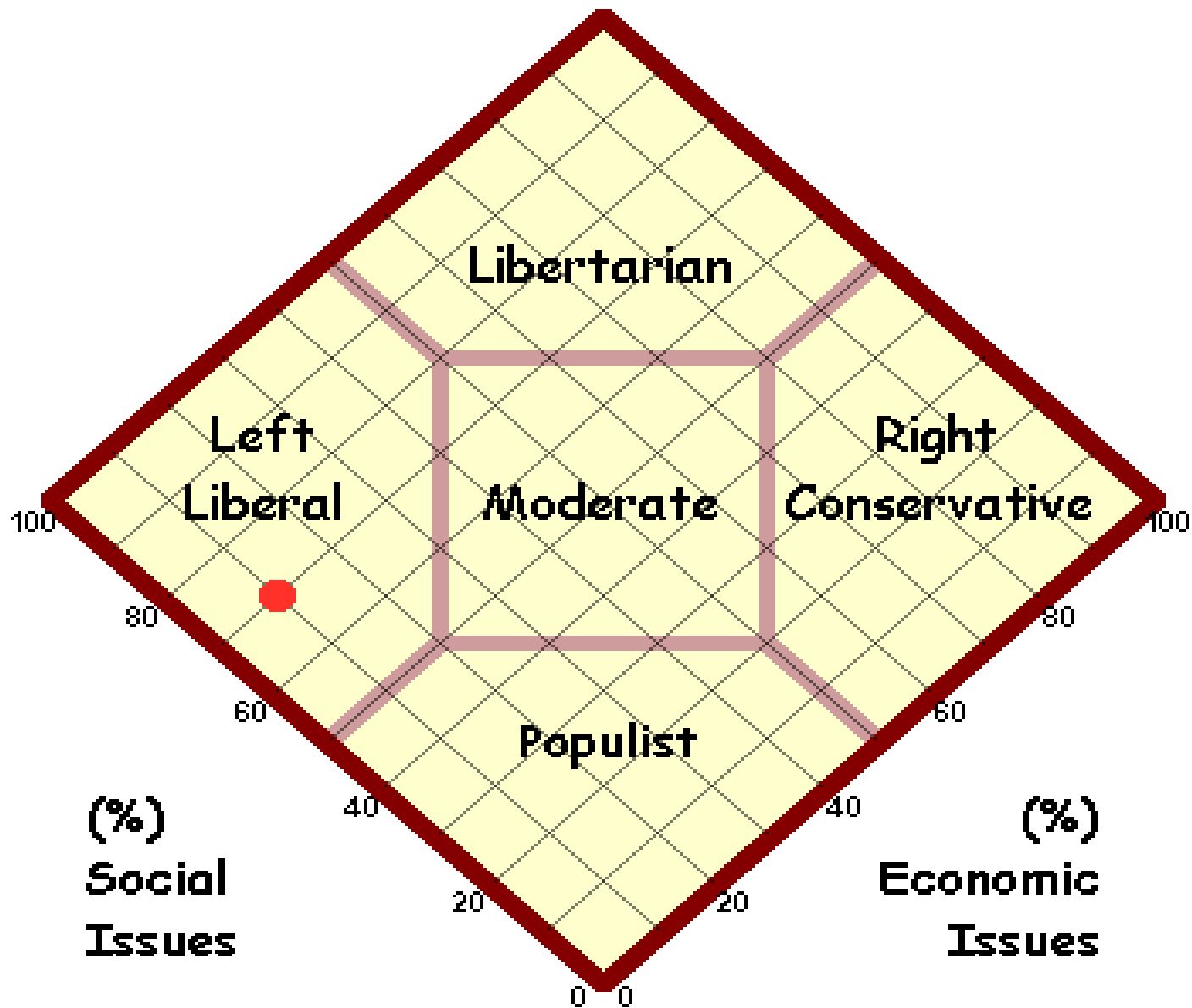


PUBLIC HEALTH & LAW: An Uneasy Alliance



**Visiting Professor Fran Miller
University of Hawai`i at Mānoa
Professor Emerita, Boston University School of Law**

The Underlying (Political) Problem



Public Health Advocates Think They Know What's Good for You



THE NANNY STATE

Libertarians Think They Know What's Good for Their Own Selves



Often They Don't Play Well Together in the Sandbox

www.StrangeCosmos.com



THE N

Just a few more regula



Presentation Roadmap

1. Public Health's Focus: **Population-wide Health**
2. Public Health *Law's* Focus: **Authority to Regulate**
3. Inherent Tensions
4. Legal Analysis
 - A. Constitutional Law
 - B. Administrative Law
 - Jurisdiction to Regulate
 - Grounds for Overturning Agency Action
 - C. Standard of Judicial Review
 - Const right implicated
 - "Mere" economic regulation
5. Case Studies: Tobacco & Obesity



1. Public Health's Focus:

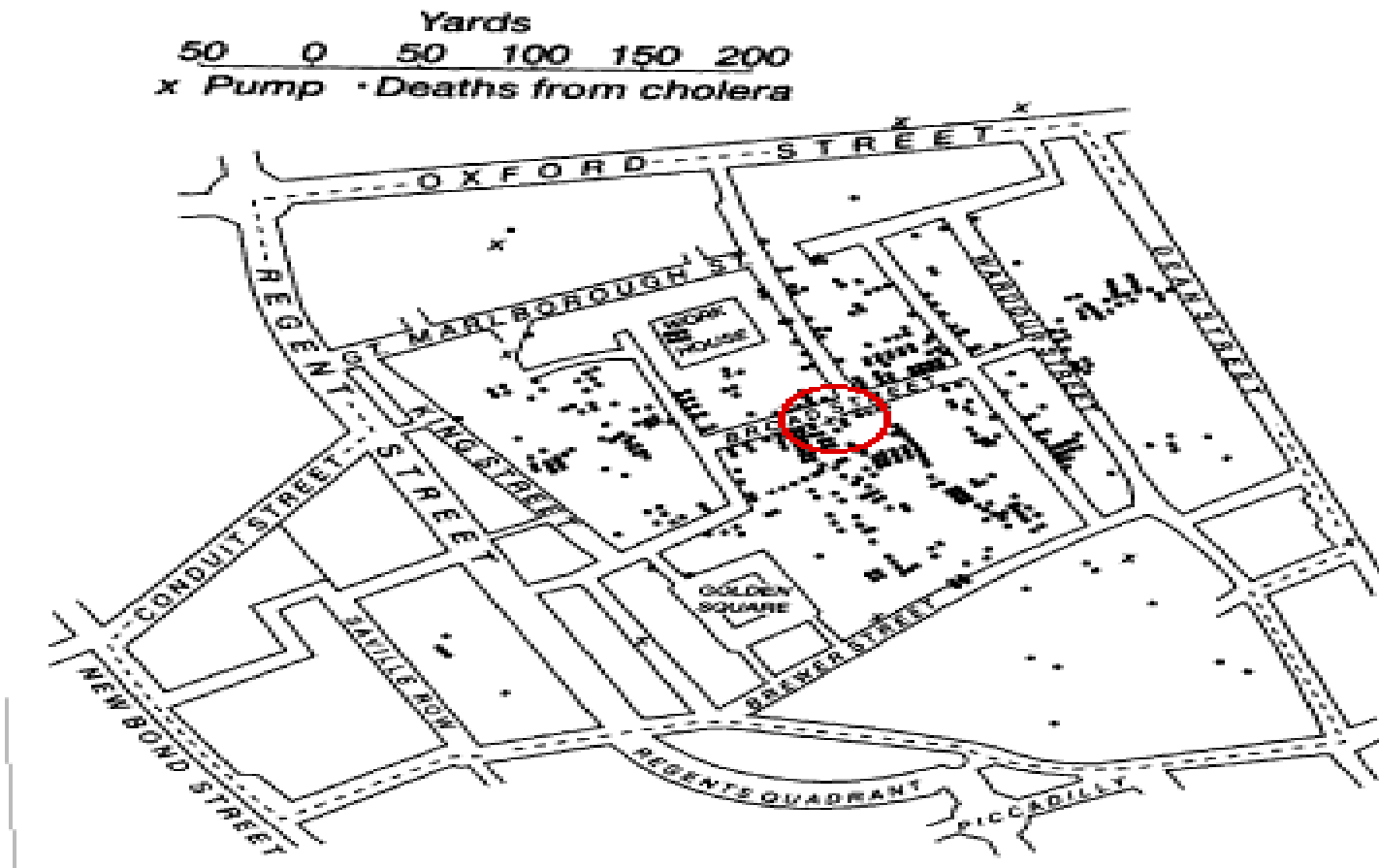
The Health and Well-Being of *Populations*





