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Bringing Transportation Decisions Closer to the People: Why States and Localities Should Have More Control

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Abstract

America's surface transportation system is in need of reform. Traffic congestion remains a problem in cities across the country, yet burdensome federal regulations and restrictions on Highway Trust Fund spending hinder states' ability to carry out cost-effective highway, road, and bridge improvement projects. In a country as large and diverse as the United States, it is state and local officials—not remote federal authorities—who have the knowledge required to address their own communities' transportation concerns. Yet much authority over surface transportation policy is centralized in the federal government, and some Members of Congress want to increase that centralization, based on a misunderstanding of the division of powers in the Constitution. In fact, the Constitution creates a federal government to deal with national issues while reserving to the state and local governments authority over all other public affairs, which vary according to local conditions. As Congress considers the reauthorization of the current highway bill in 2014, it should take concrete steps to give state and local governments the control and flexibility they need to build their own transportation projects.

The current highway authorization bill is set to expire on October 1, 2014. As Congress considers its reauthorization, including changes in the federal highway program, the question that should be at the center of the debate is: Which level of government—federal, state, or local—is best suited to maintain, improve, and expand the nation's surface transportation infrastructure?

The fundamental logic of the Constitution is that governmental power is divided among the federal, state, and local levels. The federal government is designed to deal with national issues, while state and local governments have authority over all other public policy issues that affect people at the state and local levels.

Likewise, history and everyday experience teach that the current centrally planned transportation system has failed American motorists and commuters. While the federal government has had some success in carrying out national projects, such as building the interstate highway system, it has been unable to solve local problems, such as reducing traffic congestion, repairing and expanding roads and bridges, and operating affordable mass transit systems.

Americans are a highly mobile people who depend on reliable and effective transportation infrastructure to travel to and from work, conduct business, access affordable housing, and participate in recreational activities in their communities. Yet the chronic congestion that plagues the country's network of surface transportation infrastructure (such as roads and bridges) ultimately impairs Americans' mobility. The most recent data show that congestion causes the average commuter to waste 19 gallons of gas a year and spend an additional 38 hours behind the wheel—nearly a full work week. Even more time is lost for commuters in large metropolitan areas, such as Philadelphia (48 hours) and Houston (52 hours).[1]

The federal government's current approach to surface transportation contributes to much of the problem by centralizing decision making in Washington, even though state and local authorities are more sensitive to unique, local conditions and better positioned to solve their communities' transportation problems than are distant federal officials. The next highway reauthorization bill should empower state and local governments to address the congestion and mobility challenges in their communities.

What Is Wrong with the Current System?

Currently, most federal surface transportation programs are grouped together in the Moving Ahead for Progress in the 21st Century Act (MAP-21) and are paid for by the Highway Trust Fund (HTF), which is funded primarily by the 18.4 cents-per-gallon federal gasoline tax and related excise taxes. The programs funded under MAP-21 channel HTF funds to the state and local governments and establish the rules and regulations governing how the states and localities can spend that money.

Defect: Federal Mandates on Local Spending. The current division of taxing authority and spending authority—between the federal government and state and local governments, respectively—constitutes the fundamental defect of the current federal highway program. If the state and local governments are to spend tax dollars on local transportation projects, why can they not simply collect and spend the money themselves? The answer is that controlling the flow of tax dollars empowers and benefits the federal government. Under the current system, motorists, truckers, and bus operators have to send the taxes they pay at the pump to Washington, where lobbyists, politicians, and bureaucrats decide how and when the money can be spent—before sending it back to the states and localities.

Washington is loath to give up this role as the middleman, because filtering gas tax dollars through the nation's capital allows Congress and federal agencies to attach a mix of mandates, regulations, and other restrictions to the HTF allotments—dictating to the state and local governments how they can spend their gas tax funds. Whether union-wage requirements established under the Davis–Bacon Act or pressure from interest groups to divert highway user fees to environmental projects, the result is the same: Washington's one-size-fits-all regulations prevent the states and localities from designing policies that address the unique transportation challenges in their communities. Often these federal rules and regulations cause unnecessary delays in transportation projects and lead to higher construction and labor costs.

