The Role of the Federal Government in Response to Catastrophic Health Emergencies: Lessons Learned from Hurricane Katrina

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"The only mistake we made with Katrina was not overriding the local government."

Karl Rove, White House Deputy Chief of Staff

"I am going to need all the help you can send me."²

Kathleen Babineaux Blanco, Governor, Louisiana, to President Bush

The recent devastation and destruction by Hurricane Katrina in August 2005 in the Gulf Coast exemplifies the critical need for better federal, state, and local government planning, communication, and cooperation to achieve a coordinated and swift response to a catastrophic public health emergency. Relying on only one or two of these governmental entities, or an uncoordinated response by all three, to spearhead disaster relief only exacerbates the disaster, costing thousands of lives and billions of dollars.

Although many criticized the federal government response to Katrina, especially that of the Department of Homeland Security (DHS) and the Federal Emergency Management Agency (FEMA) as highly disorganized,³ it is, nevertheless, now clear that the federal government has an

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¹ Rove Off the Record on Katrina: The Only Mistake Was Not Overriding the Local Government, The Huffington Post, http://www.huffingtonpost.com/2005/09/17/rove-off-the-record-on-ka_n_7513.html (last visited Sept. 23, 2005).

² Eric Lipton, et al., *Breakdowns Marked Path from Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, § 1, at 11 ("To President Bush, Governor Blanco directed an ill-defined but urgent appeal. 'I need everything you've got,' the governor said she told the president on Monday. 'I am going to need all the help you can send me.'").

³ See e.g., Eric Lipton & Scott Shane, Leader of Federal Effort Feels the Heat, N.Y. TIMES, Sept. 2, 2005, at A17 (noting the "remarkable confession" of Michael D. Brown, former Director of the Federal Emergency Management Agency (FEMA), who had only just learned of the three-day plight of thousands of citizens without food or water at the New Orlean's convention center). On Sept. 12, Michael Brown resigned as Director of FEMA amid heavy criticism of FEMA's response to the effects of Hurricane Katrina. Richard W. Stevenson, After Days of Criticism,

integral role to play in responding to a catastrophic public health disaster. Statements made by President Bush in the immediate wake of Katrina⁴ demonstrate that the federal government may even be more prepared to superimpose itself on states and local governments during a crisis. Indeed, federal officials (including President Bush) have also acknowledged the need for a "swifter federalization of response operations and deployment of military forces." Accordingly, emergency response planners need to be ever more mindful and aware of the role and power of the federal government in disaster response and the interaction between federal, state, and local authorities in these emergency situations.

One important element of the state recognition of that federal presence is the post 9/11 academic and policy discussion relating to the creation and implementation of new state emergency public health powers. Perhaps the touchstone of that focus and the foremost venue to discuss federal-state relations in public health emergency management centers on consideration of the Model State Emergency Health Powers Act.

In the spring of 2001, officials at the Centers for Disease Control and Prevention (CDC) requested the Center for Law and the Public's Health (CLPH) at Georgetown and Johns Hopkins Universities to draft a Model State Emergency Health Powers Act to provide states with a more effective legal mechanism to respond to catastrophic public health emergencies caused by terrorist attacks.⁶ The primary purpose behind drafting this model legislation was to update state

Emergency Director Resigns, N.Y. TIMES, Sept. 13, 2005, at A5. See also Jennifer Steinhauer & Eric Lipton, FEMA, Slow to the Rescue, Now Stumbles in Aid Effort, N.Y. TIMES, Sept. 17, 2005, at A1 ("Nearly three weeks after Hurricane Katrina cut its devastating path, FEMA . . . is faltering in its effort to aid hundreds of thousands of storms victims [and] serious problems remain throughout the affected region.").

See infra note 27 and accompanying text.

⁵ Chris Strohm, Officials Consider Ouicker Federalization, Use of Military in Disaster Response, GOVEXEC.COM, September 20, 2005, http://www.govexec.com/dailyfed/0905/092005c1.htm (last visited Sept. 21, 2005).

