amendment, the Supreme Court upheld withdrawal of a portion of Oklahoma's share of federal highway funds for failing to remove from office a member of the State Highway Commission who took an active part in political activities. His actions constituted a violation of the Hatch Act, 5 U.S.C.A. § 7324 (1967), which forbade political activities financed in whole or in part with federal funds. *Id.* See *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *United States v. Butler*, 297 U.S. 1 (1936) (Stone, J., dissenting opinion).

\(^4\) U.S. CONST. art. I, § 8.

\(^4\) 235 U.S. 610 (1915).
federal government is to supply "leadership" in the field and "help" the states develop adequate highway safety programs. While there are also several expressions of demand for specific uniform standards in specified areas of highway safety action policies, these latter expressions may signify only that Congress desired federal "leadership" to take the form of pre-emption in the designated areas, as opposed to general pre-emption. Perhaps the words "cooperation" and "leadership" were used to make some limited form of pre-emption more palatable to the Congress and the states. In any event, whether "leadership" means limited pre-emption or merely federal guidance, the legislative history of the Act would not appear to support an argument of general pre-emption of the safety field.

2. Interstitial Pre-emption

As indicated above, if there is pre-emption intent in the Act, it might take a limited form which could appropriately be termed "interstitial" pre-emption. That is, Congress may have desired to provide leadership in highway safety generally — and thus have intended no complete pre-emption — and, at the same time, it may have determined that the working safety policy should be made at the federal level and applied uniformly, where there are expressions of a desire for something more than "leadership." The fact that the precise federal policies would be made by an administrative agency (NHSB) instead of the Congress is of no moment, for this has presented no difficulty in cases involving pre-emption by the regulations of other administrative agencies.

Driver licensing is one of those facets of the highway safety prob-

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42 Hearings on S. 3052, supra note 2, at 5, 6-7, 42, 131, 151.
46 Hearings on S. 3052, supra note 2, at 5, 6-7, 42, 131, 151.
48 For instance, House Report No. 1700, refers to the Baldwin Amendment of 1965 (23 U.S.C. §135 (1965)) which provides that states "should" adopt highway safety programs in accord with uniform standards promulgated by the Secretary of Commerce. The Report concludes that the Secretary got nowhere in conference with the states and that "[t]here was no real progress." H.R. Rep. No. 1700, 89th Cong., 2d Sess. (1966).

At another point the Report refers to the fact that for forty years various safety organizations "have been trying to persuade the several State legislatures to adopt at least minimum uniform regulatory statutes, with lamentable lack of success." Id. at 6. However, the Report does recognize what it calls a "paramount" role for the states since states register automobiles, license drivers, educate the children, police traffic and enforce statutes. Nevertheless, any desire to leave these traditional state functions in state hands is not necessarily inconsistent with the pre-emption argument, for each of these functions could continue to be performed and applied uniformly by all states according to standards adopted federally. The Report speaks of the insufficient of most state programs and concludes that a "mandatory program" (id. at 7) insisted upon by the Congress may save more lives.

lem where there is reason to believe that Congress may have acted to pre-empt interstitially. House Report No. 1700\textsuperscript{48} addresses this area:

The wide variation from State to State, and the failure to achieve any semblance of control or uniformity, bespeak pressures and adherence to customs long out of date. Driver licensing is apparently more a source of revenue than a safety control. A person licensed to drive in one State, however, is in fact licensed to drive anywhere. State lines are not barriers to drivers in our highly mobile society, nor would anyone want them to be. But strict uniform licensing and renewal procedures must be developed and adopted, covering minimum age limits, mandatory physical and eyesight examinations, competent skills tests and written or oral examinations on traffic laws, varieties of traffic conditions, and emergency situations that arise in the operation of an automobile.\textsuperscript{49}

Like the House Committee Report, the report\textsuperscript{50} accompanying the Senate Bill provides: "The value of uniformity is clear in such matters as standards for driver training and education and periodic re-examination of drivers."\textsuperscript{51}

If genuinely sought, the "strict uniformity" mentioned in the House Report can come about only through uniform federal licensing standards. In our form of federalism, only a "senior partner" sovereign (the federal government) possesses the necessary power ("leadership") to force ("lead") "strict uniformity" of licensing upon state sovereigns. If expressed in precise terms, such standards will have the effect of pre-empting the states in the area of driver licensing.

3. Minimum Standards Pre-emption

Within either form of pre-emption — general or interstitial — an alternate form exists by which the Secretary (NHSB) may take action. Rather than establishing comprehensive uniform standards, the Secretary (NHSB) may promulgate minimum standards to be applied uniformly. To illustrate: It is plausible to read the federal legislation as involving driver licensing pre-emption only to the extent requiring minimum levels of uniformity. This approach would recognize continuing power in the states to adopt driver licensing standards higher than the minimum requirements imposed by the NHSB. On the other hand, state standards not meeting the federal minimum would be supplanted by the federal standards.\textsuperscript{52}

This form of pre-emption raises issues inherent in the higher-lower standards dichotomy. That is, when federal action is characterized as a requirement of minimum uniformity, a different licensing standard

\textsuperscript{49} Id. at 9.
\textsuperscript{51} Id. at 5.
\textsuperscript{52} The distinction between the pre-emptive effect of minimum standards and uniform federal standards is described in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-52 (1963).
established or proposed by a state may be viewed in one of two ways: It may be considered to relate to the imposition of further controls to prevent driver failure, or it may be viewed as necessary to protect individual freedom of travel.\textsuperscript{58} Thus, what is "higher" in terms of safety is also more restrictive, \textit{i.e.}, "lower," in terms of free travel. Likewise, a control which is "lower" in terms of safety is less restrictive, \textit{i.e.}, "higher" in terms of protecting free travel.

It is important to recognize that, at some point, the goal of increased highway safety must yield to demands for social efficiency. Hence, Congress is probably not to be understood as justifying higher standards of safety to the extent of completely disregarding the impact of safety policies on the need to travel, with a driver's license serving as a primary means of expressing that need.\textsuperscript{54} Such an interpretation would permit the states to adopt any sort of repressive control measure which could be shown to contribute to highway safety and to justify the controls in terms of the National Highway Safety Act. Absolute safety on the streets and highways cannot be expected; the corresponding loss of efficiency in transportation would not be worth the social cost.

4. Determination of the Pre-emption Issue

Of course, the decision as to whether there is legal pre-emption of the driver licensing field would be provided by the courts. This result is apparent from the fact that a body of court-created doctrine has been developed.\textsuperscript{55} Hence, the above comments are only speculative, for as yet the courts have not confronted the question. However, there is sufficient material available on which to base a plausible pre-emption argument. No doubt such an argument could prove useful to the person whose license is withdrawn under a state statute or regulation believed to be inconsistent with uniform standards promulgated by the NHSB.

C. Federal Pre-emption in Fact

Whether there has been pre-emption in law by Congress in the area of highway safety may be an academic question for the reason that there may be pre-emption in fact. This follows from the political and economic leverage over the states which is enjoyed by the federal gov-


\textsuperscript{54} The importance of the motor vehicle as a mode of expressing mobility in American society is amply demonstrated in the \textit{Appendix infra}.

\textsuperscript{55} \textit{See generally} S. Doc. 39, 89th Cong., 1st Sess., 282-94 (1964) (\textit{The Constitution of the United States of America Analysis and Interpretation}).
ernment. The states may have no real choice other than to comply with the federal mandates in the field of highway safety.

The key to the federal "leadership," "partnership," or "cooperation" with the states — however labelled — is simply money! State governments need federal grants-in-aid to accomplish the many social programs which they pursue. What makes possible pre-emption in fact is the legal doctrine which permits Congress, in the exercise of its spending power, to fix the terms on which allotments of federal funds will be made.56 The doctrine is such that a state which receives "offers of seductive favors"57 from the federal government is expected to submit to the terms on which the favors are offered or "adopt 'the simple expedient' of not yielding to what she urges is federal coercion."58

However, given the shift of economic power to the federal government through the income tax and other federal funding measures, is it realistically possible for states to refuse federal grants-in-aid, despite distasteful conditions which are imposed? The "simple expedient"59 of refusing to be coerced is a simplistic answer in a society which, in fact, depends on economic adjustments to be made by the federal government no matter what form they may take.

