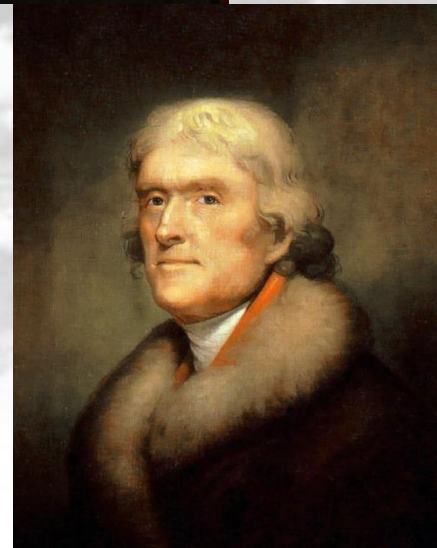


Federalists v. Anti-Federalists



Anti-Federalist Arguments



- Claimed to Constitution gave the Federal Government too much power.
 - Gives power to government that states don't even currently have
 - Criticisms of key Clauses: Necessary and Proper Clause & Supremacy Clause...Why?
- NO BILL OF RIGHTS
 - Power to suspend Habeas Corpus with invasion/insurrection
 - No protection of Free Speech
 - Lacks protection for Basic Rights even states protect
- Congress
 - Senate
 - Too much power; No Term Limits
 - Controls presidential appointments/treaties; executive will be a puppet of Senate
 - Small States Over-represented
- Will lead to Elitist rule
- Negatives of Large Republic
 - Leaders too far removed from the people
 - Population growth will make large republic inefficient
 - Too many different econ systems between states; each state had own specialties; won't work to combine slave/agr. South with industrial north

Federalist Arguments

- A.o.C. too weak/inefficient...impossible to control factions
- Control of Factions (***Federalist 10***)
 - **Republic:** Efficient, people have a voice but w/ filter (govt. by the “wise”)
 - Large Republics...
 - Check unworthy candidates...larger number of voters
 - Smaller the # in a majority...more likely to have oppression
 - Factions may kindle flames in states...but not at nat’l. level
 - Federalism is best
- Limited Government (***Federalist 51***)
 - Separation of Power & Checks and Balances (helps insure individual rights)
 - Protection of Minority Rights from Majority
 - Presidential veto; Supreme Court checks 2 branches;
 - Legislature protected from itself (bicameral)
- Judges insulated (not elected/life terms)
- Power to control economy, standard currency and common foreign policy

Bill of Rights

- 1st 10 Amendments added to the Constitution
- **Bill of Rights**
 - **Added to the Constitution to get key states of New York and Virginia to ratify the Constitution**
 - Protects political rights
 - 1st Amendment: Free speech, press, petition, assemble, religion
 - Protects the rights of the accused
 - Protection from illegal search and seizure
 - Right to a trial by jury, right to an attorney, right to be free from self-incrimination

Amendment Process: Example of Federalism?

- “Flexible, Living, Breathing Document”
- **Formal Amendment:** Actually changing wording of document (27 Amendments)
 - **Proposal:** National Level
 - 2/3 of each House of Congress
 - National Convention @ Request of 2/3 of States
 - **Ratification:** State Level
 - Approve by $\frac{3}{4}$ State Legislatures;
 - Approve by State Convention of $\frac{3}{4}$ States
- How else can Constitution be changed?
 - **Informal Amendments**
 - Tradition/Custom, Legislative/Presidential Action, Precedent, Supreme Court Decisions



Federalism

A Piece of Cake

Formal Amendments

Proposal

Proposal by **two-thirds** vote of both houses of **Congress**

Proposal by **two-thirds** vote of **national convention** called by Congress on request of two-thirds of state legislatures

Used successfully **twenty-six** times

Used **once** to repeal **Prohibition (Amdt. 21)**

Ratification

Passage by **three-quarters** of state legislatures

Passage by **three-quarters** of special state conventions

What is Federalism?



- Federalism
 - System of government which is divided into levels...central/national government and regional governments (aka states)...and where power is divided (as well as shared in some areas)
 - **10th Amendment!**
- How does this differ from Unitary & Confederate Governments?