⁶ John M. Colmers & Daniel M. Fox, The Politics of Emergency Health Powers and the Isolation of Public Health, 93 AMER, J. PUB. HEALTH 397, 397 (2003). See also Matthew E. Brown, Reconsidering the Model State Emergency Health Powers Act: Toward State Regionalization in Bioterrorism Response, 14 Annals Health L. 95, 96-97 (2005).

public health statutes viewed by the drafters as "outdated laws [that] often do not reflect contemporary scientific understandings of disease [and] pre-date the vast changes in constitutional . . . and statutory . . . law that have transformed social and legal conceptions of individual rights."⁷

After the 2001 attacks on the World Trade Center in New York and on the Pentagon in Washington, D.C., drafting accelerated and the CLPH completed and released the first draft of the Model State Emergency Health Powers Act (hereinafter Model Act)⁸ on October 23, 2001.⁹ After receiving commentary from the public, much of which was highly critical, ¹⁰ CLPH posted a revised version of the Model Act on its website on December 21, 2001. 11 Although there continues to be substantial debate within the public health community about the model legislation and its influence on state public health response, CLPH states that thirty-seven states

⁷ Lawrence O. Gostin, The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism, 13 HEALTH MATRIX 3, 10 (2003); see also Lawrence O. Gostin, Public Health Law: A Renaissance, 30 J.L. MED. & ETHICS 136, 136-137 (2002) (discussing outdated state public health laws).

⁸ THE MODEL STATE EMERGENCY HEALTH POWERS ACT, (Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, December 2001), available at

http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf (last visited Aug. 18, 2005) (hereinafter MODEL ACT). Gostin, Public Health and Civil Liberties, supra note 7, at 20. Some scholars have suggested that by accelerating the completion of the Model Act, the drafters worked under "extreme time pressure and in [a] state of high emotion." George J. Annas, Blinded by Bioterrorism: Public Health and Liberty in the 21st Century, 13 HEALTH MATRIX 33, 47 (2003). See also Bernadette Tansey, Health Bill Endangers Civil Rights; Bush Pushes Plan to Expand Control in Bioweapon Attack, S.F. CHRON, Nov. 25, 2001, at A1 ("The Centers for Disease Control and Prevention rushed out the proposed legislation, at the request of Health and Human Services Secretary Tommy Thompson, within weeks after the Sept. 11 hijackings and the ensuing anthrax attacks.").

¹⁰ See generally Larry Copeland, CDC Proposes Bioterrorism Laws, USA TODAY, Nov. 8, 2001, at 3A (noting concern that Model Act would give states too much power); Marcia Coyle, Pushing Tough State Health Laws, NAT'L L.J., Nov. 12, 2001, at A1 (citing debate over whether the Model Act encroaches on individual liberties); Deirdre Davidson, Inadmissible, LEGAL TIMES, Nov. 5, 2001, at 3 (discussing debate spurred by Model Act over states' power to control people during a health crisis); Alice Keesing, Sweeping Health Powers Sought, HONOLULU ADVER., Nov. 19, 2001, at 1A (citing civil liberties concerns); Michael Lasalandra, War On Terrorism; Smallpox Attack Preparedness Plan Would Give Officials Sweeping Powers, Bos. HERALD, Nov. 8, 2001, at 16 (citing civil liberties concerns); Raja Mishra & Beth Daley, New Bill Targets Disease Spread Plan Raises Issue of Quarantining, Bos, GLOBE, Nov. 11, 2001, at B7 (questioning the effectiveness of quarantine at countering epidemics); Wendy E. Parmet & Wendy K. Mariner, Op-Ed., A Health Act That Jeopardizes Public Health, Bos. GLOBE, Dec. 1, 2001, at A15 (questioning the necessity and wisdom of the Model Act); Nancy Shute, Germs and Guns, U.S. NEWS & WORLD REP., Nov. 19, 2001, at 50 (questioning whether a quarantine would be enforceable and be able to control an epidemic in modern times); Tansey, *supra* note 8, at A1 (citing civil liberties and privacy concerns).

and the District of Columbia have passed bills or resolutions in whole or in part based on the Model Act.¹²

While the impetus for the Model Act related to concerns about state public health responses to terrorist attacks using weapons of mass destruction, the plain language of the statute indicates that it covers responses to "natural disasters" ¹³ as well. The Act essentially creates an "all-hazards" regime for a governor to take exclusive and substantial control over public health, transportation, business, and law enforcement within a state during a catastrophic public health emergency, including the ability to compel quarantine, isolation, forced medical treatment and vaccinations, as well as seizing whatever items are needed to respond to the emergency. ¹⁴ These broad powers afforded the governor under the Model Act have been the principal cause of the substantial controversy about the proposal. ¹⁵ Nevertheless, the heated exchange itself provides an important vehicle for considering the relationship between states and the federal government in responding to catastrophic public health events.