Defect: Highway Trust Fund Spending Diversions. In addition to undermining the ability of state and local governments to solve their specific transportation needs, sending gas tax revenue through Washington allows Congress to spend HTF resources on projects and programs that are unrelated to the most pressing transportation concerns of most Americans. In 1916, when the federal government first provided assistance to the states for the construction of highways, Members of Congress, state legislators, and citizens alike understood that only the most important roads, from a national perspective, would receive federal aid.[2]

The Federal-Aid Highway Act of 1956, signed by President Eisenhower, created a *temporary* 13-year trust fund to pay for construction of a 42,000-mile interstate highway system that, upon completion, was to be turned over to the states and localities to manage. However, as Ronald Reagan observed eight years into the "temporary" life of the HTF, "governments' programs, once launched, never disappear." Indeed, the history of the HTF validates Reagan's observation that "a government bureau is the nearest thing to eternal life we'll ever see on this earth": Reluctant to cancel a program that generated many spending opportunities, Congress repeatedly reauthorized and redefined the goals of the Highway Trust Fund revenue.[3]

The Federal-Aid Highway Act of 1970, for example, significantly widened the original scope of the HTF, marking "the beginning of a trend that would continue to broaden the list of activities for which highway trust fund money could be spent," including mass transit, bridge replacement, and state highway construction.[4] Federal lawmakers quickly came to see the HTF as an endless source of spending for local pet projects that could be used to satisfy parochial special interests.

Since 1970, these spending diversions have continued to proliferate beyond reason. In fiscal year 2013, Congress allocated $809 million from the HTF to the states for bicycle and walking paths, sidewalks, community preservation initiatives, and other so-called transportation alternatives—a bureaucratic term that reveals how little the projects have to do with the concerns of the motorists, truckers, and bus operators who actually pay the federal gas tax. Not only are these spending diversions unrelated to surface transportation policy, but they do little to mitigate traffic or shorten commutes. There is no reason for the federal government to direct the funding for inherently local decisions like these.

At the heart of these regulatory burdens and spending diversions is the fatal conceit that has been driving the expansion of government since the New Deal: namely, that major public policy decisions should be made by the federal government, while state and local governments exist as instruments to carry out the decrees of Washington. The Founders, by contrast, saw such an arrangement as inimical to the interests of the people and unintelligible from a constitutional perspective. They rejected top-down politics that centralize decision making as they sought to keep government decisions as close as possible to the people affected by them.

A Government Designed to Work *for* the People

The basic logic of the Constitution reflects the Framers' commitment to keep government close to the people. Although the failures of the Articles of Confederation revealed the need for a strong federal government to handle national affairs that affect the aggregate interests of the country, the Framers understood that a centralized government located in a remote capital would have neither the time nor the local knowledge needed to govern effectively over most public affairs that affect the day-to-day lives of the people. Thus, the Constitution creates a federal government to deal with national issues—most notably foreign policy—while reserving to the state and local governments authority over all other public affairs, most of which vary according to local circumstances.

Referring to this federalist design, James Madison said that the Constitution forms a "happy combination" that allows the people to choose national representatives "who are fit to comprehend and pursue great and national objects" as well as state and local officials who are better "acquainted with all their local circumstances and lesser interests."[5] Because they are closer and more familiar with the unique conditions and circumstances of their own communities, the state and local governments' authority extends to all policies that concern the "lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[6] From this perspective, surface transportation policy is unmistakably a state and local concern.

