Assessing Changes to Federal and State Law for Megaregion Planning.
Part 1: Defining Federal Constitutional Powers for Megaregion Planning: Recommendations for Transportation Policy

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March 2018

A publication of the US DOT Tier 1 Center:
Cooperative Mobility for Competitive Megaregions
at The University of Texas at Austin

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PRELIMINARY REVIEW COPY

Technical Report Documentation Page

<table>
<tr><td colspan="2">1. Report No.
CM2 Report 1</td><td>2. Government Accession No.</td><td colspan="2">3. Recipient's Catalog No.
ORCID: 0000-0001-5143-9513</td></tr>
<tr><td colspan="3" rowspan="2">4. Title and Subtitle
Assessing Changes to Federal and State Law for Megaregion Planning.
Part 1: Defining Federal Constitutional Powers for Megaregion Planning: Recommendations for Transportation Policy</td><td colspan="2">5. Report Date
March 2018</td></tr>
<tr><td colspan="2">6. Performing Organization Code</td></tr>
<tr><td colspan="3">7. Author(s)
Alexander Hunn and Lisa Loftus-Otway</td><td colspan="2">8. Performing Organization Report No.
CM2-2017-1</td></tr>
<tr><td colspan="3" rowspan="2">9. Performing Organization Name and Address
Center for Transportation Research
The University of Texas at Austin
3925 West Braker Lane
Austin, TX 78759</td><td colspan="2">10. Work Unit No. (TRAIS)</td></tr>
<tr><td colspan="2">11. Contract or Grant No.
USDOT 69A3551747135</td></tr>
<tr><td colspan="3" rowspan="2">12. Sponsoring Agency Name and Address
Center for Cooperative Mobility for Competitive Megaregions
The University of Texas at Austin
310 Inner Campus Drive, Goldsmith Hall, 2.308
Austin, TX 78712</td><td colspan="2">13. Type of Report and Period Covered
Technical Report conducted May 2017-January 2018</td></tr>
<tr><td colspan="2">14. Sponsoring Agency Code</td></tr>
<tr><td colspan="5">15. Supplementary Notes
Project performed under a grant from the U.S. Department of Transportation's University Transportation Center's Program.</td></tr>
<tr><td colspan="5">16. Abstract
Federal and state transportation laws form the foundation of domestic transportation policies. However, as currently drafted federal laws are not sufficiently developed to support a megaregion transportation regime and will require a formalized approach to be created so that MPOs and DOTs can scale efforts beyond traditional boundaries.
This project forms part of a series of analysis of how megaregional planning can be achieved. It analyzed the United States Constitutional powers of spending, regulating commerce and preemption and provided recommendations for how federal law could be used to conduct megaregional planning at a federal level with recommendations for developing transportation policy.</td></tr>
<tr><td colspan="2">17. Key Words
Megaregions, U.S. constitution, constitutional powers, spending power, commerce clause, federal preemption, planning, transportation, megaregion policy.</td><td colspan="3">18. Distribution Statement
No restrictions. This document is available to the public through the National Technical Information Service, Springfield, Virginia 22161; www.ntis.gov.</td></tr>
<tr><td>19. Security Classif. (of report)
Unclassified</td><td colspan="2">20. Security Classif. (of this page)
Unclassified</td><td>21. No. of pages
35</td><td>22. Price</td></tr>
</table>

Form DOT F 1700.7 (8-72) Reproduction of completed page authorized

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Introduction: Megaregions and Federal Transportation Policy

This paper details federal constitutional powers as they pertain to megaregions planning, a burgeoning innovation in the field of transportation development. The paper is divided into three sections, each detailing a federal power, explaining its relevance to transportation, and making recommendations for how best to use it in crafting megaregion policy. Though other powers may at times be relevant, this paper focuses on federal preemption, spending, and commerce powers.

The federal government provides substantial transportation funding. In 1956, the government created the Highway Trust Fund, constituted primarily of gas tax revenues.[1] Today this fund is apportioned for a variety of programs under the Fixing America's Surface Transportation (FAST) Act.[2]

The U.S. Department of Transportation does not directly oversee transportation projects. Rather, the department sets requirements that states and local governments must fulfill to receive federal gas tax money. Generally, these grants require that a city, state, or county provide a percentage of the total cost for a transportation project, with the remaining cost covered by the grant.[3]

Metropolitan Planning Organizations (MPOs) are tasked with determining which projects are eligible for federal funding within specific urbanized areas.[4] Composed of representatives from local jurisdictions and authorities within their authorized area, MPOs create long, medium and short range transportation plans.[5] MPOs have limited control over which specific project in a plan to implement, and must form cooperative organizations to plan outside their jurisdiction.[6]

The current federal transportation structure represents the individual interests of states, cities, and counties. However, it currently lacks the ability to address the nation's increasingly interconnected megaregions. One crucial factor is the very process of defining megaregions. Though most agree that megaregions are sets of geographically proximate and economically entwined urban areas, there remains

[1] Richard F. Weingroff, *Federal-Aid Highway Act of 1956: Creating the Interstate System*, 60 Public Roads Magazine, No. 1 (1996).
[2] See Federal Highway Administration, *Estimated Highway Apportionments under the FAST Act* (2017).
[3] See generally 23 U.S.C.
[4] See 23 U.S.C. § 134(h)(1).
[5] See 23 U.S.C. § 134(d)(3).
[6] See 23 U.S.C. § 134(f-g).

disagreement on how exactly to define these regions and where to draw boundary lines.

To better address megaregions planning, the government must define the boundaries of existing megaregions, craft guidelines for how to connect them, and provide funding streams for megaregion planning and improvements. Federal power is not infinite, however, and to introduce new megaregion legislation it must use power granted by the U.S. Constitution. This paper will discuss the commerce, spending, and preemption powers of the federal government as they might apply to megaregion legislation and administration.

Methodology

Beyond Traffic 2045 suggested that transportation funding be organized around emerging megaregions, while at the same time noting the importance of existing and future challenges of planning across jurisdictional boundaries. According to Beyond Traffic "the mobility challenges of tomorrow cannot be best resolved by adding up silo solutions from individual communities, agencies, or transportation modes. This is because mobility problems occur locally but often originate beyond local jurisdictions crossing regional, state, or even national boundaries. The recognition of megaregions in "Beyond Traffic 2045: Trends and Choices" calls for a megaregional approach to tackle the mobility challenges of tomorrow.

In addition changing trends for millennials and older American's, along with disruptive technologies such as automated and connected vehicles will necessitate new ways of addressing how infrastructure will be developed and delivered in the future. Currently over 51% of the U.S. population lives in 146 counties, which overlap the existing Megaregions almost exclusively. Therefore, changes at multiple levels, including the federal regulatory role that directs planning activities will need to be addressed as the U.S. population continues to urbanize, around the identified megaregions.

As an example, the Texas Triangle is one of the highest growth megaregions in the country, it is critical to apply a megaregion lens to transportation planning to address mobility, equity and economic impact. U.S. Census Bureau population estimates reported a population increase of more than 412,000 people between July 2014 and July 2015 in the four metro areas in the Texas Triangle, 2015 to 2016 census figures show similar growth percentages. The Triangle's anchor cities of Houston, San Antonio, Dallas, Austin and Fort Worth are also the 4th, 7th, 9th, 11th, and 16th largest U.S. cities as of 2014. Texas projections show that by 2050 the Texas Triangle megaregion is expected to see twelve-million people added to

its 2010 baseline. The Texas State Demographer also recently showed that almost two thirds of Texas population lives around and east of the I-35 corridor.

This project – part of a compendium of projects analyzing how federal law and policy could be amended to conduct megaregional planning at the federal, state and local level – provides a groundwork compendium focuses on federal constitutional powers and how they can provide a rationale for federal megaregion planning. The project assesses three main constitutional powers: preemption, spending power and the commerce clause.

The project began by reviewing previous work conducted by Loftus-Otway et al., in the area of law and megaregions. This included a project that was conducted for the USDOTs Federal Highway Administration during 2016 on jurisdictional issues in megaregion planning that had begun to outline matrices of activities that would be needed to be undertaken for megaregion planning. Figure 1.

The project reviewed federal preemption and the spending power case law, and placed a megaregion approach into this lens, to ascertain how much latitude states may have to begin creating megaregion plans. In addition, an analysis of interstate commerce law was undertaken, to determine if megaregion policies can assist in the movement of goods and services and enhance interstate commerce.

The report wraps up with recommendations for how federal constitutional powers could be utilized for megaregion planning and policy development.

After this a traditional legal case law analysis was undertaken for each area to determine the current state of U.S. law, and to provide insight into how megaregion planning could be conducted using existing federal powers. The project also developed a series of recommendations for conducting megaregion planning and policy

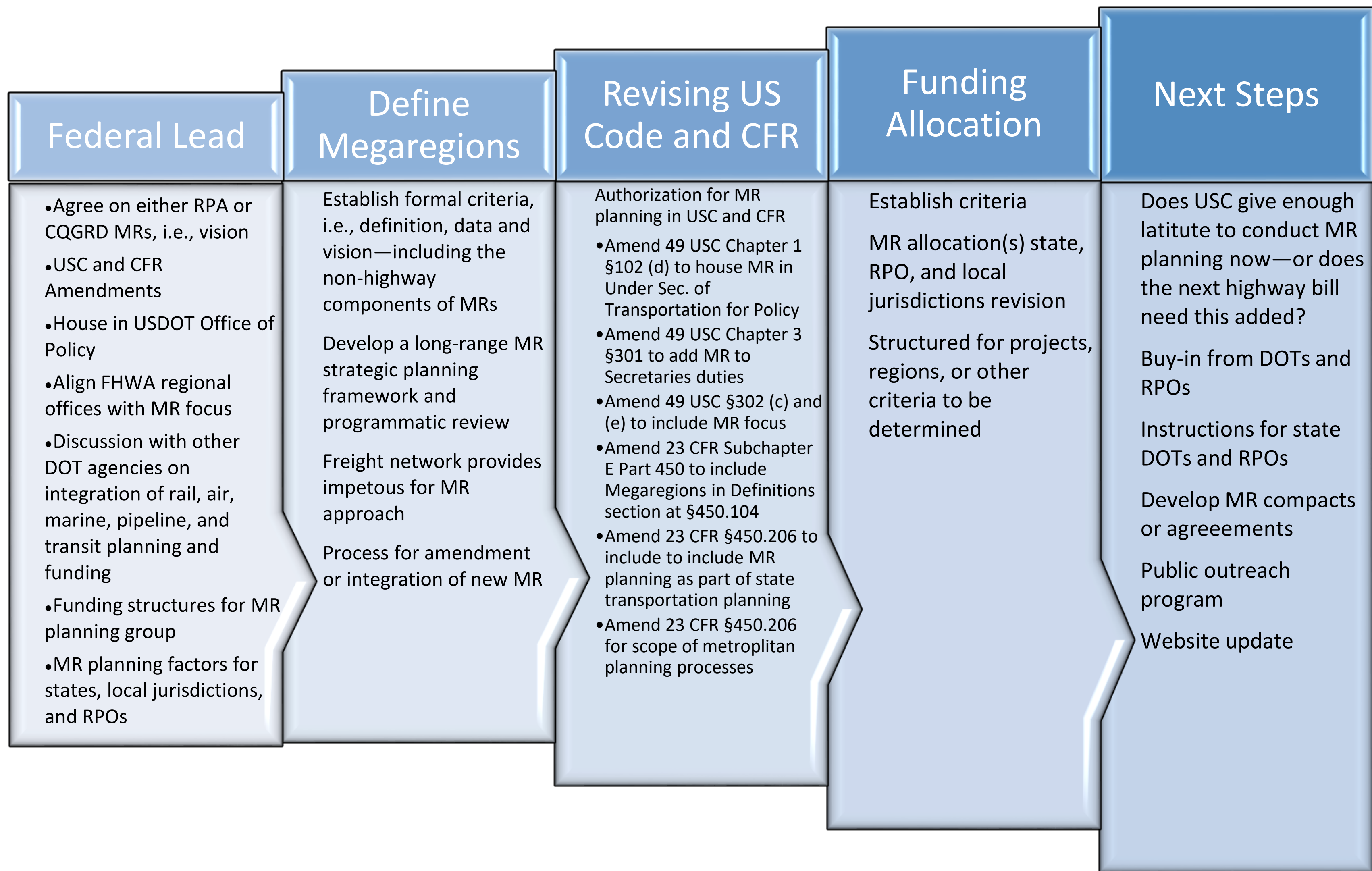

Figure 1: Federal Megaregion Matrix
Source Loftus-Otway et al., January 2017)[7]

[7] Lisa Loftus-Otway, Brian Miller, Robert Harrison, Daniel Marriott and Roger Mingo: Successful Jurisdictional Approaches to Megaregion Planning: Megaregion Policy and Roles at Federal Level. January 31, 2017. Prepared for FHWAOffice Of Policy. Unpublished please contact lead author for details.

