

Constitutional Cohesion and Public Health Promotion — Part I

Public Health and the Law

James G. Hodge, Jr.

Constitutional issues pervade the field of public health law for at least two primary reasons. First, protecting the public's health is an essential function of government at all levels (e.g., federal, state, tribal, local) and branches (e.g., legislative, executive, judicial). Constitutional structural arguments grounded in principles of federalism, separation of powers, and preemption, among others, consistently surface in light of interjurisdictional disputes and policies. Second, although public health entities seek voluntary changes in individual or community health behaviors, they are empowered to mandate efforts among private individuals and entities to address or counter threats. Rights-based infringements grounded in due process, equal protection, or freedoms of speech, assembly, and religion are inevitably implicated.

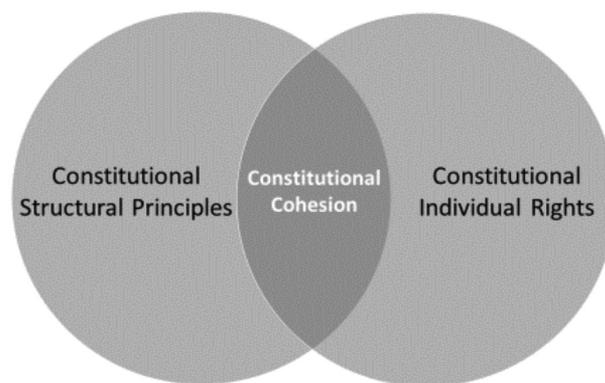
Scholars, judges, policymakers, and practitioners are apt to separate structural and rights-based constitutional arguments when challenging varied public health laws.¹ This is understandable. Discrete constitutional arguments flow logically

from the nature of a purported violation. When one level of government intrudes on the interests of another level, infringements are often framed in terms of federalism or police powers. If a public health agency impinges a person's freedom of movement, liberty-based objections extending from substantive or procedural due process tend to follow.

These intuitive constitutional responses, however, are not always the norm. Historic and modern conceptions of "constitutional cohesion" illustrate how structural- and rights-based principles are interwoven within the fabric of federal or state constitutions.² As per Figure 1, these principles are interdependent in support of (or sometimes contrary to) public health actions. The promise of constitutional cohesion in theory and practice is its capacity to provide greater stability in an era of political turbulence emanating from (1) changing federal-state-local relationships and (2) significant affronts to individual rights which collectively may be contrary to protecting or promoting the public's health.

Figure 1

Constitutional Cohesion



About This Column

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Historic Foundations

The notion that structural- and rights-based principles of constitutional law are inter-woven is neither revolutionary nor new. Constitutional cohesion is built on views among Constitutional Framers, legal philosophers, judges, and scholars assessing how varied constitutional principles work in tandem to stabilize governments and preserve individual freedoms. An impetus of structural- and rights-based constitutional norms is the promotion of accountability to protect citizens from government tyranny.

How these principles intersect fluctuates over time. As Wendy Parmet has noted, for decades courts tended to discount rights-based arguments against state and local public health measures on the premise that individual due process, equal protection, and other rights must give way to structurally-based police and *parens patriae* powers.³ On first glance, this conclusion simply illustrates how balancing public health and individual interests can be skewed in favor of the community. In its seminal decision in *Jacobson v. Massachusetts* (1905),⁴ however, the U.S. Supreme Court clarified this assessment.

Reverend Henning Jacobson challenged state and local vaccination powers based largely on due process and equal protection violations. Among the primary counter-arguments advanced by the Commonwealth of Massachusetts, and heavily acknowledged by the Court, were claims of (1) federalism (i.e., such disputes should be left to states, and not a national court, to decide consistent with their sovereign authority) and (2) separation of powers (i.e., judicial courts must respect the legislative judgments of state and local governments). A prime legacy of the Court's Opinion is the exploration of the interrelatedness of structural foundations and individual rights in finding that reasonable and fair impositions on individual freedoms stemming from vaccination requirements were justified in promotion of the public's health.⁵

Decades later in *Morrison v. Olson* (1988),⁶ the Supreme Court examined

a provision of the Ethics in Government Act of 1978⁷ authorizing a judiciary panel to appoint independent counsel to investigate specific crimes among high-ranking executive officials. Separation of powers principles were at play, but the Court focused instead on due process interests.⁸ To the extent the statute guaranteed the impartiality of decision-makers consistent with due process, it survived constitutional scrutiny. A year later in *Mistretta v. United States* (1989),⁹ the Court resonated similar analy-

actually enforced and no city officials were penalized.

