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James G. Hodge Jr.

IMPLEMENTING MODERN PUBLIC HEALTH GOALS THROUGH GOVERNMENT: AN EXAMINATION OF NEW FEDERALISM AND PUBLIC HEALTH LAW

*James G. Hodge, Jr., J.D., LL.M.**

I. INTRODUCTION

Public health law, encompassing the exercise of governmental powers in the interest of public health, is coextensive with the dynamic field of public health. The goals of public health necessarily rely, at least in part, on the use of public health law as a tool. Public health in the United States, like public health law, has been greatly transformed since the founding of the American colonies. The goals of public health, once limited to combatting infectious diseases at the local level,[1] have expanded to include the regulation and control of the multi-varied conditions in which people can be healthy.[2] Since public health regulation traditionally has relied on the exercise of governmental powers,[3] the expansiveness of

* Mr. Hodge is a Teaching Assistant, Georgetown University Law Center; Fellow, Greenwall Fellowship Program in Bioethics and Health Policy (supported by the Greenwall Foundation and jointly administered by Georgetown University and Johns Hopkins University). The author would like to sincerely thank Professor Lawrence O. Gostin (Georgetown University Law Center) for his encouragement, review, and substantive assistance in the preparation of this article, and Imron T. Aly, J.D. candidate (Georgetown University Law Center) for his research assistance.

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1. The sovereign law of colonial governments was primarily limited to controlling the contagion and spread of communicable diseases. It provided for the quarantine of diseased individuals, the vaccination of others, and, to a lesser degree, the improvement of societal conditions leading to the spread of disease. *See* Wendy Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Farming Era*, 20 HASTINGS CONST. L.Q. 267, 281 (1993).

2. The Institute of Medicine proposes that "[p]ublic health is what we, as a society, do collectively to assure the conditions for people to be healthy." INSTITUTE OF MEDICINE, THE FUTURE OF PUBLIC HEALTH 19 (1988).

3. There is perhaps no facet of governmental regulation more important to the public welfare than the maintenance of public health. *See* Lawrence O. Gostin, *Symposium: Securing Health or Just Health Care? The Effect of the Health Care System on the Health of*

public health goals is reflective of formative changes in the conception of American governmental powers.[4]

The power to act in the interests of public health once resided exclusively in state and local governments.[5] Public health regulation was defined predominantly in terms of territorial objectives, which states attempted to accomplish through virtually plenary police powers. However, as the states' exclusive power to regulate in the interests of public health was limited judicially and politically, public health law began to shift from states to the federal government, largely during the New Deal.[6] Public health goals became more national in character and design as authorities were no longer bound to regulations within state lines. National legislation allowed for uniform regulation of traditional public health

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America, 39 ST. LOUIS U. L.J. 7, 12 (1994) ("[T]he prevention of disease or disability and the promotion of health, within reasonable resource constraints, provides the preeminent justification for the government to act for the welfare of society"); *see, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (the protection and preservation of the public health is among the most important duties of state government); *see* Parmet, *supra* note 1, at 281 ("'Government is, in fact, organized for the express purpose, among others, of conserving the public health and cannot divest itself of this important duty,'" *citing* James A. Tobey, *Public Health and the Police Power*, 4 N.Y.U. L. REV. 126 (1927)).

4. The expansion and development of the field of public health from its modest, early attempts to control contagious diseases to the varied regulations of conditions affecting health has greatly relied on law. FRANK P. GRAD, THE PUBLIC HEALTH LAW MANUAL 9 (2d ed. 1990). "Law is essential to public health because public health programs are entirely dependent on *legislative* authorization." *Id.* (emphasis in original).

5. Among the states' retained powers under the Constitution, collectively known as the police powers, are the original sovereign powers used during the colonial era to protect the public health. Under the initial conception of the federalist framework of government, states and their local subsidiaries virtually had exclusive responsibility for regulating and controlling matters related to public health. In deference to legislative decision making, courts rarely struck down state public health regulations. *See, e.g.*, Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240, 2245 (1996).

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, . . . matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'

Id. (citations omitted).

6. Federal control over public health matters significantly increased as a result of the Court's broad reinterpretations of the Commerce powers and Tax and Spend powers of Congress during the New Deal era. National interests justified the expansion of federal powers into areas of traditional state concern. Executive agencies at the national level were formed pursuant to Congressional legislation with the specific and secondary purposes of improving public health. States' legal objections, based in part on principles of federalism, were ignored or brushed aside. *See* Joseph Lesser, *The Course of Federalism in America-An Historical Overview*, *in* FEDERALISM: THE SHIFTING BALANCE 11 (Janice C. Griffith, ed. 1987).

objectives, as well as public health threats once beyond the scope of the field.

Federalism has played a vital role in this transition from local to national governmental powers and corresponding public health goals. Public health objectives rely on governmental structures resulting from federalism interpretations.[7] As a principle of law, federalism distinguishes between the limited (although supreme) powers of the federal government and the broad sovereign powers left to the states via the Tenth Amendment. As a principle of legal design, it requires the division of governmental powers for the mutual preservation of national and state governments, and impliedly creates an enforceable barrier between the exercises of such authority. In theory, neither state nor federal governments may impede the respective powers of the other. In practice, however, an inherent tension exists between the exercise of powers between state and federal governments.

This tension is the focus of "new federalism" jurisprudence of the United States Supreme Court.[8] The Court attempts to resolve tensions between state and federal exercises of government power, in part, by restricting federal powers in governmental areas traditionally reserved to the states, such as public health.[9] By restricting the use of federal powers in areas of traditional state concern, new federalism has become a substantive constitutional argument for states attempting to preserve their eroding sovereign powers.

In an era of national public health objectives, new federalism cannot be ignored. Ultimately, its principles remind us that the means through which we pursue our national public health agenda must comport with

7. State exercises of police powers in the interest of public health depend on the non-interference of the national government in a decentralized, state-based framework. A national conception of public health law relies on the broad exercise of federal powers in a centralized, national government. Under either conception, the stability of federalism is important because its interpretation by the Court influences the particular governmental framework upon which the conception relies.

8. The modern question of federalism is at what point does federal intrusion into predominantly state matters exceed the limits of federal powers set forth in the Constitution.

9. Notable decisions since 1991 have reinforced the original federalism principle of federal non-interference in areas of traditional state powers, often by emphasizing the importance of the political process. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (confining Congress' authority to "commandeer" states in the regulation of the disposal of radioactive wastes); United States v. Lopez, 514 U.S. 549 (1995) (restricting Congress' Commerce powers in its attempt to criminalize the mere possession of a handgun in school zones).

our federalist system of government. Without compromising the laudable national objectives of public health, new federalism encourages us to look for sources of law other than federal legislation to accomplish public health ends. In this sense, new federalism challenges our societal conception of government as the primary source of public health regulation. By restricting the ability of the federal government to accomplish national, uniform public health objectives, new federalism suggests that society must look beyond government to maintain and improve public health. It invites us increasingly to turn to an entity more powerful than government itself, the private health care sector.

This Article explores the development of federalism, state police powers, and public health over time. Part I correlates the principles of federalism and public health law. Part II examines the traditional nature of the states' police powers as the original source of authority for public health laws, and the corresponding localization of public health goals. Although these powers were once conceived as absolute when exercised in the interest of public health, this section demonstrates how such powers were weakened judicially to protect persons from invidious public health measures. In light of increasing judicial limitations on the exercise of state police powers, the rise of the federal role in regulating public health, particularly during the New Deal, and the resulting nationalization of public health objectives, is discussed in Part III. Finally, Part IV discusses new federalism and its present and future impact on public health law, and suggests that the private sector may be a valuable outlet for public health assistance. A brief conclusion follows.

II. CORRELATING FEDERALISM AND PUBLIC HEALTH REGULATION

In the context of public health, the federal Constitution "acts as both a fountain and a levee. It controls the flow of governmental power between state and federal governments to preserve the public health, and subsequently curbs that power to protect individual freedoms."[10] If the Constitution is a fountain from which powers flow to the states,[11] federal-

10. LAWRENCE O. GOSTIN, *Public Health Law*, *in* JUDITH AREEN ET AL., LAW, SCIENCE AND MEDICINE 520 (2d ed. 1996).

11. It is uncertain that the framers or the United States Supreme Court conceived the Constitution as a source of power to the states since the states simply retained their powers not otherwise delegated to the federal Congress nor prohibited by the Constitution. *See* Gibbons v. Ogden, 22 U.S. 1, 87 (1824) ("[T]he constitution gives nothing to the States or the people. Their rights existed before it was formed; and are derived from the nature of sovereignty and the principles of freedom.").

ism represents the partition in the pool from which the states' fountain draws. It divides the available pool of legislative power into two segments of government, national and state.[12] As a principle of law and governmental design, American federalism preserves a constitutional balance of power between state and national authorities.[13]

In practice, federalism distinguishes between the powers exercised by federal and state governments. The federal government has those limited powers granted pursuant to the United States Constitution, including the power to enact laws in its jurisdiction. The remaining sovereign powers of government are reserved to the states via the Tenth Amendment.[14] As further explained in Part II, these powers, collectively known as police powers, allow states to broadly regulate matters affecting the health, safety, and general welfare of the public. They are the original and primary authority of government to regulate matters that affect the public health.

To preserve the powers of the federal government from intrusion by the states, the Supremacy Clause[15] of the Constitution provides that fed-

12. The essence of federalism is that federal and state governments "[s]hould be limited to [their] own sphere and, within that sphere, should be independent of the other." RUTH LOCKE ROETTINGER, THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM 5 (1957) *citing* K.C. WHEARE, FEDERAL GOVERNMENT (1951).

13. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). The principle of federalism emerged from the Constitutional Convention as "the product of compromise." A REPORT OF THE WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, THE STATUS OF FEDERALISM IN AMERICA 7 (1986). A minority of the colonies' delegates to the Convention, known as the federalists, advocated the creation of a federal government representing little more than a loose "compact resting on the good faith of the parties." *Id., citing* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 121 (C.C. Tansill, ed. 1927). Nationalists strongly argued for the formation of a national government, which would become a central governing authority over the new states. The resulting Constitution had to satisfy both sides. As nationalist James Madison would later state: "The proposed Constitution . . . is in strictness, neither a national nor a federal Constitution, but a combination of both." *Id.* at 8, *citing* THE FEDERALIST No. 39, at 246. Initial concerns of the federalists about the strength of the national government created by the Constitution led to the nationalists' assurance that a bill of rights, including a provision explicitly reserving to the states their inherent vast sovereign powers, would be considered by the First Congress. *Id.* at 9-10. On December 15, 1791, the Tenth Amendment of the Bill of Rights was ratified, thus explicitly reserving to the states or the people all powers other than those delegated to the United States Congress or prohibited by the Constitution.