Why Federalism?



- Benefits of Federalism
 - Check Government Power/Protect Personal Liberty
 - Power Concentrated in Single entity → Tyranny
 - Under A.o.C. → Nat'l Govt Too Dependent on States
 - Provide Balance between Nat'l & State Govt.
 - STATES = TESTING GROUNDS
 - Large Countries; Diverse Regions
 - Allows for local action—local concerns
 - More access points/ways to participate

Powers of National Government

A faint, grayscale background image of the signing of the United States Constitution. Several men in 18th-century attire are seated around a table, looking towards the center. The image is semi-transparent, allowing the text to be clearly visible over it.

- **Expressed Powers-**

- Those powers that are “spelled out” for the National Government in the Constitution
- Article I, Sec. 8; Article II, Sec. 2 (tax power; war power)

- **Implied Powers—**

- Those powers that are not expressly stated, but reasonably suggested
- Necessary & Proper Clause/Elastic Clause

- **Inherent Powers**

- belong to the National Government because it’s a sovereign state



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"Dear sir, thank you for your idea of a helicopter ejection-seat but..."



States: Reserved Powers



- **10th Amendment:** *“Those powers not delegated to the federal government, nor prohibited to the states, are reserved for the states.”* (AKA Reserved Powers)
- **State Obligations to Each Other:**
 - Full Faith & Credit Clause; Extradition

Exclusive v. Concurrent Powers

National Government

- Print money
- Regulate interstate (between states) and international trade
- Make treaties and conduct foreign policy
- Declare war
- Provide an army and navy
- Establish post offices
- Make laws necessary and proper to carry out the these powers

State Governments

- Issue licenses
- Regulate intrastate (within the state) businesses
- Conduct elections
- Establish local governments
- Ratify amendments to the Constitution
- Take measures for public health and safety
- May exert powers the Constitution does not delegate to the national government or prohibit the states from using

Concurrent Powers: Collect taxes; Build roads; Borrow money; Establish courts; Make and enforce laws; Charter banks and corporations; Spend money for the general welfare; Eminent Domain

Powers Denied to National Government

National Government

- May not violate the Bill of Rights
- May not impose export taxes among states
- May not use money from the Treasury without the passage and approval of an appropriations bill
- May not change state boundaries

State Governments

- May not enter into treaties with other countries
- May not print money
- May not tax imports or exports
- May not Impair obligations of contracts
- May not suspend a person's rights without due process
- 13th, 14th, 15th Amendment

Local Government

- Created by the States, and can only do those things States give it the power to do
- Provide Services/activities, collect taxes, trash pickup



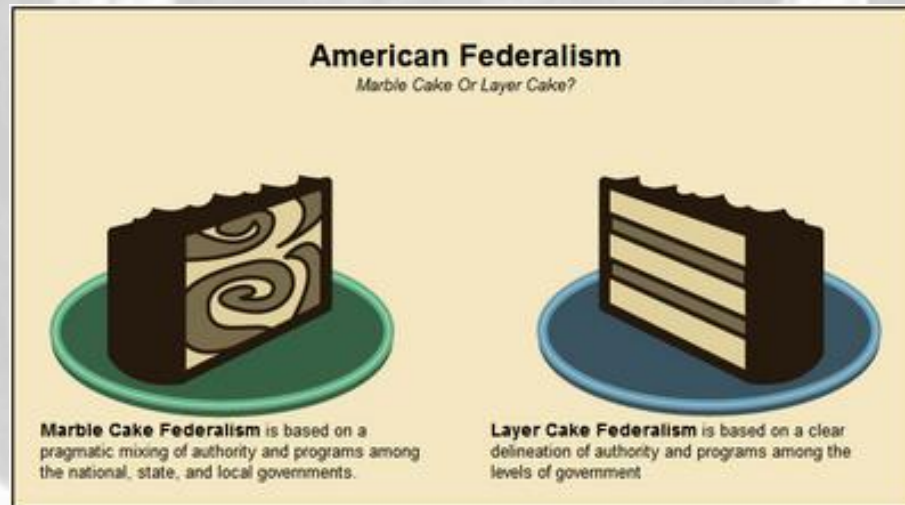
Theories of Federalism

- **Dual Federalism**

- *Layer Cake* Federalism
- States/Nat'l Govt
Remain Separate in own
spheres

- **Cooperative Federalism**

- *Marble Cake* Federalism
- States/Nat'l Govt Share
powers & policy
responsibilities



