

Policy Connection



How does federalism and IGR shape American public policy?

DOMESTIC POLICY

The Policy Challenge

In Chapter 3 we referred to federalism and IGR as a stage on which many different actors interact. In this Policy Connection we will extend that metaphor by examining how the federalism “stage” impacts American public policy. We will examine two very different cases of policies and programs to demonstrate how, in the case of American government, “the play’s the thing.”

Case 1: The Centers for Disease Control and Prevention and Hand-Washing Signage

Our first case involves a rather mundane policy that most of us are aware of, yet rarely attracts attention. This policy is probably responsible for saving thousands of Americans from suffering a major health threat each year. We are talking about regulations regarding the hand-washing practices of food handlers at restaurants and other eating establishments.

Consider the ubiquitous signs found in restaurant restrooms across the country reminding employees to wash their hands before returning to their jobs. For most of us, this amounts to common sense, a matter of personal hygiene, and we might wonder why the establishment’s managers felt it necessary to post the reminder in such stark terms. In most cases, the answer is that the sign is required by local and state laws. Operating a food-service establishment requires obtaining a license from the local (usually county) health department, and maintaining that license involves meeting specific standards and agreeing to intermittent inspections by health department

regulators. The standards used by local health departments are, in turn, typically set by a “food code” adopted by a state agency that is authorized by the state legislature to oversee food safety issues.⁵⁶ As significant is the fact that, since at least the mid-1990s, those state food codes have been based on a national “Model Food Code” issued by the U.S. Food and Drug Administration (FDA) and developed in conjunction with the federal Centers for Disease Control and Prevention (CDC). In that sense, those “employee must wash hands” signs are a product of our intergovernmental system.

The story behind those signs can be traced to efforts by the CDC and FDA to deal with a public health issue in a federal system where they have almost no formal authority to require food establishments to post them. It is a story that starts with a national concern for major outbreaks of “food poisoning.” Technically labeled “foodborne illnesses,” food poisoning afflicts an estimated 9 million Americans each year, leading to 55,000 hospitalizations and 1,000 deaths each year. Most of those incidents are related to illnesses resulting from private or personal preparation and consumption of spoiled or ill-prepared food items at home and are not regarded as a public health problem. However, when two or more cases of a similar and serious foodborne illness are reported by a medical provider (e.g., physicians, hospitals) to local public health agencies, the event is regarded as a potential public health problem and triggers an elaborate system of intergovernmental cooperation under the leadership of the CDC.

The CDC was created after World War II as an extension of government programs to deal with the

increase in contagious and tropical diseases associated with the war effort, such as malaria. Originally called the Communicable Disease Center, it was part of the U.S. Public Health Service and was tasked with offering technical assistance and advice to the states. Based in Atlanta, Georgia, adjacent to the Emory University campus, it developed a reputation as a major source of epidemiological information on the spread of diseases in the United States and abroad. During the 1950s and 1960s, it played a major role in assisting public health authorities at the state and local level who were dealing with polio and influenza epidemics and worked with international organizations to develop policies that eventually led to the eradication of smallpox. In recent decades, its work involved working with other government agencies at all levels to contend with the spread of HIV/AIDS, the outbreak of the Ebola virus in West Africa as well as the transmission of hepatitis B virus, and discovery of the hepatitis C strain.⁵⁷ Although it is authorized to carry out studies and develop recommendations related to all these public health issues, the CDC does not engage official policymaking and rarely becomes actively involved in the direct implementation of the policies it helps design.

This brings us to the role that the CDC has played in shaping the hand-washing signing policies of local and state governments. Given its interest and focus on dealing with foodborne illness outbreaks, the CDC plays a central role in tracking those outbreaks that might pose a threat to the public health. When a local or state agency reports a foodborne illness outbreak that meets the definition of a public health problem, the CDC initiates a nationwide “surveillance” program to determine the extent and intensity of the outbreak (e.g., how serious is the illness?; what is the source of the contamination?; is it local, regional, or national in scope?; does it involve a single food establishment or a chain of restaurants?). In 2014, for example,⁵⁸ the CDC monitored 864 serious foodborne illness outbreaks that had resulted in 13,246 illnesses, 712 hospitalizations, and 21 deaths. Working with the FDA and state agencies, the CDC works out plans for dealing with each of these outbreaks. In short, although it lacks the

authority to take authority to actually make or enforce public policies in these serious cases, the CDC makes effective use of the relationships it has developed in the intergovernmental public health system.