The “Old” Public Health

Focused on Eradicating Communicable Diseases



The “Old” Public Health

- Concerned with:
 - Preventing Epidemics & Disease Outbreaks
 - Collecting Statistics
 - & Emergency Response



The “Old” Public Health

Causal Links Relatively Easy to Understand

Example: “China river's dead pig toll passes 16,000, but officials say Shanghai water quality is 'normal'”





The “New” Public Health

Focuses on Eradicating *Chronic* Diseases

Chronic diseases now surpass infectious diseases as primary causes of US morbidity & mortality





The “New” Public Health

Tries to Affect Upstream Behavioral & Ecological Causes of Chronic Disease



The “New” Public Health

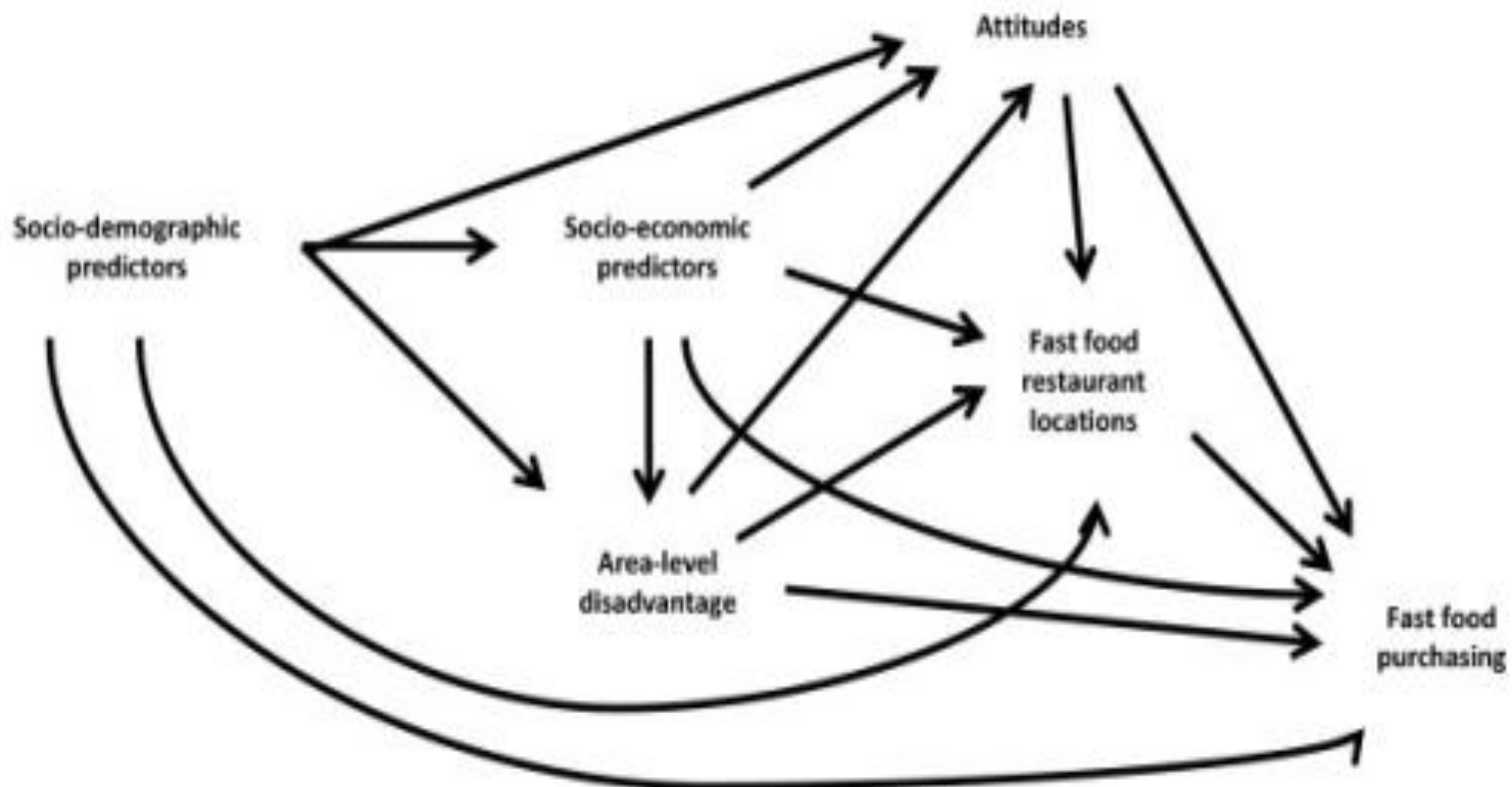
- Concerned with:
 - Unhealthy & unsafe
 - Products & behaviors



© Can Stock Photo - csp5878064

The “New” Public Health

Causal Links Often More Attenuated





2. Public Health *Law*

- Law = tool of public health *intervention*
- Focuses on *Appropriate Means* of Eliminating Threats to Public Health

– Public health *law*
= more limited in
scope than
public health *science*



Limits on Public Health *Law*:

Constitutional Law

Enumerated Rights: 1st Amendment
Freedom of Speech

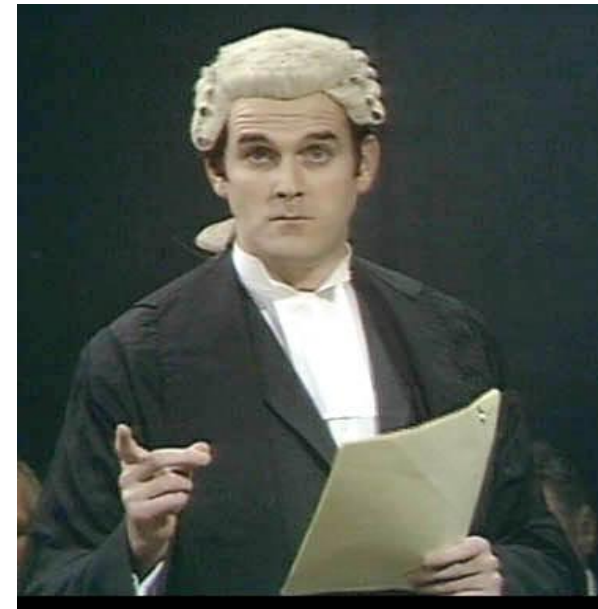
–*Example: Mandated Cigarette Advertising*