Multiple challenges to President Trump's controversial 2017 Executive Order 13768¹² (threatening to defund local jurisdictions espousing "sanctuary city" status in violation of federal and state immigration laws) successfully raised structural principles and rights-based objections.¹³ In *City of Chicago v. Sessions*,¹⁴ the Order was deemed contrary to separation of powers principles. In *County of Santa Clara v. Trump*,¹⁵ Santa Clara

Mere recognition of principles of constitutional cohesion is not the main objective. Rather, the goal is to better assess how legal challenges evincing a cohesive view of constitutional principles may be used strategically to confront legal and policy approaches threatening public health and safety. Can principles of constitutional cohesion predicate favorable strategies and outcomes against an increasing array of federal, state, and local laws antithetical to the public's health?

ses in approving the U.S. Sentencing Commission. In *United States v. Lopez* (1995),¹⁰ a minor faced criminal charges for possessing a gun at school in violation of the federal Gun Free School Zones Act. His attorneys looked beyond rights-based arguments to craft a successful federalism challenge to Congress' Commerce authority to implement the Act itself.

Modern Applications

Similar cross-cutting analyses are reflected increasingly in contemporary judicial challenges and decisions. In 2017 a Florida-based advocacy group argued that Florida's state gun statutes preempted multiple ordinances passed by the City of Tallahassee.¹¹ The City argued that state law and its accompanying penalties violated structural principles of legislative immunity as well as freedoms of speech. The case was dropped because the ordinances were never

and San Francisco were granted an injunction on a finding that the Order was "unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause."

In *State ex rel. Brnovich v. City of Tucson*,¹⁶ dual arguments grounded in local home rule and municipal due process were proffered to counter the Arizona State legislature's preemptive scheme to withhold all state funds from localities whose public health (or other) laws conflict with state laws.¹⁷ Though ultimately rejected by the Arizona Supreme Court, Tucson's rights-based challenge (e.g., due process) to structurally-based strategies (e.g., preemption) illuminated the State's suspect tactics with potential collateral political consequences.

End Game Strategies

Mere recognition of principles of constitutional cohesion is not the main objective. Rather, the goal is

to better assess how legal challenges evincing a cohesive view of constitutional principles may be used strategically to confront legal and policy approaches threatening public health and safety. Can principles of constitutional cohesion predicate favorable strategies and outcomes against an increasing array of federal, state, and local laws antithetical to the public's health? As Rebecca Brown suggests, such cohesion at the intersection of separation of powers and due process brings "a welcome coherence to the law developing around the body of the Constitution, and, more importantly, will help to ensure the future balance of government powers in a changing nation."¹⁸

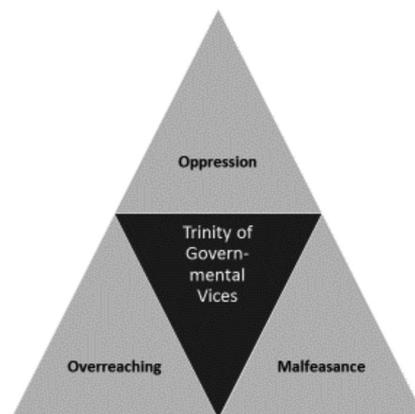
In a contemporary law and policy environment dominated by political instability and aggressive, repeated attempts by Congress and states to dismantle or defund health care and public health systems, alternative arguments are needed to buttress public health policies at all levels of government. Conservative

From this realization arises the time-proven idea that structural impediments or rights infringements may be equally viable alternatives to challenge governmental laws and policies that inadequately promote the public's health. The ploy underlying constitutional cohesion is to generate a formula to better predict success of one argument over another. Without greater predictability at the intersection of structural principles and individual rights, duties, and relationships between governments and citizens become chaotic. Formulaic analysis exceeds mere weighing of competing interests. There is no simple balancing test to accurately gauge outcomes. Instead, assessing the merits of cross-cutting arguments at the heart of constitutional cohesion involves consideration of multiple variables, including legal theory, prevailing politics, parties' positions, and available resources to sustain judicial or political objections.

The end game is the forecasting of articulable, cross-cutting claims

Figure 2

Trinity of Governmental Vices



oppression, (2) overreaching, and (3) malfeasance (see Figure 2). When governments (or their agents) at any level engage in these vices to the detriment of individuals or communities, their powers are at their lowest ebb. Intense constitutional scrutiny invariably follows. The interrelatedness of structural and individual rights arises in part from their dual mission to root out and quash these types of governmental abuses.

