

Chapter 2 Public Health in the Constitutional Design

Ann L. Abbott



1

Logical argument contd

- ch 1 PH law is about government's assurance of conditions for public to be healthy and use of tools to do so
- ch. 2 Some practical requirements (also ethical) of regulation are discussed in (risk assessment, harm principle)
- Ch. 3 Since assuring the public's health is the role of the government, what activities must government undertake to do so?
- We begin to answer – involves the US Constitution - and then legislation, regulation and common law

PUBLIC HEALTH LAW AND ETHICS

2

We look first to the Constitution to specify...

1. Duty -What must government do? ('must')
 2. Authority - What is power of government to act? ('may')
 3. Limit -What is government prohibited from doing? ('may not') – more on this in ch. 4
- Constitutionalism is the idea that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations (often associated with the political theories of John Locke and the "founders" of the American republic).

PUBLIC HEALTH LAW AND ETHICS

3

Goals

- To look more at the conceptual foundations of Public Health Law
- To consider the US Constitution's grant of powers to the federal government and the effect on the powers of state government
- To consider the doctrines of 'parens patriae' and the police power not discussed in the Constitution but residing mainly in state governments based in English and American legal tradition

PUBLIC HEALTH LAW AND ETHICS

4

Three functions of US Constitution

1. Allocates power between federal and state governments (federalism) –
2. *Divides power among the 3 branches of government (separation of powers - legislative, executive, judiciary)*
Gostin's Question: Which branch is best suited to formulate public health policy?
3. *Limits government power and protects individual liberties (where?)*
Also 9th Amendment, 10th Amendment

PUBLIC HEALTH LAW AND ETHICS

5

Const. Function 1 Federalism

Allocates power between federal and state governments - 'sorting device'

- a. Preserves balance of power between federal and state authorities p. 79 figure
- b. Grants only limited power to federal government
 - i. Enumerated powers
 - ii. Implied powers-> expansion of PH regulation
- c. States retain power – reserved powers

PUBLIC HEALTH LAW AND ETHICS

6

Const. Function #1 Federalism: US Constitution “Reserved Powers”

- The doctrine that states may exercise all the powers inherent in government....
 - Including police power
 - Including *parens patriae* power
 - These will be described in slides to come

Supreme Court cases in last 15 year have 'revisited' this provision.

PUBLIC HEALTH LAW AND ETHICS

7

U.S. Constitution – Supremacy Clause

- “The Constitution and the Laws of the US ...shall be the supreme law of the land”
- Preemption Doctrine: Congress by enacting a law may 'preempt' state power which would otherwise be squarely within the state's police or *parens patriae* power
 - Court will interpret the language of the statute to determine 'intent of Congress': Did Congress intend to bar the action the state legislation authorizes?

PUBLIC HEALTH LAW AND ETHICS

8

Summary US Constitution Function #2 – Separation of Powers and Public Health

- Legislature – creates health policy and allocates resources to it – as our elected representatives
 - Compare proposal for Federal Health Board – to determine the cost-effectiveness of treatments and choosing which services public insurance programs would cover
- Executive – enforces health policy (and in doing so also makes policy)
 - Agencies role
- Judiciary – interprets law and resolves legal disputes (and in doing so also makes policy) – determines the bounds of PH policy and of zones of autonomy, privacy and liberty and economic freedoms of the individual

PUBLIC HEALTH LAW AND ETHICS

9

Summary Const. Function #3 Doctrine of limited powers*

- The Constitution protects the rights of citizens – and not just rights listed in Bill of Rights:
- The 9th Amendment states : “
 - The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

What powers does the federal government have under the Constitution?

1. National government has limited powers
2. States have plenary power (full) that they possessed before the Constitution was ratified
3. US Congress granted certain “enumerated powers,” most importantly, as follows –
 - Power to regulate interstate commerce
 - Power to tax
 - Power to spend

US Constitution Necessary and Proper Clause extends the enumerated powers

- The basis of Congress' implied powers
- Congress shall have power....
 - “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States....”

Negative Constitution

- Imposes no affirmative duty (under U.S. Constitution) on government to provide services or protect people from harm
- Two exceptions
 1. If person is in custodial setting and because of deprivation of liberty is unable to care for him/herself
 2. If state increased threat of harm to person and is responsible for creating the danger

*Negative Constitution case

- De Shaney case (p. 87) mother lost custody of her son who was afterwards beaten severely by the custodial father. The child suffered serious brain damage and mental impairment. The mother sued the County Department of Social Service under the due process clause of the Constitution. The Department took various steps to protect the child after receiving numerous complaints of the abuse; however, the Department did not act to remove the child from his father's custody and the child was permanently disabled. Held, no constitutional remedy.

What is the argument for the state? What is the argument for the family?