I. The Federal Role in the Aftermath of Hurricane Katrina: A Catastrophic Public Health Emergency and an "Incident of National Significance"

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¹² THE CENTER FOR LAW AND THE PUBLIC'S HEALTH AT GEORGETOWN AND JOHNS HOPKINS UNIVERSITIES (CLPH), MODEL STATE PUBLIC HEALTH LAWS, THE MODEL STATE EMERGENCY HEALTH POWERS ACT, LEGISLATIVE STATUS UPDATE & MSEPHA LEGISLATIVE SURVEILLANCE TABLE, June 2005, http://www.publichealthlaw.net/Resources/Modellaws.htm (last visited Aug. 18, 2005). Some scholars dispute these numbers, claiming that the drafters of the Model Act "grossly overstate their support" and use "language of salespeople, not legal scholars." *See* George J. Annas, *Blinded by Bioterrorism: Public Health and Liberty in the* 2015 (2015)

^{21&}lt;sup>st</sup> Century, 13 HEALTH MATRIX 33, 60-61 (2003) (discussing inconsistencies in the number of states adopting a complete version of the Model Act). Some state legislatures adopted only select provisions of the Model Act, while others adopt a more complete version.

¹³ The Model Act defines "public health emergency" as

an occurrence or imminent threat of an illness or health condition that: (1) is believed to be caused by any of the following: (i) bioterrorism; (ii) the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin; (iii) a natural disaster; (iv) a chemical attack or accidental release; or (v) a nuclear attack or accident; and (2) poses a high probability of any of the following harms: (i) a large number of deaths in the affected population; (ii) a large number of serious or long-term disabilities in the affected population; or (iii) widespread exposure to an infectious or toxic agent that poses a significant risk of substantial future harm to a large number of people in the affected population.

MODEL ACT, supra note 8, § 104 (m).

¹⁴ See id. §§ 501-507, 601-608, 701-702.

As we show below, the Model Act was intentionally presented without substantial reference to the federal role in public health response despite the fact that the federal powers in this area are sweeping. Evidence of the potentially all-encompassing federal role in responding to a catastrophic public health emergency can be found by looking no further than the federal assets that brought it to bear – however belatedly – in the wake of Katrina. Roughly thirty federal departments and agencies are a part of that response effort. This response, detailed below, exemplifies the vast resources of the federal government and includes everything from providing food, water, shelter, and first aid to offering immediate income assistance to displaced workers and supporting the operation and recovery of national banks in affected areas.

Moreover, under direction of Congress through the Homeland Security Act¹⁸ and of the President through Homeland Security Presidential Directive 5 (HSPD-5),¹⁹ DHS promulgated a National Response Plan (NRP) in December 2004 further evidencing the broad reach of the federal government. The NRP is "an all-discipline, all-hazards plan that establishes a single, comprehensive framework for the management of domestic incidents [and] provides the structure and mechanisms for the coordination of Federal support to State, local, and tribal incident managers and for exercising direct Federal authorities and responsibilities." The NRP recognizes that any time the President declares an emergency under the Stafford Act, it is an

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¹⁵ See supra note 10 and accompanying text.

¹⁶ DHS, NATIONAL RESPONSE PLAN (NRP) (December 2004), at v-viii, *available at* http://www.dhs.gov/interweb/assetlibrary/NRP_FullText.pdf (last visited Aug. 25, 2005) [hereinafter NRP] (listing the Signatories to the NRP).

See also DHS, Hurricane Katrina: What Government is Doing (As of September 22, 2005), http://www.dhs.gov/interweb/assetlibrary/katrina.htm (last visited Sept. 26, 2005) (providing a complete list of assistance given by federal departments and agencies as of Sept. 22, 2005).

¹⁷ See infra note 69 and accompanying text.

¹⁸ 6 U.S.C.A. § 112 (West Supp. 2005).

¹⁹ NRP, *supra* note 16, at 1 (discussion of the NRP objectives).

²⁰ DHS, NRP BROCHURE, http://www.dhs.gov/interweb/assetlibrary/NRP Brochure.pdf (last visited Sept. 27, 2005).

"Incident of National Significance," calling into play broad federal oversight mandated by that plan. While it is now widely acknowledged that the NRP was triggered belatedly, Secretary Michael Chertoff did finally activate it by declaring an "Incident of National Significance" as a result of the destruction caused by Hurricane Katrina.