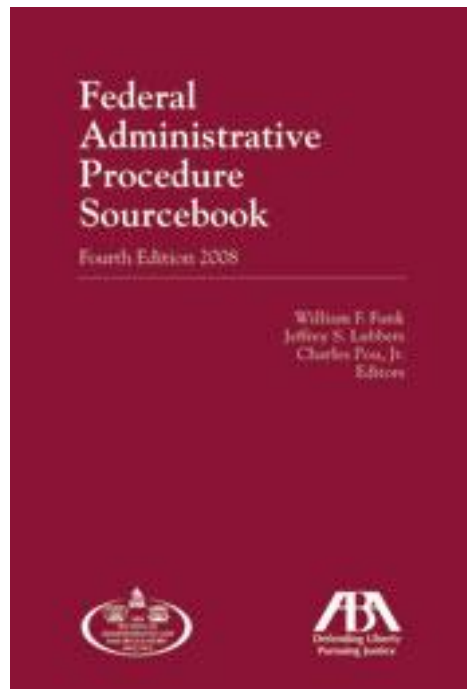
Limits on Public Health *Law*:

Administrative Law

–*Example*: Adm. agency action is bounded by the Administrative Procedure Act



“To a lawyer, process is *everything*.”



Limits on Public Health *Law*: Political Accountability



Limits on Public Health Law: Political Accountability (cont.)

Example: Prohibition

THE AMERICAN ISSUE
A Saloonless Nation and a Stainless Flag

Volume XXVI WESTERVILLE, OHIO, JANUARY 25, 1919 Number 4

U.S. VOTED DRY

36th STATE RATIFIES DRY AMENDMENT JAN. 16

Nebraska Noses Out Missouri for Honor of Completing Job of Writing Dry Act Into the Constitution; Wyoming, Wisconsin and Minnesota Right on Their Heels

JANUARY 16, 1919, MOMENTOUS DAY IN WORLD'S HISTORY

Ratification Accomplished in a Little Less Than Thirteen Months with Three States More Than the Required Three-Fourths. Resolution Gave Period of Seven Years for the Completion of Task Remaining Ones Expected to Join Their Sister States in This Act. With Possible Exception of New Jersey. United States Takes Initial Step in World-Wide Drive for Prohibition State and National Leagues Now Give Earnest Attention to Law Enforcement Legislation

TWENTY-THREE STATES APPROVED ACT IN FIRST SIXTEEN DAYS OF 1919; IN 1918, 15; 9 IN CALLED SESSIONS

Celerity With Which States Ratified Given Indication of the Popularity of This Great Reform; Also Bears in Big Majority of Approving Votes of Legislators

TOTAL VOTE "FOR" ON DAY ACT APPROVED, 3,976 WITH TOTAL OF 822 VOTES AGAINST MEASURE

Reward of Twenty-Five Years Faithful Work According to Anti-Saloon League Plans and Methods by the Temperance-Loving Citizens of the Nation

FIRST 36 RATIFYING STATES HAVE TOTAL POPULATION OF 62,033,939

This With 2,848,808 Population of Additional States Ratifying To Date Gives a Total of 69,882,807 Who, Through Their Legislatures, Have Declared for a Dry Nation

The long fought-for, prayed-for, looked-for day is here! It takes its place on the calendar as January 16, 1919 and its place in American history as a day second to none in importance as an epoch-making in progress of moral reform. On this day the Prohibition amendment was carried into the Constitution of the United States when Nebraska's House of Representatives ratified by a vote of 98 to 0, following approval by the Senate, and thus completing the required number of thirty-six approving states.

Historians interested in the long battle to win which the states have approved the amendment and the dry themselves will be glad to realize that the long battle to vote the United States into the first year of the year to have the honor of being counted among the first thirty-six. The evening of January 15 found the thirty-fifth state, the state to cast the determining vote, could hardly have been any other than Nebraska. There was no other serious possibility for this honor. Nebraska appears to have had a little advantage inasmuch as it readily carried a vote of 91 for on January 13. Her House acted at 10:15 on the morning of January 16 by a unanimous vote and they voted Missouri out of the thirty-six place by less than an hour. Wyoming was right after Missouri and could have placed its number thirty-eight, but distinguished itself as becoming the sixth state in the Union to approve the amendment simultaneously in both branches.

A Well Won Honor

No state will begrudge Nebraska the honor of casting the determining vote. The state of the Great Commons, William Pittman, deserves a fairly deserved a place among the first thirty-six. It is a sort of poetic justice that this state whose Senate first acted at a special session after the

enacted the Prohibition law as indicated by the vote of the state Senate on this question which shows but one dissenting vote.

Temperance League Was Deceived

The liquor traffic in the United States was doomed the day Dr. Howard H. Russell founded the Anti-Saloon League twenty-five years ago. It is no exaggeration to say that the organization that came into being at the founding of the League to say that not until the practical anti-liquor League methods were applied did the liquor houses show any indications through agitation and education had secured the people a voice in the realization of the harmful effects of beverage alcohol and the harmful nature of the traffic in politics.

Five Amendments Resolution

As early as 1870 a Prohibition amendment had been introduced in the House of the National Congress. Since then, Henry Mc. Clure of North Carolina and also the National Prohibition Union had introduced a Prohibition amendment to the constitution. The Women's Christian Temperance Union had done valiant service for almost ten years and the National Prohibition League had been the people's best protection.

Resolved Methods Won

The League decided and set foot first to take the resolution, subsequent efforts being made in following the traffic. Ready friends were made among the House members and the country local option and finally which states began to obtain the status by first vote of the people.

Legislation accomplished on rapidly in November 1918, in practically annual convention assembled, members of the National Prohibition Union, in 1918 a resolution to take a special Congress for a majority vote. This matter to create the amendment, this vote. On August 1, 1917, the United States Senate of the thirty-sixth Congress passed by a vote of 77 to 23, a resolution, subsequent ratification for ratification. A similar amendment passed the House on December 17, 1917, and on December 16, 1917, the Senate concurred and the

country local option and finally which states began to obtain the status by first vote of the people.

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FACTS YOU'D LIKE TO KNOW ABOUT RATIFICATION

The thirty-sixth state ratified January 16, 1919.

The fight for national Prohibition by constitutional amendment was launched at the twentieth convention of the Anti-Saloon League of America in Columbus, Ohio, on November 10-13, 1912.