14. The Tenth Amendment to the U.S. Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. AMEND. X.

15. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; shall be the supreme Law of the Land. . . .").

eral laws and regulations override conflicting state laws pursuant to the doctrine of preemption.[16] Likewise, with the passage of the Tenth Amendment, states secured their role in American government by reserving sovereign power over "all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[17] Since states retained the majority of governmental powers,[18] in theory federal legislation which infringed traditional state powers was beyond Congress' jurisdiction, and thus was neither supreme nor entitled to preemption over state law.[19]

The division between federal and state powers is not always predictable.[20] The powers of federal and state governments collide on a regular

16. State law is deemed preempted by federal constitutional or statutory law either by express provision, *see, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); by a conflict between federal and state law, *see* Maryland v. Louisiana, 451 U.S. 725 (1981); New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 653 (1995); or by implication where "Congress so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it." *See* Fidelity Fed. Sav. and Loan Assn. v. De la Cuesta, 458 U.S. 141 (1982), *quoting* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

17. THE FEDERALIST NO. 45, at 292-293 (James Madison) (Clinton Rossiter ed., 1961), *quoted in* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

18. A REPORT OF THE WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, *supra* note 13, at 10. So powerful were the states under the original balance of power among the national and state governments that Alexander Hamilton commented "there is greater probability of encroachments by the [states] upon the federal [government] than by the federal [government] upon the [states];" *id.* at 9, *citing* THE FEDERALIST NO. 31, at 197. Federal exercises of power interfering with state powers were virtually inconceivable. *See* New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 2418 (1992):

> The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities.

Id. (emphasis added).

19. As Alexander Hamilton observed during the drafting of the Constitution, it does not follow "that acts of the [national government] which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the [States] will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such." THE FEDERALIST NO. 33, at 204.

20. "The meaning of federalism, after all, has been the primary political issue for most of American history. . . ." R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L.J. 91, 120 (1995), although the original distribution of powers between governments was meant to be relatively clear. Younger v. Harris, 401 U.S. 37, 44 (1971) ("[Federalism involves] a proper respect for state functions, . . . and . . . the belief that the National Government will fare best if the States and their institutions are

basis, at which point federalism takes on many shades and "almost imperceptible gradations."[21] Public health law, which is comprised of those laws and regulations passed, enforced, and adjudicated at the federal, state, and local levels of government regulating the conditions affecting public health,[22] involves such a collision between federal and state powers.

Federalism requires us to ask which level of government has the responsibility for passing, enforcing, and adjudicating which public health laws. The answer is not an absolute. Federal and state governments can share jurisdiction in the field. Yet where federal and state powers intersect, struggles over the exercise of limited governmental powers occur. The resolution of such disputes is uniquely within the province of federalism. States' traditional ability to control and maintain public health remains contingent on the scope of their police powers, and the extent of federal intrusion. This, in turn, depends on the emphasis placed on federalism:[23] when enforced, federalism protects police powers of the states by curbing federal infringements on such powers.[24] It simultaneously restricts the federal government's ability to regulate in the interests of public health, since such regulation traditionally has been the responsibility of state governments. In the balance of these observations rest the very goals of public health that rely on the interpretation of federalism.

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left free to perform their separate functions in their separate ways."). Judicial federalism represents neither a bright line nor visible boundary between state and federal powers. *See* New York v. United States, 505 U.S. 144 (1992) ("the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases.").

21. 16 AM. JUR. 2D *Constitutional Law* § 277 (1979).

22. GRAD, *supra* note 4, at 4; *see also* Lawrence O. Gostin, *Public Health Law: A Review*, 2 CURRENT ISSUES IN PUBLIC HEALTH 205 (1996), defining public health law in terms of the study of relationships of organized society (principally government), the health of populations, and the rights of individuals as:

> The study of the legal powers and duties of organized society to assure the conditions for people to be healthy (e.g., to identify, quantify, prevent, and ameliorate risks to health in the population), and the limitations on the power of organized society to constrain the autonomy, privacy, liberty, property, or other legally protected interests of individuals for the purposes of protection or promotion of community health.

Id.

23. *See* Ronald J. Bacigal, *The Federalism Pendulum*, 98 W. VA. L. REV. 771, 772 (1996) ("Federalism [identifies] the rules of the game under which the process of decision-making and exercise of government power will proceed.").

24. *See, e.g.*, Daniel M. Kolkey, *The Constitutional Cycles of Federalism*, 32 IDAHO L. REV. 495, 502 (1996) ("Federalism can thus be a way of providing a restraint on the expansion of federal power.").

III. THE LOCALIZATION OF PUBLIC HEALTH REGULATION UNDER STATE POLICE POWERS

Consistent with the division of powers between the levels of governments, those broad powers not delegated to the federal government nor prohibited to them by the Constitution[25] are reserved for the states via the Tenth Amendment. These powers are traditionally known as "police powers."[26] In a legal sense, police powers in American jurisprudence denote the power of state governments to promote the public welfare by restraining and regulating private individuals' rights to liberty and uses of property.[27] Broad in scope,[28] police powers defy a singular meaning.[29] They are "neither abstractly nor historically capable of complete definition,"[30] but rather represent the broad expression of legislative determi-

25. THE FEDERALIST No. 45, 292-93 (James Madison) (Clifford Rossiter ed. 1961), *quoted in* Gregory v. Ashcroft, 501 U.S. 452 (1991) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

26. The term "police powers" first appeared in the landmark decision of the United States Supreme Court, Gibbons v. Ogden, 22 U.S. 1 (1824) (reported in TOM CHRISTOFFEL & STEPHEN P. TERET, PROTECTING THE PUBLIC: LEGAL ISSUES IN INJURY PREVENTION 30 (1993); *but see* ROETTINGER, *supra* note 12, at 10 (reporting that Chief Justice Marshall first used the term in the 1827 decision, *Brown v. Maryland* (citation omitted)).

Police powers originate in the inherent need of government to restrain the private actions of citizens to reduce the negative transgressions of such actions on the private rights or property of another. *See, e.g.*, CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 1-2 (1886). The police power rests on the latin maxim "*sic utere tuo ut alienum non laedas*" (so use your own that you do not injure that of another). Police powers, it is said, are the function of government by which this maxim is enforced. *See, e.g.*, 16A AM. JUR. 2D *Const. Law* § 368 (1979). As one author theorizes, "police powers have their origin in the law of necessity." Where individual actions or other elements constitute threats to the public welfare, governments should be able to use their powers to reduce, deter, or enjoin the resulting harms to society. W.P. PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY 4 (1894).

27. *See, e.g.*, ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 3-4 (1904).

28. The police powers "form a portion of that immense mass of legislation which embraces everything within the territory of the state, not surrendered to the general government; all of which can advantageously be exercised by the states themselves. Inspection laws, *quarantine laws, health laws of every description* . . . are component parts of this mass." Gibbons v. Ogden, 22 U.S. 1, 87 (1824) (emphasis added). The scope of police powers is the broadest of any field of American governmental activity. JAMES A. TOBEY, PUBLIC HEALTH LAW 33 (1926). It extends to all public needs. As a result, it is not confined to narrow categories or interpretations. *See* ROETTINGER, *supra* note 12, at 11.

29. Although "generally understood and universally recognized," 16A AM. JUR. 2D *Constitutional Law* § 362 (1979), the composition of police powers is rather ambiguous.

30. Berman v. Parker, 348 U.S. 26, 32 (1954).

nations. In this sense, the exercise of police powers is constantly evolving.

Legal theory supports that the Constitutional drafters supposed the pre-existence of sovereign police powers.[31] They intended the reservation of police powers to the states to be exclusive, thus depriving the federal government of any comparable powers. As the Supreme Court has explained, the Tenth Amendment "disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise power which it had not been granted . . . the framers intended that no such assumption should ever find justification [in the Constitution]."[32] Thus, police powers, reserved exclusively to the states, are the broadest and least limitable[33] source of authority and support for government action in the United States.

In the field of public health law, state police powers constitute the original[34] and logical[35] source of governmental authority.[36] Public health reg-

31. The Constitution historically has been construed with reference to the fact that preservation of the states' police powers was an integral presumption. *Id.; see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 379 (2d ed. 1988). This presumption took form in the language of the Tenth Amendment, which the Supreme Court has interpreted to reserve police powers to the states. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1 (1824). "*[T]he constitution gives nothing to the States or the people.* Their rights existed before it was formed; and are derived from the nature of sovereignty and the principles of freedom." *Id.* at 87 (emphasis added).

32. ROETTINGER, *supra* note 12, at 6 (*citing Kansas v. Colorado* (citation omitted)).

33. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946) ("The police power is one of the least limitable of government powers.").

34. Public health laws, originally calling for the isolation of the ill or quarantine of those exposed to contagious diseases, have been passed at the local level under the equivalent of police power since the formation of the colonies. INSTITUTE OF MEDICINE, *supra* note 2, at 57. The colony of Virginia passed a vital statistics law to track the health of the community in 1631. Massachusetts enacted the first sanitary legislation in America when it passed a maritime quarantine act in 1648 due to the threat of disease from the West Indies. A year earlier, Massachusetts also enacted a law to prevent the pollution of Boston Harbor. JAMES A. TOBEY, PUBLIC HEALTH LAW: A MANUAL OF LAW FOR SANATARIANS 10 (1926). Additional quarantine laws related to incoming sea vessels, loaded with goods and often disease, were passed in Maryland (1784), New Hampshire (1789), Virginia (1792), Georgia (1793), Connecticut (1795), and Delaware (1797). *See* Gibbons v. Ogden, 22 U.S. 1, 114-15 (1824).

35. As one legal commentator has stated "[t]he exercise of the police power is really what [state] government is about: It defines the very purpose of government. Thus, on the state level, the power to provide for and protect the public health is a basic, inherent power of the government." GRAD, *supra* note 4, at 10; *see also* KENNETH R. WING, THE LAW AND THE PUBLIC'S HEALTH 19-20 (2d ed. 1985). For informative historical accounts of the police power, *see* Deborah Jones Merritt, *The Constitutional Balance Between Health and Liberty*, 16 HASTINGS CTR. REP., Dec. 1986 (Supp.) at 2; Parmet, *supra* note 1, at 267.