Section 1. Preemption

1.1. Summary

Preemption can be a powerful tool for allowing federal oversight of megaregions to prevail over insular local interests, supporting focused top-down planning. Preemption, based on the supremacy clause of the U.S. Constitution, allows federal law to displace state law in any field in which it can constitutionally operate. There are two categories of preemption: express and implied. *Express preemption* refers to a direct statutory bar against state law. *Implied preemption* relies on inferences about how much state autonomy the U.S. Congress intended to allow in carrying out a particular law. The two types of implied preemption are *field preemption*, which prevents states from regulating in a field the federal government has fully occupied; and *conflict preemption*, which renders invalid those state laws that either conflict directly with federal law or stand as an obstacle to the implementation of a federal regulatory scheme. In determining preemption, "the purpose of Congress is the ultimate touchstone in every case."[8]

Preemption can be a powerful tool for allowing federal oversight of megaregions to prevail over insular local interests, supporting focused top-down planning. Preemption, based on the supremacy clause of the U.S. Constitution, allows federal law to displace state law in any field in which it can constitutionally operate

The courts give federal agencies like the US Department of Transportation (USDOT) considerable deference in determining whether state regulation conflicts with federal purposes, though such agencies cannot expressly preempt state law with administrative proclamations. Megaregion planning can be done at many levels, but the presence of a single overarching authority like the federal government helps to overcome collective action problems associated with self-interested states and municipalities. Federal highway and transportation statutes give the USDOT broad powers to coordinate transportation planning and allocate funds for new projects. By adopting a megaregion framework to accomplish existing statutory goals, the USDOT can use preemption to ensure each of the country's megaregion transportation networks develops according to a unified plan that takes into account the interests of each component state and municipality.

[8] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494 (1996).

1.2. Doctrine of Preemption

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land."[9] The federal government has certain powers granted by the constitution, and so long as it acts within these powers it can displace any state law. This section provides a brief summary of preemption doctrine today.

1.2.1. Express Preemption

One way for the federal government to preempt state law is with the inclusion of an express preemption clause. An express preemption clause directly states—sometimes explicitly using the word "preempt"—which state laws are displaced. The clause may use "supersede" or another alternate word instead.[10] An express preemption clause can make determinations easier for a court, but can hardly be considered the end of the story; courts have developed an in-depth doctrine for interpreting these clauses.

Disputes have arisen over how broadly or narrowly to interpret express preemption clauses, which must be resolved by ascertaining Congress's intent in drafting the law. In *Medtronic Inc. v. Lohr*, the Supreme Court noted that even where the language clearly states an intention to preempt some amount of state law, the court must determine precisely how broadly the clause applies.[11] In all preemption cases, and particularly those in fields traditionally occupied by states, courts assume that the historic powers of the states are not preempted except where necessary to achieve legislative goals.[12] Though this standard seems broadly deferential to state interests, in practice the Supreme Court has deferred to states primarily in preserving common law tort actions and favored the federal government instead when it comes to overarching national policy schemes such as immigration.[13]

Express preemption creates a category of state laws displaced by one federal law, but does not make the category exclusive; a statute with an express preemption provision can displace still more state laws through implied preemption.[14] While an express preemption clause may support an inference that Congress did not want to preempt other state laws, it does not foreclose the possibility of implied preemption.[15] In fact, the Supreme Court has held that the possibility of inference

[9] U.S. Const. Art. VI, Cl 2.
[10] 29 U.S.C. § 1144(a) (2015).
[11] 518 U.S. at 484.
[12] See *Id.*
[13] *Id.* at 490-91. Compare with *Arizona v. United States*, 567 U.S. 387, 395 (2012).
[14] *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995).
[15] *Id.* at 288.

should not be construed to place any special burden against implied preemption where it exists.[16]

1.2.2. Implied Preemption

Implied preemption is a category, rather than a discrete form of preemption. Within this category are two sorts of preemption: field preemption, in which the federal government has occupied a field to such an extent as to make any state regulation in the field impermissible; and, conflict preemption, which occurs when a court finds it is impossible to follow both federal and state law simultaneously, or when state law is an obstacle to accomplishing federal policy goals.

1.2.2.1. Field Preemption

Field preemption occurs when a state attempts to regulate in an area the federal government has already substantially regulated. In *Hughes v. Talen Energy Mktg., LLC*, the Supreme Court considered a Maryland law that offered a preferential contract to an in-state energy producer on wholesale prices.[17] However, the preexisting Federal Power Act (FPA) gave price-setting powers on the wholesale energy market to a federal commission tasked with determining fair and reasonable prices for such purchases.[18] Although the FPA did not expressly preclude state regulation of wholesale electricity prices, the Court ruled that the act resulted in the federal government fully occupying the field of wholesale electricity brokerage.[19] While Maryland's scheme did not conflict with the federal one directly, its effect would interfere with the federal government's overarching goal of keeping energy prices down by overseeing the market.[20]

The primary role of field preemption is to allow the federal government to craft a national scheme to deal with a particular issue. Allowing every state to tack on its own rules and regulations would result in "diminish[ing] the [federal government]'s control over enforcement and detract[ing] from the integrated scheme of regulation created by Congress" (internal quotation marks omitted).[21] Field preemption tends to occur in cases that involve broad interstate issues like national markets and immigration policy.[22] In such cases, it serves to eliminate the confusion and unpredictability that results from having a national concern vary significantly in its rules and enforcement between states.

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[16] See *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 872-873; *Arizona*, 567 U.S. at 388-89.
[17] See *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1294-95 (2016).
[18] *Id.* at 1292.
[19] *Id.* at 1297.
[20] *Id.* at 1298.
[21] *Arizona*, 567 U.S. at 402.
[22] See generally *Arizona*, 567 U.S.; *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

1.2.2.2. Conflict Preemption

Conflict preemption, a doctrine preventing simultaneous enforcement of conflicting policies, is sometimes distinguished into impossibility and obstacle preemption. The former occurs when complying with both federal and state regulations would be actually impossible. In *Mutual Pharmaceutical Company v. Bartlett*, the Supreme Court reviewed a situation in which New Hampshire common law required that a harmful side effect be disclosed on the labeling of a drug, but federal law prohibited alteration of the label.[23] Because Mutual Pharmaceutical was not able to follow both the state and the federal law simultaneously, the state law was displaced by impossibility preemption.[24]

The other form of conflict preemption, obstacle preemption, tends to be easier to satisfy: any state policy that stands as an obstacle to the goals of a federal law can be preempted.[25] Often, the courts consider this in light of broad regulatory schemes, making congressional and agency intent an important part of determining obstacle preemption.[26] In the 1980s, the USDOT set requirements for passive safety devices under the authority of the Transportation Code.[27] The USDOT guidelines did not specifically require airbags, listing the device as only one potential alternative for achieving its goal; USDOT wanted to encourage a mixture of different safety devices in the market, rather than mandating a single device, to lower costs and encourage technological development.[28] The Court held that this regulation preempted tort law that would ordinarily allow for a negligence claim against a manufacturer who chose not to install a specific safety feature like airbags, because allowing such a claim would be an obstacle to the federal objective of promoting variety in safety features.[29] Overall, the courts find obstacle preemption whenever a state law makes it more difficult for a federal law to achieve its goals.

1.3. Preemption Power of Federal Agencies

Congress may include statutory express preemption clauses as frequently as it desires. Federal agencies cannot. However, federal agencies like the USDOT have other significant powers in determining which state laws are preempted. The transportation and highway codes give USDOT substantial power and broad flexibility to enact statutory objectives. Preemption protects the full extent of the exercise of these powers as extensions of Congress's statutory mandates: a federal

[23] 133 S. Ct. 2466, 2471-72 (2013).
[24] *Id.* at 2473.
[25] *Arizona*, 567 U.S at 406.
[26] *Id.*, citing *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988).
[27] 49 U.S. Code § 322 (2015); 49 Fed. Reg. 28962 (1984).
[28] *Geier v. American Honda Motor Co, Inc.*, 529 U.S. 861, 875 (2000).
[29] *Id.* at 886.

regulation conflicting with state law preempts in the same way as a statutory provision. Furthermore, federal agencies are often called upon by the courts to give recommendations in preemption cases that frequently determine the outcome.

1.3.1. Preemption of State Law by Agency Regulation

"[A]n agency regulation with the force of law can preempt conflicting state requirements."[30] However, unlike a statute, a regulation cannot preempt by proclamation.[31] When reviewing such cases, the court performs its own conflict determination based on the substantive state and federal law.[32] In the majority of cases, the court sides with the relevant federal agency's interpretation of the law as it applies to preemption.[33]

Though courts have often cited the importance of respecting state police power in finding preemption, in practice courts have given federal agencies substantial discretion in crafting regulatory schemes even when they preempt large amounts of state law. For example, the FPA gives the Federal Energy Regulatory Commission (FERC) authority to set wholesale electric rates according to its own determinations of what is just and reasonable.[34] In subsequent disputes about the law, the Supreme Court has deferred substantially to FERC's judgments about what state activities are obstacles to their objectives.[35] These decisions have greatly diminished state power to regulate energy prices.

In cases of ambiguity regarding an express preemption statute, courts rely heavily on agency experience. The Supreme Court considers the agencies charged with carrying out statutory provisions to be "uniquely qualified" to determine the scope of preemption clauses.[36] To make its determination, the Court references agency regulations,[37] as well as official explanations, *amicus curiae* briefs filed by the agency, and agency history.[38] This gives a federal agency considerable power to influence preemption in its day-to-day operations, by editing regulations, publishing commentaries, and documenting practice. It also gives federal agencies an advantage in court, where they can present the aforementioned evidence as well as submitting *amicus* briefs asserting their position to an already sympathetic court.

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[30] *Wyeth v. Levine*, 555 U.S. 555, 576 (2009).
[31] *Id.*
[32] *Id.*
[33] See *Geier v. American Honda Motor Co., Inc*, 529 U.S. 861, 881; *Medtronic Inc. v. Lohr*, 518 U.S. 470, 495; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 177-178 (1978); etc.
[34] 16 U.S.C. §824e(a) (2015).
[35] See *Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288 at 1290-91 (2016); See also *Miss. Power & Light Co. v. Miss.*, 487 U.S. 354 at 374-375.
[36] See *Medtronic*, 518 U.S. at 496.
[37] *Id.* at 495.
[38] See *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 881-86 (2000).

In aggregate, arguments regarding preemption tend to succeed when backed by a federal agency, especially when the defendant is a business hoping to escape injury liability through application of a more lenient federal law.[39] Arguments in favor of preemption are received most warmly in fields of regulation involving national coordination and planning in areas like energy, transportation, and immigration.[40] In domains more traditionally held by states, such as tort law, preemption is less likely, but the support of a federal agency remains critical for either side to prevail.[41]

1.4. Megaregion Preemption

Though neither the Highways Code nor the Transportation Code explicitly mentions megaregions, USDOT megaregion policy can still reap the benefits of federal preemption. The relevant laws offer considerable flexibility in means to achieve their specific goals. As a result, it is unlikely that new legislation will be necessary to take advantage of preemption for megaregion planning and development. By framing megaregions as the next step in achieving effective intercity and regional transportation goals set out in the statutes, the USDOT can take a lead role in organizing megaregion transportation within and between the states.

The Transportation Code tasks the USDOT with ensuring coordinated and effective administration of federal transportation programs.[42] The Highways Code is one set of programs that can incorporate top-down megaregion planning and development with preemption. Section 101 of this code lists the transportation needs to be addressed by USDOT.[43] Among these are an emphasis on meeting the needs of the twenty-first century and providing safe, efficient, and reliable mobility nationally and intra-regionally.[44] This emphasis encourages the USDOT to craft forward-looking transportation plans based on the most cutting-edge models available, rather than sticking to those specifically referenced in the initial statute. Introducing megaregions as one such model would follow naturally from the USDOT's statutory mandate.