Not only does the NRP contemplate federal involvement, but the plan dictates a proactive federal response even without requests for assistance from the states. It expressly provides that "[s]tandard procedures regarding requests for assistance may be expedited or, under extreme circumstances, *suspended* in the immediate aftermath of an event of catastrophic magnitude."²⁴ The NRP also provides for federal law enforcement assistance and immediate response authority for "[i]mminently serious conditions [when] time does not permit approval from higher headquarters."²⁵ When this situation exists, the NRP makes it clear that the Department of Defense (DOD) has authorized local military commanders and responsible officials from DOD to "take necessary action to respond to requests of civil authorities consistent with the Posse Comitatus Act (PCA)."²⁶ Indeed, President Bush recognized this power under the NRP in his

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²¹ An "Incident of National Significance" is defined as "an actual or potential high-impact event that requires a coordinated and effective response by and appropriate combination of Federal, State, local, tribal, nongovernmental, and/or private-sector entities in order to save lives and minimize damage, and provide the basis for long-term community recovery and mitigation activities." NRP, *supra* note 16, at 67. There is an automatic trigger for an incident of national significance whenever major disasters or emergencies are declared under the Stafford Act. *Id.* at 4

²² See generally Editorial, Unprepared, WASH. POST, Sept. 5, 2005, at A30 (critical discussion of the delay in declaring an "incident of national significance"); Spencer S. Hsu & Steve Hendrix, Hurricanes Katrina and Rita Were Like Night and Day, WASH. POST, Sept. 25, 2005, at A1 (discussion of differences between delayed response of federal government after Hurricane Katrina compared to the response for Hurricane Rita).

²³ Press Release, Department of Homeland Security, United States Government Response to the Aftermath of Hurricane Katrina (Sept. 1, 2005), http://www.dhs.gov/dhspublic/display?content=4777 (last visited Sept. 26, 2005). ²⁴ NRP, supra note 16, at 44 (emphasis added).

²⁵ *Id.* at 42.

²⁶ *Id.* at 43. The Posse Comitatus Act (PCA), 18 U.S.C.A. § 1385 (West 2000 & Supp. 2005), prohibits the willful use of the Army or the Air Force for law enforcement purposes. *Id.* This includes interdiction of a vehicle, vessel, aircraft or other similar activity; directing traffic; search or seizure; an arrest, apprehension, stop and frisk, or similar activity. U.S. NORTHERN COMMAND, FACT SHEETS, POSSE COMITATUS ACT, http://www.northcom.mil/index.cfm?fuseaction=news.factsheets&factsheet=5 (last visited Sept. 28, 2005). The PCA expressly applies to the Army and Air Force, and Congress has included the Navy and Marines through the Departments of Defense and Navy regulations. 10 U.S.C.A. § 375 (West 1998 & Supp. 2005) (ordering the

September 15 speech in Jackson Square, New Orleans by stating that "a challenge on this scale requires greater federal authority and a broader role for the armed forces – the institution of our government most capable of massive logistical operations on a moment's notice."²⁷

The NRP also emphasizes the importance of deploying the federal National Disaster Medical System (NDMS), a coordinated effort by the Department of Health and Human Services (HHS), DHS, the Department of Veteran Affairs (VA), and the DOD.²⁸ The NDMS works in collaboration with the states and other appropriate public and private entities in providing medical response, patient evacuation, and definitive medical care to victims and responders of a public health emergency.²⁹

This federal medical assistance is deployed through Emergency Support Function (ESF) Annex #8, "Public Health and Medical Services," within the NRP. ESF #8 provides for federally directed medical assistance to supplement state and local resources in response to an incident of national significance. Katrina, as the first incident of national significance under the NRP,

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Secretary of Defense to prescribe "such regulations . . . to ensure that any activity [regarding civilian law enforcement] does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity"). *See also* U.S. DEP'T. OF DEFENSE, DIRECTIVE NO. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, at 21 (Jan. 15, 1986), *available at* http://www.dtic.mil/whs/directives/corres/pdf2/d55255p.pdf (last visited Aug. 31, 2005). There are a number of statutory exceptions to the PCA. These include the Insurrection Act, 10 U.S.C.A. §§ 331 – 335 (West 1998 & Supp. 2005); 10 U.S.C.A. §§ 372(b), 382 (West 1998 & Supp. 2005) (emergency situations involving chemical or biological weapons of mass destruction); Stafford Act, 42 U.S.C.A. §§ 5170b (c), 5192 (West 2003) (federal emergency assistance & utilization of DOD resources); 18 U.S.C.A. § 831(e) (West 2000) (military assistance in emergency situations involving nuclear materials).

