

The Scope of the Police Power

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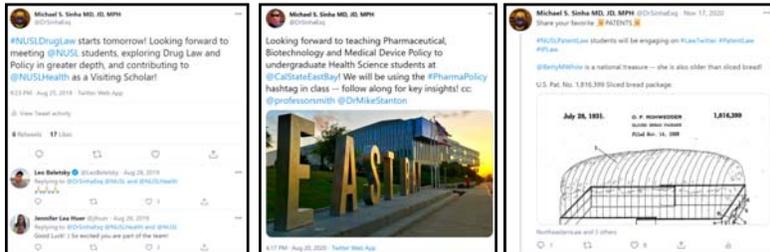


#PHLaw on Twitter

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



#NUSLDrugLaw #NUSLPatentLaw #PharmaPolicy #PHLaw



#PHLaw



#PHLaw

So despite the devastation caused by Covid-19, despite the nearly half-million lives lost and the economic and social costs, the pandemic is also an opportunity. The work needed to contain and recover from the coronavirus might — just might — create momentum to fix things before the next catastrophe, which will inevitably come in one form or another, perhaps before we've healed from this one.



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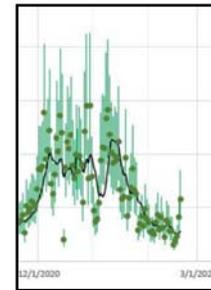
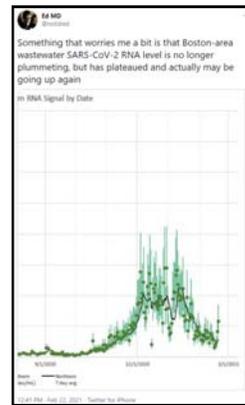
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Course Overview

- Updated syllabus will be available online
 - **SUBJECT TO CHANGE!** Always consult the online syllabus!
 - I will inform you in advance about major changes to the syllabus
 - Major changes will be posted on Canvas as announcements

<http://bit.ly/PublicHealthLaw>



Course Expectations

Attendance and Engagement	25%
Midterm Assignment	25%
Final Paper	50%



Course Expectations

Attendance and Engagement: (25% of grade)

- Class attendance and punctuality
- Participation during class
- Engagement during office hours
- Participation on the Canvas discussion board
- At least twice weekly engagement on Twitter (using the hashtag #PHLaw [optional but encouraged])



Public Comment Brief

- Topic: "Treatment of E-Cigarettes in the Mail" (U.S. Postal Service)
- Review the docket announcement and related materials for a Proposed Rule. Consult relevant legal, regulatory, and public health material to educate yourself about the context and implications for the proposed action.
- A structured "public comment" brief (5-7 pages) will be submitted to the agency by Monday, March 22, 2021 (25% of grade)
- NEW REQUIREMENT: **a draft is due to me in Word format by March 15th** so I can provide feedback before submission!
- Instructions are now posted on the syllabus page



Public Comment Brief

- Framework for public comment:
 - *Executive Summary* (250 words max, not counted toward page max): stating your position on the issues presented in the docket notice, major supporting arguments and evidence, and recommendations.
 - *Background*: (1-2 pages) Brief overview of the evolution and current state.
 - *Analysis*: (1-2 pages) Your position and its rationale, including which stakeholders' interests you are seeking to protect and how.
 - *Actions Recommended*: (1-2 pages) state the recommended course of action and what action steps would be needed to accomplish it.
 - *Tables and Figures* (optional, with attribution)
 - *Endnotes/Sources Cited* (not counted towards page limit)
- A statement that the document was prepared for a law school class will be added to the final comment prior to submission.