The Highways Code provides explicitly for the creation of MPOs.[45] These organizations are localized to individual urbanized areas, rather than megaregions.[46] The statute requires MPOs to coordinate on improvements that cross multiple

[39] See generally *Geier*, 529 U.S.; *Hughes*, 136 S. Ct; *Medtronic*, 518 U.S.; etc.
[40] See generally *Arizona v. United States*, 567 U.S. 387 (2012), *Geier*, 529 U.S., *Hughes v. Talen Energy Mktg., LLC.*, 136 S. Ct.
[41] See generally *Medtronic*, 518 U.S.; compare with *Geier*, 529 U.S.
[42] 49 U.S.C. §101(b)(1) (2015).
[43] 23 U.S.C. §101(b)(3) (2015).
[44] *Id.*
[45] 23 U.S.C. §134(d) (2015).
[46] 23 U.S.C. §134(d)(1) (2015).

metropolitan areas,[47] and allows for cooperative compacts to be made in pursuit of interstate projects.[48] For the latter, the USDOT reserves the right to alter, amend, or repeal the compacts.[49] Taken together, these statutory provisions suggest an active federal role in coordinating multiregional transportation projects. As a result of megaregion planning fitting naturally and logically into the USDOT's objectives, courts are likely to grant preemption power to prospective megaregion initiatives.

1.5. Preemption power and Megaregion Policy

In the previous section, this paper discussed several statutory provisions containing methods and objectives that can be used in a megaregion context. In order to take advantage of preemption for megaregion development without additional legislation, the USDOT can employ several strategies.

The USDOT should amend agency regulations to include the term "megaregions." For maximum effect, the term should be integrated into existing guidelines as an extension of preexisting programs.

First and foremost, the USDOT should amend agency regulations to include the term "megaregions." For maximum effect, the term should be integrated into existing guidelines as an extension of preexisting programs. The USDOT should also be transparent in including official commentary and explanations that extoll the importance of megaregion theory in planning better national systems of transportation.

Secondly, the USDOT should incorporate megaregion planning into preexisting units of organization, rather than create entirely distinct programs and organizations, to demonstrate practical integration of megaregions into existing statutory objectives. To make this most persuasive, the agency should document all of their megaregion experience. The experience documented should include both practical experience with projects, as well as research done in-house or commissioned from elsewhere. A comprehensive historical picture of the USDOT's use of megaregion theory will support its natural inclusion into the purpose and intent of the statutes and make a stronger case for preemption.

Finally, in the case of litigation, the USDOT should coordinate with the Department of Justice to include the information mentioned above in *amicus* briefs. All of the above information can be gathered together as evidence of the importance of

[47] 23 U.S.C. §134(g)(2) (2015).
[48] 23 U.S.C. §134(f) (2015).
[49] 23 U.S.C. §134(f)(3) (2015).

megaregions in USDOT policy, and help to establish a strong connection between the goals set forth by Congress and the agency's implementation.

To ensure that USDOT policy preempts state and local policy in megaregion development, the agency must show that its actions follow naturally from Congress's intent as expressed in the controlling statutes. As long as it can show a unified strategy well connected with statutory powers and objectives to justify preemption, the agency can craft effective top-down megaregion policies. Preempting state and local policy does not prevent their participation in these projects; it does, however, give the USDOT the final say.

Section 2. Spending Power

2.1. Summary

Incentivizing the development of megaregion infrastructure will require an objective authority positioned above the constituent units of any given megaregion. Because these megaregions span multiple counties, municipalities, and states, the federal government is uniquely capable of administering them equitably. Federal grants provide much of the funding available for highways and other infrastructure development; in order to use grants strategically to encourage integrated megaregion development, the USDOT must be aware of the features and limitations of the federal spending power.

The spending power allows the federal government to use money it collects to provide for the general welfare of the United States. Though the text of the power suggests a broad scope of interpretation, it has several constraints when used to pressure states to follow a particular policy. In order to make funding contingent upon certain state actions, Congress must make clear from the outset what obligations it has attached to federal funding, and those obligations must not be so coercive as to amount to compulsion.[50]

Considering the limitations on federal spending power, the USDOT will not be able to withhold most of the currently available funding contingent on commitment to megaregion planning, except that which can be integrated easily into preexisting statutory objectives. In order to create a substantial and distinct megaregion transportation framework, Congress should pass new legislation that provides some level of new megaregion funding while maintaining most preexisting highway funding.

This paper first outlines the uses and restrictions of the spending power in general, then provides recommendations for how the USDOT can alter its strategy to incorporate megaregions, indicates which grant programs can be most readily applied to megaregion objectives, and identifies those statutory changes Congress can adopt to improve the development of megaregions going forward.

2.2. Outline of the Spending Power

Article 1, §8 of the Constitution states that spending power gives the federal government the authority "to pay the debts and provide for the common defense

[50] See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012).

and general welfare of the United States."[51] Historically, the spending power has been applied to a plethora of federal policies such as purchasing real property, paying employees, and providing grants to state and local governments. Of the possible uses of the spending power, the use of grants to achieve policy goals has been subject to the most litigation and, as a result, the most restrictions. However, federal grants remain one of the most effective tools for crafting national regulatory policies because they allow state and local governments to administer the programs in consideration of superior local knowledge and infrastructure. This section will discuss the current jurisprudence on the legal uses available for the spending power and the restrictions on those uses.

2.2.1. Federal Grant Powers

Policymakers sometimes favor grants, rather than direct federal spending. Several properties of grants make them an attractive option to legislators: grants allow the federal government to delegate decision-making authority to state and local governments, can be made conditional or earmarked for certain purposes, and are subject to a lower level of constitutional scrutiny than direct action.

The Supreme Court has long recognized the federal government's power to grant funds to states, and to make those grants conditional.[52] As opposed to direct federal spending, this policy allows Congress to set directions for fields of policy while leaving considerable autonomy to the states in their implementation.[53] This sort of division between federal and state action has been termed "cooperative federalism."[54] Medicaid in its original iteration is one example of this policy in action.[55] The program sought to provide a medical safety net for the most vulnerable segments of the population; though funded largely by federal money, Congress was able to delegate to the states the ability to tailor the program to their unique citizenries.[56]

Furthermore, the federal government may choose to earmark these funds as necessary to ensure that they are applied in a manner consistent with governmental objectives, or prevent states from earmarking the funds themselves.[57] Congress can

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[51] U.S. Const. art. I, §8
[52] See *Sebelius*, 567 U.S. at 576-77.
[53] See *Id.* at 629.
[54] See *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002).
[55] *Id.*
[56] See generally Nicole Huberfield, *Federalizing Medicaid*, 14 U. Pa. J. Const. L. 431 (2011).
[57] See *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 270 (1985).

set the purposes of the disbursement, or designate a particular authority to do so; in either case, the Supremacy Clause preempts efforts by state and local government to add or subtract conditions.[58] Though an exercise of the spending power, interpreting federal earmarks can easily become a preemption issue; in conflicts with state and local law, designations by Congress will preempt state and local preferences on how to distribute money if those preferences are an obstacle to federal policy.[59]

Grants have another constitutional benefit over direct spending: diminished Tenth Amendment scrutiny. The Tenth Amendment leaves to the states any powers which are not granted to the federal government.[60] The spending power, in requiring only that the money be spent for the general welfare, allows Congress to influence fields in which active regulation can be promulgated only by states.[61] In *South Dakota v. Dole*, the Court held that though Congress may not be able to directly mandate a national drinking age, it could deny 5 percent of federal highway funding to states that did not adopt its recommendation.[62] This holding allows for the federal government to create concrete financial incentives for states to enter into national programs.

2.2.2. Restrictions on the Spending Power

Although the federal spending power provides considerable flexibility, it remains subject to several constitutional restrictions. Grants can provide powerful incentives, but states must have a choice in the process; the federal government cannot directly compel states to do its bidding. The choice offered must be clear, it must be otherwise constitutional, and it cannot be excessively coercive.

Even as part of a federally funded scheme, Congress cannot take control of state employees[63] or demand that states enact certain laws.[64] The Supreme Court has consistently held that Congress cannot require states to govern according to its instructions.[65] In *New York v. Unites States*, the Court held that the federal government could not constitutionally require states to regulate the disposal of radioactive waste, though it could encourage doing so financially.[66] The Court calls

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[58] *Id.* at 257.
[59] *Id.* at 260.
[60] U.S. Const. amend. X.
[61] See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012).
[62] See *South Dakota v. Dole*, *483* U.S. 203, 210 (1987).
[63] See *Printz v. United States*, 521 U.S. 898, 935 (1997).
[64] See *New York v. United States*, 505 U.S. 144, 188 (1992).
[65] See *Id.* at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911).
[66] See *Id.* at 175.

this sort of illegal federal action "commandeering" and has held it to be unconstitutional under the Tenth Amendment.[67]

In order for a conditional grant to be constitutional, Congress must set clear and unambiguous conditions.[68] The provisions must resemble a contract, in that they must be visible such that states can accept them "voluntarily and knowingly."[69] The federal government cannot, therefore, add subsequent terms and conditions that might change the nature of the initial agreement.[70] The Medicaid expansion in the Affordable Care Act violated this by predicating that the delivery of previously granted funds on a state's adoption of new provisions would substantially differ from the terms of the original Medicaid enactment.[71]

A federal conditional grant cannot require the states to take actions that would be otherwise unconstitutional.[72] This test, known as the "independent constitutional bar,"[73] has not been frequently considered by the Supreme Court, and lower courts have interpreted the restriction very narrowly.[74] The court's decision in *Charles v. Verhagen* suggests that this criterion would only act to bar a requirement actively preventing religious practice, or another similar direct violation of rights.[75]

Finally, a federal conditional grant cannot be so coercive as to go beyond pressure, to the point of compulsion.[76] The Supreme Court has given little guidance in how to locate this point, however. One guideline seeks to distinguish between choices which are truly voluntary, and those which are illusory.[77] Though the relative volume of funding a state stands to gain can be a factor, the courts have found the loss of preexisting funding to be more relevant in determining the degree of

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[67] *Id.*
[68] See *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291, 295 (2006) (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).
[69] *Pennhurst*, 451 U.S. at 17.
[70] See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012).
[71] See *Id.*
[72] See *South Dakota v. Dole*, *483* U.S. 203, 206 (1987).
[73] *Id.* at 208.
[74] See *Charles v. Verhagen*, 348 F.3d 601, 609-10 (2003) (upholding statutory protection of religious practices for inmates). See also *ACLU v. Mineta*, 319 F.Supp.2d 69, 81-83 (2004) (upholding restriction on advertisements on public transit receiving federal grants).
[75] See generally *Id.*
[76] See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012).
[77] See *Madison v. Virginia*, 474 F.3d 118, 128 (2006).

coercion.[78] Withholding funding that amounts to only a small percentage of the overall cost of a given program is less coercive,[79] even if that small percentage is the entirety of the federal grant and the rest is covered by the state.[80]

In summary, federal spending power is broad, and subject to less constitutional restriction than other federal powers. Issuing conditional grants allows Congress to pursue policy objectives indirectly in fields that it cannot, or does not desire to, regulate directly. However, Congress and government agencies must take note of which restrictions do exist in crafting grant policy.

2.2.3. General Regulatory Strategies

Without new legislation, the USDOT will be more limited in how it can pursue megaregion planning. It will not be able to develop radically new standards and objectives. To pursue megaregion planning at the agency level, new planning models should be incorporated as an advance in technology for accomplishing current USDOT objectives, rather than a new objective in itself. To accomplish megaregion planning, the department should use current multistate and MPO cooperation rules in pursuit of megaregion-informed policy, coordinated by federal employees.

In crafting new regulations, the USDOT should be aware of the Supreme Court's unambiguous, contract-like spending power standard in addition to ordinary agency rulemaking limitations.[81] Because states have already taken advantage of highway grant money under the original conditions of the FAST Act and previous transportation bills, substantial changes to the terms would risk being seen as an unlawful use of the spending power. However, while the USDOT cannot change the apportionment of the grants, it can account for new information in following the existing criteria by relying on empirical studies that recommend megaregion understanding as a tool in addressing the transportation issues that the current grants seek to remedy. Accordingly, megaregion strategies should be incorporated into current USDOT publications and guidelines.

To incorporate megaregions planning as part of existing objectives, the USDOT should frame it as an advancement in practical technology for modeling and

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[78] *Sebelius*, 567 U.S. at 581 (explaining that despite the low cost to states of the Medicaid expansion, the huge funding loss for refusing makes the new grant coercive).
[79] See *South Dakota v. Dole*, *483* U.S. 203, 211 (1987).
[80] See *Madison*, 474 F.3d at 128 (federal funds only make up 1.3 percent of prison funds, conditional on certain practices regarding inmates).
[81] See *Pennhurst*, 451 U.S. at 17.

addressing transportation issues, rather than as a distinct objective. Congress has limited time and resources and, as a result, agencies like the USDOT can be reasonably expected to keep up with new technologies Congress could not anticipate in the original statute. Framing megaregion policy in this way also allows it to be broadly incorporated into existing programs, rather than being an isolated new segment unable to interact with existing grants.