36. Police powers are not the only state powers used in matters related to the public

ulation lies at the core of the police power.[37] State regulations in the interest of public health are not limited to the prevention and control of contagious or dangerous diseases through such measures as quarantine[38] and vaccination,[39] but include such matters as sanitation,[40] anti-pollution and fluoridation of water supplies, licensing and regulation of occupations,[41] and injury prevention.[42]

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health. The states' exercise of its territorial jurisdiction under its *parens patriae* powers occasionally comes to play. The doctrine of *parens patriae* (literally meaning "parent [or father] of the state") stems from the English statutory duty of the king, as father of his country, to provide and care for the less able citizens of society, the likes of which originally included idiots, lunatics, and orphans. *See* Neil B. Posner, *The End of Parens Patriae in New York: Guardianship Under The New Mental Hygiene Law Article* 81, 79 MARQ. L. REV. 603, 604 (1996); Lisa Moscati Hawkes, *Parens Patriae and the Union Carbide Case: The Disaster at Bhopal Continues*, 21 CORNELL INT'L L.J. 181, 186 (1988). The *parens patriae* powers were modified by states in light of the federal structure of government. *Id.* at 186. *Parens patriae* powers were expanded to become "a tool that states use to protect the well-being of their citizens when no one citizen has standing to sue and thus cannot remedy the problem." *Id.* at 186-87. Thus, where a state can show it has a "quasi-sovereign" interest in protecting its citizens from certain activities or conduct of corporations, individuals, or other states, it may sue on the citizens' behalf to enjoin such actions. *See, e.g.*, Louisiana v. Texas, 176 U.S. 1 (1900) (reviewing the State of Louisiana's attempt to enjoin a quarantine regulation enacted by the State of Texas banning the importation of all goods from New Orleans in light of an alleged threat of yellow fever. Although the Court denied jurisdiction to determine the propriety of the regulation, it recognized the position of Louisiana "in the attitude of parens patriae, trustee, guardian or representative of all her citizens . . . to seek relief . . . because the matters complained of affect her citizens at large."). *Id.* at 19; *see also* Amelia C. Waller, *State Standing in Police Misconduct Cases: Expanding the Boundaries of Parens Patriae*, 16 GA. L. REV. 865, 874 n.52 (1982); *see also* Missouri v. Illinois, 180 U.S. 208 (1901) (enjoining the Sanitary District of Chicago from discharging raw sewage into the Des Plaines River, a tributary to the Mississippi River. The Court upheld Missouri's *parens patriae* power to seek the injunction as a legitimate sovereign interest). *Id.* at 241.

37. Parmet, *supra* note 1, at 272 ("Public health regulation has long been regarded as one of the states' primary and most important 'police powers.'"). *See also* Women's Community Health Ctr. of Beaumont, Inc. v. Texas Health Facilities Comm'n, 685 F.2d 974, 980 & n. 11, *citing* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 251 (1829); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960); Sporhase v. Nebraska, 458 U.S. 941, 102 S. Ct. 3456, 3463 (1982) ("[a] State's power to regulate . . . for the purposes of protecting the health of its citizens . . . is at the core of its police power.").

38. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 145 (1890); Morgan's L. & T. R. & S.S. Co. v. Bd. of Health, 118 U.S. 455 (1886).

39. *See, e.g., Zucht v. King*, 260 U.S. 174 (1922); Jacobson v. Massachusetts, 197 U.S. 11 (1905).

40. Private individuals may be required to update or modify their sanitation systems, plumbing, or mere living conditions to maintain a healthy environment under the police power. 39 AM. JUR. 2D *Health* § 33 (1968). However, the police power does not extend to appropriations of private property not otherwise creating a health nuisance or hazard without compensation to the property owner. *Id.* (citations omitted).

41. *Id.* at § 25.

With the formation of local health boards,[43] state public health laws and regulations proliferated in the late eighteenth and early nineteenth centuries.[44] From the onset, courts were highly deferential to state public health regulations.[45] Laws or regulations necessary to protect the public health were considered legislative questions for local and state health authorities, not questions subject to judicial review. The court's perceived role was limited primarily to determining whether health officials acted within their permissible jurisdiction, or had otherwise abused their authority. In general, courts validated any regulation of local health authorities reasonably calculated to preserve the health of the public.[46]

Some courts were skeptical of compulsory public health actions purporting to protect the public, but which in reality involved some arbitrary interference with private entities or imposed unusual or unnecessary restrictions on lawful activities.[47] Although the constitutional foundation for the exercise of compulsory police powers was public health neces-

42. CHRISTOFFEL & TERET, *supra* note 26, at 25-28.

43. The first local health board reportedly was organized in Baltimore, Maryland in 1793. Philadelphia followed suit a year later. In 1797, Massachusetts promulgated a law providing for the organization of health boards in towns and delegating to these boards the power to make regulations. Health boards formed in other towns across the new nation as states copied the Massachusetts model. Thus, public health duties among the first states of the Union were delegated, early on, to local boards at the municipal level. TOBEY, *supra* note 28, at 44; *see also* INSTITUTE OF MEDICINE, *supra* note 2, at 62. Only later did state governments form state-wide boards of health, Louisiana being the first to do so in 1855 (although the District of Columbia formed its district-wide board as early as 1822). TOBEY, *supra* note 28, at 11.

44. *See, e.g.*, Deborah Jones Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986); Wendy Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

45. *See, e.g.*, City of Little Rock v. Smith, 163 S.W.2d 705, 707-08 (Ark. 1942) ("[p]rivate rights . . . must yield in the interest of the public security, [venereal disease] affects the public health so intimately and so insidiously, that consideration of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril."). In some cases, judicial deference was absolute as courts suggested that police power regulation was immune from constitutional review, 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." *See* Arizona v. Southern Pacific Co., 145 P.2d 530 (1943), *quoting* State ex rel. McBride v. Superior Court, 174 P. 973, 976 (1918)); *see also* Lawrence O. Gostin, *The Americans With Disabilities Act and the Corpus of Anti-Discrimination Law: A Force for Change in the Future of Public Health Regulation*, 3 HEALTH MATRIX 89, 91 (1993) ("The early courts were highly deferential to state public health regulation under the police powers. To some courts, the Constitution had 'no application to this class of case,'" *citing* In re Caselli, 204 P. 364, 364 (1922)).

46. 39 AM. JUR. 2D *Health* § 22 (1968) (citations omitted).

47. *See* Lawton v. Steele, 152 U.S. 133 (1894); Jew Ho v. Williamson, 103 F. 10 (C.C.N.D. Cal. 1900).

sity,[48] the exercise of such powers outside this standard was occasionally subject to strict judicial review.[49] Many courts required medical proof that individuals subjected to compulsory public health powers actually were infectious when control measures were imposed.[50] In *Jew Ho v. Williamson*,[51] a federal court in 1900 voided a quarantine measure to control bubonic plague among Chinese immigrants, finding that the action, which actually posed a danger to the health of the community,[52] was passed as a guise for discrimination against the Chinese community.[53]

The scope of public health powers was further clarified in *Jacobson v. Massachusetts*[54] in 1905. Although the Supreme Court rejected a constitutional challenge against a Massachusetts vaccination law on the grounds

48. *See, e.g.*, Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (stating that the right of a state to protect the public health can arise only from a vital necessity, and cannot be carried beyond the scope of that necessity).

49. Where doubt was raised as to the actual purpose of the exercise of compulsory public health powers, courts delved into legislative directives and history to interpret the true intent of specific regulations.

50. *See, e.g.*, *Ex parte* Martin, 188 P.2d 287 (Cal. App. 1948) (public health officials must have "probable cause" to quarantine pending an opportunity for further investigation or examination); *Ex parte* Shepard, 195 P. 1077 (Cal. App. 1921) (court specifically rejected proposition that mere suspicion is sufficient to uphold a quarantine order); *Ex parte* Arata, 198 P. 814 (Cal. App. 1921) (court required that reasonable ground must exist to support the claim that the person is afflicted with venereal disease); *Ex parte* Dillon, 186 P. 170 (Cal. App. 1919) (marital status cannot constitute "reasonable cause" for suspicion of venereal disease); People v. Tait, 103 N.E. 750 (Ill. 1913) (family member not residing in household affected by scarlet fever should not be quarantined). As one court in New York held in 1896: "[t]he mere possibility that persons might have been exposed to such disease [smallpox] is not sufficient [to impose control measures] . . . they must 'have been exposed to it, and that the conditions actually exist for a communication of the contagion.'" Smith v. Emery, 42 N.Y.S. 258, 260 (citing *In re Smith*, 40 N.E. 497, 498-99 (N.Y. Ct. App. 1895). The *Emery* court went on to insist that these issues are to be determined by "medical science and skill," not "common knowledge." *Id.* at 260.

51. 103 F. 10 (C.C.N.D. Cal. 1900).

52. *Id.* at 22 ("It must necessarily follow that, if a large territory is quarantined, intercommunications of the people within that territory will rather tend to spread the disease than to restrict it.").

53. *Id.* at 24.

54. 197 U.S. 11 (1905). The case concerned the validity of a Massachusetts state law requiring local boards of health to vaccinate citizens when necessary in the interests of public health or safety. Such vaccinations were to be provided without charge, although anyone who refused to comply could be fined. *Id.* at 12. Pursuant to this state law, the Board of Health of the City of Cambridge adopted a regulation requiring the smallpox vaccination or re-vaccination of all city residents. *Id.* Jacobson, unwilling to be vaccinated or pay a fine, was brought to court by the State on criminal charges of refusing or neglecting to comply with the regulation. *Id.* at 13. His essential argument was that the vaccination requirement invaded his right to liberty under the federal Constitution in so much as it constituted an "assault upon his person." *Id.* at 26.

that it infringed individual liberties in violation of the Due Process Clause, it simultaneously limited state police powers exercised in the interest of public health. The Court affirmed that police powers were not absolute and could not be exercised to regulate public health matters outside a state's territory or in contravention of the federal Constitution.[55] Nor does police power authority extend to the enactment of blanket provisions restricting personal freedoms in the name of public health. Rather, public health laws must have some "real or substantial relation to the protection of the public health and the public safety."[56]

Jacobson remains a forceful statement of the constitutional limits of the exercise of police powers in the interest of public health.[57] Although the Court's "arbitrary, oppressive, and unreasonable"[58] standard of review is deferential to state public health regulations, regulatory measures that are wholly irrational, indiscriminate, or enacted in bad faith are unconstitutional.[59] As the principles of *Jacobson* were enforced more regularly by

55. *See id.* at 25. In rejecting Jacobson's argument, the court relied upon the authority of states to enact mandatory vaccination statutes under the police powers. A state's police powers authorize it to enact "all laws that relate to matters *completely within its territory* and which do not by their necessary operation affect the people of other States." *Id.* (emphasis added). This includes, of course, "health laws of every description." *Id.*

56. *See id.* at 31. In upholding the statutory exercise of power in *Jacobson*, the Court deferred to the judgment and testimony of state and local board of health officials, as well as the commonly-held medical position of the time, that smallpox vaccinations were instrumental in limiting the spread and impact of the disease. *Id.* at 34-35. Yet, public health measures, such as mandatory vaccination laws, cannot be administered against anyone who "with reasonable certainty" can show he is not a "fit subject of vaccination," *id.* at 39, or would suffer a serious impairment to his health as a result of vaccination, or that such would likely cause his death. *Id.*

57. *See* Gostin, *supra* note 45, at 92 ("modern constitutional review is remarkably similar in approach to *Jacobson*").

58. *Jacobson*, 197 U.S. at 28, 38.

59. In spite of the Court's admonitions, some state courts continued their practice of almost blind deference to the exercise of police powers by health boards. In a 1913 case, *State v. Rackowski*, 86 A. 606 (Conn. 1913), the Connecticut Supreme Court did not require any more than "common knowledge" evidence in deciding whether or not a person had scarlet fever for the purpose of imposing public health measures. *Id.* at 608. In *Kirk v. Wyman*, 65 S.E. 387 (S.C. 1909), an elderly woman with anaesthetic leprosy was isolated even though there was "hardly any danger of contagion." *Id.* She had lived in the community for many years, attended church services, taught in school, and mingled in social life without ever communicating the disease. The South Carolina Supreme Court thought it "manifest that the board [was] well within [its] duty in requiring the victim of it to be isolated [when the] distressing nature of the malady is regarded." *Id.* The only consolation offered by the court was that the victim's isolation must wait for the completion of a "comfortable cottage" outside the city limits, rather than the shotgun pesthouse within a hundred yards of the city's trash dump, which the health board proposed as an adequate place for Mrs. Kirk. *Id.* at 391. *See also* Gostin, *supra* note 45, at 91 ("Even as late as 1966, a

state and federal courts, public health measures were subjected to increased scrutiny to eliminate perceived abuses on individual rights through the exercise of state police powers.

