

Public Health Law in the Constitutional Design

Public Health Powers and Duties

The protection and promotion of the public health has long been recognized as the responsibility of the sovereign power. Government is, in fact, organized for the express purpose, among others, of conserving the public health and cannot divest itself of this important duty.

—James Tobey, “Public Health and the Police Power,” 1927

No inquiry is more important to public health law than understanding the role of government in the constitutional design. If, as we argue in chapter 1, public health law principally addresses government’s assurance of the conditions for the population’s health, then what activities must government undertake? The question is complex, requiring an assessment of duty (what government must do), authority (what government is empowered to do), and limits (what government is prohibited from doing). In addition, this query raises a corollary question: which government is to act? Some of the most divisive disputes in public health in the United States are among the federal government, tribal governments, the states, and the localities regarding which government has the responsibility or power to intervene.

The chapters in part 2 explore the legal foundations of public health law powers, duties, and restraints. After providing an overview of constitutional functions and examining the fundamental issue of positive and negative rights, this chapter describes government duty and power at the federal and state level, with particular attention to the division of powers under our federal system. In the next chapter, we continue our

focus on constitutional law with a discussion of the limits on government power derived from constitutionally protected individual rights. We end part 2 with a chapter on the special legal problems that arise when authority is delegated to local governments and administrative agencies.

CONSTITUTIONAL FUNCTIONS AND THEIR APPLICATION TO PUBLIC HEALTH

After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the Union, the safety and welfare of the parts of which it is composed. . . . It seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.

—*Federalist No. 1*, 1787

The U.S. Constitution serves three primary functions: to allocate power between the federal government and the states (federalism), to divide power among the three branches of government (separation of powers), and to limit government power (protection of individual liberties). These functions are critical to the public's health. The Constitution enables government to act to prevent violence, injury, and disease and to take measures to promote health. At the same time, it limits government's power to interfere with individual liberty and autonomy. In the realm of public health, then, the Constitution acts as both a fountain and a levee: it originates the flow of power to preserve the public's health and curbs that power to protect individual freedoms.

American Federalism: Reserved Powers and Preemption

If the Constitution is a fountain from which government powers flow, federalism is its foundation or structure.¹ Federalism separates the pool of legislative authority into two tiers of government: federal and state.² State powers are delegated to local governments, creating a third tier discussed in chapter 5. For a discussion of the relative strengths of each level of government in various matters of public health, see box 3.1.

Theoretically, American federalism grants the national government only limited powers, while the states possess plenary power to safeguard

BOX 3.1

Federalism: National, State, and Local Public Health Functions

The arguments for and against the centralization of political power have remained largely the same over the course of American history and are part of entrenched political ideologies.¹ Effective responses to public health threats frequently require action at multiple levels of government: federal, state, and local. Rigid ideological preferences for action at a particular jurisdictional level can undermine just and effective public health policy. The government best situated for dealing with public health threats depends on the nature and origin of the specific threat, the resources available to each level of government for addressing the problem, and the probability of success.

NATIONAL OBLIGATIONS

The federal government has the authority, and arguably also the ethical obligation, to create the capacity to provide essential public health services. A national commitment to capacity building is important because public needs for health and well-being are universal and compelling. Certain problems demand national attention. A health threat such as epidemic disease, a bioterrorist attack, a natural disaster, or environmental pollution may span many states or regions or the whole country, and the solution may be beyond the jurisdiction of individual states. Further, state and local governments simply may not have the expertise or resources to mount an effective response. For example, constructing levees to stem floodwaters or rebuilding cities devastated by a hurricane is beyond the capacity of any single city or state. State and local governments vary considerably in their capacity to finance public health services and social safety-net programs (contributing to stark geographic disparities in health), and all are heavily dependent on federal funds.²

STATE AND LOCAL OBLIGATIONS

Armed with sufficient resources and tools, states and localities have an obligation to fulfill core public health functions. States and localities are closer to the people and to the problems causing ill health. Delivering public health services requires local knowledge, civic engagement,

1. See Deborah Stone, *Policy Paradox: The Art of Political Decision Making*, 3rd ed. (New York: W.W. Norton, 2011), 354–77. The author argues that federalism debates are about empowering some people at the expense of others rather than about the effectiveness of the resulting policies.

2. Glen P. Mays and Sharla A. Smith, “Geographic Variation in Public Health Spending: Correlates and Consequences,” *Health Services Research*, 44, no. 5, pt. 2, (2009): 1796–1817; Glen P. Mays and Sharla A. Smith, “Evidence Links Increases in Public Health Spending to Decreases in Preventable Deaths,” *Health Affairs*, 30, no. 8 (2011): 1585–93.

and direct political accountability. States and localities are also often the best unit of government to deal with complex, poorly understood problems. In such cases, state and local governments may serve as the “laboratories of democracy,” creating and testing innovative solutions. Some regulatory approaches adopted by pioneering states and localities have eventually become federal law, such as California’s strict vehicle emissions standards³ and New York City’s mandate that calorie counts be prominently displayed on chain-restaurant menus.⁴

FILLING PUBLIC HEALTH POLICY VACUUMS

If a particular unit of government fails to act in response to a significant health risk, then other units should fill the void. During periods when the federal government has pulled back from regulation, state and local governments have acted in areas such as unsafe and unhealthy food, environmental protection, and occupational safety.⁵

HARMONIZED ENGAGEMENT

A system of overlapping and shared responsibility among federal, state, and local governments is often required.⁶ The root causes of ill health arise as a consequence of policy choices at all levels. Poor health is the result of many factors in combination, including education, income, environmental exposures, public sanitation, and access to health care. Government at all levels has responsibility for ensuring the conditions required for people to be healthy. No particular political unit (federal, state, or local) should have primacy: each should play a unique role in a well-coordinated effort.

3. California acted to regulate greenhouse gas emissions from motor vehicles after the Environmental Protection Agency (EPA) claimed it lacked authority to do so. Over time, several other states adopted the California standard to fill this regulatory gap. In 2007, the Supreme Court held that the EPA did have authority to issue tailpipe emission standards. *Massachusetts v. EPA*, 549 U.S. 497 (2007). In 2009, the EPA granted a waiver allowing states to follow the more stringent California standard. The following year, EPA issued new, stricter regulations, which were upheld by the D.C. Circuit. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012). In a fractured opinion, the Supreme Court partially reversed the circuit court decision but upheld most of the EPA’s greenhouse gas regulation. *Utility Air Regulatory Group v. EPA*, 573 U.S. ____, 134 S. Ct. 2427 (2014).

4. New York City’s approach was eventually adopted in the Affordable Care Act in 2010, although regulations implementing the federal menu-labeling law continue to face industry resistance. *N.Y. State Rest. Ass’n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009); Paul A. Diller, “Why Do Cities Innovate in Public Health? Implications of Scale and Structure,” *Washington University Law Review*, 91, no. 5 (2014): 1219–91.

5. Diller, “Why Do Cities Innovate?”; Lawrence O. Gostin, “The Supreme Court’s Impact on Medicine and Health: The Rehnquist Court, 1986–2005,” *Journal of the American Medical Association*, 294, no. 13 (2005): 1685–87.

6. Lance Gable and Benjamin Mason Meier, “Complementarity in Public Health Systems: Using Redundancy as a Tool of Public Health Governance,” *Annals of Health Law*, 22, no. 2 (2013): 224–45.

the public's health, safety, welfare, and morals. Under the doctrine of enumerated powers, the federal government may act only pursuant to authorities specifically granted in the Constitution. For public health purposes, the chief powers are the power to tax and spend and the power to regulate interstate commerce. These powers provide Congress with independent authority to raise revenue for public health services and to regulate, both directly and indirectly, private activities that endanger the public's health.

The states retain the power they possessed as sovereign governments before the federal Constitution was ratified.³ The Tenth Amendment enunciates the plenary power retained by the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The reserved powers doctrine holds that states may exercise all the powers inherent in government—that is, all the authority necessary to govern that is neither granted to the federal government nor prohibited to the states. Two specific powers—the police power (to protect the health, safety, welfare, and morals of the community) and the *parens patriae* power (to protect the interests of minors and incapacitated persons or, in some cases, the populace of the state as a whole)—express the states' inherent authority to safeguard the community's welfare.

Federalism functions as a sorting device for determining which government—federal, state, or both—may legitimately respond to a public health threat. National, state, and local governments exercise authority concurrently in most spheres of public health (e.g., injury and disease prevention, health promotion, and clean air and water). Conflicts between federal and state or local regulation, however, are resolved in favor of the federal government, pursuant to the Supremacy Clause in Article VI of the Constitution, which declares that the "Constitution, and the Laws of the United States . . . and all Treaties made . . . shall be the supreme law of the Land."

By authority of the Supremacy Clause, Congress may preempt or supersede state public health regulation, even if the state is acting squarely within its police powers.⁴ Federal preemption has powerful consequences for the public's health and safety. The Supreme Court's preemption decisions can effectively foreclose meaningful state and local regulation and bar private parties from suing for their injuries.⁵ Preemption has had deregulatory effects in fields ranging from tobacco control⁶ and food labeling⁷ to pharmaceutical,⁸ medical device,⁹ and motor vehicle safety,¹⁰ occupational health and safety,¹¹ and employer health care plans.¹² The sweep of federal supremacy that enables Congress to override state public health safeguards is extensive (see box 3.1).