Suggesting that a constitutionally-cohesive equation should identify creative pathways to frame structural- or rights-based arguments challenging the trinity of governmental injustices is easy. Developing it is not, especially given a paucity of judicial consistency or guidance. Even if conservatives and liberals concur that government oppression, overreaching, and malfeasance are inexcusable, they diverge on their understanding of these terms over time. Within the realm of public health, one person's promotion of individual rights (e.g., aggressive recognition of Second Amendment rights to bear arms) may be another's oppression (e.g., governmental allowance of sustained acts of preventable gun violence).

Reaching consensus on what constitutes an unwarranted vice versus advancement of an individual right is complicated. A purposeful, cohesive equation must (1) frame meaningful structural- or rights-based arguments that accurately and reliably

Reaching consensus on what constitutes an unwarranted vice versus advancement of an individual right is complicated. A purposeful, cohesive equation must (1) frame meaningful structural- or rights-based arguments that accurately and reliably address governmental vices at the crux of constitutional protections; and (2) be driven by the quintessential aim of government to promote individual and communal health.

approaches heavily mired in structural principles supporting limited government may run ram shod over individual rights absent compelling and countervailing arguments. At the core of these conflicts is the essential observation that structural- and rights-based violations are not necessarily at odds, but can be "mirror images" (as Ozan Varol has eloquently opined¹⁹) within a cohesive constitutional framework.

that can plausibly advance communal health interests (without necessarily tipping the hand of opposing views). As seen in cases like *Lopez* and *Brnovich*, there are no assurances that constitutionally-cohesive claims may not be used to stifle laudable or innovative public health laws. Ultimately, the utility of this equation lies in its capacity to generate arguments countering the bipartisan "trinity" of governmental vices (1)

address governmental vices at the crux of constitutional protections; and (2) be driven by the quintessential aim of government to promote individual and communal health.

Initial themes designed to implement constitutional cohesion in practice are forthcoming in Part II of this column in the next issue of JLME.

Note

The author has no conflicts of interest to declare.

Acknowledgments

The author would like to thank Sarah Wetter, JD, Research Scholar, as well as Alexandra Hess, Lane Conrad, and Jennifer Piatt, Senior Legal Researchers, at ASU's Center for Public Health Law and Policy, for their research, review, and formatting contributions.

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Constitutional Cohesion and Public Health Promotion - Part II

Public Health and the Law

James G. Hodge, Jr.

Public health across the United States is in trouble. Government de-funding and de-authorizations are gutting many traditional public health functions. The spread of multiple preventable diseases is on the rise. Rates of some chronic conditions and injuries are increasing. Life expectancy among select American sub-populations is actually going down.¹ Coextensively, modern assessments reveal threats to social determinants of health. Prevailing federal and state health and tax policies fall hard on lower and middle classes.² Deregulatory efforts in health care, housing, education, and climate change may negate decades of public health gains.

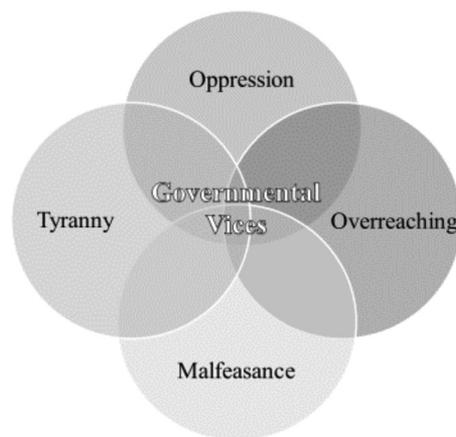
Countering this bleak forecast for America's health entails more than new law and policy approaches. It requires an innovative vision of the core role of law to further communal health. Part I of this commentary³ premised the promotion of the public's health on the truism of "consti-

tutional cohesion." For many reasons constitutional structural principles (e.g., federalism, separation of powers) are often viewed distinctly from individual rights (e.g., due process, freedom of speech). The Bill of Rights to the federal Constitution was added only after structural foundations were laid out. For years, law schools have taught structural principles and rights in separate courses. Unsurprisingly, many lawyers, judges, and policymakers tend to see them discretely. In reality, structural- and rights-based constitutional norms are highly interdependent, working in tandem to limit governmental vices (e.g., oppression, overreaching, malfeasance, tyranny) (see Figure 1).⁴

Constitutional cohesion is a fine theory, *but so what?* In a 1969 lecture, Yale Law Professor Charles L. Black, Jr. forewarned: "One who reads at all in constitutional law will know, ruefully, that there is no new thing to be said, and that when you think you

Figure 1

Governmental Vices



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have said something new you later find that others have said much the same thing before.”⁵ Even if Constitutional Framers, scholars, and others understand and support the theory,⁶ how can it lead to practical public health advancements?

