



New Administration, New Federalism?

Julia Martin

jmartin@bruman.com

Policy Institute, February 2017

M & BRUSTEIN
MANASEVIT, PLLC
ATTORNEYS AT LAW



What is Federalism?

- “Federalism is a system of government in which the same territory is controlled by two levels of government. Generally, an overarching national government governs issues that affect the entire country, and smaller subdivisions govern issues of local concern. Both the national government and the smaller political subdivisions have the power to make laws and both have a certain level of autonomy from each other.”



Origins of Federalism

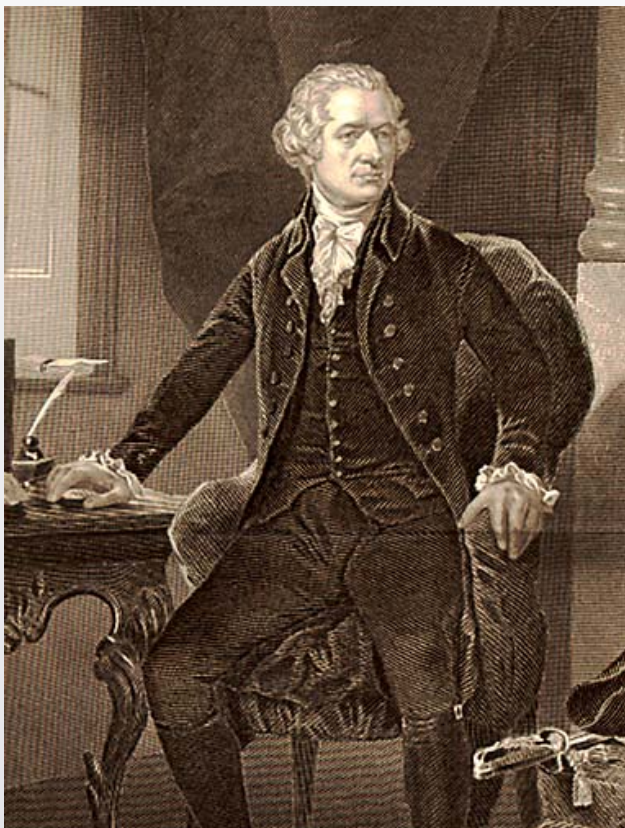


Origins of Federalism

- American colonies were independently chartered by the British government
- Each had own militia, issued its own currency
- Competition between agrarian/capitalist economies in northern and southern States



Origins of Federalism



- “We’ve got to handle our financial situation. Are we a nation of states? What’s the state of our nation?”



Constitutional Origins of Federalism

- Congressional powers: declare war, levy taxes, coin money, establish post offices
- Presidential powers: act as commander in chief, negotiate treaties
- Judicial powers (federal judges only): hear all cases in federal jurisdiction
- States: no explicit limitations

Constitutional Origins of Federalism

- Amendment X
 - “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”





Constitutional Origins of Federalism

- Congress has power to “make all Laws which shall be **necessary and proper** for carrying into Execution the foregoing Powers.”
- Congress may “pay the Debts and provide for the... **general Welfare** of the United States.”
- Congress may “**regulate commerce** ...among the several states.”

(all from Article I, Section 8)



Mapping Federalism

- Wickard v. Filburn (1942)
 - Federal government may regulate personal cultivation and consumption of crops because the aggregate effect could have an "indirect" impact on interstate commerce
- Gonzales v. Raich (2005)
 - Even if no goods were sold or transported across state lines, the Court found that there could be an "indirect" effect on interstate commerce
- United States v. Lopez (1995)
 - Gun-Free School Zones Act
 - Insufficient link to any of Congress' powers (commerce clause)



