



Pearson New International Edition

Understanding Public Policy

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Fourteenth Edition

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PEARSON®

Federalism and State Policies



Achieving National Uniformity in Drinking Laws Mothers Against Drunk Driving (MADD) sponsor a crash truck as part of a continuing youth education program regarding the dangers of drinking and driving. In 2010 MADD celebrated the twenty-first anniversary of the Lifesaving 21 Minimum Drinking Age Act for which MADD was largely responsible. The Act conditions federal highway grants-in-aid to the states on the states' enacting 21-year-old drinking laws. Setting conditions on grants-in-aid money is the primary method by which the federal government influences the policies of state and local governments. (© prettyfoto/Alamy)

FEDERAL PREEMPTIONS AND MANDATES

The supremacy of federal laws over those of the states, spelled out in the National Supremacy Clause of the Constitution, permits Congress to decide whether or not there is *preemption* of state laws in a particular field by federal law. In *total preemption*, the federal government assumes all regulatory powers in a particular field—for example, copyrights, railroads, and airlines. No state regulations in a totally preempted field are permitted. *Partial preemption* stipulates that a state law on the same subject is valid as long as it does not conflict with the federal law in the same area. For example, the Occupational Safety and Health Act of 1970 specifically permits state regulation of any occupational safety or health issue on which the federal Occupational Safety and Health Administration (OSHA) has *not* developed a standard; but once OSHA enacts a standard, all state standards are nullified. Yet another form

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of the partial preemption, the *standard partial preemption*, permits states to regulate activities in a field already regulated by the federal government, as long as state regulatory standards are at least as stringent as those of the federal government. Usually states must submit their regulations to the responsible federal agency for approval; the federal agency may revoke a state's regulating power if it fails to enforce the approved standards. For example, the federal Environmental Protection Agency (EPA) permits state environmental regulations that meet or exceed EPA standards.

Federal Mandates

Federal mandates are direct orders to state and local governments to perform a particular activity or service, or to comply with federal laws in the performance of their functions. Federal mandates occur in a wide variety of areas, from civil rights to minimum wage regulations. Their range is reflected in some examples of federal mandates to state and local governments:

- *Age Discrimination Act of 1986* Outlaws mandatory retirement ages for public as well as private employees, including police, firefighters, and state college and university faculty.
- *Asbestos Hazard Emergency Act of 1986* Orders school districts to inspect for asbestos hazards and remove asbestos from school buildings when necessary.
- *Safe Drinking Water Act of 1986* Establishes national requirements for municipal water supplies; regulates municipal waste treatment plants.
- *Clean Air Act of 1990* Bans municipal incinerators and requires auto emission inspections in certain urban areas.
- *Americans with Disabilities Act of 1990* Requires all state and local government buildings to promote handicapped access.
- *National Voter Registration Act of 1993* Requires states to register voters at driver's license, welfare, and unemployment compensation offices.
- *No Child Left Behind Act of 2001* Requires states and their school districts to test public school pupils.
- *Help America Vote Act of 2002* Requires states to modernize registration and voting procedures.
- *Real ID Act of 2005* Requires that each state produce a "Real ID" driver's license that meets standards set by the Department of Homeland Security.
- *Patient Protection and Affordable Care Act of 2010* Establishes various mandates, including a requirement that state Medicaid programs serve all persons and families with incomes below 133 percent of the federal poverty level.

"Unfunded" Mandates

Federal mandates often impose heavy costs on states and communities. When no federal monies are provided to cover these costs, the mandates are said to be *unfunded mandates*. Governors, mayors, and other state and local officials have often urged Congress to halt the imposition of unfunded mandates on states and communities. Private industries have long voiced the same complaint. Regulations and mandates allow Congress to address problems while pushing the costs of doing so onto others.

STATES BATTLE BACK

The American states are battling back on several fronts, in efforts to retain their powers against federal encroachment.

Health Insurance Individual Mandate

The comprehensive Patient Protection and Affordable Care Act of 2010 (President Obama's health care reform) includes a mandate that every individual in the country obtain government approved health insurance. Failure to comply will result in an annual tax penalty to be enforced by the Internal Revenue Service. Attorneys General in several states have undertaken legal action in federal court challenging this "individual mandate" as an unconstitutional expansion of federal power over the citizens of their states. Never before has the federal government mandated that individuals buy a product. Are there any "reserved powers" of the states under the 10th Amendment? What remains of the notion of a national government of limited and enumerated powers?

