CHAPTER FOUR

Constitutional Limits on the Exercise of Public Health Powers

Safeguarding Individual Rights and Freedoms

> The very existence of government presupposes the right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. [This] power, as expressed by Taney, C.J., "inherent in every sovereignty, the power to govern men and things," is not, however, uncontrollable or despotic authority, subject to no limitation, exercisable with or without reason. . . . [The constitutional guaranty] was designed for the protection of personal and private rights against encroachments by the legislative body . . . as held and understood when the Constitution was adopted.
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> —John A. Andrews, *New York v. Budd,* 1889

Regulation of persons and businesses is a staple of public health practice.[1] Health officials have historically exercised powers to test, vaccinate, physically examine, treat, isolate, and quarantine. With the epidemiologic transition to noncommunicable diseases and injuries as the primary drivers of premature death and disability, public health officials also regulate to reduce the impact of legal but harmful products like tobacco, alcohol, unhealthy foods and beverages, and firearms. Government agencies also license health care providers, inspect food establishments, approve pharmaceuticals, monitor occupational health and safety, control pollutants, and abate nuisances. Regulation may not be

the preferred strategy for ameliorating all health threats; education and incentives can be effective in many contexts. Nevertheless, the legal basis of regulatory power and the trade-offs between personal freedom and the common good remain core concerns of public health law.

The previous chapter examined the broad powers of government to act for the public good and structural constraints on government action arising from federalism and separation of powers. This chapter examines limits on government action derived from individual rights. Under what circumstances may the government interfere with a person's autonomy, privacy, liberty, or property to achieve a healthier and safer population? Additionally, to what extent do corporate rights—such as freedom of expression and religion—limit public health regulation? We begin with a discussion of the Bill of Rights, noting the major provisions relevant to public health and examining the doctrines of incorporation and state action. Next, we turn to two early-twentieth-century cases with enduring significance to public health law—*Jacobson* and *Lochner.* Finally, we examine limits on public health powers in the modern constitutional era. Some individual rights issues are set aside for discussion in subsequent chapters, including the Takings Clause (chapter 6) and the Second Amendment (chapter 13). Here, we focus on issues with cross-cutting significance to public health: procedural due process, substantive due process, equal protection, freedom of expression, and freedom of religion.

PUBLIC HEALTH AND THE BILL OF RIGHTS

As court decisions on gun control, vaccination, quarantine, tobacco warning labels, and countless other issues demonstrate, understanding the need for restraints on government power is crucial to public health governance. The states ratified the Bill of Rights, the first ten amendments to the Constitution, in 1791. The first eight amendments guarantee certain fundamental rights and freedoms.[2] Table 4.1 presents selected public health issues with respect to the Bill of Rights and summarizes illustrative cases.[3]

Incorporation Doctrine and Public Health

The Bill of Rights is directed to the federal government, not the states.[4] In a series of cases beginning in the 1920s, the Supreme Court has held that the Fourteenth Amendment, ratified shortly after the Civil War and directed to the states, "incorporates" most of the first eight amendments, making them applicable to the states and their local government

TABLE 4.1 PUBLIC HEALTH AND THE BILL OF RIGHTS

Selected public health issues	Selected public health cases
First Amendment: Freedom of religion, speech, press, assembly, petition	
Religious objection to vaccination	*Workman:* upholding vaccination mandate in the absence of religious exemption[a]
Advertising restrictions (e.g., for cigarettes and alcoholic beverages)	*Lorillard Tobacco Co.:* finding restrictions on tobacco advertising within one thousand feet of schools and playgrounds unconstitutional[b]
Second Amendment: The right to keep and bear arms	
Gun control legislation	*Heller:* finding ban on handgun possession unconstitutional[c]
Fourth Amendment: Freedom from unreasonable search and seizure	
Inspection of premises/Administrative searches	*Dewey:* upholding warrantless mine inspections where statutory standards provided "constitutionally adequate substitute for a warrant"[d]
Compulsory testing and screening (e.g., drug, alcohol, and HIV testing)	*Skinner:* upholding drug tests for employees involved in train accidents[e]
Law enforcement access to public health surveillance data	*Oregon Prescription Drug Monitoring Program:* finding that a warrant is required for DEA access to prescription monitoring program data[f]
Fifth Amendment: Due process, equal protection of the law, and "just compensation" for private property taken for public use	
Public health regulation that deprives a person of liberty or property must provide procedural due process	*Adalberto M.:* requiring fair procedures for quarantine[g]
Public health regulation must not be arbitrary or discriminatory	*Jacobson:* finding that compulsory vaccination is a legitimate use of state's police power[h]
Just compensation for land-use restrictions for environmental and other public health purposes	*Lucas:* finding that a landowner is entitled to "just compensation" for environmental land-use restrictions that deprived land of all value[i]

[a] *Workman v. Mingo Cnty. Bd. of Education,* 419 F. App'x 348 (4th Cir. 2011). See chapter 10.
[b] *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001). See chapter 12.
[c] *District of Columbia v. Heller,* 554 U.S. 570 (2008). See chapter 13.
[d] *Donovan v. Dewey,* 452 U.S. 594, 603 (1981). See chapter 5.
[e] *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 613–14 (1989). See chapter 10.
[f] *Oregon Prescription Drug Monitoring Program v. DEA,* 998 F.Supp. 2d 957 (D. Or. 2014). See chapter 9.
[g] *Levin v. Adalberto M.,* 156 Cal. App. 4th 288 (Cal. App. 2007). See chapter 11.
[h] *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). See chapter 10.
[i] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). See chapter 6.

subsidiaries).[5] It also provides for equal protection under the law, which has in turn been incorporated into the Fifth Amendment (making it applicable to the federal government).[6]

For most of the nation's history the Second Amendment was conspicuously absent from the list of incorporated rights: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In 2010, however, the Supreme Court reversed its earlier position, holding that the Second Amendment binds states and localities.[7] Two years earlier (in a ruling directed at the federal government) the Court held that individuals have a constitutional right to keep loaded firearms in the home for lawful purposes (see chapter 13).[8]

The Public/Private Distinction in Public Health

The Constitution prohibits government, at every level, from invading certain fundamental rights and freedoms. Any affirmative measure taken by government constitutes "state action": for example, public health statutes enacted by the legislature, regulations issued by the health department, and nuisance abatements adjudicated through the courts. But the Constitution does not constrain private conduct, however discriminatory or wrongful.[9] The state action doctrine may at first appear straightforward. However, as the following issues illustrate, the activities of government, private (for-profit businesses and nonprofit organizations), and community actors are frequently intertwined in public health; it can be difficult to separate public from private action.[10]

Official State Acts by Health Care Professionals

Health care professionals who are employed by the government and act in an official capacity are "state actors."[11] Consequently, professionals who work in prisons or state mental hospitals are bound by the Constitution and may be liable for deliberate indifference to the serious medical needs of a prisoner or detainee, in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.[12]

Licensed, Inspected, or Regulated Private Entities

Private individuals and businesses that are subject to government licensing, inspection, or regulation are not "state actors."[13] A regulatory

scheme, "however detailed it may be in some particulars," does not, by itself, invoke the state-action doctrine.[14] There may be no state action, for example, if a licensed, inspected, or regulated entity discriminates on grounds of race or sex[15] or fails to provide fair procedural protections.[16] However, private businesses (including hospitals, doctors' offices, restaurants, shops, and hotels) that offer their services to the public may be governed by statutory prohibitions on discrimination.

Organizations that Receive Government Funding

The Supreme Court rarely finds state action based solely on government funding, even if subsidies are substantial: "Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."[17] Thus, private health care providers, businesses, researchers, and community organizations that are funded by public health agencies are not bound to respect constitutional rights, though their receipt of federal funds may subject them to antidiscrimination statutes.

Private Conduct Authorized by Law

To what extent is there state action if the government authorizes or empowers a private entity to cause harm? The test used by the Supreme Court is "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor."[18] Additionally, a state is responsible for a private party's violation of constitutional rights when it enacts and enforces a law "requiring" violation of those rights, "compelling" a discriminatory act, or "commanding" a particular result.[19] The U.S. Court of Appeals for the Fourth Circuit, for example, held that the termination of a doctor's privileges by a hospital's board of trustees did not constitute state action. Although the board comprised members selected exclusively by state officials, the court found an insufficient nexus because the state did not exercise control over the board's decisions.[20] Similarly, the Third Circuit held that a federal privacy rule authorizing "routine uses" of medical records for "treatment, payment, and health care operations" does not involve state action because the privacy rule does not compel or enhance the power of private entities to disclose private health information without the patient's consent.[21] The mere fact that a private party changes its behavior in response to the law does not transform private action into state action.