One way, posited in Part I, is to consider whether structural principles or individual rights may be

tional cohesion; (2) lays out a series of practical legal angles to generate cohesive arguments (absent greater formulaic certainties); and (3) relates how these arguments may promote the public’s health.

Constitutional Cohesion Clarified

A simple premise underlies constitutional cohesion. Legal arguments

cohesive arguments. Generating this approach, however, involves a widespread assessment of multiple variables (e.g., legal theory, prevailing politics, relevant parties’ objectives/positions, specific legal factors, and available resources). Mathematically-precise predictions may not be possible, but refined analyses can heighten the odds that proffered arguments advance communal health (instead of worsening it). *Where does such analysis begin?*

At the heart of constitutional cohesion is the joint role of structural and right-based principles in addressing governmental vices. Consequently, cohesive arguments may be particularly salient when framed in terms of limiting vices such as (1) oppression, (2) overreaching, (3) malfeasance, and (4) tyranny⁹ (as defined in Table 1). Government acts (or omissions) resonating these vices are universally disdained by U.S. law- and policy-makers on both sides of the aisle. The public has little tolerance for vice activities conducted by any level of government to the detriment of individuals or communities. As a result, when subjected to constitutional scrutiny, vice-driven powers or exercises are diminished or extinguished entirely.

Framing arguments in terms of governmental vices, however, is complicated. From the start people disagree on what constitutes a vice in the public health arena. As noted in Part I, preventable gun violence may emanate from policies supported by Second Amendment rights to bear arms. Some suggest that acts of gun violence collectively constitute oppression; others insist the Second Amendment exists to deter oppres-

One way, posited in Part I, is to consider whether structural principles or individual rights may be wielded effectively and interchangeably to improve health. For example, can individual rights like due process be argued successfully to defeat structural tactics like preemption that hamper local public health innovations? Conversely, can federalism be raised to limit negative impacts on constitutionally-protected rights to privacy or liberty?

wielded effectively and interchangeably to improve health. For example, can individual rights like due process be argued successfully to defeat structural tactics like preemption that hamper local public health innovations? Conversely, can federalism be raised to limit negative impacts on constitutionally-protected rights to privacy or liberty?

The answer in either case is yes, but outcomes are unpredictable. Lacking approaches predicating positive effects, engaging constitutionally cohesive arguments may present mere “off-ramps” tied to singular victories or successes. At worst such arguments may underscore legal efforts that are initially (or later proven) antithetical to public health. In his 2009 text, for example, Robert Schapiro recounts the multiple ways the U.S. Supreme Court has “invalidated important state health and safety laws” under the guise of federalism.⁷

Still, against an onslaught of legal and political affronts to public health in the United States, cohesive legal maneuvers are worth the risk. Part II of this commentary (1) clarifies the conceptual groundwork of constitu-

raising structural impediments or rights infringements may present equally viable alternatives to challenge laws and policies that impair the public’s health. Less understood is how to wield these ideas to promote collective health. The utility of constitutionally-cohesive arguments is tenuous. There are no reliable guides to implement this strategy. Few guarantees exist that such claims will prevail initially or not be used conversely to stifle laudable or innovative public health laws.

As noted in Part I, a formulaic approach (reminiscent of Judge Posner’s legal pragmatism)⁸ may help identify and justify appropriate

Table 1

Governmental Vices — Briefly Defined

Government Vice	Brief Definition
Oppression	Unjust exercise of power largely via imposition of unwarranted burdens
Overreaching	Wrongful exercise of power in excess of established limits
Malfeasance	Affirmative performance of an unlawful or corrupt act
Tyranny	Excessive accumulation of powers in a singular entity

sion (at least via government).¹⁰ Somewhere between these perspectives lies a healthy, legal balance that respects individual rights and enhances communal health. Striking this balance begins with a proper characterization of governmental actions from which may follow cohesive counter-arguments.

Constitutional Cohesion Applied

Four primary approaches may be considered in applying the theory of constitutional cohesion to actual or emerging legal threats to the public's health (see Figure 2). The first two, intervening rights and structural swords, provide the most immediate opportunities for positive interventions. The latter two, transformed perceptions and structural inferences, take constitutional cohesion to its theoretical edge.