Hence, Congress, well aware of the limited or nonexistent choice available to states, has created many federal spending programs to which conditions are attached. Relevant to highway safety, the interstate system of highways and the federal-aid systems are two examples of such programs. While both of these projects are the combination of many years of state-federal "cooperation" in this field,60 the Federal Highway Administration61 promulgates the detailed specifications which must be met by state programs, and it approves state project proposals which are to be federally funded in part.62 These programs have been successful in securing more highway mileage of higher quality than would have been built if states had been forced to go it alone, and the states have come to depend on such grants-in-aid.

The relevance of such programs to the highway safety program lies in the power of the NHSB to refuse to approve a state safety program.63 With a broad base of transferred power — supported by the authority to impose financial sanctions on recalcitrant states — and

59 Id. at 143.
61 Id. § 109.
62 Id. § 106.
63 Id. § 402 (a) (Supp. 1970): "Each State shall have a highway safety program approved by the Secretary . . . ." Id. See text accompanying notes 22-26 supra.
given the economic position of the states, it appears that the NHSB can, indeed, provide the "leadership" necessary to inspire the states to adopt highway safety programs in accord with its uniform standards. In the final analysis there may be pre-emption of state power in fact, if not in law. In either case the federal role in highway safety will ultimately become dominant. This will follow if the NHSB makes efficient use of its standard setting and sanctioning authority.

III. NHSB PHILOSOPHY REGARDING STANDARDS

As his explanation of the approach taken by NHSB to its initial standards, former Federal Highway Administrator Lowell Bridwell stated:

I should point out that a policy choice was involved in our adoption of the new standards. If all States were to be required to meet every portion of every provision of the standards by the end of next year, [December 31, 1968] this course would have called for adopting standards with a fairly low level of performance.

Alternatively, the standards could reach much higher levels if they were to specify high but realistic goals to which the States could aspire in their programs. For that reason, the policy was adopted of setting goals as the only feasible method of procedure. The standards are therefore phrased in broad terms, permitting some variation in State regulations and allowing for a degree of flexibility between the States in experimenting with different program approaches to produce more effective results.64

Dr. William Haddon, Jr., then Administrator of NHSB echoed Mr. Bridwell as follows:

If the programs of all States were required to meet all aspects of all standards by the end of 1968, this would necessitate standards approaching the lowest common denominator of present State and community programs. If, on the other hand, the standards were to set goals which the States could work toward, they could be set at much higher levels. This latter alternative was adopted as the only one which would adequately satisfy the purposes of the Act.65

At another point Dr. Haddon stated: "The standards, therefore specify what is to be done, and not 'how' or by whom."66

A. The Relationship Between the Philosophy and the Act

Perhaps this NHSB approach to its standards development function is justifiable as to the overall program and, in general, as to the thirteen initial standards,67 but it is doubtful that the NHSB can justify its argument that the standards had to be expressed in "broad terms" and at "realistic" levels. In part, the NHSB philosophy may be criti-

64 Hearings on S. 1467, supra note 1, at 174-75.
65 Id. at 178.
66 Id. at 180.
cized for erroneously assuming that the National Highway Safety Act required states to meet all NHSB standards before January 1, 1969. It is true that Sec. 402 (b) of the Act forbids approval of any state highway safety program which does not contain the five mandated provisions; however, there is no statutory requirement that the mandated provisions or other standards promulgated by NHSB must be operational by that date. Conversely, the statute provides that states which are implementing (i.e., progressing toward compliance) approved programs on January 1, 1969, will not lose federal safety or highway-aid funds. Therefore, it is fallacious to assume that NHSB cannot include high performance level components in its standards. Implementation of state safety program elements may occur over a period of time. This implementation concept is consistent with statements of the Undersecretary of Transportation and the Federal Highway Administrator.

Further, there are at least three reasons why states would not be forced to lose federal funds if the NHSB were to adopt exacting and precise standards. First, the NHSB has discretion to approve late implementation of approved state programs, so long as some real progress is made. Congress accepts this without question. Second, the Act gives the Secretary of Transportation power to protect the state share of highway funds (but not the safety funds), authorizing him "in the public interest" to suspend the safety program approval requirement of any state "for such period as he deems necessary." Third, the Act

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69 Id. § 402(c).
70 The NHSB policies emphasize implementation of state safety programs over a period of time. The NHSB believes it has power to approve state program plans on December 31, 1968, but allow for full implementation later as the state progresses in fulfilling its obligations under the plan approved. For example, Under Secretary of Transportation Everett Hutchinson stated to the National Highway Safety Advisory Committee: The law provides that each Governor shall submit to the Secretary of Transportation, for his approval, a comprehensive highway safety program by December 31, 1968. Each program will be reviewed in the light of the progress the plan calls for over the existing level of safety program performance in the State. A plan does not have to provide for full implementation of the standards the Secretary will promulgate by any specific point in time. In the final analysis, I cannot image [sic] a State being penalized 10 per cent of its highway funds except in a very extreme situation. Of course, the public interest will be served by early implementation of the safety programs. *Hearings on S. 1467, supra* note 1, at 176-77 (quoted as part of the statement of Lowell K. Bridwell, Federal Highway Administrator). See the statement of Dr. William Haddon, former Director of NHSB, in the *Hearings on S. 1467, supra* note 1, at 177-79, and the response of Mr. Bridwell to a question by Senator Cooper: As I understand, it is absolutely correct that what you have to do is gauge the progress that is being made and make a determination as to whether or not a State is making not only a good faith effort, but also a substantial effort to implement the regulations. Is that correct?

MR. BRIDWELL. Yes, sir; I think that certainly agrees with my assessment.

Id. at 179. See also *Hearings on S. 1467, supra* note 1, at 206-07 (statement of Lowell K. Bridwell).

71 *Hearings on S. 1467, supra* note 1, indicate this acceptance.
gives the Secretary of Transportation power (in the "public interest") to "amend or waive standards on a temporary basis for the purpose of evaluating new or different highway safety programs instituted on an experimental, pilot, or demonstration basis, by one or more States . . ." This congeries of express power is ample authority upon which the NHSB might justify individual state deviations from the exacting standards which it could promulgate. In short, the NHSB was not forced into the philosophy it chose to adopt.

B. Factors Contributing to the Philosophy

The philosophy adopted by the NHSB for determining the initial standards may have been influenced in part by the probable federal funding drain occurring as a result of demands imposed by the Viet Nam war. Without sufficient federal grant-in-aid funds, high quality state safety programs could not be implemented. However, this factor does not justify the setting of low federal standards. The NHSB could construe "implementing" to mean whatever progress is possible within the budgetary limitations imposed.

Another factor which could have contributed to the perspective of the standards chosen is the statutory requirement that the standards must be developed in cooperation with the states, their political subdivisions, and appropriate federal agencies. The cooperative relationships described in the Act may have been taken too literally, and the desire for federal "leadership", which was expressed in the committee reports of both Houses of Congress, may have been lost. In effect, the philosophical rationale announced may have evolved during the NHSB deliberations with states, political subdivisions, and other federal agencies as to the standards which could "cooperatively" be agreed upon.

The determination to set "realistic goals" also may have been influenced by a desire to reassure the states that most of them would be able to meet NHSB expectations without resort to the waiver process. Innocuous standards may be promulgated to demonstrate that the NHSB is fulfilling its responsibilities. Unfortunately, such standards may be erroneously assumed by the general public to make a significant contribution to improved driver performance. Political considerations may get in the way of crusading spirit; and thus watered down, the crusade enters a new phase in which the social problem, which led to the creation of the agency, may become relegated to a secondary position. The danger is that the mix of decision factors may become such that the agency concerns itself with deciding standards' questions primarily on the basis of what is expedient rather than what is needed.