BOX 3.2 Federal Preemption

If Congress has enacted legislation on a subject, that legislation is controlling over state or local laws. This rule of law, known as preemption, allows Congress to supplant state statutes, regulations, and common law (e.g., tort claims). State legislatures can also preempt local authority, as discussed in chapter 5. The supremacy of federal law may seem straightforward, but in fact the judiciary exercises considerable discretion in determining whether, and the extent to which, Congress has preempted state and local authority.¹

The taxonomy of preemption is complex. *Express preemption* exists when a federal statute explicitly declares that it supersedes state and local law. *Implied preemption* exists when the language of the statute and its legislative history imply Congress's intent to supersede state or local law without expressly declaring it. There are two forms of implied preemption: field preemption and conflict preemption. In *field preemption*, the scheme of federal regulation is so comprehensive as to occupy the entire field, supporting the inference that Congress did not intend for states to supplement it. *Conflict preemption* is inferred by courts in two scenarios: (1) when compliance with both federal and state regulations would be impossible; and (2) when the purpose of federal law would be thwarted by state law. The latter, more expansive form of conflict preemption is sometimes called *obstacle preemption* or "purposes and objectives preemption." Its broad potential for sweeping invalidations of state law has divided conservatives on the Rehnquist and Roberts Courts.²

Congress's purpose in preempting federal law may be to set a minimum standard of protection, allowing state and local governments flexibility to adopt overlapping regulatory regimes that serve the aims of federal regulation. Many federal laws (e.g., the Americans with Disabilities Act, the Clean Air Act, and the HIPAA Privacy Rule) provide a floor of protection. Under this *floor preemption*, federal law supersedes weaker state laws while allowing states to create additional layers of protection. Public health advocates are more concerned about *ceiling preemption*, which prevents states from adopting laws that are stronger than or different from federal law, effectively invalidating state and local requirements that are not identical to federal law.

Although the preemption doctrine may seem clear, predicting the Supreme Court's reasoning can be fraught with difficulty. Consider its

1. Jim Rossi and Thomas Hutton, "Federal Preemption and Clean Energy Floors," *North Carolina Law Review*, 91, no. 4 (2013): 1283–1356, 1283–1356, 1293, distinguishing "the substantive supremacy of federal statutes from the judicially determined effects of supremacy."

2. Catherine M. Sharkey, "Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?" *New York University Journal of Law and Liberty*, 5, no. 1 (2010): 63–114; Caleb Nelson, "Preemption," *Virginia Law Review*, 86, no. 2 (2000): 225–305.

jurisprudence on pharmaceuticals and medical devices. In *Riegel v. Medtronic, Inc.* (2008), the Court held that federal law bars state tort claims by consumers injured by FDA-approved medical devices.³ A year later, in *Wyeth v. Levine* (2009), the Court came to the opposite conclusion for brand-name drugs, ruling that injured consumers could sue pharmaceutical companies for failing to warn about risks.⁴ In *PLIVA, Inc. v. Mensing* (2011), the Court found that injured consumers could not bring failure-to-warn claims for injuries caused by FDA-approved generic pharmaceuticals. In *Mutual Pharmaceutical Co. v. Bartlett* (2013), the Court found that design defect claims against generic manufacturers were also preempted. Thus, in less than five years, the Court barred state design defect claims for FDA-approved medical devices, allowed failure-to-warn claims for branded pharmaceuticals, and then barred those claims (and design defect claims) for generic pharmaceuticals.⁵

3. *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

4. *Wyeth v. Levine*, 555 U.S. 555 (2009).

5. Under federal law, the drug formulations and warnings adopted by generic companies are not permitted to deviate from those of the brand-name drug they are copying. In *Bartlett*, the First Circuit upheld a substantial jury verdict against the manufacturer, reasoning that even if the generic company could not have changed the drug's formulation, it could have taken its defective drug off the market. *Bartlett v. Mut. Pharm. Co., Inc.*, 678 F.3d 30 (1st Cir. 2012). However, in a 5-4 decision, the Supreme Court disagreed, holding that generic manufacturers could not be held liable for harms caused by a drug formulation over which they had no control. *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. ____, 133 S. Ct. 2466 (2013).

American federalism, then, limits the powers of the federal government while affording plenary powers to sovereign states. However, federal constitutional authority is far-reaching, and, when it falls within an enumerated federal power, congressional action can trump state public health regulation.

Separation of Powers

In addition to allocating power between the states and the federal government, the Constitution divides power among the three branches of the federal government. Article I vests all legislative powers in the Congress of the United States; Article II vests executive power in the president; and Article III vests judicial power in “one Supreme Court and in such inferior courts as the Congress may . . . establish.” The states, pursuant to their own constitutions, have adopted similar schemes of governance. This separation of powers provides a system of checks and balances, whereby no single branch of government can act without

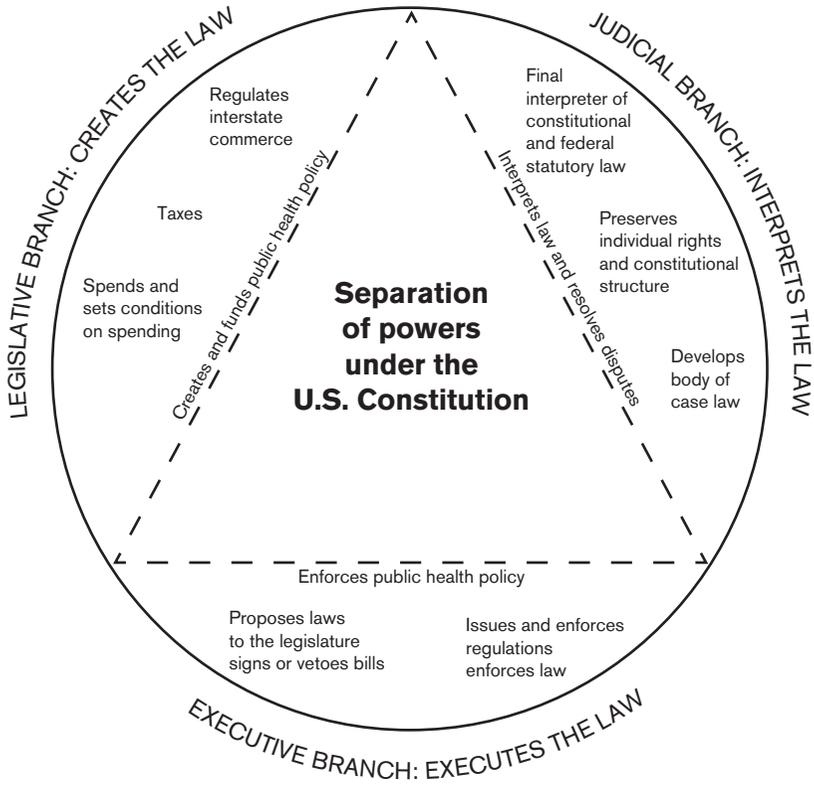


FIGURE 3.1. Separation of powers under the U.S. Constitution.

some degree of oversight and control by another, to reduce the possibility of government oppression (figure 3.1).

Each branch of government possesses a unique constitutional authority to create, enforce, or interpret laws and policies that affect public health. The legislature creates law and allocates the necessary resources to effectuate policy. Some commentators contend that legislators are ill equipped to make complex public health decisions because they often fail to dwell carefully enough on any single issue to gather the facts and consider the implications; they characteristically lack expertise in the health sciences; and they are influenced by popular beliefs (and political lobbying) that may be uninformed, prejudicial, or self-interested. Yet the legislature, as the only directly elected branch of government, is politically accountable to the people. If the legislature enacts an ineffective or overly intrusive policy or fails to act in the face of pressing public concerns, the electorate has a remedy at the ballot box. Legislatures, in

addition, are responsible for balancing public health services with competing claims for such government activities as tax relief, economic stimulus, national defense, transportation, and education.

Executive agencies (discussed further in chapter 5) have far-reaching responsibilities on matters of health. Although the legislature establishes general policy goals and statutory frameworks, agencies frequently devise the rules necessary for implementation and exercise oversight and enforcement. The executive branch possesses many attributes useful for effective public health governance. Agencies are created for the very purpose of advancing the public's health within their jurisdiction; they focus on the same set of problems for extended periods of time; and agency officials possess specific expertise and have the resources to gather facts, develop theories, and generate policy alternatives. Agency officials, however, are not elected, and the duration in office of nonpolitical civil servants can result in stale thinking and complicity with the subjects of regulation. They often work so closely with regulated industries that they risk being "captured" by industry interests. In addition, their lack of political accountability makes them a poor choice for balancing competing values and claims for resources.

The judiciary's task is to interpret laws and resolve legal disputes. These may appear to be sterile pursuits, devoid of much policy influence, but the courts' role in public health is nonetheless broad. Increasingly, the courts have exerted substantial control over public health policy by determining the boundaries of government power. The judiciary defines a zone of autonomy, privacy, and liberty to be afforded to individuals and economic freedoms to be afforded to businesses. The courts decide whether a public health statute is constitutional, whether agency action is authorized by legislation, whether agency officials have marshaled sufficient evidence to support their actions, and whether private parties have acted negligently. The judicial branch has the independence and legal training to make thoughtful decisions about constitutional claims regarding, for example, federalism or individual rights. Courts, however, may be less well equipped to review critically the substance of health policy choices: judges may be less politically accountable,¹³ are bound by the facts of a particular case, may be influenced by expert opinion that is unrepresentative of mainstream public health thought, and may focus too intently on individual rights at the expense of communal claims to public health protection (or vice versa).¹⁴

Which branch of government, if any, is best suited for formulating and executing public health policy? Public health practitioners sometimes

lament the influence wielded by legislators and judges in matters of public health. They claim that legislation and adjudication are time-consuming and costly endeavors, that legislators and judges are not trained or experienced in the sciences of public health, and that legislatures devote insufficient resources to public health infrastructure.¹⁵ Yet the separation of powers doctrine does not aspire to achieve maximum efficiency or even the best result in public health governance. Rather, the constitutional design appears to value restraint in policy making. Elected officials reconcile demands for public health funding with competing claims for societal resources, the executive branch straddles the line between congressional authorization and judicial restrictions on that authority, and the judiciary tempers public health measures with its focus on individual rights. As a society, we forgo the possibility of bold public health governance by any given branch in exchange for constitutional checks and balances that prevent overreaching and assure political accountability.