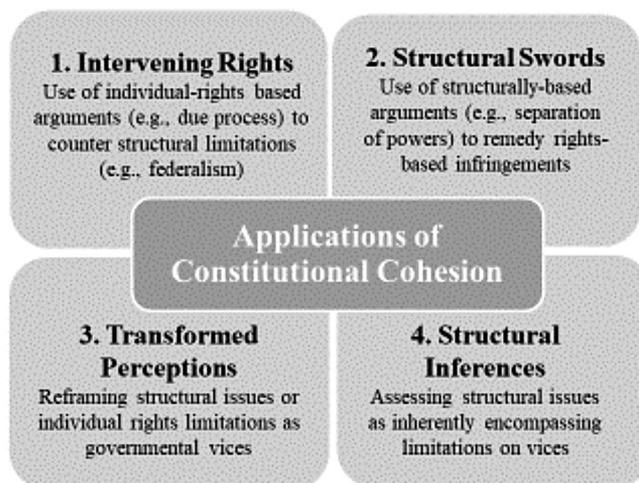
Intervening Rights. Government at all levels is empowered to protect or inhibit the public's health. Exercises of these powers are constitutional to the degree they follow structural foundations like federalism, separation of powers, sovereign powers, and preemption. Adherence to structural principles, however, is not the only measure. When government uses structural principles to infringe unnecessarily on individual rights, cohesive arguments may follow.

In *Jacobson v. Massachusetts* (1905),¹¹ the U.S. Supreme Court upheld a state-based exercise of police powers to require adult vaccinations against smallpox. In many ways the decision was consistent with decades of judicial acceptance of state and local public health efforts. However, the Court clarified that liberty principles inherent in due process do not succumb completely to public health police powers. Along the way, it revealed the interrelatedness of structural foundations and individual rights in crafting a balance between freedoms and public health exigencies.¹²

In subsequent modern cases, application of constitutionally cohesive arguments grounded in individual or entity rights are designed to counter structural implementations of powers that stifle public health or safety.

Figure 2

Theories of Constitutional Cohesion



In 2017 the City of Tallahassee initially challenged state gun laws preempting local ordinances on the dual themes of legislative immunity and freedoms of speech.¹³ That same year in *State ex rel. Brnovich v. City of Tucson*,¹⁴ joint arguments grounded in local home rule authority and municipal due process were presented in response to the Arizona State legislature's preemptive scheme to withhold all state funds from localities whose public health (or other) laws conflict with state laws.¹⁵ President Trump's 2017 Executive Order 13768¹⁶ threatening to federally-defund "sanctuary cities" led to rights-based and structural challenges.¹⁷ In *County of Santa Clara v. Trump*,¹⁸ the Order was deemed "unconstitutionally vague in violation of the Fifth Amendment's Due Process Clause."

Structural Swords. Intervening rights arguments may help counter vice-driven structural interventions. The flipside of this strategy is to use structural arguments as a sword to limit unwarranted infringements of individual rights contrary to the public's health. Among other claims, government impositions on individual rights may be circumvented via arguments that: (1) the wrong level of government has acted (i.e., federalism); (2) the wrong division of government has acted (e.g., separation of

powers);¹⁹ (3) a lower government's action is negated (i.e., preemption);²⁰ or (4) a government agency lacked authority to implement the measure at all (e.g., non-delegation doctrine, a component of separation of powers).

Use of structural swords has its greatest application when a damaging public health policy is abandoned as a result. In *City of Chicago v. Sessions* (2017),²¹ President Trump's aforementioned sanctuary city order was rejected as violative of separation of powers. However, in *United States v. Lopez* (1995),²² public defenders representing a Texas minor facing federal criminal charges for gun possession at school successfully crafted a federalism challenge to Congress' Commerce authority to implement the Gun Free School Zones Act. As a result, a portion of the Act designed to promote public health and safety nationally was repudiated.

Transformed Perception. Despite risks inherent in cases like *Lopez*, the merits of applied arguments grounded in intervening rights and structural swords are indubitable. Intervening rights principles illuminate unconstitutional elements of government acts that may otherwise be adjudged lawful. Structural swords may derail governmental interventions that may not fully infringe specific rights, but clearly reflect unconstitutional vices.

Sometimes the presence of a vice is not so clear. As an applied component of constitutional cohesion, *transformed perceptions* denotes the potential to recast governmental actions as oppressive, over-reaching, malfeasant, or tyrannical. To the extent such actions constitute a vice, they are likely unconstitutional. The essence of this application is seen in *Jacobson*. Although Reverend Henning Jacobson argued against vaccination largely on a rights continuum, his complaint resonates themes of government over-reaching and oppression. True, he lost, but his re-characterization of state police powers led to affirmative limits that remain foundations of modern public health practices.