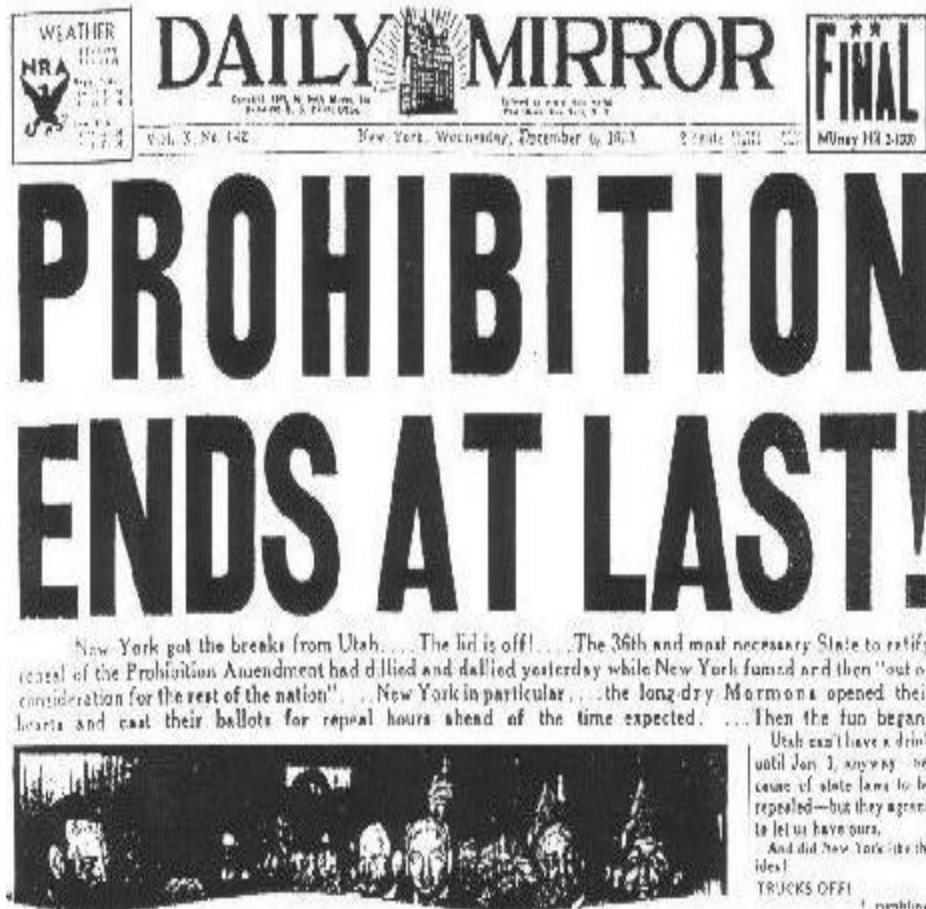
The House of the 65th Congress on December 23, 1918, gave a majority vote but failed to carry the amendment.

The House of the National Prohibition amendment resolution on December 17, 1917, and on December 16, 1917, the Senate concurred and the

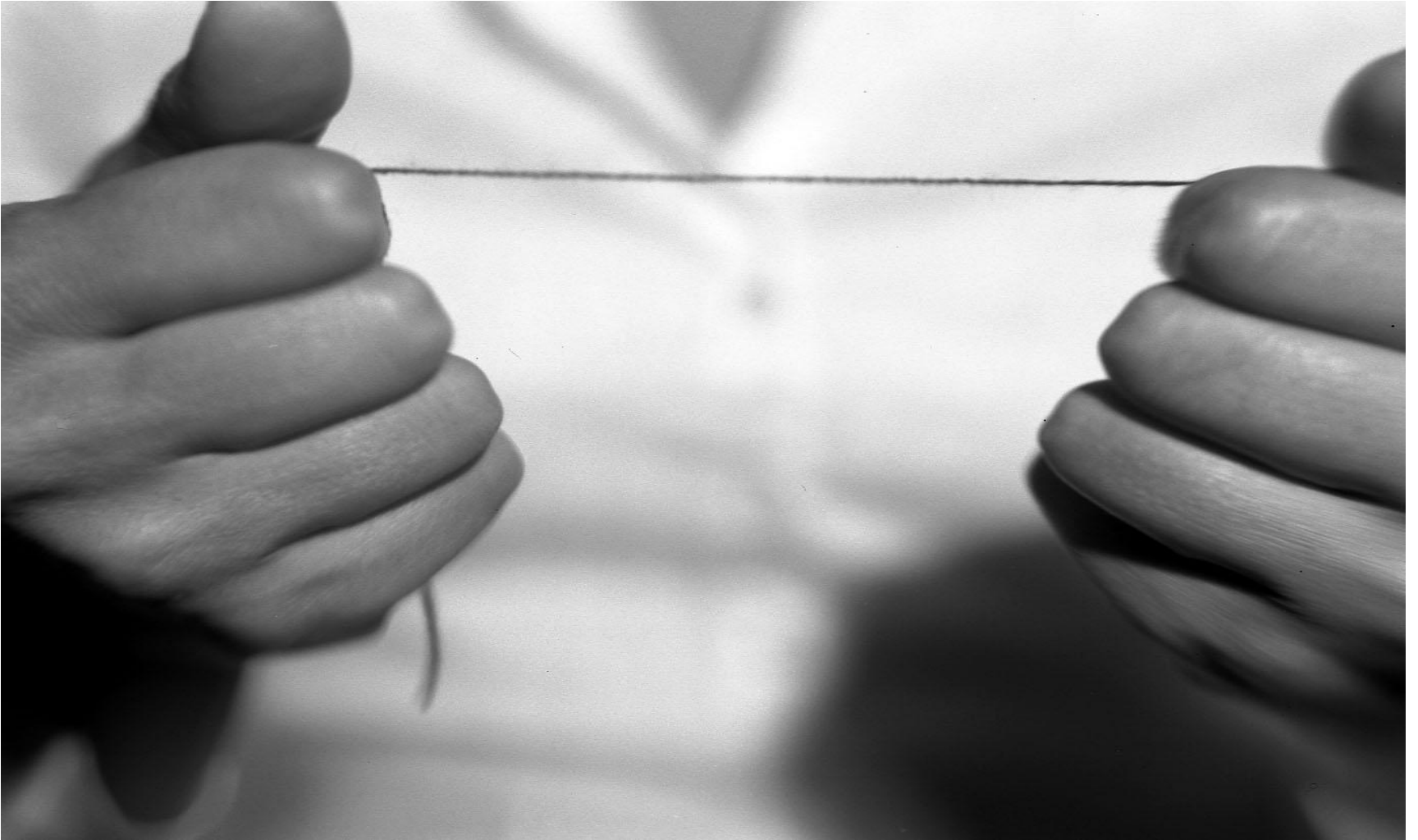


Limits on Public Health *Law*: Political Accountability (cont.)

< 14 years later



3. Inherent Tensions



Inherent Tensions (cont.)

US Law: High Respect for Personal Autonomy

US people = Citizens



UK People = Subjects

Inherent Tensions (cont.)

Americans resent being told what to do



No matter how good for them it might be

Inherent Tensions (cont.)

Public Health Initiatives Can Infringe Personal Liberty

– In ways trivial (mandatory seatbelt laws)



– And not-so-trivial (mandatory school vaccinations)



Legal Analysis of Public Health Initiatives



Constitutional Law

- **Enumerated Rights**

- **Example: Second Amendment**



Constitutional Law (cont.)

