



# Federal Constitutional Powers for Megaregion Planning

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# Scope of work

- Overview of federal constitutional powers as they pertain to megaregions
  - Reviewed federal preemption, the spending and commerce powers
- Questions asked
  - Can federal law, without any statutory changes be used to conduct megaregion policy?
  - What can be used right now?
  - What changes would be useful?
  - How can MPOs be utilized to help spearhead megaregion planning and policy?

# In the beginning.....

- Federal government provides transportation funding
  - US DOT sets requirements for states/localities to receive gas tax
  - MPOs tasked with creating planning documents for urbanized areas
  - State DOTs create plans for rural/other areas that do not have an MPO
- Current structure represents individual states, cities and counties.
  - No statutory mandate to conduct megaregion planning
  - Lacks ability to formalistically address megaregion planning through money or planning process
- Megaregions criteria and definitions are not yet agreed to
  - USDOT is using Georgia Tech's definitions, yet many others use RPAs

# Why look at federal powers?

- Many megaregions cross state lines
- Federal powers may often trump state and local powers
- Federal transportation funding as a driver of many initiatives
- Federal role in setting national and regional agendas
- The federal role in setting planning priorities, funding streams and regulations (environmental for example) that must be followed
- All of these roles make the federal role in creating, shaping, defining and planning for megaregions a structurally cohesive policy framework

# Federal Preemption

- Preemption is 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.

# Federal preemption analysis

- Federal government to preempt state law by inclusion of an express preemption clause.
  - An express preemption clause directly states— sometimes explicitly using the word “preempt”—which state laws are displaced.
- Disputes have arisen over how broadly or narrowly to interpret Express preemption clauses, are 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

# Federal preemption analysis 2

- 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
- 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
  - 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.

# Federal preemption analysis 3

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



# Preemption: some initial conclusions

- 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.
- 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
- Preemption can be a helpful tool to increase flexibility for MPOs and cities. Federal legislation can override state restrictions on spending decisions which restrict megaregional cooperation and projects.

# 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 and general welfare of the United States.”
- Allows the federal government to use money it collects to provide for the general welfare of the United States.
- Historically, the spending power has been applied to a plethora of federal policies
  - 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.
  - Federal grants remain an 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.

# Spending power analysis

- The Supreme Court has long recognized the federal government's power to grant funds to states, and to make those grants conditional.
  - 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. This sort of division between federal and state action has been termed "cooperative federalism."
- 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, See *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 270 (1985).

# Spending power analysis 2

- Federal spending power provides considerable flexibility, but is 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).
    - The Supreme Court has held that the federal government could not constitutionally require states to regulate the disposal of radioactive waste, though it could encourage doing so financially.
    - The Court calls this sort of illegal federal action “commandeering” and has held it to be unconstitutional under the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 188 (1992).
- A federal conditional grant cannot be so coercive as to go beyond pressure, to the point of compulsion. 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 (*Madison v. Virginia*, 474 F.3d 118, 128 (2006)).

# Spending power: some initial conclusions

- Creating megaregion specific grants also requires congressional action. The USDOT cannot freely reappropriation 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 local and representation.
  - USDOT could make conditional grants to match state funds dedicated to projects that conform with megaregion transportation plans.
- Congress could add on funding for megaregions specifically without issue so long as it doesn't hold preexisting funding hostage to new conditions.

# Commerce Clause

- 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.
- 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.

# Commerce clause analysis

- The expansive purview of the commerce power granted by the Supreme 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
- The power to regulate channels of interstate commerce has a long history.
  - In *Gibbons v. Ogden*, the Supreme 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

# Commerce clause analysis 2

- Overall, the Commerce Power grants significant flexibility to achieve its enumerated grant of power to regulate 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
- No easy standard exists to determine what activities substantially affect commerce, and which do not. The Supreme Court considers several factors:
  - 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.



# Commerce clause: some initial conclusions

- 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.
  - Megaregion development can substantially benefit from a fair mediator who can adjudicate disputes from a non-biased position, and an established venue for cooperation.

# Conclusions & Recommendations

- 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.
- 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.
- 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

# Conclusions & Recommendations

- 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 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.
  - 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.
- 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.

*Questions????*



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