Carrot-and-Stick Federalism

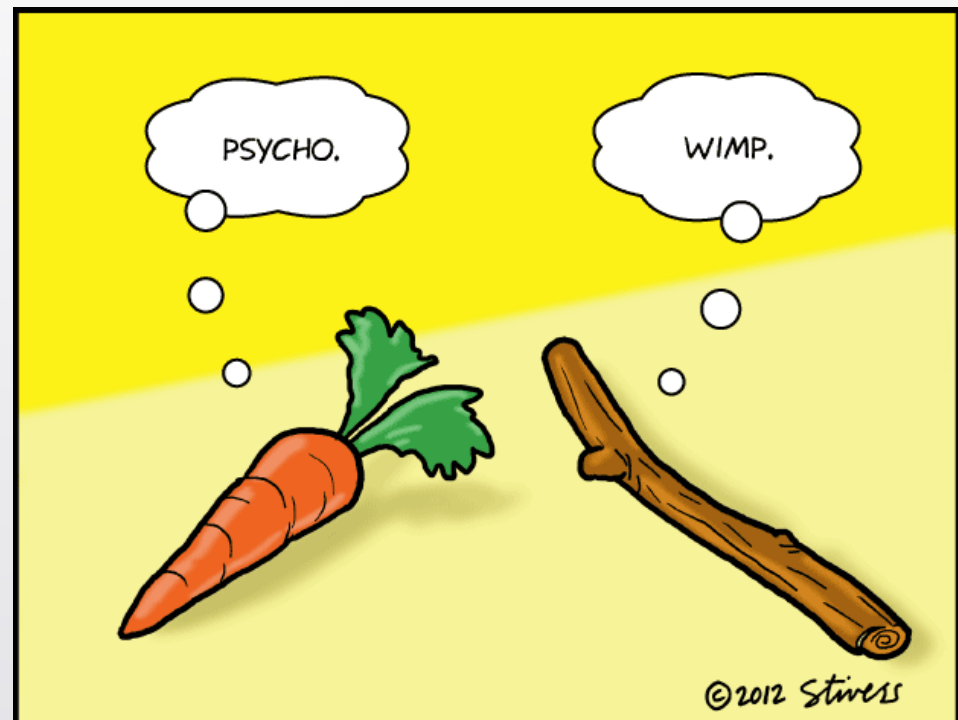


Carrot-and-stick Federalism

- If power is not explicitly or implicitly given, Congress often implements opt-in programs
 - Funding, requirements come only when a State accepts money for a program
 - Often requires significant State share
 - States free to opt out
 - Relies on public pressure

Carrot-and-Stick Federalism

- Medicaid
 - Technically optional for States
 - Passed in 1965, last State to opt in was Arizona





Carrot-and-Stick Federalism

- Every Student Succeeds Act
 - “Any State that opts out of receiving funds, or that has not been awarded funds, under one or more programs under this Act shall not be required to carry out any of the requirements of such program or programs, and nothing in this Act shall be construed to require a State to participate in any program under this Act.”



Limits of Federalism

- South Dakota vs. Dole (1987)
 - Congress passed law which withheld some federal highway funds from States with drinking age below 21
 - Five-point rule for expenditure conditions:
 - The spending must promote "the general welfare."
 - The condition must be unambiguous.
 - The condition should relate "to the federal interest in particular national projects or programs."
 - The condition must not, in itself, be unconstitutional.
 - The condition must not be coercive.
 - Dissent: condition should be reasonably related to purpose of funds



Limits of Federalism

- National Federation of Independent Businesses v. Sebelius (2012)
 - “The threatened loss of over 10 percent of a State’s overall budget is **economic dragooning** that leaves the States with no real option but to acquiesce in the Medicaid expansion.”
 - “A State could hardly anticipate that Congress’s reservation of the right to “alter” or “amend” the Medicaid program included the power to transform it so dramatically. The Medicaid expansion thus violates the Constitution by threatening States with the loss of their existing Medicaid funding if they decline to comply with the expansion.”



How Do Federal Agencies Fit In?

- Part of the executive branch – arm of the President
- *Chevron v. Natural Resources Defense Council*
 - Supreme Court ruled that the U.S Congress may delegate regulatory authority to an agency, and that the agency's regulations carry the weight of the law
 - Regulations must pass the two-part "Chevron test".^[24] Has Congress spoken directly to the question?
 - If yes, and Congressional intent followed, ok
 - If statute is silent or ambiguous, "the issue for the court is whether the agency's answer is based on a permissible construction of the statute."
 - In other words, give deference to federal agency interpretation in areas of ambiguity



ESEA Waivers

- ED offered States waivers of more onerous provisions of Elementary and Secondary Education Act (ESEA) in exchange for four major policy changes:
 - New standards (including Common Core)
 - Aligned Assessments
 - Teacher and Principal Evaluations
 - Reduction of LEA burden
- Survived until reauthorization of ESEA



The Lesson



- Limits to carrot-and-stick federalism depend on entities being willing to challenge tradeoffs



Balancing Interests



Competing Priorities

- Republicans:
 - Small federal government
 - In size and scope
 - Power to States/ individuals
 - Limited federal assistance
 - Lower taxes
- Democrats:
 - Strong federal governance role
 - Federal intervention as “guardrails” to protect individuals
 - Social safety net programs a priority



How Far Is Too Far?