Public Comment Brief

- Treatment of E-Cigarettes in the Mail
 - Docket: <https://www.regulations.gov/document/USPS-2021-0027-0001>
 - Posted: February 19, 2021
 - Due: March 22, 2021
 - Indirect regulation of public health and safety: action by a non-public health agency with public health consequences
 - Focus on the public health impacts of the proposed action. Some examples:
 - Health consequences associated with e-cigarette use
 - USPS role in e-commerce and delivery of interstate purchases
 - Federal authority to regulate interstate commerce via taxation
 - Age verification processes to prevent minors from purchasing
 - Comparison to other similar products and impact of earlier provisions (e.g., Jenkins Act and tobacco, alcohol)



Final Paper

- The final paper on a pre-approved topic should be 16-18 pages in length and contain appropriately formatted BlueBook references. (50% of grade)
- A proposal outlining the topic significance, key questions, expected outcomes and preliminary sources will be due before class on Monday, March 8, 2021
- Sample proposal and final paper instructions are now posted to the syllabus page
- Please clear the topic with Dr. Sinha prior to beginning the proposal. Use the Mariner casebook as a resource for paper ideas
- The final paper will be due **by 3pm** on Friday, May 7, 2021



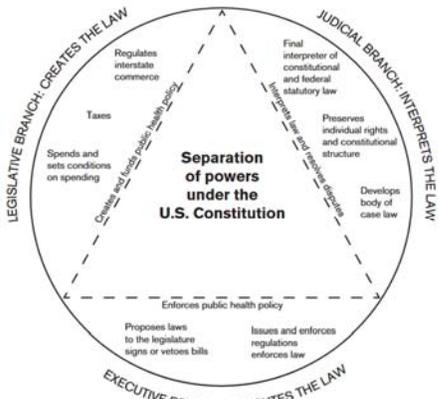


FIGURE 3.1. Separation of powers under the U.S. Constitution.

Harvard-MIT Center for Regulatory Science

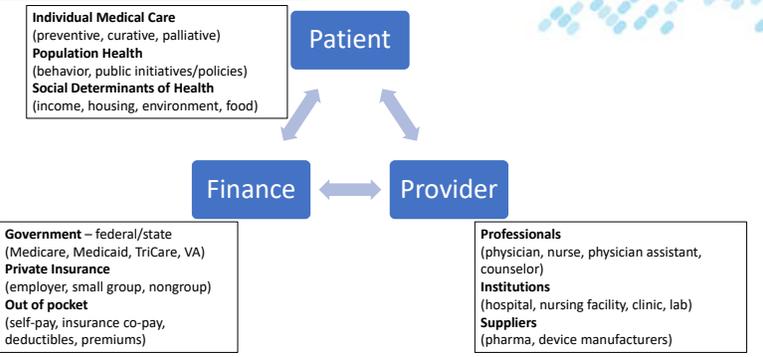
Public Health, Broadly

“Public health is the science and art of **preventing** disease, prolonging life, and promoting physical health and efficiency through organized **community** effort for the sanitation of the **environment**, the control of communicable **infections**, the **education** of the individual in **personal hygiene**, the **organization** of **medical and nursing services** for the early **diagnosis** and preventive treatment of disease, and the development of the **social machinery** to insure everyone a standard of living adequate for the maintenance of health, so **organizing these benefits** as to enable every citizen to realize his birthright of health and longevity.”

Charles E.A. Winslow
 American bacteriologist/public health expert
 (1877-1957)

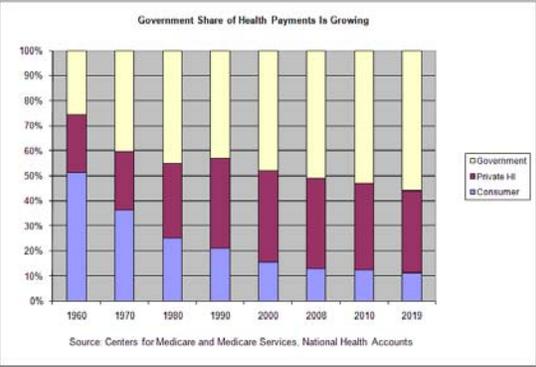
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AMERICAN HEALTH “SYSTEM”



