Journal of Health Care Law and Policy

Volume 10 | Issue 1 Article 3

Public Health and Constitutional Law: Recognizing the Relationship

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PUBLIC HEALTH AND CONSTITUTIONAL LAW: RECOGNIZING THE RELATIONSHIP

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INTRODUCTION

Why should lawyers, scholars, and students who care about constitutional law think about public health?[1] There are many answers to this question. In this essay, I focus on three possible responses: two rather pragmatic answers and one more theoretical. Each makes the case for an enhanced appreciation of the role of public health in constitutional law.

The first claim is simple: public health has played an important role in the development of myriad constitutional doctrines.[2] Hence, an appreciation of public health can help lawyers to understand critical constitutional cases and doctrines. The second claim is related: because of the high frequency of public health issues in constitutional law cases, an understanding of the methodologies and techniques of public health can help courts and lawyers assess the relationship between a state's purported ends and the means it has chosen.[3] Finally, there is a more general and theoretical claim: public health offers a perspective on the interdependency of risk that provides important insights into the relationship between individuals and states.

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1. Public health has been defined as "what we, as a society, do collectively to assure the conditions for people to be healthy." COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, INST. OF MED., THE FUTURE OF PUBLIC HEALTH 19 (1988). While useful, this definition does not capture all of the meanings of "public health" used in this essay. Most notably this definition fails to capture the fact that public health is also a discipline, or as the Acheson Report stated, "the art and science of preventing disease, promoting health, and prolonging life through organized efforts of society." COMM. OF INQUIRY INTO THE FUTURE DEV. OF THE PUB. HEALTH FUNCTION, PUBLIC HEALTH IN ENGLAND 1 (1988) [hereinafter PUBLIC HEALTH IN ENGLAND].

2. *See infra* notes 4-42 and accompanying text.

3. *See infra* notes 43-64 and accompanying text.

I. PUBLIC HEALTH'S ROLE IN CONSTITUTIONAL LAW DOCTRINES

Public health has had a long and venerable relationship with constitutional law. Understanding that relationship, as well as the impact that public health has played in the formation of constitutional law, provides important insights into critical constitutional principles and doctrines.

When the Constitution was drafted, epidemics of infectious diseases, especially smallpox and yellow fever, wreaked periodic devastation on the American states.[4] In response to these diseases, as well as the more common endemic infections, cities and states undertook a variety of legal measures. They instituted quarantines,[5] provided medical care for the poor,[6] and periodically ordered the cleaning of filthy urban centers.[7] Although these actions were often ineffective due to poor or even erroneous understanding of the diseases being combatted,[8] these state actions were, in the words of Blackstone, "of the highest importance."[9] States and cities sought to fulfill what was then viewed as one of government's essential obligations under the social contract:[10] to protect the "*Peace, Safety,* and *publick good of the people* . . . ."[11] After all, during an era where an epidemic could easily shut down an entire city, as yellow fever did to the United States capital, Philadelphia, in 1793,[12] protection from epidemics was essential to the maintenance of public order and the attainment of all other public goods.

Public health's importance to constitutional law was initially obscured by federalism. At the time of the Constitution's framing, both the obligation and the power to protect public health were widely viewed as belonging to the states.[13] Indeed, the Framers understood that the authority to protect the public's health fell among the domestic police powers that states had prior to the Constitution, and that states would continue to wield under the Constitution.[14] Because the Constitution's

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4. *See* Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era,* 20 HASTINGS CONST. L.Q. 267, 285-302 (1993).

5. *Id.* at 287-88.

6. *Id.* at 289.

7. *Id.* at 290 (describing sanitation efforts).

8. *Id.* at 281; *see also* J.N. HAYS, THE BURDENS OF DISEASE: EPIDEMICS AND HUMAN RESPONSE IN WESTERN HISTORY 106-53 (1998).

9. WILLIAM BLACKSTONE, 4 COMMENTARIES *161.

10. For a discussion of social contract theory and its role in the Constitution's framing, see Parmet, *supra* note 4, at 308-11.

11. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 353 (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1690).

12. *See* J.H. POWELL, BRING OUT YOUR DEAD: THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793, at vi, 252-53 (1949).

13. Parmet, *supra* note 4, at 319-20.

14. THE FEDERALIST NO. 17, at 80-83 (Alexander Hamilton) (Gary Wills ed., 1982).

text did not enumerate those state powers, or place many limits upon them,[15] focusing instead on the authority and the limitations of the federal government, public health was not a necessary subject of the Constitution itself.[16] Public health nevertheless played a vital role in the development of constitutional law.

During the antebellum period, public health became an important factor in the Supreme Court's understanding of horizontal federalism.[17] As early as 1824, in *Gibbons v. Ogden*, the Court identified both quarantine laws and "health laws of every description" as quintessential examples of the types of laws that the Constitution left to states.[18] Shortly thereafter, in *Willson v. Black-bird Creek Marsh Co.*, the Court rejected a Commerce Clause challenge to a state law that authorized the erection of a dam on a stream used for interstate commerce, in part due to the fact that as a result of the dam "the health of the inhabitants probably [would be] improved."[19] In effect, the Court recognized that states could properly enact laws to improve the health of their residents and that such laws were constitutional, even if they created some burden upon interstate commerce.[20]

In the decades that followed, this understanding of public health became entrenched in the Court's developing and ever-changing dormant, or negative, Commerce Clause jurisprudence. While this article does not include a full discussion of the case law, the important point is that the Supreme Court consistently saw the protection of public health as among those activities that fell within the police power, and which states could therefore undertake without running afoul of the implied limits that the Constitution placed upon state interference with interstate commerce.[21] As a result, an understanding of what threats states faced, and how they used the law to respond, may greatly help lawyers appreciate the roots of dormant Commerce Clause jurisprudence.

An understanding of public health, however, is not relevant simply to those interested in the history of the dormant Commerce Clause. Although the doctrine has changed and the Court relies far less today than it once did upon the concept of the police power in assessing whether a state law violates the negative Commerce Clause,[22] issues of public health and the ability of states to protect it continue to

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15. *See infra* notes 17-21 and accompanying text. Prior to Reconstruction, the Constitution contained few limits upon state action and none that proved particularly relevant to state actions relating to public health. *Id.* During this period, the most important limitations on state action derived from the implied limitations that the Court read into the Commerce Clause. *Id.*

16. Parmet, *supra* note 4, at 319-20.

17. JAMES VOLVO & DOROTHY DEENEEN VOLVO, THE ANTEBELLUM PERIOD xiii-xxv (2004).

18. 22 U.S. (9 Wheat.) 1, 203 (1824).

19. 27 U.S. (2 Pet.) 245, 251-52 (1829).

20. *Id.*

21. *See, e.g.*, Brimmer v. Rebman, 138 U.S. 78 (1891). At times the Court has looked to the state law at issue to try to determine whether it was indeed a public health measure or a protectionist measure disguised as a public health law. *Id.* at 82.

22. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corp. of Eng'rs, 531 U.S. 159, 181 (2001) (Stevens, J., dissenting) (arguing that the majority's decision did not follow precedent and

influence the doctrine. For example, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, a divided Supreme Court struck down a Michigan statute that prohibited private landfill operators from accepting solid waste that originated outside of their county, but only after stating that "[n]o issue relating to hazardous waste is presented, and there is no claim that petitioner's operation violated any health, safety, or sanitary requirement."[23] In addition, the Court noted the "well-recognized difference between economic protectionism, on the one hand, and health and safety regulation, on the other," but found this difference irrelevant to the case at hand since the statute before it, according to the majority, was not one that aimed to preserve health or safety.[24] By contrast, Justice Rehnquist's dissent emphasized the health risks of landfills, as well as the market imperfections that make regulations such as Michigan's a rational approach to reducing those health risks.[25] Both the majority and the dissent implied that states could enact a statute that discriminated against out-of-state commerce if the statute was a health or safety regulation.[26] The Justices merely disagreed on the characterization of the statute before them.[27] Hence, understanding what constitutes a public health problem, and how states can properly and effectively go about reducing such problems, remains an important ingredient in determining when states may constitutionally discriminate against interstate commerce.