Privatization of Public Functions

Delegation of some legislative, regulatory, or judicial powers to the private sector (e.g., granting private entities police power authority to quarantine, compel medical treatment, or regulate businesses) might be impermissible on separation of powers or individual rights grounds.[22] Yet private actors do perform many important functions that have historically been the province of government. The Supreme Court finds state action only where there is such a "close nexus" between the state and private action that it "may be fairly treated as that of the State itself."[23] The Court has held, for example, that education[24] and other important public services,[25] when operated by private entities, are not public functions. Similarly, operators and employees of privately run federal prisons have been found to be immune from litigation for constitutional violations because they do not act "under color of federal law."[26]

The acceptance by courts of privatized prisons[27] and other entities indicates that there is ample scope for delegation of a broad range of public health services to the private sector.[28] In 2010, for example, Congress delegated power to the U.S. Preventive Services Task Force (an independent, nongovernmental panel of national experts in prevention and evidence-based medicine) to determine which preventive services must be covered by private health plans without cost sharing (see chapter 8). In 2012, the City of Detroit, facing an extraordinary budget crisis and takeover by the state government, privatized its entire health department, reorganizing it into a nonprofit agency independent of the city.[29] The effects of this unprecedented move on the health and constitutional rights of the city's residents have yet to be assessed. If faced with an infectious disease outbreak, for example, may the nonprofit agency, acting as the city's health department, order quarantine or compel medical treatment?

CONSTITUTIONAL LIMITS ON THE POLICE POWER IN THE EARLY TWENTIETH CENTURY: *JACOBSON* AND *LOCHNER*

When government acts for the welfare of the community, it must abide by constitutional constraints. What exactly are the constitutional limits on public health activities? This apparently simple question requires a complex response. The starting point is the early twentieth-century understanding of the Due Process Clause found in the Fifth Amendment

(applicable to the federal government) and the Fourteenth Amendment (applicable to the states) and, in particular, the foundational Supreme Court case of *Jacobson v. Massachusetts* (1905).[30]

Jacobson is widely agreed to be the most important judicial decision in public health.[31] Why? Is it because of the Supreme Court's deference to public health decision making? Is it because the Court enunciated a framework for the protection of individual liberties that persists today? Perhaps it is because *Jacobson* was decided during the same term as *Lochner v. New York*—the most *infamous* Supreme Court case of its era.[32] If the Court's decision in *Lochner,* striking down reasonable economic regulation, exemplified judicial activism, then *Jacobson* was a paradigm of judicial restraint in deference to the police power, a vital precept of state sovereignty. There is a further question that deserves attention: would *Jacobson* be decided the same way today? What is the enduring meaning of this famous decision?[33]

Jacobson *in Historical Context: The Immunization Debates*

> The contention that compulsory vaccination is an infraction of personal liberty and an unconstitutional interference with the right of the individual to have the smallpox if he wants it, and to communicate it to others, has been ended [by the U.S. Supreme Court]. . . . [This] should end the useful life of the societies of cranks formed to resist the operation of laws relative to vaccination. Their occupation is gone.
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> —Editorial, *New York Times,* February 22, 1905

Jacobson v. Massachusetts was decided a few years after a major outbreak of smallpox in Boston, from 1901 to 1903, that resulted in 1596 cases and 270 deaths.[34] The outbreak reignited the smallpox immunization debate, with plenty of hyperbole on both sides. Antivaccinationists launched a "scathing attack," claiming that compulsory vaccination was "the greatest crime of the age;" that it "slaughters tens of thousands of innocent children;" and that it was "more important than the slavery question, because it is debilitating the whole human race."[35] The antivaccinationists gave notice that compulsion by the state "will cause a riot."[36] The response of the mainstream press was equally shrill, characterizing the debate as "a conflict between intelligence and ignorance, civilization and barbarism."[37] The *New York Times* referred to antivaccinationists as a "familiar species of crank," whose arguments are "absurdly fallacious."[38]

Prior to *Jacobson,* the state courts were heavily engaged in the vaccination controversy, and their judgments were markedly deferential to health

agencies: "Whether vaccination is or is not efficacious in the prevention of smallpox is a question with which the courts declare they have no concern."[39] The courts recognized the state's authority to delegate police powers to health agencies or boards of health with scientific expertise.[40] A bona fide objection to vaccination was not a sufficient excuse for noncompliance; however, a person could be exempted because of a physical condition posing a particular risk of adverse effects.[41] The states compelled vaccination indirectly, by imposing penalties, denying unvaccinated children admission to school, or quarantining. Thus the courts generally avoided ruling on the constitutionality of compelling vaccination by threat of force.

It was in this historical context that Massachusetts enacted a law empowering municipal boards of health to require the vaccination of inhabitants if it was deemed necessary for the public's health or safety. The Cambridge Board of Health, under authority of this statute, adopted a regulation ordering that all inhabitants of the city be vaccinated. The Reverend Henning Jacobson, who refused the vaccination, was convicted by the trial court and sentenced to pay a fine of five dollars. The Massachusetts Supreme Judicial Court upheld the conviction, and Jacobson appealed to the U.S. Supreme Court. Jacobson's legal brief asserted that "a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best."[42] His was a classic claim in favor of a laissez-faire society and the natural rights of persons to bodily integrity and decisional privacy. He grounded this claim in the rights to due process and equal protection secured by the Fourteenth Amendment, the modern understanding of which is discussed in detail below.

Jacobson was an iconic case reconciling individual rights with the collective good, and the Court's resolution continues to reverberate in modern times. Justice John Marshall Harlan's opinion for the Court has many facets. Relying on social compact theory, the Court strongly supported the police powers and deferred to public health agencies. Relying on a theory of limited government, it set standards to safeguard individual freedoms.

Social Compact Theory: The Police Power and Public Health Deference

In early American jurisprudence, before *Jacobson,* the judiciary staunchly defended the exercise of police powers. The judiciary even periodically

PHOTO 4.2. This engraving depicts public vaccination in Jersey City, New Jersey during a smallpox scare in 1881. In 1905, in *Jacobson v. Massachusetts,* the Supreme Court found compulsory smallpox vaccination constitutional. Courtesy of the National Library of Medicine.

suggested that public health regulation was immune from constitutional review,[43] expressing the notion that "where the police power is set in motion in its proper sphere, the courts have no jurisdiction to stay the arm of the legislative branch."[44] The core issue, of course, was to understand what was meant by the "proper legislative sphere," for it was not

supposed, at least since the enactment of the Fourteenth Amendment in 1868, that government could act in an arbitrary manner free from judicial control.[45]

In *Jacobson,* the Court's use of social compact theory to support an expansive vision of police powers was unmistakable. Justice Harlan preferred a community-oriented philosophy wherein citizens have duties to one another and to society as a whole:

> The liberty secured by the Constitution . . . does not import an absolute right in each person to be . . . wholly freed from restraint. . . . On any other basis organized society could not exist with safety to its members. . . . [The Massachusetts Constitution] laid down as a fundamental . . . social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the "common good," and that government is instituted "for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of any one man."[46]

The Court's opinion is filled with illustrations of the breadth of police powers, ranging from sanitary laws and animal control to quarantine.

A primary legacy of *Jacobson,* then, surely is its defense of social welfare theory and police power regulation. The Supreme Court during the *Jacobson* era upheld numerous public health activities including the regulation of food,[47] milk,[48] and waste disposal.[49] Although its Progressive Era appeal to collective interests no longer has the currency it once did, *Jacobson* has been frequently cited by the Supreme Court, typically in defense of the police power and deference to the legislature on matters of policy and science.

Theory of Limited Government: Safeguarding Individual Liberty

Jacobson's social compact theory was in tension with its notion of limited government. Beyond its passive acceptance of legislative discretion in public health, however, was the Court's first systematic statement of individual rights as limitations imposed on government. *Jacobson* established a floor of constitutional protection. It deemed compulsory powers constitutionally permissible only if they are exercised in conformity with five standards, which we shall call public health necessity, reasonable means, proportionality, harm avoidance, and fairness. These standards, while permissive of public health intervention, nevertheless require a deliberative governmental process to safeguard liberty.