In a 2016 abortion rights case, *Hodes & Nauser, MDs, P.A. v. Schmidt*,²³ Concurring Justice Gordon Atcheson of the Kansas Court of Appeals eloquently called for exacting judicial review related to Kansas' constitutional right to self-determination. "Doing otherwise," he suggested, "vaults legislation ahead of an *elemental constitutional barrier to governmental overreach*, undercutting the very purpose of a bill of rights in shielding a select set of fundamental precepts from the vicissitudes of politics and the cravenness of politicians (emphasis added)."²⁴

Structural Inferences. Sometimes the presence of a vice is clear, but a concomitant rights-based violation is not. For example, a court may concur with the identification of a vice activity that impairs the public's health, but fail to see how it impinges one's rights under a prevailing balance test or other interpretation. *Structural inferences* suggest that even when a breach of specific individual rights is absent, an identified vice may still be constitutionally debated.

The rights of people to be free from governmental vices lie at the core of constitutional democracies. Constitutional structural foundations like federalism and separation of powers are designed to help rid society of

governmental vices for the people's benefit. "[T]he Constitution divides authority between federal and state governments," held the U.S. Supreme Court in 1992, "for the protection of individuals."²⁵ As Robert Schapiro later concluded "federalism protects citizens, not states."²⁶ In theory not every right has to be specified constitutionally to warrant protection. Applied remedies must exist to address the presence of any vice irrespective of explicit delineation of rights.

In plain terms, any governmental vice that negatively impacts the public's health may be disavowed to the extent assuring communal health remains a core function of government. Whether applied facets of constitutional cohesion strike at the heart or approach the edge of governmental acts or omissions, delineating and eliminating vices that encumber population health are consummate goals at every level of government. Quite possibly governments' ultimate vice is reflected in acts or omissions that fail to promote basic public health services for all.

Note

The author has no conflicts to declare.

Acknowledgments

The author is grateful for the research and design contributions of Jennifer Piatt, Senior Legal Researcher, and reviews by Sarah Wetter, J.D., and Madeline Morcelle, J.D., M.P.H., Research Scholars, at ASU's Center for Public Health Law and Policy.

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Constitutional Cohesion and Public Health Promotion, Part III: Ghost Righting

Public Health and the Law

James G. Hodge, Jr.,
Jennifer Piatt, and
Walter G. Johnson

In two prior parts previously published in the *Journal of Law, Medicine, and Ethics*, the straight-forward concept of “constitutional cohesion” is introduced and explained.¹ Succinctly stated, though often viewed and analyzed separately, structural- and rights-based constitutional norms are highly interdependent. As Professor Akhil Reed Amar noted in 1998, “[s]tructure and rights [are] tightly intertwined in the original Constitution and in the original Bill [of Rights], which themselves [are] tightly intertwined.”² Thus, structural principles of federalism and separation of powers have similar constitutional purposes as due process and other individual rights. They are all designed to limit governmental vices (e.g., oppression, overreaching, malfeasance, tyranny).³

The theory of constitutional cohesion is not ground-breaking,⁴ but its modern applications⁵ may be essential to counter significant public health law and policy challenges.⁶ A driving premise is that structural principles or individual rights can be wielded effectively and interchangeably to improve health. Conversely, constitutional cohesion may defeat or compromise public health legal efforts. Multiple state health and safety laws supportive of civil liberties, for example, have been invalidated over decades under the guise of preemption and federalism.⁷

Despite the risks of adverse consequences, applications of constitutional cohesion in promoting the public’s health are an acceptable gamble against a bevy of legal and political affronts. As per Figure 1, four key applications emerge.

The first three of these applications reflect fairly-settled, albeit under-utilized, law. The latter application, *Constitutional Inferences*, presents more amorphous opportunities to interject constitutional norms into modern laws. It presupposes constitutional limits for any identified governmental vice, even if the limits are not explicitly framed in rights-based protections or structural principles. Consequently, unstated rights flow not only from express language in the Bill of Rights, but also from the very structure of the Constitution itself.