Recently, several Members of Congress proposed bold reforms that would address the major defects of the current surface transportation system. Senator Mike Lee (R–UT) and Representative Tom Graves (R–GA) introduced companion legislation, the Transportation and Empowerment Act (S. 1702 and H.R. 3486), that reflects this constitutional logic and offers concrete remedies to the current federal highway program.[7] Their proposal would lower the federal gas tax incrementally over five years, from 18.4 cents per gallon to 3.7 cents per gallon (and also lower other fuel taxes), and eliminate most federal mandates. The remaining gas tax revenue would fund programs that are federal concerns, such as the maintenance of the interstate highway system. A different approach can be found in Representative Scott Garrett's (R–NJ) reform, the Surface Transportation and Taxation Equity (STATE) Act (H.R. 1065), which would allow states to opt out of the federal highway program and spend their gas tax dollars without the burdens of federal mandates.

The logic of these proposals is simple: If the residents of San Francisco want more bicycle paths or mass transit in their city, they should be able to have them so long as they are willing to pay for them through local or state taxes or private financing mechanisms. Likewise, if the citizens of Tennessee want to build new roads through private–public partnerships, the state should be able to arrange for such projects without the threat of violating federal law.

Ultimately, these proposals are about empowering the American people, not simply the state and local governments. With control over their own transportation systems, local and state governments will have the flexibility to develop solutions that actually make a difference in peoples' lives and allow them to spend more time at work, at home, or in their communities than stuck in traffic.

Congressional Powers: Few and Defined

Opposition to giving state and local governments more control over their transportation decisions persists in Congress and in the Administration. Some of the policymakers who advocate a continued robust federal role in surface transportation policy justify their arguments by appealing to the powers of Congress to spend for the general welfare and to regulate interstate commerce.[8] Such arguments, however, misunderstand the proper meaning of these congressional powers and undermine the constitutional logic that divides authority between the federal government and the states and localities. Defending the current approach to surface transportation policy violates the letter, as well as the spirit, of the Constitution.

The Power to Spend for the General Welfare. The spending power, the first of the 18 enumerated powers granted to Congress in the Constitution, is the source of congressional authority to levy taxes. According to Article I, Section 8, there are two purposes for which Congress may impose taxes: to pay the country's debts and to "provide for the common Defence and general Welfare of the United States."[9] Much of the debate in Washington over federal spending thus results from conflicting definitions of "general welfare." As constitutional scholar John Eastman explains, the "contemporary view is that Congress's power to provide for the 'general Welfare' is a power to spend for virtually anything that Congress itself views as helpful."[10] This expansive and elusive view transforms what was meant to be a *limitation* on Congress's power to spend into a comprehensive justification for nearly unlimited spending.

To be sure, at the time of the Founding, there was serious disagreement over the limits of Congress's power to spend, with Alexander Hamilton famously defending the most expansive view of the "general welfare." But the broad consensus among the Founders, including Hamilton, was that the spending clause had its own inherent limiting principle: Spending must be for the "general" (national) welfare rather than exclusively for local or regional benefit.[11] The federal government is not, Madison wrote, "to be charged with the whole power of making and administering laws," because its "jurisdiction is limited to certain enumerated objects, which concern all the members of the republic."[12] From this perspective, it is manifestly outside the prerogatives of the federal government to spend money on state roads and bridges, let alone purely local concerns such as subway and bus systems, scenic overlooks, and bicycle paths.

The Power to Regulate Interstate Commerce. In the Constitution, the third power delegated to Congress is the power to "regulate Commerce … among the several States."[13] The original purpose of the clause was to give the national government the power to prevent states from creating artificial barriers to interstate commerce, understood in the literal sense as the trading and trafficking of economic commodities. Today, however, the commerce power is commonly misinterpreted as either a spending power—as when lawmakers try to justify federal spending on state or local transportation projects—or as a broad regulatory power that gives Congress the ability to regulate state and local infrastructure because it has an indirect impact on interstate commerce. Straining the text of the Constitution this way has unleashed the regulatory power of the federal government, transforming what was originally meant as a constraint on the state governments into a nearly unlimited power of Congress to regulate even purely local activities.