IV. NATIONALIZING PUBLIC HEALTH OBJECTIVES THROUGH THE FEDERAL GOVERNMENT

That police powers exercised in the interests of public health were no longer considered absolute, but, rather, were subject to increasing restraints in the interests of protecting individual federal constitutional rights, represents a transition from state to federal influence in public health law. Coextensive with this judicial influence, the federal executive branch commenced a systematic campaign during the New Deal to regulate public health through a drastic shift in governmental power.[60]

Prior to the New Deal era, the federal government's role in the field of public health was limited to the provision of health services to the military[61] and the passage of legislation with limited relation to core public health objectives.[62] The Federal Maternity and Infancy Act[63] was the

court held that 'drastic measures for the elimination of disease are not affected by constitutional provisions, either of the state or national government.'" (citations omitted)).

60. In practice, however, the history of American government has seen the gradual centralization and consolidation of governmental power into the national realm, contrary to the vision of the Union's founders. ROETTINGER, *supra* note 12, at 12. "Despite the preeminence of the States in matters of public health and safety, in recent decades the Federal Government has played an increasingly significant role in the protection of the health of our people." Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240, 2246 (1996). There are many factors which have contributed to this long-term development, including varying patterns of economic growth, shifts in population to urban areas, societal changes, and, of course, the Civil War and the Fourteenth Amendment. ROETTINGER, *supra* note 12, at 14. However, the historical backdrop for the major centralization of American government lies in the policies and practices of the federal government during the New Deal (1933-1946). *See generally*, Lesser, *supra* note 6, at 6.

61. Early federal involvement in public health began with the establishment of the Marine Hospital Service to care for merchant seamen who had no local citizenship and thus could not rely on state health services. A national board of health, adopted in 1879 to take over the responsibilities of the Marine Hospital Service, was opposed by the states and the Service alike, and was promptly disassembled in 1883. INSTITUTE OF MEDICINE, *supra* note 2, at 62. Four years later, however, the National Hygienic Laboratory was established in the Marine Hospital in Staten Island, New York. *Id.* at 66-67. Later, in 1930, the Laboratory would relocate in Washington, D.C. under its new name, the National Institute of Health. By 1912, the Marine Hospital Service was renamed the United States Public Health Service, although its services to the public remained modest in their extent. *Id.* at 68.

62. In 1906, Congress passed what has been called "its first significant legislation in the field of public health," the Food and Drug Act, in its national effort to regulate the manufacture, labeling, and sale of food. *See* Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct.

first federal law to provide direct federal funding for personal health services for mothers and children.[64] The receipt of federal funds was conditioned on the states' development of an obstetrics plan for the care and treatment of expectant mothers to be administered by a state agency. The ability of Congress to condition the state's receipt of federal funds upon compliance with federal guidelines, standards, or requirements would become one of many factors leading to increased national involvement in public health regulation.

During the great legislation rush of the New Deal,[65] President Franklin Delano Roosevelt ("FDR") relied on enhanced interpretations of the Spending Power to condition the states' receipt of federal funds on the performance of federal objectives. The President also argued that the Necessary and Proper Clause authorized Congress to spend money in aid of the general welfare. In addition, FDR sought to expand the Commerce Clause to provide Congress the broad power to legislate in the interest of interstate commerce in areas traditionally under state and local control. The culmination of these political and legislative acts threatened traditional federalism, which reserved much of the legislative subject-matter to the control of the states.

Although initially interpreting federalism conservatively in favor of the states,[66] the Supreme Court succumbed to political pressure in 1937,[67]

2240, 2246 (1996). The Chamberlain-Kahn Act of 1914 established the U.S. Interdepartmental Social Hygiene Board, which set forth a comprehensive venereal disease control program for the military, but also provided funds to the states for the quarantine of infected civilians. INSTITUTE OF MEDICINE, *supra* note 2, at 67. The Department of Labor housed the Children's Bureau, which investigated the causes of infant mortality and issues of child hygiene, and the Women's Bureau which concerned itself with the health and welfare of women in industry. TOBEY, *supra* note 28, at 26-27.

63. TOBEY, *supra* note 28, at 27 (also known as the Sheppard-Towner Act of 1922).

64. INSTITUTE OF MEDICINE, *supra* note 2, at 67. The Children's Bureau was charged with administering the Act creating the Federal Board of Maternity and Infant Hygiene, and providing funds to states to initiate programs in maternal and child health.

65. Lesser, *supra* note 6, at 7 (FDR began his presidency with the passage of fifteen separate national acts in Congress within his first hundred days in office).

66. The Court invalidated numerous pieces of New Deal legislation on the grounds that the federal Commerce power did not reach the specified local activities of the legislation under the principles of federalism. Lesser, *supra* note 8, at 7. As the Court stated in *United States v. Butler*, 297 U.S. 1 (1936), which invalidated the Agricultural Adjustment Act of 1933, the expansion of the Commerce power in the federal government might obliterate "the independence of the individual states . . . and [convert] the United States . . . into a central government exercising uncontrolled police power in every state of the Union, superseding all local control or regulation of the affairs or concerns of the states." *Id.* at 77.

67. FDR, unwilling to accept the Court's hard-lined, federalist approach, threatened it with his "court-packing" plan. He proposed that the President would be able to appoint

issuing a series of decisions leading to federal centralization under the Commerce and Spending powers.[68] These decisions collectively upheld: (1) the use of federal tax and spending powers solely for matters related to the general welfare; (2) the conditioning of federal grants to the states on their acceptance of congressionally mandated requirements; and, (3) the constitutionality of both practices despite the Tenth Amendment.[69] In 1941, the Court's decision in *United States v. Darby*,[70] upholding the Fair Labor Standards Act of 1938, clarified that Congress' commerce power was not limited by the states' police power. In so much as the Tenth Amendment "states but a truism that all is retained which has not been surrendered,"[71] the Court held that congressional exercises of commerce power may be "attended by the same incidents which attend the exercise of the police power of the states."[72] *Darby* dispelled all rumors that traditional federalism was simply on the decline; rather, it appeared federalism was gasping its last breath.[73]

The reinterpreted Commerce Clause, together with other broad federal powers, effectively gave the federal government national police powers.[74] Over the next few decades, Congress would use its reinterpreted powers to introduce national policies and objectives into many areas previously reserved for the states, including public health, with general acquiescence

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one new Supreme Court Justice, up to a maximum of six, for every Justice who, having reached age seventy and having served for ten years, failed to retire. The plan was immediately challenged on constitutional grounds, but ultimately was not acted upon by Congress. Lesser, *supra* note 6, at 7.

68. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act, which guaranteed the right of collective bargaining for labor forces); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (upholding employer's tax to fund unemployment compensation under the Social Security Act of 1935); Helvering v. Davis, 301 U.S. 619 (1937) (upholding tax to fund old-age benefits under the Social Security Act of 1935); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) (upholding the validity of various provisions of the Alabama Unemployment Compensation Law).

69. Lesser, *supra* note 6, at 8.

70. 312 U.S. 100 (1941), *overruling* Hammer v. Dagenhart, 247 U.S. 251 (1918).

71. *Darby*, 312 U.S. at 124.

72. *Id.* at 114.

73. *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 23 (1950). As one author stated, "legal federalism," conceived, debated, and drafted into our constitutional framework to act as a true barrier between state and federal governmental power, "is dead." Lesser, *supra* note 6, at 11, *citing* Richard B. Cappalli, *Restoring Federalism Values in the Federal Grant System*, 19 URB. LAW. 499 (1987). What remained was a sort of "political federalism," used in token fashion to argue for or against the continued federal intrusion of states' traditional powers. Lesser, *supra* note 6, at 11-12, *citing* Cappalli at 506.

74. Lesser, *supra* note 6, at 9.

by the courts.[75] "Federal programs in disease control, research, and epidemiology expanded throughout the mid-twentieth century,"[76] as did federal social reform and welfare programs.[77] Activities of state and local public health authorities increasingly were influenced or overtaken by federal programs, grants, initiatives, or laws. Modern federal regulations concern broad areas of public health such as air and water quality,[78] food and drug safety,[79] tobacco advertising,[80] pesticide production and sales, consumer product safety, occupational health and safety, and medical

75. *Id.* at 10-11.

76. The National Institute of Health ("NIH") significantly expanded its research mission to include the study and investigation of all diseases. In 1937, the National Cancer Institute became the first of many institutes within NIH to concentrate its efforts on a particular disease or condition. INSTITUTE OF MEDICINE, *supra* note 2, at 68. Other institutes within the NIH include, among others, the Institute for Neurological and Communicative Disorders and Stroke, the Institute for Child Health and Human Development, the Institute for Environmental Health Sciences, and the Institute of Mental Health. *Id.* In 1938, Congress passed a venereal disease control act, in addition to the Chamberlain-Kahn Act of 1914. This second act provided federal funds to the states for investigation and control of venereal diseases. The Federal Security Agency was established in 1939 and within it the Public Health Service and national programs in education and welfare were created. The National Mental Health Act of 1946 established the National Institute of Mental Health as part of the NIH which was instrumental in financing training programs for mental health professionals and the development of local community health services. *Id.* Two decades later, the Partnership in Health Act of 1966 provided federal funding of state and local activities concerning public health as an incentive for the further development of such services at the subnational level. *Id.* at 68-69. The Comprehensive Health Planning Act of 1967 allowed federal funding of neighborhood or community health centers, which although governed by local boards, relied on the federal government for policy and program direction.

77. The Social Security Act of 1935 included within its many titles a federal grant-in-aid program to encourage states to establish and maintain public health services and train public health personnel. "Supporters of the [Social Security Act said] that its operation [was] not a constraint [on state's rights], but the creation of a larger freedom, the states and the nation joining in a co-operative endeavor to avert a common evil." Steward Machine Co. v. Davis, 301 U.S. 548, 587 (1938) (upholding the Social Security Act). Subsequent titles (Titles 18 and 19, respectively) to the Social Security Act in 1966 established the Medicare and Medicaid programs providing federal payments for health services to the elderly and joint federal-state payments for health services to the poor. INSTITUTE OF MEDICINE, *supra* note 2, at 68.

78. *See, e.g.*, Acorn v. Edwards, 81 F.3d 1387, 1388 (5th Cir. 1996) (explaining the purpose of the Lead Contamination Control Act of 1988, which amended the Safe Drinking Water Act, to regulate levels of lead in supplies of drinking water).