Issues of public health have likewise played an important role in the Court's development and articulation of the due process clause of the Fourteenth

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instead adopted a more narrow interpretation of the commerce power). *See generally* Norman R. Williams, *The Dormant Commerce Clause: Why* Gibbons v. Ogden *Should Be Restored to the Canon*, 49 ST. LOUIS U. L.J. 817 (2005).

23. 504 U.S. 353, 358 (1992).

24. *Id.* at 365-67.

25. *Id.* at 368-72 (Rehnquist, C.J., dissenting). In effect, Chief Justice Rehnquist argued that hazardous waste was a public health threat precisely because it was a public bad that market forces alone would not reduce to sufficient levels in all communities. *Id.* at 372-73. For an argument that seeks to limit the purview of public health to "public bads," see Richard A. Epstein, *Let the Shoemaker Stick to His Last: A Defense of the "Old" Public Health*, 46 PERSP. BIOLOGY & MED. S138 (2003).

26. *Fort Gratiot Sanitary Landfill*, 504 U.S. at 365 n.6 ("[A] State's power to regulate . . . for the purpose of protecting the health of its citizens . . . is at the core of its police power. For Commerce Clause purposes, [we recognize] a difference between economic protectionism . . . and health and safety regulation . . . ."); *see also id.* at 371-72 (Rehnquist, C.J., dissenting) (noting that the Court's previous decisions in *Brimmer v. Rebman*, 138 U.S. 78 (1891), and *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), illustrated instances where states were permitted to adopt "health and safety regulations that are directed to legitimate local concerns" and that Michigan should be given an opportunity, on remand, to demonstrate that its regulation aimed to do the same).

27. *Compare id.* at 363, 366-68, *with id.* at 368-71 (Rehnquist, C.J., dissenting). The characterization of a statute as a health or safety statute is also relevant under the so-called *Pike* balancing test under which the Court reviews whether a statute that does not discriminate against out-of-state interests violates the dormant Commerce Clause. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Under this balancing test, the Court supposedly weighs the statute's impact upon commerce against the legitimate benefits it brings to the state. *Id.* at 142.

Amendment.[28] Indeed, questions of public health were central to the Court's introduction to that clause in the *Slaughter-House Cases*, in which the Court upheld a Louisiana law that was likely designed, at least in part, to improve sanitary conditions in New Orleans in the face of repeated and horrific yellow fever epidemics.[29] In that case and subsequent cases, the Court imported into the Fourteenth Amendment the previously developed understanding of the police power, so that state action falling within the traditional boundaries of the police power—including, especially, state action designed to protect public health—was deemed constitutional and not a violation of the due process clause.[30] Thus, to understand the formative and oft-criticized due process clause cases of the pre-New Deal era, it is useful, if not essential, to understand both the public health threats that were salient when due process jurisprudence was developing, as well as the legal interventions that states used to retard those threats.[31]

Undoubtedly, the Court's approach to the due process clause, as well as the role that public health played in the Court's evaluation of state action under that clause, changed dramatically with the New Deal Court. Simply put, the question whether a challenged state law protected public health was, after the New Deal, no longer dispositive.[32] Nevertheless, the question remains relevant in due process cases that examine whether a state law is rationally related to a legitimate state goal. For example, in the important case of *Williamson v. Lee Optical*, a case oft-cited as an example of the post-New Deal Court's extreme deference to state regulation, the Court still apparently felt the need to justify or rationalize a state law limiting the practice of optometry by citing its hypothetical, but rational, relationship to public health.[33] More recently, and less famously, in *Greater Chicago Combine & Center, Inc. v. City of Chicago*, the United States Court of

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28. U.S. CONST. amend. XIV, § 1. Much the same can be said about the application of the equal protection clause in those cases which do not pertain to discrimination against protected classifications. *Id.*

29. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 64-66 (1872); RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 6-8 (2003). For further discussion of the role that public health played in this case, see Wendy E. Parmet, *From* Slaughter-House *to* Lochner*: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 481-88 (1996).