²⁷ Press Release, The White House, President Discusses Hurricane Relief in Address to the Nation, Sept. 15, 2005, available at http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html (last visited Sept. 26, 2005).

²⁸ NRP, *supra* note 16, at 69.

²⁹ Id

³⁰ NRP, PUBLIC HEALTH AND MEDICAL SERVICES ANNEX, *supra* note 16, at ESF #8-1. This support is categorized into the following areas: assessment of health/medical needs; health surveillance; medical care personnel; health/medical equipment and supplies; patient evacuation; in-hospital care; food/drug/medical device safety; worker health/safety; all-hazard consultation; mental health care; public health information; vector control; potable water/wastewater and solid waste disposal; victim identification/mortuary services; and veterinary services. *Id.* at ESF #8-6.

demonstrated, even when belatedly deployed,³¹ the actual effectiveness of these federal mechanisms for response.

A. The Model Act and the Federal Role: An Example of Overlap

This vast array of federal programs and laws provide federal authority that substantially overlaps state powers afforded in the Model Act. Just one important example of that overlap is quarantine.³² The Model Act grants state officials the authority to examine, vaccinate, isolate and quarantine individuals who pose a threat to public health.³³ Yet, Congress has granted quarantine power to the Surgeon General and Secretary of HHS to "prevent the introduction, transmission, or spread of communicable diseases [and they] may provide for such inspection, fumigation, disinfection, sanitation, [and] destruction of . . . articles."³⁴ The regulations implementing this provide that the Director of the CDC may utilize this quarantine authority whenever she "determines that the measures taken by health authorities of any State or possession ... are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession."³⁵

This essentially means that any quarantine measures taken by a state may be in conflict with, or duplicative of, measures taken by the Director of the CDC. It is well-established that federal authority will take precedence over, i.e., legally preempt, conflicting state actions, whenever state legislation, such as legislation modeled on the Model Act, is inconsistent with

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³¹ See supra note 3 and accompanying text.

³² See MODEL ACT, supra note 8, § 604.

³³ *Id.* §§ 602-604. For descriptions of all powers of the Governor during a public health emergency under the Model Act, *see id.* §§ 401–405, 501–507, 601–608.

³⁴ 42 U.S.C.A. § 264(a) (West 2003 & Supp. 2005). This section is the Quarantine and Inspection part of the general powers and duties subchapter of the public health service chapter of the Public Health Service Act, 42 U.S.C. §§ 264 - 272. President Bush issued an executive order to amend the PHSA in 2005 to address "[i]nfluenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic." Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (April 1, 2005).

³⁵ 42 C.F.R. § 70.2 (2004) (defining measures to be taken "in the event of inadequate local control").

existing federal law.³⁶ The federal laws and regulations discussed above dealing with quarantine are illustrative of the possibility of preemptory power. To enact or implement state legislation without a recognition of existing comparable federal law may frustrate the very purpose of state emergency laws, i.e., to provide comprehensive, direct, and meaningful guidance for action in a public health emergency.

II. The Model Act and Federal Power under the Commerce Clause

While there is some very limited recognition by the drafters of the importance of the federal role in a public health emergency,³⁷ their commentary on the Model Act focuses almost entirely on state health powers,³⁸ because the drafters expressly fear that the Constitution may limit federal powers in this area.

Relying on the Supreme Court's 1824 decision in *Gibbons v. Ogden*,³⁹ the drafters contend that "states have a deep reservoir of public health powers [encompassing an] immense mass of legislation [including] 'inspection laws, quarantine laws, and health laws of every description." Because of *Gibbons*, the drafters assert that the "power to act to preserve the public's health is constitutionally reserved primarily to the states as an exercise of their police powers." ³⁹

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³⁶ See generally JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW § 9.2 (1st ed. 2004) (federal preemption); NORMAN REDLICH, ET AL., UNDERSTANDING CONSTITUTIONAL LAW § 6.09 (3rd ed. 2005) (congressional conflict and preemption).

