8 The Constitution, Federalism, and Federal Preemption

Learning Objectives

- Understand the role of the US Constitution in setting the framework for the federal government.
- Define *federalism* and explain how the Constitution allocates power between the federal and state governments.
- Explain the difference between express preemption and implied preemption and understand the role that preemption plays in public health policy.

Introduction

A new public health law should be rooted in the best available evidence, but it must also be legally sound. The city council, legislature, or agency enacting a law must have the legal *authority* to do so, and the law must not *exceed the limits* imposed by any higher law, like the state or federal constitution. It does not matter how effective a suggested policy would be if it is struck down in court.

This chapter focuses on the constitutional division of lawmaking authority in our nation's complicated federal system, in which states and the federal government share governmental authority. The chapter starts with some background on the US Constitution, legal authority, and governmental structure before diving into the issue of *federalism*—the relationship between the federal government and the states. It particular, it examines the legal doctrine of *federal preemption*—the ability of the federal government to limit the authority of state and local governments—using the example of tobacco regulation to provide context. We explore how the legal authority to engage in any particular public health action

depends on both what level of government (federal, state, or local) and what branch of government (legislative or executive) is considering the action.

The Constitution

Under our system of government, questions of legal authority—questions about who has the power to do what—ultimately track back to the national Constitution. The US Constitution allocates power between the federal (national) government and state governments, sets limits on the government's powers, and defines the roles of the three different branches of the federal government.

Drafted at the Constitutional Convention of 1787, the Constitution was designed to remedy some of the problems with the Articles of Confederation, the first compact binding the newly independent states. Under the Articles of Confederation, the powers of the national government were quite limited; reacting to the abuses of the British government, the states zealously guarded their own authority. The national government was authorized to conduct diplomacy with foreign governments and engage in war, but, critically, it had no authority to raise money through taxation. Instead, it was dependent on voluntary contributions from the states, which were not reliably forthcoming. And even in the narrow areas where the Articles of Confederation granted the national legislature some lawmaking power, the national government had no ability to enforce its decisions. (The national government consisted solely of a legislature; there was no executive branch and no permanent court system.) As a result, Alexander Hamilton (1787) lamented that the country was left with the "the extraordinary spectacle of a government destitute even of the . . . power to enforce the execution of its own laws."

When this design proved unworkable, the delegates to the Constitutional Convention sought to establish a much stronger federal government while still leaving broad swaths of authority to the individual states. As discussed in Chapter 9, the Constitution gave the newly designed legislature, Congress, far broader powers than those set out in the Articles of Confederation, including the power to "lay and collect taxes." The Constitution also set up an executive branch headed by the president to implement and enforce the law and a judicial branch headed by the Supreme Court to resolve disputes. Division of the government into three separate branches—legislative, executive, and judicial—was "designed to create

a system of checks and balances and lessen the possibility of tyrannical rule" (Chemerinsky, 2015).

When the Constitution was sent to the states for ratification, several states insisted on the addition of clearer protections for individual rights. This led to the creation of the Bill of Rights, consisting of 10 amendments that were quickly added to the newly ratified Constitution. The Bill of Rights includes some of the fundamental protections—for freedom of speech and religion, for due process of law, for trial by jury in criminal cases—that are commonly associated with the Constitution. Importantly, the protections in the Bill of Rights only apply to actions by the *government*, not by private parties. For example, the government cannot fire an employee for engaging in political activity outside of work, because it would violate the First Amendment's protections for free speech. But private-sector employees do not have similar protection against being fired for expressing their political views, unless a state law provides it. (While the Bill of Rights was originally thought to place limits only on the *federal* government, most of those same protections now also apply to state and local governments as a result of later court decisions.)

In many cases, the meaning of a constitutional provision is not self-evident. The Constitution consists largely of somewhat vague pronouncements (like the Eighth Amendment's prohibition of "cruel and unusual punishment") that can be interpreted in many different ways. Writing in 1787, the authors could not possibly have anticipated all of the issues that might be raised more than 200 years later. Thus, judges need an explicit, defensible method of interpreting the Constitution and applying its provisions to modern-day concerns. Methods of interpretation are hotly contested because they inform how Supreme Court justices and lower court judges make decisions. For example, some judges believe that that Constitution's meaning was fixed in 1787 and is essentially unchanging. In this view, the role of judges is to seek out and implement that pre-existing meaning. Others contend that the meaning of the Constitution must change as society evolves and that the Constitution's adaptability is the source of its strength. Table 8.1 encapsulates the leading approaches and their challenges.

Legal Authority for Public Health Measures

With that background in mind, we move to some general principles of legal authority to enact public health measures. When considering

TABLE 8.1. Theories of Constitutional Interpretation

INTERPRETIVE METHOD	DEFINITION	CHALLENGES
Textualism	Follow the "plain meaning" of the Constitution's words.	Many questions are not clearly answered by the text; words are subject to multiple meanings.
Originalism	Follow either the "original intent" of the Framers or the "original public meaning" of the Constitution (what it was understood to mean at the time it was written)	Framers could not foresee all issues; original intent/meaning often not known; Framers did not agree with each other on all issues
Constitutional Principles	When meaning is unclear, draw upon the structure and core principles/values of the Constitution (e.g., protection of minorities, self-governance)	Disagreement about what the core principles are; principles may be in conflict; may not be clear which way principles cut in any given case
Pragmatism	When meaning is unclear, look at the consequences of a decision and consider its effects	Consequences may be unknown or unknowable; gives judges considerable power to impose own views and biases
Precedent/ Tradition	Follow the way courts have interpreted an issue in the past	Sometimes courts get it wrong; society changes its views on issues over time

whether a government entity (e.g., a local city council) can enact a particular public health measure, there are two essential questions to ask: (a) Does the government entity have the authority to regulate in this particular area? and (b) Does this measure violate the Constitution or conflict with any other higher laws? The federal government, state governments, and local governments all have broad authority to regulate in order to protect public health, so the answer to the first question is usually yes. The second question arises because even if the government entity has authority to pass the law in question, the law may still be void because it conflicts with a "higher" law. The Constitution is the supreme law of the land (and the state constitution has the same pride of place within each state's law), and, generally, state laws cannot conflict with federal ones and local ordinances cannot conflict with state laws.