Limited Powers

A third constitutional function is to limit government power for the purpose of protecting individual liberties. When government acts to promote the communal good, it frequently infringes on the rights and freedoms of individuals and businesses. For example, isolation and quarantine restrict liberty; cigarette advertising restrictions limit free expression; bathhouse closures constrain free association; and product regulation impedes economic freedom. Consequently, public health and individual rights, at least to some extent, conflict: efforts to promote the common welfare may compel a trade-off with personal and proprietary interests.

Protection of rights is commonly regarded as the Constitution's most important function. The Constitution grants extensive government power but curtails it as well. The Bill of Rights (the first ten amendments to the Constitution), together with other constitutional provisions, creates a zone of individual liberty, autonomy, privacy, and economic freedom that exists beyond the reach of the government. The framers of the Constitution, moreover, believed that people retain rights not specified in the Constitution. The Ninth Amendment states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Although the Supreme Court has rarely interpreted the Ninth Amendment as granting an independent source of rights, some scholars argue that the framers intended to protect "natural rights."¹⁶

The constitutional design, then, is one in which government is afforded ample power to safeguard the commonweal but is prohibited from exercising it to trample individual rights. The constant quest of students of public health law is to determine the point at which government authority to promote the population's health should yield to individual rights claims. Put another way, to what degree should individuals forgo freedom to achieve improved health, a higher quality of life, and enhanced safety for the community? And under what circumstances is the relationship between health and individual rights complementary? Much of the remainder of this book strives to answer these questions.

THE NEGATIVE CONSTITUTION: GOVERNMENT'S DUTY TO PROTECT HEALTH AND SAFETY

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by [a state court, county social workers, and other state actors] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all"—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.

—Justice Harry Blackmun, dissenting in *DeShaney v.*

Winnebago County Department of Social Services, 1989

Given the importance of government in maintaining the public's health and safety (and many other communal benefits), one might expect the Constitution to create affirmative government duties to act. Many countries have ratified international treaties and adopted national constitutions that recognize social and economic rights, such as the right to health.¹⁷ Indeed, many U.S. states have adopted social and economic rights and affirmative government obligations in their constitutions with regard to education, health, welfare, and environmental protection.¹⁸

Although the U.S. Constitution does require government to take action in narrow circumstances, such as guaranteeing a defendant's right to an attorney in a criminal trial, it is cast largely in terms of negative rights "to be left alone" by government.¹⁹ The Constitution does not set forth generally applicable affirmative obligations to provide services or to protect people from harm.²⁰ The Supreme Court has consistently rejected any "affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property, of which the government itself

may not deprive the individual.”²¹ In the 1970s, the Court flatly refused to recognize government duties (via the Fourteenth Amendment’s Due Process Clause, discussed in chapter 4) to provide for public welfare assistance,²² housing,²³ education,²⁴ and medical care.²⁵

The Supreme Court remains faithful to a negative conception of the Constitution, even in the face of dire consequences for individuals and communities.²⁶ For example, in *DeShaney v. Winnebago County Department of Social Services* (1989), a state court granted a divorce and awarded custody of a one-year-old child, Joshua DeShaney, to his father. Two years later, county social workers in Wisconsin began receiving reports that Joshua’s father was physically abusing him. The suspicious injuries were carefully noted, but the department of social services took no action. Eventually, at four years of age, Joshua was beaten so badly that he suffered permanent brain damage. He was left severely disabled and institutionalized. In *DeShaney*, the Court found no government obligation to protect children from harm of which the state is acutely aware. The Court held that since there is no affirmative government duty to protect, there is no constitutional remedy.²⁷

In *Castle Rock v. Gonzales* (2005), the Court extended its reasoning to procedural protections, holding that state law requiring the police to enforce domestic-abuse restraining orders does not confer the type of entitlement protected by the doctrine of procedural due process.²⁸ Simon Gonzales, who had a history of erratic and suicidal behavior, violated a restraining order by abducting his three young daughters. In the eight hours after his estranged wife first contacted the police, who failed to respond, Simon Gonzales purchased a gun, murdered the girls, and opened fire on a police station. By framing her case as one of process rather than substance, Ms. Gonzales sought to circumvent the holding in *DeShaney*. But the Court saw little difference between the two cases. Justice Antonin Scalia, writing for the majority, said that the arrest of a person who violates a protective order is discretionary, so there was no entitlement. This was a strained interpretation of state law.²⁹ Ms. Gonzales had in fact relied on the state’s unambiguous promise, through its statutes and enforcement procedures, to protect women and children subject to domestic violence. Yet the Court held there was no deprivation of life, liberty, or property under the Due Process Clause of the Fourteenth Amendment. The Supreme Court made it clear that the Constitution does not offer vulnerable people a remedy, even in the face of the direst need.

Supreme Court cases dealing with access to abortion also illustrate the importance of the Court’s distinction between government interfer-

ence and inaction. In *Maher v. Roe* (1977),³⁰ indigent women brought suit challenging a Connecticut law prohibiting state funding of abortions that were not medically necessary. The plaintiffs argued that the state law infringed on their constitutional right to an abortion, as recognized in *Roe v. Wade* (1973).³¹ The Court upheld the state regulation, concluding that the Constitution merely protects women from unduly burdensome interference with the freedom to decide whether to terminate a pregnancy. The Court noted that “the Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents.”³² A few years later, in *Harris v. McRae* (1980), the Court upheld the Hyde Amendment, a federal law that prohibits the use of federal funds for most abortions, including many deemed medically necessary.³³ The Court held that although the Constitution prohibits unwarranted government interference with freedom of choice in the context of certain personal decisions, “it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”³⁴ The majority in these and other cases has found it irrelevant that, if a woman is poor, her only realistic access to medical services may be through government assistance.

The Negative Constitution from a Public Health Perspective

The area of men’s free action must be limited by law. But equally it is assumed . . . that there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority. Where it is to be drawn is a matter of argument, indeed of haggling. Men are largely interdependent, and no man’s activity is so completely private as never to obstruct the lives of others in any way. “Freedom for the pike is death for the minnows”; the liberty of some must depend on the restraint of others. Freedom for an Oxford don, others have been known to add, is a very different thing from freedom for an Egyptian peasant.

—Isaiah Berlin, “Two Concepts of Liberty,” 1958

A weakness of the negative theory of constitutional law is that its distinction between action and inaction is difficult to sustain.³⁵ The Supreme Court has repeatedly held that a government act that causes harm

is actionable, while government passivity with regard to an existing state of affairs is not. Yet the distinction between an act and an omission is often blurred. Any government failure to act is usually embedded in a series of affirmative policy choices (e.g., which agency will be established; what the agency's objectives are and how its staff will be trained; what resources, if any, will be devoted to certain problems). When government deliberately chooses to allocate scarce resources in one sphere and conspicuously fails to perform in another, can that fairly be characterized as "inaction"? The distinction between action and inaction assumes that the distribution of life chances is a matter of natural order rather than the cumulative product of a multitude of state actions.

Another problem with the negative rights theory of the Constitution is that citizens rely on the protective umbrella of the state. When the state establishes an agency to detect and prevent domestic abuse (or to prevent any other cause of injury or disease), it promises, at least implicitly, that it will respond in cases of obvious threats to health. If an agency represents itself to the public as a defender of health and safety, and the public justifiably relies on that protection, is government responsible when it knows that a substantial risk exists, fails to inform private parties so they might initiate action, and passively avoids a state response to that risk?

Finally, judicial refusal to examine government's failure to act, irrespective of the circumstances, leaves the state free to abuse its power and cause harm to citizens. Government more often exerts its power, and its capacity to harm, by withholding services in the face of obvious threats to health.³⁶ Neglect of the poor and vulnerable and calculated failures to respond to obvious hazards are direct and certain causes of harm. Moreover, a constitutional rule that punishes government misfeasance (when the state intentionally or negligently causes harm) but not nonfeasance (when the state simply does not act) provides an incentive to withhold services and interventions.

The rule requiring affirmative state action as a prior condition for judicial review offers an uninspired vision of the Constitution, one that certainly limits its power to safeguard individual rights. Several scholars have offered alternative visions that would broaden government obligations in the Constitution.³⁷ Constitutional scholars Louis Seidman and Mark Tushnet have argued for a more expansive understanding of affirmative state conduct. They suggest that the Fourteenth Amendment's historical purpose is consistent with the view that "the state is inflicting

. . . deprivation [of life, liberty, or property] when officials organize their activities so that people fall prey to private violence.”³⁸ Similarly, the public health law scholar Wendy Parmet uses social compact theory and early public health laws to argue that the framers intended that the Constitution obligate rather than merely empower the government to protect the public’s health.³⁹

STATE AND LOCAL POWER TO ASSURE THE
CONDITIONS FOR THE PUBLIC’S HEALTH:
SALUS POPULI EST SUPREMA LEX

States and localities have had primary responsibility for protecting the public’s health since the founding of the republic. Early public health law employed a legal maxim that embodied the intrinsic purposes of a sovereign government: *Salus populi est suprema lex*, the welfare of the people is the supreme law.⁴⁰ *Salus populi* demonstrates the close connection between state power and historic understandings of the public’s well-being. From a constitutional perspective, there exist historic wellsprings of state authority to protect the common good: the police power to protect the public’s health, safety, and morals, and the *parens patriae* power to defend the interests of persons unable to secure their own interests.

*Police Powers: Regulation for Health, Safety, and
Morals: Sic utere tuo ut alienum non laedas*

OF OFFENCES against the PUBLIC HEALTH, and the PUBLIC POLICE OF ÆCONOMY. [A] species of offences, more especially affecting the commonwealth, are such as are against the public health of the nation; a concern of the highest importance. . . . By public police and æconomy I mean the due regulation and domestic order of the kingdom: whereby individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.

