Regulation of Public Health, Part 1

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#PHLaw on Twitter

- Engage with course materials and current topics in patent law and policy by joining the conversation on Twitter!
- Counts toward participation!
- Be sure to tag the following in your tweets:
  - @DrSinhaEsq
  - #PHLaw
- Optional additional tags: @PHLawWatch, @PHLR_Temple, @NetworkforPHL, #PublicHealthLaw, #LawTwitter
- Student tweets will be highlighted at the beginning of each class
- If you want help getting started on Twitter, schedule time during office hours

#PHLaw

Conclusion: The menthol cigarette ban is a course correction of a structurally racist policy. It shows that Black Lives Matter.

Thank you to those who advocate for justice, to the people cited above, and to the many others whose work allows us to push for a better tomorrow.
U.S. Constitution
Article I Section 8

The Congress shall have Power ...
• [3] To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes;
• [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Modern Commerce Clause Analysis (US v. Lopez)

- Commerce Clause ("CC") Power to Regulate Use of Channels of Interstate Commerce ("IC")
- CC Power to Regulate the Instrumentalities of or Persons/Things Traveling in IC
- CC Power to Regulate Local Activities that Have a Substantial Effect on IC

Dormant Commerce Clause?
Relationship to Police Power?

Ask:
- Is it an economic activity?
- Does the Act contain a jurisdictional element?
- Do congressional findings indicate why Congress rationally believes the activity has an effect on interstate commerce?

Exercise 1:
- Can the federal government:
  - Prohibit the possession of a firearm in a local school zone? (US v. Lopez)
  - Prohibit the local cultivation and use of marijuana? (Gonzales v. Raich)
  - Regulate surface coal mining on private, non-Federal land? (Hodel v. Virginia Surface Mining & Reclamation Association)

Exercise 2:
- Can a state legislature pass legislation to limit price gouging of pharmaceutical products within its borders? (AAM v. Frosh)
Preemption

**Express Preemption:** federal statute specifically proclaims intent to preempt state law

**Implied Preemption:** federal statute does not state intent to preempt state law, but Court infers a need to preempt; 3 subcategories:
- **Conflict preemption:** impossibility of mutual compliance
- **Objective/goal preemption:** state law impedes federal objective
- **Field preemption:** federal legislation is so comprehensive that Court concludes Congress did not intend to leave any “room” for state legislation in the area, whether or not that legislation presents a conflict or impedes the federal goal

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Exercise 3:

- Does federal law preempt a state governor’s attempt to ban sale of electronic cigarettes within a state’s borders?

*The Philadelphia Inquirer*

Vaping bans like Massachusetts’ will not stop illness outbreak | Opinion

Having seen the consequences of the ban in Massachusetts, we encourage other states to think twice before implementing aggressive measures that lack evidence.

By Stephanie Fritz and Michael S. Sisak, for the Inquirer
Update Oct 1, 2019

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U.S. Constitution

Article I Section 8

The Congress shall have Power …

- [1] To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

**United States v. Butler (1936)**

“…the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”

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Exercise 4:

- Can the federal government hedge federal funding on a state’s agreement to:
  - Adopt a minimum drinking age of 21? (South Dakota v. Dole)
  - Require seatbelt use for all passengers in the front seats of a motor vehicle? On an airplane?
  - Require abstinence-only sex education in schools?
  - Expand Medicaid eligibility (with significant federal support)? (NFIB v. Sebelius)
  - Subject hospitals to Emergency Medical Treatment and Active Labor Act (EMTALA) requirements?

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Recap: Federal Authority

- Governance depends on the powers available to each branch of government
- US federal law results from the words in the US Constitution authorizing Congress to act
- And the US Supreme Court interprets the Constitution, which can expand or limit congressional authority
Recap: Interstate Commerce

- Use of the channels of interstate commerce
  - *e.g.*, highways, hotels
- Instrumentalities of or persons or things in interstate commerce
  - *e.g.*, railroads, airlines, household goods
- Intrastate activities with a substantial effect on interstate commerce
  - Illicit drugs, goods or items moving in commerce that need to be regulated in the aggregate

Recap: Tax & Spend Power

- Congress can *indirectly* regulate (and/or influence policy) through taxing and spending powers
- Also can spend federal money *directly* (*e.g.*, Medicare)
- But cannot *force* states to act (federalism principles)

Any questions?