When considering both of these questions, the courts have traditionally given governments significant leeway. More often than not, they

uphold public health measures even if they impose some limitations on personal autonomy or private business interests. This is at least in part in deference to democratic decision-making; if tough choices are to be made about how to protect the public, courts generally prefer that democratically elected officials make the call. Additionally, judges recognize that they are not scientific experts, and therefore they rely on legislatures and specialized agencies to review the evidence and choose a course of action when there is scientific debate. As we will see, however, there are plenty of cases in which public health measures have been struck down by the courts on constitutional or other grounds. These cases are interesting and important because they touch on the meaning and importance of values such as free speech, liberty, and freedom from racial discrimination.

Although courts are generally deferential to governments' efforts to address public health concerns, the specifics of the legal authority to pursue public health measures and the procedures for doing so can vary considerably between differently situated policymakers. This is true with respect to both the *vertical* distribution of power between the federal, state, and local governments and the *horizontal* distribution of power between legislative bodies (such as state legislatures) and executive entities (such as state health departments).

The federal government and state governments have parallel structures. Each state has a legislative branch, an executive branch (headed by a governor), and a judicial branch (headed by the state's highest court). Municipalities, such as cities, also divide power between an executive (often a mayor) and a legislature (a city council), but they do not have their own judicial branches, and the separation of powers between the executive and the legislature may be more fluid (e.g., the mayor may also be a member of the city council). As we will discuss, the basis of legal authority is different for each level and branch of government—though the spheres of authority overlap considerably. Similarly, the procedures vary between levels of government. As a general rule of thumb, the processes for enacting a law or promulgating a regulation are less formal at the state level than the federal level and even less formal at the local level. Nonetheless, required procedural formalities must be observed, even at the local level. For example, local public health laws have been challenged on the basis that council members violated "open meetings laws" by conferring in private or failing to provide proper notice of upcoming meetings.

Federalism

The US government is organized on the principle of "federalism," meaning that power is shared between the federal government and state governments, with each having their own spheres of authority. The Constitution defines the relationship between the federal and state governments with two separate provisions. First, the Supremacy Clause provides that the Constitution and federal laws are the "supreme Law of the Land" (United States Constitution, 1787). In the event of any conflict, federal law takes precedence over state or local law. (We return to this momentarily.) Second, the 10th Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." This amendment, the last one in the Bill of Rights, expresses the principle that, absent a conflicting federal law, states retain the traditional powers that they possessed prior to the ratification of the Constitution. This includes the states' historic "police powers," discussed further in Chapter 10, to regulate for the health, safety, and welfare of their residents.

Assuming they are all acting within their legal authority, there is nothing that prohibits federal, state, and local governments from working to address the same public health issue in different ways. Indeed, this is often what occurs. For example, the federal government requires K-12 schools that receive federal funds to meet certain nutritional guidelines for food sold in the school. In addition, most states have their own guidelines for school nutrition, and these requirements may exceed the minimum requirements set by the federal government. At the local level, school boards are also able to set their own nutrition requirements—as long as they do not conflict with federal and state standards. Local school districts can also develop complementary policies and programs by, for example, prohibiting the advertising of unhealthy food and beverages on campus.

Historically, state and local governments have taken the lead in addressing issues of public health, and local health departments still carry out many of the critical day-to-day functions of public health. However, the federal government's role in public health has been increasing steadily over time. This is in large part due to the recognition that in an interdependent, industrialized, and globalized society, few issues of public health are truly local in nature. For example, the creation of the US Food and Drug Administration in the early 20th century was due in large part to the

realization that the mass production and mass marketing of food and drugs across state lines necessitated a federal oversight role.

Despite the increasing role of the federal government in public health matters, state and local governments still play a critical role as "laboratories of democracy," testing out new policy approaches that can be studied and, if successful, shared with other jurisdictions. Indeed, many of the most critical innovations in public health, from smoke-free laws to water fluoridation, began as local experiments that only spread to other jurisdictions after their feasibility and efficacy had been established. In recent years, however, antiregulatory forces have waged a political and legal battle aimed at aggressively limiting state and local authority to innovate new approaches to public health (and other social and economic) problems.

Preemption

Different levels of government often work in parallel, and frequently in coordination with one another, to address the same public health challenge collaboratively. But sometimes the relationship is fraught, with the federal and state governments pursing different—or even opposite—approaches. As noted earlier, the Supremacy Clause elevates the Constitution and federal laws over other laws in the event of conflict. The same idea, in somewhat different legal form, applies to the relationship of state to local law, as we will explain in Chapter 10.

The doctrine of *preemption* implements this principle. It not only establishes that higher law prevails in the event of a conflict, but it also more generally empowers the higher-level government to block or override the actions of lower levels of government. Federal preemption comes in two forms: *express* and *implied.* Express preemption is implicated when Congress passes a law that specifically and directly limits state (and therefore also local) authority in some particular way. Implied preemption occurs when courts find that state or local regulations are inconsistent with a federal regulatory scheme created by Congress, even though such laws are not expressly preempted. The decades-long effort to reduce tobacco use provides a useful case study for exploring the interplay between state and federal regulation, particularly with respect to issues of preemption. This example highlights the ongoing legal and political struggle over where important health policy decisions should be made.

Tobacco Regulation: An Example

Tobacco regulation is often identified as one of the greatest public health success stories of the 20th century, but it is a story of incomplete success at best. In 1964, when US Surgeon General Luther Terry released his landmark report on the health consequences of smoking, more than 40% of American adults were regular smokers. Today, that percentage is around 15%, and experts estimate that tobacco control measures have prevented more than 8 million premature deaths since 1964 (Holford et al., 2014). However, smoking still kills more than 480,000 Americans every year, and it remains the leading cause of preventable death in the United States. Moreover, the impact on health-related disparities is stark. The smoking rate is gradually approaching zero for adults with graduate degrees, but it remains stubbornly high for adults without a college degree, living in poverty, or residing in rural areas.