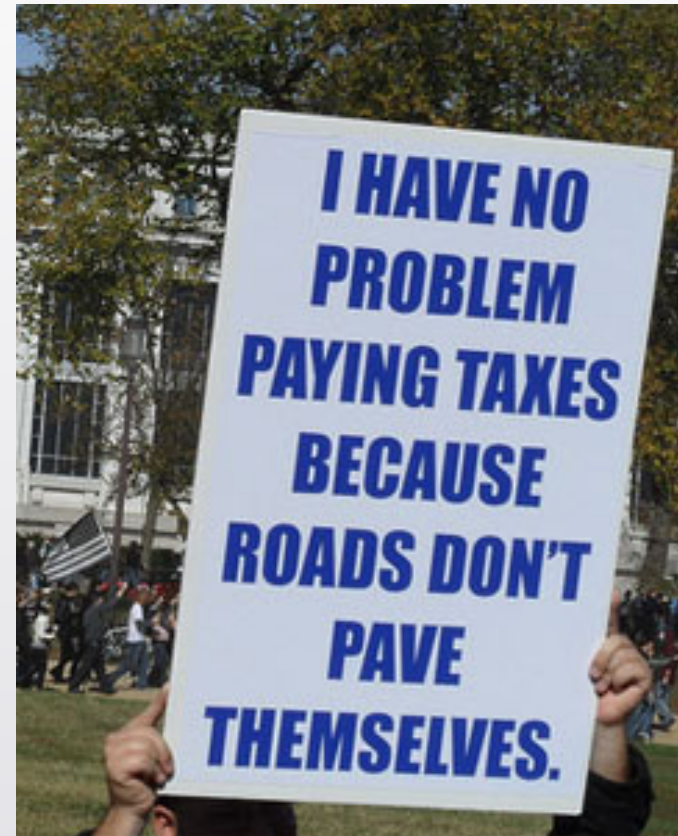
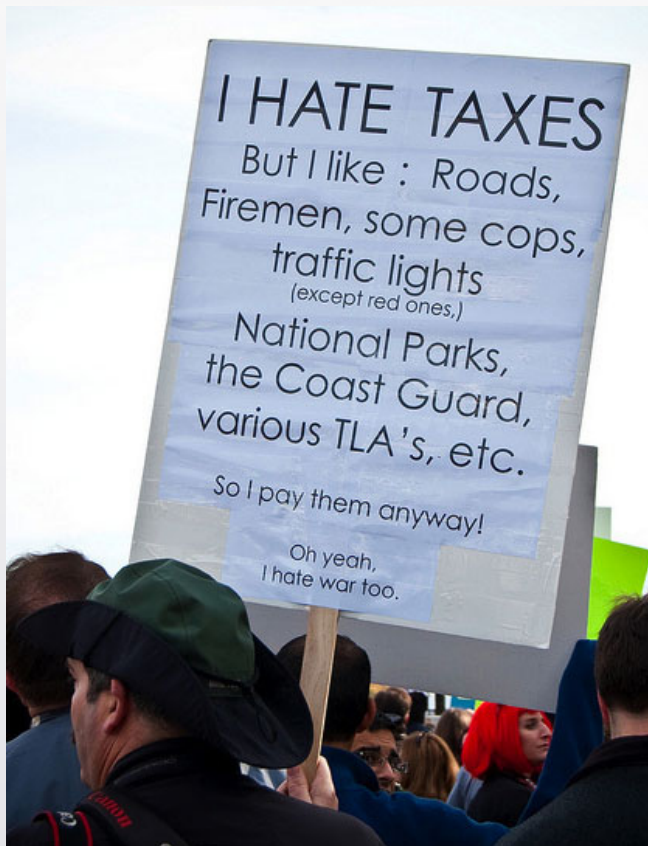
- North Carolina (March 2016): “Bathroom bill” (H.B. 2) prohibited prevents municipalities in North Carolina from enacting anti-discrimination policies, setting a local minimum wage, etc.
- Michigan (December 2016): New State law prohibits local governments from banning, regulating, or imposing fees on the use of plastic bags and other containers

How Far is Too Far?

- DC was only recently granted “home rule” (1973) and control over its own governance by Congress
 - Has no voting representation in Congress
 - Congress sponsors private school voucher program for DC residents
 - Recently introduced legislation would overrule DC law on assisted suicide, gun possession, abortion, legal marijuana



Equilibrium?