79. *See* Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240, 2245-46 (1996) (detailing the history and purposes of the Food and Drug Act of 1906).

80. *See* Cippolone v. Liggett Group, Inc., 505 U.S. 504, 513-16 (1992) (outlining the history of federal legislation regulating the advertising of tobacco products and health warning requirements).

care.[81] As the Institute of Medicine has recently summarized, the federal government:

> surveys the population's health status and health needs, sets policies and standards, passes laws and regulations, supports biomedical and health services research, helps finance and sometimes delivers personal health services, provides technical assistance and resources to state and local health systems, provides protection against international health threats, and supports international efforts toward global health.[82]

The expansion of national powers into the field of public health prompted changes in public health objectives and a fundamental restructuring of public health philosophy.[83] Public health goals were centralized and reformed to utilize the new national government powers ushered in during the New Deal. Merely controlling the effects of public health problems became inadequate. National powers allowed for the broad regulation of

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81. The Clinton Administration has identified several areas within the field of public health where national oversight is recommended, including infectious diseases, chronic and environmentally-related diseases, violence and injury control, comprehensive school health, maternal and child health, public health surveillance, epidemiologic services, and information networks. THE WHITE HOUSE DOM. POL'Y COUNCIL, THE PRESIDENT'S HEALTH SECURITY PLAN: THE CLINTON BLUEPRINT 165-69 (1993).

82. INSTITUTE OF MEDICINE, *supra* note 2, at 165. The U.S. Public Health Service, now a part of the Department of Health and Human Services, is the federal unit with primary responsibility for national public health. Its organization includes the Centers for Disease Control ("CDC"); NIH; the Food and Drug Administration ("FDA"); the Health Resources and Services Administration; the Alcohol, Drug Abuse, and Mental Health Administration; and the Agency for Toxic Substances and Disease Registry. The Public Health Service is not the only federal agency concerned with public health on a national scale. According to the Institute of Medicine, other federal agencies or department divisions handle health-related problems of a specific nature or population. Such include the medical divisions of the armed forces, the Veteran's Administration, the Bureau of Indian Affairs, the Agricultural Extension Service, the Department of Education, the Occupational Health and Safety Administration, the Federal Trade Commission, the Bureau of Labor Standards, the Bureau of Mines, the Maritime Commission, multiple bureaus within the Department of Agriculture, and the Bureau of Employee's Compensation. In addition, the Environmental Protection Agency provides invaluable assistance in public health concerns such as water and air pollution, hazardous waste cleanup, pesticide control, and radiation protection. *Id.* at 192. The Health Care Financing Administration, also part of the Department of Health and Human Services, operates the Medicare and Medicaid programs. *Id.* at 166-67.

83. The "new paradigms" of public health law presuppose a national public health system working within an international penumbra. They include: (1) the focus on scientifically objective assessments of significant risk rather than remote or speculative risks; (2) ecologic understandings of injury and disease rather than discrete causes; and, (3) a synergistic relationship between public health and human rights. *See* Gostin, *supra* note 22, at 210.

the very conditions that led to such problems. Public health strategy shifted from preventing and treating localized public health dilemmas to controlling the conditions in which such effects arose.

Regardless of the attributes of the centralization of public health efforts,[84] it is an important observation of the New Deal era that the dissimilation of traditional federalism has led to the creation of our existing national public health agenda.

V. New Federalism and the Future of Public Health Law

A. *Modern Interpretation of Federalism*

The reconception of public health from a purely local to a national concern occurred simultaneously with an interpretive change in federalism. Although designed to uphold states' powers against federal intrusion, federalism was reduced to a mere political theory of American government during the New Deal. As a result, our modern public health system is driven by national priorities in the pursuit of national goals.[85] While the existing allocation of powers between federal and state governments seems well-suited to accomplish national public health objectives, this allocation is once again the subject of legal and political debate.

A revitalized interest in traditional federalism has flooded political and judicial circles. What has been coined "new federalism"[86] is a principle of political change spurred by mini-revolutions among the states and enveloped in the idea that the existing powers of the federal government should be limited.[87] While new federalism is partially the result of in-

84. There are many attributes of a nationalized public health system, including the deemphasis on the varied and confusing web of state public health laws which had developed over decades of exclusive state control over the field. *See* Lawrence O. Gostin, et al., *Reforming Public Health Law*, __ Milbank Q. ___ (1996).

85. Grad, *supra* note 4, at 14 ("Through . . . categorical grant-in-aid programs, the federal government influences the manner in which public health is administered and the methods of service delivery. The taxing and spending power clearly has as much impact on public health as does the more direct exercise of power under the interstate commerce clause.").

86. The term "new federalism" may have been used first by Donald E. Wilkes, Jr. in his article, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974).

87. Richard C. Reuben, *The New Federalism*, A.B.A. J., Apr. 1995, at 76-77. Whether the concept is a necessarily recent development is itself a point of debate. In 1957, Ruthe Locke Roettinger noted in her book The Supreme Court and State Police Power: A Study in Federalism that "[t]he states were never more loved than they are today. There is much talk about bringing government back home from Washington. The states hold the answers to many of our problems, it is said." Roettinger, *supra* note 12, at 1.

creased state efforts to obtain greater autonomy from federal political processes on Capitol Hill,[88] the Supreme Court, as in the past, represents the bastion of change in modern legal thought on the principle.

A landmark case in support of the traditional powers of states, decided in 1976, was *National League of Cities v. Usery*.[89] Justice Rehnquist, writing for a 6-3 majority of the Court, held that Congress lacked the jurisdictional power under the Commerce Clause to regulate the wages and hours of state public employees engaged in "integral operations in areas of traditional governmental functions."[90] Among the many functions considered to be under the jurisdiction of traditional state police powers were matters concerning public health.[91] Although later overruled,[92] *National League* breathed life into the principle of federalism as a limit on federal power.[93]

Other authors have equated new federalism with the legal movement among state courts of the importance of state law and the independent interpretations of state constitutional law that distinguish state rights from those at the federal level. *See* Lisa D. Munyon, *It's A Sorry Frog Who Won't Holler in his Own Pond: The Louisiana Supreme Court's Response to the Challenges of New Federalism*, 42 LOY. L. REV. 313 (1996).

88. *See* John K. Iglehart, *Health Policy Report: Politics and Public Health*, 334 NEW ENG. J. MED. 203 (1996) ("The rush to shrink the federal government and reduce its costs, propelled by the Republican-controlled Congress with the reluctant acquiescence of the Clinton administration, has begun to change the Public Health Service and other federal health agencies in important ways.").

89. 426 U.S. 833 (1976) (In 1974 Congress amended the Fair Labor Standards Act to include virtually all employees of state and local governments under the coverage of the act. Municipal and state governments challenged the amendment of the Act as an unconstitutional intrusion upon the traditional functions of state and local governments). *Id.* at 836-37.

90. *Id.* at 852; *see also* Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (holding that the Tenth Amendment restricts Congress from exercising power so as to impair the states' integrity or their ability to function in a federal system).

91. *National League*, 426 U.S. at 851.

> These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which States have traditionally afforded their citizens.

Id.

92. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

93. With the promotion of Justice Rehnquist, a staunch supporter of state sovereignty, to Chief Justice in 1986 and the addition of federalist Justice Sandra Day O'Connor, the Supreme Court has built upon the foundation it first laid in *National League*. Joan Biskupic, *Justices Shift Federal-State Power Balance*, WASH. POST, Mar. 29, 1996, at A1 ("Rehnquist has made it his mission to protect states' rights since he joined the Court in 1971 . . ."); Reuben, *supra* note 87, at 78-79. This is not to say that the Court's federalism jurisprudence since National League has been consistent. As the Court acknowledged in

In 1991, the Court upheld a state constitutional provision requiring the mandatory retirement of state judges against a challenge based on an apparent conflict with the federal Age Discrimination in Employment Act of 1967 ("ADEA").[94] In *Gregory v. Ashcroft*,[95] the Court, per Justice O' Connor, held that the state constitutional provision was preempted by the ADEA because appointed state judges were not covered under the Act[96] despite statutory language suggesting otherwise.[97] Federalism was the imprimatur for the *Gregory* decision.[98] As the Court stated, federalism demands that certain matters are "decision[s] of the most fundamental sort for a sovereign entity,"[99] including "the power to prescribe the qualifications of [its] own officers."[100] To allow Congress to interfere unequivocally with this right would "upset the usual constitutional balance of federal and state powers."[101] To this end, Congress must "make its inten-

New York v. United States, 505 U.S. 144, 160 (1992), "[t]he Court's jurisprudence in this area has traveled an unsteady path."

94. Gregory v. Ashcroft, 501 U.S. 452, 454 (1991). Article V, section 26 of the Missouri Constitution required most state judges to retire at the age of seventy, including those appointed by the governor. Several state judges subject to the mandatory retirement provision challenged the law as violative of the Federal Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34 (1996), which makes it unlawful for employers, including states and their political subdivisions, to discharge any individual who is at least forty years old because of such individual's age. 29 U.S.C. §§ 623(a), 631(a), 630(b)(2) (1996). Accordingly, the judges argued, the state constitutional provision was preempted by the ADEA, and thus was invalid. *Gregory*, 501 U.S. at 456.

95. 501 U.S. 452 (1991).

96. *Gregory*, 501 U.S. at 467. The Court determined that appointed state judges were not considered "employees" under the ADEA, relying on the ADEA's coverage exception for any state employee who qualified as "an appointee on the policymaking level . . . ." *Id.* at 465, *citing* 29 U.S.C. Sec. 630(b)(2) (1996). Appointed state judges are exempted from the Act, said the Court, not because they are necessarily defined as appointees on the "policymaking level," but rather because the quoted phrase is "sufficiently broad that [the Court] cannot conclude that the [ADEA] plainly covers appointed state judges." *Gregory*, 501 U.S. at 467. In other words, the Court was unwilling to interpret the ADEA to cover appointed state judges unless Congress made it explicitly clear that judges are included. *Id.*

97. *See* Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir.), cert. granted, 117 S.Ct. 293, rev'd ___ U.S. ___, 117 S.Ct. 2157 (1997) ("the Court in *Gregory* refused to construe a congressional act to reach state governmental functions in the absence of a clear statement from Congress that it intended to do so.").

98. Recounting the historical development of the United States as a nation of united sovereign states, *Gregory*, 501 U.S. at 457-60, Justice O' Connor analogized federalism as a constitutional concept of governmental design requiring a proper balance of power between the federal and state governments. For federalism to thrive, the powers of governments must be mutually restraining. Yet, stated the Court, "[the] twin powers [of government] will act as mutual restraints only if both are credible." *Id.* at 459.

99. *Id.* at 460.

100. *Id.* at 460, *citing* Taylor v. Beckham, 178 U.S. 548, 570-71 (1900).