³⁷ Gostin, *Public Health and Civil Liberties, supra* note 7, at 23 (noting that "[i]t is certainly true that federal authority is extraordinarily important in responding to catastrophic public health events").

³⁸ See MODEL ACT, *supra* note 8, §§ 202(a)(2); 303(b); 403(b)(3); 809, for reference to the federal government in the text of the Act.

³⁹ 22 U.S. (9 Wheat.) 1.

⁴⁰ Gostin, Public Health and Civil Liberties, supra note 7, at 24 (quoting Gibbons, 22 U.S. at 203).

⁴¹ Lawrence O. Gostin, et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622, 622 (2002).

Yet, as some scholars have convincingly demonstrated,⁴² even Chief Justice Marshall's statements in *Gibbons* in 1824 suggest a "more complex relationship" between Congress' power and state power over public health,⁴³ i.e., that *Gibbons* does not propose that states have exclusive or dominant power over health, but instead "that the power to protect the public health is an inherent and undeniable aspect of sovereignty that states may exercise unless and until Congress preempts that power by exercising one of its own enumerated powers."⁴⁴

Also influencing the Model Act drafters were the cases of *U.S. v. Lopez*⁴⁵ and *U.S. v. Morrison*, ⁴⁶ from the mid-1990s, where the Supreme Court held that regulating the possession of firearms near school zones and enacting the civil remedy provisions of the Violence Against Women Act (VAWA)⁴⁷ were not within Congress' power under the commerce clause. ⁴⁸ Citing *Lopez*, for example, one of the drafters argued that the "Supreme Court . . . has regarded federal police powers as constitutionally limited, and has curtailed the expansion of national public health authority."

Yet even *Lopez* and *Morrison* define commerce broadly as "includ[ing] the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." The Court in both *Lopez* and *Morrison*

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⁴² See Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 201-202 (2002) (discussing Chief Justice Marshall's statements in *Gibbons v. Ogden*).

⁴³ *Id.* at 202.

¹*a*. a 44 *Id*.

⁴⁵ 514 U.S. 549 (1995).

⁴⁶ 529 U.S. 598 (2000).

⁴⁷ Morrison, 529 U.S. 598 (2000) (construing the civil remedy provisions of the Violence Against Women Act (VAWA), 42 U.S.C.A. § 13981 (West 1995 & Supp. 2005)).

⁴⁸ See Lopez, 514 U.S. at 549 (holding that regulating firearms near school zones "exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States . . . "") (quoting U.S. Const., Art. I, § 8, cl. 3); Morrison, 529 U.S. at 602 (holding that "Congress lacked constitutional authority to enact the [Violence Against Women Act's] civil remedy"). See also Lawrence O. Gostin, Public Health Theory and Practice in the Constitutional Design, 11 HEALTH MATRIX 265, 289- 91 (2001) (discussion of public health and federal government's power under the commerce clause).

⁴⁹ Gostin, *Public Health and Civil Liberties*, supra note 7, at 24 (citing *Lopez*, 514 U.S. at 566-68).

⁵⁰ Lopez, 514 U.S. at 558-59; Morrison, 529 U.S. at 609.

maintained that where "activity substantially affects interstate commerce, legislation regulating that activity will be sustained." Local gun sales and enforcement of civil remedy provisions of the VAWA may not have been considered commerce, but legislation regulating public health self evidently affects economic activity which certainly affects interstate commerce.

A more recent commerce clause case makes clear that public health issues are almost always deemed interstate commerce. In *Gonzales v. Raich*, ⁵² the Court held that Congress' commerce clause power includes the "power to prohibit the local cultivation and use of marijuana in compliance with California law." The two respondents in *Raich*, Angel Raich and Diane Monson, used medical marijuana pursuant to the terms of the California Compassionate Use Act of 1996 (CCUA). The California legislature passed the CCUA to "ensure that 'seriously ill' residents of [California] have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps toward ensuring the safe and affordable distribution of the drug to patients in need." After federal officials and local sheriffs, relying on the federal Controlled Substances Act (CSA), seized and destroyed Monson's marijuana plants, both respondents challenged those actions, arguing that the CSA's prohibition of intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeded Congress' authority under the commerce clause.

In rejecting this argument, the Supreme Court held, *inter alia*, that Congress' assertion of authority under the commerce clause has "evolved over time," and intrastate growth of marijuana

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⁵¹ Morrison, 529 U.S. at 610 (quoting Lopez, 514 U.S. at 560).