Supporters of the individual mandate claim that it is justified under the Interstate Commerce Clause of the Constitution. Historically this Clause has been given broad interpretation by the Supreme Court; Congress can regulate any economic activity that "taken in the aggregate substantially affects interstate commerce."¹³ Health insurance, supporters argue, is an integral part of interstate commerce. The health insurance industry must pool all individuals, including the young and healthy, if the industry is to cover the ill and persons with preexisting conditions. They also argue that the individual mandate is constitutional because it is structured as a tax on income, which is authorized under the 16th Amendment.

Arguments over the individual mandate and the Patient Protection and Affordable Care Act are highly partisan. The Act was passed in Congress without a single Republican vote in either the House or Senate. The issue of the constitutionality of the individual mandate is likely to be decided by the Supreme Court.

Arizona's Immigration Law

Frustrated by the failure of the federal government to enforce existing federal immigration laws, Arizona passed its own illegal-immigration law in 2010. The Arizona law mirrors federal law dealing with aliens, requiring them to carry valid immigration documents. It makes it a *state* crime to be in the country illegally. Police are given broad powers to detain anyone suspected of being an illegal alien.

The U.S. Justice Department filed suit against the Arizona law arguing that it violates the Supremacy Clause of the Constitution: "A state may not establish its own immigration policy or enforce state laws in a manner that interferes with federal immigration laws. The Constitution and federal immigration laws do not permit the development of a patchwork of state and local immigration policy throughout the country."¹⁴ (A separate constitutional question is whether the Arizona law poses a threat to the 14th Amendment's Equal Protection Clause by encouraging racial profiling in its enforcement.)

Supporters of the law argue that it is not in conflict with federal laws on immigration. When the federal government fails in its own responsibility to protect the nation's borders, states may intervene to do so themselves. Federal courts must answer the question, "Do federal laws totally preempt state laws in the area of immigration?"

Marijuana for Medical Use

The federal government prohibits the sale, possession, or growth of marijuana for any purpose. Federal law does not recognize a medical exception. The Food and Drug Administration lists marijuana as a “Schedule 1 substance under the Controlled Substance Act, classified as having a high potential for abuse and no currently accepted medical use.”

But a number of states have undertaken to legalize marijuana for medical use. Many have done so through ballot propositions. Majorities of Americans approve the use of marijuana for medical purposes. (However, in 2010, California voters defeated a ballot proposition that would have allowed marijuana use for recreational purposes.) There is a clear conflict between federal and state laws over medical marijuana.

In partial recognition of this conflict, Attorney General Eric Holder announced in 2009 “clarifying guidelines... for the use of federal investigative and prosecutorial resources.” The Drug Enforcement Administration (DEA) will not arrest or prosecute individual marijuana users who are in compliance with state laws authorizing marijuana for medical purposes. “These guidelines do not legalize marijuana. [BUT] it is not the practice of the DEA to target individuals with serious medical conditions who comply with state laws authorizing their use for medical purposes.”¹⁵ In other words, the federal government will not enforce federal law in states which have passed laws approving the use of marijuana for medical purposes.

STATE POLICYMAKING BY INITIATIVE AND REFERENDA

The U.S. Constitution has no provision for direct voting by the people on national policy questions. The nation’s Founders were profoundly skeptical of direct democracy—citizens themselves initiating and deciding policy questions. They had read about direct democracy in the ancient Greek city state of Athens and believed the “follies” of direct democracy outweighed any virtues it might possess. The Founders believed that government rests ultimately on the consent of the governed. However, their notion of “republicanism” envisioned decision making by representatives of the people, not the people themselves—representative democracy rather than direct democracy.

But 100 years later, a strong populist movement developed in the American states, attacking railroads, corporate “trusts,” and politicians under their sway. Populists believe that elected representatives were ignoring the needs of farmers, debtors, and laborers. They sought to bypass politicians and have the people directly initiate and vote on policy issues. Today the initiative and referenda for state constitutional amendments exists in 18 states (see Table 2).

Initiative

The initiative is a device whereby a specific number or percentage of voters, through the use of a petition, may propose policy changes, either as constitutional amendments or as state laws to be placed on the ballot for adoption or rejection by the electorate of a state. This process bypasses the legislature and allows citizens to propose laws and constitutional amendments.

Referendum

The referendum is a device by which the electorate must approve laws or constitutional amendments. Referenda may be submitted by the legislature, or referenda may be demanded by popular petition through the initiative device.