Constitutional interpretations against governmental infringements may take many forms via this application. As examined below, new rights may emerge from cobbled interpretations of a penumbra of rights (a.k.a. “auxiliary righting”) or expanded conceptions of existing rights (a.k.a. “creative righting”). Less well explored is the distinct, ethereal concept of what we identify here as “ghost righting,” or the generation of rights-based interventions arising from or embedded within structural foundations or unstated Constitutional norms. At a minimum, ghost righting presents another novel way to generate rights-based objections to substantial legal threats to communal health. At its apex, however, the concept may help usher in a new constitutional right to public health.

Crafting Rights-Based Norms from Existing or Expanded Constitutional Principles

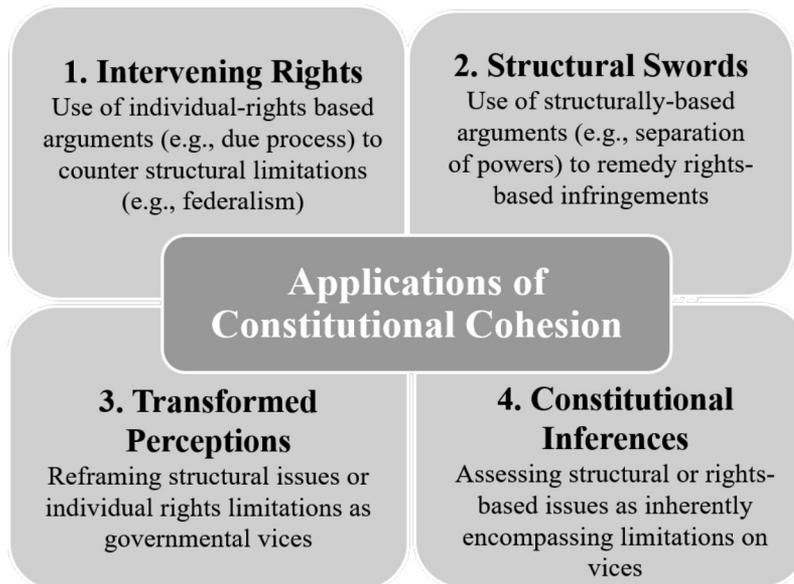
That governmental vices may be addressed through individual rights not clearly enunciated in Constitutional text is fairly settled and non-

About This Column

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Figure 1



controversial. Prominent examples include individual rights to privacy and rights to bear arms crafted by the U.S. Supreme Court to combat what it identifies as governmental vices.

Auxiliary Rights

While privacy rights evolved from initial conceptions dating back to the late 19th century,⁸ the Supreme Court did not explicitly acknowledge a standalone “right to privacy” until 1965 in *Griswold v. Connecticut*,⁹ when it struck down a state law prohibiting birth control. As Justice Douglas (writing for the majority) explained, privacy rights are not explicitly framed in the Constitution. Rather, they are undergirded via the 1st, 3rd, 4th, 5th, 9th, and 14th Amendments which collectively provide “penumbras” from which “zones of privacy” originate.¹⁰ In this way, the Court examined the Constitution as a cohesive whole instead of a mere collection of principles, much like the Framers, to craft auxiliary privacy rights otherwise unstated textually. Modern privacy rights buttress reproductive and other freedoms¹¹ with significant corollary public health benefits.

Creative Righting

In 2008 the Court’s interpretation of the right to bear arms in *District of Columbia v. Heller*¹² led to a substantial reassessment of the 2nd Amendment. Justice Scalia bifurcates the Amendment’s (1) prefatory clause (“A well regulated Militia, being necessary to the Security of a free State”) from the (2) operative clause (“the right of the people to keep and bear arms, shall not be infringed”). Dismissing the former clause as nonessential (despite established precedence¹³), he argues that the operative language creates a right to self-defense at home with a lawful firearm. In dissent, Justice John Paul Stevens suggests the “Court appear[s] to have fashioned [its interpretation] out of whole cloth.”¹⁴ Later, in 2018, retired Justice Stevens calls for a complete repeal of the 2nd Amendment given the escalation of gun-related deaths in the U.S.¹⁵

Ghost Righting

This concept exceeds the prior two examples of Constitutional inference. Like spirits themselves, its manifestations exist but are rarely seen. Perhaps the most notable example extends from the Court’s multi-fac-

eted recognition of the right to travel (or prohibit travel among foreigners as per ongoing litigation related to President Trump’s proposed “Muslim” ban).¹⁶ Like privacy, nowhere in the language of the Constitution is there explicit reference to rights to travel. In *Saenz v. Roe* (1999), however, the Court explains how the right has three components, two of which have textual sources.¹⁷ First, U.S. citizens have a right “to be treated as a welcome visitor ... when temporarily present” in another state under Article IV’s privileges and immunities clause. Second, they have a right to be treated like other citizens who are permanent state residents pursuant to the 14th Amendment’s privileges and immunities clause.

