Regulation of Public Health, Part 2

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Syllabus

• Updated syllabus online is SUBJECT TO CHANGE!
  • Class 1 slides now posted (titles are hyperlinked)
  • Public Comment and Final Paper details now posted
  • Final Paper
    • The final paper on a pre-approved topic should be 16-18 pages in length and contain appropriately formatted BlueBook references. (50% of grade)
    • Clear the topic with Dr. Sinha prior to beginning the proposal (due in one week).
    • Skim the Mariner casebook (or Twitter) for paper ideas!
    • A proposal outlining the topic significance, key questions, expected outcomes and preliminary sources will be due before class on Wednesday, June 9, 2021
    • Instructions and sample proposal now posted to the syllabus page
    • The final paper will be due by 3pm on Tuesday, August 24, 2021

• Public Comment Brief
  • Topic: “Phased Approach to the Resumption of Cruise Ship Passenger Operations 2021-09094” (Centers for Disease Control and Prevention)
  • Review the docket announcement and related materials for a Proposed Rule. Consult relevant legal, regulatory, and public health material to educate yourself about the context and implications for the proposed action.
  • A structured “public comment” brief (6-8 pages) will be submitted to the agency by midnight on Wednesday, June 30, 2021 (25% of grade)
  • A draft is due to me in Word format by June 16th so I can provide feedback before submission!
  • Instructions are now posted on the syllabus page

  • Framework for public comment:
    • Executive Summary (250 words max, not counted toward page max): stating your position on the issues presented in the docket notice, major supporting arguments and evidence, and recommendations.
    • Background: (1-2 pages) Brief overview of the evolution and current state.
    • Analysis: (1-2 pages) Your position and its rationale, including which stakeholders’ interests you are seeking to protect and how.
    • Actions Recommended: (1-2 pages) state the recommended course of action and what action steps would be needed to accomplish it.
    • Tables and Figures (optional, with attribution)
    • Footnotes (no formatting required)

  • Phased Approach to the Resumption of Cruise Ship Passenger Operations 2021-09094
    • Docket: https://www.regulations.gov/document/CDC-2021-0011-0001
    • Due: June 30, 2021

  • The OMB is particularly interested in comments that will help:
    • Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
    • Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
    • Enhance the quality, utility, and clarity of the information to be collected;
    • Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses; and
    • Assess information collection costs.
Speaking of Cruise Ships...

Compagnie Française de Navigation à Vapeur v. Louisiana Board of Health (1902)

Background and Holding

• Does a state have the authority to impose a cordon sanitaire preventing the docking of the S.S. Britania?

• “[H]ealth and quarantine laws of the several States are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce ...”

• Disease in question: Yellow Fever

From a public health standpoint, does containing people on a cruise ship make sense?

Whose quarantine authority is likely strongest in this case: CDC, State of California, or City of Oakland?
**Jacobson v. Massachusetts**

(1905)

**Background and Holding**

• When necessary for the public health and safety, can a state enforce a mandatory vaccination of all inhabitants in the state?

• “... an affirmative answer to these questions (that the statute violates Constitutional liberties) would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease.”

• Disease in question: Smallpox

**Conditions Imposed on States under the Spending Clause**

**South Dakota v. Dole** (1987)

**Background and Holding**

• Can Congress hedge its provision of federal funding to the state of South Dakota on the condition that they increase their drinking age from 19 to 21?

• “Indeed, the condition imposed by Congress is directly to one of the main purposes for which highway funds are expended – safe interstate travel.”

• What is the four-part test described here?

**Harris v. McRae** (1980)

**Background and Holding**

• Does Title XIX require a State participating in Medicaid to fund the cost of medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment?

• No. “[t]he liberty protected by the Due Process Clause ... does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”

• Which is more persuasive to you, the majority opinion or the Marshall dissent? Why?
**NFIB v. Sebelius (2012)**

**Background and Holding (Medicaid expansion)**

- Can the federal government hedge all of a State’s Medicaid funds on the expansion of Medicaid coverage?