Public Health Necessity

Public health powers are exercised under the theory that they are necessary to prevent an avoidable harm. In *Jacobson,* Justice Harlan insisted that police powers must be based on the "necessity of the case" and could not be exercised in "an arbitrary, unreasonable manner" or go "beyond what was reasonably required for the safety of the public."[50] Early meanings of the term *necessity* are consistent with the broad exercise of police powers.[51] To justify the use of compulsion, government must act only in the face of a demonstrable health threat. The standard of public health necessity requires, at a minimum, that the subject of the compulsory intervention must actually pose a threat to the community, though the Court indicated that it would defer to any reasonable determination of the legislature in this regard.[52]

Reasonable Means

Under the necessity standard, government may institute compulsory measures only in response to a demonstrable threat. The methods used, moreover, must be designed to prevent or ameliorate that threat. The *Jacobson* Court adopted a means-and-ends test that required the demonstration of a reasonable relationship between the intervention and the achievement of a legitimate governmental objective. Even if the objective of the legislature is valid and beneficent, the methods adopted must have a "real or substantial relation" to protection of the public health and cannot be "a plain, palpable invasion of rights."[53]

Proportionality

The public health objective may be valid in the sense that a risk to the public exists, and the means may be reasonably likely to mitigate that risk. A regulation is nevertheless unconstitutional if the human burden imposed is wholly disproportionate to the expected benefit. "The police power of a State," wrote Justice Harlan, "may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression."[54] Public health authorities have a constitutional responsibility not to overreach in ways that unnecessarily invade personal spheres of autonomy. This suggests the need to reasonably balance the

public good to be achieved against the degree of personal invasion. If the intervention is gratuitously onerous or unfair, it may overstep constitutional boundaries.

Harm Avoidance

Those who pose a risk to the community can be required to submit to compulsory measures for the common good. The control measure itself, however, should not pose a health risk to its subject. Justice Harlan emphasized that Henning Jacobson was a "fit subject" for smallpox vaccination, but asserted that requiring a person to be immunized who would be harmed is "cruel and inhuman in the last degree."[55] If there had been evidence that the vaccination would seriously impair Jacobson's health, he might have prevailed in this historic case.[56] *Jacobson*-era cases reiterate the theme that public health actions must not harm subjects. For example, in *Jew Ho v. Williamson* (1900), a federal court struck down a quarantine of a district in San Francisco in part because it created conditions likely to spread bubonic plague.[57] Similarly, courts required safe and habitable environments for persons subject to isolation on the theory that public health powers are designed to promote well-being, not to punish the individual.[58]

Fairness

The facts in *Jacobson* did not require the Supreme Court to enunciate a standard of fairness under the Equal Protection Clause of the Fourteenth Amendment because the vaccination requirement was generally applicable to all inhabitants of Cambridge. Nevertheless, the federal courts had already created such a standard in *Jew Ho v. Williamson*. By enforcing a quarantine exclusively against Chinese Americans, the federal district court said, health authorities had acted with an "evil eye and an unequal hand."[59]

Judicial Deference in Jacobson

In balancing individual rights against the common good, the Court in *Jacobson* relied on separation of powers and federalism to stake out a deferential stance toward the legislative branch and the states. The Court's virtually unquestioning acceptance of legislative findings of scientific fact was grounded in separation of powers. Quoting the New

York Court of Appeals (which had recently upheld compulsory vaccination as a condition of school entry),[60] Justice Harlan said:

> The legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government.[61]

Under a theory of democracy, Justice Harlan would grant considerable leeway to the elected branch of government to formulate policy. The Supreme Court, relying on principles of federalism, also asserted the primacy of state over federal authority in the realm of public health. "It is of the last importance," wrote Justice Harlan, that the judiciary "should not invade the domain of local authority except when it is plainly necessary. . . . The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government."[62]

Lochner v. New York: *The Antithesis of Judicial Deference*

Jacobson v. Massachusetts was decided in the same term as *Lochner v. New York*—the beginning of the so-called *Lochner* era in constitutional law (1905–37).[63] In *Lochner,* a 5–4 majority of the Supreme Court held that a limitation on the hours that bakers could work violated the freedom of contract. This so-called economic due process argument points to the Fifth and Fourteenth Amendments of the U.S. Constitution, which prohibit the federal government and the states from depriving any "person" (including corporations)[64] of "life, liberty, or property, without due process of law."[65] Justice Harlan, in a ringing dissent, professed that the New York statute was expressly for the public's health: "Labor in excess of sixty hours during a week . . . may endanger the health of those who thus labor."[66] Quoting public health treatises, Harlan observed that "during periods of epidemic diseases the bakers are generally the first to succumb to disease, and the number swept away during such periods far exceeds the number of other crafts."[67]

The *Lochner* era posed deep concerns for those who realized that much of what public health does interferes with economic freedoms

PHOTO 4.3. Lewis Wickes Hine, *Child Laborers at Bibb Mill No. 1 in Macon, Georgia,* 1909. Child labor was common in the early twentieth century. This and other photographs were taken by Hine to aid lobbying efforts of the National Child Labor Committee (NCLC). Of this photo, Hine wrote: "Some boys and girls were so small they had to climb up on the spinning frame to mend broken threads and to put back the empty bobbins." NCLC's efforts led to the 1916 adoption of the first federal law prohibiting the interstate sale of goods produced with child labor. The Supreme Court struck down the law in *Hammer v. Dagenhart,* 247 U.S. 251 (1918). This decision was overturned—along with many other *Lochner*-era decisions—during the New Deal era.

involving contracts, business relationships, the use of property, and the practice of trades and professions. *Lochner,* in the words of Justice Harlan's dissent, "would seriously cripple the inherent power of the states to care for the lives, health, and well-being of their citizens."[68] Indeed, over the next three decades, the Supreme Court struck down important health and social legislation protecting trade unions,[69] restricting child labor,[70] setting minimum wages for women,[71] protecting consumers from products that posed health risks,[72] and licensing or regulating businesses.[73]

By the time of the New Deal, those who believed that contractual freedom was far from unfettered, and that economic transactions were naturally constrained by unequal wealth and power, challenged the laissez-faire philosophy that undergirded Lochnerism.[74] People looked to government to ensure the public's health and welfare, and social and

BOX 4.1

Economic Liberty from the Founding Era to the Modern Deregulatory Movement

The *Lochner* era, from 1905 to 1937, was a time when the Supreme Court prized economic freedoms and aggressively invalidated social and economic regulations, many of which were aimed at protecting workers' safety (see chapter 13). The major flaw of *Lochner*'s economic due process argument was that it permitted courts to supplant their view for that of the legislature as to what is in the best interests of society and the economy. Since 1937, the Court has granted police power regulation a strong presumption of validity, even if it interferes with economic and commercial life (see chapter 3).

Modern conservative scholars have sought to resurrect the *Lochner* doctrine.[1] As Judge Richard Posner remarked in 1985, "there is a movement afoot (among scholars, not as yet among judges) to make the majority opinion in *Lochner* the centerpiece of a new activist jurisprudence."[2] Conservative scholars argue that economic liberties are important in the constitutional design and deserve protection from commercial regulation.[3] They claim that individuals have constitutionally protected rights to possess, use, and transfer private property; engage in business; and pursue their occupations as they see fit.[4]

This movement, which adopts the promarket, antiregulation philosophy underlying *Lochner,* has gained influence in political and academic circles.[5] The judiciary has repudiated the jurisprudence of *Lochner,* and for good reason. It is for democratically elected assemblies to strike a balance between a well-ordered, safe society and the property rights of individuals. Nonetheless, some commentators have linked current judicial movements such as new federalism and expanding use of First Amendment protections for corporations as a shield against social and economic regulation to the fundamental values articulated in *Lochner.*

1. David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011); Robert G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," *Supreme Court Review,* 1962 (1962): 34–62, arguing that there are strong reasons for reviving economic due process but that the Supreme Court should not do so for reasons of judicial economy.

2. Richard Posner, *The Federal Courts: Crisis and Reform* (Cambridge, MA: Harvard University Press, 1985): 209 n. 25.

3. Bernard Siegan, *Economic Liberties and the Constitution,* 2nd ed. (New Brunswick, NJ: Transaction, 2006).

4. Randy Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998).

5. Michael J. Phillips, "Another Look at Economic Substantive Due Process," *Wisconsin Law Review* (1987): 265–324; David A. Strauss, "Why Was Lochner Wrong?" *University of Chicago Law Review,* 70 (2003): 373–86.

economic equity. It was within this political context that the Supreme Court repudiated *Lochner:* "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."[75] The post–New Deal period led to a resurgence of a permissive judicial approach to regulation, irrespective of its effects on commercial and business affairs.[76]

Why have legal historians viewed *Jacobson* so favorably and *Lochner* so unfavorably? *Lochner* represented an unwarranted judicial interference with democratic control over the economy to safeguard the public's health and safety. *Lochner* was a form of judicial activism that was unreceptive to protective and redistributive regulation. The *Lochner* Court mistakenly saw market ordering as a state of nature rather than a legal construct.[77] *Jacobson* was the antithesis of *Lochner,* granting democratically elected officials discretion to pursue innovative solutions to hard social problems.