73 Id. § 402(a).
74 Id. § 402(e).
75 Hearings on S. 1467, supra note 1, at 174-75 (statement of Lowell K. Bridwell, Federal Highway Administrator).
IV. NHSB DRIVER LICENSING STANDARD

Inasmuch as the standards are based on the philosophy described above, they should be analyzed to determine the effect of the implementation in light of the stated philosophy. For purposes of this paper, the NHSB driver licensing standard will serve as an example of the effect of the philosophy on a single aspect of the federal program. It is submitted that the philosophy, in this instance, has subverted the Congressional desire for "uniform standards." However, it should be borne in mind that driver licensing is only one of thirteen standards promulgated by NHSB. For this reason, the general success or failure of the NHSB standards to achieve the goals set by Congress should not be expected to be forecast from the analysis which follows.

A. General Provisions

Under the Act, the NHSB could have promulgated the mandatory driver education and training standard\(^7\) as the sole federal requirement

7 U.S.C. § 402(b)(1)(E) (Supp. 1970) wherein the Congress declared that no state highway safety program should be approved by the Secretary of Transportation, unless it provides for comprehensive driver education and training programs.

NHSB may be justified in expressing this standard in broad terms, for the reason that driver education and driver training are two of the most expensive elements in any highway safety program. The question of "where do we get the money?" looms large in the minds of both state and federal officials. The Viet Nam War has resulted in a drastic curtailment of federal safety funds available to NHSB. Furthermore, Congress did not make successful completion of either a driver education or driver training course a prerequisite to being licensed to drive. Hence, this standard relates to driver licensing in the larger sense, in that it is also designed to improve driver performance, but it is not imposed on individuals as a licensing control measure.

For these reasons, it is difficult to fault the NHSB driver education and training standard. The congressional mandate has been met, for the standard does require establishment of such programs, and it contains all of the elements which appear in the statute, with possibly one exception. The standard is vague on the point that the driver education program must be within the state school systems and administered by appropriate school officials. Perhaps it is present by implication, but this statutory requirement could well be stated more explicitly.

The standard indicates that the content of the high school driver education course will be expected to consist, at a minimum, of practice driving and instruction in the following:

1. Basic and advanced driving techniques, including handling emergencies;
2. Rules of the road and other state and local laws and ordinances;
3. Critical vehicle systems and subsystems which require preventative maintenance;
4. Vehicle, highway, and community features which aid the driver in avoiding crashes, protect him and his passengers in crashes, and maximize salvage of the injured;
5. Signs, signals, highway markings, and design features of highways which must be understood if one is to drive safely;
6. Differences between urban and rural driving, including use of expressways;
7. Pedestrian safety.

Highway Safety Program Standard No. 4, Driver Education, 23 C.F.R. § 204.4 (1970). Finally, students are to be encouraged to enroll in first aid training. Id.

Other than providing for the high school course, states are further expected to: (a) establish a research and development program leading to procurement of practice driving facilities, simulators, and other teaching aids; (b) establish a program for adult driver training and retraining; (c) establish a policy for control of commercial driving schools by licensing them and certifying their instructors; and (d) evaluate its entire program periodically, and provide NHSB with an evaluation summary. Id.
in the area of driver controls for state programs. However, it exercised its discretion to promulgate an additional standard pertaining to driver licensing. This standard establishes "minimum" state licensing program content; hence, states must adopt at least these licensing control measures, but they are also obligated to structure their licensing programs to prevent needlessly removing the opportunity of the citizen to drive. The eight components which comprise the standard will be discussed consecutively along with relevant portions of the NHSB Highway Safety Program Manual, which provides more specific recommendations for implementing the standard.

B. Component I: One-License Concept

The state must adopt the one-license concept and identify the types of vehicles the licensee is authorized to drive. With a multiplicity of licenses, the driver is in a position to continue driving until his supply is “exhausted” by suspension, revocation, or expiration of all his licenses. Multiple licensing makes it difficult to construct viable controls through point system pressures and formal license actions by administrators or courts. Thus, the one-license system makes it illegal to possess more than one license and requires surrender of all valid licenses when applying for a license. If all states apply this concept, eventually all drivers will be limited to a single license.

This requirement appears to be a worthwhile standard which is within the power granted NHSB. It is useful, because it helps prevent drivers from escaping licensing controls. It is relevant to improved

77 Highway Safety Program Standard No. 5, Driver Licensing, 23 C.F.R. § 204.4 (1970) [hereinafter cited as Standard No. 5].
78 Id.
79 DEPARTMENT OF TRANSPORTATION, HIGHWAY SAFETY PROGRAM MANUAL, VOL. 5, DRIVER LICENSING (1969) [hereinafter cited as MANUAL]. The NHSB Manual is a publication proposed for the states to give them more specific recommendations for implementing the Standards:
To assist the States in developing the details of their highway safety programs under the new standards, the Bureau is now preparing a set of policies and procedures to be issued with regard to each individual standard... These policies and procedures will provide specific recommendations for matters to be incorporated in State and local program regulations. When State safety projects are presented to the Department for approval, consideration will be given to the extent to which the State has followed the recommendations embodied in these policies and procedures.
Hearings on S. 1467, supra note 1, at 174 (statement of Lowell K. Bridwell, Federal Highway Administrator).
To assist them [states] in the administration of their program, we have included several projects, one of which will develop guidelines in the form of texts and manuals, describing managerial policies, techniques, methods, and procedures for conducting the safety programs.
Hearings on S. 1467, supra note 1, at 201 (statement of Dr. William Haddon, former Director of the NHSB).
80 Standard No. 5, supra note 77, § 204.4(1).
81 NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, UNIFORM VEHICLE CODE § 6-101(c) (Revised 1968).
driver performance, for it helps make effective license withdrawal decisions. The single-license concept may be evaluated as to its success or failure as a safety measure by a determination of whether it permits more effective control over individual drivers and makes it possible to subject them to measures designed to improve driver performance. However, evaluation must await the accumulation of sufficient experience data. It is not the sort of "broad generalized recommendation" the House Committee rejected as unacceptable.82

C. Component II: Proof of Date and Place of Birth

Drivers must submit acceptable proof of date and place of birth when applying for an original license.88 This component complements the policy of establishing minimum age limits, which is based upon the assumption that there is, in fact, a predictive relationship between age and being involved in an accident. Furthermore, information with respect to age makes it possible to collect accident statistics and relate them to age. Hence, the proof requirement contributes to an evaluation of the success or failure of age requirements as driver control measures. It is acceptable as something more than a "broad generalized recommendation."84

D. Component III: Examinations

1. Initial Examination

All drivers must pass an initial examination in which the applicant demonstrates his (1) "[a]bility to operate" the types of vehicles for which he seeks a license; (2) "[a]bility to read and comprehend" traffic signs and symbols; (3) "[k]nowledge of laws relating to" traffic, safe driving practices, vehicle and highway safety features, emergency situations, and other driving responsibilities; and (4) "[v]isual acuity, which must meet or exceed State standards."85

There is little doubt that all four parts of this component are relevant to the goal of improved driver performance. Current knowledge is not complete and empirical, but it is sufficient to justify assuming a relationship exists.86

Dr. Haddon, former NHSB administrator stated:

I think also that if we were to wait for adequate information with respect to all of the more clearly important aspects of highway safety we, in effect, would be doing nothing for a good many decades.

The issues are just so complicated that obviously we can, and I believe should, move ahead for quite a few years on the best information that we have available without waiting for the momentum of perfect information.

Hearings on S. 1467, supra note 1, at 205.
But are these expressions acceptable as the sort of "performance criteria" standards which Congress expected from the NHSB? Are they capable of being evaluated as to their success or failure "in actual application"? Are they anything more than "broad generalized recommendations"? If they are neither of these, then in what sense are they "uniform"? Are they actually "nonuniform nonstandards" and outside the meaning of the Act?

Phrases such as "ability to operate," "ability to read and comprehend," "knowledge of law," and "visual acuity" are sufficiently amorphous to require further definition if they are to be applied by the states. By making it necessary for the states to give their own content to these phrases, the so-called "standard" is revealed to be devoid of content. Furthermore, the "strict uniform" licensing programs sought by the House Report on the Act are likely to be lost because states may individually ascribe whatever meaning they desire to the phrases. For example, State A may require an extensive, in-depth demonstration of ability to operate, while State B may require no more than a superficial demonstration. Yet, both states may contend, with justification, that they have met this part of the federal standard! State A may require visual acuity of 20/40 correctable in both eyes, while State B may require only 20/40 correctable in one eye. Yet, both states may contend that they are in compliance with the visual acuity requirement.