In the 1950s, the scientific community came to a consensus that smoking was deadly, but instead of acknowledging the health harms of smoking, the tobacco industry vigorously denied that such harms existed. In a 2006 decision finding that the major cigarette companies had violated federal racketeering laws, Judge Gladys Kessler found a long pattern of deliberate deception:

> From at least 1953 until at least 2000, [cigarette manufacturers] repeatedly, consistently, vigorously—and falsely—denied the existence of any adverse health effects from smoking. Moreover, they mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an "open question." Finally, in doing so, they ignored the massive documentation in their internal corporate files from their own scientists, executives, and public relations people that . . . there was "little basis for disputing the findings [of the 1964 Surgeon General's Report concluding that smoking causes lung cancer]" (*United States v. Philip Morris USA, Inc*., D.C. Cir. 2006).

Although tobacco companies now grudgingly concede that smoking is deadly, they continue to aggressively market their products, spending close to $25 million *each day* on advertising and promotion. Considerable evidence suggests that this marketing continues to make tobacco products more attractive to youth, despite restrictions imposed by the Master

Settlement Agreement (discussed later in this chapter). In seeking to limit regulation and protect itself from legal liability, the industry has used preemption as a key legal tool.

Express Preemption

The year after the 1964 Surgeon General's Report was released, Congress passed the Federal Cigarette Labeling and Advertising Act (FLCAA), requiring warnings on cigarette packages for the first time (these read, "Caution: Cigarette Smoking May Be Hazardous to Your Health"). Though this often presented as a public health success, it was actually the tobacco industry, which realized that some form of regulation was inevitable, that was behind this law. As historian Allan Brandt summarizes, "If the industry could not avoid government action, it could ensure that the action was taken in their preferred venue: the U.S. Congress" (Brandt, 2007). Working with Congress, the tobacco industry ensured that the law included a preemption provision prohibiting any state or local government from requiring its own warnings on cigarette packages or advertisements. This was an example of *express preemption*: the law was explicit (express) in limiting state and local authority.

Express preemption is often problematic from a public health perspective because it effectively means that the federal law sets a "ceiling" on regulation; states are barred from enacting laws that would provide greater protection for public health than the federal standard. Here, the effect of the FCLAA was to prevent the states from innovating by determining what types of cigarette labeling requirements would be most effective. Absent preemption, states could have required vivid graphics, for example, along with the federal textual warning. More troublingly, the FCLAA's preemption provision was not limited to warnings; it more broadly preempted state and local governments from engaging in *any* regulation of the advertising or promotion of tobacco products.

The tobacco companies, who had powerful allies in Congress, argued that such preemption was necessary to avoid "a multiplicity of State and local regulations pertaining to labeling of cigarette packages [that] could create chaotic marketing conditions" by requiring different labeling for cigarettes sold in different parts of the country (Senate of the United States, 1965). In nearly any context, the need for a uniform, consistent regulatory scheme is the most commonly asserted argument in favor of preemption. While uniformity and consistency do make it easier for businesses to operate, industry groups often advocate for federal preemption for an

additional reason: the rules set in preemptive federal statutes are often less stringent that those that at least some states would otherwise set. That was surely the case with the FCLAA, which cut off state efforts to design their own health warnings and blocked state and local efforts to limit tobacco advertising.

When express preemption is involved, the extent of the preemption depends on an analysis of the specific wording used in preemption provisions, and there are often disputes about what exactly Congress meant. Usually, it is clear that Congress intended to preempt *some* state laws, but it may be unclear *which* laws fall within the preemption provision's reach. In the case of the FCLAA, two major disputes about the law's preemptive scope popped up decades after the law was first enacted. In both cases, public health advocates sought to work around the FCLAA's preemption clause to pursue tobacco measures that were not barred by federal law, but they were eventually stymied by the Supreme Court's broad reading of the FCLAA's preemptive scope.

In *Cipollone v. Liggett Group, Inc*. (1992), the Supreme Court considered whether the FCLAA preempted state court lawsuits against the tobacco industry. The relevant preemption clause of the FCLAA read: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." The issue in *Cipollone* was whether the statute's language only preempted laws and regulations set forth by state legislatures and administrative agencies or whether it also barred *lawsuits* against the tobacco industry.

The Supreme Court concluded that lawsuits asserting that the tobacco industry had failed to adequately warn consumers about the dangers of smoking were indeed preempted by the FCLAA. It reasoned that judicial decisions imposing liability on tobacco companies in such cases would imply that the tobacco companies' "advertising or promotions should have included additional, or more clearly stated, warnings," and would thereby create the non-uniform standards that Congress sought to avoid.

Nearly 10 years later, in *Lorillard v. Reilly* (2001), the Supreme Court reexamined the same preemption clause in another context. In that case, the Supreme Court struck down a Massachusetts regulation that prohibited outdoor tobacco advertising near schools and playgrounds. Stressing that the regulation of land usage is a quintessential local power, Massachusetts had argued that the FCLAA preempted state

law requirements relating to *what* could be said in tobacco advertisements but not laws about *where* such ads could be placed. The Supreme Court rejected this argument. Looking at the plain language of the preemption clause, the majority concluded that the FCLAA made no such distinction between location-based and content-based regulation and that the Massachusetts regulation was therefore preempted. It noted that a contrary holding would have permitted states and localities to use location-based restrictions to essentially eliminate outdoor tobacco advertising by very narrowly limiting the locations where tobacco advertising was permissible (an outcome that, in the Supreme Court's opinion, Congress sought to avoid).

There are two interesting postscripts to this story. The first is that although states were preempted from passing laws to regulate tobacco advertisements, they eventually succeeded in doing so indirectly. Starting in 1994, every state filed a lawsuit against the major cigarette companies in order to recover funds that the states were spending on treating smoking-related illnesses. (Since the legal claims at issue were not premised on the industry's advertising or its failure to warn of health risks, they were not preempted.) These lawsuits culminated in the 1998 Master Settlement Agreement (MSA) between the cigarette companies and 46 state attorneys general. In the MSA, the companies agreed to make major monetary payments to the states and to reform their marketing practices. For example, the companies agreed to end the use of cartoon characters in advertising, discontinue brand name sponsorships of most athletic events, and stop using billboards and other outdoor advertising (except at retail stores). Because these commitments were made as part of a voluntary settlement—and not imposed through state law—they were not preempted by the FCLAA.