The Enduring Meaning of Jacobson

Lochner has taken its place in the American constitutional "anticanon"—"consistently cited in Supreme Court opinions, in constitutional law casebooks, and at confirmation hearings as [a] prime example of weak constitutional analysis."[78] The enduring meaning of *Jacobson* is less clear. Modern Supreme Court jurisprudence is markedly different from the deferential tone of *Jacobson* and its embrace of the social compact. The Warren Court, in the context of the civil rights movement, transformed constitutional law, developing a tiered approach to due process and equal protection that placed a constitutional premium on the protection of civil rights and civil liberties. Would the outcome in *Jacobson* be the same if it were presented to the Court today? The answer is almost certainly yes, even if the style and reasoning of the opinion would differ.

The validity of *Jacobson* as a sound modern precedent seems, at first sight, obvious. The federal and state courts, including the U.S. Supreme Court,[79] have repeatedly affirmed its holding and reasoning, describing them as "settled" doctrine.[80] The courts have upheld compulsory vaccination in particular on numerous occasions.[81]

During the past several decades, the Supreme Court has recognized a constitutionally protected liberty interest in refusing unwanted medical treatment. The Court has recognized rights to bodily integrity in cases involving the rights of persons with terminal illness[82] and mental disability.[83] Outside the context of reproductive freedoms,[84] however,

the Court has not viewed bodily integrity as "fundamental." Instead of applying heightened scrutiny, the Supreme Court balances a person's liberty against state interests.[85] In fact, where it adopts a balancing test, the Court usually sides with the state.[86] The Court has held that health authorities may impose invasive forms of treatment, such as antipsychotic medication, if a person poses a danger to herself or others.[87] The treatment must also be medically appropriate.[88] The lower courts, using a similar harm-prevention theory, have upheld compulsory physical examination[89] and treatment[90] of persons with infectious diseases.

Jacobson merely began a debate about the appropriate boundaries of the police power that is still evolving today. Americans strongly support civil liberties, but they equally demand state protection of health and safety. The compulsory immunization controversy still swirls with regard to mandatory school vaccinations and vaccinations for anthrax and smallpox to counter bioterrorism. Despite considerable discord in public opinion, however, *Jacobson* endures as a reasoned formulation of the boundaries between individual and collective interests.

LIMITS ON PUBLIC HEALTH POWERS IN THE MODERN CONSTITUTIONAL ERA

Jacobson established a floor of constitutional protection for individual rights, including five standards of judicial review: necessity, reasonable methods, proportionality, harm avoidance, and fairness. Arguably, these standards remain in the modern era, but the Supreme Court has since developed a far more elaborate system of constitutional adjudication. Modern constitutional law is complicated, and the analysis of public health measures affecting personal autonomy, liberty, privacy, and property will unfold in subsequent chapters. Here, we provide a basic review of the major civil rights and liberties that cut across public health issues: due process (both substantive and procedural), equal protection, freedom of expression, free exercise of religion, and levels of scrutiny used by the Court to balance public goods with individual rights.

It will be obvious from the discussion of federalism in chapter 3 and the *Jacobson* and *Lochner* era in this chapter that the path toward more rigorous constitutional scrutiny of governmental action has been slow, cyclical, and politically charged. In response to the social and political movements of the 1960s, the Supreme Court, principally under Chief Justice Earl Warren, revitalized and strengthened the Court's position on equality and civil liberties. The Warren Court set a liberal agenda that

prized personal freedom and nondiscrimination and exhibited a healthy suspicion of government. The Burger and Rehnquist Courts, however, were less sympathetic to progressive constitutional construction. The Roberts Court has exhibited a probusiness, antiregulatory agenda, but it has also wrestled with bitter social and political controversies, such as health reform, same-sex marriage, national security, and data privacy.

Procedural Due Process

The Fifth and Fourteenth Amendments have identical provisions prohibiting federal and state governments, respectively, from depriving individuals of "life, liberty, or property, without due process of law." The Due Process Clause has been read to impose two distinct obligations: a procedural element requiring government to provide a fair process for individuals subject to state coercion, and a substantive element requiring government to provide a sound justification for invading personal freedoms.[91] Consider a state requirement to license physicians or inspect food establishments. These governmentally imposed conditions on the ability to practice a profession or to run a business meet the substantive part of the test if the state has a legitimate public health rationale (e.g., to assure the competent practice of medicine or the safe preparation of food). Actual decisions to deny or withdraw the license meet the procedural part of the test if the state affords professionals or businesses a reasonable opportunity to be heard.[92]

The procedural element of due process requires government to provide a fair process before depriving a person of life, liberty, or property. The principal components of such a process are notice, a hearing, and an impartial decision maker. Affording individuals an opportunity to present their case is so essential to basic fairness that Europeans refer to procedural due process as "natural justice." Procedural due process is important in many public health contexts, ranging from licenses and inspections of businesses to isolation and quarantine. This section explains property and liberty interests in the context of public health and briefly discusses the kinds of procedures often required.

Property Interests

Health departments possess the statutory authority to take, destroy, or restrict property uses to prevent risks to the health or safety of the community.[93] Except in urgent cases,[94] due process generally requires notice

and an opportunity to be heard before the deprivation of a property interest.[95] Deprivations of property interests, which trigger procedural due process, occur in a variety of health contexts: inspections of goods and buildings;[96] licenses of health care professionals,[97] hospitals and clinics,[98] nursing homes,[99] and restaurants;[100] and hospital staff privileges[101] (see chapter 5).

A "property interest" is more than an abstract need, desire, or unilateral expectation. The person must "have a legitimate claim of entitlement."[102] Certainly, an individual has an entitlement to the real or personal property that she owns. Thornier questions include whether a person has an entitlement to a benefit, a job, a professional license, a business permit, or even government protection against private violence, necessitating procedural protections to ensure that the benefit is not denied unjustly.

The Supreme Court, until the 1970s, limited property interests to cases in which the person had a legal right to a benefit, and not a simple privilege. However, in *Goldberg v. Kelly* (1970), the Court abandoned the distinction between rights and privileges, holding that individuals have a property interest in the continued receipt of welfare benefits.[103] While the Court has officially rejected the distinction between rights and privileges, demonstrating an entitlement can be difficult. Under the reasoning of *Goldberg,* an entitlement is measured by the importance of the interest to the person's life: without welfare, for example, a person may not be able to obtain the necessities of life. The modern Court's preferred approach is to examine whether the person has a legitimate claim of entitlement to the property interest based on an independent source such as state law.[104]

The Supreme Court has held that a benefit is not a protected entitlement if government officials may grant or deny it at their discretion.[105] In *Castle Rock v. Gonzales,* discussed in the last chapter, the Court found that police had "discretion" not to enforce a domestic violence restraining order, even though the order specifically declared, and a state statute commanded, that it must be enforced.[106] The Court said that even if enforcement was "mandatory," "it is by no means clear" that the individual has a "property interest" for the purposes of due process: "Such a right would not, of course, resemble any traditional conception of property," wrote Justice Scalia.[107]

Liberty Interests

Government must provide procedural due process before depriving individuals of liberty.[108] The Supreme Court broadly defines a "liberty

interest" as "not merely freedom from bodily restraint, but also the right to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God . . . , and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[109] Procedural due process is required in any case where public health authorities interfere with freedom of movement (e.g., isolation and quarantine; see chapter 11) or bodily integrity (e.g., compulsory physical examination and medical treatment; see chapter 10).

The Elements of Procedural Due Process

Fair procedures are constitutionally required if an individual or business suffers a deprivation of property or liberty. However, this requirement does not decide the question of exactly what kinds of procedures the government must provide. Due process is a flexible concept that varies with the particular situation.

In deciding which procedures are required, courts balance several factors.[110] First, the courts consider the nature of the private interests affected. The more intrusive or coercive the state intervention, the more rigorous the procedural safeguards. In cases of plenary deprivation of liberty,[111] such as civil commitment of a person with mental illness[112] or tuberculosis,[113] the state must provide the full panoply of procedures—notice, counsel, impartial hearing, cross-examination, written decision, and appeal.

