Federalism

Issues in Federalism

Throughout our nation's history, disputes have raged about how to combine federal and state sovereignty within one political and constitutional system. As these recent controversies illustrate, the disputes continue.

Video: Same-Sex Marriage

The question of same-sex marriage has provoked a firestorm of controversy in the United States. The battleground for this debate has shifted from state courts to state legislatures, to federal courts, and even to the US Congress, as interest groups search for the best forum to make their case. Marriage, once an issue for individual states, has become a federal matter. This video explores the complicated role of federalism in the issue of which governing body defines marriage.

Video Focus Points

Look for answers to these questions when watching the video:

• What is the purpose of the Full Faith and Credit Clause of the US Constitution?
• Is marriage a state or federal prerogative?
• What are the legal advantages of marriage?

Video Script:

Protestor 1: Homosexual marriage!

Protestor 2: Folks, what do we want? When do we deserve them?

Crowd: Now!

Protestor 1: You are exactly like Adolph Hitler. Can’t you see that?
Narrator: Over the past two decades, the right to marry has provoked a firestorm of controversy when it involves the issue of same-sex marriage.

Crowd: Shame on them! Shame on you!

Narrator: The battleground for this debate has moved from state courts to state legislatures, and now to the U.S. Congress, turning what was an individual state issue into a federal issue. While advocates say they are merely seeking equal rights under the law, opponents contend that marriage should only be allowed between a man and a woman.

H.W. Perry, University of Texas School of Law: One of the great advantages of federalism people talk about is that states are laboratories for experiments of different types of policy. And so, many people claim that as we’re moving into this new area of trying to understand whether or not gay marriage would be something acceptable in the United States that it makes some sense to have certain states that are willing to do it as laboratories of experimentation and that “one size fits all” is not a particularly good standard for something that is so controversial in the nation.

Narrator: Traditionally, marriage has been a policy area reserved for the states. But, the Full Faith and Credit Clause of the U.S. Constitution requires every state to recognize the public acts and judiciary procedures of every other state.

H.W. Perry: If, for example, one state legalizes gay marriage and a couple is seen as a legitimately married couple in one state and they move to another state, must the state treat them as a married couple and give Full Faith and Credit to the decision to allow them to marry in another state?

Narrator: The debate among federal and state governments over same-sex marriage reached critical mass in 1996, when the Hawaii Supreme Court ruled in the case of that the state constitution established a right for same-sex couples to marry.

Lorie Burch, DFW Human Rights Campaign: The Baehr case in Hawaii was the first case to recognize that the restriction of allowing same-sex couples to marry was discrimination on the basis of sex, not sexual orientation per se, but on the basis of sex, meaning that I as a woman cannot marry another woman but if I were a man, I could marry that woman. So it used that argument, which ultimately was the argument that Massachusetts used in order to pass gay marriage in that state.
Narrator: While the Baehr decision was ultimately reversed by an amendment to the Hawaii Constitution, Congress was quick to redefine marriage.

Rep. Bob Barr: No one state of the union can have its…decision of its people over-ridden, run rough shod, by people from…judges from another state.

Narrator: Anticipating that other state courts might also condone same-sex marriages, Congress passed the Defense of Marriage Act in 1996.

H.W. Perry: It defined marriage as being a relationship between a single man and a single woman. And in this same act, Congress suggested that states need not accept another state’s definition of marriage as a way of governing how they treated people in their own state. Some people claim that that latter part, at least, violates the Full Faith and Credit Clause of the Constitution.

Bob Barr: Social relationships, personal relationships, if they’re defined by government at all, ought to be defined by the state government under our concept of federalism, not the federal government.

Narrator: The growing collision of state and federal regulations raised an important constitutional question. Are federal and state laws that extend marriage rights only to individuals in heterosexual relationships constitutionally vulnerable because they lead to unequal treatment of individuals in same-sex relationships? In a landmark 1967 case, the Supreme Court struck down state laws that would not recognize interracial marriage.