30. This idea was repeated in numerous Fourteenth Amendment cases. *See infra* notes 32-37 and accompanying text.

31. I have argued elsewhere that issues of public health were actually central to the *Lochner* case itself and that indeed, the division between the majority of the Court in that case and Justice Harlan, in dissent, was over an understanding of what constitutes a public health problem and how much deference should be given to the discipline of public health in reaching that determination. *See* Parmet, *supra* note 29, at 497-501.

32. Under the so-called "rational relationship" test adopted by the New Deal Court for the vast majority of due process cases (in which no fundamental right is infringed), the Court is willing to defer to legislative determinations that a statute will advance a legitimate state goal without inquiring as to whether or not that is actually the case. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

33. *Id.* at 487-88.

Appeals for the Seventh Circuit upheld a city ban on owning pigeons in residential neighborhoods, in part because it was at least "plausible that feeding and maintaining pigeons in backyard coops would increase the public health risks posed by rodents and disease."[34] The court quoted its own earlier determination that "[c]oncern for public health is a sufficient reason on its face" for an ordinance to survive a due process challenge.[35] To be sure, in cases such as *Greater Chicago Combine*, which do not implicate any fundamental right triggering heightened scrutiny, the courts' review is highly deferential and often lacks a serious analysis of the public health issues at stake.[36] Still, it is both revealing and important to recall that courts continue to care whether state action relates to the protection of public health.[37] Yet, only by understanding public health can constitutional theorists assess the meaning and validity of the courts' concern. And, as I will discuss, only by understanding public health can lawyers litigating such cases address that concern.[38]

Importantly, the Commerce Clause and the "rational relationship" test under the due process clause are not the only constitutional doctrines in which public health plays an important role. While this article does not include a complete discussion of all the areas of constitutional law in which issues and ideas about public health are prominent, it is worth noting that in recent years, concerns about public health have also played an increasingly important role in debates about the regulation of so-called commercial speech.[39] Under the prevailing *Central Hudson* test, the regulation of truthful and nonmisleading commercial speech may be upheld if the government is pursuing a substantial state goal and the regulation directly advances that goal without being more extensive or burdensome than is necessary.[40] Not surprisingly, given the Court's historic attitude toward public health, the protection of public health has been recognized by the Court as a substantial state goal that may justify the regulation of commercial speech.[41] Hence, once again, the ability to identify a public health issue is important to understanding what a state may and may not do. Likewise, an understanding of public health is also useful for evaluating the means that a state may use to realize its goals. Indeed, in several recent First Amendment cases concerning health-related regulations, the Court has rejected the government's claim that the regulation at issue directly advances health protection in a manner that is no more

34. Greater Chi. Combine & Ctr., Inc., v. City of Chi., 431 F.3d 1065, 1072 (7th Cir. 2005).

35. *Id.* (quoting Pro-Eco, Inc. v. Bd. of Comm'rs, 57 F.3d 505, 514 (7th Cir. 1995)).

36. *Id.* at 1072-73.

37. *See, e.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 366-67 (1992).

38. *See* discussion *infra* Parts II and III.

39. *See* Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 406-29 (2006).

40. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (outlining the four-part test).

41. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 570-71 (2001).

extensive than necessary.[42] It turns out that to conduct that inquiry, the discipline of public health has much to offer. It is to the pragmatic, but vital, relationship between public health and constitutional law that I now turn.