Second, in 2009, Congress decided to revise the language of the FCLAA's preemption provision. In the Family Smoking Prevention and Tobacco Control Act (FSPTCA), it added language stating that "a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the [FSPTCA] imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes." Congress changed the law to eliminate the preemption that *Lorillard* had found in the earlier version of the FCLAA. Although they still cannot regulate the content of cigarette advertisements, states and localities can now restrict where, when, and in what form they appear (subject to First Amendment limitations discussed in Chapter 13).

Implied Preemption

The second type of federal preemption is *implied preemption*, which takes several forms. Under this doctrine, even if Congress has not explicitly said that state law is preempted, state laws cannot stand if they are clearly inconsistent with federal law (*conflict preemption*), pose an obstacle to the fulfillment of Congressional objectives (*obstacle preemption*), or interfere with a comprehensive regulatory system set up by Congress (*field preemption*). The Supreme Court has repeatedly stated that in areas of traditional state authority—including public health—there is a "presumption against preemption." This means that if Congress's intent is not clear, the courts should lean against finding state and local laws preempted. As the Supreme Court has explained, "[this] approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety" (*Medtronic, Inc. v. Lohr*, 1996).

Implied federal preemption has not played a major role in the story of tobacco regulation. However, in a recent case, a federal appeals court ruled that any state products liability lawsuit based on a theory that cigarettes are "inherently defective" would be preempted under the doctrine of obstacle preemption (*Graham v. R.J. Reynolds Tobacco Co.*, 2015). The court reasoned that (a) a court decision finding cigarettes to be "defective" would function, "in essence, as a ban on cigarettes," and (b) this would conflict with Congress's conclusion—expressed through the FCLAA and other statutes governing cigarette sales—that cigarettes should be regulated but not banned. The court wrote: "Congress has known about the dangers of cigarettes [and] has regulated cigarettes for many years. But it has never banned them. Indeed, regulation of cigarettes rests on the assumption that they will still be sold and that consumers will maintain a 'right to choose to smoke or not to smoke.' "

Although it dealt with whether or not lawsuits were preempted, the logic of the decision would suggest that if Congress has regulated (but not banned) any harmful product, states and localities may not prohibit its sale. If that logic were extended to other cases, it could strip states and local governments of a great deal of regulatory power. For example, communities around the country have banned (or strictly limited) the use of trans-fats in prepared foods. The federal government has not banned them but has instead regulated them with labeling requirements. Using the court's logic, the federal regulation of trans-fats could be read to presume their availability and therefore preempt local bans. As this suggests,

preemption can be a powerful legal tool for industries fighting against regulation and seeking to shift legal doctrine in their favor.

The *Graham* decision was appealed, however, and it was vacated by an *en banc* panel (a panel consisting of all of the judges on the court) of the same appeals court two years later (*Graham v. R.J. Reynolds Tobacco Co*., 2017). Contrary to the first appeals court decision, the *en banc* panel concluded that "[n]othing in [federal law] reflects a federal objective to permit the sale or manufacture of cigarettes." Rather, the FCLAA and other cigarette-related laws set the requirements that tobacco companies must follow *if* cigarettes are sold. According to this second opinion, Congress never sought to guarantee that cigarettes could be sold, and therefore the lawsuits at issue in *Graham* did not stand as an obstacle to the accomplishment of any federal objectives. The court closed by referencing the presumption against preemption, writing:

> We may not supersede the "historic police powers of the States" unless it is the "clear and manifest purpose of Congress." And "[t]hat assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States."
>
> R.J. Reynolds and Philip Morris would have us presume that Congress established a right to sell cigarettes based on a handful of federal labeling requirements. We decline to do so. We discern no "clear and manifest purpose" to displace tort liability.

Although the implied preemption argument was ultimately rejected in the *Graham* case, it will certainly be raised again in challenges to other tobacco regulations or lawsuits.

Outside of the tobacco context, courts have found implied federal preemption in a variety of public health cases, including cases relating to state regulation of medical devices and automobile safety. As a general rule, however, courts have been more willing to find implied preemption in areas of law where the Constitution grants Congress the primary regulatory rule, such as in cases touching on immigration, foreign affairs, and maritime law.

Lessons Learned? Preemption Law and Politics in Public Health Today

This brief review of preemption in the context of tobacco shows the role that preemption plays in policing the blurry line between state and

federal authority. It also suggests that preemption is usually tied up with issues of politics and power—in particular, with calculations by advocates about which level of government will be most amenable to their wishes. Those with influence in Congress can seek to use preemption as a way of staving off more aggressive regulation by states and localities. In the case of the FCLAA, the tobacco industry used its sway over Congress to insert a broad preemption provision into the law, and this provision continued to block attempts at state- and local-level regulation—as well as lawsuits—for decades. This bulwark did not protect the industry forever, though. States found creative ways to push back against the harm that tobacco use was causing their citizens, and in the 1990s the tobacco industry eventually yielded to the pressure of state lawsuits and agreed to major restrictions on its marketing practices. In the 2000s, as political dynamics shifted further, Congress rolled back much of the FLCAA's preemption of state and local authority.

Similar preemption dynamics continue to play out in a variety of other contexts. For example, when cities around the country started enacting ordinances requiring calorie information on restaurant menus, the restaurant industry began pressing for a federal law that would set minimum requirements but preempt more stringent local laws. In 2010, Congress included a menu labeling requirement in the Affordable Care Act—but also preempted states or localities from imposing any additional obligations on the chain restaurants subject to the federal law. To the consternation of public health advocates, the federal law sets the "ceiling," and local jurisdictions cannot require different or additional labeling.