Lorie Burch: The case of Loving versus Virginia, which struck down any laws that would not recognize interracial relationships, is not the exact issue that is at play here, but it certainly provides some very useful parallels when it comes to the argument of same-sex marriage. First, and foremost, the Supreme Court recognized that marriage is a fundamental basic civil right that is afforded to individuals and is not subject to the state to decide.

Kelly Shackelford, Chief Council, Liberty Legal Institute: Marriage has everything to do with the bringing together of the sexes. It has nothing to do with race. The point is, there is a reason it is one man and one woman…and there are some special things that happen in that committed relationship that are good for children…and that are good for society.

Lorie Burch: What's very telling is that the same arguments that were made against interracial
marriage are the same arguments that are being used against gay marriage, in that it’s not God’s will and that it has an adverse effect on family and children. The role of the courts, traditionally, has been to protect minority rights over the majority will.

TV Commercial: Join me.

Join me.

Be wise.

Be informed.

Lorie Burch: And right now with the gay marriage issue, we have a lot of this going to a vote.

TV Commercial 1: We’re all Californians. We’re all equal. Let’s keep it that way. Vote No on Prop 8.

TV Commercial 2: Gay marriage will be taught in our schools unless we vote Yes on Proposition 8.

Lorie Burch: It would be interesting to see how interracial marriages would have fared as part of a popular vote if it had been put up to the people at that time. And it is counter to our system to have the majority be able to vote on the rights of minorities.

Narrator: But the Supreme Court has been hesitant to extend equal protection guarantees to marriage laws that discriminate on the basis of sexual orientation.

Kelly Shackelford: I would say that every citizen should have full protection under the law. But, you get into a problem when you start creating special protections for people based upon their preferences…or their lifestyle. Then you begin elevating that over other people. An example would be…you know, a law that gave special protection to people based upon sexual orientation.

Pres. George W. Bush: If we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America.

Narrator: Once again, seeking to preempt state laws and judicial extension of marriage rights to same-sex couples, Congress proposed the Federal Marriage Amendment in 2004. If ratified,
the constitutional amendment would have limited marriage in the United States to unions of one man and one woman.

Kelly Shackelford: It would actually allow the people to be a part of that decision. What’s been happening over the past years is, the homosexual activist attorneys, they knew they could not win any vote in any of the states. So the idea was – go into the state courts, the more liberal state courts, win a lawsuit, then force same-sex marriage on that state through the court, then have people from other states fly there, get married, go to other states and say, "Under the Full Faith and Credit Clause of the United States Constitution you have to recognize our marriage." And by doing that, they could force this new definition on society, really without anybody getting to vote on it.

Lorie Burch: Those who are proponents of gay marriage are not arguing that there needs to be, at the federal level, a definition of marriage. What they’re saying is that from state to state, there should not be discriminatory laws that do not allow for the equal treatment of individuals, in this case same-sex couples. So the idea of enshrining discrimination into our Constitution is very counter to our whole system of government, which is one of the reasons the Federal Marriage Amendment failed.

Narrator: Marriage is a core institution in American society. But will it be defined by the federal government or by the states? For some, it is to be protected and defined as a union only between a man and a woman.

Kelly Shackelford: Homosexuals, lesbians, bisexuals have the freedom to be in whatever relationship they want to. But they don’t have the freedom to redefine marriage for society, because it has consequences. Really, it doesn’t just redefine marriage, it destroys the definition because there really is no tenable definition after you unhinge it from the distinctiveness of the sexes and bringing one male and one female together.

Narrator: For others, marriage provides the legal benefits and privileges that should be guaranteed to any couple under the law.

Lorie Burch: It is about equality. It is about inheritance rights. It’s about…it’s about health insurance. It's about Social Security. It's about not being discriminated at work. It is about being able to make medical decisions and inherit property and be able to have hospital visitation to your partner. But at the core, it's something so much simpler and greater than that… and it's
the basic human need to be loved and...to be able to create a family.