II. THE ENDS/MEANS RELATIONSHIP

The term "public health" does not simply refer to the health condition of a population or community; it refers also to "the art and science of preventing disease, promoting health, and prolonging life through organized efforts of society."[43] In other words, public health is also a field that studies the health of populations and how to improve it. A central sub-discipline within this field is epidemiology, which has been defined as "[t]he study of the distribution and determinants of health-related states or events in specified populations, and the application of this study to control of health problems."[44]

In recent years, epidemiology has received considerable attention in the law. Much of this attention has centered on its use as evidence in toxic tort cases,[45] especially in the context of the *Daubert* doctrine, which determines the admissibility of expert testimony in federal court.[46] Epidemiology, however, also plays an important role in constitutional law, especially in many doctrines and cases, some of which were discussed above, in which the state's purported attempt to protect public health is relevant to the determination of the constitutionality of state action.[47] Indeed, in such cases, epidemiology and its sister sciences, such as biostatistics, are absolutely critical to understanding both what courts are doing and the constitutionality of particular state actions.

Importantly, the application of epidemiology to constitutional law raises different issues than those common in the tort context. In a tort case, epidemiology is generally used to provide evidence about causation; specifically, whether the particular product or activity at issue caused the plaintiff's particular harm.[48] In constitutional law cases, the issue is far different. Courts are not being asked to decide whether particular state regulations cause harm to particular persons, but

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42. *E.g.*, *id.* at 561; Thompson v. Western States Med. Ctr., 535 U.S. 357, 371 (2002).

43. *See* PUBLIC HEALTH IN ENGLAND, *supra* note 1, at 1.

44. T. KUE YOUNG, POPULATION HEALTH: CONCEPTS AND METHODS 7 (1998) (quoting A DICTIONARY OF EPIDEMIOLOGY (John M. Last ed., 4th ed. 2001)). For a further discussion of epidemiology, see Richard A. Goodman, *Epidemiology 101: An Overview of Epidemiology and Its Relevance to U.S. Law*, 10 J. HEALTH CARE L. & POL'Y 153 (2007).

45. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993); Cano v. Everest Minerals Corp., 362 F. Supp. 2d 814, 820-21 (W.D. Tex. 2005); *In re* Asbestos Litigation, 900 A.2d 120, 151-56 (Del. Super. Ct. 2006).

46. *Daubert*, 509 U.S. at 592-95.

47. *See, e.g.*, Greater Chi. Combine & Ctr., Inc., v. City of Chi., 431 F.3d 1065, 1071-72 (7th Cir. 2005) (considering the effect of feeding and maintaining pigeons as increased public health risks, and determining that the city's law regarding such activities had a rational relation to protecting the public health).

48. *See, e.g.*, *Cano*, 362 F. Supp. 2d at 820; *In re Asbestos Litigation*, 900 A.2d at 151.

rather, to understand the relationship between challenged state interventions and the harms faced by a population.[49] Thus, the critical problem that arises in tort cases of applying population-level data to determine individual causation does not arise often in constitutional law cases. Indeed, because the state in a typical constitutional law case is not trying to show a causal relationship between an individual's harm and the state action at issue, but rather a population benefit from the challenged state action,[50] epidemiological evidence is both easier and more appropriately applied in constitutional law cases than in tort cases.

Consider, for example, the Court's analysis of Massachusetts's attempt to regulate cigar and smokeless tobacco advertising in *Lorillard Tobacco Co. v. Reilly*.[51] Under the prevailing First Amendment commercial speech doctrine, the constitutionality of the state's regulations depended upon the state being able to show, first, that it was advancing a substantial state interest, second, that the regulations directly advanced such an interest, and third, that the regulations were no more extensive or burdensome than was necessary.[52] As previously discussed, the Court has consistently accepted that public health is a valid and even important state function.[53] But how could the Court know that the regulation of tobacco marketing to minors was in fact related to protecting public health? Moreover, how could the Court know whether the regulations protected public health, either directly or at all, and in a manner no more extensive than is necessary to achieve the state goal?