⁵² 125 S.Ct. 2195 (2005).

⁵³ Gonzales v. Raich, 125 S.Ct. 2195, 2199 (2005).

⁵⁴ Raich, 125 S.Ct. 2195 (construing CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2005)).

⁵⁵ *Id.* at 2199 (quoting CAL. HEALTH & SAFETY CODE § 11362.5 (b)(1)).

⁵⁶ *Id.* (construing Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–802, 811–814, 821–830, 841–844a, 846–853, 854–864, 871–881, 882–887, 889–904 (West 1999 & Supp. 2005))).

⁵⁷ *Id.* at 2200-01.

⁵⁸ *Id.* at 2204-05.

does encompass interstate commerce. In so holding, the Court affirmed that Congress has the power to "regulate purely local activities that are part of an *economic* 'class of activities' that have a substantial effect on interstate commerce." It is difficult to imagine that if the Court finds that the wholly intrastate growth of marijuana affects interstate commerce, that it would not conclude that an "incident of national significance" affecting the nationwide movement of food, fuel, clothing, medicine, and other commodities does not self evidently substantially affect interstate commerce.

Hurricane Katrina is a prime example of the impact of a catastrophic public health emergency on interstate commerce. ⁶⁰ In the immediate aftermath of the hurricane, the destruction sent thousands of victims across state borders in search of food and shelter and required delivery of relief workers and supplies from across the nation. ⁶¹ In the extended

Largest Relief U.S. Relief Effort, N.Y. TIMES, Sept. 1, 2005, at A1 (discussing evacuation attempts for the city of New Orleans as well as New Orleans's Mayor C. Ray Nagin's fear that the hurricane might have killed thousands in his city).

⁵⁹ *Id.* at 2205 (emphasis added) (citing Perez v. U.S., 402 U.S. 146, 151 (1971); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942)). Relying heavily on *Wickard*, the Court in *Raich* stressed in its ruling that the California Compassionate Use Act fell within the purview of Congress' power under the commerce clause. The word "economic," used by the Court, refers to "the production, distribution, and consumption of commodities [and includes] [p]rohibiting the intrastate possession or manufacture of an article of commerce [and these prohibitions] include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements." *Id.* at 2211 (citing Webster's Third New International Dictionary 720 (1966); 16 U.S.C.A. § 668(a) (West 2000 & Supp. 2005) (prohibiting bald and golden eagles); 18 U.S.C.A. § 175(a) (West 2000 & Supp. 2005) (prohibiting biological weapons); 18 U.S.C.A. § 831(a) (West 2000) (nuclear material); 18 U.S.C.A. § 842(n)(1) (West 2000 & Supp. 2005) (certain plastic explosives); 18 U.S.C.A. § 2342(a) (West 2000 & Supp. 2005) (contraband cigarettes)).

⁶⁰ HHS Secretary Mike Leavitt declared a federal public health emergency on August 31, 2005 for the states of Louisiana, Alabama, Mississippi, and Florida. Press Release, Department of Health and Human Services, HHS Delivering Medical Care to Help Evacuees and Victims (Aug. 31, 2005), available at http://www.hhs.gov/news/press/2005pres/20050831.html (last visited Sept. 1, 2005). See also Associated Press, Before Katrina, the Economy was Doing Fine, N.Y. TIMES, Sept. 8, 2005, at C6 (discussing the prediction by private economists and the Congressional Budget Office that "fallout from the storm would cause overall economic activity to slow in the second half of this year by one-half to a full percentage point on an annualized basis").

61 See James Dao, Off the Map; No Fixed Address, N.Y. TIMES, Sept. 11, 2005, at 41 (discussing "resettling evacuees" from the Gulf Coast who fled to other states after Katrina); Kirk Johnson, et al., President Visits as New Orleans Sees Some Gains, N.Y. TIMES, Sept. 12, 2005, at A1 (discussing extent of relief effort from all over the nation); Robert D. McFadden & Ralph Blumenthal, Bush Sees Long Recovery for New Orleans; 30,000 Troops in

aftermath, commerce in several industries was drastically affected.⁶² For example, the hurricane severely impaired substantial portions of the country's oil refineries and curtailed offshore production of oil and gas.⁶³ As a result, the nation is currently experiencing its highest rates in gasoline prices in recent history.⁶⁴ On August 31, the White House decided to release oil from the nation's emergency stockpiles to meet shortages caused by Hurricane Katrina.⁶⁵ In response to this announcement alone, the price of crude oil fell in trading.⁶⁶ Therefore, the suggestion that the federal government's role is limited in a catastrophic public health emergency because of commerce clause constraints is unconvincing. Moreover, the broad array of federal legislation programs that address catastrophic health emergencies itself evidences Congress' strong belief that it has the constitutional power to address these kinds of national crises.⁶⁷