End of video.

In 2013, two Supreme Court rulings advanced the recognition of same-sex marriage. In *United States v. Windsor* (2013), the court declared unconstitutional the section of the Defense of Marriage Act (DOMA) that denied federal benefits to same-sex couples. The court ruled that DOMA wrongly "instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." As a result of the decision, the federal government recognizes same-sex marriages only in states where such marriages are legal.

In the case of *Hollingsworth v. Perry* (2013), a narrowly divided Supreme Court cleared the way for same-sex couples to marry in California, dismissing an appeal of a lower court’s ruling overturning the state’s voter-approved Proposition 8 that banned such marriages. In both decisions, the court avoided the broader issue of whether same-sex marriage is a constitutional "equal protection" right, leaving intact state laws banning same-sex marriages.

**Video: Hurricane Katrina**

Although the federal system divides powers and responsibility between national, state, and local governments, the boundaries between these areas of responsibility are not always clear. This confusion may produce deadly results when disaster strikes, as in August 2005 when Hurricane Katrina devastated New Orleans and much of the Gulf Coast. This video examines whether the failures of government action during and after Hurricane Katrina were a result of the structure of federalism.

**Video Focus Points**

Look for answers to these questions when watching the video:

- How does an event become classified as a major disaster?
- Who should decide if an event is national or local?
- What might be the dangers of endorsing national override of state leadership?
Video script:

Music introduction and blowing wind

Mayor Ray Nagin: We are facing a storm that most of us have feared.

TV Weatherman: What we’re looking at right now is a category five hurricane.

News Anchor: …which means big, big trouble along the northern Gulf Coast.

Mayor Ray Nagin: Every person is hereby ordered to immediately evacuate the city of New Orleans.

Music

Narrator: August 29th, 2005. Hurricane Katrina pounds the city of New Orleans with winds gusting up to 130 miles per hour. Levees, built to protect the below-sea-level city, give way under the force of a 27-foot tidal surge. More than eighty percent of the city is flooded. Over 100,000 people are stranded without food, water, or electricity. Images broadcast around the world reveal an agonizing meltdown of governmental authority. The word “Katrina” becomes synonymous with federalism in crisis.

James Chen, University of Louisville School of Law: Our government’s commitment to federalism, and by that I mean the entire American system of government, the constitutional system that we’ve had in place since the founding of this republic, that commitment may and I think in the case of Katrina did, interfere with responses to disaster by confusing the question of who’s in charge.

Narrator: In the United States, emergency planning and disaster response mimics the structure of federalism, shifting much of the authority from the federal level to state and local governments.

At the local level, New Orleans Mayor Ray Nagin directed the police and fire departments and tried to coordinate evacuation efforts. Louisiana Governor Kathleen Blanco controlled state agencies and the Louisiana National Guard. Reporting to the Department of Homeland Security and the President, FEMA, the Federal Emergency and Management Agency, coordinated the efforts of the federal government. But even as Hurricane Katrina was bearing down on the
Louisiana coast, the fractured division of responsibility under the federalist system complicated the first response.

James Chen: The first stage is to make a request for emergency assistance, then to make a request for a declaration of a major disaster. That just takes time. It takes local authority reporting up to the governor’s office. The governor has to make a communication to the White House. And then the White House has to decide and until that happens, the default method of emergency and disaster planning at the federal level is to stay back. It’s what we call a pull system. You don’t get assistance. You don’t get actual response until you, the requesting authorities at the local and state level, make the request.

Lawrence Korb, Senior Fellow, Center for American Progress, Washington, D.C.: Does the President have to declare a natural disaster and what if he doesn’t and the governor hasn’t asked him to, you know, to do that and so what you saw play out there were people who did not recognize that in an emergency, you can sort of bypass the normal checks and balances.