This expansive view of the Commerce Clause, often held by proponents of the current Washington-based approach to surface transportation policy, is wrong on both counts. The Commerce Clause grants Congress the power to regulate, not *spend* money, and it extends that power only to commerce among the states, not to the exclusively internal commerce of a state. As law professor David Forte, explains, "Purely local activities, therefore, remain outside of the reach of Congress under the Commerce Among the States Clause."[14]

The Path to Reform

The current highway program is in urgent need of reform. In recent decades, the federal government has steadily centralized decision making and spending authority in Washington, resulting in inefficient spending of highway resources. Today's federal highway program contradicts the logic of the Constitution, which reserves to the state and local governments authority over purely local affairs, by imposing federal mandates that dictate how states can spend their gas tax dollars and manage transportation projects. In the next highway bill, Congress should:

- **Eliminate transportation alternatives and other diversions, such as mass transit, from the federal highway program.** These activities are of local, not federal, concern and do little if anything to reduce traffic congestion.
- **Adhere to the division of powers enshrined in the Constitution.** The federal government should focus solely on national transportation issues, while state and local governments have authority over local activities, such as mass transit and most highways, roads, and bridges, as well as bicycle paths, sidewalks, and all other transportation alternatives.
- **Give state and local governments more control and flexibility over most highway funding and decision making.** Transportation decisions should be brought closer to the citizens because state and local governments know much better than Washington what their priorities are. Free from burdensome mandates and spending restrictions, states could plan, finance, and build the kind of surface transportation that best addresses the specific problems in their communities, working with the private sector when appropriate.

In the coming months, Congress should follow this path to reform and fundamentally rethink the federal highway program, empowering state and local governments to take control over their own transportation infrastructure.

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[1] David Schrank, Bill Eisele, and Tim Lomax, "2012 Annual Urban Mobility Report," Texas Transportation Institute, December 2012, Table 9, http://d2dtl5nnlpfr0r.cloudfront.net/tti.tamu.edu/documents/mobility-report-2012.pdf (accessed March 31, 2014).

[2] John W. Fischer, "From Interstates to an Uncharted Future: A Short History of the Modern Federal-Aid Highway Program," in Wendell Cox, Alan Pisarski, and Ronald D. Utt, eds., *21st Century Highways: Innovative Solutions to America's Transportation Needs* (Washington, DC: The Heritage Foundation, 2005), p. 12.

[3] Ronald Reagan, "A Time for Choosing," transcript of October 27, 1964, radio broadcast, Heritage Foundation *First Principle Series*, http://www.heritage.org/initiatives/first-principles/primary-sources/a-time-for-choosing-ronald-reagan-enters-the-political-stage.

[4] Fischer, "From Interstates to an Uncharted Future," p. 21.

[5] James Madison, *Federalist* No. 10, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Signet Classic, 1999), p. 77.

[6] James Madison, *Federalist* No. 45, in Hamilton, Madison, and Jay, *The Federalist Papers*, p. 289.

[7] Emily Goff, "Empowering the States by Turning over the Federal Highway Program," Heritage Foundation *Issue Brief* No. 4087, November 15, 2013, http://www.heritage.org/research/reports/2013/11/impact-of-turning-over-the-federal-highway-program-to-the-states.

[8] Some lawmakers appeal to the power of Congress to "establish Post Offices and post Roads" (Article I, Section 8, Clause 7). A thorough treatment of this justification is unnecessary, as the text of that clause unambiguously refers to a specific type of road that is not the subject of the current debate over the federal highway program.

[9] Constitution of the United States, Article I, Section 8, Clause 1, *The Heritage Guide to The Constitution*, http://www.heritage.org/constitution/#!/articles/1.

[10] John C. Eastman, "Enough Is Enough: Why General Welfare Limits Spending," Heritage Foundation *Constitutional Guidance for Lawmakers* No. 4, January 13, 2011, http://www.heritage.org/research/reports/2011/01/enough-is-