And as important for our story, it uses those same IGR relationships in its efforts to prevent or mitigate future outbreaks—including developing the Model Food Code, which it offers to states and local public health authorities who do have direct authority to pass and implement their own versions of the model code. Not every recommendation of the Model Food Code is adopted by every state and locality, but many are. The almost universal presence of the “employees must wash hands” sign is but one indicator of how the CDC has learned to shape public policy through our complex federal system.

Case 2: Battles over Gun Control

They are names of places associated with tragedies: Columbine High School outside Denver, Colorado; Virginia Tech in Blacksburg, Virginia; Fort Hood, Texas; Sandy Hook Elementary in Newtown, Connecticut; the Century 21 Theater in Aurora, Colorado; Umpqua Community College in Roseburg, Oregon; Inland Regional Center in San Bernardino, California; the Pulse Nightclub in Orlando, Florida. Each involved a mass shooting involving the use of legally acquired assault weapons, and each spurred intense debates about the need for national gun control laws.

At the heart of those debates has been the question of whether gun control policies violate the Second Amendment’s provisions regarding the “right of the people to bear arms.” The problem is, historically there is no such right. Although many Americans believe debates about gun owner rights have been going on since the republic’s founding, the fact is that the issue did not really emerge until the 1960s, after Congress debated an expansion in the national government’s role in gun control. Until then (and with few exceptions), gun control laws were an accepted and expected function of state and local governments as they exercised their constitutional “police powers” (see p. 78). In fact, by the late 1960s there were thousands⁵⁹ of policies in place throughout the United States related to the production, sale,

possession, and use of firearms. This was especially the case at the local level, where gun registration and prohibitions against openly carrying handguns in public places were common.

As with other policy areas involving states and localities and despite efforts to provide some uniformity through “model codes” similar to the CDC/FDA discussed in case 1, there was significant variation in the form, focus, and effectiveness of the policies. Thus, although the state of Minnesota had almost no state laws regarding firearms, cities such as Minneapolis and Duluth did have significant gun control policies in place; in contrast, the state of New Jersey imposed many detailed regulations and restrictions on guns, leaving little room for local exceptions.⁶⁰ In short, at least through the 1960s there was never any doubt that governments in the federal system could pass and enforce gun control laws. For states and localities, the right of the people to bear arms was not a constraint, and questions related to federal laws remained open.

This all began to change during the 1960s as Congress considered toughening already existing federal gun control laws that were passed during the 1930s. Those earlier measures were a reaction to a wave of gangland shootings, such as the St. Valentine’s Day Massacre in Chicago in 1929 and the Kansas City Massacre of 1933 that involved law enforcement, as well as a failed 1933 assassination attempt targeting Franklin Roosevelt, which took the life of Chicago’s mayor. Usually called the “Tommy gun law,” the National Firearms Act of 1934 was explicitly aimed at preventing criminals from obtaining submachine guns and sawed-off shotguns, which were associated in popular culture with gangsters from “Pretty Boy” Floyd to Bonnie and Clyde. This popular measure required the registration of all automatic fire weapons as well as short-barrel shotguns with the newly formed Alcohol, Tobacco, and Firearms agency and included prohibition of sales of those guns to convicted felons.

The 1934 law was a popular measure, and even the National Rifle Association (NRA) had no objections to it, nor did it take stands against state and local laws other than expressing technical objections on the basis of how the laws might inconvenience its members. In fact, from the time it was formed in 1871 until the

early 1970s, the NRA was basically an “apolitical” organization, devoted to its core mission of improving gun-related skills for hunters and those engaged in sports involving shooting and marksmanship.⁶¹

The gun law debate proved to be quite different in the 1960s. Political assassinations, urban riots, and rising violent crime rates contributed to the call for tougher national policies and extending federal policies to include handguns. This came to a head in 1968 after the assassinations of Martin Luther King and Robert Kennedy, as well as a Supreme Court decision declaring the gun registration provisions of the 1934 law to be in violation of the Fifth Amendment prohibition against self-incrimination. The Gun Control Act of 1968 was designed to get around the Court’s objections by using the federal government’s power over “interstate commerce” and by requiring those who sold firearms to obtain a federal license and to keep records of all sales. In addition, it was written so as to not interfere with tougher state and local laws.