Fundamental Rights

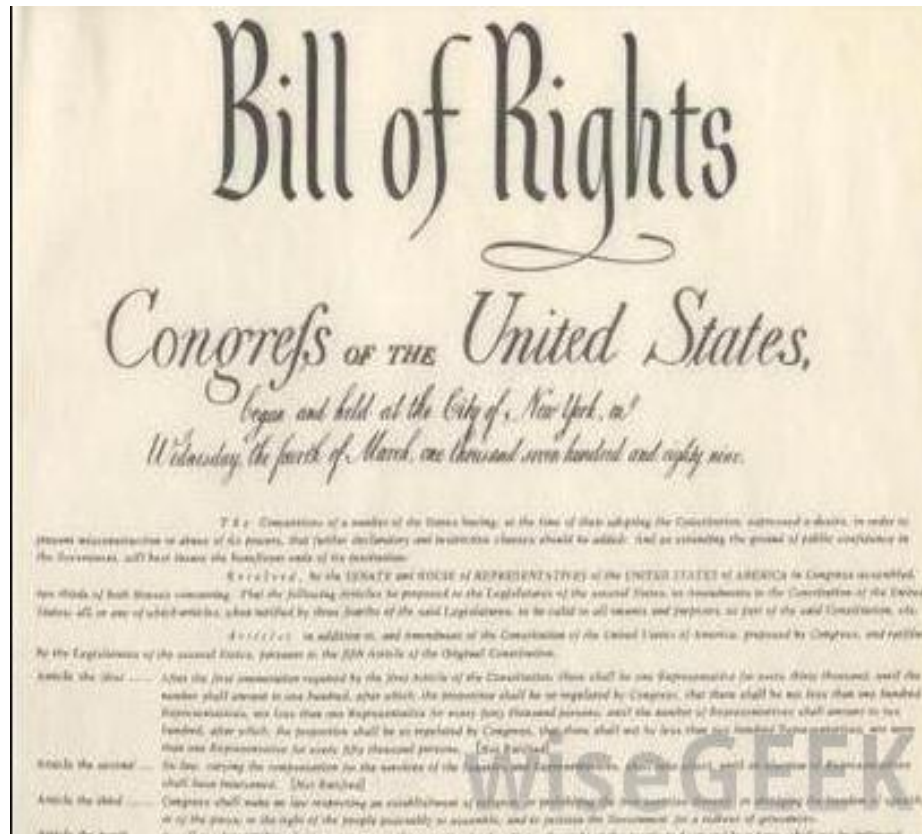
–*Example:* Privacy

**Is the New HPV Vaccine
a Good Choice for
Your Daughter?**



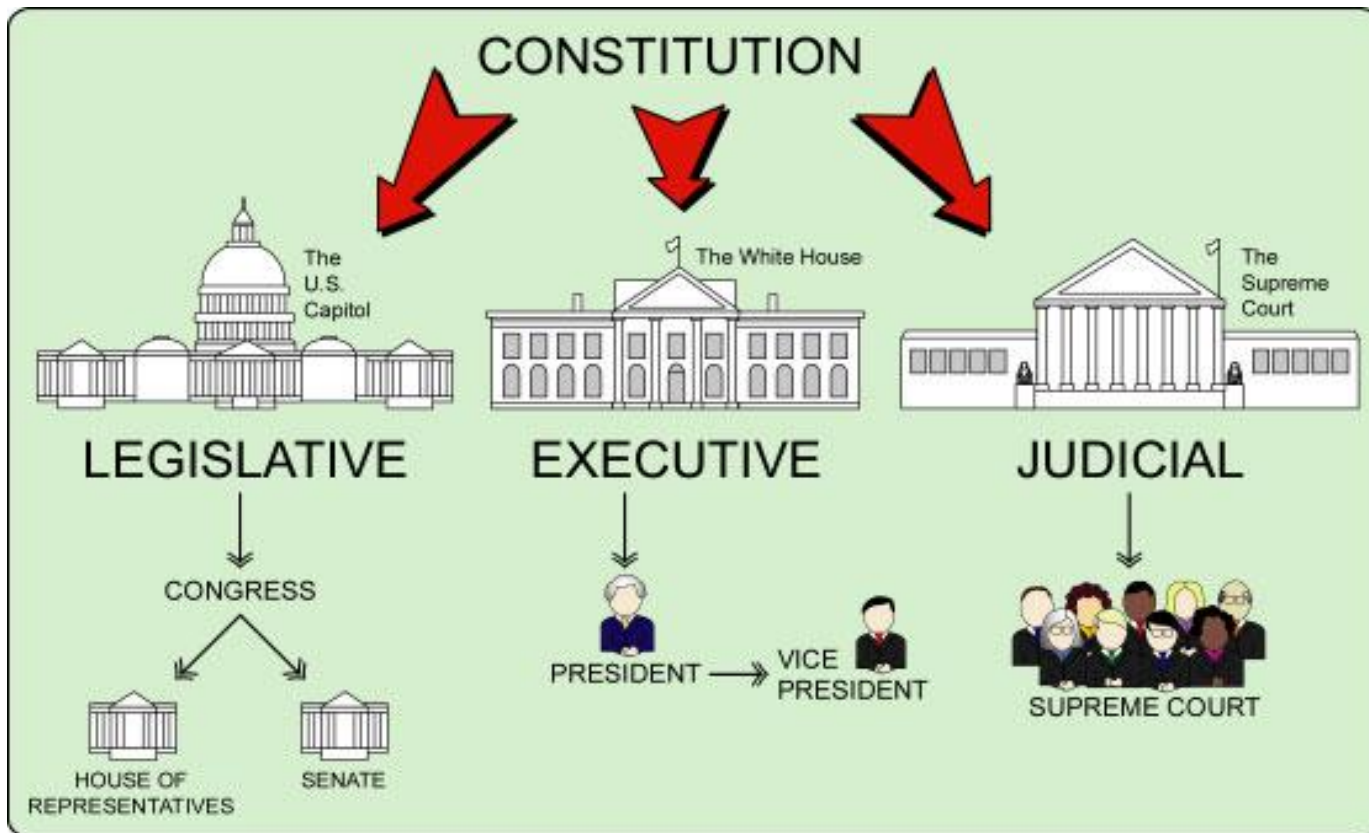
Constitutional Law (cont.)

- Due Process



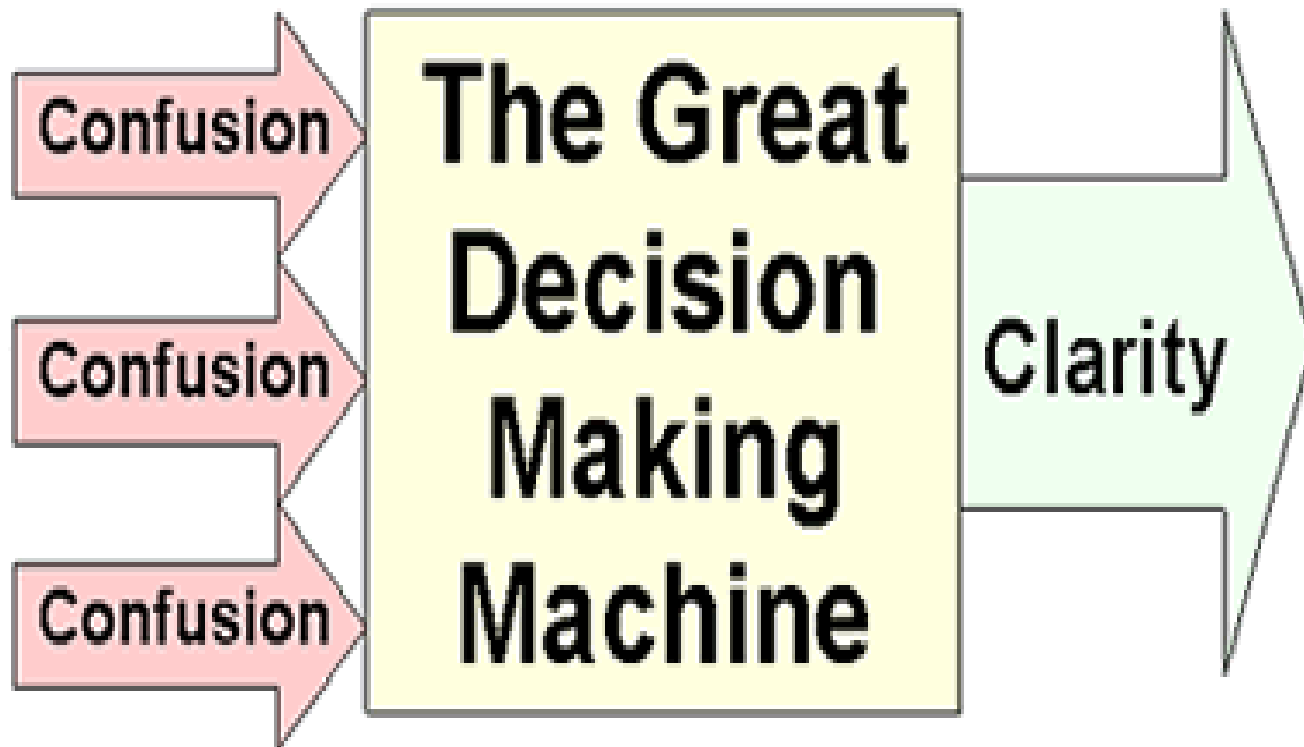
Constitutional Law (cont.)