- **Devolution (New Federalism—Nixon/Reagan)**

- Transfer of Responsibilities from Federal Government back to States

Key Federalism Clauses



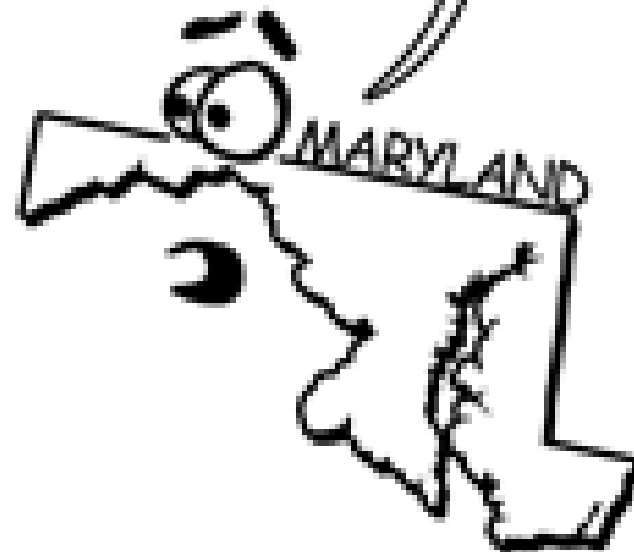
- **Necessary & Proper Clause (Elastic Clause)**
 - Intro. Concept of Implied Powers
 - Congress has any power necessary to carry out its responsibilities (expressed powers)
- **Supremacy Clause**
 - Constitution: Supreme Law of the Land
 - National takes precedent over state law
- **Supreme Court: umpire of federalism**
 - McCulloch v. Maryland

Supremacy/Necessary & Proper Clause (Elastic Clause): McCulloch v. Maryland

1819

Establishing a national bank was "necessary" to carry out Congress's power to tax.

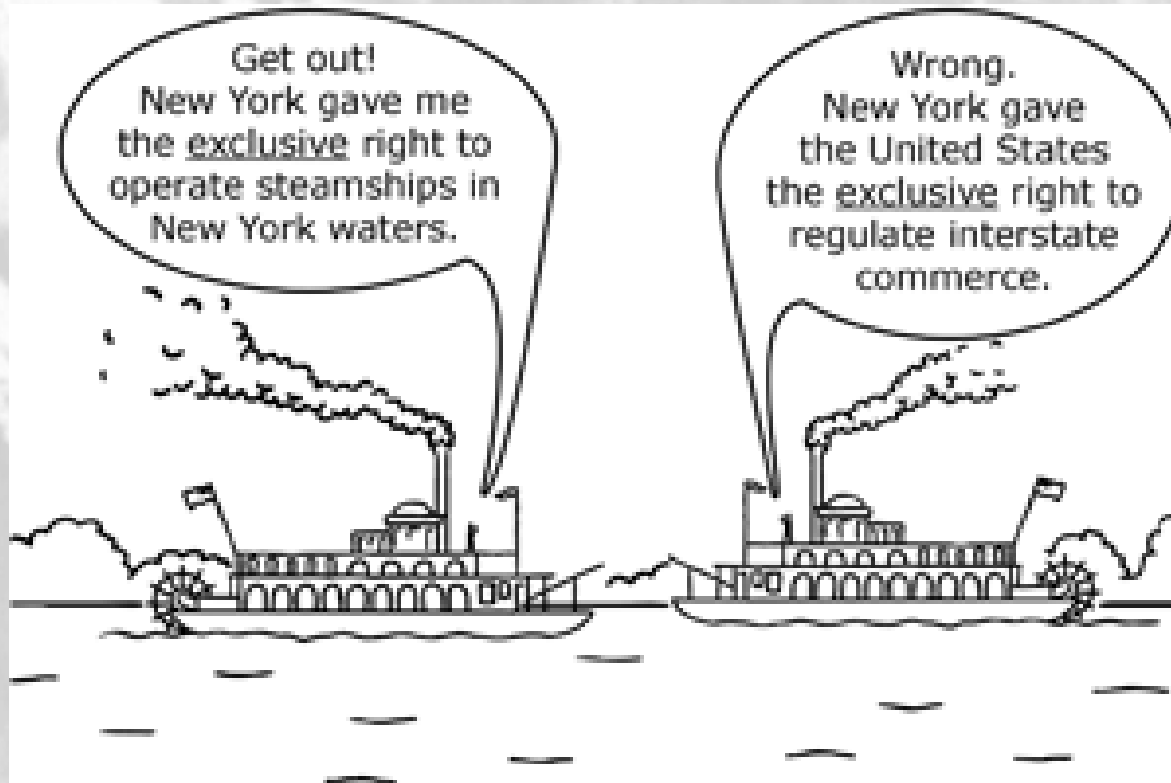
Exactly. That's why we want it stopped.