Second, the courts consider the risk of an erroneous deprivation of property or liberty and the probable value, if any, of additional or substitute procedural safeguards. Here, the courts are concerned with procedures as a means of protecting against erroneous decision making. If the court feels that an informal process is likely to lead to a "correct" result, it will not require procedural formalities that it regards as unnecessary. In *Parham v. J.R.,* "mature minors" were "voluntarily" admitted to a mental hospital by their parents, although the minors opposed the admission. The Supreme Court ruled that the hearing did not have to be formal or conducted by a court. Since juvenile admission was "essentially medical in character," an independent review by hospital physicians was considered sufficient to meet the requirements of due process.[114]

Third, the courts consider the fiscal and administrative burdens of providing additional procedures and the extent to which the govern-

ment's interests would be undermined by doing so. Most mental health or public health statutes permit an expedited form of due process in cases of emergency, sometimes allowing hearings to be conducted post-deprivation. Reduced due process is justified by the fact that the state's interests in rapid confinement of persons posing an immediate risk of danger would be undermined by elaborate, time-consuming procedures.

Substantive Due Process

Through the substantive due-process doctrine, the judiciary has interpreted the Fifth and Fourteenth Amendments as also placing limitations on the power of government to impose social and economic regulation. We have discussed the rise of this doctrine during the *Lochner* era. It was largely abandoned by the Court in the late 1930s but was rekindled as a tool for protecting "fundamental rights," especially the right to privacy (see chapter 9), beginning in the 1960s. In 2015, the Court relied on the fundamental right to marriage protected by the Due Process Clause of the Fourteenth Amendment in holding that states must issue marriage licenses to same-sex couples and recognize same-sex marriages licensed by other states.[115]

The substantive due-process doctrine requires government to justify deprivations of life, liberty, or property with an adequate rationale.[116] Depending on the level of judicial scrutiny applied, government action must be justified by a legitimate, a substantial, or even a compelling public interest.[117] The means must also be—at a minimum—rationally related to the government's purpose. Another way of thinking about substantive due process is as a proscription against arbitrary and capricious government activity, regardless of whether a fundamental right is affected. So, too, the state must avoid regulation influenced by animosity toward a politically unpopular constituency. If government's principal purpose is to disadvantage a person or population, the "enactment [is] divorced from any factual context from which [the court] could discern a relationship to legitimate state interests."[118]

Perhaps the most controversial aspect of the substantive due-process doctrine is the identification of "unenumerated" rights that are not expressly guaranteed in the Constitution but are nonetheless fundamental to liberty. The ongoing debate between those with an expansive and those with a restrictive view of due process is highly important in public health. Few public health measures directly infringe on a right or freedom declared in the Bill of Rights. The Constitution, for example, does

not explicitly mention bodily integrity, which is implicated in mandatory testing and treatment, or privacy, which is implicated in public health surveillance, mandatory reporting, and partner notification (see chapters 9 and 10). The fact that the Supreme Court has recognized these rights as implied in the Constitution is thus important to the study of public health law.[119]

The modern Court has repeatedly declared its reluctance to recognize unenumerated rights "because guideposts for responsible decision-making in this unchartered area are scarce and open-ended."[120] Some justices see substantive due process as being in conflict with democratic values because it places policy questions outside the "arena of public debate and legislative action."[121] Their concern is that, absent objective criteria, substantive due process would permit members of the Court to inject their policy preferences. Modern substantive due-process analysis relies on two requirements designed to facilitate objective reasoning. The Court requires, first, a "careful description" of the asserted liberty interest and, second, a demonstration that the interest is "deeply rooted in the Nation's history and traditions."[122] In a deeply divisive case, *Lawrence v. Texas* (2003), the Supreme Court acknowledged that history and tradition are the starting point, but not necessarily the ending point, of substantive due-process inquiry. The Court, in a departure from its narrow reading of substantive due process, said that criminal penalties against same-sex sodomy touched on "the most private human conduct, sexual behavior, and in the most private of places, the home."[123]

In recent cases, the Court has avoided articulating newly recognized fundamental rights, preferring instead to blend aspects of substantive due process, equal protection, and federalism doctrine. In 2013, for example, the Court struck down the Defense of Marriage Act's definition of marriage as between a man and a woman (for the purposes of federal law). Justice Anthony Kennedy's opinion for the majority cited equal protection and federalism concerns, in addition to describing the provision "as a deprivation of the liberty of the person protected by the Fifth Amendment."[124] Two years later, Justice Kennedy again authored the majority opinion in *Obergefell v. Hodges* (2015), holding that states must license same-sex marriages and recognize such marriages licensed and performed in other states. The majority opinion in *Obergefell* blended liberty and equality rationales, relying on recognition of marriage as a fundamental right under substantive due-process doctrine and equal protection scrutiny of distinctions based on sexual orientation.[125]

Equal Protection

The Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," a provision incorporated into the Fifth Amendment's Due Process Clause, making it applicable to the federal government.[126]

Regulations draw distinctions among individuals and businesses for a variety of purposes, with resulting disadvantage (or advantage) to various groups.[127] The law can discriminate in two ways. First, it can expressly make distinctions between groups. This kind of discrimination is called a facial classification because the distinction is "on the face" of the statute. For example, a statute that requires searches of persons of Middle Eastern descent facially discriminates on the basis of national origin. Second, the law can be facially neutral (applying a general standard to everyone) but discriminatory nonetheless because it disproportionately affects particular groups. For instance, a law that mandates HIV testing for pregnant women in geographic areas with a high prevalence of HIV infection will have a disparate impact on women of color and low income women because of disproportionate rates of HIV in their communities. The Supreme Court will not necessarily find that a generally applicable law violates equal protection, even if it has a demonstrably inequitable effect on vulnerable groups. If a law is facially neutral, the disproportionately burdened class must demonstrate that the government's actual purpose was to discriminate against that group, which can be exceedingly difficult to prove.[128]

Contrary to popular belief, government is not obliged to treat all people identically. Instead, equal protection requires government to treat like cases alike but permits—and may even require—government to treat unlike cases dissimilarly.[129] Virtually all public health policies establish classes of people or businesses that receive a benefit or burden and classes that do not. For example, a rule limiting the container size in which sugary drinks may be sold might apply to restaurants but not grocery stores. A rule regulating tobacco advertising or firearm possession might apply within a certain distance of schools or playgrounds but not in other locations. The critical question is whether a sufficient justification exists for making the distinction. Medicare eligibility, for example, is based on age and disability, but the government has a plausible reason for offering the benefit to the elderly and disabled and excluding others. On the other hand, quarantining only people of Chinese descent in an area where there is a disease outbreak cannot be

justified,[130] particularly because some kinds of distinctions trigger more searching judicial review than others.

The courts strictly scrutinize laws that create "suspect classifications" (e.g., race, national origin, and alienage) or burden "fundamental rights" (e.g., procreation, marriage, interstate travel, and voting) (see "Levels of Constitutional Review" below). For example, the courts would closely examine a policy that required all African Americans to be tested for sickle-cell disease. Similarly, the courts would carefully examine a quarantine placed at the border of New York and New Jersey that inhibited movement across state lines. On the other hand, laws drawing distinctions between opticians and optometrists with regard to their scope of practice, for example, are subject to minimal review.[131]

Freedom of Expression

> The tobacco industry used the First Amendment to have new, scarier health warnings on cigarette packaging thrown out on the grounds that the labels constituted a form of compelled speech. . . . Google has argued that, since search results are speech, its rights are impinged by the enforcement of tort and antitrust laws. Airlines have employed the First Amendment to resist efforts to force them to list the full price of tickets. The incomplete, misleading cost, they have argued, is a form of free speech, too . . . . Free speech is a cherished American ideal; companies are exploiting that esteem to try to accomplish goals that are not so clearly related to speech.
>
> —Tim Wu, "The Right to Evade Regulation," 2013

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The field of public health is deeply concerned with the communication of ideas. Thus, freedom of expression has important implications for public health regulation.