Negative Constitution case

- Webster v. Reproductive Health Services -No government obligation to provide abortion services for the poor (even if realistically that cuts off woman's access to such services)

Negative Constitution case

- Castle Rock v. Gonzales – held state law requiring police to enforce domestic abuse restraining orders does not establish interest protected **under procedural due process**
- To arrest person who violates protective order is 'discretionary', so there is no entitlement (but Statute says police 'shall' arrest)
- Gostin criticizes doctrine as at odds with international human rights; unsustainable distinction of 'action' and 'inaction'; leaves state free to abuse its power

Parens Patriae and Police Power

Parens Patriae

- "Parens patriae," literally "parent of the country,"... It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents. (Blacks Law Dictionary)
- The King as Father
- The Country as Family

Modern Parens Patriae Powers

- Invoked to
 - To make decisions on behalf of individuals incapable of deciding for themselves – substantial restraint on their freedom so imposed only after legal proceeding
 - substitute decision should be consistent with person's know wishes or with her/his best interests
 - Examples:
 - Child Welfare
 - Incompetency
 - Mental Health Care
 - May be used by a state Attorney General to sue and assert state's general interest in communal health and welfare – gives state standing in court to assert communal interest – residents 'in general' affected

PUBLIC HEALTH LAW AND ETHICS

19

Police Power for “the security of the social order”

- Right of Societal Self-Defense
- Right of the State to Protect Itself
- Right of the State to Protect Its Citizens
- Derived from English Common Law and was the Core of Colonial Government
- 3 principles:
 1. To promote public good
 2. Permits restriction of interests
 3. Scope of power is pervasive

PUBLIC HEALTH LAW AND ETHICS

20

Police powers

- Used to protect the public from health hazards and includes all measures to decrease mortality and morbidity
- Derived from the state's responsibility in protecting the health, safety, and welfare of the citizens
- Vaccination and immunization programs, sanitation, etc. - in paragraph at top p. 95

PUBLIC HEALTH LAW AND ETHICS

21

U S Constitution enumerated powers

- Article 1, Section 8
- Congress shall have power..... "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
- "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."
 - i.e., to spend for the general welfare

US v. Lopez -power to regulate interstate commerce 'revisited'

- Lopez was challenge to Gun Free School Zones Act of 1990 (Gostin P. 105) – invalidated under the Commerce Clause
- Upheld under Commerce Clause after Lopez – Case involving access to abortion clinics (Federal Freedom of Access to Clinic Entrance Act) upheld in 2 Federal appeals courts in different (geographical) circuits in 1997 and S. Ct denied petition for review by losing party)

SOLID WASTE AGENCY v. UNITED STATES ARMY CORPS OF ENGINEERS (US S Ct 2001)

- Suburban Chicago municipalities wanted to put solid waste disposal site, an abandoned sand and gravel pit.
- Excavation trenches that had evolved into permanent and seasonal ponds so they sought a landfill permit under §404(a) of the Clean Water Act (CWA), which authorizes the Corps to issue permits allowing the discharge of dredged or fill material into "navigable waters."
- The CWA defines "navigable waters" as "the waters of the United States," 33 U.S.C. § 1362(7).
- In 1986, the Corps, in what has been dubbed the "Migratory Bird Rule," stated that §404(a) extends to intrastate waters that provide habitat for migratory birds. 51 Fed. Reg. 41217. The Corps refused to issue a §404(a) permit.
- Held, the regulation exceeds the authority granted to Corps

US Constitution, Federalism and Public health threats

- There are often areas of concurrent exercise of federal and state powers
- A national, state and local presence exists in most spheres of PH (e.g. environmental law and regulation)
- This is a 'marble cake' not a 'layer cake'

PUBLIC HEALTH LAW AND ETHICS

25

US Constitution Function 2 (limits power) - Amendment X of US Constitution

- "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."
- Recent cases upholding the sovereignty of the states are discussed by Gostin
 - Congress cannot pass laws that authorize private persons to sue the state
 - Brady Bill provision invalidated – compelled state and local law enforcement officials to perform the background checks mandated by federal law

PUBLIC HEALTH LAW AND ETHICS

26

*Held, 10th Amendment violated

- The Low-Level Radioactive Waste Management Act Amendments of 1985
- Required states alone or in compacts with other states to dispose of such radioactive waste within their borders.
- A "take-title" qualification, stipulated that states must take legal ownership and liability for low-level waste within its borders.
- Held, this is an attempt to 'commandeer' state governments into the service of federal regulatory purposes, and so be inconsistent with the Constitution's division of authority between federal and state governments." (NY v. US 1992)
- Congress 'rewrote' law

PUBLIC HEALTH LAW AND ETHICS

27

11th Amendment and Sovereign Immunity (immunity of state from suit)

- "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"
- Florida case – Congress may not give private citizen the right to sue the state. *Seminole Tribe of Florida v. Florida* 1996
- The Supreme Court has recognized that Congress can abrogate Eleventh Amendment immunity through the exercise of power under the Fourteenth Amendment, but the conditions for such abrogation are limited by two considerations.
 1. whether Congress specifically states in the legislation an intent to abrogate immunity, and,
 2. whether Congress identifies a history and pattern of unconstitutional discrimination by the states, at the time it enacted the legislation. It is this latter condition which is being found not to exist.