- Separation of Powers



Administrative Law

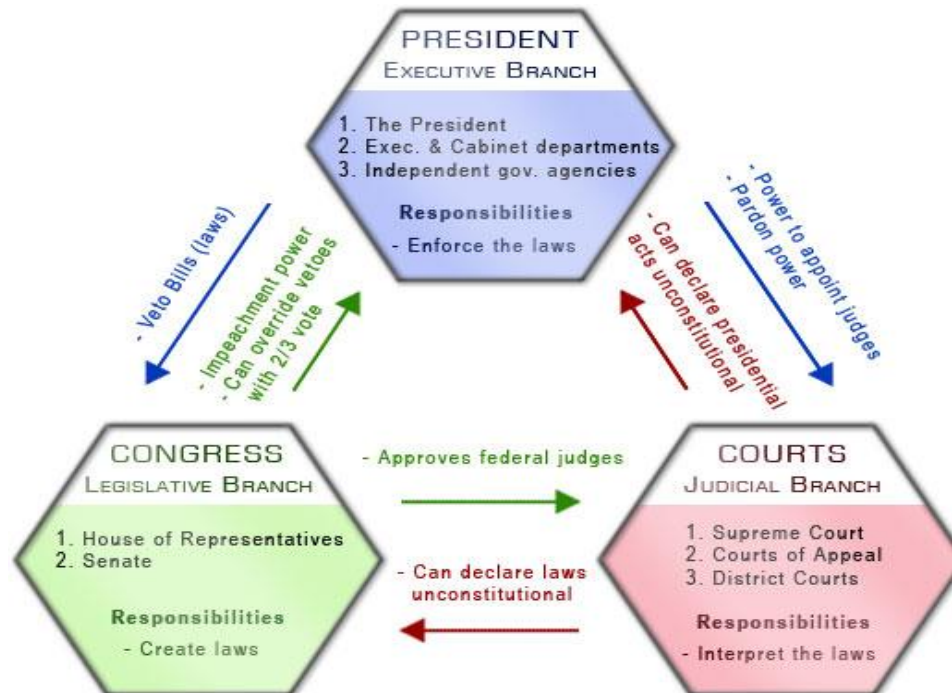
Focuses on *How* (Public Health) Decisions
Are Made



Administrative Law (cont.)

Agency Jurisdiction to Regulate:

- **Must Come From Legislative Branch** ➡
Executive Branch (see Separation of Powers)



Administrative Law, cont.

Jurisdiction to Regulate (cont): Source of Agency Power = Legislative Enabling Act



Administrative Law (cont.)

- Agency Jurisdiction to Regulate, cont:

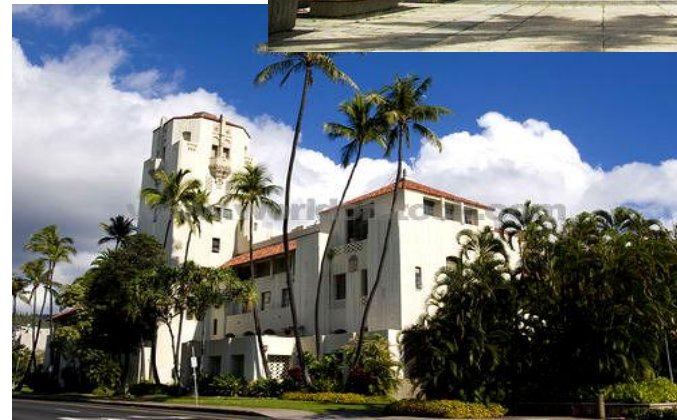
**Federal – Congress
(General Welfare Clause)**



**State – State Legislatures
(Police Power)**



**Local - City Councils
(Legislative Charter)**



Judicial Review of Agency Action

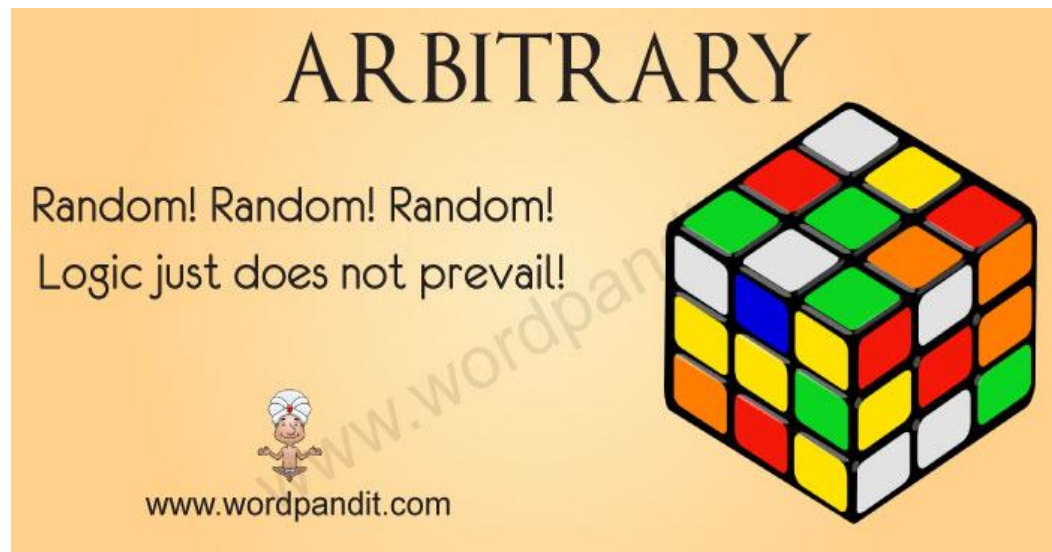
- Judicial deference to agency expertise
“Win at the Agency level, or not at all”



A breast cancer patient testifies in favor of Avastin during the FDA hearing. (She lost.)³⁴

Administrative Law (cont.)