Current rules allow for the coordination of states and MPOs in addressing megaregion policies. Title 23 contains provisions for interstate compacts,[82] as well as providing for MPOs to cooperate on improvements that span more than one MPO's jurisdiction.[83] The USDOT can use this framework to generate lists of the governments and MPOs constituting each megaregion. These lists can then be used, through the tools provided in Title 23, to generate and enact megaregion plans across the boundaries of multiple states and MPOs. Plans can be provided by the USDOT or by local authorities, but the department will have a necessary role in adjudicating the process to ensure equitable distribution of funds between localities, and ensuring that the process works on the megaregion scale in addition to the local one.

The USDOT should appoint federal employees to oversee coordination in each megaregion for several reasons. First, the USDOT does not have the authority to require state or local government to do so without an act of Congress.[84] Second, few of the national megaregions exist in a single state; as a result, most lack a non-federal governing body that can be trusted to distribute attention and funding equitably between jurisdictions. The state and local governments should be incentivized to contribute voluntarily, allowing federal employees to act with good information about local needs and conditions.

2.2.4. Megaregion Applications of Specific Existing Grants

The FAST Act provides several statutory pathways to megaregion investment. The Surface Transportation Block Grant Program (STBGP) places few constraints on state action, and could be used to set up programs in single-state megaregions, or to fund related development. The National Highways Performance Program (NHPP) gives the USDOT more power, allowing it to set some sort of megaregion requirement. Finally, the Nationally Significant Freight and Highway Projects (NSFHP) fund gives the USDOT considerable power to set a megaregion agenda through competitive grants.

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[82] 23 U.S.C. §134(f)(2)
[83] 23 U.S.C §134(g)(2)
[84] See *New York v. United States*, 505 U.S. 144, 175 (1992).

The NSFHP allows the secretary of transportation broad flexibility to set the criteria for competitive grants. The grants provided under this program are discretionary,[85] and the secretary can freely determine application requirements.[86] The grants under this program can be for the purposes of improving movement efficiency, generating national economic benefits, reducing congestion, and improving connectivity between modes of transportation, as well as several other goals.[87] The specifically listed goals all fit snugly within the purview of megaregion theory. In addition, the statute lists as eligible applicants any "multistate of multijurisdictional group of entities" composed of a combination of states, MPOs, local governments, and other similar bodies, allowing for federal endorsement of megaregion organizations.[88]

The NSFHP does place a few limits on the secretary's flexibility in apportioning these grants. The federal share of assistance with this grant cannot be greater than 60 percent, [89] or 80 percent in conjunction with another federal grant.[90] There is no restriction on how small the grant can be relative to the project, however. The secretary must also determine if the project is viable based on cost, funding, and timetable constraints.[91] Some of the grant must be awarded to small projects[92] and to rural areas.[93] Because megaregions generally include less developed areas between major cities, this requirement may actually facilitate megaregion development. Finally, the statute includes a provision allowing Congress to disapprove a project with a joint resolution;[94] however, the requirement of a majority vote of both houses plus presidential approval makes such an occurrence highly unlikely.[95]

The NHPP gives the USDOT less power over how states can use its funding. The secretary does have the power to determine the appropriate form of the state asset management plan,[96] and those determinations are frequently required in subsequent portions of the statute to ensure that states remain in compliance with its standards.[97]

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[85] 23 U.S.C. §117(c)(1) (2015).
[86] 23 U.S.C. §117(c)(2) (2015).
[87] 23 U.S.C. §117(a)(2) (2015).
[88] 23 U.S.C. §117(c)(1)(H)
[89] 23 U.S.C. §117(j)(1) (2015).
[90] 23 U.S.C. §117(j)(2) (2015).
[91] 23 U.S.C. §117(g) (2015).
[92] 23 U.S.C. §117(e) (2015).
[93] 23 U.S.C. §117(i) (2015).
[94] 23 U.S.C. §117(m) (2015).
[95] See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 958 (1983) (legislative veto unconstitutional unless passed by both houses and signed by president).
[96] 23 U.S.C. §119(e)(4) (2015).
[97] See generally, 23 U.S.C. §119 (2015).

The program allows funding to be applied to a broad array of projects spanning all manner of highway transportation improvements.[98] Because the statute allows for a broad variety of projects, the secretary could easily include requirements that state asset management plans address ways to use the projects in consideration of megaregions within their borders.

The STBGP gives the least flexibility to the USDOT in setting requirements, but it does allow considerable state flexibility to apply it to a variety of projects.[99] A state like Texas, which contains the Texas Triangle megaregion, could use this fund to develop transportation systems. In order to direct the funds strategically in this way, the USDOT will have to set incentives using programs it controls more directly and rely on simple cooperation with state authorities.

Overall, the NSFHP gives the greatest authority to the USDOT to specifically direct megaregion funding. Using this resource, the department should generate a set of grants to be awarded specifically to groups of state and local governments, MPOs, and other such groups that can join together to represent specific megaregions. Using the flexible funding structure provided by the NSFHP, the department can use smaller percentage grants to incentivize projects already eligible for funding under other programs like the NHPP by increasing the overall federal share; this method would allow the department to stretch the limited funding apportioned to the NSFHP to better incentivize the creation of megaregion compacts.

In conjunction with NSFHP incentives, the secretary should require that states containing part or all of a designated megaregion must include said megaregion in their asset management plans. This could include cooperation with the plan of megaregion compacts created by NSFHP incentives. By requiring that states address the priorities and objectives of megaregions within their borders, and providing grants to organizations that address these megaregions, the USDOT can set the groundwork for a forward-thinking transportation strategy.

The options presented in this section can all be achieved without legislative action. By incorporating megaregions using the modest options currently available, the USDOT can foster the growth of institutions, the success of which can be used to justify greater investment. The foundations created by preliminary adoption of megaregion planning will also generate the data and organizational framework required for a larger-scale implementation of these principles in future transportation and infrastructure bills.

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[98] 23 U.S.C. §119(d) (2015).
[99] See generally 23 U.S.C. §133 (2015).

2.3. The Spending Power and Megaregion Policy

Though the USDOT has several options for incorporating megaregion technology into its current framework, comprehensive megaregion development can benefit substantially from congressional recognition. Congress can aid megaregion development by endorsing one particular megaregion designation for the country. It can also greatly improve the USDOT's ability to incentivize development by creating specific grants for megaregion development.

Comprehensive megaregion development can benefit substantially from congressional recognition

Several megaregion models exist, with some variation on how to designate the location and extent of megaregions in the United States.[100] Designating a single official model for megaregion public policy would go a long way toward standardizing perceptions and clarifying the field of megaregion research and development. Congress, being the highest legislative body in the country, has the unique ability to make one model official. Because many megaregions straddle state borders, no other governing body can make an authoritative determination consistent for all states and municipalities within any given megaregion.

Creating megaregion specific grants also requires congressional action. The USDOT cannot freely reapportion its grants to incorporate megaregion specific funds. While incorporating megaregion technology into currently existing programs is an option currently available to the USDOT, creating an independent fund would help to address issues that may not fit in cleanly with the current framework. With dedicated megaregion funding, the USDOT could create interstate committees beyond the limited scope of current cooperation statutes, incorporating representatives from state and local government as well as MPOs. In addition, the department could make conditional grants to match state funds dedicated to projects that conform with megaregion transportation plans.

The spending power does somewhat limit Congress's ability to reapportion funding. The Supreme Court has held that Congress can only withhold limited amounts of preexisting funding contingent on new commitments.[101] As a result, a megaregions act would likely only be able to condition five to ten percent of preexisting funding on the adoption of new requirements.[102] Congress can, however,

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[100] Catherine L. Ross, Myungje Woo, & Jason Barringer, THE PHYSICAL AND FUNCTIONAL DELINEATION OF MEGAREGIONS (2009).
[101] See *South Dakota v. Dole*, *483* U.S. 203, 211 (1987).
[102] See generally *Id.*

add on funding for megaregions specifically without issue so long as it doesn't hold preexisting funding hostage to new conditions. A megaregions act in Congress might set aside five percent of current highways funding, add an additional 10 percent in new appropriations, and condition the sum in part on participation in newly created megaregion committees and in part on a payment-matching model for undertaking projects set out by megaregion plans.

By following the above guidelines, Congress can create an effective megaregions policy that allows the USDOT considerable flexibility to address megaregion development while remaining within the bounds of constitutional legality.

Section 3. Commerce Clause

3.1. Summary

The Commerce Clause of the United States Constitution gives Congress substantial powers to control economic activity in the country. It allows the federal government to regulate the channels and instrumentalities of interstate commerce, and to regulate activities that substantially affect this commerce. Using the Commerce Clause, Congress has broad authority to outlaw activities that interfere with commerce and to set up regulatory schemes for markets. However, the Commerce Clause does not permit Congress to compel action from states or citizens; other powers work more effectively to motivate action.

Solutions to the challenge of megaregion transportation development favor encouraging action over preventing it. While the USDOT certainly prefers some types of development more than others, additional investment and engagement of any sort is a net benefit that should not be discouraged. For increasing transportation investment according to national objectives, selective grants made using the Taxing and Spending Power Clause are more effective than restrictions created using the Commerce Clause.

The Commerce Clause can be effectively used to achieve several USDOT goals, such as allowing Congress to promulgate a single definition of the nation's megaregions. It also allows for the passage of laws preventing state transportation policies that would endanger transportation equity, burden the environment, or create safety risks. This section will discuss the scope of the Commerce Clause and its limitations, and demonstrate how it can be applied to federal megaregion policy.

3.1.1. Scope of the Federal Commerce Power

The Commerce Clause is defined within the Constitution as the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."[103] In furtherance of this power, Congress has the authority to make "all Laws which shall be necessary and proper" in its execution.[104] Taken together, these clauses give Congress a flexible power to affect any kind of commerce or commerce-related activity in the country.

[103] U.S. Const. Art I, § 2, Cl. 3.
[104] U.S. Const. Art. I, § 2, Cl. 18.

To define the strength of the commerce power, it is important to define what qualifies as "interstate commerce" subject to regulation. Current jurisprudence has settled on three categories Congress may regulate:[105]

1) Congress can regulate channels of interstate commerce.
2) Congress can regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce.
3) Congress can regulate activities that substantially affect interstate commerce.

The power to regulate channels of interstate commerce has a long history. In *Gibbons v. Ogden*,[106] the Court ruled that navigable waters within the United States are channels of commerce, subject to federal regulation. Therefore, the federal government can by law determine who is allowed to sail a given waterway, and what requirements to place on maritime commerce along those channels.[107] Railroads are another channel of interstate commerce; in the Shreveport rate cases, the Court determined that the commerce clause gives the federal government power to regulate prices for both interstate and intrastate routes, because of the effect of intrastate routes on interstate commerce generally.[108] Other channels of interstate commerce include airports, pipelines, and highways.[109]

The second power listed by the Court allows Congress to regulate instrumentalities of commerce, as well as persons and things in interstate commerce. An instrumentality is a facility or object that plays a substantial role in moving persons and things in interstate commerce, such as a railroad terminal, airport, or bridge.[110] Such an instrumentality may be located in only one state, and may be used in both intra- and interstate commerce.[111] In *Heart of Atlanta Motel v. United States*, the Supreme Court determined that the substantial influence of hotels in aggregate on interstate commerce made them such an instrumentality and therefore subject to civil rights law.[112] Persons and things in interstate commerce have not received the same level of definition, but the Court suggests a federal law punishing theft from interstate shipments as an example of such a regulation.[113]

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[105] *Gonzalez v. Raich*, 545 U.S. 1, 16-17 (2005).
[106] 22 U.S. 1, 197 (1824).
[107] See generally *Id.*
[108] Houston, E. & W. Tex. R. Co. v. United States, 234 U.S. 342, 358-59 (1914).
[109] 29 C.F.R. § 776.29(a) (2017).
[110] 29 C.F.R. § 776.29(b) (2017).
[111] *Id.*
[112] See generally 379 U.S. 241 (1964).
[113] See *Perez v. United States*, 402 U.S. 146, 150 (1971) (citing 18 U. S. C. § 659 (2012)).

The third and most expansive purview of the commerce power granted by the Court is the ability to regulate anything that substantially affects interstate commerce. In determining whether the effect is substantial, courts consider not just the action in question, but also the aggregate effects of all such actions nationwide.[114] Regardless of whether the activity is local or commercial, or whether its effect on commerce is direct or indirect, it can be regulated so long as the effect on interstate commerce is substantial.[115] This power has been used to regulate wheat production,[116] home-grown medical marijuana,[117] and even illegal loan-sharking.[118] This power is uniquely broad in scope, but has also been subjected to the greatest scrutiny.

