

Regulation of Public Health, Part 1

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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



Under the Constitution, the powers of the federal government are far-reaching but not all-encompassing. States have always retained control over public health and safety, from policing crimes to controlling infectious disease, including distribution of coronavirus vaccines that Washington helped create and whose supply it controls.

But even some Democratic governors have chosen to ignore federal guidelines and set their own vaccination priorities.

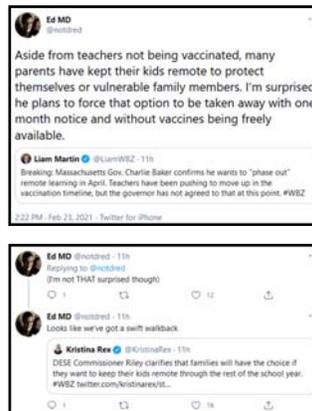
The CDC calls for vaccinating all essential workers, including teachers, before moving on to those under 75. But several states have chosen to vaccinate people over 65 and those with pre-existing conditions first.

"We are going to rely on the CDC definition of an essential worker. But that's a lot of people, including teachers," Connecticut Gov. Ned Lamont told the Hartford Courant's editorial board. "I'm not sure you move grandma to the back of the line so you can move [teachers] forward."

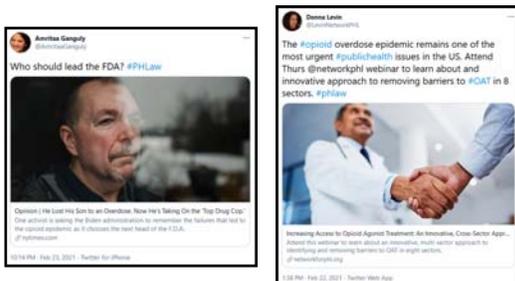
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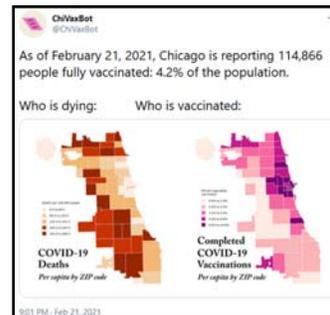
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Syllabus



- Updated syllabus online is **SUBJECT TO CHANGE!**
- **NEW:** shortened Mariner reading for March 1, added new COVID-19 related readings

<http://bit.ly/PublicHealthLaw>



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



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



U.S. Constitution Article I Section 8

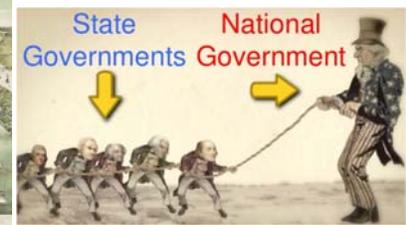


The Congress shall have Power ...

- [3] To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes;
- [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.



Commerce Among the States?



“This [Commerce] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” Gibbons v. Ogden (1824)



Modern Commerce Clause Analysis (*US v. Lopez*)

Commerce Clause ("CC") Power to Regulate Use of Channels of Interstate Commerce ("IC")

CC Power to Regulate the Instrumentalities of or Persons/Things Traveling in IC

CC Power to Regulate Local Activities that Have a Substantial Effect on IC

Dormant Commerce Clause?

Relationship to Police Power?

Ask:
- Is it an economic activity?
- Does the Act contain a jurisdictional element?
- Do congressional findings indicate why Congress rationally believes the activity has an effect on interstate commerce?

Other considerations
'Traditional' State Activities
Local vs. National



Exercise 1:

- Can the federal government:
 - Prohibit the possession of a firearm in a local school zone? (*US v. Lopez*)
 - Prohibit the local cultivation and use of marijuana? (*Gonzales v. Raich*)
 - Regulate surface coal mining on private, non-Federal land? (*Hodel v. Virginia Surface Mining & Reclamation Association*)



Exercise 2:

- Can a state legislature pass legislation to limit price gouging of pharmaceutical products within its borders? (*AAM v. Frosh*)



Perspective
JULY 13, 2017

Targeting Unconscionable Prescription-Drug Prices — Maryland's Anti-Price-Gouging Law

Jeremy A. Greene, M.D., Ph.D., and William V. Padula, Ph.D.



Preemption

Express Preemption: federal statute specifically proclaims intent to preempt state law

Implied Preemption: federal statute does not state intent to preempt state law, but Court infers a need to preempt; 3 subcategories:

- Conflict preemption:** impossibility of mutual compliance
- Objective/goal preemption:** state law impedes federal objective
- Field preemption:** federal legislation is so comprehensive that Court concludes Congress did not intend to leave any "room" for state legislation in the area, whether or not that legislation presents a conflict or impedes the federal goal



Exercise 3:

- Does federal law preempt a state governor's attempt to ban sale of electronic cigarettes within a state's borders?

The Philadelphia Inquirer

Opinion
Vaping bans like Massachusetts' will not stop illness outbreak | Opinion

Having seen the consequences of the ban in Massachusetts, we encourage other states to think twice before implementing aggressive measures that lack evidence.

by Shaleen Title and Michael S. Sinha, for the Inquirer
Updated Oct 7, 2019



U.S. Constitution Article I Section 8

The Congress shall have Power ...

- [1] To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.



United States v. Butler (1936)

...“the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”

Exercise 4:

- Can the federal government hedge federal funding on a state's agreement to:
 - Adopt a minimum drinking age of 21? (*South Dakota v. Dole*)
 - Require seatbelt use for all passengers in the front seats of a motor vehicle? On an airplane?
 - Require abstinence-only sex education in schools?
 - Expand Medicaid eligibility (with significant federal support)? (*NFIB v. Sebelius*)
 - Subject hospitals to Emergency Medical Treatment and Active Labor Act (EMTALA) requirements?

Recap: Federal Authority

- Governance depends on the powers available to each branch of government
- US federal law results from the words in the US Constitution authorizing Congress to act
- And the US Supreme Court interprets the Constitution, which can expand or limit congressional authority

Recap: Interstate Commerce

- Use of the channels of interstate commerce
 - *e.g.*, highways, hotels
- Instrumentalities of or persons or things in interstate commerce
 - *e.g.*, railroads, airlines, household goods
- Intrastate activities with a substantial effect on interstate commerce
 - Illicit drugs, goods or items moving in commerce that need to be regulated in the aggregate

Recap: Tax & Spend Power

- Congress can *indirectly* regulate (and/or influence policy) through taxing and spending powers
- Also can spend federal money *directly* (*e.g.*, Medicare)
- But cannot *force* states to act (federalism principles)

Any questions?