101. *Gregory*, 501 U.S. at 460.

tion unmistakably clear in the language of the statute,"[102] that state law is preempted where such may alter the balance of federalism.[103]

While the "plain statement rule" of federal preemption had been adjudicated many times prior[104] (and many times since[105]), *Gregory* crafted the role which federalism plays in determining the extent of federal supremacy. Without limiting congressional jurisdiction, the Court conditioned the exercise of federal power which infringed traditional state interests on the political process. If traditional state interests are to be preempted, it must be the result of the legislative process, which itself features numerous protections to prevent the infringement of powers between levels of government. As a corollary, the states' ability to legislate in areas fundamentally related to their sovereign interests without congressional interference is strengthened.

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102. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

103. *Gregory*, 501 U.S. at 462.

104. *See, e.g.*, Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 99 (1984); United States v. Bass, 404 U.S. 336, 349 (1971); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

105. *See* Cipplone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). This case concerns whether state tort and contract claims for personal damages resulting from a person's smoking-related injuries and death were preempted by the Federal Cigarette Labeling and Advertising Act, as amended by the Public Health Cigarette Smoking Act of 1969. Liggett argued that the petitioner's state claims were preempted by federal statutes requiring manufacturers to post health warnings on each cigarette package sold. The federal statutes' contained preemption clauses with the general intent of prohibiting states from imposing further requirements concerning cigarette advertising on manufacturers. The Court held that two of the six state law claims were preempted. It presumed that "the historic police powers of the States [are] not to be superseded unless that [is] the clear and manifest purpose of Congress." *Id.* at 2617 quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). This case concerns the effectiveness of the state law imposition of a surcharge on employee benefit plans under the Employment Retirement Income Security Act of 1974 (ERISA) in light of ERISA's provision that it "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan." *Id.* at 1675. In reversing the lower courts, the Supreme Court stated "in cases like this one, where federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 1676. (citations omitted). To stretch the "relate to" language of ERISA's preemption clause to its furthest point would seriously conflict with the Court's presumption against federal preemption. *Id.* at 1677; Medtronic, Inc. v. Lohr, ___ U.S. ___, 116. S. Ct. 2240 (1996). This case concerns whether the Medical Device Amendments of 1976 ("MDA"), which provided for pre-market approval of medical devices by the Food and Drug Administration, precluded product liability claims under state common law for damages resulting from defective medical products. The Court held that state product liability claims may be brought despite the general proscription of the MDA. *Id.* at 2245.

The Court's subsequent decision in *New York v. United States*[106] emphasized the principle of federalism in the public health context of a federal regulatory program designed to encourage states to take responsibility for the disposal of low-level radioactive wastes. Whereas *Gregory* concerned the authority of Congress to preempt state law, *New York* concerned the circumstances in which Congress may use states as "implements of regulation."[107] Without challenging the authority of Congress to legislate in the field, the petitioners contended that the chosen method of federal regulation violated the Tenth Amendment by directing states how they, as sovereigns, should legislate in the field.[108] Striking down a part of federal legislation requiring states to regulate consistent with federal directives or be forced to "take title" to environmentally damaged land,[109] the Court held that Congress may not "commandee[r] the legislative processes of States by directly compelling them to enact

106. 505 U.S. 144 (1992).

107. *Id.* at 153. Petitioners, New York state and two of its counties, challenged several provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("the Act"). Pub. L. 96-573, 94 Stat. 3347. The Act set forth several federal incentives to states in an attempt to require them to provide for the proper disposal of radioactive wastes generated within their borders. *Id.* Among these incentives were (1) various monetary rewards to states which achieved a series of waste site developments and (2) restricted access provisions that would eventually allow states in compliance with the Act to turn away radioactive wastes from non-complying states. *New York*, 505 U.S. at 153. "Take title" provisions required states that failed to provide in a timely manner for the disposal of radioactive wastes within their borders to take title to and possession of the wastes upon the request of the waste's generator or owner. A state's failure to take title and possession of such wastes would subject it to the liability of the waste generator or owner for all damages suffered therein. *Id.* Petitioners did not dispute that Congress had the power to legislate in the field of radioactive waste disposal. *Id.*

108. *Id.* at 159-60. This distinction is important to the outcome of the case, for the Court believed that Congress could have simply preempted the field of radioactive waste disposal under the Supremacy Clause to avoid a Tenth Amendment challenge. *Id.* at 160.

109. The Court found no constitutional problem with the first or second set of incentives discussed, *supra* note 107. Both of these incentives were supported by affirmative grants of the Spending and Commerce Clause powers to Congress, and thus were consistent with the Tenth Amendment. *New York*, 505 U.S. at 171-74. However, the third set of alleged incentives, which would require non-complying states to take title and possession of in-state radioactive wastes (or suffer the liability resulting therefrom), were found to be beyond the authority of Congress. *Id.* at 174-75. This third provision gave states two choices: (1) legislate in the manner in which the federal government has demanded; or, (2) be held liable to the citizens of your state who are responsible for the resulting damages. Neither choice is constitutional since either alternative presented to the states would effectively "'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Id.* at 175.

and enforce a federal regulatory program."[110] While Congress can encourage state regulation or offer incentives to influence policy choices made by states,[111] it cannot mandate state regulation.[112] States retain the power to comply or not comply with the federal agenda in their discretion.[113] The Court concluded that while federal enumerated powers are subject to expansion under the broad nature of constitutional language,[114] such expansion does not uproot the federalist structure underlying the division of authority.[115]

New York is particularly compelling in the field of public health law because of instances, as with the disposal of radioactive waste, where uni-

110. *Id.* at 161 (relying on the legal principle elucidated in Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981)). The Constitution does not allow Congress to instruct states how to legislate since its authority is based on the power to regulate individuals, not states. *New York*, 505 U.S. at 167.

111. "[It] may attach conditions on the receipt of federal funds," *Id.* (*citing* South Dakota v. Dole, 483 U.S. 203, 206 (1987)), under the Spending Power, provided the conditions bear some relationship to the purpose of federal spending. It also can offer states a choice pursuant to the Commerce Clause between regulating activity according to federal standards, or having state law preempted by federal regulation in the spirit of "cooperative federalism." *New York*, 505 U.S. at 167, *citing* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1981); *see also* FERC v. Mississippi, 456 U.S. 742, 764-65 (1982).

112. The Federal Government may not compel the states to enact or administer a federal regulatory program. *New York*, 505 U.S. at 180.

113. *See* Jesse H. Choper, *Commentary: Federalism and Judicial Update*, 21 HASTINGS CONST. L.Q. 577, 583-84 (1994) for an additional discussion of the Court's holding in *New York*.

114. *New York*, 505 U.S. at 156-57.

115. *Id.* at 159 ("The actual scope of the Federal Government's authority with respect to the States has changed over the years . . . but the constitutional structure underlying and limiting that authority has not."). Justice O' Connor, for the majority, examined the authority of Congress under the Constitution in two ways:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment.

Id. at 155 (citations omitted). "[I]n a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other." *Id.*; *cf.* Martin H. Redish, *Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 594 (1994) (Justice O'Connor's premise is "totally false; significant practical consequences flow from a reviewing court's choices between these two interpretive methodologies."). Justice O' Connor further states: "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York*, 505 U.S. at 156 (citations omitted).

form response can be critical to the containment of a national public health problem. In a public health system driven by national objectives, congressional legislation compelling state regulation and enforcement may be the most expeditious manner of accomplishing such uniformity. Since such national legislation is constitutionally suspect under the Tenth Amendment, however, Congress must legislate carefully to avoid the appearance of requiring states to regulate on behalf of the federal government. Regardless of legitimate congressional ends, federalism requirements concerning the legislative process are an inherent part of the political process,[116] which cannot be undermined even to accomplish urgent national public health goals.

In *United States v. Lopez*,[117] the Court applied new federalism in an-

116. Justice O'Connor further elaborated this point in *New York*. Where Congress attempts to compel state compliance with federal objectives, the damage inflicted upon state sovereignty is reflected in the diminished voter accountability at both levels of government. If, for example, a state's citizenry believes it to be in the interests of the state to avoid federal compliance in a given field, it may elect state representatives that will act upon their beliefs by rejecting such compliance. In such a case, Congress may choose to preempt state regulation in the field whereby members of Congress from said state will suffer the consequences should preemption prove unwise. However, where the federal government directs states to legislate in an unwise manner, the state representatives will directly face the political consequences of their actions, not the members of Congress per se. As Justice O' Connor summarizes, "[a]ccountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169. The role of individual voters, to which the government owes its existence, is thwarted and diminished. This result is an abuse of government that federalism was designed to avoid by requiring mandatory legislative safeguards inherent in the political process against federal intrusions upon the states' traditional powers.

See also United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring). Justice Kennedy, in a thoughtful concurring opinion joined by Justice O' Connor, provided insight into Justice O' Connor's theory of political accountability as an underpinning of federalism. Justice Kennedy acknowledged the double security of the rights of the people inherent in a governmental system where different governments control each other as well as themselves. Of course, the people control both governments. The ultimate benefit to the citizenry of federalism is the enhanced liberty accorded in two governments versus one. From this structure arises "two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Id.* at 576. To allow one government to overtake the other would blur "the boundaries between the spheres of federal and state authority. . . . [P]olitical responsibility would become illusory." *Id.*

117. 514 U.S. 549 (1995). The case involved a challenge to a provision of the Gun-Free School Zones Act of 1990 (Gun-Free Act), 18 U.S.C. § 922(q)(1)(a) (1996), which made it a federal criminal offense for "any individual knowingly to possess a firearm at any place [the individual] knows . . . is a school zone." *Lopez*, 514 U.S. at 551. Congress relied upon its commerce power in legislating the offense. Alfonso Lopez, Jr., a minor at a San Antonio, Texas, public high school, was charged with violating the Gun-Free Act after he

other field of national public health concern, gun control among minors.[118] Affirming the decision of the Fifth Circuit Court of Appeals[119] that a minor could not be federally convicted for gun possession in school in violation of the Gun-Free School Zones Act of 1990,[120] the United States Supreme Court questioned the power of Congress to criminalize the mere possession of a gun on the basis that such conduct substantially affected interstate commerce under the Commerce Clause.[121] Unswayed by government theories supporting congressional jurisdiction to proscribe such crimes,[122] the Court stated: "[I]f we were to accept the Govern-

admitted carrying a .38 caliber handgun and five bullets to school on the day he was arrested. Lopez originally was charged with a violation of a Texas state law, Tex. Penal Code Ann. § 46.03(a)(1) (Supp. 1994), prohibiting similar conduct. The state charges were dropped when federal authorities charged the minor under the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1988 Supp V.). *Lopez*, 514 U.S. at 551. Lopez moved to dismiss the federal indictment on the ground that the underlying offense represented an unconstitutional attempt by Congress to legislate control over state public schools. *Id.* The federal district court rejected Lopez's motion and tried and found him guilty on the offense charged. *Id.*

118. *See* CHRISTOFFEL & TERET, *supra* note 26, at 202-03 ("Firearm injuries have been a particular problem in the United States for centuries, so laws to control firearms are not new. . . . Gun control has traditionally been a state and local concern."). However, the Court in *Lopez* analyzed Congress' jurisdiction to enact the Gun-Free School Zones Act exclusively under the assumption that the Act was a criminal law (which, like public health, is a matter primarily under the jurisdiction of states pursuant to their police powers). *Lopez*, 514 U.S. at 561.

