

The Legal Basis of Public Health

An Individual or Group Study Course in Ten Modules

Module 1 Introduction

SS0001

The Legal Basis of Public Health

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Supported by

The Centers for Disease Control and Prevention
The Association of Schools of Public Health

Cooperative Agreement U36-CCU 300430-14

Provided through

Public Health Training Network
<http://www.cdc.gov/phtn>

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About this module

Overview

Professionals in public health need to understand the legal basis of public health.

Like many others, you may feel that law is a mysterious subject that can be understood only by lawyers. In fact, law deals with the concerns of everyday life, and with a little effort you should be able to understand its application to public health.

This module gives an overview of the legal basis of public health, which you need to understand to practice public health effectively, especially if you are responsible for enforcing compliance with public health regulations.

The meaning of law

The word “law” refers to

- The legal system
- The legal process
- The legal profession
- Legal knowledge and learning

Defining the content and meaning of law is therefore not a simple exercise. Defining the functions of law is more straightforward.

The functions of law

Any society’s laws serve the functions of social control and conflict resolution. As part of these functions, law helps to

- Regulate conduct
- Protect individual and property rights
- Define the duties and responsibilities of government and individuals
- Guide the judiciary

Module components

This “Introduction” module consists of the following components:

- Text and self-study exercises to be completed individually or discussed with your learning community. These exercises are meant to help you absorb what you have just read and immediately apply the concepts.
- A self-check review, found at the end of the text, will help you assess your understanding of the material.
- Group exercises to undertake with your learning community, found at the end of the text.

Keep these goals in mind as you study the module; they describe how it can help you in your job.

Goals of the module

This module is intended to help you as a public health professional:

1. Make maximum use of permissible public health legal authority in performing your job.
2. Develop a better understanding of the legal system and your relationship to that system, allowing you to enhance the functioning of the public health department.
3. Communicate and collaborate more effectively with the legal authorities of the public health department.
4. Develop a better understanding of the functions, authority, and interrelationship of other agencies—including the legal counsel's office and departments of public health at various levels of government—which will promote improved relations with those agencies.

Learning objectives

At the end of this module, you should be able to:

1. Describe the United States legal system, including its four types of laws and the basis for each type.
2. Describe administrative agencies, their functions, and the procedures called for by the Administrative Procedure Act.
3. Describe the organizational structure of public health in the United States and how it functions.
4. Describe the sources of authority for public health laws and how challenges to those laws are handled by the courts.
5. Describe the protections provided for individual rights and discuss how these affect public health laws.



Start by networking...

Because laws and regulations vary from state to state, you need access to much more information than this module provides if you are to understand the legal basis for the activities of your agency. Networking with knowledgeable people is one way to get this information.

As you begin this module, think about who may be able to provide you with some of the information you need. Think about friends who might help you gain access to others you want to meet. Each of these contacts can lead you to *other* knowledgeable people and sources of information. We have entered some categories to help you.

Colleagues in your agency, especially those in legal affairs

Contacts and acquaintances in other agencies

Members of the legal profession

Politicians

Public interest groups

Public records

Federal Register

Public library

State and local newspapers

Internet

Public Health Service

State Distance Learning Coordinator

The U.S. legal system

Laws are created by all three branches of government.

The U.S. Constitution and the various state constitutions provide the framework for the U.S. legal system. In addition, laws are created by each of the three branches of government—legislative, executive, and judicial—at both the state and federal levels. All of these laws, together with the various constitutions, make up the U.S. legal system.

Laws are classified according to their source of authority.

Based on their origin or source of authority, these laws are classified into the following four types:

- Constitutional law (constitutionally based)
- Statutory law (legislatively based)
- Regulatory law (administratively based)
- Common law (judicially based)

Each type of law is further described below.

Constitutional law

Includes both U.S. and state constitutions

Constitutional law is based on the U.S. and state constitutions. The U.S. Constitution defines the powers, limits, and functions of the federal government, and through its initial amendments—the Bill of Rights—it protects individual rights by setting restrictions on the activities of government. By ratifying it, the states gave up certain governmental powers and made the Constitution the highest legal authority for the nation.

The U.S. Constitution is broad, general, and somewhat indefinite in wording and, therefore, is open to interpretation as to application and meaning. State constitutions, which provide the same type of legal definitional authority and restrictions on governmental actions for the states and their subdivisions, often are more specifically worded.

Statutory law

Composed of federal laws, state laws, and local ordinances

To implement their policies for addressing public needs, Congress and state legislatures enact acts and statutes, and municipalities enact ordinances. These enactments govern a wide variety of human endeavors and can address a need through programs, requirements, restrictions, or prohibitions. For example, they may provide funds for addressing a problem through research, education, or prevention services, or they may take the form of laws that require or prohibit certain acts.

Example of how a law has addressed public health needs

Consider, for example, the following ways the Illinois General Assembly addressed various public health needs in parts of the legislation known as the Department of Public Health Act:

- It required the state health department to conduct a “public information campaign to inform Hispanic women of the high incidence of breast cancer and the importance of mammograms and where to obtain [them]” (para. 22 Sect. 2).
- It made funding available for regional poison resource centers (para. 22.06).
- It required the state health department to publish rules that required “the labeling of bodies upon the death of persons suspected of having infectious or communicable diseases transmittable through contact with bodily fluids.” (para. 22.05)

Regardless of the approach taken to address a public health problem, all statutory laws must be consistent with the U.S. Constitution. State and local enactments must also be consistent with the constitution of that state.

Regulatory law

Created by agencies, regulations have the force of law.

Although Congress and state legislatures make their policies known by enacting legislation, they often lack the time and expertise to make the legislation very specific. Instead, they often delegate such authority to administrative agencies via statutes. Through this mechanism, agencies develop the detailed rules and regulations that are designed to translate the broad legislative mandates into operating standards. Regulations must be derived from and be consistent with relevant constitutional and statutory authority, but because they are the execution of the legislature’s statutory intent, they have the full force of law.

Importance of agencies to public health

Administrative agencies have increased in importance over the past several decades, particularly as a tool for protecting public health and safety. The impact of this tool is limited only by political and fiscal, not legal, constraints.

For example, it is revealing that on the national level, only a fraction of one percent of the federal budget is spent annually to fund the combined regulatory efforts of the Environmental Protection Agency, the Occupational Safety and Health Administration, the Food and Drug Administration, the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, and the food safety programs of the Department of Agriculture.¹

In theory, agencies implement policies set by legislation.

In theory at least, administrative agencies merely implement policies established by the legislative branch. For example, when Congress enacted the “Residential Lead-Based Paint Hazard Reduction Act of 1992,” it gave the Department of Health and Human Services, Housing and Urban Development, U.S. Environmental Protection Agency, and the U.S. Occupational Safety and Health Administration, among other agencies, authority to apply the Act’s provisions to the broad range of activities and environments that fell within the jurisdictions of those agencies [*The Residential Lead-Based Paint Hazard Reduction Act of 1992* (106 Stat. 3897-3927), *Title X of the Housing and Community Development Act of 1992*, P.L.102-550 (H.R.5334) 10/28/92 (106 Stat. 3672, et seq.)].

In practice, agencies establish policy.

But administrative agencies may also play a significant policy development role, because legislation often leaves considerable room for interpretation, thus giving administrative agencies some discretion to make and implement policy. Legislative bodies sometimes purposely avoid making policy decisions and instead hand controversial issues over to administrative agencies.

Legislation may fail to provide the means for an agency to act.

Or legislative bodies may make what appears to be a popular policy choice by enacting a statute while really doing much less than meets the eye by failing to provide the relevant administrative agency with the necessary resources, clear legislative language, or specific guidelines to meaningfully implement the policy.²

¹ Bollier and Claybrook, p. 210

² Rosenblatt

Failure to provide the means can hinder or advance effective public health action.

This legislative maneuver of enacting a statute but withholding the implementation tools may hinder or help public health agencies. Obviously an important public health program that cannot be made fully operational is a loss and a disappointment. But statutes may also hinder effective public health. For example, in Illinois, the legislature enacted a statute—against the advice of public health authorities—that required extensive patient notification for any health professional who was HIV-positive, regardless of the possible risk to patients. Fortunately (in the view of the health department), the legislature appropriated only \$1 to implement the law, leaving the state health department without the resources necessary to carry out the notification program.

Common law

Common law is based on prior court decisions.

Common law is based on judicial decisions of the most authoritative courts. Although it was originally derived from English legal principles and traditions, it now also includes the loose collection of legal custom, tradition, and precedent that has developed over time from the decisions of U.S. federal and state courts.

When a court addresses a legal dispute, it is usually guided by what has been decided previously in similar disputes. These *precedents* become a type of law in themselves. The guiding principle is that judges should follow the principles of law set down in these prior decisions, unless it would violate simple justice to do so. Reliance on precedent serves to promote predictability and create an aura of rule “by law, not men.”