Mayor Ray Nagin: The storm surge most likely will topple our levee system, so we are preparing to deal with that, also. So that’s why we’re ordering the mandatory evacuation.

NARRATOR: Less than twenty-four hours before Hurricane Katrina hit New Orleans, Mayor Ray Nagin ordered a mandatory citywide evacuation amid warnings that the levee system might fail. While most residents escaped, more than 100,000 were stranded without transportation.

James Chen: There were many, many people for whom an evacuation order based on having their own vehicles was laughably impossible to comply with. I mean, I say laughably, it’s more tragic. So many of the poorest residents, the most vulnerable residents, especially of New Orleans but also of the surrounding communities, didn’t have cars. So we had laws, and maybe the laws were not perfectly written because of our commitment to federalism, but we didn’t carry them out in a way to enable the federal government to intervene aggressively and proactively before things happened. You wound up having to wait until there is no way out.

Gusting wind

Narrator: When the eye of Hurricane Katrina passed to the east of New Orleans, it appeared the city had been spared the worst. But within hours the levees cracked under the pressure of the storm’s tidal surge. Millions of gallons of water spilled into vast areas of New Orleans, flooding homes and businesses, and stranding thousands of residents.
James Chen: The question of levee failure during Katrina is probably one of the most intriguing illustrations of the system of federalism. These levees were the subject of federal grants and the typical federal grant is a block grant of chunks of money that are obviously appropriated at the federal level, but the important thing to remember is that decisions on how to spend the money are often carried out at the local level.

David Boaz, Executive Vice President, CATO Institute, Washington, D.C.: Louisiana had gotten more money for Army Corps of Engineer civil projects over the past few years than any other state. But for some reason it wasn’t spent on levees and flood control projects.

Narrator: While most of the attention focused on rescue efforts, security in New Orleans quickly eroded. Looting spread throughout the city. Paralyzed by the communication and transportation breakdown, police officers could do little to stop the chaos. On September 2nd, five days after Katrina made landfall, the Bush administration sent Louisiana Governor Blanco a request to federalize the National Guard to help restore order.

James Chen: Under ordinary circumstances, the National Guard is under the command of the governor of each state. But the National Guard is, under certain circumstances when you follow the legal protocols, it becomes part of the federal military. The National Guard, when called into national military service, has to obey the same rules that the national military must always obey. Those rules presumptively say no federal military involvement in law enforcement. Now there are all sorts of exceptions to this. There’s something called the Insurrection Act that says if you have looting or organized defiance of civil authority, they may take action.

Gov. Kathleen Blanco: Usually, disasters like this bring out the best in everybody and that’s what we expected to see. And now we’ve got people that it’s bringing out the worst in… and we’re going to restore law and order.

Narrator: Governor Blanco refused President Bush’s request to federalize the state National Guard. This delayed the arrival of federal troops by days and resulted in separate state and federal command structures.

Music transition

NARRATOR: Hurricane Katrina was the worst natural disaster in America’s history, with an estimated 81 billion dollars in damages and over 1,800 lives lost. Criticisms were directed at all levels of government for the slow and disorganized response. Many faulted New Orleans
Mayor Ray Nagin for failing to mobilize public transportation to assist with the evacuation effort. Governor Blanco was criticized for not acting decisively to invite federal intervention in order to stop looting and unrest. But most of the blame in the wake of Katrina was leveled at the federal government – FEMA Director Michael Brown, the Secretary of the Department of Homeland Security Michael Chertoff, and President George W. Bush.

James Chen: I think it was a crucial moment in the country’s history when all of us looked to the Gulf Coast, in particular New Orleans, and said this can’t be happening. This is a national tragedy. We are made to look incompetent in the eyes of the world and in the eyes of our own people… and how could this have happened. And the question of blame arises and you wonder whether it’s a failure of the design of federalism or is it a failure of the execution of the plan. I think you can lay blame in both instances.