—William Blackstone, *Of Public Wrongs*, 1769

The police power is the natural authority of sovereign governments to regulate private interests for the public good (see figure 3.2).⁴¹ We define police power as the inherent authority of the state (and, through delegation, local government) to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general

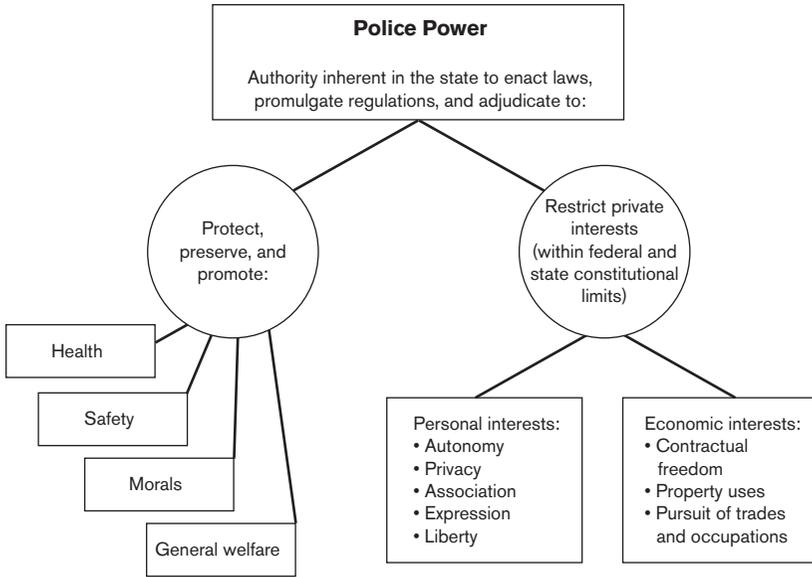


FIGURE 3.2. Police power.

welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests: personal interests in autonomy, privacy, association, and liberty as well as economic interests in freedom to contract and uses of property.

Police power evokes images of an organized civil force for maintaining order, preventing and detecting crime, and enforcing criminal laws. But the origins of the term are deeper and far more textured than notions of basic law enforcement and crime prevention. The police power in early American life, according to the legal historian William J. Novak, was part of a well-regulated society, a “science and mode of governance where the polity assumed control over, and became implicated in, the basic conduct of social life. . . . No aspect of human intercourse remained outside the purview of police science.”⁴² The classical Greek origins of *police* demonstrate a close association between government and civilization: *politia* (the state), *polis* (city), and *politeia* (citizenship).⁴³

As sovereign governments that predate the formation of the United States, the states still retain sovereignty except as surrendered under the

Constitution.⁴⁴ Part of the constitutional compact was that states would remain free to govern within the traditional spheres of health, safety, and morals. All states, to a greater or lesser degree, delegate police powers to local government: counties, parishes, cities, towns, or villages.

The definition of police power encompasses three principles: that the government's purpose is to promote the public good; that the state's authority to act permits the restriction of private interests; and that the scope of state powers is extensive.⁴⁵ States exercise police powers to ensure that communities are safe and secure, to create conditions conducive to good health, and, generally speaking, to promote human well-being. Police powers enable state action to protect and promote broadly defined social goods and ameliorate public harms.

Government, in order to achieve common goods, is empowered to enact legislation, regulate, and adjudicate in ways that necessarily limit private interests. Thus government has inherent power to interfere with personal interests in autonomy, privacy, association, and liberty as well as economic interests in ownership, uses of private property, and freedom to contract. State power to restrict private rights is embodied in the common law maxim *sic utere tuo ut alienum non laedas*: use your own property in such a manner as not to injure that of another. The maxim supports the police power, giving government the authority to determine safe uses of private property to diminish risks of injury and ill health to others.⁴⁶ More generally, the police power affords government the authority to keep society free from noxious exercises of private rights. The state retains discretion to determine what is considered injurious or unhealthful and the manner in which to regulate such activity, consistent with constitutionally protected rights.

Countless judicial opinions and treatises articulate police powers as a deep well of public authority granted to the body politic.⁴⁷ In *Gibbons v. Ogden* (1824), Chief Justice John Marshall conceived of police powers as an "immense mass of legislation, which embraces every thing within the territory of a state, not surrendered to the general government. . . . Inspection laws, quarantine laws, health laws of every description . . . are components of this mass."⁴⁸ In the *Slaughter-House Cases* (1873), Justice Samuel Miller asserted that the police power was preeminent because "upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property."⁴⁹

In the context of public health, police powers include all law and regulation directly or indirectly intended to prevent morbidity and premature mortality in the population. Police powers have enabled states and their subsidiary municipal corporations to promote and preserve the public's health in areas ranging from injury and disease prevention to sanitation, waste disposal, and the protection of clean water and air. Police powers exercised by the states include vaccination,⁵⁰ isolation and quarantine,⁵¹ inspection of commercial and residential premises,⁵² abatement of unsanitary conditions and other nuisances,⁵³ regulation of air and surface water contaminants, restriction of public access to polluted areas,⁵⁴ standards for food and drinking water,⁵⁵ extermination of vermin,⁵⁶ fluoridation of municipal water supplies,⁵⁷ and licensure of physicians and other health care professionals.⁵⁸

Historically, the judiciary turned to the police power as a rough sorting device to separate authority rightfully retained by the states from that appropriately exercised by the federal government. In recognition that a state's power is "never greater than in matters traditionally of local concern" to the health and safety of its population, the Supreme Court adopted a cautious stance toward constitutional restrictions on state authority in areas governed by enumerated federal powers.⁵⁹ Similarly, in assessing federal preemption, the Court often acknowledged that police powers are "primarily, and historically, . . . matters of local concern"⁶⁰ and adopted a presumption that "the historic police powers of the States [are] not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress."⁶¹ In recent years, however, the Court has appeared more willing to imply ceiling preemption, even in areas firmly within the purview of the state's police power.⁶²

The presumption against federal authority influenced the Court in a closely watched same-sex marriage case in 2013. In *United States v. Windsor*, the Court struck down section 3 of the Defense of Marriage Act, which denied many federal benefits to same-sex couples whose marriages were recognized under state law. By defining *marriage* and *spouse* to exclude same-sex partners for purposes of federal law, Congress intruded on a traditional province of states.⁶³ Two years later, however, the Court held that states *must* license same-sex marriages and recognize same-sex marriages licensed by and performed in other states based on interrelated principles of liberty and equality found in the Fourteenth Amendment. These principles are discussed further in chapter 4.⁶⁴

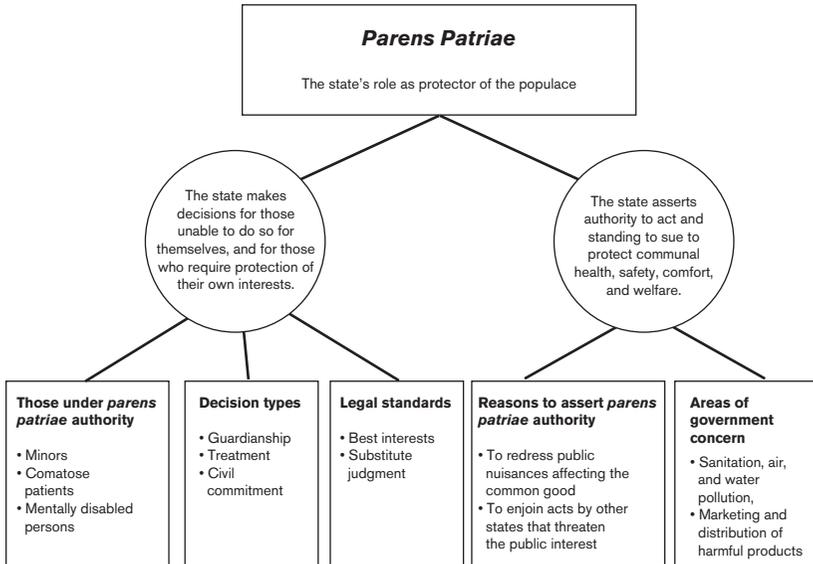


FIGURE 3.3. *Parens patriae* power.

Parens Patriae: State Power to Protect the Populace

This prerogative of *parens patriae* is inherent in the Supreme power of every state, whether that power is lodged in a royal person, or in the legislature . . . [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.

—Joseph P. Bradley, *Mormon Church v. United States*, 1890

Parens patriae—literally, parent of the nation—refers to “the open-ended power of the state to act as parent.”⁶⁵ In the United States, the *parens patriae* function belongs primarily to state and local governments. It is traditionally invoked in two contexts: to protect individuals who are unable to protect themselves because they are incapacitated,⁶⁶ and to assert the state’s general interest and standing in communal health, comfort, and welfare, safeguarding collective interests that no individual, acting alone, has the capacity to vindicate (see figure 3.3).⁶⁷

Protection of Children and Incapacitated Persons

In its narrow form, *parens patriae* refers to the role of the state as the guardian of persons under legal disability (principally minors and individuals who are deemed legally incapacitated as a result of mental illness

or disability).⁶⁸ The *parens patriae* power is used in diverse contexts, including custody cases and other decisions relating to children; guardianship over money, property, and personal affairs for incapacitated persons; treatment decisions for incapacitated or comatose patients; and civil commitment of persons with mental illness.