Activities controlled by common law

Common law controls many areas of human activity that have not been addressed by other forms of law. For example, many state legislatures have not enacted legislation concerning “public nuisance.” In these states, the common law of nuisance—as determined by judicial decisions—defines what conditions constitute a “public nuisance” and authorizes a public health official to take action. Of course, the legislature in one of these states can always enact a law that addresses nuisance. So long as that law was constitutional, it would override common law in that area.



A quick check of your reading so far...

Write the type of law—constitutional, common, regulatory, or statutory—that would probably apply to each scenario below.

Type of Law

Scenario

- | | |
|--|--|
| _____

_____ | 1. A couple is forced to find other homes for its 23 dogs because they've been declared a public nuisance.

2. Funding is provided to mount a statewide awareness campaign on the importance of lowering cholesterol to avoid heart disease.

3. A court rules that the KKK has the right to march in a public parade even though some community members object.

4. A health department adds "suspected spousal abuse" to the list of reporting requirements for medical professionals. |
|--|--|



See Group exercise 1.1 at the end of the module.

Answers:

1. Regulatory, common law or statutory
 2. Statutory 3. Constitutional 4. Regulatory

Judicial interpretation and control

Laws must be interpreted

The legal system composed of constitutional, statutory, regulatory, and common law is neither self-enforcing nor entirely predictable. A computer, programmed with all existing statutes and judicial precedents, could conceivably settle new disputes (that is, decide new cases) in a reasonable, logical manner. But the computer's decisions would definitely not be the same as those reached by human judges.

Grounds for interpretation

Judicial decision-making is not a matter of applying some sort of legal template. Applying the abstractions of law to a specific situation calls for interpretation, and interpretation is what judges do best.

Judges can interpret a law, including regulatory laws and agency authority, on the following grounds:

- What it means. Laws often contain broad and vague language.
- How it applies to the facts of a particular situation
- Whether it is constitutional

The power to declare federal and state laws—laws enacted by Congress or state legislatures and signed by the President or governor—unconstitutional and therefore null and void is by far the greatest potential power of the judiciary. In most instances, courts will avoid using this “ultimate” power and will decide cases on more narrow grounds.

The political nature of the law

There is little disagreement over law being *the* systematic social control mechanism, but there is considerable debate over the political nature of that mechanism. Does law represent an overall societal consensus or does it exist to support particular interests within the society? The answer obviously depends in large part on one's view of how political power operates in society.

Classical view of law as based on logical principles

At the beginning of the twentieth century, “classical jurisprudence” offered a widely accepted view of the origins of law as:

the belief that a single, correct legal solution could be reached in every case by the application of logic to a set of natural, self-evident principles. Classical jurisprudence understood the process of deciding cases to be purely rational and exclusively deductive and thus produced a formal and mechanical approach to decision making.³

View of law as based in the political process

But others see it differently, arguing that law is more political than it is intellectually pure. Rather than representing social consensus or compromise, law signifies the victory of one particular interest over the rest of society. It is hard to escape the conclusion that law is part and parcel of the political process, rather than an abstract set of self-executing principles somehow existing outside the realm of other social mechanisms.

In all of this, it is perhaps most important to emphasize that questions of legal principles and concepts, as well as of the underlying dynamics of law, are open to analysis and discussion by non-lawyers as well as lawyers. Law is not the purview of the legal profession alone.

³ Monahan and Walker, p. 479



What do you think?...

Some say that political liberals are more supportive of a positive, protective role for government than conservatives are and, at the same time, they are more concerned with the rights of individuals. They also say that political conservatives are primarily concerned with business rights.

The decisions of judges do seem to reflect their backgrounds, including their politics. For example, during the confirmation hearings for the (unsuccessful) appointment of Judge Robert Bork to the U.S. Supreme Court, an analysis of his decisions in the Court of Appeals showed that his consistent pattern led to government losing to business and triumphing over individual citizens.

1. What *is* government's "protective" role as concerns public health?
 2. What traditional values influence conservatives other than business?
 3. What conservative values might actually protect individual rights?
 4. What are some interest groups other than business that might differ with society as a whole?
-

Administrative agencies

The administrative functions of modern-day government are mammoth, resulting in a powerful, often confusing bureaucracy.

Types of agencies and their functions

Definition and role of agencies

Administrative agencies (also called regulatory agencies) are part of the executive branch at the federal or state level. In each jurisdiction, the chief executive—president or governor—bears the ultimate legal responsibility for executing the laws enacted by the legislative branch of government. But the great bulk of actual day-to-day execution of these laws is carried out by an extensive system of these administrative agencies and their staff members.⁴

There are two types of administrative agencies:

Cabinet executive departments

- The first type is a cabinet executive department, such as the U.S. Occupational Safety and Health Administration, or a division of a major executive department, such as a state-level department of public health. Its chief administrator is appointed by, and usually serves at the pleasure of, the president or governor or of their cabinet-level appointees.

Independent commissions or boards

- The second type is a commission or board established as an independent administrative agency, such as the Consumer Product Safety Commission or a state liquor control commission. These independent administrative agencies are not considered part of the executive cabinet. Their commissioners or board members serve for fixed terms—often staggered—to overlap the term of the successor to the president or governor who nominated them. They were originally created because it was thought that they would be less political and more effective in serving the public interest. In practice, it is not clear that they function differently than cabinet executive departments.

⁴ See Christoffel, pp. 32-45; Grad, pp. 288-307; Wing, pp. 175-201.

Agencies carry out statutory mandates in four ways.	<p>Whichever form an administrative agency takes, its basic function is to carry out statutory mandates. This means:</p> <ul style="list-style-type: none"> • Administering programs • Overseeing enforcement • Making rules • Adjudicating noncompliance
Rulemaking	<p>Rulemaking involves the development of regulations for future enforcement. Regulations specify what those covered by a law must do to meet the law's requirements. For example, a state department of public health might set maximum contaminant standards for swimming pools or establish requirements for water supply systems under its jurisdiction.</p> <p>Rulemaking describes what is expected in general terms. It is done apart from and before any particular instances of failure to comply with regulations. Judging noncompliance and imposing penalties for it are done as a part of adjudication.</p>
Adjudication	<p>An agency adjudication is an internal hearing that is similar to a judicial proceeding. It is typically conducted before an agency official acting in the capacity of an administrative law judge without a jury. An agency adjudication is less formal than a judicial proceeding. An adjudicatory hearing deals with specific parties and facts; it establishes what happened and prescribes what is to be done about it, including what any penalties are to be. For example, a health department might conduct an adjudication proceeding in which it first establishes that a nursing home owner has violated sanitation standards at the home and then revokes the owner's license. Thus administrative agencies can function as rulemaker/quasi-legislator, prosecutor, and judge all rolled into one.</p>
Rationale for consolidating authority	<p>The rationale for consolidating governmental authority in this way is that administrative agencies have narrow, discrete areas of technical expertise and are best able to deal with all facets of regulating their area of experience and authority.</p>
Agencies are controlled by Congress or by the state legislature.	<p>It has been well established that Congress (and similarly, the state legislatures) can delegate broad authority to administrative agencies. It is also quite clear that the regulations promulgated by these agencies have the full force of law.</p>

At the same time, there are controls on the agencies. Congress and the state legislatures can:

- Restrict or remove regulatory authority previously given
- Mandate specific regulatory actions
- Specify the method by which all agencies must act
- Increase or reduce appropriations
- Approve or not approve new appointees
- Conduct legislative oversight hearings

Agencies act independently within limits that ensure fairness.

Notwithstanding these supervisory powers, legislatures usually allow administrative agencies to function relatively independently within limits defined by the legislatures. In theory, at least, the purpose of these limits is to afford some level of fairness—or due process—in the regulatory process. In simplest terms, such fairness means that all those affected by the regulatory process are guaranteed notice, a chance to be heard, and a written record for use in judicial appeals. The major statutory statements of procedural fairness are the federal Administrative Procedure Act and comparable state administrative procedure acts.



Bringing it all home...

If you don't have all the answers for this exercise, look at page 3, which suggests some sources of information. If you are in a study group, the group facilitator and other members may be able to help with some of the information.

1. What is a law that your agency executes?
 2. What specific programs carry out that mandate?
 3. Briefly describe any rules or regulations that your agency has developed to help meet the law's requirements.
 4. How is compliance with the rules and regulations enforced?
 5. Describe an adjudication that your agency has been involved in.
 6. What has Congress or your state legislature done recently to influence the functioning of your agency?
-

The Administrative Procedure Act: dictating fairness and due process

Specifies procedures
for agencies to follow

The federal Administrative Procedure Act (5 U.S.C. Sec. 551 *et seq.*), much like its state counterparts, provides for basic procedural safeguards in the federal regulatory system and establishes and defines judicial review authority over the federal regulatory agencies. A major thrust of the Act is to ensure public input into the rulemaking process.