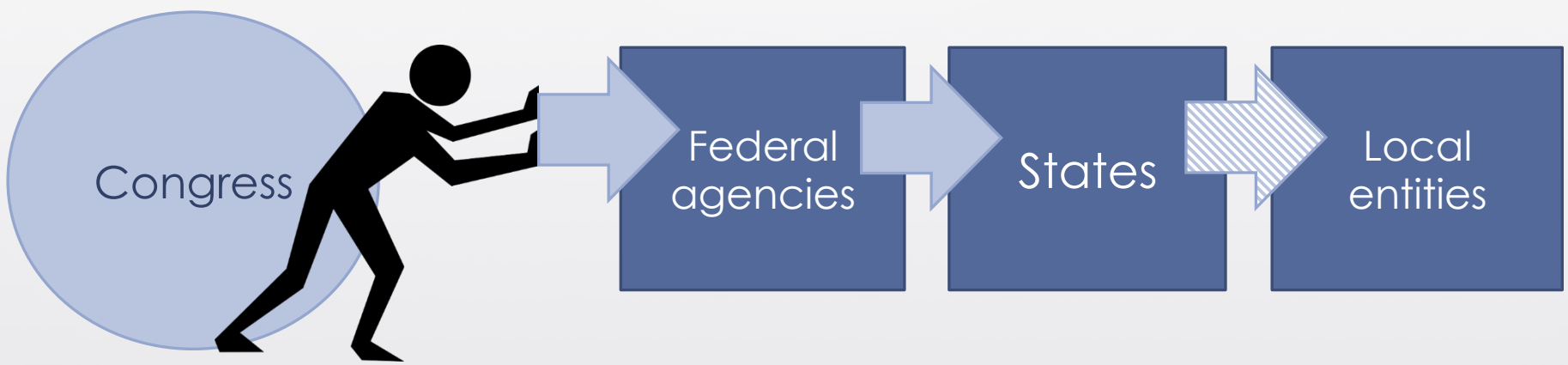




Shifting Authority



Shifting Authority





Movement to Limit Agency Discretion

- ESSA strictly prohibits Secretary from doing anything to:
 - Require/incentivize certain standards or assessments, instructional content, programs of instruction, curricula, etc..
 - Deny approval of State plans without good reason
 - Deny approval of waivers without good reason
 - Set new criteria through regulation or requiring certain policies in exchange for flexibility or approval of State plans
 - Specify additional pieces of accountability system
 - Endorse a specific curriculum or develop a federally sponsored assessment



Movement to Limit Agency Discretion

- Draft Perkins Act Reauthorization bill introduced in Senate in 114th Congress:
 - Secretary can't promulgate regulations that would:
 - Add new requirements/criteria that are "inconsistent with or outside the scope of this Act"
 - "Be in excess of statutory authority granted to the Secretary"
 - Secretary can't prescribe:
 - Specific performance indicators, targets, or levels of performance
 - Approaches taken to ensure equitable access
 - Indicators or measures of teacher/faculty education or quality
 - "The role of the Secretary...shall be limited to providing technical assistance"



Whose Job is it Now?

- Rep. Virginia Foxx (R-NC) interview in Inside Higher Ed (November 2016)
 - “We need to look at the functions of the Education Department and see are there things that can be done at the state and local level that are now being done at the federal level.”
 - “We will want to use [the Government Accountability Office] and the inspector general a lot more than we have. I have advocated for a long time that we beef up the staff of the GAO. I really and truly believe that the GAO really does very good work.”



Whose Job is it Now?





New Federalism



CRA & MRRA

- Congressional Review Act (existing law)
 - Reaches back 60 legislative days
 - Rescinds regulation
 - Prohibits agency from ever issuing “substantially similar regulations
- Midnight Rules Relief Act (*proposed*)
 - Allows regulations to be bundled for the purposes of the CRA