As an example, the help given by the federal government in the wake of Katrina included: deploying more than 72,000 unified federal personnel; housing approximately 89,400 people in shelters nationwide; completing roughly 55,000 housing damage inspections; rescuing more than 33,000 lives; restoring more than 73% of affected drinking water systems in Louisiana and 78% in Mississippi; and serving more than 12 million hot meals and more than 8.2 million

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⁶² Prices for Energy Futures Soar in the Wake of Hurricane Katrina, N.Y. TIMES, Aug. 31, 2005, at C2 ("Economists warned that Katrina was likely to leave a deeper mark on the national economy than previous hurricanes because of its profound disruption to the Gulf of Mexico's complex energy supply network."). See also id. at C4 ("The airline industry felt the delayed brunt of Hurricane Katrina, with some airports running low on jet fuel and carriers canceling hundreds more flights.").

⁶³ Jad Mouawad & Simon Romero, *Gas Prices Surge as Supply Drops*, N.Y. TIMES, Sept. 1, 2005, at A1.

⁶⁴ Some states reached their highest gasoline prices ever. Associated Press, *Gasoline Pricing Violations*, N.Y. TIMES, Sept. 11, 2005, at 14NJ-6 ("New Jersey's gasoline prices hit their highest levels ever on Labor Day, averaging \$3.16 a gallon for regular."); Jad Mouaward, *Storm Stretches Refiners Past a Perilous Point*, N.Y. TIMES, Sept. 11, 2005, at 27 ("The hurricane also knocked off a dozen refineries at the peak of summer demand, sending oil prices higher and gasoline prices to inflation-adjusted records."); Mouawad & Romero, *supra* note 63 ("While gasoline averaged \$2.60 a gallon earlier in the week [of Aug. 29 to Sept. 2], unleaded regular gas was selling [on Aug. 31] at \$3.09 at stations in West Palm Beach, Fla.; \$3.49 in Indianapolis; and \$3.25 in San Francisco. Premium fuel was going for up to \$3.89 a gallon in Chicago.").

⁶⁵ Press Release, The White House, President Outlines Hurricane Katrina Relief Efforts (Aug. 31, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/08/20050831-3.html (last visited Sept. 1, 2005).

⁶⁶ Mouawad & Romero, supra note 63. The price of crude oil fell in trading from \$69.81 to \$68.94. Id.

⁶⁷ See supra notes 16 – 31 and accompanying text.

snacks to survivors.⁶⁸ These federal actions and the implementation of policies and programs under the NRP⁶⁹ demonstrate the strong level of commitment and involvement by the federal government in preparation and response to catastrophic public health emergencies.

Accordingly, whether adopting the Model Act or using existing public health laws or other forms of new laws, states must plan for response to a catastrophic event with an eye toward the federal government. They must do so to be aware of the substantial assistance the federal government can provide. They must do so to be prepared to advise the federal government of the role the state wants it to play. In the absence of keeping federal government in mind, states will not know what to ask from the federal government for assistance, as evidenced by Governor Blanco's highly generalized request of President Bush ("I'm going to need all the help you can send me"). Even worse, the doctrine of Karl Rove may be followed – just take over the response and ignore the states and localities. States should be prepared to fight such a takeover if they feel able to lead a response or invite federal leadership if they believe they are overwhelmed.

Hurricane Katrina has hopefully taught an important lesson – that the federal government cannot be ignored; its resources and powers must be acknowledged by states to ensure a healthy balance between the state and federal role during a catastrophic public health emergency.

⁶⁸ See DHS, What Government is Doing, *supra* note 16; U.S. Interagency Council on Homelessness, In Washington: Federal Agencies Make Additional Resources and Waivers Available to Assist Those Affected by Hurricane Katrina, http://www.ich.gov/ (last visited Sept. 28, 2005).

⁶⁹ See supra notes 16-31 and accompanying text.

⁷⁰ See Lipton, supra note 2.

⁷¹ See Rove Off the Record, supra note 1.