It was during the debate over the 1968 law that the right of the people to bear arms began to emerge. The prevailing view of the Second Amendment at the time was that the amendment was designed to prevent the national government from interfering with the ability of states to maintain their individual state militias. Thus, the right of the people to bear arms was directly related to the right of the states to determine what it required of its citizenry. Early in the republic’s history, most states maintained their state militias by requiring all white males between the ages of (for example) sixteen and sixty to possess and maintain a weapon that can be used when that individual is called to arms.⁶² Given the fact that state militias as distinct and independent entities had all but disappeared as they were integrated into the U.S. military structure during and after World War II, the “militia interpretation” of the Second Amendment became a historical anachronism and certainly irrelevant when it came to the national government’s ability to pass gun control policies.⁶³

In reaction to the 1968 law, however, a number of articles appeared in the popular press as well as law journals making the case for a reinterpretation of the Second Amendment that asserted it included an absolute right to bear arms. Although dismissed by

experts in constitutional law, in the early 1970s the “individual right to bear arms” view of the Second Amendment was adopted by a vocal group within the NRA who called for a stronger stand against any form of gun control by the organization’s leadership. Eventually that coalition of pro-gun rights members took control of the organization and in 1975 funded the creation of an Institute for Legislative Action (NRA-ILA)⁶⁴ dedicated to rescinding existing restrictions on gun ownership and blocking any additional efforts by gun control advocates at the national level.

A coalition led by the NRA-ILA proved increasingly effective during the 1980s and 1990s, although gun control advocates were still able to pass additional background checks and a temporary assault weapons ban in 1993 and 1994. But by the late 1990s it was evident that the NRA and its allies in Congress were in a position to block any further efforts at gun control, even in the face of a growing number of mass shooting events.

What made the NRA-ILA job easier was that in the early 1970s there was no organized opposition dedicated to a pro-gun control position. When Mark Borinsky, a recent victim of a gun-related crime, sought to join a group devoted to gun control, he found no such group existed. In response, in 1974 he used his limited personal resources to establish a National Council to Control Handguns, which became Handgun Control, Inc. in 1980. As the only association in Washington devoted to promoting gun control, Handgun Control, Inc., developed ties with pro-gun control members of Congress as well as with federal agencies studying gun violence, including the Department of Justice and the CDC. In the 1980s, Handgun Control, Inc., eventually affiliated with the Center to Prevent Handgun Violence, an organization formed by the family of James Brady, the press secretary to Ronald Reagan who was shot during an assassination attempt on the president in 1981. Together, the organizations worked for passage of the “Brady Bill,” legislation passed in 1993 that required background checks on those who purchase guns from licensed dealers. A year later, Congress passed the Federal Assault Weapons Ban, which outlawed the sale of nineteen kinds of assault weapons and magazines holding ten or more rounds.

By 2001, Jim Brady’s spouse, Sarah, became head of the merged organization now called the Brady Campaign to Prevent Gun Violence.⁶⁵ In terms of size and resources, however, the Brady Campaign was dwarfed by the influential NRA-ILA and its allies.

With the growing number of mass shootings, however, the pro-gun control lobby has grown. The Brady Campaign remains a leading organization in the fight for gun control at the national level, but there are now at least a dozen other organizations involved in the effort. Nevertheless, the NRA-ILA forces have been able to block additional gun control efforts at the national level and have been able to undermine the ability of the Alcohol, Tobacco, and Firearms Agency and other federal agencies to effectively enforce existing policies.⁶⁶

And it is at this juncture that federalism comes into play. Unable to overcome the power of the NRA in a Republican-controlled Congress, gun control advocates have started to focus their efforts on states and localities. At the center of this effort is Everytown for Gun Safety, an organization specifically designed to work for gun control at the state and local levels. Formed in 2014 after the shootings at Sandy Hook Elementary School, which killed 27 people, most of them children, Everytown was funded primarily by the billionaire and former New York City mayor Michael Bloomberg. Everytown adopted many of the organizational tactics of the NRA-ILA coalition, building a membership base (about 3 million, compared with the NRA’s 5 million members), establishing chapters in all fifty states, and hiring active lobbyists in thirty-one of them. With promises of still more funding by Bloomberg and others, they have made progress toward statewide bans on the sale of assault weapons and stricter requirements and local enforcement of other policies aimed at restricting the purchase and use of handguns and long guns. In short, gun control advocates are changing the shape of policies by moving the play to the intergovernmental stage.⁶⁷