To answer each of these questions, the Court had to review and assess epidemiological evidence. First, the Court had to acknowledge the evidence, taken by now almost as a given, that tobacco is a public health hazard.[54] Second, and more interestingly, the Court had to consider the relationship between tobacco marketing and tobacco usage.[55] In so doing, Justice O'Connor showed an understanding, demonstrated by modern epidemiology, of how social and environmental factors can affect a population's health.[56] This required an appreciation of the differences between determining the cause of an individual's illness and a population's heightened incidence of that illness. Thus, while it may

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49. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556-61 (2001) (describing generally problems with underage use of smokeless tobacco and cigars); *Greater Chi. Combine*, 431 F.3d at 1072 (describing the rationale for prohibiting pigeons in residential areas of the city).

50. *Lorillard*, 533 U.S. at 556-61; *Greater Chi. Combine*, 431 F.3d at 1072.

51. *Lorillard*, 533 U.S. at 556. The state in that case also attempted to regulate the marketing of cigarettes, but these regulations were found to be preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (2000), and were hence not subject to analysis under the First Amendment. *Lorillard*, 533 U.S. at 532, 551.

52. *Id.* at 554 (quoting Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).

53. *See* discussion *supra* Part I.

54. *Lorillard*, 533 U.S. at 542.

55. *Id.* at 556-61.

56. *Id.*

be difficult to say that the advertising and marketing at issue in *Lorillard* caused any particular individual's illness,[57] the epidemiological evidence clearly demonstrates that advertising and marketing increase the rate of tobacco use and illness across a population.[58] Finally, under the *Central Hudson* test, the Court had to consider whether the state's regulations were overly extensive.[59] In undertaking this analysis, the *Lorillard* Court lost sight of a key epidemiological question and considered only the burdens of the regulations on speech rather than whether there were other effective ways for the state to address the public health threat created by tobacco marketing and advertising.[60] To decide whether the state in fact had other alternatives, the Court would have had to consider how environmental factors operate at a population level as well as the impact of various regulatory strategies on population health.

Likewise, in order for courts to determine whether state laws that purport to protect public health violate the Commerce Clause, courts must have some appreciation of the relevant epidemiological and other public health evidence.[61] Knowledge of epidemiology is also important for assessing claims subject to the rational relationship test under the equal protection and due process clauses. While courts in these cases are expected to give great deference to the state, the relationship between ends and means must still be considered.[62] Judicial deference does not entail the complete abnegation of all review. As a result, lawyers involved in such litigation must be able to present and contest epidemiological evidence that suggests or undermines the finding of a rational relationship between the state's action and the public health goal that the action is said to justify in those cases in which the state points to a public health goal. To do so, lawyers must have some familiarity with epidemiology and must be able to focus on the population-level issues that are rarely considered when epidemiology is discussed in the torts and evidence literature.

Finally, it is important to appreciate that an understanding of epidemiology and its use in constitutional litigation does not simply ensure support for state actions undertaken in the name of public health. On the contrary, only when constitutional lawyers and courts are knowledgeable about and confident of their ability to use and assess epidemiological evidence will they be able to question and

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57. This of course has been a problem for individual plaintiffs in tort cases against tobacco companies. *See, e.g.*, Gary T. Schwartz, *Tobacco Liability in the Courts*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 131, 152-53 (Robert L. Rabin & Stephen D. Sugarman eds. 1993).

58. *Lorillard*, 533 U.S. at 556-61.

59. *Id.* at 554, 556, 565.

60. *See* Parmet & Smith, *supra* note 39, at 416-18.

61. In *Kassel v. Consol. Freightways Corp.*, Justice Brennan questioned this point and argued that "[i]n determining [a regulation's] benefits, a court should focus ultimately on the regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment." 450 U.S. 662, 680 (1981) (Brennan, J., concurring).