As discussed in Chapter 10, industries seeking to avoid or minimize regulation also pursue favorable *state* laws that preempt local laws. This is currently one of the most active battlegrounds in public health policy, with ongoing efforts to preempt local laws relating to gun control, paid leave, fracking, obesity prevention, and more.

Conclusion

After providing some background on the Constitution and governmental authority, this chapter discussed *federalism,* which deals with the distribution of authority between the federal, state, and local governments. In particular, it focused on the legal doctrine of *preemption*, which is derived from the Supremacy Clause of the Constitution. Preemption empowers "higher" levels of government to override or block the actions of "lower"

levels of government. From a public health perspective, preemption can be problematic if it limits the flexibility of local governments to address public health challenges, particularly because local innovation has historically been the source of key breakthroughs in public health policy.

Further Reading

Brandt, A. M. (2007). *The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product that Defined America.* New York: Basic Books.

Clinton, R. N. (1989). A Brief History of the Adoption of the United States Constitution. *Iowa Law Review*, *75*, 891.

9 | Federal Public Health Authority

Learning Objectives

- Understand that Congress can only exercise the powers enumerated in the Constitution and the implications of this limitation.
- Describe how Congress's use of the Commerce Clause has evolved.
- List the three ways that Congress can use its taxing/spending authority to influence public health.
- Summarize the importance for public health of the Supreme Court's decision in *National Federation of Independent Business (NFIB) v. Sebelius*.
- Describe how Congress can delegate its authority to federal agencies.

Introduction: Federal Public Health Authority

The Constitution provides the general framework for the organization of the federal government and its powers in relation to state and local governments. In some areas, such as immigration and foreign relations, the federal government is paramount. In other fields, state and local governments have traditionally played the lead role. Traditional state fields include public health and healthcare but also a wide variety of others including education, criminal justice, and insurance regulation. Even in these areas, however, the federal government has extremely powerful levers it can pull to exert its influence and push policy in its preferred direction.

Take, for example, how Congress used its spending power to get states to raise the minimum age for alcohol sales. When the majority of states lowered their minimum drinking age from 21 to 18 in the 1970s, they experienced an increase in traffic fatalities caused by inebriated younger drivers. To address the problem, Congress wanted to raise the minimum drinking age back to 21, but it ran into a constitutional obstacle. Not only is

public health a traditional area of state regulation, but the 21st Amendment to the Constitution, which repealed Prohibition in 1933, gave the states the primary authority to regulate alcohol sales and use within their borders. Thus Congress arguably lacked the legal authority to directly increase the minimum sales age. So, instead, it passed a law withholding some federal funding for transportation projects from states that would not raise their drinking age to 21. The Supreme Court upheld this indirect approach (*South Dakota v. Dole*, 1987).

Even though Congress can only exercise the limited number of powers allotted to it by the Constitution, those powers are, in practice, quite extensive. After introducing Congress's enumerated powers, this chapter focuses on the two that are most central to federal public health lawmaking: the Commerce Clause and the Taxing and Spending Clause. Neither speaks of health, but in practice Congress can pursue virtually any type of public health objective using one or the other of these constitutional tools. The chapter concludes with a discussion of how Congress can delegate its powers to federal agencies.

Enumerated Powers

Under the Constitution, the federal government is one of *enumerated powers*, meaning that Congress only has the authority specifically granted to it in the Constitution. Any law that Congress passes must be supported by one of its enumerated, or listed, powers. Beyond that, how Congress chooses to prioritize its actions is its prerogative: the federal government is one of limited powers, not affirmative duties. Because there is no constitutional right to health—or to housing, education, or other basic needs—Congress is not required to ensure that everyone has adequate health insurance or to prepare for infectious disease outbreaks. Instead, we rely on our democratic process to encourage our representatives in Congress to "promote the general welfare."

The powers allotted to Congress are primarily enumerated in Article 1, Section 8 of the Constitution (Box 9.1). If Congress is unable to sufficiently ground a law in one of these powers, courts can strike down that law if it is challenged.

In the seminal case of *McCulloch v. Maryland* (1819), the U.S. Supreme Court upheld the power of Congress to create the Bank of the United States, even though no enumerated power specifically mentions the creation of a bank. In an opinion by Chief Justice

BOX 9.1 CONGRESS'S ENUMERATED POWERS UNDER ARTICLE I OF THE CONSTITUTION

1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
2. To borrow money on the credit of the United States;
3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
6. To provide for the punishment of counterfeiting the securities and current coin of the United States;
7. To establish post offices and post roads;
8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;
9. To constitute tribunals inferior to the Supreme Court;
10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
13. To provide and maintain a navy;
14. To make rules for the government and regulation of the land and naval forces;
15. To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
16. To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
17. To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

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.

Note: Section 5 of the 14th Amendment also gives Congress the power to enforce the amendment's protections of due process and equal protection under the law.

John Marshall, the Supreme Court cautioned against an overly literal and narrow interpretation of the Congress's powers, writing that by its nature, a constitution provides only the "great outlines" of the government's structure. Congress, the Supreme Court reasoned, should be given leeway to determine *how* to carry out its enumerated powers. Establishing a bank was a permitted "incidental or implied" power that would help the federal government to collect taxes, borrow money, and support an army and navy (all powers that are enumerated). From that time onward, the Supreme Court has generally construed Congress's enumerated powers broadly. Thus, even though some of the powers Article I lists are quite specific, the list as a whole is interpreted by the courts to provide Congress with wide-ranging authority to address virtually any subject.

A number of specific powers, such as the power to enter into treaties or grant patents for inventions, have relevance for public health that will not be explored here. But as a general rule, two powers loom largest in public health and most other domestic policy contexts: the power to regulate interstate commerce and the power to tax and spend. In our interconnected national economy, most laws can be framed as an attempt to regulate interstate commerce. Even when this is not the case, the federal government can usually influence the conduct of individuals, businesses, and states through taxes or spending.