The exercise of *parens patriae* powers in this individualized context can deprive individuals of autonomy, privacy, and liberty: “An inevitable consequence of exercising the *parens patriae* power is that the ward’s personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution.”⁶⁹ Consequently, courts adopt legal standards and processes for decision making to safeguard individuals’ interests.⁷⁰

Protection of Rights Common to the General Public

The state, in exercising its *parens patriae* function, may also act to vindicate rights “common to the general public,” such as through public nuisance litigation “brought by the sovereign to enjoin unreasonable interference with the public health, the public safety, the public peace, the public comfort or the public convenience.”⁷¹ These collectively held common law rights to health, safety, and well-being predate the Constitution. The state’s obligation to safeguard these rights from private interference is inherent in the social compact from which sovereignty is derived. The Constitution was built, in part, on the social-compact theory developed by Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, a key precept of which is that individuals’ moral and political obligations are dependent on a compact among them to form a mutually beneficial society. The social compact necessitates that private individuals surrender some of their freedom of action to avoid harm to the commons. States, in turn, are empowered, and obligated, to effect the common good.

This broader meaning of *parens patriae* can be used to support a state’s standing or right to sue in court to protect communal interests. The legal theory is that the state litigates to defend the well-being of its populace, not to defend the economic interests of the state itself or the interests of particular individuals.⁷² Likewise, in situations where a state cannot legislate or institute a regulatory scheme to protect its citizens (because of federalism constraints), it can sue in federal court under the *parens patriae* doctrine to enjoin another state from actions that pose a threat to health or welfare (e.g., where polluted water from

another state threatens the health of its populace).⁷³ In these actions, the plaintiff state may sue to force the defendant state to regulate entities under its jurisdiction posing a threat of harm to the plaintiff state's residents.⁷⁴

The Supreme Court has recognized the states' broader *parens patriae* role in the context of quarantine,⁷⁵ sanitation,⁷⁶ protecting the water supply,⁷⁷ and preventing air and water pollution.⁷⁸ In recent years, many state and city governments have acted in their *parens patriae* capacity in litigation against industries that produce and distribute products harmful to the public's health, including asbestos, tobacco products, lead paint, and firearms (see chapter 7). States can also use this authority to protect vulnerable groups from discriminatory action by local governments. For example, the State of New York sued to redress the denial of a zoning approval for a residence for homeless persons living with HIV/AIDS.⁷⁹ The "quasi-sovereign" interest asserted by the state was the damage to its population's health and welfare by the denial of benefits that a residential care facility would provide.

FEDERAL POWER TO SAFEGUARD THE PUBLIC'S HEALTH

Whereas the states' police powers are considered plenary (subject to restraints arising from constitutionally protected rights and federal preemption), federal authority is limited to the powers enumerated in the Constitution. Article I, Section 1 endows Congress with the "legislative Powers herein granted," not with plenary legislative authority. Thus, before an act of Congress is deemed constitutional, two questions must be asked: does the Constitution affirmatively authorize Congress to act, and does the exercise of that power improperly interfere with any constitutionally protected interest?

Despite these limitations, the federal government possesses considerable authority to act and exerts extensive control in the realm of public health and safety. The Supreme Court, through expansive interpretations of Congress's enumerated powers, has enabled the federal government to maintain a vast public health presence in matters ranging from biomedical research and health care to infectious diseases, occupational health and safety, and environmental protection.

Under Article I, Section 8 of the Constitution, Congress may "make all Laws which shall be necessary and proper for carrying into Execution" all powers vested by the Constitution in the government of the

United States. The Necessary and Proper Clause, the subject of many great debates in American history, incorporates the doctrine of implied powers. Thus the federal government may employ all means reasonably appropriate to achieve the objectives of constitutionally enumerated national powers. Chief Justice John Marshall’s authoritative construction of the Necessary and Proper Clause in *McCulloch v. Maryland* (1819) suggests that Congress may use any reasonable means not prohibited by the Constitution to carry out its express powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.”⁸⁰

The Constitution delegates diverse authorities to the United States (table 3.1).⁸¹ For public health purposes, the foremost federal powers are the authority to tax and spend and to regulate interstate commerce. Additionally, Congress has authority “to promote the progress of Science and useful Arts.”⁸² Intellectual property protection provides incentives for scientific innovation in areas such as vaccines, pharmaceuticals, and medical devices. The presidential authority “to make Treaties” with the Senate’s advice and consent also has public health significance in such areas as tobacco control and climate change.⁸³

The Power to Control Commerce Is the Power to Broadly Regulate

The Commerce Clause, more than any other enumerated power, affords Congress potent regulatory authority. Article I, Section 8 states that “the Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.” This provision grants considerable power to the federal government to adopt economic and social regulation. It also limits the state police power, via the Dormant Commerce Clause doctrine (see box 3.3).

On its face, the Commerce Clause is limited to controlling the flow of goods and services across federal or state borders. As interstate commerce has become ubiquitous, however, activities once considered purely local have come to exert national effects and have, accordingly, come within Congress’s commerce power. Since Franklin Delano Roosevelt’s New Deal era, the Supreme Court has interpreted the commerce power broadly, giving Congress the ability to regulate in multiple spheres. The Court’s post-1937 jurisprudence has described “commerce among the

TABLE 3.1 ENUMERATED FEDERAL POWERS WITH RELEVANCE TO THE PUBLIC'S HEALTH

Federal power	Constitutional authority	Public health application
Regulate interstate commerce	Congress has the authority “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” (Article I, Section 8).	Courts have upheld exercises of the commerce power in the fields of environmental protection, food and drug safety, occupational health, and other public health matters.
Tax and spend	Congress “shall have Power 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” (Article I, Section 8).	To raise revenue to provide for the good of the community. Affords financial resources to provide health services; also affords power to regulate risk behavior and influence health-promoting activities.
Protect intellectual property	Congress has authority “to promote the progress of Science and useful Arts” (Article I, Section 8).	Patent protection for vaccines, pharmaceuticals, and medical devices
Ratify treaties	The President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur” (Article II, Section 2)	Framework Convention on Tobacco Control (which the United States signed but did not ratify)
Enforce Reconstruction-era Amendments (abolition of slavery, equal protection, and voting)	“Congress shall have power to enforce, by appropriate legislation, the provisions of this article” (Amendments XIII, XIV, and XV).	Civil rights legislation

states” as “plenary” or all-embracing, applying it to virtually every aspect of social life.⁸⁴ Indeed, from 1937 to 1995, the Supreme Court did not find a single piece of social or economic legislation unconstitutional on the basis that Congress had exceeded its commerce power. This expansive constitutional construction has enabled national authorities to reach deeply into traditional realms of state public health power and has

BOX 3.3

The Dormant Commerce Clause:
Limits on State Police Power

In certain realms, the Constitution dictates that federal jurisdiction is exclusive because the activity is fundamental to executing national responsibilities. For example, in matters regarding foreign policy, tariffs, immigration, and intellectual property, states are constitutionally barred from regulating in ways that infringe on federal authority.¹ With regard to regulation of interstate commerce, the so-called dormant or negative Commerce Clause implicitly limits state authority to regulate in ways that place an undue burden on interstate commerce. Thus, even if Congress has not regulated in ways that preempt state and local authority with respect to a public health concern, states may not regulate if doing so obstructs commerce among the states.²

When a state or local action—including legislation, regulation, and imposition of tort liability—is challenged on dormant Commerce Clause grounds, courts ask whether the law discriminates against out-of-state businesses or products. If it does, the law will be invalidated unless it is deemed necessary to achieve an important purpose. The Supreme Court has a history of invalidating state and local public health legislation on dormant Commerce Clause grounds, striking down state and local police power regulation involving milk pasteurization and pricing;³ liquor taxes;⁴ groundwater use;⁵ and solid,⁶ liquid,⁷ and hazardous waste⁸

1. *Arizona v. United States*, 567 U.S. ___, 132 S. Ct. 2492 (2012) (blocking implementation of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act because it was preempted by federal immigration regulations).

2. The Supreme Court has long held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994). Even when the states are acting under express constitutional powers to regulate the sale of alcoholic beverages (U.S. Const. amend. XXI), the Court has held that discriminatory action violates the dormant Commerce Clause. *Granholm v. Heald*, 544 U.S. 460 (2005) (holding that a Michigan statute that prohibited out-of-state wineries from shipping wine directly to in-state consumers, but permitted in-state wineries to do so if licensed, discriminated against interstate commerce).

3. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (holding that a local ordinance denying a corporation the right to sell its products within the city because of the distance to its pasteurization plants violated the Commerce Clause because it imposed an undue burden on interstate commerce); *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994) (holding that a Massachusetts milk-pricing order that subjected all milk sold to Massachusetts retailers to assessment, with all proceeds distributed to Massachusetts dairy farmers, violated the Commerce Clause); *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003) (rejecting the lower court’s holding that California’s milk pricing and pooling laws were exempt from Commerce Clause scrutiny).

4. *Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263 (1984) (holding that a Hawaii local liquor-tax exemption violated the Commerce Clause).

disposal and processing. The Constitution, therefore, does not simply empower Congress to control “commerce among the states” but implicitly limits state public health authority that unduly burdens interstate commerce.

5. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958–60 (1982) (invalidating state regulation of groundwater because it posed an unreasonable burden on interstate commerce).

6. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994) (invalidating a local requirement that solid waste be processed at the town’s transfer station because it deprived out-of-state firms access to the local market); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep’t of Natural Res.*, 504 U.S. 353 (1992) (holding that a state regulation prohibiting private landfill operators from accepting solid waste that originated outside the county in which their facilities were located violated the Commerce Clause).

7. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating a New Jersey statute prohibiting the importation of most solid or liquid waste that originated outside the state because it attempted to regulate out-of-state commercial interests in violation of the Commerce Clause).

8. *Chemical Waste Mgmt v. Hunt*, 504 U.S. 334 (1992) (holding that an Alabama statute imposing an added fee on hazardous waste generated outside the state violated the Commerce Clause).

diminished the force of the Tenth Amendment. The courts have upheld exercises of the commerce power in the fields of environmental protection, food and drug safety, occupational health, and infectious diseases.