REINS Act

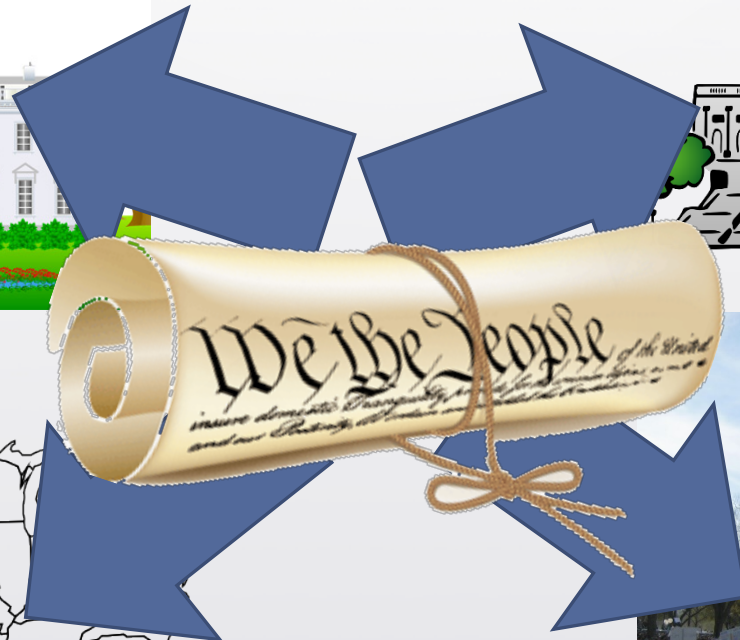
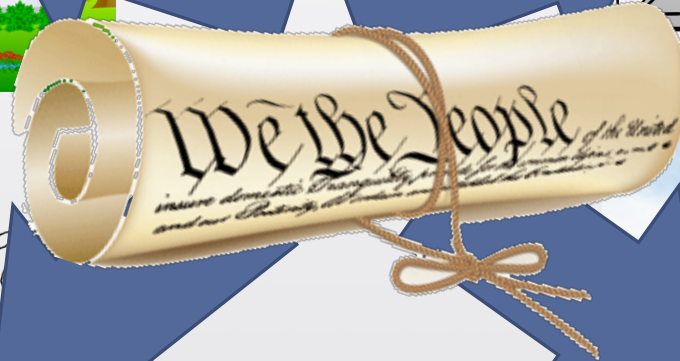
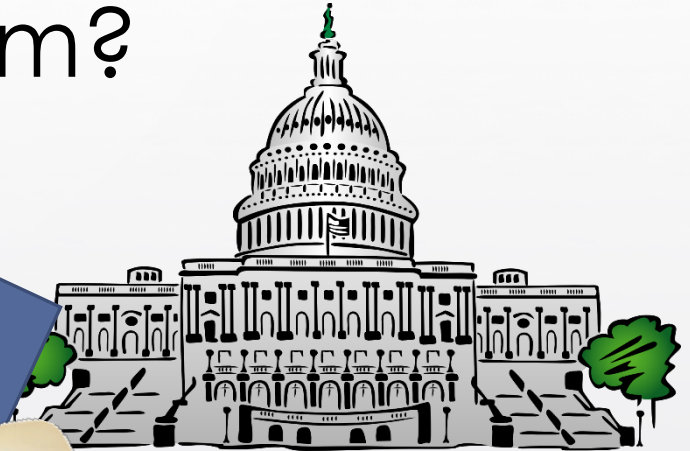
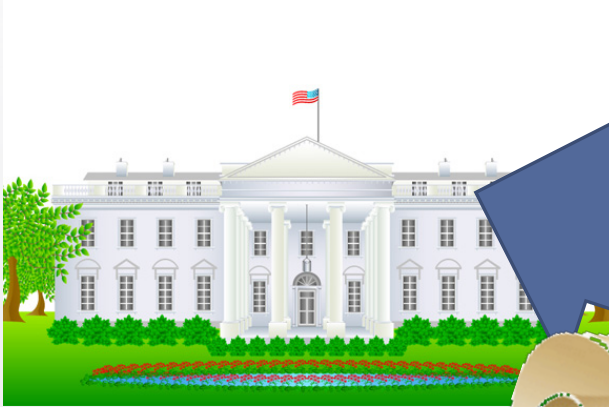
- Regulations from the Executive in Need of Scrutiny Act (*proposed*)
 - Expands definition of “major rule”
 - Congress has 70 legislative days to vote on new rule
 - If they don't approve, doesn't take effect
 - President can require rule to take effect for 90-day period in an emergency
 - Subjects all portions of rulemaking process to judicial review



RAA

- Regulatory Accountability Act (*proposed*)
 - health and safety standards must also take cost into account, adopt “least costly” rule
 - Agencies must analyze “substantial alternatives” submitted by “interested persons” during rulemaking
 - Ends “Chevron deference”

The Future of Federalism?





LEGAL DISCLAIMER

This presentation is intended solely to provide general information and does not constitute legal advice or a legal service. This presentation does not create a client-lawyer relationship with Brustein & Manasevit, PLLC and, therefore, carries none of the protections under the D.C. Rules of Professional Conduct. Attendance at this presentation, a later review of any printed or electronic materials, or any follow-up questions or communications arising out of this presentation with any attorney at Brustein & Manasevit, PLLC does not create an attorney-client relationship with Brustein & Manasevit, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.