Commerce Clause Power

The Constitution's Commerce Clause gives Congress the authority to regulate "commerce . . . among the several States, and with the Indian Tribes." Deciphering the meaning of this clause requires figuring out what counts as "commerce," a question that has bedeviled the Supreme Court repeatedly for the past two centuries. The Supreme Court settled on its current approach in the late 1930s and 1940s, when it concluded that Congress

was not limited to directly regulating the movement of goods and services between states but could also legislate with respect to anything that had a "substantial effect" on interstate commerce (*U.S. v. Darby Lumber Co.*, 1941). Thus, for example, Congress could set workplace safety standards, even though such laws did not directly regulate economic transactions crossing state lines. The Supreme Court also articulated a related *aggregate effects doctrine*, under which the Commerce Clause permitted Congress to regulate activities that, viewed in isolation, had a negligible impact on commerce, so long as those actions would substantially affect commerce if many people engaged in the same action (*Wickard v. Filburn*, 1942). This allowed Congress to regulate activity that occurred solely within state lines, like a single farmer growing wheat, so long as the cumulative effect of such activity could have substantial effects on interstate commerce.

Combined, these two doctrines gave Congress extremely broad authority to regulate economic activity, and it proceeded to base an exceedingly wide range of actions on its extensive Commerce Clause authority. These included civil rights laws, criminal laws, licensing requirements, laws regulating food and drugs, insurance regulations, and more. Indeed, the Commerce Clause has been referred to as "the principal constitutional foundation of the modern regulatory state" (Coan, 2012).

Between 1937 and 1995, not one law was struck down on the grounds that it exceeded Congress's Commerce Clause authority. For example, in *Heart of Atlanta Motel v. United States* (1964), the Supreme Court upheld the 1964 Civil Rights Act, which prohibited racial discrimination by private businesses open to the public. The Court rejected the argument that Congress's authority under the Commerce Clause did not extend to the regulation of local companies that did not conduct business across state lines. Alluding to the aggregate effects doctrine, it concluded that the "disruptive effect that racial discrimination has on commercial intercourse" in the economy as a whole provided the necessary link to the Commerce Clause. Similarly, in *Perez v. United States* (1971), the Supreme Court ruled that a federal criminal law prohibiting "loan sharking"—using violence or extortionate threats to collect a debt—was justified by the Commerce Clause, even though each individual case was typically local in nature (and not exactly your typical commercial transaction). The Supreme Court reasoned that loan sharking provided financing to organized crime, and organized crime in turn had substantial effects on interstate commerce.

As Congress based more and more actions on the Commerce Clause in the late 20th century, many scholars speculated that the Commerce Clause

power was virtually unlimited, since nearly any type of activity could be characterized as impacting commerce in the aggregate. In 1995, however, the Supreme Court—for the first time in six decades—found that Congress had gone too far. In a 5–4 decision, the Supreme Court concluded that the Gun-Free Schools Act, which prohibited individuals from carrying guns in school zones, was unconstitutional (*U.S. v. Lopez*, 1995). The Court wrote that although Congress can regulate local economic activity that, in the aggregate, has a substantial effect on interstate commerce, "[t]he possession of a gun in a local school zone is in no sense an economic activity." Ruling otherwise, the majority wrote, would "authorize enactment [by Congress] of every type of legislation . . . at the expense of the Constitution's system of enumerated powers." Four dissenting justices, however, objected that this decision was contrary to earlier decisions such as *Perez*, since a logical line could be drawn between school violence and an aggregate effect on economic activity.

Later, in a 2005 case about medical marijuana, the Supreme Court appeared to return to an expansive interpretation of "commerce," holding that a federal law prohibiting individuals from growing marijuana for their own personal medical use (as authorized by state law) was justified by the Commerce Clause (*Gonzales v. Raich*, 2005). Even though no commercial activity was involved, the Supreme Court reasoned that some home-grown marijuana would likely find its way into interstate markets, and therefore Congress could regulate such cultivation and use. (This case highlights the intersection of the Commerce Clause and preemption; because the regulation of home-grown marijuana was within Congress's constitutional power, Congress also had the power to displace conflicting state law on the subject.)

As *Lopez* and *Raich* (as well as *NFIB v. Sebelius*, which is discussed later in this chapter) suggest, the Supreme Court continues to struggle with how to define what exactly "commerce" means for purposes of the Commerce Clause. The Commerce Clause supplies the legal foundation for much of what Congress does, but occasionally a case still arises that tests the outer boundaries of Congress's authority.

Power to Tax and Spend

In those few cases when Congress cannot use the Commerce Clause to accomplish its objectives, it has another very effective tool at its disposal: the power to "provide for the . . . general welfare" through taxing

and spending (often called the Taxing and Spending Cause). These powers operate independently, so Congress does not need to demonstrate a nexus with interstate commerce in order to levy taxes or spend money on a particular project or program. Rather, it must only be able to demonstrate that its taxing and spending is "for the general welfare." In practice, this is not much of a limitation at all (and certainly includes efforts to further public health). Thus the taxing and spending power is a flexible tool that Congress can use in cases when the Commerce Clause (and Congress's other Article I powers; see Box 9.1) would not justify action.

Congress can use its power to tax and spend in three main ways. First, it can enact taxes to raise funds for public health efforts, to discourage unhealthy behavior, or to encourage healthy conduct. In addition to raising money, taxes and tax credits can influence the behavior of both individuals and businesses. The federal excise tax on cigarettes, for example, discourages smoking by individuals, while the Affordable Care Act's (ACA) tax credits incentivize small businesses to provide health insurance for their employees.

Second, Congress can appropriate funds to spend for the general welfare. This spending power underlies the federal bureaucracy that administers federal healthcare programs, conducts and funds health-related research, and supports state and local public health efforts. The government can also use its spending power to subsidize private conduct that it wants to encourage, such as the development of new vaccines. Notably, however, both the taxing and spending powers of Congress are also used in ways that may be antithetical to public health. For instance, federal agricultural spending likely contributes to the US obesity epidemic by artificially lowering the price of unhealthy foods, such as those produced with government-subsidized high fructose corn syrup (Franck, Grandi, & Eisenberg, 2013).