The Court also recognizes that citizens have rights to ingress and egress across state borders. Yet, it does not identify a specific Constitutional source for this “elusive” component,¹⁸ concluding instead that it “may have been ‘conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.’”¹⁹ In *Attorney General of New York v. Soto-Lopez*, Justice Brennan noted in dicta the right to ingress and egress is “inferred from *the federal structure of government* adopted by our Constitution.”²⁰ Such acknowledgments evince a clear case of “ghost righting:” unwritten individual rights arising from the very structure of the Constitution, with public health implications. Rights to ingress and egress necessitate balancing individual and communal interests across diverse policies related to sex offender registries, juvenile curfews, drug and gun free exclusion zones, and emergency evacuations/relocations.²¹

Crafting a Ghost Right to Public Health

Whether applied facets of constitutional cohesion strike at the heart or approach the edge of governmental acts or omissions, delineating and eliminating vices that encumber population health are consummate goals at every level of government. Among the highest functions of government is the need to protect public health and safety on which so many other

freedoms rely. Failing to promote basic public health services for all is more than a health justice or equity issue. *It is a governmental vice.* And, as with any vice, there must be a constitutional remedy even if it is unstated or unidentified to date.

The shadow of a ghost right to public health manifests in the Court's recognition of governmental obligations to protect the health of specific populations, particularly prisoners and wards of the state. Denying medical services to prisoners is an affront to human dignity²² in violation of the 8th Amendment.²³ Consistent with substantive liberty interests, govern-

human rights abuses (including violations of rights to health) abroad.³⁰ Later, in 2018, it would deny access to courts for similar suits against foreign corporations.³¹

Amidst this jurisprudence "black hole,"³² proposals have regularly emerged for federal Constitutional or Congressional recognition of "rights to health."³³ Multiple states recognize health rights in some way through their state constitutions.³⁴ New York's constitution provides that "[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern."³⁵ Hawaii's constitution reads "[t]he State shall

can be unenumerated, is it possible to imagine entire constitutional amendments that are unwritten?"⁴¹ Wendy Parmet and others purport that the Framers' expectation that government protect the public's health obviated any need for constitutional mandates.⁴² This may help explain the absence of affirmative Constitutional language effectuating public health protections. However, it does not resolve the resulting vice stemming from governmental failures to provide for even base levels of public health services. Crafting a purposeful right to public health starts with the recognition of this vice. Principles of constitutional cohesion suggest the recognition of a vice lends to structural or rights-based objections to counter it. Consistent with the theory of ghost righting, it follows that a positive right to public health assuredly exists, waiting for an opportunity to appear to advance the health of all Americans.

Crafting a purposeful right to public health starts with the recognition of this vice. Principles of constitutional cohesion suggest the recognition of a vice lends to structural or rights-based objections to counter it. Consistent with the theory of ghost righting, it follows that a positive right to public health assuredly exists, waiting for an opportunity to appear to advance the health of all Americans.

ment must also provide appropriate medical care for persons involuntarily committed via quarantine, isolation, or for mental health purposes.²⁴

Of course the Court has historically refused to interpret the U.S. Constitution as including anything that approaches a positive right to health for all. In *Maher v. Roe* (1977),²⁵ it held that "[t]he Constitution imposes no obligation on the States to pay... any of the medical expenses of indigents." Later the Court found the Due Process Clauses "generally confer no affirmative right to governmental aid" for individuals²⁶ or third parties.²⁷ Principles of equal protection may support nondiscriminatory access to specific governmental medical services,²⁸ but do not require government to fund services in the first place.²⁹ In 2013, the Court flatly rejected a statutory basis for American courts to hear claims against parties alleged to have committed

provide for the protection and promotion of the public health.³⁶ Montana's constitution states that "[a]ll persons...have certain inalienable rights [including] to...[seek] their...health...in all lawful ways."³⁷ Though purposeful, each of these provisions falls short of enunciating an affirmative right to public health.³⁸ Some activist groups have therefore proposed sets of state constitutional amendments to solidify positive rights to health care.³⁹ The effects of these constitutional platitudes on public health promotion are not well known. One 2015 study links stronger state right to health provisions and subsequent decreases in infant mortality.⁴⁰

Absence of rights and protections from constitutional parlance does not always mean they do not exist. As Akhil Reed Amar posits, "[i]f rights

Note

The authors have no conflicts to disclose.

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