The Act specifies the following procedures that agencies must follow when engaged in rulemaking and adjudication:

1. Notice of any proposed rule must be published by the proposing agency in the *Federal Register*. The *Federal Register*, issued several times a week, publishes all Executive Orders and Presidential Proclamations, proposed federal administrative regulations, and final regulations.
2. The agency proposing a new rule must allow interested parties time to submit comments. In some instances, public hearings, with an official record and formal rules, must be conducted.
3. Public comments must be reviewed and considered by the agency before final adoption of a regulation, and the agency must explain why it did or did not incorporate preferred suggestions in the final regulation.
4. Final regulations must be published at least thirty days before they are to take effect, so as to allow an opportunity both for legal challenge and for adjustments necessary for compliance with the regulation.

Agencies have
discretion in applying
the rules.

It is important to note, however, that unless Congress specifically limits its grant of authority when setting up a statutory program, federal agencies have considerable discretion in applying these procedural rules. An agency may even waive some of the notice and hearing requirements if the agency judges them to be “impracticable, unnecessary, or contrary to the public interest.”



See Group exercise 1.2 at the end of the module.

Challenges to agency actions

Because administrative agencies exercise considerable power and discretion, their policy decisions are often subjected to challenge. According to William Ruckelshaus, former Environmental Protection Agency administrator, more than 80 percent of that agency's regulations were challenged in court, with the result that almost 30 percent were significantly changed.⁵

While court challenges are common, persons who are adversely affected by an agency decision usually base the challenge on procedural rather than substantive grounds. This is because the courts are enormously deferential to an agency's expertise and are very unlikely to interfere with the substantive decisions made by an agency. Procedural challenges are brought in the hope of overturning the decision, gaining an opportunity for a negotiated settlement, or delaying the decision's implementation.

For example, environmentalists may challenge an agency's decision to license a hazardous waste incinerator on the basis that the agency failed to consider all pertinent evidence in the record concerning the incinerator's potentially damaging health effects. This is a procedural challenge intended to delay the building of the incinerator and/or to gain an opportunity to negotiate additional safeguards on behalf of the community.

Courts tend to be more concerned with ensuring agencies act according to proper procedure than with forcing agencies to take action.

If an agency avoids making a decision, affected parties may also request judicial review to require a decision. The courts are even more loathe to second-guess an agency's determination of when and where to initiate a particular action. The courts generally will not compel action unless an agency has completely failed to act where action has been specifically mandated by the legislative body (for example, has failed to collect taxes). Even then, the courts have rarely forced agencies to take an action—such as improving prison conditions—that would require spending sizable amounts of tax funds, because it would be difficult to enforce such orders without the support of the executive and legislative branches.

The status quo is favored by this tendency of the courts to attend more closely to procedural impropriety than to ineffective action or simple inaction.

⁵ Ruckelshaus

Criteria used in
judicial review

Administrative agency activity must be consistent with the Constitution and relevant statutes, and judicial review of administrative agency activity is important in overseeing and assuring this consistency. Standards for judicial review of agency actions are outlined in the Administrative Procedure Act and define the basis and scope of judicial intervention and review. The courts have evolved a set of criteria by which to assess the fairness of administrative actions. These criteria do not address whether an administrative agency acted wisely, rather they consider whether the agency has:

- Stayed within its Constitutional or statutory authority
- Properly interpreted the applicable law and statutory language
- Conducted a fair proceeding
- Avoided arbitrary, capricious, and unreasonable action
- Reached a decision supported by substantial evidence in the record

Basis for judicial
review criteria

The basis for the first of these criteria—consistency with the Constitutional and statutory authority—should be evident. No statute or regulation can stand if it is inconsistent with the Constitution. Likewise, no regulation can remain in force if it has not been properly authorized by statute or is inconsistent with statutory requirements.

The second criterion is less clear-cut. It governs situations in which the language in a statute is sufficiently ambiguous that reasonable people might disagree on what it means. The legislature can always clarify its meaning by enacting a new statute, but in the absence of such clarification it falls to the courts to determine as best they can what ambiguous statutory language really means.

Implications of due
process criteria

These due process criteria are important because of the extensive authority exercised by administrative agencies. In the 1970s, the U.S. Supreme Court made it easier to initiate judicial challenges to administrative decisions and actions, and Congress has broadened what is known as “standing”— the right of individuals, groups, or organizations to bring a lawsuit because they are affected by the issues involved.

The Supreme Court has also ruled that the criteria courts are to follow in reviewing agency decisions should include a searching and careful inquiry to determine “whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment” (*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 1971). This in effect leaves reviewing courts with considerable latitude—and quite open-ended criteria—for overseeing the actions of administrative agencies.

Implications for
public health
agencies

What does all of this say to the public health professional? Obviously public health professionals, even if on the staff of regulatory agencies, can have very little effect on what the courts do or don't do. The best advice that can be offered here is that any involvement with the regulatory process should include a fastidious attention to procedural detail.

- Know what the procedural ground rules are
- Adhere to them
- Keep explicit and complete records
- Be open and direct

Such an approach is not only advisable for its own sake—assuring a fair and open process—but also leaves fewer administrative loose-ends for a reviewing court to use to invalidate regulatory efforts.



See Group exercise 1.3 at the end of the module.



Check your reading...

1. Name two ways that the general public can become involved in the rulemaking process.

 2. What criteria do courts use in assessing the fairness of agencies' actions?
-
-

Answers:

- | |
|--|
| <ol style="list-style-type: none">1. • Through public hearings and comments before rules take effect• By initiating a lawsuit after rules take effect <ol style="list-style-type: none">2. • Actions must be within constitutional or statutory authority.• The law and its language must be properly interpreted.• The proceeding must be fair.• Actions must not be arbitrary, capricious or unreasonable.• Actions must be based on substantial recorded evidence. |
|--|

Public health agencies

Public health authority at the state and local levels is typically exercised by boards of health and public health agencies. The jurisdiction and legal authority of these entities vary from state to state. The relationship between state agencies and local public health departments within each state is itself varied and complex.

State health agencies All fifty states, the District of Columbia, and the territories of Guam, Puerto Rico, American Samoa, and the U.S. Virgin Islands have a state or territorial health agency (which we will call a state agency for brevity). Each state health agency is directed by a health commissioner or a secretary of health. Each state also has a chief state health officer, who is the top public sector medical authority in the state. (The same person may fill both positions, or the chief state health officer may answer to the director of the state agency.)

State health agencies are generally organized as one of the following:⁶

- An independent agency that is directly responsible to the governor or a state board of health (33 states)
- A division within a supra-agency

State boards of health As of 1982, twenty-four states had boards of health. In most of these states, the chief health officer reports to the board. In some states, the chief health officer is a member of the board. More than 90 percent of the state boards are appointed by the governor. The remainder are appointed by professional associations or by the state health agency director.

The general responsibilities of state boards of health are policy and budget related. For example, as the governing body of the Texas Department of Health, the Texas Board of Health adopts goals and rules to govern the department's activities. The six member Board is charged with the ultimate legal authority over most public health issues in the State of Texas.

⁶ Public Health Foundation, 1986b

There are about 2,900 local health departments in the United States⁷. They are structured in one of the following ways:

- *Centralized at the state level.* About one-third of the states use this organizational structure, with the state agency operating whatever local health agency units exist within the state (1981 data).
- *Autonomous units.* Some local health agencies operate completely independently of the state health agency and receive only consultation and advice from the state.
- *Semi-centralized.* In the majority of states, some programs are operated completely by the state, some programs are shared with the local health department, and some programs have the state act merely as an adviser to the local health department⁸. The extent of local health department jurisdiction also varies intra-state and across the nation. Some local health departments serve a single city or county, others serve a group of counties, and some serve a city-county combination.

Boards of health at
the local level

Approximately 73 percent of local health departments serve a jurisdiction that has a local board of health. Eighty-eight percent of the local boards of health have statutory authority (under the concept of “home rule”) to establish local health policy, fees, ordinances, regulations, etc. In addition, 61 percent of local boards of health have statutory authority to approve the local health department's budget⁹.

⁷ NACCHO, 1992-93 report

⁸ Institute of Medicine Report

⁹ NACCHO, 1995



Bringing it home...

Draw an organization chart that shows the relationships among state and local public health agencies in your state or, if one already exists, get a copy of that. Show the following:

- Where your agency fits in
 - Which agencies are centralized at the state level, which are semi-centralized, and which are autonomous
 - Whether there are state or local boards of health
 - The titles of the heads of the various organizations
-
-



See Group exercise 1.4 at the end of the module.