Third, the *conditional spending power* allows Congress to attach conditions to federal grants to the states, thereby influencing state conduct. As suggested by the *South Dakota v. Dole* case discussed earlier, this is a compelling way of getting states to do what Congress wants. Even though Congress lacks the ability to directly require states to adopt or enforce any particular law, money is a very powerful motivator. For example, the 1992 Synar Amendment provides that states that do not adopt and enforce laws prohibiting cigarette sales to minors face the risk of losing a portion of their federal funding for substance abuse prevention and treatment. Needless to say, every state submits a detailed annual report to the federal

government demonstrating its compliance (or attempted compliance) with this requirement.

NFIB v. Sebelius

The Supreme Court's 2012 decision in *National Federation of Independent Businesses (NFIB) v. Sebelius* addressed the scope of Congress's power under both the Commerce Clause and the Taxing and Spending Clause. This case, which considered the constitutionality of key sections of the ACA, is one of the most well-known and controversial decisions of the past few decades. The Supreme Court's decision is consequential, regardless of whatever ultimately happens to the ACA, because it shapes (and arguably reshapes) the contours of Congress's Article I powers, which may have significant implications for Congress's authority to enact public health laws moving forward.

The Individual Mandate

The ACA included an "individual mandate," requiring most adults to demonstrate that they have health insurance that meets minimum federal standards or else pay a penalty. Congress considered the individual mandate essential to stabilize the health insurance market, given the ACA's requirement that insurance companies could no longer discriminate against people with pre-existing medical conditions. Soon after the law was passed, NFIB and other plaintiffs filed suit, arguing that the individual mandate exceeded Congress's power under the Commerce Clause. Eventually the case made it to the Supreme Court, and by a 5–4 vote the Court ruled that the Commerce Clause did *not* provide Congress with the authority to impose the individual mandate.

Writing for the majority, Chief Justice Roberts reasoned that while Congress has broad authority to regulate activity that affects interstate commerce, the Commerce Clause does not permit the government to require people to engage in economic activity or to purchase a specific product—in this case, health insurance. Roberts explained:

> [T]he Government's logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. . . . Under the Government's theory, Congress could address the diet problem by ordering everyone to

buy vegetables. . . . That is not the country the Framers of our Constitution envisioned.

Justice Ginsburg, writing in dissent, objected to this framing of the issue and to the majority's conclusions. First, she argued that it is quite clear that a program to reduce the number of uninsured Americans has substantial implications for interstate commerce—and that this alone should be enough to authorize Congress's action under the Supreme Court's Commerce Clause precedents, including *Heart of Atlanta, Perez*, and *Raich*. Second, she objected to the characterization that Congress was "compel[ling] individuals not engaged in commerce to purchase an unwanted product." Since virtually all Americans consume healthcare at some point in their lives, she argued that Congress was not forcing people into a market, but rather "defining the terms on which individuals pay for an interstate good they consume"—by, in effect, requiring them to pay in advance through insurance.

The Court's decision that the Commerce Clause did not provide authority for the individual mandate was, however, not the end of the matter. In a separate 5–4 opinion, Chief Justice Roberts joined with the Supreme Court's more liberal justices in concluding that the individual mandate could be upheld under Congress's taxing power. Because the mandate was enforced by a penalty collected through the tax system (i.e., the penalty is added to one's tax payment), Justice Roberts wrote that the mandate was effectively a tax on the choice not to carry insurance—and Congress was within its authority to impose such a tax.

The Supreme Court's decision to uphold the individual mandate as a tax was surprising to many observers who thought that the government's Commerce Clause argument was stronger than its Taxing and Spending Clause argument. But it reinforces the basic point that any Congressional action must be supported by just *one* enumerated power. In this case, the government argued that two enumerated powers supported the individual mandate. Although it lost its Commerce Clause argument, prevailing on the Taxing and Spending Clause argument was all that was needed to uphold this part of the law.

Medicaid Expansion

The other major provision at issue in *NFIB* was the ACA's "Medicaid expansion," which required states participating in the Medicaid program (which is all of them) to broaden eligibility for participation the program.

The Medicaid expansion was designed to enable most adults with incomes under 138% of the federal poverty level (FPL) to qualify for Medicaid. Before the ACA, low-income adults in most states were not eligible for Medicaid unless they possessed certain other qualifying characteristics, such as parenthood or disability, and the income limitation for most Medicaid groups was lower than 138% of the FPL.

Congress premised its authority for the Medicaid expansion on its conditional spending power under the Taxing and Spending Clause. Since Congress was providing funds to the states for Medicaid, it was entitled (it reasoned) to place conditions on those funds—similar to what it had done to encourage states to raise their minimum drinking age. But in *NFIB*, the Supreme Court found that the deal offered by Congress to the states was so "coercive" as to deprive states of autonomy over their own policy decisions. For the first time ever, the Court invalidated an effort by Congress to use its conditional spending power, concluding that Congress exceeded its constitutional powers (and raised federalism concerns) by disguising a legal command it could not issue as a monetary incentive.

Writing for a seven-justice majority on this point, Chief Justice Roberts noted that a state that refused to expand Medicaid was threatened with the loss of *all* of its Medicaid funding, which could amount to 10% of more of state's entire budget. This, he concluded, was "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion." Although the Supreme Court did not spell out the exact point at which influence turns to coercion, it concluded that no state could realistically decline to participate in the expansion, and this made the program unconstitutionally coercive. Having concluded that the Medicaid expansion unduly pressured states in violation of the Taxing and Spending Clause, the Supreme Court had to determine the proper remedy. In yet another 5–4 split, it ruled that states must be given the option of whether or not to expand Medicaid. The four dissenting justices would have invalidated the Medicaid expansion program in its entirety.