**NFIB v. Sebelius (2012)**

**Apply the South Dakota v. Dole test:**

- Is the exercise of the spending power here in pursuit of “the general welfare”?
- Has Congress conditioned the receipt of federal funds “unambiguously, enabling states to exercise their choice knowingly”?
- Are federal funds linked to “national projects or programs”?
- Do “other constitutional provisions ... provide an independent bar to the condition of federal funds”?
- Where did the majority land on this issue? The dissent?

**NFIB and Inducement**

“... in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.”

— **South Dakota v. Dole**

“In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’ – it is a gun to the head.”

— **NFIB v. Sebelius**

**Conditions Imposed on Private Entities that Receive Federal Funding**


**Background and Holding**

- Can the grant of federal funds for Title IX projects be conditioned on forbidding counseling of abortion as a method of family planning?
- “The Secretary’s regulations are a permissible construction of Title X and do not violate either the First or Fifth Amendments to the Constitution.”

**Policy after Rust**

- President Reagan instituted the “Mexico City Policy” on August 1984
- President Clinton revoked the Mexico City Policy on January 22, 1993 and ordered HHS to revoke 1988 regulations and reinstate prior regulations
- President George W. Bush reinstated the Mexico City Policy January 22, 2001
- President Obama revoked Mexico City Policy January 23, 2009
- President Trump reinstated January 23, 2017
- President Biden revoked January 28, 2021

Background and Holding

• Can the federal government condition billions of dollars in funding on a requirement that funding not be “used to promote or advocate the legalization or practice of prostitution or sex trafficking,” or the requirement of an explicit policy opposing prostitution or sex trafficking?

• What distinguishes the holding in Rust with the holding in USAID?

Federalism, Public Health, and COVID-19

SCOTUS and COVID-19

• May 29, 2020: South Bay United Pentecostal Church v. Newsom
  • 5-4 vote to uphold California’s limit on attendance at places of worship
  • C.J. Roberts concurs, quotes Jacobson; J. Kavanaugh argues religious discrimination

• July 24, 2020: Calvary Chapel Dayton Valley v. Sisolak
  • 5-4 vote to uphold COVID-19 restrictions on worship
  • J. Alito, J. Gorsuch, J. Kavanaugh all argue religious discrimination; J. Alito frames as 1st amendment issue, questions Jacobson’s relevance

• September 18, 2020: Passing of Supreme Court Justice Ruth Bader Ginsburg

• October 26, 2020: Confirmation of Supreme Court Justice Amy Coney Barrett

SCOTUS and COVID-19

• November 25, 2020: Roman Catholic Diocese of Brooklyn v. Cuomo
  • Limits on in-person worship during COVID-19 (10 people in red zones, 25 people in orange zones) – no such limits for grocery shopping, education
  • Majority (unsigned) argued that New York orders “single out houses of worship” and must be held to a “strict scrutiny” standard
  • J. Gorsuch concurrence criticized C.J. Roberts’ South Bay opinion for relying on Jacobson, adding that “things never go well” when the Court tries to “stay out of the way in times of crisis”
  • J. Sotomayor dissented, noting that “Justices of this Court play a deadly game in second guessing the expert judgment of health officials”

• February 5, 2021: South Bay United Pentecostal Church v. Newsom
  • Application for injunctive relief
  • C.J. Roberts: “federal courts owe significant deference to politically accountable officials with the ‘background, competence, and expertise to assess public health’ … [the] Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the states.”
  • J. Barrett and J. Kavanaugh: singing ban should be enjoined, favors certain sectors (houses of worship) over others (Hollywood studio)
  • J. Gorsuch, J. Thomas, and J. Alito: the State “so obviously targets religion for differential treatment,” in violation of the First Amendment unless the State can show they are the least restrictive means of achieving a compelling government interest.” Cite to dissent in Sisolak

• February 5, 2021: South Bay United Pentecostal Church v. Newsom
  • J. Kagan, J. Breyer, and J. Sotomayor dissent: “Justices of this Court are not scientists. Nor do we know much about public health policy … In the worst public health crisis in a century, this foray into armchair epidemiology cannot end well.”

• February 26, 2021: Gateway City Church v. Newsom
  • “The Ninth Circuit’s failure to grant relief was erroneous. This outcome is clearly dictated by this Court’s decision in South Bay United Pentecostal Church v. Newsom (2021).”
Where do you see this Supreme Court jurisprudence going?

15 Minute Break