Where is the uniformity which Congress sought? Is not each state left to write its own standards as has been the practice? About the most that can be said for this component of the standard is that it informs the states that they are supposed to "do something" in the areas identified without telling them what is really expected.

In order to "do something" which would result in NHSB approval of the state program when reviewed after December 31, 1968, the state had few ways in which to discover what was actually expected of it. Aside from conferences with NHSB personnel, the only other source of information appears to be the NHSB Highway Safety Program Manual, Vol. 5, Driver Licensing (1969). It provides little specific

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89 Id.
91 Standard No. 5, supra note 77, § 204.4(III) (A) (1).
92 Id. § 204.4(III) (A) (2).
93 Id. § 204.4(III) (A) (3).
94 Id. § 204.4(III) (A) (4).
96 Manual, supra note 79, ch. IV, at 6-7.
guidance for state administrators as to the meaning of the vague language of this component of the driver licensing standard.

For example, the required demonstration of "ability to operate" is explained to mean that a road performance test should be given and should include—but not limited to—the road test recommendations of the American Association of Motor Vehicle Administrators in *Testing Drivers.* In addition, the examiner is expected to explain any unsatisfactory performance to the applicant, and the road performance test may be omitted if a licensee with a satisfactory driving record is applying for renewal or if the applicant possesses a license from another state having an acceptable licensing program. The specific licensing policies which the states are expected to adopt are not articulated in the Manual.

The required demonstration of ability to read and comprehend traffic signs and symbols is also not explained further in the Manual. Similarly, the required demonstration of knowledge of laws relating to traffic, safe driving practices, vehicle, highway and other safety features is amplified only briefly. The specific elements of the knowledge test are not indicated and must be created by each state.

The required test of visual acuity is amplified in the Manual to include an evaluation of field of vision. This raises a related question: If the NHSB believes license applicants should be examined for field of vision, why is it not included in its standard? The Manual implies visual acuity is only one of several vision factors which relate to improved driver performance. Perhaps the explanation is found, in part, in the NHSB administrative philosophy to establish "watered-down" standards with which states could more easily comply.

2. Licensee Re-examination

After an initial examination, each licensee must be re-examined every four years for "at least visual acuity and knowledge of rules of the road." This component presses the states to recognize that continuing driver controls are necessary, since it is fallacious to assume

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97 Standard No. 5, *supra* note 77, § 204.4(III) (A) (1).
99 *Id.* ch. IV, at 6-7.
100 *I.e.*, the actual criteria of decision applied as working policies in the state licensing program.
102 *Id.* ch. IV, at 5, 6.
103 *Id.* ch. IV, at 5. These visual characteristics, along with depth perception, muscle balance, and color perception, are believed, by the American Optometric Association and the American Association of Motor Vehicle Administrators, to be relevant to proper performance of the driving task. *American Optometric Association, Vision Screening for Driver Licensing 12-13* (1966).
104 See notes 64 & 65 and accompanying text *supra*.
105 Standard No. 5, *supra* note 77, § 204.4(III) (B).
that physical and mental characteristics of drivers do not change after initial licensing. Periodic re-examination facilitates discovery of licensees who no longer qualify. This requirement should also help eliminate the license renewal by mail practice — followed in some states — which destroys the utility of the license renewal process as a safety device, at least insofar as the renewal function is expected to involve a re-evaluation of the licensee. Thus, periodic re-examinations are relevant to improved driver performance. Furthermore, the re-examination requirement will be capable of being so evaluated as to its success or failure in actual application, after sufficient experience to permit accumulation of a base of data.

Unfortunately, however, this component uses the same type of vague phrases which appear in the previous component and is thus subject to the criticism that it, too, is devoid of content. The states are told they must re-examine licensees on at least two of the factors tested for initial licensing; but they are not told what is expected because the standard is so vague as to be meaningless. The NHSB driver licensing Manual indicates the re-examination should occur prior to license renewal at least every four years and should include as a minimum "the tests for visual ability and knowledge of rules and regulation."106 The road test may be waived at renewal if the applicant's driving record is satisfactory.107

E. Component IV: Driver Record System

This component imposes on states recordkeeping responsibilities, which should lead to a future source of detailed information on individual drivers. It requires the state record system to provide rapid entry of data, controls to eliminate delay in obtaining data for the system, rapid response to requests for status of license validity, ready availability of data for statistical purposes, and ready identification of drivers.108 The Manual suggests that close liaison should be maintained with state education, highway, health, welfare, and traffic records agencies in order to facilitate an interchange of information.109

Such a requirement is useful, because it facilitates collection of information for both highway safety research purposes and for the driver identification and license validity purposes. The building of a base of appropriate licensee information obviously has relevance to improved driver performance, if only because it makes possible more sophisticated research on driver behavior.

106 MANUAL, supra note 79, ch. IV, at 4, 8.
107 Id. ch. IV, at 6, 7.
108 Standard No. 5, supra note 77, §§ 204.4(IV) (A)-(E).
109 MANUAL, supra note 79, ch. IV, at 11.
F. Component V: Specific Term and Renewal of Licenses

This portion of the federal licensing standard requires states to issue licenses for "a specific term,"\(^{110}\) and they must be "renewed"\(^ {111}\) to remain valid. At the time of both issuance and renewal, the applicant's "record must be checked."\(^ {112}\)

Yet the NHSB's meaning of "specific term"\(^ {113}\) is not clear. Does it mean any period of time adopted by the state which has an identifiable beginning and end? If NHSB desires the term to be no longer than the four-year maximum term established for re-examination in Component III, why doesn't it so specify? Such vague language in the standard presents the states with the same problem described above with respect to the initial examination requirements.

However, if state officials examine the licensing Manual, they will discover that NHSB expects the maximum "specific term" of a license to be no longer than four years.\(^ {114}\) Why is this information not included in the language of the formal standard? Why is it tucked away in a publication designed to interpret standards purportedly expressed as "performance criteria"?\(^ {2115}\) If NHSB knows this is what it will expect of the states, why does it not so specify in a straightforward manner? Without the Manual, the states would be left to their own interpretations of the phrase.

The component imposes the further requirement that a "driver's record must be checked"\(^ {116}\) at the time of issuance or renewal of the license. For what is the record to be "checked"? The Manual merely repeats the language of the standard.\(^ {117}\) However, it does provide that before issuing an original license, each state should request the National Driver Register to "verify the applicant's eligibility for licensing."\(^ {118}\) These appear to be the only statements which refer to checking the applicant's "record." Furthermore, even if it were possible to ascertain what is expected as a "check," what is the state supposed to do about the matters which it checks? Under the present standard, a state may "check" for many things and still determine that it is appropriate to issue or renew a license. If the NHSB expects states to deny initial and

\(^{110}\) Standard No. 5, supra note 77, § 204.4(V).
\(^{111}\) Id.
\(^{112}\) Id.
\(^{113}\) Id.
\(^{114}\) MANUAL, supra note 79, ch. IV, at 8.
\(^{116}\) Standard No. 5, supra note 77, § 204.4(V).
\(^{117}\) MANUAL, supra note 79, ch. IV, at 9.
\(^{118}\) Id. ch. IV, at 7. The Register is fully described in THE NATIONAL HIGHWAY SAFETY BUREAU, THE NATIONAL DRIVER REGISTER (1967). The Register acts as a clearing house for driver identification and records information received from states.
renewal licenses on the basis of certain factors to be checked, why doesn't it so state?

In large measure, this entire component leaves the states to their own devices to determine what NHSB expects of them. Yet safety program approval by NHSB is required if states are to continue to qualify for federal safety and highway-aid funds.