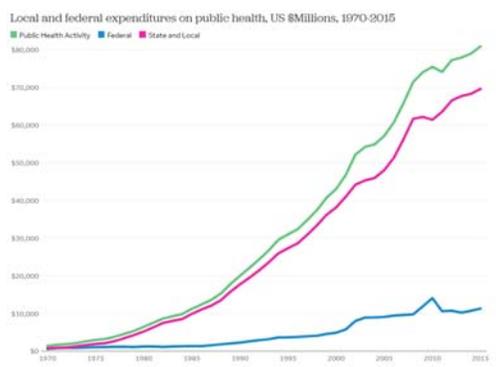
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Government Share of National Health Expenditures

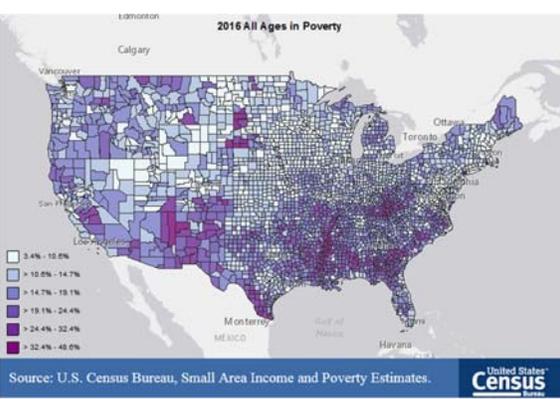


Harvard-MIT Center for Regulatory Science

Spending on public health has increased, particularly by state and local governments



Harvard-MIT Center for Regulatory Science



2018 Federal Poverty Level: \$12,140 individual; \$25,100 family of 4

Harvard-MIT Center for Regulatory Science

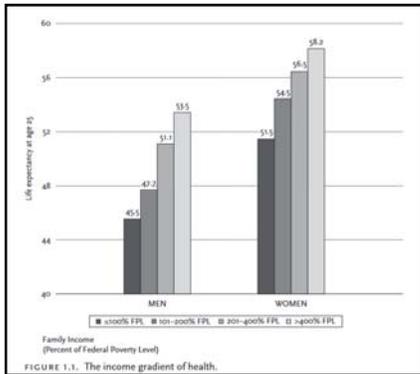
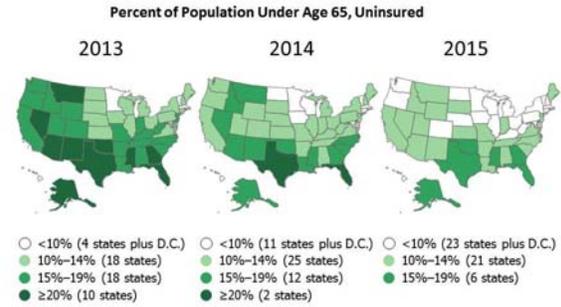
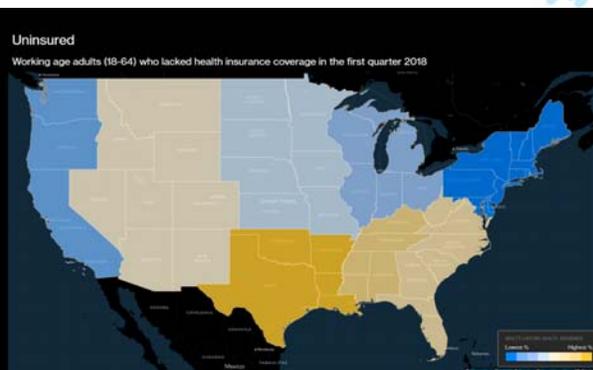


FIGURE 1.1. The income gradient of health.

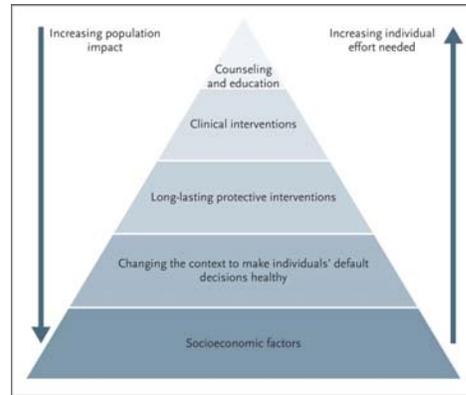
Two years after implementation of the Affordable Care Act's major health insurance reforms, the coverage map of the country looked dramatically different.