Commerce Clause

Congress ability to regulate interstate commerce

– Gibbons v. Ogden



[Colbert-If At First You Don't Secede](#)

Impact of the Elastic and Commerce Clauses

- Civil Rights Act of 1964
- Food & Drug Administration (FDA)
- Building of the Interstate Highway System
- Federal Controlled Substances Act
- Clean Air Act/EPA
- *U.S. v. Lopez*
 - *Temporarily* invalidated Gun Free School Zone Act as an overextension of Commerce Clause
 - This was the first time in over half a century that the Supreme Court limited Congressional authority to legislate under the Commerce Clause.

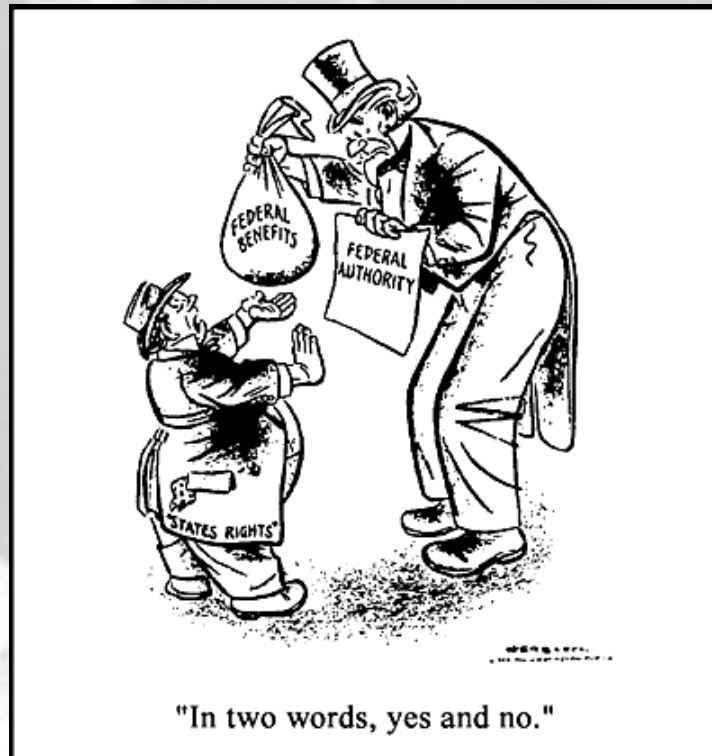
60 Minutes: Medicinal Marijuana...

A Conflict in Federalism

- <http://www.cbsnews.com/news/medical-marijuana-like-youve-never-seen-it-before/>
- <http://www.youtube.com/watch?v=DA-Emy7sZzg>
- Discussion Questions
 - Why have states turned towards legalizing medical marijuana?
 - What constitutional clauses are involved in this discussion and how?
 - What federal and state laws are in conflict? How is this a conflict in federalism?
 - Why have the dispensaries in Colorado been allowed to operate despite violating federal law?
 - How has Justice Department decided to limit the operations of dispensaries?