Faced with this challenge, the NRA and its allies have countered with efforts to relax existing gun control regulations in those states and localities where it can exercise significant influence. Thus, whereas states like New York, Connecticut, California, and Maryland are passing tougher gun laws,

states like Texas and Mississippi have moved to expanding “open-carry” laws that permit greater freedom for gun owners to carry their weapons (both handguns and long guns) into public places.⁶⁸ A number of states have attempted to go even further by passing “nullification” statutes that attempt to invalidate all federal gun control policies within their borders, although it is doubtful such actions will stand up in court if challenged.⁶⁹

In the case of gun control, it might be helpful to modify our use of the “stage” metaphor when considering the role that federalism plays in this policy arena. At least for the foreseeable future, federalism is more of a battlefield than a stage.

Federalism’s Myths and Public Policies

The cases discussed in this Policy Connection can be seen as representing two extreme versions of how federalism impacts American public policy. In the CDC case, federalism and IGR are used by the agency to establish a national policy regarding the behavior of food handlers. In the gun control case, both advocates and opponents of bans on assault weapons and stricter requirements on handguns have turned to the state and local levels of the federal system in pursuit of their policy objectives. In these and other cases, understanding the complex federal setting from which policies emerge can help us in our effort to make sense of our political system.⁷⁰

Although our cases offer examples of how federalism and IGR is used by those engaged in the policy-making process to make and change public policies, there are times when the effort to develop national policies requires a more assertive stance because of opposition from states and localities. For example, there are times when the myths that underlie federalism—the myths of state sovereignty and local self-government—can act as obstacles to major policy initiatives by the national government. This is most in evidence when the national government is perceived by state and local officials as imposing its will on their respective jurisdictions. Perhaps the clearest historical example was the national debate about

slavery. Most historians agree that it was the perceived threat of a national policy abolishing slavery that led to South Carolina’s secession, which sparked the Civil War.⁷¹ Similarly, federal court decisions during the 1950s and 1960s requiring an end to segregation of public schools (see Chapter 5) generated strong protests and resistance in northern cities such as Boston as well as throughout the South.⁷²

Most recently, state and local officials have asserted the myths of state sovereignty and local self-government in their political and judicial challenges to a number of national policy initiatives. In addition to the passage of nullification acts designed to invalidate federal gun control policies discussed earlier, more than half of the states have filed several lawsuits challenging provisions of the Affordable Care Act of 2010. Several states have taken legal actions aimed at preempting presidential executive orders related to immigration and environmental protection policies, and a number of local and state officials have attempted to block or undermine the expansion of gay marriage in their jurisdictions. Politicians in Texas have even raised the possibility of seceding (once again) from the Union.⁷³ All this bears witness to the fact that the myths of state sovereignty and local self-government are alive and well in the American constitutional system.

QUESTIONS FOR DISCUSSION

1. We are becoming increasingly aware that we will face some extremely difficult problems in the coming years, especially those associated with the growing threat of climate change and its consequences. Given what you know about the history of American federalism and IGR, do you think our system will be able to handle the challenges resulting from climate change? Or is it time to consider a major overhaul of the federal system in anticipation of those challenges?
2. In the concluding section of Chapter 3 we highlighted the approach called “pragmatic federalism” advocated by the former Maryland governor Glendening. The pragmatic approach works in many (if not most) areas where compromises and bargains can be struck and policies adapted to the

demands of our complex system. But what do we do when an issue is so politically divisive that compromises and bargains are unlikely and perhaps impossible? Slavery was such an issue in the early first half of the nineteenth century, and the stalemate eventually led to the Civil War. Some would argue that today the hardened positions taken by policymakers on a range of issues—from abortion rights and gun control to health care and immigration—make pragmatic policy solutions

unlikely or perhaps even impossible. Debates over such policies can last for decades, or at least until one position or the other ultimately “wins.” Another approach, currently used in the implementation of the Affordable Care Act, might be to reactivate the notion of “nullification” in modified form by allowing states and localities to “opt out” of national policy initiatives. Would such an approach work in the case of gun control? Abortion rights? Immigration? Education? Environmental protection?