Public health laws

Sources of authority for public health laws

The “police power” is the main source of a state’s authority.

State governments (and, by delegation, their various subdivisions) possess the authority to enact and enforce public health laws under what is known as their “police power,” a broad concept that encompasses the functions historically undertaken by governments in regulating society.

The term “police power” is not mentioned in the Constitution of the United States. Rather, police power is inferred from the powers traditionally possessed by governments and exercised to protect the health, safety, welfare, and general well-being of the citizenry. Chief Justice John Marshall of the U. S. Supreme Court first used the term in 1824. The police powers, he noted,

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(1824)].

The police power is not easily limited.

The police power has been used to uphold a wide variety of actions by the states, many quite broad in their reach and impact. Generally such laws will be upheld if it can be shown that the laws are reasonable attempts to protect and promote the public's health, safety, and general welfare and that the laws are not arbitrary or capricious attempts to accomplish such an end.

State authority in this area has been sustained not only for laws aimed at protecting the public's health and safety in general, but also for laws aimed at protecting individuals, even when such laws restrict property rights and individual autonomy. The U.S. Supreme Court made it clear that “the police power is one of the least limitable of governmental powers . . .” and that the states possess extensive authority to protect public health and safety [*Queenside Hills Realty Co., Inc. v. Saxl, Commissioner of Housing and Buildings of the City of New York*, 328 U.S. 80 (1946)].

States can authorize local governments	On the state level, all governmental authority (including the expansive police power) resides with the state governments. The state governments, in turn, can and do authorize local governmental entities to exercise governmental authority on the local level. The establishment of local boards of health are authorized by state laws, which establish guidelines for their operation.
Public health laws tend to be disorganized.	The state statutes and local ordinances that authorize public health activities are usually poorly organized. Regardless of the state or local jurisdiction involved, public health enforcement is <i>not</i> governed by a single public health statute. The laws have been enacted in a piecemeal fashion over the years to deal with problems as they emerged. Thus food and drug laws may be found in one area of the statutes, environmental laws in another, health facility licensing laws in another, and so on.
Several departments may have public health responsibilities.	Public health functions may be divided among a number of governmental departments—health, environment, registration, etc. Often local boards of education have principal responsibility for conducting school health programs, and state departments of education have primary regulatory responsibility for school health services.
Consolidations of public health laws tend to be temporary.	A few states, notably Michigan, have sought to consolidate their public health authority by enacting an overall public health code. But even these exceptions have omitted—usually for political reasons—important laws related to public health, especially those dealing with entitlements.
Types of authority for local activities	<p>Any statutory consolidation is short-lived, however, because subsequent legislation will add to, remove, or modify the state's public health laws. Legislatures enact laws to deal with specific problems, and the statutory law thus becomes a patchwork of legislative solutions to a myriad of problems. Rarely does a desire for logical wholeness enter into these legislative actions.</p> <p>Local health departments carry out their activities under two types of authority:</p> <ul style="list-style-type: none"> • <i>Delegation of authority.</i> State legislatures commonly empower local health departments to carry out administrative functions of the state—such as the enforcement of the state public health code. • <i>Home rule authority.</i> To avoid the need for specific authorization each time a new need arises, most states—either through legislation or by constitutional amendment—have given local governmental units the right of local self-governance, that is, the right of localities to make decisions concerning their own welfare.

Home rule allows local government to carry out public health and other functions without having to seek legislative authority anew for each specific activity. In Illinois, for example, home rule units “may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare: to license; to tax; and to incur debt.” Without constitutional or statutory home rule authority, cities and town governments would not be empowered with their own rule-making functions.

Extent of local authority

Local public health authority, although generally not as broad or extensive as that authorized on the state level, is still quite considerable. For example, the New York City Health Code regulates virtually every phase of human existence, requiring reports of births, ritual circumcisions, and deaths, and regulating the disposal of human remains and the location of cemeteries.

Also, general grants of authority can at times serve as the basis of authority for enacting ordinances in circumstances not specifically contemplated by the state legislature. For example, on the basis of such general authorization, the courts upheld the New York City health department's authority to require window guards in high-rise residences. Similarly, they upheld the authority of the Mayor of San Francisco to declare a “public health emergency” and authorize needle-exchange programs that were otherwise illegal under state law.

It is common for city councils to develop their own local public health ordinances or health codes. This autonomous exercise of power is limited by the rule that localities may not assign responsibilities to local health departments that are in conflict with state laws and regulations. Thus public health law is even more of a patchwork at the local level, where health departments are not only responsible for local public health ordinances but must also deal with enforcement authority, responsibility, and limitations established by state law.

Federal, state, and local agencies have interrelated activities.

The activities of the various levels of government are often interrelated. For example, a local health department may inspect local nursing home facilities and make enforcement recommendations to a state agency, which has final enforcement authority. At the same time, federal Medicare and Medicaid determinations may actually have the biggest governmental impact on the operations of these same regulated facilities.

In many instances, the federal government has the legal authority to preempt an area of public health regulation, thus denying regulatory authority to the states. Similarly, the states have authority to pre-empt all areas of public health regulation from local governments, denying county and municipal governments any regulatory authority. The governmental level with highest authority has several options:

- It may choose not to exercise its potential authority, leaving the lower levels of government the complete discretion to adopt legislation it deems appropriate.
- It may preempt the area, adopt legislation and implement the program.
- It may also preempt the area by adopting legislation and delegate the implementation of the program to a lower governmental unit to run.

The latter type of relationship, especially if it involves the provision of funds, will usually mean that lower levels of government must meet specific programmatic guidelines and may be subject to oversight by a higher level of government. For persons working in public health agencies, this legal patchwork can mean a confusing mix of obligations and authority (or lack of it).

Preemption defined

A doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law.

As applied to state action versus local action, “preemption” means that where a [state] legislature has adopted a scheme for regulation of a given subject, local legislative control ceases over such phases of the subject as are covered by state regulation.

(See Black’s Law Dictionary)



Bringing it home...

1. Does your agency carry out any activities under “police power” authority?
 2. What other sources of authority mandate your agency’s actions?
 3. Are most of your activities carried out under delegation of authority or home rule authority?
 4. Do you carry out any federal mandates?
 5. Can you think of any examples of when federal, state and/or local laws have been inconsistent?
-
-

Profile of Local Public Health Department Activities 1992–1993¹⁰

Selected environmental service areas

Sewage disposal systems (75%)
 Private water supply
 safety (74%)
 Groundwater pollution
 control (58%)
 Environmental emergency
 response (57%)
 Vector control (57%)
 Surface water pollution (52%)
 Public water supply
 safety (52%)
 Solid waste management (46%)
 Hazardous waste manage-
 ment (42%)

Inspections and/or of selected facilities

Restaurants (80%)
 Swimming pools (68%)
 Private water systems (64%)
 Food and milk control (56%)
 Recreational facilities (55%)
 Public water systems (45%)
 Health facilities (33%)
 Nursing homes (32%)
 Public water systems (45%)
 Health facilities (33%)
 Nursing homes (32%)

Selected personal health service areas

Immunizations (96%)
 Tuberculosis services (86%)
 Well child clinics (79%)
 Early/periodic screening,
 diagnosis, treatment (72%)
 STD testing/counseling (71%)
 Family planning (68%)
 HIV/AIDS testing and
 counseling (68%)
 STD treatment (66%)
 Prenatal care (64%)
 Personal health case manage-
 ment (48%)
 HIV/AIDS treatment (33%)

Other selected service areas

Community outreach/educa-
 tion (86%)
 Health education/risk
 reduction (84%)
 Laboratory services (60%)

¹⁰ NACCHO Report, 1992-1993. Percentages are based on the number of local health departments reporting activity, directly or through contractual arrangement, in the NACCHO study. The number of survey respondents was 2,079 or 72% of the nation's local health departments.

Limits on government power

Although the courts have interpreted the state police power broadly, governmental authorities do have limits placed on their powers. Limitations on state and federal powers are found in:

- The U.S. Constitution
- The constitutions of individual states
- Federal and state laws

Federal laws must be based on the U.S. Constitution.

In the case of a federal law, the federal government has specifically enumerated powers, and if the subject matter of legislation does not fall within any of the enumerated areas of federal authority, then either the matter is one that is reserved to the states or it is a matter beyond the Constitutional reach of government altogether.

For example, to address the problem of large amounts of low-level radioactive waste building up at temporary storage sites, Congress passed a law that required states to provide a disposal site for this waste by a specific date. Any state that failed to meet that deadline was required to “take title to” and be responsible for all such waste produced in the state. New York State contested the “take title” provision on the grounds that it went beyond the enumerated powers of the federal government and therefore violated the Tenth Amendment of the U.S. Constitution. The U.S. Supreme Court agreed with that argument [*New York v. United States*, 505 U.S. 144 (1992)].