Overall, the Commerce Power grants significant flexibility to achieve its enumerated grant of power to regulate commerce. These regulations can take many forms, and reach activities within states that are themselves somewhat removed from commerce. In the current era, however, the Commerce Clause is not an open grant of power; recent jurisprudence has scrutinized and rejected decisions that stray too far from the clause's enumerated purposes.

3.1.2. Restrictions on the Commerce Power

Although the commerce power allows for a broad variety of regulation, the Supreme Court has outlined non-trivial restrictions of its use. Laws that govern actions not substantially related to interstate commerce are invalid, as well as those that regulate inaction rather than action. This selection will briefly overview how the Supreme Court defines these restrictions.

Congress has attempted to use the Commerce Clause power to justify the passage of new criminal laws several times, only to be repudiated by the Supreme Court.[119] Congress may regulate commerce for non-commercial purposes, as in the case when it banned interstate sale of lottery tickets,[120] or it may regulate non-commercial activities for commercial ends, as when it capped wheat production for private consumption.[121] However, the Court has held that the activity being regulated must substantially affect commerce.[122]

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[114] See *Wickard v. Filburn*, 317 U.S. 111, 127-128 (1936).
[115] See *Id.* at 124-25.
[116] See generally *Ib.*
[117] See generally *Gonzalez v. Raich*, 545 U.S. 1 (2005).
[118] See *Perez*, 402 U.S. at 156-57.
[119] See generally *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).
[120] See *Champion v. Ames*, 188 U.S. 321, 357-358 (1903).
[121] See *Wickard v. Filburn*, 317 U.S. 111, 125 (1936).
[122] See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

No easy standard exists to determine what activities substantially affect commerce, and which do not. However, the Supreme Court considers several factors:[123]

- Whether the activity being regulated is commercial in nature.
- Whether the statute includes a jurisdictional element relating the regulated activity to interstate commerce.
- Whether legislative history demonstrates any findings as to the activity's effect on interstate commerce.
- The degree of attenuation between the activity and its effect on commerce.

The Court considers every factor, but no single factor is necessarily decisive.[124] In addition to those listed above, the Supreme Court may consider other factors, such as whether the proposed law intrudes upon traditional areas of state control such as education or family law.[125]

Another restriction on the Commerce Clause, expressed recently in the litigation stemming from the Affordable Care Act, is the prohibition against federal regulation of inactivity.[126] In his decision, Chief Justice Roberts emphasized that *Wickard v. Filburn* (restricting wheat production) set the outer bounds of the federal commerce power.[127] Noting that inaction can have an equally substantial effect on commerce to action, the Chief Justice nonetheless drew a hard line prohibiting the former—a distinction likely to apply well into the future of Commerce Clause jurisprudence.[128] In the example that set this standard, the Court held that while the Commerce Clause allows the federal government to set rules regarding the price of insurance, and specify the sorts of care to be provided, it does not allow the government to compel anyone to actually buy insurance.[129] Notably, however, the Court still upheld the "mandate" to buy health insurance as part of the taxing power.[130]

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[123] See *Morrison*, 529 U.S. at 610-612.
[124] See *Id.* at 609
[125] See *Id.* at 615-16.
[126] See *Sebelius*, 567 U.S. at 552.
[127] See *Id.* at 552-53 (citing *Wickard v. Filburn*, 317 U.S. 111 (1936)).
[128] *Id.* at 555.
[129] See generally *Id.*
[130] *Sebelius*, 567 U.S. at 562-63.

3.2. The Commerce Clause and Megaregion Policy

The Commerce Clause gives the federal government considerable power to set standards in any field related to interstate commerce. Megaregions, being interconnected as they are by trade and transportation, fit snugly into the purview of commerce legislation. However, the Commerce Clause cannot be used to compel action, and therefore lacks the ability to independently encourage new development. In addressing megaregions, this power should be used to set standards designed to encourage long-term development that prioritizes congestion reduction, safety, and environmental responsibility. It can also be used to set national standards identifying megaregions, and to encourage cooperative action in multistate areas.

The Commerce Clause gives the federal government considerable power to set standards in any field related to interstate commerce. Megaregions, being interconnected as they are by trade and transportation, fit snugly into the purview of commerce legislation.

Feuding jurisdictions create a substantial barrier to large-scale development plans, especially without systems in place to cooperatively plan and apportion funds.[131] Megaregion development can substantially benefit from a fair mediator who can adjudicate disputes from a non-biased position, and an established venue for cooperation. For disputes that cross state lines, the federal government fits naturally into the role of mediator. Using the commerce power, the federal government can set rules and create venues for cooperation between jurisdictions in shared megaregions.

Congress can also use the commerce power to set national objectives and guidelines. Foremost among these is the designation of what constitutes a megaregion, and identifying the extent of each individual megaregion within the country. Avoiding conflict between myriad megaregion models will improve the ability of state and municipal governments to harmonize their development plans.

The federal government can use the commerce power to set minimum standards. Such standards could include requirements for what sort of materials and features must be included on newly built roads, environmental and congestion mitigation requirements for new development, equity safeguards for less-represented communities, and other such features.

[131] Arthur C. Nelson, *Megaregion Projections 2015 to 2045 with Transportation Policy Implications*, 2654 Journal of the Transportation Research Board 11, 11 (2017).

Though powerful, the negative, preventative nature of the Commerce Clause makes it a poor fit for megaregion planning generally. Differences in terrain, weather, local population, and other variables make setting national standards difficult. Restrictive micromanagement of new development may have the opposite of the desired effect by discouraging this development with complicated rules. Usually transportation and infrastructure development of any kind is a net positive for the country, and the most effective path to reaching the right sort of development will inevitably rely on local actors with knowledge of local circumstances. Increasing federal oversight in enforcing standards adds additional cost to all parties involved, and will likely only pay dividends in specific situations where state borders and other divisions create collective action problems.

The power to tax offers another alternative to heavy-handed Commerce Clause regulation for megaregion strategy. As expressed in the *Sebelius* holding, tax penalties can be used in place of a mandate that would not survive Commerce Clause scrutiny.[132] Recent Supreme Court jurisprudence seems to suggest that a tax-penalty/spending-incentive strategy is a more resilient way to encourage cooperation with federal plans than a Commerce Clause strategy.

As a result of the inherent utilities and disutilities of the Commerce Clause, it should likely be used only in a supporting role for megaregion development. For most purposes, the Taxing and Spending Power Clause offers more flexibility and efficiency in encouraging development according to broad policy goals.

[132] *Sebelius*, 567 U.S. at 562-63.

Conclusions

The current federal transportation structure represents the individual interests of states, cities, and counties. However, it currently lacks the ability to address the nation's increasingly interconnected megaregions. To better address megaregions planning, the government must define the boundaries of existing megaregions, craft guidelines for how to connect them, and provide funding streams for megaregion planning and improvements. Federal power is not infinite, however, and to introduce new megaregion legislation it must use power granted by the U.S. Constitution.

This paper discussed the commerce, spending, and preemption powers of the federal government as they might apply to megaregion legislation and administration and found:

Preemption

- Preemption can be a powerful tool for allowing federal oversight of megaregions to prevail over insular local interests, supporting focused top-down planning. Preemption, based on the supremacy clause of the U.S. Constitution, allows federal law to displace state law in any field in which it can constitutionally operate.
- Though neither the Highways Code nor the Transportation Code explicitly mentions megaregions, USDOT megaregion transportation policy can still reap the benefits of federal preemption. It is unlikely that new legislation will be necessary to take advantage of preemption for megaregion planning and development.
- By framing megaregions as the next step in achieving effective intercity and regional transportation goals set out in the statutes, the USDOT can take a lead role in organizing megaregion transportation within/between the states.
- The USDOT should amend agency regulations to include the term "megaregions." For maximum effect, the term should be integrated into existing guidelines as an extension of preexisting programs.
- To ensure that USDOT policy preempts state and local policy in megaregion development, the agency must show that its actions follow naturally from Congress's intent as expressed in the controlling statutes. As long as it can show a unified strategy well connected with statutory powers and objectives to justify preemption, the agency can craft effective top-down megaregion policies.

Spending Powers

- Incentivizing the development of megaregion infrastructure will require an objective authority positioned above the constituent units of megaregions. As megaregions span multiple counties, municipalities, and states, the

federal government is uniquely capable of administering them equitably. The Spending Power allows USDOT to use targeted funding streams to incentivize specific megaregion policy goals of cooperation between jurisdictions and investment in large intercity transportation projects.

- The USDOT has several options for incorporating megaregion technology into its current framework, but comprehensive megaregion development can benefit substantially from congressional recognition. Congress can aid megaregion development by endorsing one particular megaregion designation for the country. It can also greatly improve the USDOT's ability to incentivize development by creating specific grants for megaregion development.
- While incorporating megaregion technology into currently existing programs is an option currently available to the USDOT, creating an independent fund would help to address issues that may not fit in cleanly with the current framework. With dedicated megaregion funding, the USDOT could create interstate committees beyond the limited scope of current cooperation statutes, incorporating representatives from state and local government as well as MPOs.

Commerce Clause

- The Commerce Clause gives the federal government considerable power to set standards in any field related to interstate commerce. Megaregions, being interconnected as they are by trade and transportation, fit snugly into the purview of commerce legislation. However, the Commerce Clause cannot be used to compel action, and therefore lacks the ability to independently encourage new development.
- In addressing megaregions, this power should be used to set standards designed to encourage long-term development that prioritizes congestion reduction, safety, and environmental responsibility. It can also be used to set national standards identifying megaregions, and to encourage cooperative action in multistate areas.
- Congress can use the commerce power to set national objectives and guidelines. Foremost among these is the designation of what constitutes a megaregion, and identifying the extent of each individual megaregion.
- Avoiding conflict between myriad megaregion models will improve the ability of state and municipal governments to harmonize their development plans.
- The federal government can use the commerce power to set minimum standards. Such standards could include requirements for what sort of materials and features must be included on newly built roads, environmental and congestion mitigation requirements for new development, equity safeguards for less-represented communities, and other such features.

Going forward, the Spending Power will continue to be the strongest tool the federal government can use to affirmatively shape American transportation planning and investment. However, legislators and administrators should consider the powers granted through the commerce and preemption clauses to set standards, increase flexibility, and break down state and local barriers for megaregional transportation development. Within the scope of its enumerated powers, the federal government can create the framework for 21st century megaregion development to occur at all levels of American government.

Assessing Changes to Federal and State Law for Megaregion Planning. Part 2: Can MPOs Can Lead American Megaregion Policy in the 21st Century? A critical analysis

Alexander Hunn & Lisa Loftus-Otway
March 2018

A publication of the US DOT Tier 1 Center:
Cooperative Mobility for Competitive Megaregions
at The University of Texas at Austin

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PRELIMINARY REVIEW COPY

Technical Report Documentation Page

1. Report No. CM2 Report 2	2. Government Accession No.	3. Recipient's Catalog No. ORCID: 0000-0001-5143-9513
4. Title and Subtitle Assessing Changes to Federal and State Law for Megaregion Planning. Part 2: Can MPOs Can Lead American Megaregion Policy in the 21st Century? A critical analysis		5. Report Date March 2018 6. Performing Organization Code
7. Author(s) Alexander Hunn, Lisa Loftus-Otway		8. Performing Organization Report No. CM2-2017-2
9. Performing Organization Name and Address Center for Transportation Research The University of Texas at Austin 3925 West Braker Lane Austin, TX 78759		10. Work Unit No. (TRAIS) 11. Contract or Grant No. USDOT/69A3551747135
12. Sponsoring Agency Name and Address Center for Cooperative Mobility for Competitive Megaregions The University of Texas at Austin 310 Inner Campus Drive, Goldsmith Hall, 2.308 Austin, TX 78712		13. Type of Report and Period Covered Technical Report conducted May 2017-January 2018 14. Sponsoring Agency Code

15. Supplementary Notes
Project performed under a grant from the U.S. Department of Transportation's University Transportation Center's Program.

16. Abstract
Federal and state transportation laws form the foundation of domestic transportation policies. However, as currently drafted federal laws are not sufficiently developed to support a megaregion transportation regime and will require a formalized approach to be created so that MPOs and DOTs can scale efforts beyond traditional boundaries.
This project part 2 of a series of analysis of how jurisdictional and legal elements for how megaregional planning can be achieved. It analyzed how MPOs could conduct megaregion planning under the constraints of existing federal laws and regulations. MPOs Since their inception, MPOs have gained much of the necessary authority and competence to coordinate effective transportation plans for their jurisdictions. This project trough statutory and regulatory analysis, along with targeted interviews of MPO staffers provides examples of how MPOs are currently conducting megaregion, and regional planning activities, and how provides recommendations for MPOs moving forward.