119. Lopez v. United States, 2 F.3d 1342, 1367-68 (1993).

120. *Lopez*, 514 U.S. at 551.

121. *Id.* at 551-59. The Court identified three broad categories of activity that Congress can regulate lawfully under its modern commerce power. Congress may regulate: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce (even though a threat thereto may derive solely from *intrastate* activities, *id.* at 558); and, (3) those activities having a substantial relationship to interstate commerce. *Id.* at 558-59. Under the final prong, legislation regulating any economic activity which substantially affects interstate commerce is generally upheld. *Id.* at 559. Since the first two prongs of Commerce Clause jurisdiction were inapplicable, the challenged provision of the Gun-Free School Zones Act must have been lawfully passed pursuant to the third prong of Commerce power. In other words, the federal criminalization of the mere possession of a firearm in a school zone must economically, or otherwise, substantially affect interstate commerce. *Id.* at 559.

122. The Government presented two theories supporting the exercise of the commerce power, which relied on twisted, broad interpretations of what is substantially related to interstate commerce in an economic sense. The first of these theories, labeled by the Court as the "costs of crime reasoning," centered on the correlation between firearm possession and violent crime, and the resulting effect the latter had on the national economy. The second theory, the so-called "national productivity reasoning," focused on the substantial threat to the educational process posed by the presence of guns in schools. The result of a threatened educational system, it was argued, is a less productive citizenry which in turn has an adverse effect on the economic well-being of the Nation. *Id.* at 1632.

ment's arguments, we are hard-pressed to posit any activity . . . that Congress is without power to regulate."[123] Clearly the Constitution withholds from Congress "a plenary police power that would authorize enactment of every type of legislation."[124] Striking down the provision of the Act under which Lopez was convicted, the Court concluded that to find otherwise would require it "to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States . . . . This we are unwilling to do."[125]

The Court's denial of national police powers to Congress is a bold statement concerning new federalism.[126] The power that Congress used so extensively during the New Deal to expand the federal presence in public health was limited in the context of an important public health objective of stemming the national crisis of death and injury resulting from handgun use. In *Printz v. United States*,[127] the Court recently condemned another exercise of federal power promoting gun control policy: whether an unfunded provision of the Brady Bill requiring local law officials to investigate the backgrounds of handgun purchasers violates state sovereignty under the *New York* theory that the federal government is commandeering states to enforce federal objectives.[128] The Court's decision rejecting Congress' attempt to require state officials to serve as "agents" to enforce the federal Brady Bill, like its decision in *Lopez*, strikes a blow in the national effort to control handgun violence.[129] More

123. *Id.*

124. *Id.* at 1633, *citing* U.S. CONST. art. I, § 8.

125. *Lopez*, 514 U.S. at 557-58. Justice Thomas in his concurring opinion advocated a reformulation of the "substantial relationship" prong of the Commerce Clause to prevent the Congress from having "a police power over all aspects of American life." *Id.* at 584. (Thomas, J., concurring). Although failing to present a reformulated test for future use, Justice Thomas noted that the extension of the Commerce power to all matters substantially related to interstate commerce has extended the federal government into areas unknown to the constitutional Framers. *Id.* at 559. The Commerce power as it exists under its present formulation gives Congress "a blank check." *Id.* at 602.

126. Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 644 (1996) ("[*Lopez*] . . . was the first decision in some five decades to define any limit to the meaning of the phrase 'commerce among the states'."). The Court's decision was particularly compelling because fifty-four years earlier, in United States v. Darby, 312 U.S. 100 (1941), it effectively gave Congress national police powers under the Commerce Clause.

127. ___ U.S. ___, 117 S. Ct. 2365 (1997).

128. *See* Linda Greenhouse, *Justices Will Handle Dispute Over Investigating Gun Buyers*, N.Y. TIMES, June 18, 1996, at A20; Joan Biskupic, *Justices Joust Over States' Rights*, WASH. POST, Dec. 4, 1996, at A20.

129. *Cf.* Joan Biskupic, *Court Voids Background Check of Gun Buyer Under Brady Law*, WASH. POST, June 28, 1997, at A1 ("The decision is likely to have limited impact on

so, it threatens the cooperative nature of federal and state efforts in other public health contexts by allowing states to opt out of federally-mandated reporting, enforcement, and administrative requirements.[130]

Two additional decisions of the Supreme Court in the past two years have furthered the federalism trend. In *U.S. Term Limits, Inc. v. Thornton*,[131] the Court acknowledged the sovereign nature of state powers, although it rejected an argument that states may impose term limits on its federal representatives[132] in opposition to federal Constitutional requirements for holding office.[133] The issue of new federalism settled in *Greg-*

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gun control; most states already require background checks and the federal government is developing a nationwide screening system to do the work that currently is left to local law enforcement.").

130. *See, e.g.*, Women's Community Health Ctr., Inc. v. Texas Health Facilities Comm'n, 685 F.2d 974, 980 n.14 (5th Cir. 1982) ("The theory underlying the constitutionality of the [National Health Planning and Resources Development] Act's 'requirement' that the states pass and enforce legislation is that the states have chosen to accept this duty as a condition for receiving federal grants.") (citations omitted).

131. 514 U.S. 779 (1995).

132. The State of Arkansas argued that the Tenth Amendment empowers a state to impose term limits on its own federal representative offices. *Id.* at 798. The voters of the State of Arkansas adopted Amendment 73 to their state constitution, which was in part intended to impose term limits on candidates for federal seats in both Houses of Congress. A challenge among opposing voters in the state questioned the constitutionality of a state law that attempted to alter the terms of qualification for federal office as set forth in Article I of the United States Constitution. *Id.* at 784-85. Since the Constitution contains no express provision prohibiting further qualifications at the state level, Arkansas concluded that states must have been reserved the power to do so via the Tenth Amendment. *Id.* at 800. The question whether the federal Congress could alter the constitutional qualifications for its offices had already been answered by the Court in Powell v. McCormack, 395 U.S. 486, 540 (1969). Clearly, it could not. *Thornton*, 514 U.S. at 779. "[W]e reaffirm that the qualifications for service in Congress set forth in the text of the Constitution are 'fixed,' at least in the sense that they may not be supplemented by Congress." *Id.* at 798.

133. Although the states "unquestionably do retain a significant measure of sovereign authority," *id.* at 801, *citing* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985), the power to add qualifications to federal offices is not a part of their powers. *Thornton*, 514 U.S. at 802.

Justice Thomas in dissent argued that where the Constitution is silent on the question of additional qualifications for federal offices, it impliedly allows the exercise of further power by the states. *Thornton*, 514 U.S. at 845 (Thomas, J., dissenting). States can exercise all the powers which the Constitution does not withhold from them. *Id.* at 848. "The Constitution derives its authority . . . from the consent of *the people* of the States," *id.* at 851 (emphasis in original), not from the consent of state governments. That the Tenth Amendment reserves those powers not delegated to the federal government "to the states respectively, or to the people," means that the people, and not solely the government, can decide the extent of those powers. *Id.* (Thomas, J., dissenting). Thus, as Justice Thomas concluded, since neither the Qualifications Clause of Article I nor any other provision of the Constitution prohibits the determination of further qualifications for office, the Tenth Amendment must have reserved this power to the states or their people.

ory, *New York*, and *Lopez* is the degree to which federal powers can intrude on state sovereignty. *Thornton* simply reaffirms the other side of federalism: the sovereign powers of states cannot be used to alter federal constitutional law because federal law is supreme. Modification of the supremacy of federal powers by states is not a part of the federalism debate: federal powers have been absolved from such state intrusions since *McCulloch v. Maryland*.[134] The Tenth Amendment's reservation of powers to states does not imply the supremacy of state uses of its police powers in contravention of the federal Constitution and laws.

The supremacy of federal statutory law was debated in the Court's subsequent federalism decision, *Seminole Tribe of Florida v. Florida*,[135] concerning an Eleventh Amendment[136] challenge to various provisions of the federal Indian Gambling Regulatory Act,[137] passed on authority of the Indian Commerce Clause,[138] allowing Indian tribes to sue states in federal court. The Seminole Indian Tribe asked the Court to extend Congress' Eleventh Amendment abrogation authority under the Indian Commerce Clause.[139] Instead, the Court withdrew its approval of its prior

134. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) (invalidating the attempt by Maryland to tax the issuance of bank notes by the newly created national bank).

135. Seminole Tribe of Florida v. Florida, ___ U.S. ___, 116 S. Ct. 1114 (1996).

136. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Eleventh Amendment supports two precepts of federalism: (1) that each state is a sovereign entity in our federal system; and, (2) that, inherent in the nature of sovereignty, each state is immune to suit without the sovereign's consent. *Seminole Tribe*, 116 S. Ct. at 1122; *but see* ___ U.S. ___, 116 S.Ct. at 1147 (Souter, J., dissenting) ("[T]he legislative history of the Constitution hardly warrants the conclusion drawn by some that there was a general understanding, at the time of ratification, that the states would retain their sovereign immunity.") (citations omitted).

137. 25 U.S.C. § 2710(d) *et seq.* (1996). The Act's provisions allow an Indian tribe to engage in gaming activities on its reservation, but only pursuant to a valid compact between the tribe and its host state. A duty is imposed upon the states to negotiate in good faith with Indian tribes toward the formation of a valid compact. If a state fails to negotiate in good faith for this purpose, the Act authorizes an Indian tribe to compel such negotiations by filing suit in federal court. *Seminole Tribe*, 116 S. Ct. at 1119-20.

138. U.S. CONST. art. I, § 8, cl. 3.

139. *Seminole Tribe*, 116 S. Ct. at 1125. To abrogate state sovereign immunity Congress must evidence the unequivocal intent to do so pursuant to a valid exercise of Congressional power. *Id.* at 1123 *citing* Green v. Mansour, 474 U.S. 64, 68 (1985). The Court acknowledged that Congress had stated unequivocally its intention to abrogate state sovereign immunity under the Indian Gambling Regulatory Act. *Id.* at 1124. The remaining question was whether Congress had acted pursuant to a valid exercise of the commerce power. *Id.* at 1125. The Court previously had allowed Congress to abrogate state sovereign immunity only under the Fourteenth Amendment, *see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), or the Interstate Commerce Clause. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

extension of congressional abrogation of state sovereignty under the Commerce power.[140] As a result, states' rights not to be subjected to suit under the Eleventh Amendment were strengthened.[141]

Seminole Tribe demonstrates that federal governmental powers cannot be exercised in contravention of federal constitutional law because constitutional law is supreme.[142] In this sense, it reaffirms the flip-side of the same federalism principle of *Thornton*. The decisions exhibit the Court's intolerance of exercises of government power at the state or federal level, which impede constitutional guarantees of power and immunity allotted to each level. Together, they evince the fundamental division of state and federal power in a federalist system of government.

B. Accomplishing National Public Health Objectives

New federalism represents the Court's return of legitimacy to state sovereignty[143] through the calculated restraint of congressional legislative power within the political process.[144] New federalism has resulted in the

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140. The sole case upholding Congress's abrogation rights under the Commerce power, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), was overturned. *Seminole Tribe*, 116 S. Ct. at 1128.