G. Component VI: Driver Improvement Program

Each state is required to establish a driver improvement program "to identify problem drivers for record review and other appropriate actions designed to reduce the frequency of their involvement in traffic accidents or violations." The vagueness of this standard raises a number of questions: What criteria are to be used to select those licensees who are to be termed "problem drivers"? What sorts of license actions are deemed "appropriate" and in what circumstances? What assumptions lie behind the notion that frequency of "involvement" in accidents should be reduced? Does this expression indicate that NHSB assumes "involvement" in an accident to be the equivalent of causation (i.e., fault) based on human failure? Like the language of other components, states may interpret the language of this standard very differently and still be within its terms. As a result, there is no assurance of uniformity among the states; it is another example of a "nonuniform nonstandard." Again the states must consult the Manual to determine what NHSB expects of them; and, fortunately, the Manual describes more precisely the content of the driver improvement program it expects states to establish.

Basically, the state licensing agency is expected to establish a system of identification and rehabilitation of drivers who "repeatedly" become involved in accidents and traffic law convictions. The selection of persons for treatment is to be made on the basis of a point system such as that described in the American Association of Motor Vehicle Administrators publication, Guide to Driver Improvement. The essence of a point system is the assignment of a numerical value to traffic law convictions and accidents according to their "severity." When the total number of points reaches a predetermined action level,

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119 Standard No. 5, supra note 77, § 204.4(VI).
120 For a full discussion of this question, see J. Reese, Power, Policy, People: A Study of Driver Licensing Administration pt. II, ch. 1 (1970) [hereinafter cited as J. Reese].
122 Id., ch. IV, at 12.
123 Id.; National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code § 206(b), wherein there is included a point system for the identification of problem drivers.
124 Manual, supra note 79, ch. IV, at 12. What is meant by "severity"?
the administrative machinery is activated, and some "reform" action designed to improve driving performance is taken.

The action is initiated by specially trained driver analysts who are expected to review the record of each driver. According to the Manual, the first action should consist of sending an advisory letter to drivers who have accumulated a certain number of points but who are not yet considered to have become serious problem drivers. The second action should consist of a personal interview — to be conducted by a driver analyst — after an advisory letter has been sent followed by the accumulation of more points. The interview is expected to "[r]esult in recommendations by the driver analyst of remedial measures designed to improve the driving performance . . . ."

The range of remedial choices available to the analyst for recommendation includes (but is not limited to) the following:

(a) Referral to a Medical Advisory Board — This recommendation is justified when the analyst has "reason to believe" that the licensee has a physical or mental limitation which impairs his driving performance. However, the Manual does not provide the factors which the analyst should use to conclude that there is "reason to believe" medical evaluation is necessary. The Manual suggests that states should establish their own guidelines to assist the analyst to select the most suitable measures. The results of any medical examination are to be reviewed by the Medical Advisory Board before further action is taken. However, the medical criteria and standards to be applied by the Board are not stated. Perhaps the primary reason statements regarding mental and physical limitations on driving are not more precise is that not enough is known about the driving task to permit its elements to be identified and quantified. Until this has been accomplished, there will be a great deal of calculated guessing by analysts and medical boards.

(b) Instruction — The analyst may decide driving performance can be sufficiently upgraded by discussing with the licensee "the specific problem areas" believed to have caused poor performance. How the analyst determines the problem areas or when such a decision is appropriate remains unstated, and no examples are given.

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126 Id. ch. IV, at 12.
127 Id. ch. IV, at 12-13.
128 Id. ch. IV, at 13. How is the "serious" problem driver to be identified? The point system per se does not make the selection. Someone must establish an action level, and the action level may vary widely from state to state. The uniformity Congress sought is sacrificed.
130 Id.
131 Id.
(c) Driver improvement school — The analyst is expected to require attendance at such a school when he "has concluded that such treatment may improve the licensee's driving performance." Yet upon what factors is the analyst to base such a conclusion? There are no illustrations. The Manual is as useless as the standard! To permit analysts to make this judgment on factors known only to themselves makes it impossible to evaluate and control analysts' choices within the range of recommendations. If this situation occurs, it is virtually impossible to determine whether the agency has provided the due process and equal protection of the law's guarantees which the general public is entitled to expect of its administrative agencies. The factors of choice should be made known.

(d) The final three remedial choices available to the analyst are license probation, license suspension, and license revocation. Suspension is expected to be recommended when the analyst concludes that it "[w]ill produce an improvement in an individual's driving habits . . . ." How the analyst is to decide and what factors he is to use in estimating the probability of improvement of habits are not stated. Such vagueness vests in the analyst a broad case of uncontrolled authority to make the critical initial withdrawal decision which, in all probability, will become that of the agency. Without knowledge of the specific criteria of decision, it will be difficult to evaluate and control the analysts' recommendations.

The Manual suggests probation in lieu of suspension when deemed appropriate. Yet the factors which should be used to decide when probation is appropriate are not indicated in the Manual.

Revocation is said to be appropriate when the analyst concludes that the attained driving record "precludes the immediate upgrading of the individual's driving ability" through any of the other choices. Again, the Manual is of no assistance, for it does not indicate the criteria on which the recommendation should be based.

A final driver improvement program suggestion found in the Manual is that all licensees suspended "may" be re-examined in the same manner as are original license applicants before their licenses are restored. Further, the Manual provides that an examination must be given if a new license is sought after revocation.

134 Id.
135 Id.
136 Id.
137 Id. ch. IV, at 7.
138 Id. ch. IV, at 14.
139 Id. ch. IV, at 4. The use of the word "may" is an invitation to states to delay instituting a policy requiring re-examination of licensees following expiration of a period of suspension. "May" transfers power to the states to choose not to re-examine.
The existence of the Manual suggests several questions about the formal language of the licensing standard. First, if the NHSB expects its Manual recommendations to be part of the state programs, why does it not state them in the standards? If it can reduce them to writing in the Manual, it can include them in the language of the standard. It must not be forgotten that NHSB has power to approve state safety program plans which have not yet been fully implemented. Therefore, a standard containing specific requirements would constitute a useful policy statement to which backward states could aspire.

Second, several instances have been described wherein the Manual is either silent on the particular topic or speaks in the same terms as the standard. The Manual, therefore, does not provide the specific recommendations which Mr. Bridwell and Dr. Haddon promised.

Third, the net effect of parroting the language of the formal standard in the Manual is to leave the NHSB with almost total discretion to approve or disapprove the driver licensing provisions of state safety programs on whatever basis it desires. The NHSB has not committed itself except in general terms, for it has promulgated a "non-standard" which is inadequately explained in its Manual. This is particularly true of the initial licensing examination component, the renewal process component, and the driver improvement program component.

H. Component VII: Medical Evaluations

1. Establishment of a System

States must establish a system which provides for "medical evaluation" of licensees whom the agency "has reason to believe have mental or physical conditions which might impair their driving ability." The NHSB licensing Manual contains two elements pertaining to medical evaluation of specific licensees: The first is the authority of the driver analyst to refer licensees to a medical advisory board, licensed physicians, or specialists for examination as part of the driver improvement program, and the second is a requirement that the results of a physical examination should be reviewed by the medical advisory board before any license action is taken by the agency.

A curious feature of both the standard and the Manual is that they appear to assume medically trained persons possess competence not only to evaluate physical conditions but also to determine to what extent those conditions relate to performance of the driving task. It is sub-

\[141\] 23 U.S.C. 402(c) (Supp. 1970); see notes 69-71 supra.

\[142\] See note 79 supra.

\[143\] Standard No. 5, supra note 77, § 204.4(VII)(A).

\[144\] MANUAL, supra note 79, ch. IV, at 13.

\[145\] Id.
mitted that, at best, the conclusions of the physician relative to appropriate licensing action will be largely guesswork. This contention is based primarily on the fact that high quality research into the nature of the driving task has been unable to describe the task in terms which permit its quantification. Until this has been done, the actual relationships of mental and physical abilities to the driving task remain in large measure speculative.