17. Key Words Megaregions, United States Federal Code, United States Code, Code of Federal Regulations megaregion planning, Metropolitan Planning Organizations, regional planning, transportation, megaregion policy.	18. Distribution Statement No restrictions. This document is available to the public through the National Technical Information Service, Springfield, Virginia 22161; www.ntis.gov.

19. Security Classif. (of report)	20. Security Classif. (of this page)	21. No. of pages	22. Price
Unclassified	Unclassified	19	

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1. Introduction

The United States has seen a long period of migration, urbanization, and modernization that has fundamentally changed the distribution of people and development in the country. However, the political subdivisions have remained largely unchanged since the beginning of the 20th century; they represent a dispersed and rural country divided roughly into states. As the country progresses further into the 21st century, this model has become increasingly unrepresentative when most of the U.S. population lives and works in metropolitan areas and multi-city regions bonded by economic, cultural, and geographic connections that may not map to state or local borders at all.

Clusters of cities in geographic regions have existed since economic industrialization. Gottman, in 1961, identified a large, interdependent region ,linked by ties outside its metropolitan boundaries along the urban corridor between Boston and Washington D.C.[1] He proposed that economic, transportation, and communication linkages made these metropolitan areas a single functioning region.

Figure 1 shows the striking contrast of population density across the U.S., as over half of U.S. residents live in 9 states (California, Texas, Illinois, Michigan, Ohio, Pennsylvania, New York, Georgia, and Florida)[2] and 50.1 percent of the U.S. population lives within 244 counties.[3] Most notable is the overlay of the identified megaregions with these counties, which for the most part align with the megaregions of Cascadia, California, Arizona Sun Corridor, Texas Triangle, Central Plain Midwest, Piedmont Atlantic, Florida, DC-Virginia, and the Northeast.

Planning for metropolitan areas requires significant coordination, sometimes between hundreds of local governments for the various counties, cities, towns, and other such subdivisions. In response to this challenge, the 1962 Highways Act created metropolitan planning organizations (MPOs) as a means of coordinating

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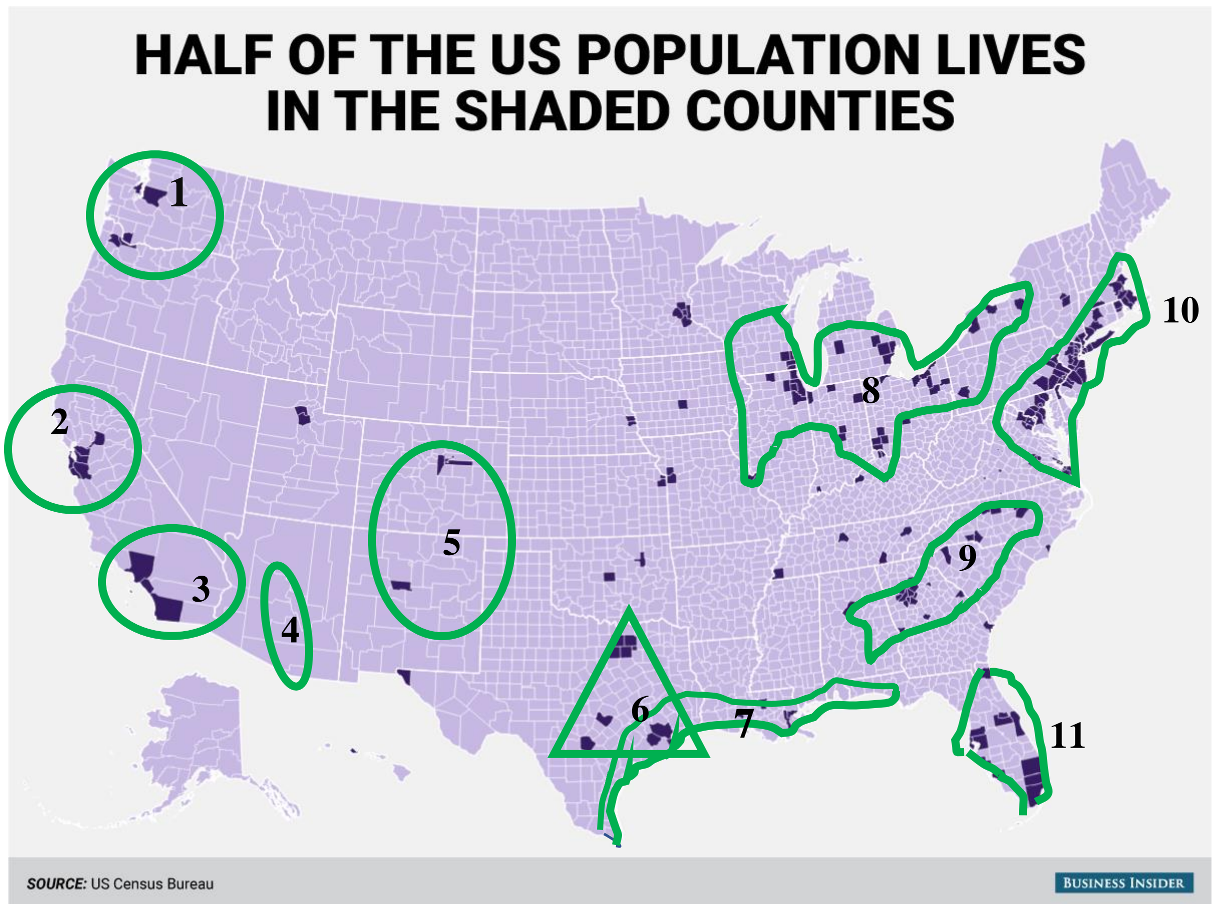
[1] Gottman Jean. (1961). Megalopolis: The Urbanized Northeastern Seaboard of the United States. MIT Press, Cambridge: MA.

[2] Fu, Florence and Weller, Chris. Half the U.S. Population Lives in these 9 States. Business Insider June 22, 2016. Accessed at: http://www.businessinsider.com/half-of-the-us-population-lives-in-just-9-states-2016-6

[3] Kiersz, Andy. Half the U.S. Population Lives in the 244 Super-Dense Counties. Business Insider, July 21, 2015. Accessed at: http://www.businessinsider.com/densest-counties-in-america-2015-7

improvements in these critical urbanized areas.[4] Since their inception, MPOs have gained much of the necessary authority and competence to coordinate effective transportation plans for their jurisdictions.[5]



Key: The dark purple areas indicate the 244 counties. The 11 megaregions are outlined in green, and are keyed by number:

1	2	3	4	5	6	7	8	9	10	11
Cascadia	Northern California	Southern California	Arizona Sun Corridor	Front Range	Texas Triangle	Gulf Coast	Great Lakes	Piedmont Atlantic	Northeast	Florida

Source: Kiersz, 2015

Figure 1: The 244 Counties Home to 50.1% of U.S. Population, with Overlay of the 11 Megaregions

Though MPOs have made great strides at making order out of chaos in their own jurisdictions, increasing interconnection *between* multiple metropolitan areas has created a new set of problems they have only limited power to address. In the 21st

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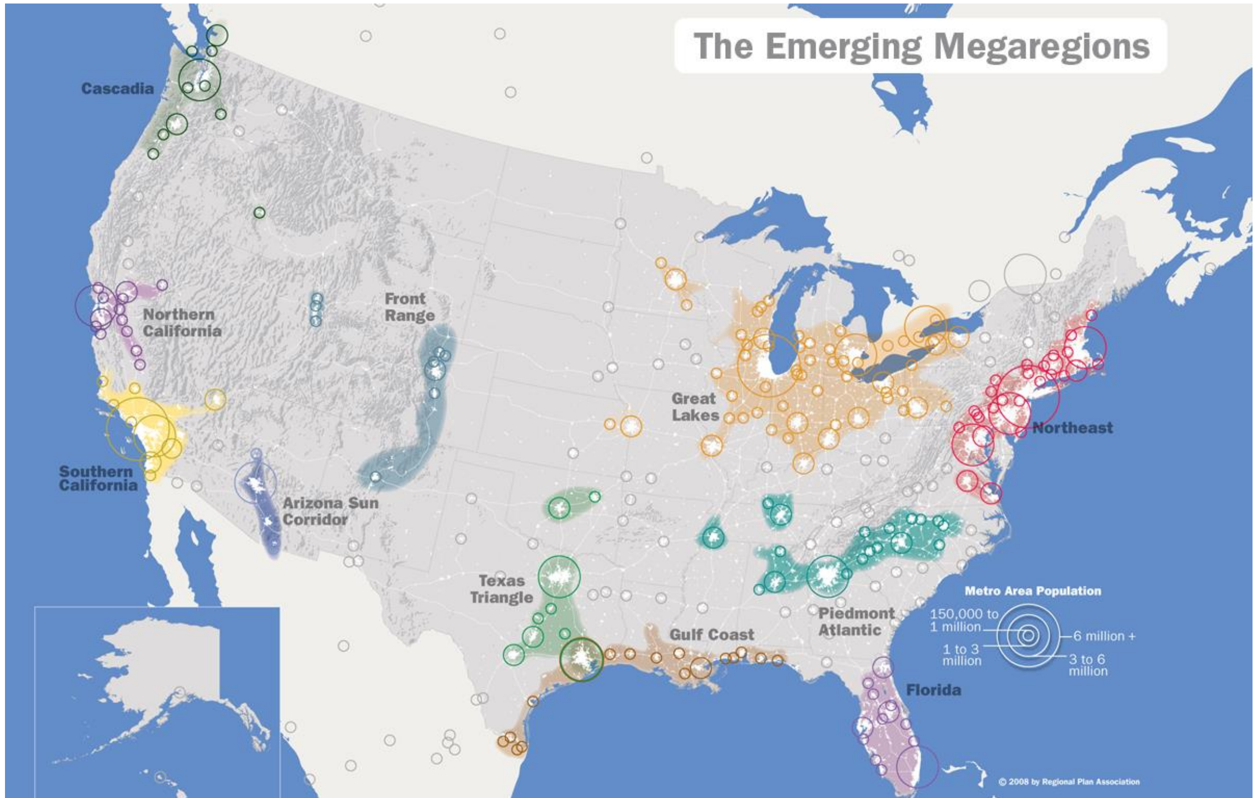
[4] See Federal-Aid Highway Act of 1962 §9, 87th Congress (The text mandates cooperative planning, without naming MPOs explicitly. The bill added §134 to Title 23, which now describes MPOs explicitly).

[5] See generally 23 U.S.C. §134.

century, a new concept of "megaregions" has emerged to describe these large interconnected areas.

According to America 2050 (a national infrastructure planning and policy program), megaregions are defined by environmental systems and topography, infrastructure systems, economic linkages, settlement patterns and land use, and shared culture and history.[6] Figure 2 outlines America 2050's current mapping of the U.S. megaregions.



Source: America 2050

Figure 2: America 2050 Definition of Megaregions

While MPOs have the capability to coordinate with other governments and MPOs outside their jurisdictions,[7] the current structure does not allow for sufficient consideration of intercity projects. MPOs cannot generally undertake projects beyond their borders, adding additional hurdles to large projects aimed at connecting major cities separated by rural areas not incorporated into their jurisdictions.[8]

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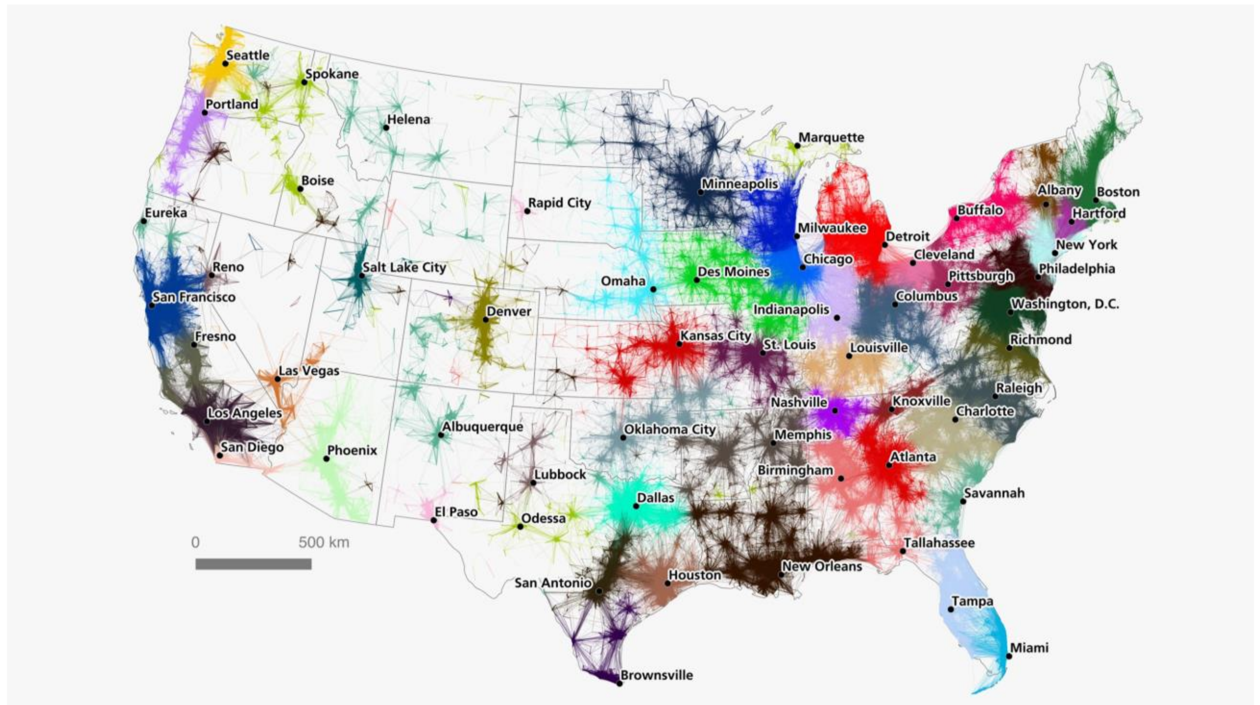
[6] See www.america2050.org

[7] 23 U.S.C. §134(i)(5), 23 U.S.C. §134(g)(2).