141. *Seminole Tribe*, 116 S. Ct. at 1131 ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area [as with the Indian Commerce Clause], the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.").

142. Congress may not: (1) create statutory rights prohibited by the Constitution; (2) remove rights guaranteed by the Constitution; or, (3) create a right which is inconsistent with a constitutional objective. *See* Flores v. City of Boerne, 73 F.3d 1352, 1356 (5th Cir.), *cert. granted*, ___ U.S. ___ (1996), 117 S.Ct. 293 (1996), rev'd ___ U.S. ___, 117 S.Ct. 2157 (1997).

143. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) ("What the concept [of federalism] . . . represent[s] is a system in which there is sensitivity to the *legitimate* interests of both State and National Governments.") (emphasis added).

144. The federalism movement of the Supreme Court has not fallen on deaf ears in Congress. In fact, the prevailing pattern of federalism decisions "appears to be in tune with the prevailing political winds." Nagel, *supra* note 126, at 645. For example, in Gregory v. Ashcroft, 501 U.S. 452, 460 (1991), and subsequent preemption decisions, *see* Cippolone v. Liggett Group, Inc., 505 U.S. 504 (1992); New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., ___ U.S. ___, 115 S. Ct. 1671 (1995); Medtronic, Inc. v. Lohr, ___ U.S. ___, 116 S. Ct. 2240 (1996), the Court acknowledged that Congress had the power to override traditional state law in the pursuit of federal interests through strong preemption language. Its refusal to hold that state law was preempted under the plain statement rule evidences the Court's recognition of the political difficulty in negotiating forceful preemption language, and thus the likelihood that state law would remain intact.

Some argue that recent federalism jurisprudence represents the Court's attempt to restructure American government. *See* Nagel, *supra* note 126, at 643-44. It is contended that federalism and its accompanying emphasis on states' rights represent a politically-

Court's adoption of a super-strong rule against federal invasion of "core state functions,"[145] a presumption against the application of federal statutes to state and local political processes,[146] and a disdain for federal action that "commandeers" state governments, whether legislatively or through the use of state agents, into the service of federal regulatory purposes.[147] The Commerce powers, expanded greatly during the New Deal, have been reigned in to a degree.[148] Collectively, the cases illustrate the reality of federalism as a powerful, substantive tool of constitutional law.[149] Their strength lies in their diversity. Virtually any case where federal and state interests collide presents an opportunity for a federalism argument.

The impact of new federalism on the field of public health law is seen in the history of public health regulation. The metamorphosis of public health regulation from purely local to predominantly national means resulted from increased federal presence in the field corresponding to a deemphasis on traditional federalism. It is an inescapable conclusion that an increased federal presence shifted public health goals. National public health priorities dominate local ones. New federalism restrains the federal intrusion on state public health powers by requiring Congress to op-

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acceptable means to decentralize governmental power. Justice O'Connor acknowledges the maintenance of a decentralized government as one of the advantages of the federalist structure. *Gregory*, 501 U.S. at 458. While "[r]estoring true federalism [would] require the 'most fundamental restructuring of state and federal relations since the New Deal,'" Reuben, *supra* note 87, at 77, such is not the Court's intent. It has not come close to restructuring government in the United States, nor will it. *See* Nagel, *supra* note 126, at 655 ("It seems doubtful . . . that a majority of the Justices favor significant decentralization . . . the record as a whole is mixed enough to cast doubt on the idea that devotion to decentralized decision-making is now an overriding value for most members of the Court."). *Id.* While federalism principles presumably allow the Court to paint with a broad brush, its decisions exhibit narrow, accurate strokes.

145. *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 544-46 (1994); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 251, (1994); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); California v. ARC Am. Corp., 490 U.S. 93 (1989).

146. *See* City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 373 (1991).

147. *See* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, ___ U.S. ___, 117 S.Ct. 2365 (1997).

148. United States v. Lopez, 514 U.S. 549 (1995); Seminole Tribe of Florida v. Florida, ___ U.S. ___, 116 S. Ct. 1114 (1996). *Lopez* stripped Congress of national police powers. *Seminole Tribe* limited Congress' ability to subject states to suit in federal court under the Interstate Commerce Clause.

149. "There is no going back on federalism," said Professor Susan Low Bloch of Georgetown University Law Center. "This is something Rehnquist and O'Connor have been working toward for years and now that they have the votes they are not likely to stop" in their federalism jurisprudence. Joan Biskupic, *Vexing Social Issues Portend A Stirring Term for Supreme Court*, WASH. POST, Oct. 6, 1996, at A6.

erate within the constraints of the political process. As a result, state police powers exercised in the interest of public health are strengthened emphatically by the political process confining federal authority to enter the field.

These summary points are illustrated in *Association of Community Organizations for Reform Now ("ACORN") v. Edwards*,[150] where the Fifth Circuit Court of Appeals recently struck down provisions of the Lead Contamination Control Act ("LCCA") requiring states to establish remedial action programs for the removal of lead contaminants from school and day-care water fountains.[151] The State of Louisiana claimed the LCCA's provisions were unconstitutional based on the *New York* theory that they compelled state compliance with a federal regulatory program. The circuit court agreed, at least concerning the LCCA's requirement that states develop remedial programs or be subject to civil sanctions. The requirement that states develop a program to further the federal government's purposes, or be subject to civil suit, "is no choice at all."[152] Rather it represents "an attempt by Congress to force States to regulate according to congressional direction. As the *New York* Court explained, the Constitution does not permit Congress to so control the States' legislative processes."[153] Thus, despite the legitimate public health objective of the LCCA, the court in *ACORN* was compelled by federalism concerns to strike down the particular manner in which Congress chose to legislate.

New federalism does not tell us as a society that we are wrong to prioritize public health duties in terms of national goals.[154] There are concrete

150. 81 F.3d 1387 (5th Cir. 1996).

151. The Lead Contamination Control Act ("LCCA") was enacted by Congress in 1988 in response to the national public health concern that children were exposed to unsafe amounts of lead in their drinking water. *Id.* at 1388. The Environmental Protection Agency was charged primarily with the administration of the Act. States were only required to implement the Agency's recommendations as to lead-safe water fountains and "establish a program . . . to assist local educational agencies in . . . remedying lead contamination at schools." 42 U.S.C. § 300j-24(b)(d) (1996). When the State of Louisiana failed to comply in a timely manner with the Act, a local public interest group sued the state governor and Department of Health and Hospitals under a citizen's suit provision of the Safe Drinking Water Act (which the LCCA amended).

152. *ACORN*, 81 F.3d at 1394.

153. *Id.* In this sense, the LCCA works an unconstitutional intrusion upon a state's sovereign prerogative to legislate as it sees fit. *Id.*

154. However, the Institute of Medicine's assessment of the existing nationalized structure in 1988 certainly raises questions as to the overall effectiveness of the public health system. INSTITUTE OF MEDICINE, *supra* note 2, at 19-34; *see also* Stanley J. Reiser, *Commentary: Medicine and Public Health*, 276 JAMA 1429 (1996) ("By the 1990's . . . the

reasons for the shift of public health from local to national goals, including the containment of public health concerns, which can be accomplished only through national policy. Nor does new federalism require the abandonment of national public health goals to return public health powers to the states that originally held them. Rather, it requires us to develop appropriate public health law strategies, which accomplish national objectives without infringing state sovereignty.

Regulating in the interests of public health may require refocusing on state public health powers.[155] National public health objectives may be accomplished through states directly by encouraging them to enact uniform legislation at their own level. Although the potential for differences in state enforcement and timing of legislative enactments is disadvantageous, federalism concerns are minimized. Of those public health objectives requiring national implementation, new federalism suggests accomplishing them by persuading, rather than requiring, states to comply. National legislation, which proposes legitimate incentives to states, such as federal funds or national expertise, in return for their voluntary cooperation, comports with a federalist system of government.

The reality of new federalism, however, is that public health goals, left exclusively to governmental political processes at either level, are subject to delays and off-target measures inherent in the struggle over limited governmental powers. It suggests that efforts to accomplish national public health objectives may be more productive if vested in the private sector. The role of managed care organizations, for example, in improving public health is an increasingly important topic of study and discussion.[156]

United States continued to top all other nations in health care spending but got unacceptably poor returns measured by patterns of health and illness in its population.").

155. This suggestion is not necessarily detrimental. The reality of the federal political process is that federal legislation and regulation invariably represents a compromise to the accomplishment of specific goals. In an overly-centralized government, national public health objectives may remain unfulfilled in light of watered-down national legislation enforced by bureaucratic, non-accountable federal agencies. While the state legislative process involves compromises like those seen in the federal Congress, state governments may be more responsive to the needs of their citizenry. State governments serve vital functions as innovators and pioneers of public health policy. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); United States v. Lopez, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring) (the States serve a valuable role "as laboratories for experimentation to devise various solutions where the best solution is far from clear" *citing* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Since public health needs differ from state to state, nationalizing public health priorities to the exclusion of states could be harmful.

156. *See e.g.*, Paul K. Halverson et al., *Not-So-Strange Bedfellows: Models of Interaction Between Managed Care Plans and Public Health Agencies*, 75 MILBANK Q. 113 (1997);

The issue is not so much whether regulating public health is in the interests of private sector health organizations,[157] but whether a systematic and reliable infrastructure of private sector public health regulation can be developed with encouragement from government. Subsequent issues such as whether private sector public health could be uniform in application and whether market forces would be any more effective than purely governmental processes also arise. Yet, as public health goals mature further to reflect international (versus purely national) objectives, market sources of regulation may become a primary source of public health control in a global economy.

VI. CONCLUSION

The interrelation of federalism and public health law is evident. Federalism has shaped the scope of governmental power to control public health, producing fundamental shifts in our conception of public health objectives. Public health goals once conceptualized in relation to exercises of state police powers and limited to localized concerns have broadened to accomplish national objectives through the expansion of federal powers. The destruction of traditional federalism during the New Deal was largely responsible for this federal expansion. The reemergence of federalism preserving state powers suggests that Congress must legislate carefully if it wishes to accomplish national public health objectives or, in the alternative, that state police powers be used to accomplish public health goals which the federal government cannot. While the abandonment of national public health objectives is not required, the use of government powers to accomplish these objectives must be done through the political system in which governmental power is distributed. Thus, new federalism does not threaten the national conception of public health as much as it challenges us to develop new strategies to fulfill the public health needs, a part of which includes developing market-driven public health goals for private sector health organizations.

William L. Beery et al., *Managed Care and Public Health: Building a Partnership*, 13 PUBLIC HEALTH NURSING 305 (1996); Institute of Medicine, *Healthy Communities: New Partnerships for the Future of Public Health—A Report of the First Year of the Committee on Public Health* (1996).

157. *See, e.g.*, Beery, *supra* note 156, at 306 ("directly concerned with maximizing the health of enrolled populations, managed care systems have a concrete need for applying public health expertise . . . . Both managed care and public health clearly benefit from healthier communities.")