In *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Supreme Court broke with long-standing practice to invalidate politically popular measures on the ground that they exceeded the scope of the commerce power.⁸⁵ In *Lopez*, the Court held that Congress exceeded its commerce authority by making gun possession within a school zone a federal offense, concluding that possessing a gun within a school zone did not “substantially affect” interstate commerce. In *Morrison*, the Court struck down the private civil remedy in the Violence Against Women Act. In spite of congressional findings that violence impairs the ability of women to work, harms businesses, and increases national health care costs, the Court found no national effects. The Court invalidated these statutes not on grounds that regulating guns in school zones and preventing violence against women were unimportant aims of government, but only on grounds that they were outside the reach of the federal government. *Lopez* and *Morrison* did not indicate a wholesale retreat from the liberal interpretation of the commerce power. In *Gonzales v. Raich* (2005) the Court upheld Congress’s commerce power to prohibit purely local cultivation and use of marijuana approved by a physician and in compliance with California law. Justice

John Paul Stevens explicitly said that *Lopez* and *Morrison* had been read “far too broadly.”⁸⁶

National Federation of Independent Business v. Sebelius (2012) represents the Roberts Court’s most ambitious foray to date into the mire of public health federalism.⁸⁷ The Supreme Court considered whether provisions of the Affordable Care Act (ACA) fell within the federal government’s enumerated powers. Twenty-five states challenged the ACA’s individual mandate, requiring most Americans to have insurance by 2014 or face financial penalties, and its expansion of Medicaid through spending inducements. Here we consider the Court’s ruling under the commerce power; we take up its discussion of the taxing and spending powers later in this chapter.

Supplying a crucial fifth vote, Chief Justice John Roberts found that the Commerce Clause did not empower Congress to compel individuals to buy health insurance. Justice Roberts endorsed an activity/inactivity distinction, stating that the mandate does not regulate existing commercial activity: “It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority.”⁸⁸

Many health law and policy experts are critical of this distinction. A person’s refusal to buy health insurance affects commerce in important ways. Unexpected medical expenses can easily exceed the means of all but the wealthiest individuals. Under federal law, emergency care must be provided by hospitals, regardless of the patient’s ability to pay, and health care providers pass those costs along to paying patients by raising prices. Under the ACA’s guaranteed-issue and community-rating provisions, which prohibit health insurers from discriminating against people based on health status, some individuals may choose to remain uninsured until they are injured or become ill, leading to higher insurance premiums for everyone. Does the mandate force individuals to initiate commerce, or does it merely regulate the manner and timing of commerce, because everyone requires medical care eventually?

Some scholars suggest that *NFIB v. Sebelius*, although it ultimately upheld the individual mandate as a valid exercise of the tax power (see below), may indicate that a majority of justices on the Roberts Court have adopted the “constitutional gestalt” of “new federalism” begun by the Rehnquist Court.⁸⁹ Whether Chief Justice Roberts’s activity/inactivity distinction will turn out to have bite is unknown.⁹⁰ If Congress

enacted future mandates, for example, it could avoid raising a question regarding the scope of its commerce power by undergirding its action through the power to tax, which the Court endorsed in *NFIB*.

*The Power to Tax Is the Power to Raise Revenue,
Regulate Risk Behavior, and Induce Health-
Promoting Behaviors*

No attribute of sovereignty is more pervading [than taxation], and at no point does the power of government affect more constantly and intimately the relations of life than through the exactions made under it.

—Thomas M. Cooley, *A Treatise on Constitutional Limitations*, 1890

Article I, Section 8 of the Constitution states, “Congress shall have Power 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.” Congress has broad authority to tax and spend and has wide discretion to determine what is in the nation’s general welfare.⁹¹

The power to tax is closely aligned with the power to spend. Economists regard congressional decisions to provide tax relief for certain activities as indirect expenditures because government is, in fact, subsidizing the activity from the national treasury. Economists estimate, for example, that favorable tax treatment afforded to employer-sponsored health care plans costs the federal government \$250 billion per year in forgone revenue.⁹²

On its face, the power to tax has a single, overriding purpose—to raise revenue. Absent this ability, the legislature could not provide for national security, law enforcement, education, health care, transportation, or sanitation. But the taxing power has another, equally important purpose: it provides an independent source of federal legislative authority. Congress may regulate through the tax system for purposes that may not be authorized under its other enumerated powers.⁹³

In *NFIB*, the Court upheld the ACA’s requirement that most Americans either obtain health insurance or pay a penalty as a valid exercise of Congress’ taxing power. The fact that Congress labeled the payment a “penalty” rather than a “tax” was not controlling. Explaining that the Court is obligated to adopt any reasonable interpretation of the statute that would preserve its constitutionality, Chief Justice Roberts adopted a functional approach, focusing on the means by which the penalty is assessed (as a proportion of income) and collected (by the Internal Revenue Service).

The Court concluded, moreover, that the tax is structured such that individuals have a choice in fact, rather than just in theory, whether to purchase insurance or remain uninsured and pay the resulting tax.

As *NFIB* demonstrates, the power to tax is also the power to discourage unhealthy choices and encourage health-promoting activities. In its early jurisprudence, the Supreme Court distinguished between revenue-raising taxes, which it upheld, and purely regulatory taxes, which it found constitutionally concerning.⁹⁴ This distinction has all but disappeared. Noting that “taxes that seek to influence conduct are nothing new,” Chief Justice Roberts was untroubled by the fact that the ACA’s penalty was “plainly designed to expand health insurance coverage.”⁹⁵

The Court has similarly upheld federal taxes on firearms capable of being concealed and on persons who deal in or prescribe marijuana, stating that a “tax does not cease to be valid because it regulates, discourages, or even definitely deters the activities taxed.”⁹⁶ In *NFIB*, the Court declined to decide “the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.”⁹⁷

To some, Justice Roberts’ reasoning in *NFIB* contorted the concept of taxation and was incongruent with the will of Congress.⁹⁸ Should Congress be permitted to use the tax power to compel individuals to engage in economic activity, such as purchasing health insurance? Does allowing Congress to exercise the power to tax while avoiding reference to taxation obscure political accountability? Does the Court’s decision open the door to increased federal power, or does it constrain federal power by denying Congress broad commerce powers? These are critical questions that could shape the future of federal health powers.

Regardless of the logic under which the case was decided, the practical importance of the Court’s holding cannot be overstated. The sustainability of the ACA’s economic model depends on the mandate (and subsidies, which were upheld in the face of an administrative law challenge in 2015, see chap. 5) to ensure that younger and healthier people purchase insurance to expand the risk pool and keep the cost of premiums reasonable.⁹⁹

The Power to Spend Is the Power to Allocate Resources and Induce Conformance with Public Health Standards

The spending power provides Congress with independent authority to allocate resources for the public good; Congress need not justify its spending by reference to a specific enumerated power.¹⁰⁰ Closely connected to the power to tax, the spending power has two purposes. First,

BOX 3.4 Shared Jurisdiction and Cooperative Federalism

As a constitutional matter, authority with regard to most issues is shared between the federal government and the states. Thus, it is left to Congress to determine whether to preempt state law and thus achieve exclusive jurisdiction via statute; eschew preemption, embracing a dual federalism whereby federal and state regulatory regimes each operate in their separate spheres, often in an uncoordinated manner; or regulate cooperatively with the states. How cooperative federalism works depends on the enumerated power relied upon by Congress.

Where Congress acts under the commerce power, it may offer states the choice of either regulating according to federal standards or having federal regulation preempt state law. This model is found in regulatory regimes concerning occupational health and safety, environmental protection and conservation, and private health insurance reform.¹ It is the predominant approach to environmental law. Under this model, federal agencies (e.g., the EPA) establish minimum national standards, and states retain the choice to administer the federal standards themselves or have federal authorities implement national standards.²

Where Congress acts pursuant to its spending power, the federal government “sets forth, structures, and funds a common goal.”³ If a state accepts the proffered funding, it must abide by the accompanying federal rules and guidelines. Congress’s power to set the terms on which state appropriations are distributed is an effective regulatory device. States and localities can seldom afford to decline federal public health grants.⁴ Congress and the federal agencies use conditional

1. Ronald J. Krotoszynski Jr., “Cooperative Federalism, the New Formalism, and Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State Government Officers Enforcing Federal Law,” *Duke Law Journal*, 61, no. 8 (2012): 1599–669, 1629–39; Daniel C. Esty, “Revitalizing Environmental Federalism,” *Michigan Law Review*, 95, no. 3 (1996): 570–653; Robert L. Fischman, “Cooperative Federalism and Natural Resources Law,” *New York University Environmental Law Journal*, 14, no. 1 (2005): 179–231; Kyle Thompson, “State-Run Exchanges in Federal Healthcare Reform: A Case Study in Dysfunctional Federalism,” *American Journal of Law and Medicine*, 38, nos. 2–3 (2012): 548–69.

2. One rationale for national minimum standards is to prevent states from relaxing environmental protection to attract industry. This “race-to-the-bottom” rationale is thought to help states resist local economic pressures, but it has been criticized. Richard L. Revesz, “Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation,” *New York University Law Review*, 67, no. 6 (1992): 1210–54.

3. Nicole Huberfeld, “Federalizing Medicaid,” *University of Pennsylvania Journal of Constitutional Law*, 14, no. 2 (2001): 431–594 n. 14.