[8] Telephone interview with North Central Texas Council of Governments (July 18, 2017). See also U.S.C. §134 (j)(1)(A).

Maps created by Garrett Dash Nelson and Alasdair Rae in 2016 also show that American commutes are not only local but interregional and megaregional (Figure 3), extending beyond a single given city, so finding new ways to create policies for the new commuting landscape has never been more paramount.[9]



Source: Aarian Marshall, Wired, 2016

Figure 3: Commuting Maps in the U.S. Reveal we All Live in Megaregions Not Cities.

A first look might suggest creating a new class of organizations, each with jurisdiction over a federally designated megaregion. This sort of solution is subject to the same pitfall that made previous political solutions ineffective—just as the "cities" and "towns" and "villages" of previous centuries no longer properly reflect the real boundaries of how Americans live, any federal designation of megaregions would fail to allow for natural changes over time. It would also constrict into arbitrary boundaries a system of relationships between metropolitan areas more complicated than can be represented in a single map.

Instead of imposing a series of subdivisions from the top down, this paper will outline a series of policy recommendations aimed at taking advantage of the superior expertise of MPOs to create flexible cooperative subdivisions for specific projects and initiatives. As the situation requires, cooperation could take place over

[9] Aarian Marshall. Mesmerizing Commute Maps Reveal We All Live in Mega-Regions, Not Cities. Wired: Transportation December 2, 2016. Accessed at: https://www.wired.com/2016/12/mesmerizing-commute-maps-reveal-live-mega-regions-not-cities/

the long or short term, and would not have any arbitrary restriction to remain within a particular delineated megaregion boundary. Dallas would be able to effectively cooperate with other cities in the Texas Triangle, but also be able to work just as well with Shreveport or Tulsa.

The critical elements of this policy involve improving the reach of MPOs to undertake projects outside their jurisdiction, facilitating coordination between governmental organizations, and creating new funding streams specifically for cooperative projects.

2. Historical Responses to Changing Transportation Needs

In the 20th century, the United States changed drastically from a majority-rural to a heavily urbanized society. The percentage of the population living in urban areas doubled from about 40 percent to nearly 80.[10] Many factors convened to cause this change, including access to jobs and services, education and technology.

Further, the 20th century saw massive growth in the overall population of the United States. From 1900 to 2000, the population grew from 76 million to 308 million, over quadrupling in size over a single century.[11] This massive boom in population, combined with an intensification into compact metropolitan areas, created new and significant transportation problems.

The most significant policy created to address these problems came in the form of the Federal-Aid Highway Act of 1956. Made possible in part by the empowering of the federal government achieved by the New Deal legislation, this act was in its time the largest federal action ever taken in the field of transportation.[12] Recognizing the need for an effective network connecting communities across the country, the Federal-Aid Highway Act provided for the construction of 41,000 miles of interstate highways.[13]
Recognizing the need for greater local planning, six years later Congress passed the Federal-Aid Highways Act of 1962. This act created a framework for metropolitan planning in urbanized areas, generating the organizations that would develop into today's MPOs.[14] Decades later, the Intermodal Surface Transportation Efficiency

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[10] U.S. Census, 2010, Table 10.
[11] *Id.*
[12] Richard F. Weingroff, Federal-Aid Highway Act of 1956: Creating the Interstate System, Public Roads, vol. 60 no. 1 (1996).
[13] Id.
[14] See Federal-Aid Highway Act of 1962 §9, 87th Congress.

Act (ISTEA) expanded the authority of MPOs to set transportation agendas by granting them greater control over allocation of funds, and increasing their flexibility to allot funds to varying modes of transportation.[15]

Historically, transportation reform efforts have adapted, albeit slowly, to advancing technology and changing circumstances. Some MPOs have planned effectively for their jurisdictions, making the most of limited funds to create effective transportation systems. In some cases, these have integrated multiple transportation modes;[16] in others, highways have predominated, frequently due to influence by the state.[17] Though both solutions have been somewhat effective on an individual-city scale, the nature of MPOs' jurisdictional authority has impeded their ability to effectuate intercity transportation networks. As the United States progresses into the 21st century, the economic connections between megaregional cities continue to increase; connecting these cities in ways that are accessible, equitable, and convenient requires greater coordination between MPOs, and with local governments between their jurisdictions.

3. The Current State of Affairs

MPOs are required to coordinate planning with the state departments of transportation into a series of plans that address transportation development for the short, medium, and long term.

Title 23: Highways, Code of Federal Regulations (CFR) in Subchapter E, Planning and Design at Part 450, contains the rules and requirements for creating the state transportation plan,[18] the statewide long-range transportation plan, and development and integration of transportation improvement plans, which are created by the MPOs, and then amalgamated into the state transportation improvement plans. The definitions of Section 450.104 outline how a DOT and its partners plan for regional projects and prioritization of projects by the MPOs.

[15] Intermodal Surface Transportation Efficiency Act of 1991 §1024, 102nd Congress.
[16] Telephone Interview with Delaware Valley Regional Planning Commission (August 11, 2017).
[17] Dug Begley, Road spending popular, but effects can be fleeting, Houston Chronicle, Nov. 4, 2015.
[18] The state transportation plan must (i) adhere to conformity determination for attainment and non-attainment areas and the maintenance areas, (ii) demonstrate fiscal constraint, and (iii) comply with the state implementation plan as defined by Section 302(q) of the Clean Air Act.

Loftus-Otway et al. (2016)[19] outlined relevant definitions contained in Title 23 Part 450 that could be utilized for megaregion planning, provided in Figure 4:

Regionally significant projects: transportation project on a facility which serves regional transportation needs (access to/from area outside the region; major activity centers in the region; major planned developments/terminals) included in the modeling of the metropolitan area's transportation network. At minimum, this includes all principal arterial highways and fixed guideway transit that offer a significant alternative to regional highway travel.
Transportation management area (TMA): an urbanized area with a population over 200,000 persons defined by Census and designated by the Secretary of Transportation, or any additional area where Governor requests TMA designation and the Secretary of Transportation authorizes.
Unified planning work program (UPWP): a statement of work identifying the planning priorities and activities to be carried out within a metropolitan planning area. At minimum, a UPWP includes: description of planning work and products, who will conduct work, outline time frames for work completion, cost and source(s) of funds.
Urbanized area: geographic area with population of > 50,000 designated by the U.S. Census.

Figure 4: Definitions from Title 23 that Could be Used for Megaregion Planning

Section 450.206 of Subchapter E in Chapter 2 of 23 CFR (Parts 420-480) sets the bounds for the statewide transportation planning process (STPP). Sections 450.206 (a) and 450.306 (a) set out the range for the statewide and metropolitan transportation planning process that must address eight key planning factors. In general, all states shall carry out a continuing, comprehensive, and cooperative ("3-C") STPP that provides for projects, strategies, and services that address the eight factors listed in Table 1.

Section 450.208 requires that states, at a minimum, develop the STPP in coordination with MPOs. In conjunction with the STPP (§450.206), section 450.208 requires States to coordinate with other statewide agencies and offices (e.g., trade and economic groups) who also conduct multistate planning efforts. Thus, MPOs have some latitude within this process to develop megaregional components within their plans, although there is no specific stipulation through either statute or regulations to conduct megaregional planning.

[19] Loftus-Otway, Lisa; Miller, Brian; Harrison, Robert; Marriott, Dan; and Mingo, Roger. Policy Memorandum created for FHWA's Office of Policy, February 17, 2016. Unpublished, copy available from contributing author.

Table 1: Eight Planning Factors to Be Addressed

1. Support economic vitality 2. Enhance safety 3. Ensure security 4. Increase accessibility and mobility	5. Protect and enhance the environment 6. Increase connectivity for people and freight 7. Efficient management and operation 8. Preservation of the existing system

Under Section 450.212, MPOs or public transportation operators may undertake a *multimodal, systems-level, corridor, or subarea planning study* as part of the STPP. These transportation planning studies must be developed and involve consultation with, or joint efforts among, the state(s), MPO(s), and/or public transportation operator(s) to the extent practicable.

Title 23 Part 450 Sub-part C, Metropolitan Transportation Planning and Programs, implements the provisions of 23 U.S.C. 134 and 49 U.S.C. 5303, which set policy to designate MPOs for each urbanized area in order to carry out a multimodal planning process, and to define the criteria and the scope of the metropolitan transportation planning process (MTPP). Sub-section 450.306 (d) requires that the MTPP be carried out in coordination with the STPP. The scope of the MTPP is nearly identical to the eight planning factors required under Section 450.206 for the STPP, and all required criteria in the MTPP could be directly applicable to megaregion transportation planning and coordination. State legislation often requires or encourages MPOs to align their plans and projects with state goals and objectives. This could motivate MPOs to coordinate with each other to pursue megaregion scale joint planning efforts if these were encouraged. Megaregion initiatives that focus on designated planning topics may attract greater MPO engagement because these agencies may have access to general discretionary funds set for regional planning activities within a state.[20]

Several factors make MPOs more capable than individual local governments to direct megaregion planning. On the individual city scale, scale-dependent improvements such as rail transportation may not make sense; however, in the

[20] John A. Volpe National Transportation Systems Center. December 2014. Metropolitan Planning Organizations and Transportation Planning for Megaregions Accessed at: http://www.fhwa.dot.gov/planning/megaregions/reports/mpo_and_transportation_planning/fhwahep15010.pdf; and William M Lyons. *The Challenge of Transportation Planning for Megaregions*. July 24, 2012. Accessed at: https://www.volpe.dot.gov/sites/volpe.dot.gov/files/docs/The_Challenge_of_Transportation_Planning_for_Megaregions.pdf; and John A. Volpe National Transportation Systems Center. June 2014. Role of Regional Planning Organizations in Transportation Planning Across Boundaries. Accessed from https://www.fhwa.dot.gov/planning/megaregions/reports/regional_planning_organizations/

context of a megaregional effort, its value increases dramatically. To properly internalize the benefits of these externalities, MPOs need to cooperate; even without significant federal encouragement. MPOs have made substantial strides through the use of *memoranda of understanding* (MOUs), documents that outline the cities' shared interest and commitment to cooperation.[21] This practice should become a normalized process of doing business by MPOs to assist in creating megaregional plans, or segments of projects that can improve megaregional mobility options for its citizens.

Composed of local officials (elected and otherwise),[22] MPO leadership is well connected to local needs, and most MPOs work closely and effectively with state departments of transportation.[23] The flexible nature of the organizations, combined with their structural predisposition to include state and local officials, have allowed for substantial, harmonious cooperation.

Several weak points, however, reduce the ability of MPOs to effectively connect megaregional areas. MPOs have substantial planning powers within their jurisdictions, but in many megaregions (such as the Texas Triangle) these jurisdictions are divided by hundreds of miles of unincorporated land. To undertake a project connecting cities, MPOs must be highly creative about funding due to jurisdictional restrictions on spending, and in determining boundaries and developing interagency memoranda to cooperate.[24]

Title 23 at Section 450.312 sets the boundaries of a metropolitan planning area (MPA), determined by agreement between the MPO's board of trustees and the state's governor. At a minimum, the MPA boundaries encompass the entire existing urbanized area as defined by the Bureau of the Census, plus the contiguous area expected to become urbanized within a 20-year forecast for the MTP.