No doubt it is useful to acquire medical opinion before licensing action based on physical and mental qualities is taken. No doubt such decisions will be made despite the lack of knowledge on the critical issue of relevance to the driving task. However, medical opinion should be recognized as offering no panacea to driver licensing administrators. Although it is an informed judgment, the licensing recommendation of a physician is nothing more than an opinion. It should be recognized and treated as such. As more information on the nature of the driving task becomes available and relevant characteristics are identified, the licensing agencies, including NHSB, should make certain that medical examiners base evaluations on those physical and mental factors known to relate to the driving task. In short, the criteria of medical judgment must be readily adaptable to change with the base of knowledge acquired if medical judgment is to be rational. Furthermore, it would seem that some knowledge of the driving function currently exists although it is far from perfect. Assuming this to be true, NHSB should identify the physical and mental factors believed to be relevant to driving and instruct the medical examiner to base his conclusions on those factors insofar as it is possible. Criteria of judgment should be indicated to the medical examiner no matter how imperfect. Surely some such identification of criteria can be made, and hopefully, the medical profession will insist upon it. Otherwise, the medical examiner's responsibility to both the licensee and the traveling public may not be met.

These comments also apply to the medical advisory board which reviews the medical examiner's recommendations. Although it is composed of medically trained persons, there is no reason to assume the board is more competent to determine the relevance of physical and mental factors to the driving task. Similarly, medical advisory boards, whose members may be unfamiliar with driver behavior research, should be provided with guidance by those who make an occupational specialty of high caliber highway safety research. It is they, if anyone, who should

146 According to Dr. Ross McFarland, and other researchers, our knowledge of the driving task is fragmentary. See their statements to this effect, in J. Reese, supra note 120, pt. II, ch. 1.


be familiar with the current state of scientific knowledge of the characteristics of driver performance. If the medical advisory board is not given such guidance in its review task, its decision may actually be irrational, because it may be based on factors irrelevant to driving performance; at the very least, it may be heavily colored by irrelevant factors, erroneously thought to be relevant because of the "folklore" and dogma of traditional safety literature which is typically based on unreliable research conclusions.  

2. Identity of Applicants for Aid to the Blind

States are expected to establish a procedure which will inform the licensing agency of the identity of licensees who have applied for or are receiving any type of aid to the blind or the near blind. This requirement establishes a form of licensee surveillance which, on its surface, should aid in enforcing vision requirements for drivers. So viewed, it is a commendable requirement. However, its effect in application may be to drive into "hiding" licensees with serious vision deficiencies who must choose between the receipt of state aid and the risk of losing their licenses. It has been asserted that statutes making denial of the license mandatory where epilepsy is involved have had that effect in some states. With respect to this requirement, the NHSB Manual makes no specific recommendations; it merely restates the requirement in the language of the standard.

3. The Medical Advisory Board

The states are expected to create a medical advisory board, or its equivalent, "to advise the driver license agency on medical criteria and vision standards." Such a requirement is comforting, for it suggests that some licensing decisions should be made on medical criteria known to be related to driver performance. It is also psychologically comforting to be told such criteria ought to be established by "qualified personnel," even though no statement of qualifications for appointment to the Board is made. Considered together, these suggestions offer further comfort, for they imply licensing decisions should not be made on factors irrelevant to driving performance, e.g., morality, character, economic status, or race. Therefore, such statements have the salutary effect of reiterating the goal of driver licensing to be improved driver performance and not the general regulation of antisocial conduct.

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149 That such unreliable research exists is apparent from the comments of Dr. Ross McFarland, in PROCEEDINGS OF THE NATIONAL CONFERENCE ON MEDICAL ASPECTS OF DRIVER SAFETY AND DRIVER LICENSING 44 (1964); W. HADDON, E. SUCHMAN, D. KLEIN, ACCIDENT RESEARCH: METHODS AND APPROACHES 30 (1964).

150 Standard No. 5, supra note 77, § 204.4(VII)(B).


152 Standard No. 5, supra note 77.

153 Id. § 204.4(VII)(c).
However, the requirement is disquieting in other respects. What basis exists for NHSB to presume that people who are "qualified" (medically or otherwise) for appointment to such a Board are, in fact, sufficiently acquainted with the current state of empirical research knowledge to be competent to advise licensing agencies on "medical criteria" and "visual standards" for driver license actions? A doctor may be a good medical man and still know nothing about medical factors or vision requirements in the context of driver performance. Is this possibility recognized by NHSB? Are the Board members instructed to study research findings and recommended norms of professional groups in the licensing context (e.g., AAMVA-AOA vision norms) in order to make medical and vision licensing criteria recommendations? Why cannot significant research findings be compiled by NHSB, or by one of its research contractors, be used as the basis of medical and vision criteria and be written into NHSB standards? Perhaps this kind of work is being done, but meanwhile, there is some danger that local medical boards may suggest the use of irrelevant medical factors as criteria for license actions.

Another difficulty with this federal standard in its current form is that it presents the possibility of losing the desired uniformity of licensing standards throughout the nation. As in other instances, the language of the federal standard is imprecise. The quoted phrases are so broad as to be meaningless. Similarly, the licensing Manual is not helpful; it offers no more specific recommendations or definitions than the formal language of the standard. Hence, further definition will be provided by the boards themselves, and there is no assurance they will establish the same interpretations in all the states. Hence, what begins as a vague expression in a so-called "uniform standard" promulgated by NHSB may actually result in fifty different sets of "medical criteria" and "vision standards." If that occurs, the only assured uniformity is that there will be boards and they will have made recommendations. This sort of uniformity can hardly be termed that which is expected by Congress, for the concept of uniform performance criteria is effectively destroyed. Another "nonuniform nonstandard" has been promulgated by NHSB.

J. Component VIII: Periodic Evaluation of a State Licensing Program

The final component of the licensing standard is a requirement that the state program shall be "periodically" evaluated by the state

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155 The Institute for Educational Development, Newport Beach, California and Spindletop Research, Lexington, Kentucky have been awarded NHSB research contracts to evaluate driver licensing programs and inventory and evaluate licensing criteria.

156 Manual, supra note 79, ch. IV, at 19.
and that a summary of the evaluation shall be given to the NHSB. The evaluation is expected to attempt to ascertain the extent to which driving without a license occurs; yet the standard does not make clear to what extent and by what methodology the NHSB expects the states to conduct such an evaluation, nor does it indicate what span of time is meant by "periodically." Similarly, the licensing Manual does not suggest a specific time span; and, while a sample checklist of questions to be asked in establishing a base for evaluation of the licensing program is provided, it does not provide any suggestion of a research model which the states should use to attempt to determine the extent to which driving without a license occurs. Until such suggestions are made, the states may make all sorts of interpretations of the evaluation language of the standard.

On the other hand, some insight into the expected content of the periodic review is gained from NHSB indications of the type of report which will be expected from the states. The Manual states that a reporting system should encompass program operations, program management information, and program evaluation. The NHSB intends to ask the states for summary reports containing information similar to the checklist in chapter IV of the Manual. The checklist questions are oriented toward determining the extent of state compliance with the driver licensing standard.

K. Recommendations

As the above analysis makes evident, the NHSB driver licensing standard is essentially illusory. It may be described as a "nonuniform nonstandard." Because of its lack of precision, state programs may vary greatly and yet meet the standard; and because the standard is so vague, the states must confer individually with NHSB to determine what licensing criteria will be deemed to meet the standard.

The driver licensing Manual is also generally unsatisfactory. As has been shown, it contains little explication of most of the components of the licensing standard. In large part, the more specific recommendations which were promised are not contained in the Manual, and the states are left largely to develop their own interpretations.

The NHSB could strengthen its driver licensing program by promulgating an amended standard more precisely stating the national expectations, or it could amend its Manual to provide more specific recommendations to the states. As a third alternative, the NHSB could promulgate both a new standard and a new Manual. What is important

167 Id. ch. V, at 6-11.
158 Id. ch. VI, at 1.
159 Id. ch. VI, at 4.
160 Id. ch. V, at 6-11.
is that NHSB proceed to develop an improved driver licensing standard, and it should do so with a commitment to monitor and modify both the standard and Manual as new knowledge becomes available in ensuing years. This is essential, for sound research may be expected to identify new relevancies with respect to the "human factors" aspects of highway collisions, and it may serve to expose the fallacy of current "folklore" licensing policies as contributing nothing to the solution of the problem of driver failure which results in highway accidents.