Freedom of expression is foundational to American law and culture and has powerful benefits for public health. Public health advocates, for example, have urged courts to invalidate government regulations that restrict speech by health experts concerning safer sexual practices and the risks of gun ownership and that compel physicians to provide inaccurate information regarding health risks associated with abortion—with mixed success.[132] Yet increasing First Amendment protection for commercial speech—and corporate personhood under the Constitution more broadly (see box 4.2)—has emerged as a major barrier to effective public health regulation, particularly with regard to drug and medical device safety,[133] tobacco and alcohol control,[134] health information privacy, and health care cost control.[135] Modern commercial speech doc-

BOX 4.2
Corporate Personhood and the Public's Health

> Recent arguments favoring commercial entities' free speech often sound as if business enterprises are flesh and blood citizens of the republic and, as such, are entitled participants in a public sphere, rather than instrumental creations that we bring into legal existence in order to serve our interests. It is as if society consists of two opposing types of "beings," each equally worthy of moral and legal concern—people and corporations. This is idiocy. . . . When claims are made on behalf of commercial entities, the conflict involves people's creations claiming rights over their creators.
>
> —C. Edwin Baker, "Paternalism, Politics, and Citizen Freedom," 2004

Corporations have long been recognized as legal persons that enjoy certain rights and obligations independent of their shareholders.[1] During the nineteenth century, the Supreme Court subscribed to the widely held view that a corporation is an "artificial entity" created by human beings and the law.[2] It thus recognized personhood status only to the extent that it would facilitate shareholders' property interests by granting corporations the capacity to engage in contracting, to hold property, and to file suit to vindicate economic rights. The Supreme Court's approach to extending other constitutional protections to corporations was perhaps inconsistent. It declined, for example, to recognize corporations as "citizens" under the Privileges and Immunities Clause in Article IV of the Constitution,[3] while recognizing them as legal "persons" for the purposes of the Fifth and Fourteenth Amendments' guarantees of equal protection and due process.[4]

During the *Lochner* era, the Court adopted the more radical view that a corporation is a "real entity," independent both of "the individual members who compose it [and] of the state that legally recognizes its form."[5] The real entity theory led to significant expansion of corporate rights beyond protection of shareholders' property and contract interests.[6] Nonetheless, the Court continued to assess the logic of corporate personhood on a case-by-case basis, holding, for example,

1. Virginia E. Harper Ho, "Theories of Corporate Groups: Corporate Identity Reconceived," *Seton Hall Law Review,* 42 (2012): 892.

2. Susanna Kim Ripken, "Corporations Are People Too: A Multi-dimensional Approach to the Corporate Personhood Puzzle," *Fordham Journal of Corporate and Financial Law,* 15 (2009): 107.

3. *Bank of Augusta v. Earle,* 38 U.S. 519 (1839).

4. *Santa Clara Cnty. v. S. Pac. R. Co.,* 118 U.S. 394 (1886); *Minneapolis & St. Louis Ry. Co. v. Beckwith,* 129 U.S. 26, 28 (1888).

5. *Ripken,* 112.

6. Elizabeth Pollman, "Reconceiving Corporate Personhood," *Utah Law Review,* 2011 (2011): 1655.

that a corporation does not have a Fifth Amendment right against self-incrimination but does have a Fourth Amendment right against unreasonable searches and seizures.[7]

In contemporary cases, the Court has moved beyond traditional property interests as the foundation of corporate personhood. In *First National Bank of Boston v. Bellotti* (1978), the Court held that corporations have a First Amendment right to make political expenditures to influence elections, reasoning that this approach would protect the marketplace of ideas.[8] In 1990 and 2003, however, the Court upheld state and federal restrictions on certain political expenditures based on the government's compelling interest in combating "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[9]

In 2010, the Supreme Court partially overturned the 1990 and 2003 precedents in *Citizens United v. Federal Election Commission.*[10] In a 5–4 decision that deeply divided the nation, the Court invalidated restrictions on independent political expenditures by corporations, associations, and labor unions. The majority described corporations as "associations of citizens,"[11] which suggests "that a corporation is best understood as a group of otherwise disaggregated natural persons joining together by agreement to mutually pursue a private endeavor."[12] The dissent, however, enunciated a sharply different view, describing corporations as exercising "delegated responsibility for ensuring society's economic welfare."[13]

The implications of *Citizens United* and subsequent decisions invalidating other campaign finance reforms are continuing to play out in the political arena.[14] Before *Citizens United,* corporate interests could influence elections only through political action committees (PACs), drawing on designated contributions from corporate officers, shareholders, and employees. As a result of the Court's decision, they may now reach directly into their treasury funds to sponsor advertisements expressly advocating the election or defeat of a candidate. The

7. *Hale v. Henkel,* 201 U.S. 43 (1906).

8. *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

9. *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652 (1990); see also *McConnell v. Fed. Election Comm'n,* 540 U.S. 93 (2003).

10. *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010).

11. *Id.* at 354.

12. Lyman Johnson, "Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood," *Seattle University Law Review,* 35 (2012): 1140, 1142.

13. *Citizens United,* 558 U.S. at 465 (Stevens, J., concurring in part and dissenting in part).

14. See *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 131 S.Ct. 2806 (2011), invalidating a portion of Arizona's public campaign financing system whereby public funds were triggered by private financing of opposing candidates; *McCutcheon v. Fed. Election Comm'n,* 134 S.Ct. 1434 (2014), invalidating aggregate limits on contributions by individual donors.

amount and frequency of corporate lobbying and PAC activity increased following the Court's decision.[15] Voters in a few states and hundreds of cities have passed referenda calling on Congress to pass an amendment imposing limits on corporate political expenditures and stating that "corporations should not have the constitutional rights of human beings."[16]

William Wiist argues that *Citizens United* could have a "catastrophic" impact on public health in the United States.[17] Effective public health strategies often rely on law and policy interventions that target corporate interests: the tobacco industry, the pharmaceutical industry, firearms manufacturers and sellers, the alcohol industry, the food and agriculture industry, the chemical industry, motor vehicle manufacturers, and others. *Citizens United* affords even more political power to these interests.

15. See John C. Coates IV, "Corporate Politics, Governance and Value before and after Citizens United," *Journal of Empirical Legal Studies,* 9 (2012): 657.

16. Kathleen Miles, "Prop C, LA Measure to Overturn Citizens United, Will Be Voted on by Angelenos Next Week," *Huffington Post,* May 14, 2013, www.huffingtonpost.com/2013/05/14/prop-c-la-citizens-united_n_3267240.html.

17. William H. Wiist, "Citizens United, Public Health, and Democracy: The Supreme Court Ruling, Its Implications, and Proposed Action," *American Journal of Public Health,* 101 (2011): 1172.

trine is so uncertain, but still potentially so forceful, that it chills a great deal of public health regulation.

Because human behavior is a powerful contributor to injury and disease, public health strives to influence behavioral choices. Public health agencies deliver messages to promote healthy behavior directly (government speech) and indirectly through spending (government-sponsored speech). Government also suppresses commercial messages deemed hazardous to the public's health (through advertising restrictions) and compels warnings and disclosures deemed essential to the public's health (compelled speech). Government control of the information environment raises profound social and constitutional questions.

Government Speech

Government, as a health educator, uses health communication campaigns as a major public health strategy. These campaigns, like other forms of advertising, are persuasive communications; instead of promoting a product or a political philosophy, public health authorities promote safer, more healthful behaviors, such as vaccination, seat belt and helmet use,

healthy eating, physical activity, breastfeeding, and abstention from smoking.[136] Health education often is a preferred public health strategy, and in many ways it is unobjectionable. When the government speaks, citizens may choose to listen and adhere to the health messages, but they are free to reject government advice. Government's use of its own voice does not raise the constitutional concerns triggered when it silences or compels speech.[137] Even in cases where a law compels private subsidization of government speech, the Supreme Court has held that First Amendment concerns are not implicated.[138] For example, a state may impose special taxes on tobacco companies and earmark the revenue for an antismoking campaign without running afoul of the First Amendment.[139]

Government-Subsidized Speech and the Unconstitutional Conditions Doctrine

Restraints on speech as a condition imposed on recipients of government funds are subject to the "unconstitutional conditions" doctrine, which specifies that government cannot punish those who convey disfavored ideas by denying them benefits.[140] Government is free to specify the message it wants to promote with its own funds, but it cannot compel or restrict speech by grant recipients supported by other funds.