The MPA boundaries may be further expanded to encompass the entire metropolitan statistical area or combined statistical area, as defined by the Office of Management and Budget [§450.312 (a)]. MPOs may also adjust their existing

[21] See Joint Memorandum of Understanding between the North Central Texas Region and the East Texas Region (on file with author, and with NCTCOG); Memorandum of Understanding: MPO Boundaries and Coordination of Transportation Between Delaware Valley Regional Planning Commission (DVRPC), South Jersey Transportation Planning Organization (SJTPO) and Wilmington Area Planning Council (WILMAPCO) (on file with author, and with mentioned MPOs); etc.
[22] 23 U.S.C. §134(2)(A).
[23] Telephone interviews with North Central Texas Council of Governments (July 18, 2017); Delaware Valley Regional Planning Commission (August 11, 2017).
[24] Telephone interview with North Central Texas Council of Governments (July 18, 2017).

boundaries so that the entire urbanized area lies within only one MPA. However, an added complexity for establishing MPA boundaries into a megaregion is that currently these boundaries are not permitted to overlap with each other [§450.312 (g).] Additional adjustments could be made to reflect the most comprehensive boundaries that foster formal planning activities and collaboration between traditionally "siloed" agencies and stakeholders on megaregion scale planning projects and activities. Boundary adjustments that change the composition of the MPO may require re-designation of one or more such MPOs [§450.312 (h)]. Where part of an urbanized area served by one MPO extends into an adjacent MPA, area MPOs shall, at a minimum, establish written agreements that clearly identify areas of coordination and the division of transportation planning responsibilities among and between the MPOs. Again, authority for these megaregional planning opportunities exists within federal code. The justification for this coordination is set out within sub-sections 450.312 (f), (h), and (i).

Identification of a megaregion could occur during the review of boundaries after each census. Section 450.318 (a) allows the MPO(s), state(s), or public transportation operator(s) to undertake a multimodal, systems-level corridor or subarea planning study as part of the MTPP. To the extent practicable, development of these transportation planning studies shall involve consultation with, or joint efforts among, the MPO(s), state(s), and/or public transportation operator(s). The development of the next sets of MTPs could be an ideal time to begin to review how a megaregional approach may assist in achieving economies of scale and in assisting with non-attainment and conformity programs within state implementation plans.

4. Analysis

MPOs do not generally have access to grants that can be readily applied to intercity projects, and no grants exist to specifically fund and encourage cooperation between MPOs, counties, municipalities, and states along megaregion transportation corridors. As an example, the Transportation Investment Generating Economic Recovery (TIGER) grants offered avenues for flexible transportation spending on ambitious projects, but in practice the discretionary nature of the grants has led to politicization in how they are distributed.[25]

Jurisdictionally, MPOs are well suited to representing the interests of large urbanized areas. However, as population has increased across the country the

[25] Telephone interviews with North Central Texas Council of Governments (July 18, 2017); Delaware Valley Regional Planning Commission (August 11, 2017); and Maricopa Association of Governments (July 28, 2017).

50,000-person threshold set out in Title 23 to create one may be too low. Smaller MPOs face challenges corralling sufficient resources to plan independently, and the small cities they serve may be better served through state, county, and municipal governance.

5. MPOs: The Organizations Most Capable of Megaregion Planning

As megaregions increasingly become part of our understanding of complex intercity economic relationships, government must adapt to ensure proper transportation in these areas. However, the United States has already been divided among thousands of jurisdictions. Adding yet another jurisdiction, complete with boundaries, to address each megaregion would only serve to intensify the existing challenges of coordinating the many governments for any given area. Instead, policy can seek to bolster cooperation among existing jurisdictions and empower MPOs to take a leading role.

Section 450.322 defines the MTPP requirement to develop a medium- to long-range regional transportation plan (RTP) addressing no less than a 20-year planning horizon. Although planning agencies are given discretion on the degree of consideration of the eight key planning factors and extending the planning horizons (based on complexity and scale) under sub-section 450.306(a), the planning process is designed to provide a financially realistic approach to meeting the MPO's needs and priorities.

Concurrently, this process can also provide a broader transportation vision by including regionally significant projects from other regions with impacts expected within the MPO's planning jurisdiction and projected resource availability to support a broader vision. The plan is required to be reviewed and updated every four years in air quality nonattainment and maintenance areas [§450.322 (c)], and at least every five years in attainment areas. This is to ensure its validity and consistency with current and forecasted conditions and trends and to extend the forecast period to at least a 20-year planning horizon.

MPOs could broaden the scope of the MTPP for RTP requirements under sub-section (f) to include program priorities that meet the needs of corridors running through, but that are not contained, within the TMA and across jurisdictions for expanding upon potential megaregion activities. However, many of these aspects are challenging to consider at the megaregion level because few established agencies actively guide long-term growth for transportation and land use planning

across formal jurisdictional and institutional boundaries, let alone within a single-state or multi-state megaregion.[26]

While planners can model the travel, trade, and other connections to generate relatively clear maps of the country's megaregions, delineating these areas explicitly would stifle responses to the complex realities on the ground. For example, while the Texas Triangle clearly enjoys elevated economic interconnections, a system that allows and encourages Dallas to work with Shreveport or Oklahoma City would be preferable to one that doesn't, MPOs are well positioned to determine which cities outside their own area have the most shared interest. By providing funding and authority for MPOs to collaborate across long distances, the organizations can build up megaregion connections from the bottom up. This flexibility allows for porous megaregion boundaries, and for local authorities to adapt to changing demographic realities.

MPOs have several advantages over state and local governments. Unlike states, counties, and municipalities, the borders of MPOs can easily be altered to accommodate geographic changes in urban demographics. Within these borders, MPOs incorporate local elected officials, bureaucrats, and representatives of public transportation agencies, and engage with the local community.[27] MPOs already generate detailed short- and long-term transportation plans for their urban areas, and as a result are intimately familiar with the unique transportation problems facing their jurisdiction, and possess the general expertise necessary to contemplate large transportation projects.

MPOs also have significant experience cooperating with one another, as well as with state and local government. For example, the Maricopa Association of Governments and Pima Association of Governments have made agreements with one another, as well as with the governments of Phoenix, Tucson, and even across the border with Sonora to plan for what is becoming known as the "Arizona Sun Corridor."[28] The North Central Texas Council of Governments has drawn up MOUs to cooperate on projects with MPOs and local governments in the Texas

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[26] Prepared by John A. Volpe National Transportation Systems Center. December 2014. Metropolitan Planning Organizations and Transportation Planning for Megaregions Accessed at: http://www.fhwa.dot.gov/planning/megaregions/reports/mpo_and_transportation_planning/fhwahep15010.pdf
[27] Title 23 §134(d)
[28] *Partnering Charter Formation of an Arizona-Sonora Binational Megaregion*, Asociacion de Alcaldes de Sonora, Maricopa Association of Governments, et. al provided to the research team by MAG.

Triangle, Louisiana, and Arkansas.[29] The Delaware Valley Regional Planning Commission has MOUs with every neighboring MPO, state DOT, and transit agency.[30] Megaregions planning and transportation improvement can best be facilitated by taking advantage of MPOs' ability to form working relationships across all levels of government to reach the best transportation results.

MPOs have the expertise, flexibility, and collaborative networks to effectively facilitate megaregional transportation planning. Currently, however, federal policy does not provide sufficient tools and support to make full use of these skills.

6. Preparing MPOs to Address Megaregional Concerns

The current MPO system of transportation planning and resource allocation has been effective for the urban areas these organizations address. As American cities become more interconnected, federal policy must support and encourage greater multijurisdictional cooperation and investment by MPOs.

First and foremost, MPOs need a fresh funding stream. In the past few decades, federal transportation funding has failed to keep up with growing needs stemming from urbanization, technological improvements, and population growth; while transportation needs have intensified, funding has remained stagnant by percentage of GDP.[31] Increased fuel efficiency, decreased reliance on automobile transportation, and simple inflation has significantly reduced gas tax revenue, a longstanding source of transportation funding.[32] To compensate for this, Congress must either increase the gas tax or find alternative ways to fund new transportation projects. Unlike some other types of spending, improvements to transportation drive economic growth, and investment in public transportation can even open up new revenue streams to pay for itself through fares or taxes.

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[29] Joint Memorandum of Understanding between the North Central Texas Region and the East Texas Region and the Northwest Louisiana Region and the North Delta Region, North Central Texas Council of Governments (NCTCOG), East Texas Council of Governments (ETCOG), Northwest Louisiana Council of Governments (NLCOG), et. al provided to the research team by NCTCOG.
[30] Telephone Interview Delaware Valley Regional Planning Commission (August 11, 2017).
[31] Jeff Davis, *The 70-Year Trend in Federal Infrastructure Spending*, Eno Transportation Weekly, May 9, 2016, https://www.enotrans.org/article/70-year-trend-federal-infrastructure-spending/.
[32] Robert D. Atkinson et al., National Surface Transportation Infrastructure Financing Commission, *Paying our Way A New Framework for Transportation Finance*, (2009).

In order to make the most of any funding granted to megaregion development, the money must be strategically apportioned to incentivize cooperation and strategic long-term infrastructure investments. Some amount of funding should be set aside in a "Multijurisdictional Project Grant" specifically for use on projects undertaken by at least two MPOs, considering factors such as distance covered and awarding bonuses to efforts that incorporate more MPOs and other state and local governments. These grants should be apportioned to MPOs based on factors like population but are useable only for cooperative projects, though the choice of which projects to undertake and with whom should be left to the substantial expertise of the MPOs. A small portion of the funding should be reserved specifically to directly fund planning meetings and symposia between multiple MPOs as well as state and local governments.

Existing grants can be altered to improve the capability of MPOs to address megaregional transportation needs; TIGER grants, by virtue of the executive discretion they allow, have raised concerns about political favoritism.[33] Blue administrations favor blue states, and red administrations favor red states, at the expense of fairly backing the best and most innovative projects. As a result, MPOs tend to prefer the vast majority of funding to be distributed by formulas rather than discretionary grants.[34] However, for certain programs looking to test out innovative new ideas, a limited duration grant program such as the Sustainable Communities Program can be highly effective.[35] To be effective, such a program should support a specific technology, technique, or idea for a limited duration, and after running its course should be transitioned to formula grants as necessary.

In addition to revising grant structures, Congress should increase MPOs' authority to work outside their individual jurisdictions. Currently, MPO spending is restricted to the urbanized area they represent.[36] Combined with a specific multijurisdictional funding stream, relaxing this restriction would encourage MPOs to build transportation improvements through areas between their jurisdictions without necessarily needing the permission and cooperation of every county and municipality along the way.

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[33] Telephone interviews with North Central Texas Council of Governments (July 18, 2017); Delaware Valley Regional Planning Commission (August 11, 2017); and Maricopa Association of Governments (July 28, 2017).
[34] See *Id.*
[35] Telephone Interview with Delaware Valley Regional Planning Commission (August 11, 2017).
[36] Telephone interview with North Central Texas Council of Governments (July 18, 2017).

MPOs' authority is also constricted by their inability to effectively prioritize projects.[37] While state and local governments must follow the transportation plan to receive federal funding, they can cherry-pick projects as they desire, and as a result may delay certain projects indefinitely or otherwise disrupt the process as conceived by MPOs. MPOs should be granted the authority to prioritize projects in the transportation plan; to encourage following this prioritization, federal matching percentages should be reduced for projects that skip the line.

In conjunction with increasing MPO authority, Congress should add multijurisdictional, megaregion planning as an important factor for MPO transportation plans to incorporate. Though not a legal mandate, enshrining it as a priority would encourage greater consideration. Doing so would also demonstrate official federal support for MPOs as authorities in megaregion planning.

7. Conclusion

Current transportation policy cannot effectively accommodate an increasingly interconnected, megaregional America. Federal law must be amended to provide for the new transportation problems that interconnection presents. Fortunately, a framework already exists to handle these new problems. By incorporating megaregion ideas into the structure of MPOs and federal grants, Congress can craft a framework capable of bringing American transportation into the 21st century.[38]

[37] See 23 U.S.C. 134(k)(4)(A).

[38] The authors would like to thank for their insight and candor in interviews conducted during July and August 2017: Mike Morris Director of Transportation, Amanda Wilson Program Manager and Kevin Feldt, Program Manager of the North Central Texas Council of Governments; Barry Seymour, Executive Director, Delaware Valley Regional Planning Commission; and Amy St. Peter Assistant Director and Denise McClafferty Regional Program Manager, Maricopa Association of Governments.