The commitment to monitor and modify is essential because of our history of protecting persons from unwarranted governmental controls on their activities. The American tradition has been to foster liberty of the individual by limiting governmental interference whenever possible. Hence, through its standard-setting authority, the NHSB may be viewed as having the responsibility of balancing the interests of individuals against those of society in light of emerging highway safety knowledge. Fortunately, the NHSB seems aware of this responsibility; the introductory language of its driver licensing standard provides: "Each State shall have a driver licensing program: (a) to insure that only persons physically and mentally qualified will be licensed to operate a vehicle on the highways of the State; and (b) to prevent needlessly removing the opportunity of the citizen to drive." While the vagueness of the components of the present driver licensing standard allows sufficient flexibility to adjust control measures to avoid unduly restricting the need to drive, that same vagueness may permit states to adopt licensing program policies which "needlessly" remove the opportunity to drive. This problem might be eliminated if the United States Supreme Court, which on several occasions has recognized individual mobility to be a Constitutionally protected interest, would also recognize that driving an automobile is the primary means by which this mobility is expressed. While the right to travel has been accorded constitutional protection; e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. Guest, 383 U.S. 745, 757-59 (1966); Otheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Kent v. Dulles, 357 U.S. 116, 125 (1958); Edwards v. California, 314 U.S. 160, 162-63 (1941); see Zemel v. Rusk, 381 U.S. 1 (1965); cf. Hague v. CIO, 307 U.S. 496 (1939); United States v. Wheeler, 254 U.S. 281 (1919); Williams v. Fears, 179 U.S. 270 (1900); Slaughter-House Cases, 31 U.S. (6 Wall.) 36 (1873); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). It is not to be expected that the Court would hold motor vehicle operation to be a constitutional "liberty" or "right" of the individual. The constitutional protection lies in mobility and not its method. However, since the purpose of the motor vehicle is mobility, a Court decision that driving a car is the primary means by which mobility is expressed would have the same effect. The data collected in the Appendix infra leave no doubt that the motor vehicle is, in fact, the overwhelming choice of the American public.

161 Standard No. 5, supra note 77, § 204.4.

162 The right to travel has been accorded constitutional protection; e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. Guest, 383 U.S. 745, 757-59 (1966); Otheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Kent v. Dulles, 357 U.S. 116, 125 (1958); Edwards v. California, 314 U.S. 160, 162-63 (1941); see Zemel v. Rusk, 381 U.S. 1 (1965); cf. Hague v. CIO, 307 U.S. 496 (1939); United States v. Wheeler, 254 U.S. 281 (1919); Williams v. Fears, 179 U.S. 270 (1900); Slaughter-House Cases, 31 U.S. (6 Wall.) 36 (1873); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). It is not to be expected that the Court would hold motor vehicle operation to be a constitutional "liberty" or "right" of the individual. The constitutional protection lies in mobility and not its method. However, since the purpose of the motor vehicle is mobility, a Court decision that driving a car is the primary means by which mobility is expressed would have the same effect. The data collected in the Appendix infra leave no doubt that the motor vehicle is, in fact, the overwhelming choice of the American public.
of the laws. Such a holding would press the NHSB to effectively consider all interests — individual and governmental — and thus truly implement the introductory language of the driver licensing standard noted above.

V. SUMMARY

In 1966, social facts were translated into formal legal policy through congressional recognition that highway safety is a nationwide problem. The thrust of the 1966 legislation was to inject the federal government into the field to provide, if possible, national leadership out of the chaos which claims more lives than the Viet Nam War.

The federal leadership is to be provided by the National Highway Safety Bureau through its power to set national standards designed to press states to create more effective programs to attack the problem; through its power to approve or disapprove state programs which are not in compliance with the national standards; and through its authority to impose financial sanctions on states which do not adopt safety programs which it is willing to approve.168

In developing a philosophy by which to implement its powers, the NHSB decided to promulgate broadly stated goals to which states could aspire rather than specific standards with which the states would be eventually expected to comply.164 Yet it is arguable that Congress expected more precision, uniformity, and strictness than the NHSB provided; for various committee reports and other sources of legislative history suggest that the statutory language may have been intended to have the legal effect of pre-empting the states in certain areas.165 The agency's decision appears to be based on the premise that the statute required compliance with all NHSB standards by January 1, 1969; a more accurate reading of the statute would permit compliance at a later date, so long as the state is making good faith progress toward meeting the standards.

The result of the agency's decision to develop broadly stated goals instead of specific standards is evidenced in the NHSB driver licensing standard.166 In promulgating a standard, the NHSB has the duty to provide responsible leadership while encouraging states to upgrade and unify their driver licensing programs. This responsible leadership would take the form of an NHSB obligation to make a dual evaluation of its licensing standard and state licensing program policies, based upon both

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163 See § I(C) supra.
164 See § III supra.
165 See § II(B) supra.
166 See § IV supra.
the need for greater safety on the highways and the need of individuals to drive motor vehicles in an auto-oriented society. Such responsibility would seem to imply the need for more precise standards in order to achieve uniformity which, in turn, would prevent states from interfering unduly with the need to drive.

Yet the major criticism which may be levelled at the licensing standard is that its components are, in general, not sufficiently precise to achieve more than a modicum of uniformity in state driver licensing programs. Because of the vagueness of the component expressions, state licensing programs may be widely different and yet comply with the literal language of the standard. The broad terminology and vagueness apparently result from the philosophy behind the NHSB standards, which precluded use of its authority to set standards at high levels and grant waivers for non-compliance to states which could not implement the standards immediately.167

In short, NHSB did not actually commit itself to a program of leadership by its driver licensing standard. Hence, NHSB actually retains broad discretion to approve or disapprove individual state driver licensing programs on whatever criteria it chooses to apply. The lack of precision in the standard has the effect of leaving the NHSB in a position of great flexibility with respect to evaluation of individual state licensing program content. Lack of commitment does not serve to promote the strict uniformity of which Congress spoke with respect to standard setting in the field of driver licensing. It is unfortunate that NHSB did not provide stronger leadership in the area of driver licensing through its standard setting function.

Despite our dissatisfaction with NHSB action in the field of driver licensing, it would be inappropriate to fail to recognize that driver licensing is only one facet of the total problem of highway safety which the NHSB must confront. The driver licensing standard is only one of thirteen standards promulgated by the NHSB in its initial attempt to accomplish its task. It should not be assumed from these comments that similar criticisms are inferred with respect to other aspects of the safety agency's program. Perhaps it should be assumed that the NHSB has met its responsibilities in other areas until analysis shows otherwise. The crucial problem of lack of adequate funds for staffing and research may serve in large measure to explain the relative ineffectiveness of NHSB standard setting in the driver licensing field. For these reasons, the question of the general success or failure of the NHSB program remains unanswered; the jury is still out.

167 See §§ III(A) & (B) supra.
I. URBANIZATION OF THE POPULATION

The 1960 census figures indicated that almost two of every three Americans live in metropolitan areas. The population concentration in metropolitan areas is evident in the following percentages of the total population living in Standard Metropolitan Statistical Areas: 1900 — 32 percent; 1920 — 44 percent; 1940 — 51 percent; 1960 — 63 percent. Projections of the metropolitan percentage by 1980 are in the range of 70 percent to 80 percent. The Stanford Research Institute believes the Interstate Highway System will reinforce and accelerate the trend toward metropolitan concentration for the reason that it focuses on the present metropolitan areas and maximizes their accessibility.

II. URBANIZATION OF MOTOR VEHICLES

Since motor vehicles could be expected to be found and used where the population is located and in view of the fact there are relatively few highly populated metropolitan areas, it is interesting to note that 54 percent of the motor vehicles registered in the United States are located in ten states. Furthermore, these ten states include thirteen of the twenty largest metropolitan areas and account for 54 percent of the nation's licensed drivers. In addition, the same states report 53 percent of the annual vehicle miles traveled in the nation and 61...
percent of the total urban and municipal vehicle miles.\textsuperscript{175} However, only 48 percent of the traffic deaths of 1967 occurred there.\textsuperscript{178}

Empirical data is essential to an assessment of the extent to which there is harmony between social fact and social policy. Fortunately, some empirical studies have been made with respect to motor vehicles which should serve to help describe those who use motor vehicles, where the vehicles are located, and how they are used.