The distinction between choosing which speech to subsidize and imposing unconstitutional conditions on recipients is far from straightforward. In *Rust v. Sullivan* (1991), for example, the Court upheld regulations prohibiting doctors and staff in clinics receiving family planning funds under Title X of the Public Health Services Act from providing abortion counseling or referrals.[141] The Department of Health and Human Services (DHHS) regulations at issue mandated that abortion-related activities conducted by recipients be wholly separate—physically and financially—from activities conducted with federal funds. These requirements (mandating separate facilities, separate personnel, etc.) were burdensome enough to amount to a de facto prohibition on abortion counseling and referral. Doctors and staff "were expressly instructed that one permissible response to questions about abortion would be that a Title X project 'does not consider abortion an appropriate method of family planning,'"[142] yet the restrictions were upheld. In *Agency for Int'l Development v. Alliance for Open Society Int'l* (2013), however, the Court struck down a provision requiring private U.S. organizations receiving global health funds to have an explicit policy opposing sex work (the so-called antiprostitution pledge). The Court emphasized a distinction "between conditions that

define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the [government-funded] program itself."[143]

Restrictions on Commercial Speech

Commercial speech is an "expression related solely to the economic interests of the speaker and its audience"[144] that "does no more than propose a commercial transaction."[145] The three attributes of commercial speech are: (1) it identifies a specific product (i.e., offers a product for sale), (2) it is a form of advertising (i.e., is designed to attract public attention to, or patronage for, a product or service, by paid announcements proclaiming its qualities or advantages), and (3) it confers economic benefits (i.e., the speaker stands to profit financially).[146]

Prior to the mid-1970s, the Supreme Court held that commercial advertising was entirely unprotected by the First Amendment.[147] When the Court first began to recognize limited constitutional protection for commercial speech, it did so in the interest of consumer protection, striking down state laws prohibiting advertisements for abortion services and prohibiting pharmacists from providing information about prescription drug prices.[148] In the years that followed, the Court continued to recognize the "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," granting less constitutional protection to the former.[149]

In *Central Hudson Gas & Electric Co. v. Public Service Commission of New York* (1980), the Court elaborated a four-step intermediate scrutiny test for establishing whether a regulation of commercial speech violates the First Amendment.[150] First, commercial speech is not protected by the First Amendment if it promotes unlawful activity or is false, deceptive, or misleading (step 1). To regulate truthful advertising with regard to lawful activity, the government must have a "substantial" interest in regulating the speech (step 2); the regulation must "directly advance the governmental interest asserted" (step 3); and the regulation must be no "more extensive than is necessary to serve" the stated governmental interest (step 4).[151]

In early cases applying the *Central Hudson* test, courts routinely deferred to commonsense legislative judgments. Increasingly, however, the Court has required the state to have a clear and consistent policy as

well as evidence to demonstrate that the regulation is likely to achieve the asserted objective and is no more restrictive than necessary. For example, in a 1986 challenge to restrictions on advertising for gambling, the Court acceded to the commonsense assumption that advertising stimulates demand (and thus restrictions decrease demand) for socially harmful products and services.[152] Thirteen years later, the Court declined to defer to a similar legislative judgment, assuming instead that advertising would merely channel consumers to a different venue or brand, rather than stimulate demand.[153] This argument is worrisome because it is exactly the claim made by tobacco, alcohol, and sugary drinks manufacturers, who insist that they are advertising only to achieve greater market share, not to stimulate demand (see chapter 12).

The commercial speech doctrine has relevance for other public health regulations as well. In *Thompson v. Western States Medical Center* (2002), for example, the Court invalidated portions of a federal law that exempted traditional compounding pharmacies (which mix drugs to create a medication tailored to a patient's needs) from various safety regulations applicable to manufacturers, so long as pharmacies did not advertise or promote the compounded drugs.[154] In holding that the advertising-based distinction between pharmacies and manufacturers amounted to an unconstitutional restriction on commercial speech, the Court reasoned that the government failed to demonstrate that the restrictions on advertising were no more extensive than necessary to achieve state interests. The resulting deregulation was indirectly implicated in dozens of deaths during a 2012 fungal meningitis outbreak traced to contaminated medications distributed by a Massachusetts compounding pharmacy to twenty-three states.[155]

Compelled Commercial Speech

Federal and state regulations compel a great deal of speech for public health or consumer protection purposes. Regulations require businesses to label their products by specifying contents or ingredients (for products such as foods and cosmetics), potential adverse effects (for pharmaceuticals and vaccines), and hazards (e.g., for cigarettes, alcoholic beverages, or pesticides). Laws may also create a "right to know" for consumers (e.g., for quality measures for hospitals or health plans), workers (such as health and safety risks), and the public (e.g., for hazardous chemicals in the environment).[156]

Because mandates to disclose factual and noncontroversial information "trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," the First Amendment interests implicated are substantially weaker than those at stake when speech is suppressed.[157] In *Zauderer v. Office of Disciplinary Counsel* (1985), the Supreme Court held that laws requiring the disclosure of commercial information are constitutional as long as they are reasonably related to the state's asserted interest.[158] Federal courts have applied *Zauderer* to uphold country-of-origin labeling requirements for meat products[159] and calorie postings for menu items in chain restaurants.[160] There is uncertainty, however, regarding *Zauderer*'s applicability to mandates for graphic warning labels that seek to discourage consumption (see chapter 12).

Freedom of Religion

> Whenever the exercise, or alleged exercise, of religious freedom has come in conflict with public health laws, medical practice acts, and laws requiring adequate medical care for minor children, the courts of last resort in this country invariably have ruled that it is public health which must prevail. Freedom of belief may be absolute, but freedom of action is not.
>
> —James Tobey, "Public Health and Religious Freedom," 1954

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Conflicts between religious belief and public health are long-standing—especially with regard to mandatory vaccination, testing, and treatment and reproductive health—but the courts have primarily decided free-exercise cases in favor of generally applicable health and safety regulations.

Jacobson did not address whether mandatory vaccination laws violate the free exercise of religion because, at the time, the First Amendment had not yet been applied to the states via incorporation.[161] The Supreme Court has noted in dicta, however, that the parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[162] Lower courts have routinely upheld vaccination mandates that do not provide for religious exemptions[163] and have also upheld local officials' authority to assess the sincerity, strength and religious basis of individuals' objections in deciding whether to grant exemptions (see chapter 10).[164]

Prior to the 1990s, free-exercise jurisprudence was murky, with the Court strictly scrutinizing government action that purposefully interfered with religion and sometimes applying heightened scrutiny in cases where state action had a burdensome effect on conduct with religious significance. In 1990, however, the Supreme Court largely abandoned the heightened scrutiny test for free-exercise challenges to "neutral laws of general applicability."[165] In response, Congress passed the Religious Freedom Restoration Act (RFRA), which prohibits the federal government[166] (but not the states, because of the sovereign immunity doctrine discussed in chapter 3)[167] from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability."[168] Congress may overcome this prohibition in legislation adopted after RFRA, but only if it expressly supersedes RFRA.[169]

In 2014, *Burwell v. Hobby Lobby Stores* raised the question of whether RFRA rights extended to for-profit corporations.[170] The plaintiffs were closely held corporations and their owners, who operate their for-profit businesses (ranging from Christian bookstore chains to mortgage companies and kitchen cabinet manufacturers) in conformity with their personal religious beliefs. They challenged the Affordable Care Act's mandate that all private health plans must offer coverage for contraceptives (see chapter 8). "Religious employers" were exempted from the mandate, but DHHS has defined that category to include only churches, their integrated auxiliaries, and church associations. The Court's decision in *Hobby Lobby* to recognize the religious rights of for-profit corporations (at least when they are closely held, a term that the Court failed to define clearly) has significant implications for reproductive health and beyond.[171]

Levels of Constitutional Review

> A first requirement of any law, whether under the Due Process or Equal Protection Clause, is that it rationally advance a legitimate government policy. Two words ("judicial restraint") and one principle (trust in the people that "even improvident decisions will eventually be rectified by the democratic process") tell us all we need to know about the light touch judges should use in reviewing laws under this standard.
>
> —Hon. Jeffrey Sutton, *DeBoer v. Beshear,* 2014

As this brief discussion of substantive due process, equal protection, freedom of expression, and free exercise of religion suggests, the Supreme Court adopts different levels of constitutional review depending on the nature of the classification or the civil liberty in question. The level of

review signals how a court will balance the various interests in a particular case—the government's interest in advancing the public good and the individual's interest in nondiscrimination, autonomy, privacy, or liberty. The level of review also signals how carefully the court will scrutinize the public health policy or, to put it another way, how much deference the courts will give to the legislature or agency. The lower the level of scrutiny, the greater the presumption of constitutionality. The three formal levels of constitutional review, ranging from most to least deferential, are rational basis (minimum rationality), intermediate review (which is sometimes used interchangeably with "heightened scrutiny"), and strict scrutiny.[172] This rigidly structured scheme was widely followed for decades, but in recent years the Court has preferred a more nuanced approach, rarely following these formal levels of review.