State and local laws are based on the police power as well as on the Constitution.

A challenge to the constitutional authority of a state law would both acknowledge the state's broad police power authority and argue that the law went beyond that authority. A local ordinance may be challenged because it is inconsistent with the state or federal constitution or because it addresses an area that the state legislature has not given the city or county authority to regulate.

Laws may be challenged because they interfere with individual liberty.

Public health laws are from time to time challenged as infringing upon constitutionally-protected individual rights. These challenges require the courts to balance between the social needs of the community and the liberty of the individual.

Definition of civil rights

There are two broad categories of individual rights that a court might enforce: civil rights and civil liberties. Civil *rights* are granted and defined by statute or common law and belong to every citizen by virtue of his or her citizenship. These rights are positive in nature; they can be asserted by one person against another and redressed or enforced in a civil action. Thus, for example, an employee has a right under the Occupational Safety and Health Act to call on the federal district court to compel the Secretary of Labor to take action in cases of imminent danger in the workplace.

Definition of civil liberties

Civil *liberties* are rights guaranteed in various provisions of the U.S. and state constitutions—most notably the first ten amendments to the Constitution, the Bill of Rights. These rights are negative in nature in that they define those things that government cannot do to the individual. If Congress or a state legislature enacts a law inconsistent with any of these Constitutional provisions, the courts may be asked to invalidate the law as being “repugnant to the Constitution.” But in order to get a court to make such a determination, an individual or group must challenge the law, in many cases by violating it and then claiming, in defense, that the law should be declared invalid.

Courts’ enforcement of individual rights varies with the times.

Judicial determinations of individual rights are fluid; thus the elucidation of “constitutional rights” can and do vary with the times. The area of public health and safety laws, however, has historically been quite static, and the courts have traditionally been very hesitant to invalidate these laws, even for the sake of protecting individual “rights.”

In the 1905 case of *Jacobson v. Massachusetts*, the U.S. Supreme Court approved a broad grant of authority for the enactment of public health laws of all types. *Jacobson* tested the validity, under the U.S. Constitution, of a Massachusetts statute providing that “the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all [its] inhabitants” [197 U.S. 11 (1905) at 26.] Those refusing to comply were to be fined \$5.

Example of an early Supreme Court decision balancing individual rights with the common good

Under the authority delegated by this statute, the Cambridge Board of Health, concerned with the spread of smallpox in the city, ordered the vaccination of all inhabitants not vaccinated against smallpox during the preceding five years. Jacobson refused to be vaccinated and refused to pay the \$5 fine. The case went to the U.S. Supreme Court to determine whether the vaccination requirement was a reasonable exercise of the state's police power or whether such a requirement was unduly oppressive, going too far in restricting Jacobson's liberty under the Constitution. The Court balanced the competing interests involved—on the one hand, the state's responsibility to protect the public from infectious disease and, on the other, Jacobson's interest in making his own health decisions. The *Jacobson* opinion, upholding the validity of the vaccination law, provided a clearly stated and firm endorsement of the broad embrace of the police power. *Jacobson* is important both for its affirmation of the police power and for the proposition that society can be “governed by certain laws for the common good” and that competing individual rights are not absolute.

Although a contagious disease—smallpox—was involved in *Jacobson*, the Supreme Court's decision did not hinge on the danger of contagion. In fact, in the line of cases that have followed *Jacobson*, the nation's courts have invoked the police power to uphold a variety of public health and safety measures, many of which did not involve any danger of contagion. For example, the police power justification outlined in *Jacobson* has been used to uphold laws requiring the fluoridation of public drinking water and mandating the use of seat belts by automobile occupants and of helmets by motorcyclists.

Court's recognition of individual rights has broadened since the *Jacobson* case

Since the Supreme Court decided the *Jacobson* case in 1905, it has broadened its recognition of individual rights. For example, the Court first recognized the broad right to privacy more than half a century after its *Jacobson* decision, and the recognition of that right has since been important in several of its decisions on public health issues. This broadening of individual rights raises the question of whether *Jacobson* would be decided differently by today's Supreme Court. Although some health law scholars have suggested otherwise¹¹, it seems unlikely that it would.

Modern Supreme Court decisions have upheld public health laws despite their intrusiveness.

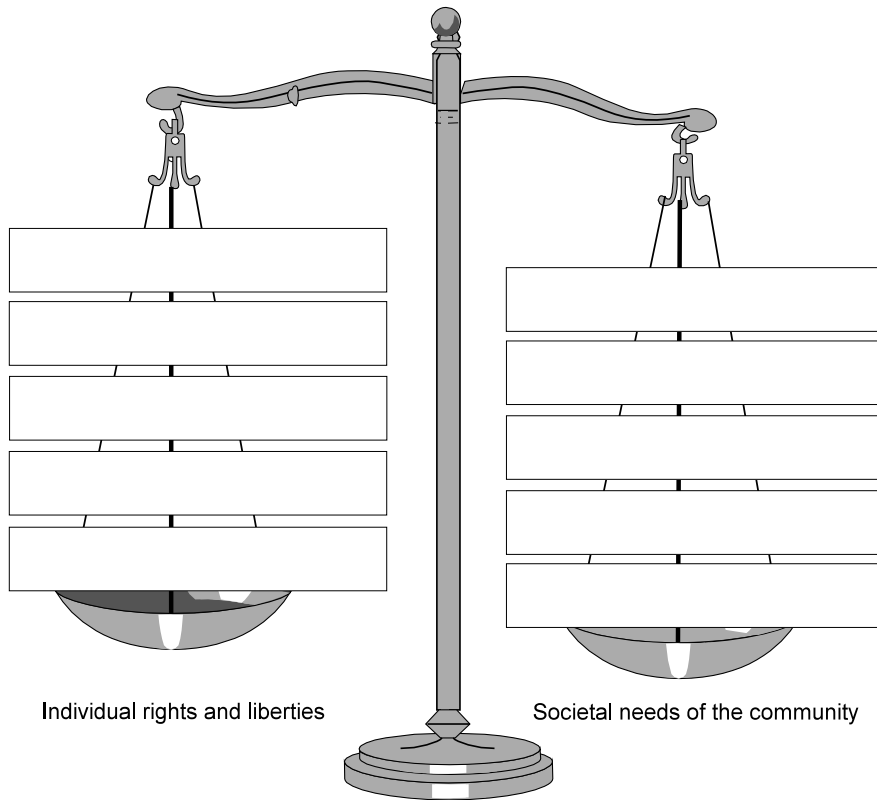
Recently, the courts have been consistent in rejecting the claim that Constitutional rights to privacy and due process prevent government from mandating seatbelt use in motor vehicles, despite the absence of any threat of contagion (as in *Jacobson*). Similarly, compulsory examination, treatment, and quarantine have long been upheld by the nation's courts as legitimate governmental requirements, despite their highly intrusive nature.

¹¹ Gostin and Curran



Maintaining a just and fair balance...

From your reading and your own experience, fill in each box in the illustration below. On the left, enter a constitutionally protected individual interest. Then, on the right, enter a societal need that may conflict with that interest.



Supreme Court

Bill of Rights

The Bill of Rights originally applied only to acts of Congress.

The Bill of Rights was added to the U.S. Constitution to protect the individual from certain types of restrictive action *by the federal government*. This is a very specific protection. For example, the First Amendment does not say that *no one* may prohibit the free exercise of religion, but only that *Congress*—that is, the federal government—may not do so. This should not be surprising, since a major purpose of the Constitution was to define and limit the powers of the new federal government.

The 14th Amendment extended protective restrictions to state governments.

On a case-by-case basis, the Supreme Court has applied most but not all of the Bill of Rights' restrictions on federal action to the state governments as well, pursuant to the Fourteenth Amendment. For example, neither the states nor the federal government can pass laws that establish religion or restrict its free exercise or that abridge the freedom of speech, press, or assembly.

Effect on public health laws

Many public health laws have been challenged on the basis that they interfere with the civil liberties guaranteed by the Bill of Rights and the Fourteenth Amendment to the U.S. Constitution.

Some of the more important provisions are discussed below to illustrate how the courts weigh an individual's rights against society's need for protection from preventable harms.

The Free Exercise of Religion clause of the First Amendment

A law that would force some individuals to abandon or violate important tenets of their religious faith could conflict with rights granted in the First Amendment to the U.S. Constitution, which provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Because religious tolerance and freedom were of major concern when the U.S. Constitution was ratified, it is not surprising that the Bill of Rights focuses first on religious freedom, protecting the free exercise of religion and prohibiting the establishment of any official religion.