Fiscal Federalism

- Taxing & Spending
- Grants-in-Aid:
 - Fed. Funds appropriated by Congress for distr. to st./local govt. (way to infl. State govt.)



"In two words, yes and no."

Fiscal Federalism (Grants-in-Aid)

- **Categorical Grants:**

- Main source of federal **aid**...

- **Have a *narrowly* defined/ specific purpose**...

- Usually comes w/ conditions (matching)

- Two Types:

- Project Grant—specific purpose...based on merit of application

- Formula Grant—based on formula in legislation

- Examples?

- Federal Highway Act Funding,

- Requires Drinking Age of 21 to receive highway funding from federal government

- Head Start, Food Stamps, Medicaid

Fiscal Federalism (Grants-in-Aid)

- **Block Grants:**

- Given to states/local govt. to support **broad programs**

- Community Development, Law Enforcement, Social Services

- **Less strings attached...**

- Examples

- Temporary Assistance to Needy Families (TANF): Welfare

- *How do block grants go along with devolution?*

- How does the Federal Government use categorical and block grants to impact state policy?

Federal Mandate

- **Federal Mandate**

- Rules telling states what they must do to comply w/ federal guidelines
- *Must comply with regardless of whether federal funding provided*
- **Amer. w/ Disabilities Act (1990)**
- How do mandates increase the power of the federal government over states?





North Carolina: House Bill 2— “The Bathroom Bill”

A Conflict in Federalism

N.C. HB2:

- **H.B. 2 Timeline**

- **February 22:** Charlotte City Council adds LGBT protections to the city's non-discrimination ordinance, granting protections in places of "public accommodations"
- **February 23:** N.C. House Speaker, Tim Moore, calls for legislative action on the "bathroom portion" of Charlotte's ordinance
- **March 23:** In single day, N.C. General Assembly passes HB2, "the bathroom bill." Gov. McCrory signs it into law that night.
 - The law requires people to use bathrooms in public facilities in line with the gender listed on their birth certificate
 - The law also prohibits local governments from passing LGBT non-discrimination laws
 - Sets a statewide definition of classes of people who are protected against discrimination: race, religion, color, national origin, age, handicap or biological sex as designated on a person's birth certificate.

N.C. HB2

- **Timeline (continued)**

- **March 29:** ACLU and others file lawsuit challenging HB2
 - U.S. Justice Dept. warns the state that the law jeopardizes billions of federal dollars the state receives each year in money for schools, colleges and other issues.
- **May 9:** Justice Dept. files a Civil Rights lawsuit against N.C. : Challenge constitutionality of HB2 and a statewide ban on its enforcement
 - Republican legislative leaders Tim Moore and Phil Berger file their own complaints asking the courts to declare the law non-discriminatory; they argue Justice Department is abusing its power by misinterpreting protections of civil rights legislation to include LGBT protections
- **May 12:** Obama administration issues sweeping directive telling every public school district in the country to allow transgender students to use the bathrooms that match their gender identity.
 - It does not have the force of law, but it contains an implicit threat: Schools that do not abide by the Obama administration's interpretation of the law could face lawsuits or a loss of federal aid.