Rational Basis Review

The judiciary's lowest, and most commonly used, standard of constitutional review is the rational basis test. All public health regulation must, at least, comply with this minimum rationality standard. Rational basis review requires both a legitimate government objective and means that bear some rational relationship to that objective. "Public safety, public health, morality, peace, law and order . . . are some of the more conspicuous examples" of legitimate governmental interests.[173] The Court has expressly upheld numerous public health objectives, including traffic safety,[174] detection of underdiagnosed disease,[175] and disease prevention.[176]

Rationality review is highly permissive of public health regulation, with the judiciary granting a strong presumption of constitutionality[177] and frequently cautioning that constitutional review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[178] The legislature need not "actually articulate at any time the purpose or rationale" for its public health policy.[179] Rather, public health regulation is upheld if there is "any reasonably conceivable state of facts that could provide a rational basis."[180]

In the absence of a suspect classification (race, national origin, religion, or alienage) or fundamental right (e.g., expression, free exercise of religion, privacy, procreation, marriage, interstate travel), the Court has reasoned that the legislative branch may enact underinclusive laws applicable to some classes of actors or contexts, but not others: dealing with social problems "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[181] An

incremental approach to public health regulation is not only permissible but also often preferable, particularly with regard to complex, multifaceted problems that require action through multiple modes, undertaken by multiple government actors. Unless a court can identify no rational relationship between classifications drawn by a law and any conceivable purpose the law might serve, neither underinclusiveness nor overinclusiveness will be grounds for judicial invalidation. "Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."[182]

Applying rationality review, the courts have upheld a wide spectrum of public health regulations, ranging from infectious disease screening,[183] mandatory treatment,[184] and vaccine compensation[185] to regulation of landfills.[186]

Intermediate Review

Laws that discriminate on the basis of "quasi-suspect" classifications, including sex[187] and "legitimacy" of children,[188] trigger an intermediate level of scrutiny, as do restrictions on commercial speech.

Under this middle level of constitutional review, the state must establish that its intervention serves "important" (not simply "legitimate") governmental objectives and must be "substantially" (not merely "reasonably") related to those objectives. Consider, for example, mandatory syphilis testing of female, but not male, applicants for a marriage license. This sexual classification would probably be unconstitutional because it does not serve a substantial public health purpose.[189] The prenatal HIV testing of women, however, might withstand constitutional scrutiny, because the state could demonstrate a substantial reason for focusing the intervention on women.[190]

Strict Scrutiny

As discussed above, the Supreme Court strictly reviews laws that create suspect classifications (classifications based on race, national origin, and, with some exceptions, alienage have been designated suspect) or burden fundamental rights (including liberty interests in procreation,

marriage, interstate travel, and child rearing as well as certain privacy interests). The Court has found a constitutionally protected interest in bodily integrity, but it has yet to hold that such interest is fundamental.[191]

Under strict scrutiny, the government must demonstrate a "compelling" interest and a tight fit between means and ends and must also show that its objectives could not be achieved by less restrictive or discriminatory purposes. Once the Court adopts strict scrutiny, it almost invariably strikes down the statute. Public health and safety are quintessentially regarded as compelling interests,[192] but the means/ends fit and least restrictive alternative requirements can pose problems for some health and safety regulations.

Beyond Levels of Constitutional Scrutiny

Breaking with long-standing practice, several contemporary Supreme Court cases appear to apply a more rigorous form of rational basis review, sometimes declining to identify the standard of review at all, suggesting that the Court is moving away from its historical reliance on rigidly defined categories (rationality, intermediate, strict), classifications (suspect, quasi-suspect, or nonsuspect), and rights (fundamental or not). In *City of Cleburne v. Cleburne Living Center, Inc.* (1985), the Court, purportedly using rational basis review, declared unconstitutional a zoning ordinance that effectively prevented the operation of a group home for persons with intellectual disabilities.[193] Under conventional rationality review, the judiciary would be deferential, but the Court felt that the legislature was motivated by animus against a traditionally disenfranchised group.

Similarly, in *Romer v. Evans* (1996), the Supreme Court reversed a state constitutional amendment motivated by prejudice against lesbian, gay, bisexual and transgender (LGBT) people, groups historically subject to animus and disenfranchisement. Colorado had amended its state constitution via a voter referendum to prohibit all legislative, executive, or judicial action designed to protect individuals from discrimination on the basis of "homosexual, lesbian, or bisexual orientation, conduct, practices or relationships." The Court held that the state constitutional amendment "fails, even defies," the standard of review, reasoning that it "seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."[194]

Notably, the Supreme Court failed to specify a level of scrutiny when it invalidated state sodomy laws in *Lawrence v. Texas* (2003) on the basis of a liberty interest protected by substantive due process.[195] The Court

did not appear to apply strict scrutiny, which would have been appropriate if it were indeed recognizing a fundamental right protected by substantive due process. Instead, as in *Cleburne* and *Romer,* it was apparently applying what Justice Scalia's dissent referred to as "an unheard-of form of rational basis review that will have far-reaching implications."

The Court continued this move toward abandoning rigid categorization in *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015). In *Windsor,* the district court had found the federal Defense of Marriage Act's restrictive definition of marriage unconstitutional under rational basis review. The circuit court ruled that gay and lesbian people were part of a "quasi-suspect class," and thus the provision warranted intermediate scrutiny. While the Supreme Court agreed with both lower courts that the provision was unconstitutional, it declined to identify a level of scrutiny, drawing on federalism, equal protection, and substantive due-process language for its rationale. In *Obergefell,* the lower courts striking down state bans on same-sex marriage had adopted various rationales, including that marriage is a fundamental right protected by the substantive due-process doctrine, that distinctions based on sexual orientation trigger heightened scrutiny under the equal protection doctrine, and that bans on same-sex marriage lack any rational relationship to a legitimate government purpose as required by both substantive due process and equal protection. Justice Kennedy's opinion for the majority of the Supreme Court eschewed reliance on levels of scrutiny, emphasizing the interrelatedness of the principles of liberty and equality embodied in the Fourteenth Amendment.[196]At a minimum, these cases suggest that there are areas where legislatures (or voters, through referenda) act against politically disfavored groups with such hostility that the Court is prepared to examine legislative motives more carefully than in conventional applications of rationality review. In the Court's words, "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government purpose."[197] These cases are highly relevant to public health law because discrimination on the basis of sexual orientation, disability, and socioeconomic class has played an important role in the history of public health (see chapters 10, 11, and 14).

Furthermore, this line of cases may represent a broader trend away from rigid categories of scrutiny altogether. Many constitutional scholars and members of the judiciary criticize the levels of review for being inflexible and outcome determinative.[198] Strict scrutiny is "strict in theory, but fatal in fact."[199] In the absence of narrowly defined triggers for constitutional concern (suspect classifications and fundamental rights),

the Court uses the rational basis test, and the government almost invariably wins. Certainly, different standards ought to apply depending on the class affected or the right infringed; yet it is far from clear why such sharply different constitutional standards, and outcomes, should result. The rigid approach has the benefit of greater predictability, but this may be outweighed by its lack of flexibility.

The Court's recent due process and equal protection analysis suggests that it is moving toward a more flexible approach, approximating a sliding scale. As the intrusiveness and unfairness of a policy increase, so does the level of judicial scrutiny. This approach reflects a more fluid balancing of individual interests and collective needs, but its flexibility comes at the cost of predictability.

PUBLIC HEALTH AND CIVIL LIBERTIES: CONFLICT AND COMPLEMENTARITY

The inherent conflict between the common good and civil liberties (for individuals as well as corporations) is a primary theme of this book. However, the relationship between rights and health is much more complex and nuanced. Infringing on individual interests can itself adversely affect the public's health. By the same token, individual rights can be tools for protecting the public's health.

If the U.S. Constitution recognized social and economic rights (to health care, food, housing, education, etc.) and affirmative government obligations to provide for these basic needs, the relationship between health and rights might be more symbiotic (see the discussion of the social safety net in chapter 8). Nonetheless, protection of individual rights "to be left alone" can have benefits for public health as well. Government interference with reproductive rights, for example, can have negative consequences for women's health. Protection of racial and ethnic minorities from discrimination—and protection of people with minority sexual identities or preferences—can reduce health disparities. Protection of corporate interests might promote economic development, which may ultimately be an effective path to improved public health.

The multifaceted interaction between constitutional powers, duties, and limitations and the public's health is critically important to understanding public health law. However, constitutional law is not the only field of domestic law relevant to public health. In the following chapters, we examine the fields of administrative law, local government law, and tort law—all of which are vital to the study of public health law.