For public health laws, the First Amendment's second clause is the most relevant: "Congress shall make no law . . . prohibiting the free exercise [of religion]." A literal interpretation of this provision would be fraught with serious problems. Would the First Amendment prevent the trial and punishment of someone who committed murder as part of a sincerely held belief in a religion that called for human sacrifice? Are adherents of religions that condone or promote polygamy not subject to state laws outlawing this practice?

Supreme Court interpretation of the free exercise clause

Religious beliefs vs.
religious practices

In addressing such issues, the Supreme Court has made a distinction between *religious beliefs* and *religious practices*, holding that the government cannot interfere with the former but may enact laws that have the effect of interfering with the latter [*Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990)]. But this is an elusive guiding principle, and the Court has been less than consistent in applying it.

When conflict occurs between a legitimate, otherwise valid law and a religious practice, the courts will look at:

- The adherent's sincerity, not the validity of the particular underlying religious beliefs
- How central or essential the practice at issue is to the particular religion

Where the court finds a real conflict between religious belief and an otherwise valid law, it must weight the competing social and individual interests.

Standard of proof, historically

Law as least
restrictive means to a
compelling end

For several decades the Supreme Court upheld a law in the face of free exercise challenge only if the law was shown to be the *least restrictive means to a compelling end*. As Constitutional-law scholar Laurence Tribe explains:

If the government can approximately attain its goal without burdening religion then it must follow that path, regardless of how compelling the goal may be....[The Court has viewed government's failure to accommodate religion, when the government could substantially achieve its legitimate goals while granting religious exemptions, as hostility toward religion.]¹².

Court ruling against a religious practice

Thus the Supreme Court has held that Jehovah's Witness parents are not free to withhold a blood transfusion from their children, no matter how seriously held their religious objection to such a transfusion. Protecting children from abusive treatment is a compelling governmental interest. There is no other path to take that would achieve the same end without restricting some religious belief.

Court ruling in favor of a religious practice

A contrary decision was reached by the Supreme Court in another case involving children. In *Wisconsin v. Yoder* the Court held that a state cannot force the Old Order Amish to obey a compulsory education law that conflicts with the religiously motivated practice of withdrawing their children from formal schooling after eighth grade. The court would not accept the lack of post-elementary education as harmful enough to outweigh the "preferred position" of religious practice [406 U.S. 205 (1972)].

Public health concerns have been deemed to outweigh individual interests in the area of compulsory vaccination. As the Supreme Court stated, "The right to practice religion freely does not include liberty to expose the community...to communicable disease..." [*Prince v. Massachusetts*, 321 U.S. 158 (1943)]. It should be noted, however, that states sometimes choose to provide an exemption in their immunization laws for persons whose religious beliefs prohibit immunization.

Recent Court decisions: A new standard of proof

Applying laws of neutral and general applicability

In an important departure from prior U.S. Supreme Court opinions, in the early 1990s the Court decided two cases in which it articulated a much less rigorous standard of proof for a state faced with a free exercise challenge. In both cases the Court noted,

a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.

¹² Tribe, 1988, pp. 1253 and 1257

In the second case, the Court found a local ordinance prohibiting animal sacrifice “in a public or private ceremony not for the primary purpose of food consumption” an unconstitutional restriction on the free exercise of religion as practiced by a church of the Santeria religion [*Church of Lukumi Babalu v. Hialeah*, 508 U.S. 520 (1993)]. In the second case, unlike the first, the ordinance forbade animal slaughter only as a religious practice and specifically allowed non-ritual slaughter. Thus in the second instance the law was not “neutral and of general applicability.”

In these and similar cases, the Supreme Court has relied on the Fourteenth Amendment to make the free exercise clause applicable to the states.

Freedom of speech,
press, and assembly

Laws may also be invalidated because they conflict with that part of the First Amendment which protects the free communication of ideas:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Laws can conflict with free expression and communication either directly or indirectly. For example, a law making it a crime to publicly criticize either of the two major political parties would be intentionally aimed directly at restricting communication and would be barred by the First Amendment. A law that was aimed at something other than communication itself but that restricted communication as a secondary or indirect effect might also be barred. This argument is used by those who oppose limits on political campaign contributions and expenditures.

Individual rights may
be abridged to protect
public safety.

As with any of the individual rights addressed in the Bill of Rights, First Amendment rights are *not* absolute and may be abridged under certain circumstances. The classic statement is that of Justice Holmes, who noted that the First Amendment does not afford a right to cry “fire” in a crowded theater.

In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the U.S. Supreme Court upheld an ordinance that required parade permits, although a group who challenged the law argued that it abridged their First Amendment rights of assembly and communication. The Court concluded:

The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safe-guarding the good order upon which they ultimately depend. . . .The question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.

The Fourth Amendment to the U.S. Constitution provides that

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

This clause—which is applicable to the states through the Fourteenth Amendment—is particularly relevant to how public health departments conduct inspections. Module 5, Inspections, discusses Fourth Amendment search and seizure issues at length.

The Fifth Amendment contains five provisions, each one limiting how government may intrude upon the individual citizen’s life, liberty, or property. Each provision is stated in the negative and together they provide that:

Fifth Amendment

- No person shall be subjected to serious criminal charges unless first indicted by a grand jury.
- No person shall be more than once put in jeopardy on the same criminal charge.
- No person shall be compelled to be a witness against himself in any criminal case.
- No person shall be deprived of life, liberty, or property without due process of law.
- No private property shall be taken for public use without just compensation.

The first two of these provisions, dealing with grand jury indictments and double jeopardy, have only indirect relevance to public health and will not be considered here.

Protection against self-incrimination

Under the Fifth Amendment's self-incrimination provision, people may refuse to answer official questions if the answers could be used as evidence against them in a criminal prosecution. This right applies not only to questioning by the federal government but also, through application of the Fourteenth Amendment, to questioning by state and local governmental agencies.

Self-incrimination may be an issue with records and reports required in public health and safety enforcements if they could conceivably lead to criminal prosecution. This potential conflict is sometimes avoided by making it a criminal offense to fail to maintain and report such records but forbidding use of their content for criminal prosecution. This is the approach taken by New York City, for example, in its self-inspection program for food establishments [N.Y.C. Health Code Sections 81.39(a), 131.03(d), 131.05(b)]¹³.

Due process

The Fifth Amendment due process provision provides that "no person shall be deprived of life, liberty, or property without due process of law." This clause, along with a similar provision in the Fourteenth Amendment applying due process to state governmental actions, establishes the Constitutional principle that government must act fairly, according to clear procedures.

In its most straightforward sense, due process means fairness in the procedural application of the law. The most basic components of due process fairness are:

Due process defined: notice and an opportunity to be heard

- Notice
- An opportunity to be heard

¹³ See Grad, pp. 272-278.

Laws must be clearly written and understood.

Notice includes giving adequate information about legal requirements to the persons affected, so that they can avoid the consequences of noncompliance. For example, fair notice means that a law must be written clearly and precisely enough so that those subject to the law can understand what the law requires. A law that is so vague that reasonable people may not understand its meaning lacks the basic fairness that is at the heart of due process. Such statutory or regulatory language could be invalidated by the courts as “void for vagueness” under the due process clause.

Individuals must be given the opportunity to challenge an agency’s action.

Due process also requires that when an agency takes action affecting a person’s rights or entitlements, the person be given notice of the intended action and an opportunity to challenge the agency’s determination. For example, a public health agency cannot revoke a nursing home license without giving the owner notice of the action and, under most circumstances, an opportunity to challenge the action *before the license is revoked*. In an emergency situation the agency may unilaterally revoke a license, but must then give the owner an opportunity to challenge the action in a later hearing.)

How much notice must be given and what constitutes “an opportunity to be heard,” that is, what type of hearing is required, depend on the situation. These components of due process are explored in greater detail in Module 6.

Enforcement.

Equal protection

Due process also requires equal protection of the law.

The U.S. Supreme Court has also interpreted due process to mean that no person shall be denied equal protection of the laws. This guarantee is provided for explicitly in the Fourteenth Amendment, applicable to the states, and implicitly in the Fifth Amendment Due Process clause, applicable to the federal government.

Equal protection of the law refers to the simple goal of even-handed application of law. In its most basic sense this means that government and the legal system cannot arbitrarily discriminate. But in fact equal protection is an intricate concept that can be violated in two ways.

Discrimination between similar persons

- The government may deny equality if its rules or programs make distinctions between persons who are actually similar in terms of any relevant criteria. For example, if a law restricted governmental job eligibility based on sex rather than training and ability, it would be denying equality in the application of law.

Not distinguishing legitimate differences

- The government may deny equality if it fails to distinguish between persons who are actually different in terms of relevant criteria. For example, a government program that provided free smoke detectors to the public would violate equal protection rights of persons with disabilities if it required them to appear personally at a government office to obtain one¹⁴.