62. *E.g.*, *Lorillard*, 533 U.S. at 554 (quoting Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).

limit state actions taken in the name of public health. The claim that an intervention is needed in the name of public health is a powerful one, perhaps as compelling as the cry of national security.[63] Only by recognizing when public health is actually at risk, and when a state action does and does not have a plausible foundation in the empirical world, can courts have the confidence to question that claim and limit state actions, such as in the infamous mandatory sterilization upheld in *Buck v. Bell*,[64] undertaken in the name of public health. Thus, the ability to be knowledgeable and critical consumers of the discipline of public health is necessary, not only to ensure that the law can protect public health, but also to safeguard against abuses undertaken in the name of public health.

III. THE INTERDEPENDENCY OF RISK

The third, and perhaps most important, reason why constitutional law should take notice of public health is that it can add insight and an often neglected perspective to our understanding of why we have governments and how they relate to their citizens. At its core, public health demonstrates the interdependency of communities and populations. Public health shows that in a multitude of ways our own well-being depends not only on the genes we were born with and the choices we make, but also on the nature of the communities we inhabit and what happens within them.

This point is easiest to see in the context of communicable diseases. By definition, communicable diseases spread from one person to another[65] and thrive in communities. The risk of any individual contracting a communicable disease depends, to a large degree, upon factors outside that person's own control.[66] For an airborne infectious disease, for which there is no effective vaccination available, the only effective means of reducing an individual's risk of contracting the disease is to work, at a population level, to reduce the community's risk by altering those factors that make the community vulnerable.[67] Hence, when it comes to a highly contagious disease such as pandemic influenza, concerted action is often necessary. In these situations, government action is not simply optional; rather, it is imperative if risks are to be reduced. Moreover, given the capacity of some epidemics to

63. City of Newark v. J.S., 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993) ("The claim of 'disease' in a domestic setting has the same kind of power as the claim of 'national security' in matters relating to foreign policy.").

64. 274 U.S. 200, 207 (1927).

65. MOSBY'S DICTIONARY OF MEDICINE, NURSING & HEALTH PROFESSIONS 426 (7th ed. 2006).

66. This is not to say that individuals cannot at times take actions to reduce their own risk of an infectious disease. For many infectious diseases, individuals can opt to be vaccinated thereby decreasing their own risk of contracting the disease. However, because vaccinations can create herd immunity, the risk of individuals contracting a vaccine-preventable disease are affected by what others do. For a discussion of this, see Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights, in* LAW IN PUBLIC HEALTH PRACTICE 262, 262-63 (Richard A. Goodman et al. eds., 2003).

67. *Id.* at 264.

destroy and disrupt economic and civil life, risk-reducing interventions are not simply desirable, they may be essential to the survival of community. Thus, by focusing on the issue that gave rise to the field of public health—infectious epidemics—one garners a deeper appreciation for the fact that many government actions taken to promote public health are not merely gratuitous services provided by the welfare state; they are critical, as they have always been, to a state's ability to thrive. As Justice Harlan noted 100 years ago in *Jacobson v. Massachusetts*, in society, liberty depends upon the protection of civil society.[68]

The interdependency of risk and the importance of collective action in reducing risk, however, are not limited to the case of infectious disease. On the contrary, the study of public health and the science of epidemiology demonstrate that rates of chronic disease and injuries are also, significantly, influenced by social and environmental factors that are determined on a population level.[69] Thus, the risk we face of dying of heart disease, or from a motor vehicle accident, may be determined more by factors affecting our communities than by the decisions we make.[70] This again suggests that if we wish to reduce the risks that individuals face, concerted action, often requiring government (i.e., legal) intervention will almost necessarily have an important role to play. As public health theorists have come to understand, law is an essential tool for public health.[71]

But how does an appreciation of this factor alter our view of constitutional law? One quick, but I think ultimately unsatisfactory, answer is that the interdependency of risk demonstrated by epidemiology argues for the need for constitutional law to give less weight to "individual rights" and more leeway for government actions taken in the name of public health.[72] Certainly the Supreme Court's seminal public health law case, *Jacobson*, which upheld a Cambridge, Massachusetts ordinance requiring individuals to be vaccinated for smallpox during a smallpox epidemic,[73] can be cited for such a proposition. Clearly public health can lend support for the claim that the fates of individuals are joined and that individual rights should not be read to trump the collective well-being.