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TABLE 2 Citizen Initiatives in the States Initiative for Constitutional Amendments (Signatures Required to Get on Ballot)^a

Arizona (15%)
Arkansas (10%)
California (8%)
Colorado (5%)
Florida (8%) ^b
Illinois (8%)
Massachusetts (3%)
Michigan (10%)
Mississippi (12%)
Missouri (8%)
Montana (10%)
Nebraska (10%)
Nevada (10%)
North Dakota (4% of state population)
Ohio (10%)
Oklahoma (15%)
Oregon (8%)
South Dakota (10%)

^aFigures expressed as percentage of vote in last governor's election unless otherwise specified; some states also require distribution of votes across counties and districts.

^bFlorida requires referenda to pass by a supermajority (60 percent).

Proponents of direct democracy make several strong arguments on behalf of the initiative and referendum device. It enhances government responsiveness and accountability; even the threat of a successful initiative and referendum drive sometimes encourages officials to take popular actions. It allows groups that are not especially well represented in state capitals, taxpayers for example, to place their concerns on the public agenda. It stimulates voter interest and improves election day turnout. Controversial issues on the ballot—the death penalty, abortion, gay marriage, gun control, taxes—bring out additional voters. Finally, it can secure the passage of constitutional amendments and laws ignored or rejected by elected officials.

Opponents of direct democracy, from our nation's Founders to the present, argue that representative democracy offers far better protection for individual liberty and the rights of minorities than direct democracy. The Founders constructed a system of checks and balances not so much to protect against the oppression of a ruler, but rather to protect against the tyranny of the majority. It is also argued that voters are not sufficiently informed to cast intelligent ballots on many issues. Moreover, a referendum does not allow consideration of alternative policies or modifications or amendments to the proposition set forth on the ballot. In contrast, legislators devote a great deal of attention to writing, rewriting and amending bills, and seeking out compromises among interests.

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TABLE 3 Selected State Ballot Propositions 2010

<i>Marijuana.</i> California's Proposition 19 that would have legalized recreational use of marijuana was one of the highest profile initiatives in 2010. But it ended up failing by a 46–54 vote in that state. Voters rejected medical marijuana use in Arizona, Oregon, and South Dakota. In prior years most medical marijuana use referenda had won approval on state ballots.
<i>Labor Unions.</i> Voters in Arizona, South Carolina, and Utah passed propositions requiring secret ballots for union elections. These measures are intended to overcome the “card check,” allowing workers to unionize without a secret ballot by signing cards stating they support unionization.
<i>Income Tax.</i> Voters in the state of Washington firmly rejected, 35–66, a proposal to enact an income tax on individuals earning more than \$200,000. Voters appeared to be in no mood to soak the rich. Or they may have believed that once an income tax was enacted, the income threshold would gradually fall, extending the tax to lower income individuals.
<i>Racial Preferences.</i> Arizona voters approved a proposition that prohibits the state from discriminating for or against individuals on the basis of race and ethnicity by a 59–41 margin. The state joins California, Michigan, Nebraska, and Washington that had previously approved such measures. The effect of these measures is to limit affirmative action programs.

Politics of State Initiatives and Referenda

National surveys report overwhelming support for “laws which allow citizens to place initiatives directly on the ballot by collecting petition signatures.” Both liberal and conservative interests have used the initiative and referendum devices (see Table 3).

COMPARING PUBLIC POLICIES OF THE STATES

An overview of state and local government spending suggests the variety of policy areas in which these governments are active. Education is by far the most expensive function of state and local governments: Education accounts for about 35 percent of all state–local spending. Most of this money goes to elementary and secondary schools, but about nine percent nationwide goes to state universities and community colleges. Welfare, health and hospitals (including Medicaid), and highways place a heavy financial burden on states and communities (see Figure 3).

The American states provide an excellent setting for comparative analysis and the testing of hypotheses about the determinants of public policies. Policies in education, taxation, welfare, health, highways, natural resources, public safety, and many other areas vary a great deal from state to state, which allows us to inquire about the causes of divergent policies.

Variations in State Tax Policy

State governments rely principally upon sales taxes and income taxes to fund their services, while local governments rely principally upon property taxes. Currently only five states do *not* impose a general sales tax (AK, DE, MT, NH, OR). Sales taxes in the states range from five to nine percent; groceries, rent, and medicines are usually exempted, in an effort to make sales taxes less regressive.