Discussion Prompts

- How is this event an example of a conflict in Federalism?
 - What did the state do when the conflict began?
 - Is the state justified in placing a blanket ban on any LGBT non-discrimination laws passed by local governments?
 - What federal provisions is the Justice Department using to challenge the law?
 - How is the federal government trying to use fiscal federalism to influence policy in North Carolina?
 - How are the federal government's actions similar/different from the actions taken by the state against local governments?
 - Although President Obama's directive to public schools does not have the force of law, what constitutional authority does he have to act on this issue?
- One of the arguments used the state has used to support the law is that it will prevent "sexual predation." Is this a valid argument and does it trump the concern for Civil Rights?
- One of the arguments used by the ACLU to support their actions (as well as the Justice Department) is that HB2 is similar to the Jim Crow Laws against African Americans in the South, as well as the arguments used against gays and lesbians using the restrooms/lockers with straight people; is this a valid comparison, and if so, can HB2 be upheld as constitutional?
- What are other examples of times where the federal government intervened in states to protect Civil Rights?
- Extension Question:
 - Outside of the newly clarified right to marry as a result of the Supreme Court decision in Obergefell v. Hodges, there is currently no federal law prohibiting other types of sexual orientation discrimination. Sexual orientation is not protected by federal law the way race, color, sex, religion, national origin, age, and disability are for private employers. Although currently the EEOC interprets the Civil Rights Act of 1964's protection against sex discrimination to include sexual orientation and gender identity, as stated, currently there is no federal law that specifically prohibits discrimination against LGBT citizens in their jobs. The Employment Nondiscrimination Act as well as the Equality Act that would do so have been proposed for many years, but have not passed. What obstacles stand in the way of this law's passage and should the Congress pass this legislation which would make

N.C. HB2

- Federal Provisions being used to challenge the law
 - **14th Amendment:**
 - No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
 - **Civil Rights Act of 1964**
 - Outlawed discrimination based on race, color, religion, sex, or national origin in all public accommodations
 - Title VII-Protects against Sex Discrimination; Obama Administration has stated that Sexual Orientation and Gender Identity fall under protections against discrimination based on Sex.
 - **Title IX of the Civil Rights Act of 1972**
 - Prohibits discrimination in all school programs. The federal government includes sexual identity and orientation under the broader category of sex discrimination.

Federal Provisions used by Justice Dept.

- Executive Order 11478, section 1 (as amended by Executive Orders 13087 and 13152) provides:
 - It is the policy of the government of the United States to provide equal opportunity in federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, age, sexual orientation or status as a parent, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the federal government, to the extent permitted by law.

Further Information

- **How does HB2 affect schools?**

- Under HB2, North Carolina now requires students to use public school restrooms and locker rooms based on the gender on their birth certificates. The federal government says that violates Title IX of the Civil Rights Act that prohibits discrimination in all school programs. The federal government includes sexual identity and orientation under the broader category of sex discrimination.
- McCrory and other HB2 supporters accuse the Justice Department, the U.S. Department of Education and other federal officials of "radically reinterpreting" discrimination law to include LGBT individuals. The 4th Circuit Court of Appeals, which has precedence in North Carolina, ruled in a recent Virginia transgender bathroom case that the federal agencies acted within their rights to include LGBT protections.
- That leaves the state's public colleges, universities and local school districts caught in the middle of a bitter court fight, with potentially billions of federal education dollars at stake.
- North Carolina's school superintendent said in May that school districts across the state were not complying with HB2. That appeared to be the case in Charlotte-Mecklenburg Schools, the state's second largest district. The Rowan-Salisbury schools did say it would follow state law while respecting the privacy of all of its students.

Further Information

- President Obama's Directive to Public Schools

- School may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so," according to the letter, a copy of which was provided to The New York Times.
- A school's obligation under federal law "to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns," the letter states. "As is consistently recognized in civil rights cases, the desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students."
- As soon as a child's parent or legal guardian asserts a gender identity for the student that "differs from previous representations or records," the letter says, the child is to be treated accordingly — without any requirement for a medical diagnosis or birth certificate to be produced. It says that schools may — but are not required to — provide other restroom and locker room options to students who seek "additional privacy" for whatever reason.

Further Information



- Critics of the President on the right:
 - The move is certain to draw fresh criticism, particularly from Republicans, that the federal government is wading into local matters and imposing its own values on communities across the country that may not agree.

Further Information



- **Can someone be fired in North Carolina for being gay or transgender?**
 - Yes. North Carolina is an “at will” employment state and offers limited protection for all workers. State law has never included protections for workers who are LGBT. The language in HB2 makes it more clear that the state does not intend to create a new class of protections based on sexual orientation or identity, and also will not allow cities and counties to create such a protected class.