Data source: U.S. Census Bureau, 2013, 2014, and 2015 1-Year American Community Surveys. Public Use Micro Sample (ACS PUMS).



Health Impact Pyramid



A Framework for Public Health Action: The Health Impact Pyramid
TR Frieden, American Journal of Public Health. 2010; NEJM 2015



Public Health Policy Tools

- Regulation (set standards, requirements/prohibitions)
- Taxation (encourage/discourage purchases, subsidies)
- Funding (grants/loans to others for desired services)
- Direct service provision (government services)
- Market forces (harness, regulate competition)
- Education (provide information)

State Legislative Authority: "The Police Power"



- Authority of a state to enact laws to protect the **health, safety & welfare** of its population
- Retained by states when they gave up some power to allow creation of a more powerful central (federal) government in ratifying the US Constitution

Police Power

- Authority states retain within their borders
 - US Supreme Court repeatedly has held that Congress/federal government does not have police power
- States exercise police power by enacting legislation (may include giving authority to counties, towns, localities)
- Courts generally defer to legislative judgment regarding reasonable means to a legitimate end
 - ... as long as the state action does not violate constitutional rights

Police Power

- Police power is generally limited to protecting other people (not the person for their own benefit)
- *Parens patriae* power: state power to protect individuals who are not capable of protecting themselves from harm (e.g., children, adults who lose competence, some mentally ill persons)

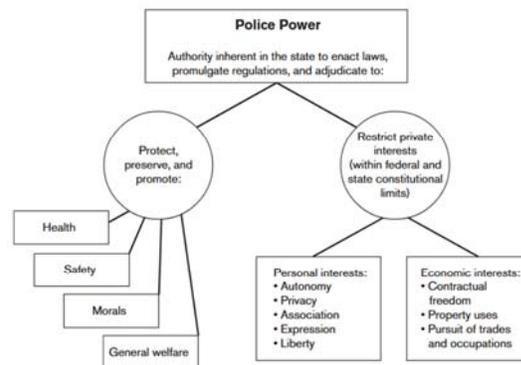


FIGURE 3.2. Police power.

Parens Patriae

The state's role as protector of the populace

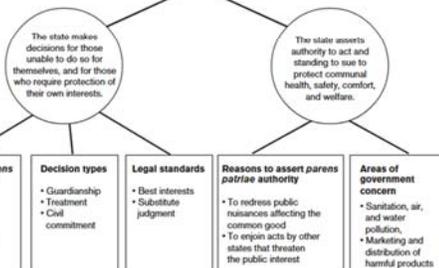


FIGURE 3.3. Parens patriae power.

Muller v. Oregon (1908)

Background

- Constitutionality of Oregon law limiting work hours for women in factories to 10 hours per day
- Convicted and upheld by Oregon Supreme Court

Muller v. Oregon (1908)

J. Brewer's opinion for the Court

- What is the state interest here?
- How does the Court distinguish *Lochner*?
- Do you agree with the Court's decision?

ABATE of Georgia v. Georgia (N.D. Ga. 2001)

Background

- Constitutional challenge to Georgia's motorcycle helmet law

ABATE of Georgia v. Georgia (N.D. Ga. 2001)

J. Thrash's opinion for the Court

- What is the state interest here?
- What do you make of the plaintiff's arguments?
- Do you agree with the Court's decision?

- Would a federal helmet law have withstood judicial scrutiny? Why or why not?

Guertin v. State of Michigan (6th Cir. 2019)

Background

- As a cost-saving measure, public officials switched City of Flint water supply from Detroit to the Flint River and an outdated treatment plant
- Significant immediate impact on water quality and health of Flint residents

Guertin v. State of Michigan (6th Cir. 2019)

J. Griffin's opinion for the Court

- What was the government interest being asserted here?
- What are the two legal issues being discussed here?
 - How did the Court decide on the 14th Amendment issue?
 - How did the Court decide on the 11th Amendment issue?

Any questions?