4. Albert J. Rosenthal, “Conditional Federal Spending and the Constitution,” *Stanford Law Review*, 39, no. 5 (1987): 1103–64.

appropriations to induce states to conform to federal standards in numerous public health contexts such as HIV testing,⁵ Medicaid coverage and reimbursement rates,⁶ abortion counseling and referral,⁷ and land use and solid waste management.⁸

Cooperative federalism has many advantages. It allows states to experiment with a diversity of regulatory responses while preserving federal oversight.⁹ It also, however, raises significant problems. Lack of uniformity from state to state, even in programs that are purportedly federal, can lead to spectacularly unjust results.¹⁰ Even if they opt into a federal program, states may not be fully committed to the goals set forth in federal law, particularly with regard to politically charged matters like environmental protection or health reform. Their enforcement may be lax and sluggish or downright obstructionist. Federal agencies are generally authorized to revoke federal funds or take over a state's programs, but those crude tools are virtually never used. To make matters worse, the Supreme Court has sharply curtailed the ability of private parties to enforce federal spending legislation through civil litigation.¹¹

Even as Congress has relied more heavily on a cooperative approach, federal-state relations on social and economic policy remain highly contentious. On matters like health reform and gun control, several states have gone so far as to pass "nullification statutes" that purport to block implementation or even criminalize enforcement of federal law.¹² State nullification has been consistently rejected by the Supreme Court as inconsistent with the Supremacy Clause, but the statement these laws make demonstrates the marked polarization of state and federal politics.¹³

5. 42 U.S.C. § 300ff-33 (requiring states to adopt laws or regulations in conformance with specified testing procedures, including universal testing for newborns and voluntary opt-out testing for pregnant women and clients of sexually transmitted disease clinics and substance-abuse treatment centers).

6. 42 U.S.C. § 1396a (enumerating Medicaid requirements for establishment of state plans).

7. *Rust v. Sullivan*, 500 U.S. 173 (1991) (permitting federal regulations prohibiting use of Title X funds in programs where abortion is used as a means of family planning).

8. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1465; Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387; Resource Conservation and Recovery Act, 42 U.S.C. § 6901.

9. Philip J. Weiser, "Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act," *New York University Law Review*, 76, no. 6 (2001): 1692-1767.

10. Huberfeld, "Federalizing Medicaid,"; Jessica Bulman-Pozen and Heather K. Gerken, "Uncooperative Federalism," *Yale Law Journal*, 118, no. 7 (2009): 1256-310.

11. *Gonzaga University v. Doe*, 536 U.S. 273 (2002), adopting stringent standards for determining whether a federal statutory provision confers a federal right enforceable via Section 1983.

12. Ryan Card, "Can States 'Just Say No' to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law," *Brigham Young University Law Review* 2010, no. 5 (2010): 1795-829.

13. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Bush v. Orleans Parish Sch. Bd.*, 364 U.S. 500 (1960); *Ableman v. Booth*, 62 U.S. 506 (1858); *United States v. Peters*, 9 U.S. 115 (1809).

it expressly authorizes expenditures for the public's health, safety, and well-being. Second, it effectively induces state and private party conformance with federal regulatory standards.

Theoretically, the spending power may be exercised only to pursue a common benefit, as distinguished from a purely local purpose, but the Supreme Court has historically deferred to Congressional determinations regarding common benefit,¹⁰¹ in recognition of the dynamic nature of the general welfare: "Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation."¹⁰²

The spending power does not simply grant Congress the authority to allocate resources: it is also an indirect regulatory device. Congress may prescribe the terms on which it disburses federal money to the states or to private entities. The conditional spending power is akin to a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions. The Supreme Court permits conditional appropriations, provided the conditions are clearly expressed in the statute, reasonably related to the program's purposes, and not unduly coercive.¹⁰³ The "unconstitutional conditions" doctrine, which prohibits Congress from making a grant or a tax conditional on the requirement that the recipient give up a constitutional right, is discussed in chapter 4.

When Congress imposes regulatory conditions on the acceptance of federal funds by states, it must do so unambiguously to permit the states to make an informed choice.¹⁰⁴ "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told [in the statutory text] regarding the conditions that go along with the acceptance of those funds."¹⁰⁵

Additionally, the strings attached to federal resources must bear some reasonable relationship to the purposes of the grant. Despite this theoretical limit, the Supreme Court grants Congress substantial leeway and appears to search for permissible relationships between the appropriation and the conditions.¹⁰⁶ For example, the Court saw a direct relationship between the appropriation of highway funds and the states' acceptance of a drinking age of twenty-one. Since a major purpose of highway funds is to promote traffic safety, the drinking-age limits were deemed constitutionally acceptable.¹⁰⁷

Finally, conditional spending cannot be so coercive as to pass the point at which "pressure turns into compulsion."¹⁰⁸ Prior to 2012, the Supreme Court had never struck down a spending condition as unconstitutionally coercive. Yet in *NFIB*, the Court held that the federal government could not deny existing Medicaid funds to states that failed to comply with the

“In Two Words, Yes And No”



PHOTO 3.2. This political cartoon, published in the *Washington Post* in 1949, illustrates that the power of the federal purse to expand federal authority has long been controversial among states' rights advocates. A 1949 Herb Block Cartoon, © The Herb Block Foundation.

ACA's requirement to expand Medicaid eligibility. Chief Justice Roberts's opinion for a plurality of the Court deemed the ACA's Medicaid reforms to be a "shift in kind, not merely degree": the expansion transforms Medicaid such that it "is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."¹⁰⁹ The Court also emphasized that the expansion was improper because when states first accepted Medicaid

funds, they were not given notice that Congress would eventually predicate funding on participation in comprehensive health reform. Finally, the Court condemned the expansion as “economic dragooning that leaves the States with no real option but to acquiesce.”¹¹⁰ The threatened withdrawal of billions of federal Medicaid dollars was, in Chief Justice Roberts’s words, “a gun to the head” of recalcitrant states.¹¹¹

As a consequence of the *NFIB* decision, Medicaid expansion was made optional. Nearly half the states had refused to expand Medicaid as of 2014, even though the federal government undertook to pay 100 percent of the costs from 2014 to 2016, gradually decreasing to 90 percent after 2019. This result significantly undermined the ACA’s goal of universal coverage, as Medicaid expansion was supposed to account for approximately half the ACA’s increased coverage.¹¹²

It is obvious from this discussion that the power to tax and spend is not value neutral but rather is laden with political and jurisprudential overtones. Collection of revenues and allocation of resources go to the very heart of the political process. Legislators, influenced by the public and interest groups, purport to promote the public’s health, safety, and security, but their priorities are also influenced by moral, cultural, and social values, such that government’s economic power may be used to *discourage* activities that many public health advocates support, such as safe abortion, sex education, and needle exchange. At the same time, government may create incentives for unhealthy or risky behavior. For example, the government grants farmers considerable subsidies to produce unhealthy foods, such as high-fructose corn syrup.¹¹³

The Reserved Powers Doctrine

Even if the federal government is acting under a valid grant of constitutional authority such as the commerce power, there is another way in which the Supreme Court can strike down public health regulation: the reserved powers doctrine. In *New York v. United States* (1992), the Court, for only the second time in more than half a century, invalidated a federal statute on the grounds of the Tenth Amendment.¹¹⁴ Congress had adopted various incentives to induce states to provide for disposal of radioactive waste generated within their borders. To ensure effective action, if a state was unable to dispose of its own waste, it was required under the statute to “take title” and possession of the waste. The Court invalidated the “take title” provision because the Constitution does not confer on Congress the ability to “commandeer the legislative processes of the States by

directly compelling them to enact and enforce a federal regulatory program.” According to the Court, although Congress may exercise its legislative authority directly over private persons or businesses, it lacks the power to compel states to regulate according to the federal standards.¹¹⁵ The Court’s theory is that state officials “bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”¹¹⁶

In *Printz v. United States* (1997), the Supreme Court used its reasoning in *New York* to overturn provisions in the Brady Handgun Violence Prevention Act, which directed state and local law enforcement officers to conduct background checks on prospective handgun purchasers.¹¹⁷ In *New York*, the Court held that state legislatures are not subject to federal direction. In *Printz*, the Court held that federal authorities may not supplant the state executive branch. In this instance, Congress did not require the state to make policy but only to assist in implementing the federal law. The Court rejected the distinction between making law or policy on the one hand and merely enforcing or implementing it on the other. As a result of *New York* and *Printz*, the Tenth Amendment has become a vehicle for challenging federal statutes that compel state legislative or administrative action.

PRIVATE ENFORCEMENT OF FEDERAL LAW: STANDING AND SOVEREIGN IMMUNITY

Absent a “particularized” injury, there would be little that would stand in the way of the judicial branch becoming intertwined in every matter of public debate. . . . If a citizen disagreed with the manner in which agriculture officials were administering farm programs, or transportation officials’ highway programs, or social services officials’ welfare programs, those might all be challenged in court. In each instance, the result would be to have the judicial branch of government—the least politically accountable of the branches—deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government.

—Hon. Stephen J. Markman, *National Wildlife Federation v. Cleveland Cliffs Iron Co.*, 2004

In many instances, private parties may wish to enforce federal law (including individual rights protected by the Constitution, discussed in chapter 4) against state and local governments or federal agencies. The extent to which such suits are allowable is circumscribed by two constitutional doctrines: standing (derived from separation of powers) and sovereign immunity (derived from the Eleventh Amendment).

Private parties can sue governments using a variety of mechanisms. In some areas—especially civil rights and environmental protection—Congress has expressly authorized “citizen suits” to enforce particular federal statutory provisions, including against federal agencies and state and local governments.¹¹⁸ In other areas—including Medicaid, education, housing, and other safety-net programs discussed in chapter 8—Section 1983 of the 1871 Civil Rights Act may be used by private parties to enforce some provisions of federal law against state officials and local governments, even though the federal law that is the basis of the party’s substantive claims does not itself recognize a private right of action.¹¹⁹ Federal courts have jurisdiction to hear private suits against federal officials for violations of an individual’s constitutional rights (called *Bivens* actions).¹²⁰ The Administrative Procedure Act authorizes private suits against federal agencies to challenge “reviewable” agency actions (see chapter 5).¹²¹ The Tucker Act allows claims for monetary damages against the federal government under limited circumstances.¹²² The Federal Tort Claims Act allows for tort damages claims against federal employees acting within the scope of their employment (see chapter 7).¹²³ Regardless of congressional intent, suits brought pursuant to these various mechanisms must comport with constitutional standing requirements and may be subject to sovereign immunity as an affirmative defense.