Equality before the law applies to both the law and its implementation.

The requirement of equality before the law applies not only to a law itself, but also to how agencies implement that law. For example, in one of the most famous equal protection decisions, the Supreme Court held that a local ordinance which prohibited the construction of wooden laundries without a license—although a valid safety measure on its face—had been implemented in a way that violated the equal protection clause of the Fourteenth Amendment. Almost all Chinese applicants were denied licenses while non-Chinese applicants routinely received them [*Yick Wo v. Hopkins*, 118 U.S. 356, (1886)].

Similarly, the landmark school desegregation decision of *Brown v. Board of Education*, 347 U.S. 483 (1954), stands for the proposition that equality on the face of the statute is not necessarily equality before the law; “separate but equal” schools can be unequal as measured in terms of real-world impact.

Equal protection does not require the same treatment in all instances.

Equal protection does not require the same treatment in all instances. Government often does classify people into groups and treat the groups differently. For example, some state governments apply more stringent driver’s license requirements to persons over 75 years of age. And several states restrict the driving privileges of persons suffering from certain medical conditions. Yet these distinctions have not been held to be violations of equal protection.

Individuals and groups may be treated differently where there is good reason to do so.

The fact is that government can differentiate between individuals and groups *if it has good reason to do so*. The critical question, therefore, is what constitutes an acceptable reason for applying law differently to persons in similar situations or applying law similarly to persons in different situations? In answering this question, the Supreme Court has adopted a rough two-tiered approach to equal protection analysis:

- Rational basis
- Strict scrutiny

¹⁴ Tribe, 1978, p. 993

Rational basis approach to equal protection

The rational basis standard applies in cases that do not involve a “suspect classification” or a “fundamental right.” The standard is easily and routinely met. It simply requires that government offer some plausible basis for a law’s unequal application

Strict scrutiny standard

The strict scrutiny standard applies when the law involves a “suspect classification” such as race, sex, age, or national origin, or when the law affects a “fundamental right” such as the right of interstate travel, the right to vote, or the right to free speech. The strict scrutiny standard is very difficult to satisfy. Under this higher standard, the government must show:

- A compelling state interest in applying the law unequally
- That the law is tailored narrowly to achieve that purpose.

Other standards for equal protection

There has recently been some judicial exploration of intermediate standards, which would be employed where there are any of the following:

- Significant interference with—or undue burden upon—individual liberty interests
- A denial of governmental benefits
- A specific type of discriminatory effect, notably gender discrimination
- A challenged regulation that is substantially related to a clearly legitimate governmental interest.

It is too early to tell whether this will clarify or further confuse what has become an unhelpful morass of equal protection jurisprudence.

Equal protection challenges are difficult to win.

Equal protection challenges are easy to raise but difficult to establish. The courts have found no difficulty in dismissing most equal protection complaints with a minimum of analysis. All of this could leave the more cynical agreeing with the famous words of Anatole France, who relegated the concept of equal protection to a state of meaninglessness by observing that “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”

Taking of private property

The Fifth Amendment also provides that no private property shall be taken for public use without just compensation. The Fifth Amendment prohibition applies to both:

- real property, defined as land, buildings and other real estate, and
- personal property, defined as everything that is subject to ownership, that is not considered “real property.”

Protecting the public’s health and safety sometimes interferes with use and enjoyment of private property.

Many public health laws prohibit, ban or otherwise regulate the possession or use of hazardous agents, products and real estate. The government does so to protect the public’s health and safety. Such laws may substantially interfere with people’s use and enjoyment of their property. But are these laws a “taking”; and does the Fifth Amendment require the government to compensate those persons whose private property rights were affected by the public health laws?

To answer these questions, the Supreme Court looks at several interrelated factors, in effect balancing the public interest involved against the reasonableness of the infringement on individual private interests.

In the early, leading case of *Mulger v. Kansas*, 123 U.S. 623 (1887), the U.S. Supreme Court explained that:

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

When compensation is or is not required

The general rule may be stated as follows:

Government “takings” of private real and personal property to prevent harm generally do not require compensation, thus underscoring the broad authority the Constitution extends to government as the protector of public health and safety;

Where, however, unoffending land is taken for a public purpose, such as to build a new highway, the government must compensate the innocent landowner who is required to surrender his or her private property for the public good.

Thus the courts have routinely upheld the exercise of the police power even when property will be confiscated or destroyed. Examples include the condemnation of a toxic waste site, bans on the sale and possession of machine guns, explosives, and certain pesticides, and the government mandated recall of an imminently hazardous consumer product. In each of these situations the government may act without compensating owners for their economic losses.

Recent Supreme Court position on compensation for land-use restrictions

Some observers had expected that the Reagan-Bush Supreme Court would significantly limit government’s ability to regulate land use, using the Fifth Amendment to impose stricter compensation requirements in instances in which environmental and other regulations reduced the economic value of land. But, in a case decided in 1992 involving a State prohibition against developing property in environmentally sensitive coastal areas, the Court failed to do so [*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)]. Instead, it limited its decision to regulations which deprive owners of *all* economic benefit of their land, and—even then—held that compensation need be paid by government only if the law involved cannot be justified under relevant and accepted principles of governmental land-use regulation.

On the “taking” of personal property

Most judicial challenges to governmental “takings” involve real property, that is, land, buildings, and other real estate, rather than personal property. This is true even though bans and prohibitions affecting a great variety of personal property are imposed by all levels of government.

Bans and restrictions on possession of personal property

In Illinois, for example, no person other than those specially licensed by the state may possess explosives. And the state authorizes Illinois municipalities to “regulate and prevent the storage of turpentine, tar, pitch, resin, hemp, cotton, gunpowder, nitroglycerin, petroleum, or any of their products, and other similar combustible or explosive materials. . . .”

Other current bans apply to certain categories of firearms (e.g., machine guns, assault rifles, and handguns), lawn darts, trash containers, large collections of harmless animals (e.g., dogs and cats), explosives, and nuclear weapons. Recently there has been a renewal of interest and litigation surrounding the use of the police power to ban, destroy, and otherwise regulate certain categories of dogs, most notably pit bulls. A century ago, in *Sentell v. New Orleans & Carrollton R.R.*, 166 U.S. 698 (1897), the U.S. Supreme Court held that such canine control measures did not deprive owners of their due process rights to possess their animal. State courts have similarly upheld a wide variety of such canine control ordinances.

There are several possible explanations for the broader acceptance of the governmental taking of personal property without compensation:

- Society traditionally values real property more highly than personal property.
- Usually personal property is worth less than real property.
- Unlike hazardous real property, hazardous personal property usually cannot be used for a less hazardous purpose; thus the government usually has no alternative other than to ban the product outright.

Privacy Rights

The Constitutional right of privacy

An argument frequently made against public health laws, such as immunization requirements, fluoridation, compulsory HIV testing, and helmet and seat-belt use laws, is that such laws infringe on individual rights. Opponents of such laws assert that they reach beyond the police powers of the states, deny due process, and violate the Constitutional “right of privacy.” But where does one look in the U.S. Constitution to find reference to a privacy right?

The answer lies in Constitutional law history.

In 1965 the U.S. Supreme Court decided *Griswold v. Connecticut*, 381 U.S. 479 (1965), a case involving a Connecticut law that prohibited the prescribing of contraceptives and their use by any person, including married couples. The Court declared the Connecticut statute unconstitutional. Members of the seven justice majority presented four different rationales for this result. In the main opinion, Justice William Douglas laid out the basis of a Constitutional right to privacy. He acknowledged that the Constitution nowhere explicitly mentions a right to privacy and that the Court had never before specifically recognized such a right. But, he argued, a number of explicitly-mentioned Constitutional rights, such as the freedoms of speech, press, assembly, and protection against unreasonable search and seizure, have been extended by Court decisions well beyond a literal reading of the Constitution. He declared that these “various guarantees create zones of privacy.”

The right to privacy has been limited to intimate areas of life.

The Constitutional right to privacy has been applied by the Supreme Court only in situations involving “the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.” It received its most important application in the Supreme Court’s abortion decisions of 1973. Efforts to expand the right of privacy to less intimate areas as a basis for invalidating public health and safety laws have not succeeded. For example, the Courts have consistently rejected the argument that compulsory seat-belt use laws violate the Constitutional right to privacy. Similarly, a 1977 U.S. Supreme Court decision rejected the argument that the New York State *Controlled Substance Act of 1977* violated the Constitutional right of privacy. The Act authorized the State of New York to record in a centralized computer file the names and addresses of all persons who had obtained, pursuant to a doctor’s prescription, certain drugs for which there is both a lawful and an unlawful market. Central to the Court’s decision was a finding that there were adequate statutory confidentiality protections in place [*Whalen, Commissioner of Health of New York v. Roe*, 429 U.S. 589 (1977)].