Implications

The *NFIB* decision consisted of three main holdings (Table 9.1), all of which could have lasting implications for the scope of Congressional power to regulate for the public's health. First, the Supreme Court concluded that Congress had exceeded its Commerce Clause authority by

TABLE 9.1. Anatomy of the *NFIB v Sibelius* Decision

ISSUE	DECISION
Under the *Commerce Clause*, can Congress mandate that individuals purchase health insurance?	No (5–4)
Under its *Taxing Power* can Congress mandate that individuals purchase health insurance?	Yes (5–4)
Is the ACA's Medicaid expansion a constitutional use of Congress's conditional spending power?	No (7–2)
What is the appropriate remedy for the unconstitutional use of the conditional spending power?	The appropriate remedy is to make the Medicaid expansion optional for the states (5–4)

"forc[ing] individuals into commerce" with the individual mandate. It is too soon to determine whether this is the beginning of a broader push by the Supreme Court to more narrowly redefine what counts as "commerce" that Congress can regulate. But, as many public health laws are premised on the Commerce Clause power, this is an important issue to watch.

Second, the Supreme Court upheld the individual mandate under Congress's taxing power. This suggests that if the contours of Congress's Commerce Clause power remain uncertain (or are further restricted by future decisions), Congress could instead turn to the taxing power to further its public health objectives. Under *NFIB*'s reasoning, Congress appears to have broad authority to take virtually any regulatory action—even, perhaps, requiring everyone to purchase vegetables—so long as the penalty for noncompliance is enforced through the tax system. However, for political reasons, it is likely that Congress will not want to rely too heavily on its taxing authority to justify public health actions.

Finally, the Supreme Court concluded that Congress had "coerced" the states into accepting Medicaid expansion, exceeding its authority under the Taxing and Spending Clause. As we have seen, conditional spending—using federal funding to influence state conduct—is a tool Congress has repeatedly used to nudge the states into implementing public health initiatives. The exact bounds of the Supreme Court's coercion doctrine are unclear, but fear of future court decisions that build on the holding in *NFIB* may deter Congress from relying on its conditional spending power to promote public health goals.

Federal Administrative Authority and Delegation

So far we have looked at Congress's power to enact federal health laws, including measures that influence states to take action that Congress desires. We have noted that the Commerce Clause and the power to tax and spend enabled the growth of the modern regulatory state. While Congress sometimes enlists state governments in this undertaking, most of the national regulatory work in this country is assigned by Congress to federal administrative agencies. The doctrines of *preemption* and *home rule*, discussed in Chapters 8 and 10, address the vertical distribution of authority between levels of government. By contrast, the issue of *delegation*—which is central to public health law—addresses the horizontal distribution of authority between the legislative branch and the executive branch. And while we focus here on delegation within the federal government, similar rules and practices apply at the state level.

When Congress passes a law, it typically delegates (assigns) the authority to implement that law to a federal agency. These agencies are usually part of the federal executive branch. For example, the US Environmental Protection Agency (EPA) is tasked by Congress with implementing a wide array of federal laws relating to the environment. The EPA is part of the executive branch of the federal government, and the EPA administrator is part of the president's cabinet. Although legislatures typically select an existing administrative agency to implement a new law, they also have the power to create new administrative agencies.

Delegations of power relating to public health tend to be to be quite broad. For example, the Supreme Court has recognized that the Food and Drug Administration "has been delegated broad discretion by Congress in any number of areas" relating to the regulation of food and drugs (*Young v. Cmty. Nutrition Inst.*, 1986). Because public health authorities may be called upon to respond to unanticipated issues and diseases, flexibility in regulatory authority is essential. Statutes often grant agencies even broader authority in emergency situations, including the power to waive otherwise applicable procedural requirements.

One major task of administrative agencies is to promulgate *regulations*, or rules, that fill in the gaps of a broad statutory scheme and provide clearer direction to the entities they regulate. Congress may delegate general authority to federal administrative agencies to issue regulations, or it may provide detailed guidance and limitations on the scope of rulemaking authority. Congress could, for example, instruct an environmental agency to "issue regulations limiting emissions from new fossil fuel-fired power

plants, taking into account health and environmental impacts, as well as technical feasibility," or it could instruct the agency more specifically to "issue regulations limiting emissions from new fossil fuel-fired power plants that set a maximum level of emissions no higher than 1,400 pounds of carbon dioxide per megawatt-hour." In either event, the instructions provided by Congress limit the federal agency's regulatory power. A more specific set of instructions means that the agency has less discretion or flexibility.

The Administrative Procedure Act (1946) governs the process through which federal agencies promulgate regulations. To issue a new regulation, agencies must generally provide for "notice and comment." That is, they must first issue a "Notice of Proposed Rulemaking" in the Federal Register (the official record of the federal government's activities). After a proposed rule is published, the public can provide comments to the agency about the planned action. While anyone can provide submit a comment through an online form at http://regulations.gov, it should be unsurprising that regulated industries tend to be the most active commentators and that such industries typically seek to reduce the stringency of proposed rules (West & Raso, 2012). The agency is required to review and respond to all comments before issuing a final rule, which may include modifications suggested by some of the comments. Once a final rule is promulgated by an agency, it carries the force of law. However, if Congress disapproves of any agency action, it can refuse to provide funding to implement the rule, or it can override it by passing a new law. Additionally, the Congressional Review Act (CRA; 1996) provides that Congress can void an agency rule by passing a joint resolution, signed by the president, within 60 days of the rule's issuance. The CRA was only used once to invalidate a rule between 1996 (when it was enacted) and 2016, but in 2017 it was used to override more than a dozen rules that had been issued during the final months of the Obama administration.

Conclusion

Federal public health authority is grounded in the Constitution's enumerated powers. Congress cannot take any action unless it can be linked to one of the powers listed in Article I of the Constitution. Congressional power is broad, which is consistent with our need as a nation for consistent and coherent laws, and Congress's power can be delegated to federal agencies that then regulate within their assigned domains. At least in the short term,

cases exploring the outer limits of Congress's authority are likely to center on the meaning and implications of the *NFIB* decision, which addressed the reach of Congress's power under both the Commerce Clause and the Taxing and Spending Clause.

Further Reading

Huberfeld, N., Leonard, E. W., & Outterson, K. (2013). Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius. *Boston University Law Review*, *93*, 1–88.

Metzger, G. E. (2012). To Tax, to Spend, to Regulate. *Harvard Law Review*, *126*, 83–116.