

# Policy Connection



What does it mean to say that public policies must be constitutional?

DOMESTIC AND  
FOREIGN POLICY

Public policies take many forms. In this book we define public policies very broadly, as decisions and actions taken by government regarding a perceived problem. A declaration of war by Congress is a public policy, as is the 20-miles-per-hour speed limit in school zones set by your local community. Some policies are so mundane or invisible that we rarely give them a second thought, as when we listen to music that is protected by policies related to copyright. Other policies impact us directly, as when we pay a state sales tax or look at how much money has been deducted from our pay for social security. And there are some policies—such as the use of capital punishment—that raise issues that challenge our sense of what is moral and just.

When passing and implementing policies, governments must consider a number of questions. Does the policy address the problem? Does the government have the resources and capacity to carry out the policy? Are the policies in place having an impact on the problem? How effective will any changes in public policies be?

These are all important and reasonable questions, but there is one more applied to almost all policy decisions and actions: is the policy constitutional?

In this Policy Connection we will consider the question of what it means for a policy to be constitutional.

## By What Authority?

In April 1952, in the midst of the Korean War, president Harry S. Truman ordered his secretary of commerce, Charles W. Sawyer, to seize the country's major steel mills on the eve of a threatened steelworkers' strike. Arguing that such a strike would

undermine the U.S. military efforts in Korea by creating a shortage of ammunition and other supplies, the White House asserted it had the authority to act under the president's inherent powers as commander in chief (see Chapter 12). In response, the steel mill owners went to court, and in June the Supreme Court issued a decision (*Youngstown Sheet & Tube Co. v. Sawyer*) noting that the president had no authority under the Constitution to seize private property on the grounds of national security alone. Such an action, they argued, would have to be done under some authority granted by Congress.

Any public policy—whether a congressional act or an executive order such as the one issued by Truman—must be rooted in some constitutional authority. The question of whether an act or action of government is constitutional comes up more frequently than most Americans realize. Whenever a major hurricane or other devastating natural disaster takes place, for example, there is a call for assistance from the federal government. This is especially the case when lives are in immediate jeopardy and local and state governments are unable to maintain law and order. In the most extreme cases, news reports highlight the fact that the president has declared a state of emergency in the impacted area and ordered federal troops to the scene. What is not obvious is that before the White House can take such actions, it must be requested to do so by the governor of the state and must follow a specific process before those troops can be deployed. The reason is found in the provision of an 1876 law that prohibited the use of the federal military “for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.”



Who determines whether a public policy act or action is or is not authorized? Typically, this decision is left to the judiciary, and each year we see court dockets filled with challenges to public policies based on the argument that a law or action of government lacks constitutional authorization. Many of those challenges are settled in the lower courts, but some make it to the Supreme Court, which many believe is the ultimate arbiter on such matters (see Chapter 14).

In recent years the Court's decisions have been controversial. For example, in 1992 the Court declared provisions of a 1985 act that required states to follow specific approaches to the disposal of low-level radioactive waste. The Court decided that although the federal government could use grants and other policy mechanisms to get states to voluntarily follow the national policy, Congress lacked the constitutional authority to mandate that state take required actions (*New York v. United States*).

### Passing Constitutional Scrutiny

Another constitutional standard is that the provisions or enforcement of a policy cannot arbitrarily violate the civil rights and civil liberties guaranteed under the Constitution. As we will learn in Chapters 4 and 5, there is a substantial body of constitutional law built on guarantees that prevent government from discriminatory actions while protecting a citizen's basic liberties (e.g., speech, assembly, privacy). Laws and policies that result in the unequal treatment of racial minorities are likely to be declared unconstitutional if they are challenged in the courts, and public officials who use their position of authority to discriminate "under color of law" are subject to dismissal or criminal action. Those who make public policies, as well as those who enforce them, must be "constitutionally competent" at their jobs.<sup>57</sup>

In the legal jargon of constitutional lawyers, public policies that have the potential to discriminate against some class of citizens are subject to "standards of strict scrutiny." That is, almost all laws have a differential impact on some group of persons. A law against murder is designed to discriminate against those who commit homicide; a policy that gives low-interest loans to small businesses is discriminatory in that it favors those who would benefit. At a general level, the "test" for any policy is

whether there is a *compelling public or government interest being served by the policy*. When the policy or law is regarded as a possible threat to some fundamental constitutional right, then the even more stringent test of strict scrutiny is applied by the courts (see Chapter 5). Under that test, not only must there be a compelling reason for the policy, but also the policy must be "narrowly tailored" to achieve its objective and it must use the "least restrictive means" in doing so.