See Group exercise 1.5 at the end of the module.



Know your rights...

Enter the letter of the amendment or rights that might be used to challenge each of the situations described below. The answers are given below. (See Appendix A for text of the amendments.)

- A. 1st Amendment
- B. 4th Amendment
- C. 5th Amendment
- D. 14th Amendment
- E. Privacy rights

Situations

- _____ 1. Frequent and unannounced restaurant inspections
- _____ 2. Requiring children to have blood transfusions against their parents' objections
- _____ 3. Restricting the number of people allowed inside a public meeting room
- _____ 4. Denying disability benefits based on age
- _____ 5. Disclosing HIV status to employers without employee's consent
- _____ 6. Introducing evidence of child abuse from a guardianship or parental termination proceeding into a criminal proceeding
- _____ 7. Giving minors contraceptives without parental consent

Answers:

1. B, C 2. A, C, E 3. A 4. C 5. E 6. B 7. E

[The 14th Amendment (answer D) would be used to challenge the governmental action described in each situation if

governments (amendments 1 through 10) was directed at the states via the 14th Amendment.]

volved. The



Review of terminology...

The preceding pages used a number of legal terms that may have been unfamiliar to you. Some of the terms used are listed below. You may find it useful for review to define them now in your own words; doing this will also give you a glossary that is specific to this module. Feel free to add more terms.

adjudication

Administrative Procedure Act

Bill of Rights

Cabinet executive department

civil rights

civil liberties

common law

compelling state interest

constitutional law

delegation of authority

due process of law

equal protection

Fifth Amendment

First Amendment

Fourteenth Amendment

Fourth Amendment

home rule authority

independent administrative agency

judicial interpretation

judicial review

ordinances

“police power”

precedents

preemption

regulations

standing

statutory law



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A useful Internet site, Law Crawler, is located at <http://www.lawcrawler.com/>. From there, one can link to state government servers, state court decisions and codes.

Group exercises

Exercise 1.1 Language used in laws and regulations

1. Review the language of a public health statute and regulation for your state. Notice how the level of detail in the two differs.
2. Discuss the pros and cons of the legislature writing more detail in the statute.

Exercise 1.2 Rulemaking and adjudication

Questions for group discussion:

1. Where can you find your state's Administrative Procedure Act?
2. Does your agency engage in rulemaking? adjudication?
3. What procedures does your agency follow when:
 - rulemaking?
 - adjudicating disputes?
4. Where are your agency's procedural requirements written down?
5. What could happen if you violated your agency's procedural rules?

Exercise 1.3 Legal research

1. Where, in your jurisdiction, can you find the actual text of the following:
 - State statutes
 - State regulations
 - Local municipal codes
 - State judicial opinions
2. Have you ever used a law library to find such material? How would you describe the experience?
3. What do the following citations mean:
 - Fla. Stat. § 828, 12 (1987)
 - 40 CFR Subpart A, § 46.101
 - Ordinance 87-40
 - 494 U.S. 829 (1989)?
4. How would you go about determining if certain physical conditions amount to a “public nuisance”? Would you look to statute/code or the common law? Whom could you contact to get this information?

Organization of public health agencies**Exercise 1.4**

Discussion questions:

1. What is the legal relationship between your state and local health departments?
2. Does your state provide for home rule?
3. Does your health department share authority with a board of health? If so, how is responsibility and authority divided between the two entities?

Exercise 1.5 Views on the creation and quality of laws

Something to ponder individually or discuss as a group:

Current legal specialists have several competing views on how to determine why particular laws exist or whether a particular law is “good” or “bad.”

1. **The law and economics movement** evaluates and explains legal rules and institutions from an economic perspective, using market competition and efficiency as the standards to determine which laws are socially appropriate and which are not.
2. **The law and society movement** uses sociological concepts and theories to define the law by how it is actually implemented, not simply law as it is written down in statutes, regulations, or even judicial opinions. This movement sees the law as political, rather than objective and rational.
3. **The critical legal studies movement** interprets law as a political tool that protects the material interests of particular political and economic forces and also serves the ideological function of justifying the status quo. The most recent of the three current intellectual perspectives on law, this movement views law as neither just, impartial, nor natural, as reproducing rather than resolving social contradictions, and preserving and justifying an inequitable distribution of scarce resources.

How might each of these approaches affect public health?

Appendix A - Constitutional Amendments I - X and XIV

THE FIRST 10 AMENDMENTS TO THE CONSTITUTION AS RATIFIED BY THE STATES

The following text is a transcription of the first 10 amendments to the Constitution in their original form. These amendments were ratified December 15, 1791, and form what is known as the "Bill of Rights."

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* (emphasis added)

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

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.

Amendment XIV [relevant portion only]

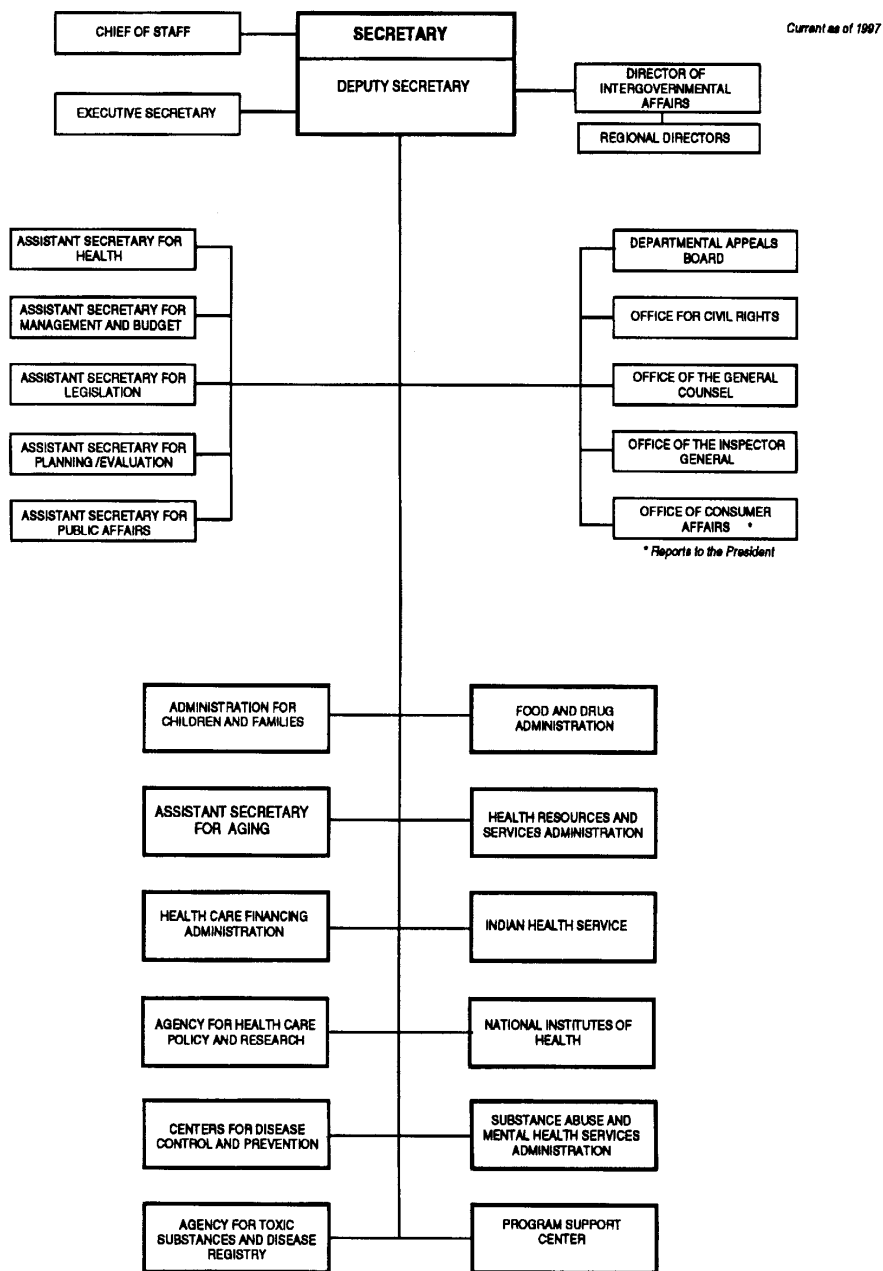
[Passed by Congress June 13, 1866. Ratified July 9, 1868.]

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (emphasis added)

Appendix B - Organizational Chart of the U.S. Department of Health and Human Services

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES



ENVIRONMENTAL PROTECTION AGENCY