In general, it may be said that 79 percent of all American households (48 million) own passenger cars, and 25 percent of them own two or more.\textsuperscript{177} Sixty-two percent of the households owning passenger cars are in metropolitan areas and 38 percent in nonmetropolitan areas. Of the 62 percent in metropolitan areas, 12 percent are in central cities of more than 500,000 population, 16 percent in central cities of less than 500,000 population, and 34 percent in suburbs of metropolitan areas.\textsuperscript{178}

By income groups 63 percent of the nation’s households earning an income of less than $4,000 per year own passenger cars. Ownership in the higher income groups ranges from 76 percent to 95 percent.

Privately owned passenger cars accounted for 80 percent of the total vehicle miles traveled in 1967. Trucks accumulated 19 percent, while all other vehicles combined accounted for 1 percent.\textsuperscript{179} Urban traffic alone accounted for 50 percent of the total vehicle miles, and passenger car operation accounted for 43 percent of that 50 percent. The significance of these figures is that 50 percent of the travel occurred on urban streets which comprise only 14 percent of the total road mileage, and 37 percent occurred on main rural roads which consist of 15 percent of the road mileage. With 87 percent of all travel occurring on 29 percent of the road mileage, it is apparent that the traffic capacity problem is concentrated in a relatively small part of the total road mileage.\textsuperscript{180}

\begin{footnotesize}
\item[175] \textit{Automobile Ass'n, supra note 172, at 49; Dickerson & Corvi, Motor Vehicle Traffic Estimates, 33 Public Roads 148-50 (1965)} [hereinafter cited as Dickerson & Corvi].
\item[176] \textit{National Safety Council, Accident Facts 64 (1968 ed.). But note that Bureau of the Census, supra note 172, at 573, indicates that 50 percent of the traffic deaths of 1966 occurred in these states.}
\item[177] \textit{Automobile Ass'n, supra note 172, at 44.}
\item[178] \textit{Automobile Manufacturers Association, Inc., Automobile Facts and Figures 41-42 (1965). These figures are based on Alfred Politz Research, Inc., National Automobile and Tire Survey (1964) (a sample survey sponsored by Look magazine).}
\item[179] \textit{Automobile Ass'n, supra note 172, at 50, based on Bureau of Public Roads, Table VM-1, 1967; Dickerson and Corvi, supra note 175, at 150.}
\item[180] \textit{Automobile Ass'n, supra note 172, at 50, 52. The definition of urban used in this study included areas within the political boundaries of municipalities, such as cities, boroughs, and villages. A similar Bureau of Public Roads study of 1964, in which state highway officials were asked to estimate the traffic in their states for 1962, defined urban as "an area including and adjacent to a municipality or other urban place having a population of 5,000 or more. . . ." Under this narrower definition, urban traffic was reported as 46 percent of the total vehicle mileage. See also Reck, A Car Traveling People 31 (1960); Smith & Associates, supra note 170, at v.}
\end{footnotesize}
At the request of the Bureau of Public Roads, 24 states conducted empirical research on the uses of passenger cars by their inhabitants between 1951 and 1958. In addition, the Bureau of the Census conducted relevant studies as a part of its 1963 Census of Transportation. The findings tell a great deal about the purposes for which Americans use their motor vehicles.

Combined data for the state studies show that passenger cars are used as follows: 46 percent of the trips and 44 percent of the vehicle miles are for earning a living, including travel to and from work, and related business; 29 percent of the trips and 19 percent of the vehicle miles are for family business, including medical and dental trips, shopping, and miscellaneous purposes; 8 percent of the trips and 4 percent of the vehicle miles relate to educational, civic and religious activities; while 17 percent of the trips and 34 percent of the mileage are social and recreational, consisting of vacations, pleasure rides, and other purposes.

Therefore, 75 percent of the trips of the passenger car and 63 percent of its mileage are directly related to earning a living and family business. Educational, civic and religious activities, along with social and recreational use account for only 25 per cent of the trips, but 37 percent of the mileage.181 It should be noted that rush hour congestion is largely explained by the fact that almost half the trips and vehicle miles are directly related to work, travel, and business. Two-thirds of these trips occur in two or three hours of the day during the working week as travel to and from work.182

In incorporated areas of high population density (population of 100,000 or more), the combined data indicate the following: 51 percent of the trips and 48 percent of the mileage are for earning a living; 26 percent of the trips and 15 percent of the mileage are for family business; 6 percent of the trips and 3 percent of the mileage are for educational, civic and religious purposes; 17 percent of the trips and 34 percent of the mileage are social and recreational. Thus, in highly populated metropolitan areas, 77 percent of the trips of the passenger car and 63 percent of its mileage are directly related to earning a living and family business.183

As for length of trip, the state studies indicated the average distance to the first stop was 8 miles. The breakdown for the above purpose was: earning a living — 8 miles; family business — 7 miles; educational, civic and religious — 4 miles; social and recreational (ex-

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181 AUTOMOBILE ASS'N, supra note 172, at 40; Bostick, The Automobile in American Daily Life, 32 PUBLIC ROADS 243 (1963) [hereinafter cited as Bostick]. In these studies, a "trip" is defined as a one-way movement from starting place to the first stop for one of the purposes shown.

182 AUTOMOBILE ASS'N, supra note 172, at 61; Bostick, supra note 181, at 241.

183 Bostick, supra note 181, at 249.
cluding vacations) — 13 miles. Vacation trip length averaged 296 miles one way. 184

As has been noted, use of the passenger car for work travel is an important part of its function. The state studies disclosed that two out of three of the nation's workers travel to work as drivers or passengers in cars. Fifteen percent use public transportation and 12 percent walk to work. 185 The 1963 Bureau of the Census survey indicated that of all commuting workers, 82 percent travel by passenger car, while 14 percent use public transportation, and 4 percent use other means or walk. In the core cities of Standard Metropolitan Statistical Areas 67 percent of the commuters use cars and 29 percent use transit. Even there, the passenger car is favored by two to one. Outside the core city, commuters favor the passenger car by ten to one. Such widespread selection of the passenger car is said to be due largely to the fact that about 43 percent of the work commuters do not have ready access to mass transit. 186

A 1967 Bureau of the Census survey covered national travel, which was defined as travel by one or more members of a household to and from (a) an out-of-town place for overnight or longer or (b) a place at least 100 miles away. It excluded travel of persons while serving as crews, commuting trips, and travel by military personnel under orders. The findings were that 79 percent of all such trips are by automobile, and they account for 86 percent of the travelers. 187

III. Summary

Such studies as these portray automobile ownership and use as follows: Privately owned automobiles account for 80 percent of all motor vehicle mileage. About half of this travel is on urban streets, and the private automobile accounts for almost all of it. Three-fourths of the nation's households own automobiles of which two-thirds are owned by metropolitan area households. About one-third of the automobiles will be found in the suburbs of the great metropolitan centers, one-third divided between metropolitan central cities of more than or less than 500,000 persons, and one-third in rural areas.

Cars are used primarily for earning a living or for family business, on trips between seven and eight miles in length one way. Only one out of four car trips is for social, educational, or recreational purposes. The

184 Automobile Ass'n, supra note 172, at 40. A 1961 survey by the United States Bureau of the Census showed the average trip length to be 9 miles. Its breakdown was: earning a living — 12 miles; family business — 7 miles; educational, civic, religious — 5 miles; social and recreational — 14 miles.

185 Bostick, supra note 181, at 243.

186 United States Bureau of Census, Passenger Transportation Survey: Home to Work Travel, 1963 Census of Transportation 76, 77 (1965); Automobile Ass'n, supra note 172, at 41.

187 Automobile Ass'n, supra note 172, at 37.
car may be used on a vacation trip which will be about 300 miles one way.

Two-thirds of the nation's workers commute to and from their jobs. Four out of five of these commuters drive or ride in passenger cars. Even in central cities of metropolitan areas, two out of three commuters use cars rather than transit. Of commuters living in suburbs of metropolitan areas, the car is used in a ten to one ratio over transit.