Lawrence Korb: You had everybody saying no, it’s the governor, no, the mayor, no, it’s the President and when you get right down to it, it’s really the President. I mean, the President has to set the tone.

Narrator: But others are less inclined to point the finger at federalism and the federal government.

David Boaz: I’m not sure I see the Katrina problems as either a failure of federalism or a failure of leadership. The federal government intruded itself into matters that should’ve been left at the layer of government closer to the people. And then I think what you had was a failure of central planning.

Gavel hit

Narrator: As a post-mortem to Hurricane Katrina, the White House and Congress conducted weeks of hearings and generated thousands of pages of reports, detailing the mistakes and misjudgments in the federal government’s response. But even years later the question still remains – has the government learned any lessons from Hurricane Katrina?

James Chen: Much of the public disappointment over the response of the national government, in particular, to Katrina was that we had to come to expect if there is something of this magnitude, if there is human suffering at this scale, our federal government’s supposed to be involved. I think as a result of this incident, the use of the existing mechanism for rolling out
federal relief will be faster. I do think that a reality of the federal government in modern society emerged as a result of Katrina.

Music and gusting wind

End of video.

**No Child Left Behind Act**

Education has long been an area for which states had primary responsibility. The United States has a strong tradition of local control over public elementary, middle, and secondary schools, with municipal school boards and parent-teacher associations exerting enormous influence on the curriculum. This decentralization of public education makes the United States atypical among most economically developed democracies where national governments play a much greater role in administering public schools.

However, since the Northwest Ordinance of 1787, the federal government has had an interest in promoting education. The GI Bill following World War II sent many veterans to college. Likewise, the federal government pumped money into science education in the public schools and universities after the Soviet launch of the first satellite, Sputnik, in 1957. In 1979, the US Department of Education was created as a cabinet-level department, though it remains the smallest of the existing fifteen departments. These actions testify to the belief that a successful educational system is vital to a strong and economically vibrant nation.

Even though the federal government has long played a role in funding education through grants to states and local educational institutions, the passage of the No Child Left Behind Act (NCLB) in 2001 marked a qualitative shift in its involvement. It was passed under the Bush administration with bipartisan support. An example of fiscal federalism, the Act increased federal funding for public schools and required state governments to develop statewide academic standards. In order to receive funding, schools had to meet a variety of federal requirements that are unprecedented in their detail compared to past educational grants. Compliance with NCLB has become a side industry within state educational systems and has greatly increased the emphasis on standardized testing.

Proponents of NCLB applaud increased funding and involvement by the federal government.
International comparisons have found American students to be lagging behind their counterparts in other industrialized nations. Local control of education in this country has long been blamed for poor educational outcomes. Increased government funding and more rigorous emphasis on standardized testing and measurement of performance outcomes may be a remedy for a public educational system that does not live up to the greatness of the country it serves. Federal requirements in NCLB also increased focus on the racial and economic inequalities in education and placed pressure on local and state governments to correct them. Critics of NCLB express alarm at what they consider an unprecedented intrusion into an area of traditional state and local authority. Many believe the emphasis on standardized testing encourages teaching to the test and gaming of the system by manipulation of standards and exam results. Others consider the requirements of NCLB as imposing an unfunded mandate on school systems because of inadequate federal funding necessary to meet federal targets. Like the same-sex marriage debate, support for NCLB did not follow typical ideological divisions. While the law was a Bush administration initiative and enjoyed the support of many Republicans, prominent Democrats criticized the law and its undermining of local control over education.

Legalization of Marijuana

Controversy has long surrounded the federal government's War on Drugs. Thousands of individuals are incarcerated in federal prisons on drug-related offenses. Additional thousands are held in state prisons. The government's failure to significantly reduce illegal drug use and the underground economy it generates has led many individuals and a few states to rethink the wisdom of outlawing drugs such as marijuana, particularly in cases where marijuana may have medical benefits.