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68. 197 U.S. 11, 26 (1905).

69. YOUNG, *supra* note 44, at 120-25.

70. *See* GEOFFREY ROSE, THE STRATEGY OF PREVENTIVE MEDICINE 22 (1992) (noting that few individuals feel that risks that have not materialized in an individual's own experience need to be taken seriously).

71. George A. Mensah et al., *Law as a Tool for Preventing Chronic Diseases: Expanding the Spectrum of Effective Public Health Strategies*, 1 PREVENTING CHRONIC DISEASES: PUB. HEALTH RES., PRAC., & POL'Y 1, 2 (2004), http://www.cdc.gov/pcd/issues/2004/jan/pdf/03_0033.pdf ("Laws can play pivotal roles in the elimination of disparities in access to and delivery of quality health care. In addition, appropriate laws undergird the broader mission of state and local public health agencies in assessing the burden of chronic diseases, setting priorities, allocating resources, and delivering health services.").

72. Lawrence O. Gostin, *Dunwoody Distinguished Lecture in Law: When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105, 1140-41 (2003).

73. *Jacobson*, 197 U.S. at 39.

But there is another way to interpret the tale told by public health about the relationship of individuals and their community. This approach deemphasizes the potential clash of interests between individuals and "the common good," and points, instead, to the joint or interdependent fate of individuals within a community. Hence, many public health writers have shown how conditions that harm some in a community, for example, cultural patterns that prevent women from having a say regarding their sexual activities, threaten others.[74] Likewise, focusing on the phenomenon of "emerging infections" can lead to an appreciation of how the neglect of economic and environmental resources in the developing world can bring harm not only to the people in those nations, but to everyone in the global community.[75] From this perspective, the lessons for constitutional law are not necessarily that individual rights need to be overridden in the name of public health, or that individuals stand in opposition to public health, but that respect for individual rights may, at least at times, be a necessary prerequisite for improving public health.[76] Moreover, this perspective suggests that the critical deficiencies in constitutional law today are not its overemphasis of rights, but the shallowness of those rights and the fact that constitutional doctrine generally fails to appreciate the complimentary nature of individual rights and public health.[77]

My goal is not to debate these two different positions, nor even to develop either fully. Rather, I present these positions merely to suggest that public health can offer insight and a focus into some of the critical issues of constitutional law. By understanding the teachings of public health and the ways in which our fates are and are not joined together, and what interventions we can and cannot do successfully, we can begin to add to our understanding about why we have governments, what actions they can and cannot do well, and what role individual rights can play in our well being.

CONCLUSION

Constitutional law, at its core, provides a system for understanding, debating, and organizing governments and their relationship to those they govern. These are vast and weighty subjects, influenced necessarily not only by the Constitution's text and framing, but also by its history, the nation's culture, economy, wars, and fears, as well as the structure and imperatives of constitutional law itself. I do not claim that public health holds the key to constitutional law, nor that public health should dominate constitutional discourse. Public health can never provide *the* answer to constitutional law. Nevertheless, recognition of public health's role in

74. Jonathan M. Mann, *Medicine and Public Health, Ethics and Human Rights*, *in* ETHICAL HEALTH CARE 583, 588 (Patricia Illingworth & Wendy E. Parmet eds., 2006).

75. LAURIE GARRETT, THE COMING PLAGUE: NEWLY EMERGING DISEASES IN A WORLD OUT OF BALANCE 8-11(1994).

76. *Id.* at 11.

77. *Id.*

constitutional law, and an application of its teachings to that subject, can enrich the understanding of both practical advocates and theoretical scholars of many of the central challenges raised by constitutional law.