- (Narrow) Grounds for Overturning Agency Action on Judicial Review
 - Violation of Applicable Law
 - Violation of Applicable Procedure
 - Arbitrary & Capricious Agency Action



Std of Judicial Review: Constitutional Right Implicated

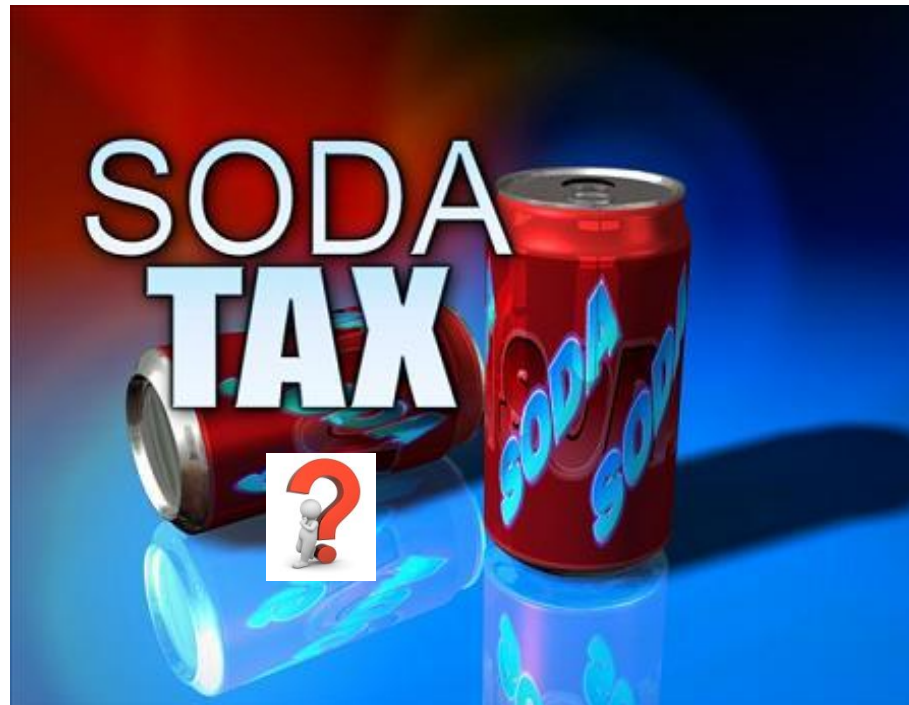
Strict Scrutiny (state interest must be compelling, & govt action narrowly tailored to achieve the purpose)



Std of Judicial Review: “Mere Economic Regulation”

“Minimum Rationality” sufficient

(Challenged action must merely be ‘rationally related to legitimate state interest’)



A Tale of Two Crises

- “It was the best of times . . . It was the worst of times



Case Study: Smoking

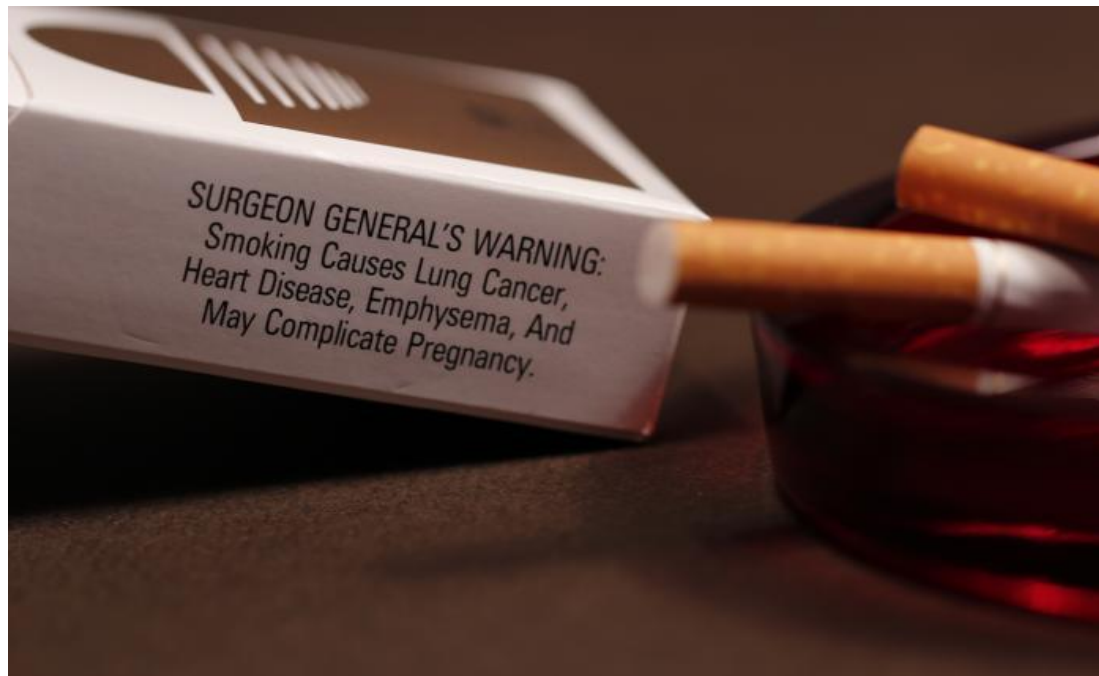


Evidence overwhelming re causal link between smoking and (smoker & bystander) morbidity & mortality

Case Study: Smoking (cont.)

Regulatory toolkit to cut smoking incidence

–Warnings



This is O.K.

Case Study: Smoking (cont.)

Regulatory toolkit to cut smoking incidence

– Warnings: *these may not be OK – Why?*



Case Study: Smoking (cont.)

Regulatory toolkit: Taxation

NYC average price of cigarettes = \$12.50 – city & state tax adds \$5.85 to cost of every pack (Hawaii av. price = \$7.50, state tax = \$3.20)



Case Study: Smoking (cont.)

- **Limit sales:** Flavored Cigars Available to Kids in Every ABC Store on Waikiki



Cf., HB 672 HD2 SD1 Relating to Health (Vapor Product Sale or Purchase to Minors Prohibited).

Case Study: Smoking (cont.)

Regulatory tools: Prohibition



Honolulu City Council, April 2013

Case Study: Smoking (cont.)

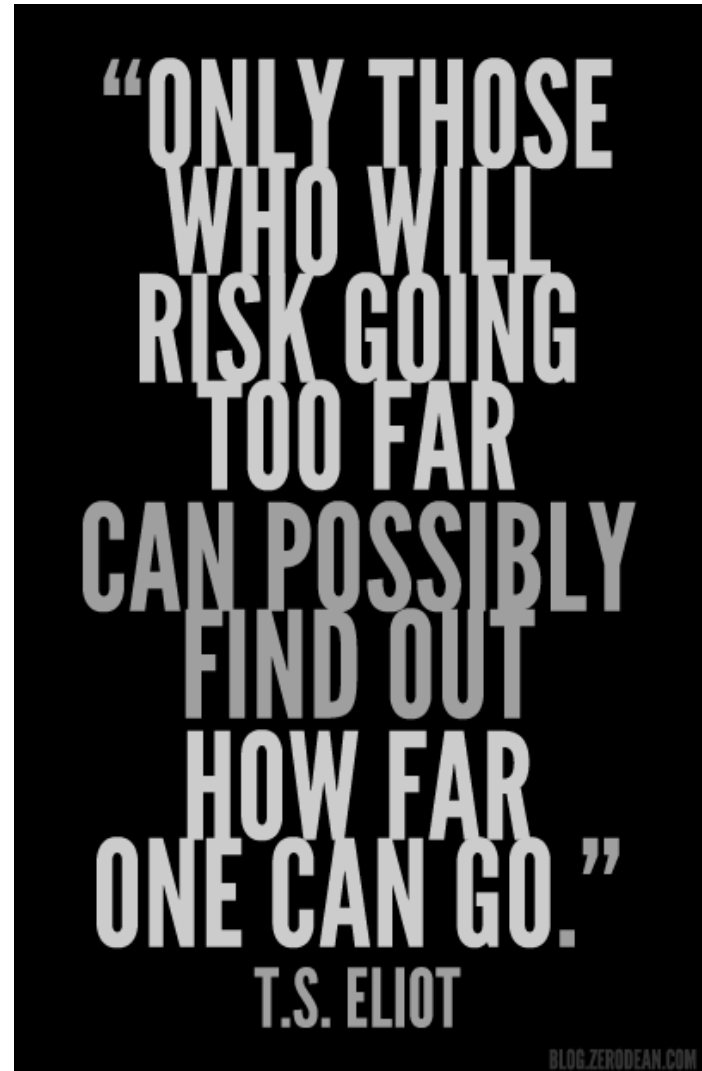
- **Regulatory toolkit: Education**



Case Study: Smoking (cont.)