California was at the forefront of reformulating policy concerning marijuana laws. In 1996, the voters of California approved Proposition 215 that allowed people with a doctor's recommendation to possess and grow marijuana for personal medical use.

A 2000 Supreme Court decision upheld federal laws outlawing the use of marijuana (for any purpose) over the California law authorizing prescription and use of medical marijuana. Marijuana possession and use, medical or recreational, remains a federal crime. However, the decision also recognized that while federal law is technically supreme over state law, the federal
government cannot compel state law enforcement officials to enforce federal laws. When state laws conflict with federal laws, it becomes problematic and can undermine national policy objectives. As a practical matter, the overwhelming majority of arrests for illegal marijuana possession are by state police officers rather than federal agents. So while the federal government can continue to investigate and make arrests of citizens in violation of federal law within a state, the limited legalization of marijuana would effectively gut law enforcement measures.

In November 2012, Washington and Colorado became the first states in the US to legalize recreational use of marijuana. Ballot initiatives passed in both states allow for the possession of up to one ounce for adults over the age of 21. The laws also legalize the sale of marijuana through authorized retail outlets, subject to state regulation and taxation. As of May 2013, the US Department of Justice had yet to rule whether Colorado and Washington's marijuana laws should be preempted by federal law and declared invalid.

The controversy over state legalization of marijuana illustrates arguments for and against federal systems of government. On the one hand, supporters of legalizing marijuana, much like supporters of state laws and judicial decisions recognizing same-sex marriage, celebrate federalism’s openness to creative policy solutions that can be pioneered at the state level. Whether the net effect of these policies are eventually judged a success or not, other states can learn from the experiment without having to undertake the same experiment themselves. On the other hand, legalizing marijuana at the state level conflicts with federal drug laws, illustrating how a federal system can foster state policies that work at cross-purposes with policies of other states or the federal government itself, since marijuana is clearly a product of interstate commerce. The effects of state-level marijuana legalization have spillover effects on states that may wish to maintain a more conservative strategy in combating drug use and abuse.

**Activity: Check Your Understanding**

Covers issues in federalism. Points out that Hawaii’s Supreme Court ruling in *Baehr v. Lewin* (1996) was a milestone in the same-sex marriage debate because it recognized that restricting same-sex marriage discriminated on the basis of sex. Mentions that Congress passed the Defense of Marriage Act in 1996 to define, at the federal level, marriage as being a union between one man and one woman. Explains how emergency planning and response to
disasters mimics the structure of federalism because authority shifts from federal to state and local governments. Highlights a 2000 Supreme Court decision that upheld federal laws outlawing the use of marijuana (for any purpose) over the California law allowing the use of medical marijuana.

Additional Resources

Websites

Education Week
http://www.edweek.org/ew/index.html

A major online magazine on American education policy, with a searchable archive for past articles. Searching "federalism" will yield articles debating federal funding, national education standards, and inequalities between school districts.

Books


The Environmental Protection Agency has spent years seeking enforcement of its laws in the courts, facing down challenges from large companies, not-for-profit environmental groups, and even other federal agencies. This book chronicles the policy battles that often take place across state lines.

Films/Videos

When the Levees Broke: A Requiem in Four Acts (2006), directed by Spike Lee.

A documentary about the devastation of New Orleans due to the failure of the levees during Hurricane Katrina. Interviewees include victims, politicians, journalists, musicians, and prominent civil rights leaders. Notable for its connection to federalism as it examines the state and national relationship in the wake of natural disaster.
Saving Marriage (2006), directed by John Henning and Mike Roth.

When the Massachusetts Supreme Court legalized gay marriage in 2004, the public outcry led some politicians to approve a constitutional amendment that would override the decision and prohibit gay marriage. This documentary interviews many of the major players in the Massachusetts marriage battle, following those who were making history in the gay rights movement.