Standing

The doctrine of standing, along with other justiciability requirements based in Article III of the Constitution, secures the separation of powers by ensuring that only true “cases or controversies” are within the power of the judiciary to decide.¹²⁴ When a state or federal agency violates federal law—for example, by failing to implement environmental regulations or failing to provide adequate health care coverage for children under Medicaid—which private parties may bring suit? Generally, courts require that: (1) the plaintiff has suffered or will imminently suffer an invasion of a legally protected interest that is concrete and particularized (“injury in fact”); (2) the plaintiff’s alleged injury is “fairly traceable” to the challenged action of the defendant; and (3) it is likely, and not merely speculative, that a favorable court decision would redress the injury.¹²⁵

Many parties have a stake in federal, state, and local government actions, but they do not necessarily have standing to sue simply by virtue of their status as citizens or taxpayers. In 2006, for example, the

Supreme Court held that state taxpayers do not have standing to challenge state taxation or spending decisions in federal court on the grounds that they violate the dormant Commerce Clause by giving preferential treatment to in-state business interests: “No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.”¹²⁶

In many public health contexts, standing hurdles are problematic but not necessarily insurmountable. In cases where it would be difficult to demonstrate actual or imminent harm to the health of identified individuals (see chapter 7), community organizations may be able to point to other concerns as a stand-in for health risks. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental* (2000), the Court held that injury in fact was adequately documented when environmental organizations submitted affidavits and testimony of members asserting that they were concerned about the effects of the defendant’s illegal discharge of neurotoxic mercury into a nearby river, which directly affected their “recreational, aesthetic, and economic interests.” The Court contrasted these submissions with the “general averments,” “conclusory allegations,” and “‘some day’ intentions to visit endangered species halfway around the world” deemed insufficient when raised by environmental groups in previous cases.¹²⁷

Federal Abrogation of State Sovereign Immunity

While standing requirements are applicable to all manner of suits brought before the judiciary, suits brought against government defendants raise the additional issue of sovereign immunity. As sovereigns, the federal and state governments are immune from lawsuits unless they have waived immunity or consented to being sued. Thus Congress can validly waive federal sovereign immunity, and state legislatures can waive state sovereign immunity as they see fit. For example, the Administrative Procedure Act creates a private cause of action for private parties to challenge certain types of federal agency actions and eliminates the defense of sovereign immunity in cases where private parties seek injunctive relief (monetary damages are barred), claiming that a federal agency, officer, or employee acted or failed to act in an official capacity in violation of federal law (see chapter 5).¹²⁸

Abrogation of state sovereign immunity by the federal government without the consent of the state presents more difficulty. The Eleventh

Amendment grants states immunity from certain lawsuits in federal court without the state's consent.¹²⁹ The modern Court perceives the states' immunity from suit to be a fundamental precept of sovereignty: "Federalism requires that Congress accord States the respect and dignity due them as residuary sovereigns and joint participants in the Nation's governance."¹³⁰ Thus, Congress's power to authorize private lawsuits against states by abrogating state sovereign immunity is limited and varies depending which of its enumerated powers it is exercising.

Abrogation under the Spending Power

Congress may require a state to waive sovereign immunity with respect to particular federal laws as a condition of receiving federal funds, even though it may not order the waiver directly (see chapter 8).¹³¹ As with all conditional spending, Congress's requirement of a waiver is effective only if the statutory language is unequivocal.¹³²

Abrogation under the Commerce Power

In *Seminole Tribe of Florida v. Florida* (1996), the Supreme Court held that Congress lacks the power, when acting under the Commerce Clause, to abrogate the states' sovereign immunity in federal court.¹³³ Three years later, the Court extended *Seminole* by declaring that states cannot be sued without their consent by private parties in the state's own courts for violations of federal law.¹³⁴ These cases effectively preclude Congress from authorizing private individuals to sue states for infringing important federal rights in many areas, including consumer protection¹³⁵ and disability law.¹³⁶

Abrogation under Section 5 of the Reconstruction Amendments

Although Congress may not abrogate state immunity based on its commerce power, it may subject nonconsenting states to suit in federal court when it does so pursuant to its power to enforce, through "appropriate legislation," rights recognized in the Reconstruction Amendments with respect to slavery (the Thirteenth Amendment), equal protection (the Fourteenth Amendment), and voting (the Fifteenth Amendment). This authority is referred to as Section 5 enforcement power, after the section number in which enforcement provisions appear within each of the Reconstruction Amendments.

The Supreme Court has interpreted the scope of Congress's Section 5 power narrowly, invigorating the doctrine of state sovereign immunity.¹³⁷ In *Board of Trustees of the University of Alabama v. Garrett* (2001), for example, the Court held that Congress exceeded its Fourteenth Amendment Section 5 power by authorizing state workers to sue for discrimination under Title I (employment discrimination) of the Americans with Disabilities Act (ADA).¹³⁸ The Court has been more willing, however, to allow federal abrogation of state sovereign immunity in cases involving race or sex discrimination¹³⁹ or the exercise of fundamental rights, such as access to the courts.¹⁴⁰

Availability of Injunctive Relief against State Officials

The Eleventh Amendment creates a major hurdle for persons seeking to enforce federal public health or antidiscrimination laws against state governments. The impact of sovereign immunity is softened by the doctrine of *Ex parte Young*, which permits suits for injunctive relief against state officials in certain circumstances, even when the state itself is immune from suit.¹⁴¹ Thus indirect suits may be permitted against state officers to enforce federal law, even if suits against the state itself are barred.¹⁴² The Eleventh Amendment limits suits against state officials in their official capacity to prospective injunctive relief, but it does not affect claims for monetary damages against officials in their personal capacity. On the other hand, officials sued in their individual capacity may assert personal immunity defenses such as “objectively reasonable reliance on existing law.” These personal immunities may be absolute or qualified, depending on the circumstances.¹⁴³

STRUCTURAL CONSTRAINTS AND THE PUBLIC'S HEALTH

When it comes time to make policy, all eyes look to Washington, and federalism is viewed as one of many cross-pressures rather than as a pathway through them. . . . The political idea of states as polities and localities as communities has all but disappeared.

—Stephen L. Schechter, “The State of American Federalism in the 1980s,” 1982

Structural constraints contained in the constitutional design have powerful implications for the public's health. As the Supreme Court's federalism, separation of powers, and preemption jurisprudence continue to evolve, public health laws face mounting challenges.

The Rehnquist Court's new federalism articulated more stringent limits on federal power, giving preference to state solutions. Federal public health law has become more vulnerable to challenge under the Court's increasingly restrictive articulations of the enumerated and implied powers of Congress and more expansive understanding of powers reserved to the states. At the same time, the Court's expansion of conflict preemption to invalidate state laws that pose an obstacle to the "purposes and objectives" of a federal law has made state and local public health law more vulnerable to challenge.¹⁴⁴

The Supreme Court is perceptibly shifting its stance on federalism. The Roberts Court appears less focused on protecting states' rights for their own sake, preferring instead to police the constitutional design in ways that protect individual liberty.¹⁴⁵ In recent cases, the Court has staked out its claim that "federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity." It has found: "In allocating powers between the States and National Government, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. . . . It enables States to enact positive law in response to the initiative of those who seek a voice in shaping the destiny of their own times, and it protects the liberty of all persons within a State by ensuring that law enacted in excess of delegated governmental power cannot direct or control their actions."¹⁴⁶

Even as a Court with a conservative majority is articulating a quasi-libertarian vision of structural constraints on government power,¹⁴⁷ many progressives are embracing federalism and decentralization to fill regulatory gaps, broaden political participation, and promote community engagement.¹⁴⁸ State and local governments have emerged as pioneers of significant reforms in many areas of public health importance (e.g., tobacco control, healthy eating, gun control, harm prevention for illicit drug use, and environmental protection) as well as other areas (e.g., student loans and same-sex marriage) where federal reform has stagnated. Can they, in the words of constitutional scholar Robert A. Schapiro, "turn the federalism table, and . . . reappropriate a concept that once served as an obstacle to progressive policies?"¹⁴⁹

Beyond political and legal debates about federalism and separation of powers lie important questions about the population's health and safety. If the states do not act effectively or uniformly in response to health threats that are of national importance but do not clearly implicate interstate commerce, will the judiciary permit national authorities to exercise a police function? When federal regulations are lax or lag-

ging, will states and localities be permitted to exercise their police powers to safeguard the public's health and safety? What kind of leeway will the executive have to step in when congressional action grinds to a halt in the face of a health crisis? The current political thrust evident in the judiciary has been predominantly deregulatory—a consequence of federal preemption, enumerated powers, and reserved powers. The Supreme Court champions these constraints on government power in the name of “those who seek a voice in shaping the destiny of their own times,” but when the Court strikes down public health statutes as unconstitutional, it is eviscerating social legislation enacted through the democratic process.¹⁵⁰

The constitutional design is complex, seeking a balance between federal and state power (federalism); legislative, executive, and judicial power (separation of powers); and government authority and individual liberties (limited government). As we have seen, both federalism and separation of powers pose intriguing problems in the context of public health. Much of the history of public health, however, involves earnest debate over the relationship between the power of government and the freedom of individuals. That debate has only intensified with the contemporary concerns over emerging infectious diseases, bioterrorism, and so-called lifestyle diseases like diabetes and heart disease. How should we balance government's power to act for the collective good with individual rights to liberty, privacy, expression, property, and freedom of contract? This is the question to which we turn in the next chapter.