### Same-Sex Marriage

The recent history of policies related to same-sex marriage offers an important example of how constitutional constraints under the strict scrutiny test impact public policies. In 2014, the Court declared unconstitutional key provisions of the controversial 1996 Defense of Marriage Act (DOMA). DOMA was passed by Congress and signed into law by President Bill Clinton in response to the possibility of legalization of same-sex marriages in Hawaii and other states.

Under the full faith and credit provisions of the Constitution (Article IV), a marriage performed in one state is to be recognized as legal in all other states. DOMA was designed to undermine the authority of those states that were considering sanctioning same-sex marriages by defining marriage as a union of one man and one woman "for federal purposes." It effectively cut off any marriage-based federal benefits to same-sex couples and, in the process, gave legal support for those states that passed policies refusing to recognize such marital arrangements.

Despite this action, in May 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples. Connecticut followed four years later, as did Iowa and Vermont (2009), New Hampshire (2010), New York (2011), and Maine and Washington State (2012). Thus, the stage was set for a challenge to DOMA as legally married same-sex couples sought to receive the very benefits that DOMA denied them.

In its 2014 decision, *United States v. Windsor*, the Supreme Court found that DOMA discriminated against same-sex couples legally married in states like Massachusetts, but did so in violation of fundamental constitutional guarantees of due process and other protections under the Fifth Amendment. In



short, the Court found that key provisions of DOMA *did not pass the strict scrutiny test*. In doing so, the Court laid the groundwork for the watershed *Obergefell v. Hodges* decision in 2015 that overturned all state laws prohibiting same-sex marriages.

## Avoiding Constitutional Conflicts

Because public policies emerge from a number of different sources in our complex federal system (see Chapter 3), there is always the possibility that two policies might be in conflict.

For example, prior to 1918, the federal government attempted to protect migratory bird populations by regulating the hunting of waterfowl that flew across state boundaries. These regulations conflicted with state hunting laws. In court, the states successfully argued that there was no constitutional basis for congressional action on these matters. State laws prevailed.

But this all changed after the United States negotiated a treaty in 1918 with Canada and the United Kingdom focused on protecting migratory waterfowl, and in 1920 the Supreme Court (in *Missouri v. Holland*) found that under the supremacy clause of Article VI, the provisions of the treaty meant that the federal government could indeed now make policies regulating how individual states controlled the hunting of migratory birds.

There are many instances where there is no clear mechanism such as a supremacy clause to settle such conflicts. As we will see in Chapter 3, American federalism may actually foster such conflicts through its complex arrangements of legal jurisdictions. For example, the treatment of undocumented immigrants in various jurisdictions became an issue in 2015 when state and local governments claimed that federal policies issued through executive orders by President Obama unconstitutionally impose costly requirements

on them. This eventually led to a series of lawsuits focused on the administration's authority to establish such policies, but at the heart of the argument was the conflict inherent in U.S. immigration policy and the treatment of aliens.

### QUESTIONS FOR DISCUSSION

These are only three examples of the role that constitutionality plays in shaping the making and enforcement of public policies. Some of the most controversial issues drawing public attention in recent years have been focused on the constitutionality of public policies.

1. For example, to what extent does the president, as commander in chief, have the authority to commit U.S. forces to hostile action abroad?
2. Should the U.S. government be allowed to impose a penalty tax on those who fail to obtain health insurance?
3. In those states that allow capital punishment, what form should the death penalty take if it is to be in line with the constitutional prohibition against "cruel and unusual" punishment?
4. Since the attacks of 9/11 and the devastation of hurricanes Katrina and Sandy, Americans have realized that they are vulnerable to some significant threats that they are vulnerable to some significant threats requiring a comprehensive government response, including the declaring of a "state of emergency" that allows officials to suspend many of our constitutionally guaranteed civil liberties and civil rights. How would you react to such a declaration? Under what conditions should constitutional standards be relaxed or suspended in cases of national emergency? Assuming constitutional conditions are eventually reinstated, what actions should be taken against those who are determined to have abused the authority they had under the state of emergency? Should they be given amnesty or put on trial?