Regulatory tools:

- What's next?
- How far is too far?



How Far Is Too Far?

Bloomberg's Plan Would Make Stores Conceal Cigarettes

Monday, March 18, 2013

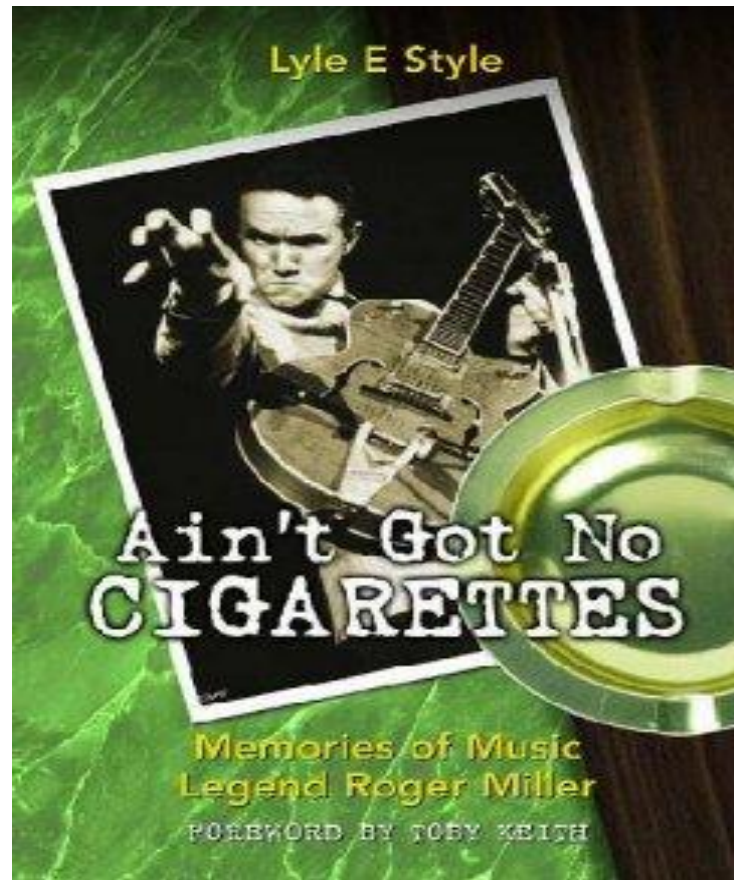
The New York Times



How Far Is Too Far?

- Prof. Daynard's proposal would prohibit sale of cigarettes to anyone born after 2000 . . .

Forever!



Case Study: Obesity



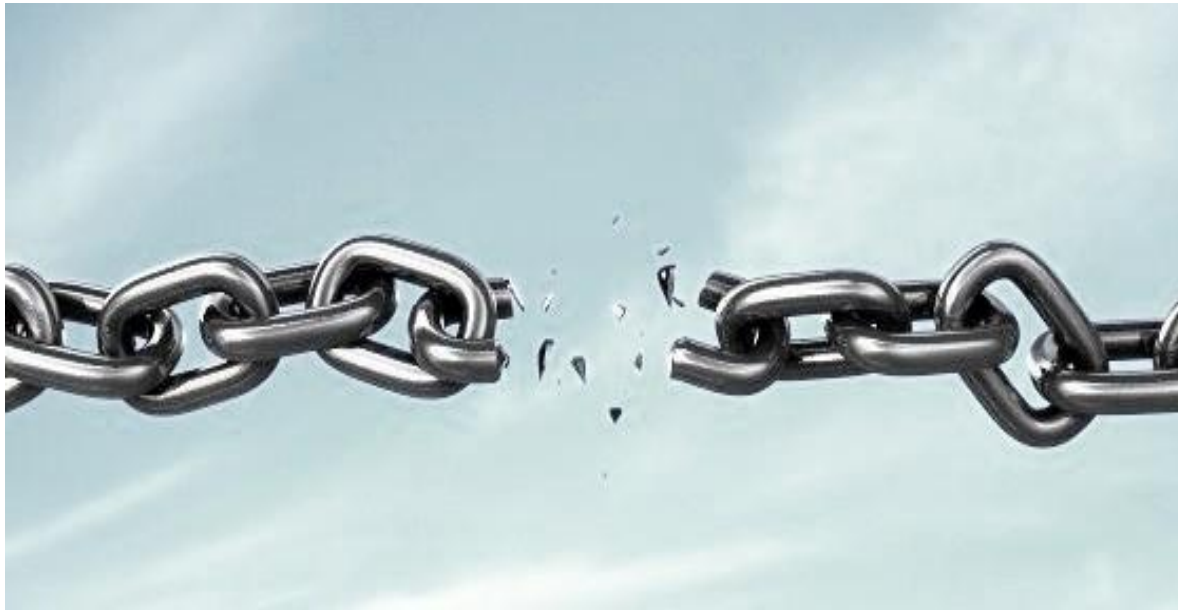
Case Study Obesity: Hawai`i-Specific



Iz died at age 38 of morbid obesity, adult onset diabetes & renal insufficiency

Case Study: Obesity

- Causal Links re Obesity and Morbidity & Mortality Not So Clear



Popular support usually depends on proving that causal link

Obesity: Regulatory Tools

- Same old, same old

–Tax



Hawaii Said No

State soda fee fails to pop

Senators on the Ways and Means Committee table a charge on sugary drinks

By Derrick DePledge
ddepledge@staradvertiser.com

Isle soda drinkers will not have to worry about paying a penalty this year to get their jolt of sugar.

State senators have chosen not to advance a soda fee of 1 cent per ounce that would have brought in

about \$37 million a year to counter obesity. The Abercrombie administration had hoped that the soda fee, as with higher taxes on tobacco, would discourage consumption.

"We decided that we won't be moving forward with the soda fee this year. Of course, it's always in play for next year," said Sen. David Ige (D, Pearl Harbor-Pearl City-Aiea), chairman of the Senate Ways and Means Committee. "In just talking with the members, we didn't

believe that it would be prudent for us to implement that fee this year."

The soda fee had moved through the Senate Health Committee and the Senate Judiciary and Labor Committee but was not taken up by the Senate Ways and Means Committee in time to meet today's internal procedural deadline to have bills ready to cross between chambers next week. A bill for a soda fee in the House was not advanced.

Gov. Neil Abercrombie had per-

sonally lobbied senators on the legislation, which his administration had described as a priority this session. All of the money collected from the soda fee would have been directed at state programs to combat obesity and chronic diseases such as diabetes. Two years ago lawmakers rejected Abercrombie's proposal for a soda tax by which some of the revenue would have gone into the state's

Please see SODA, A20

Obesity: Regulatory Tools

NYC Board of Health Regulation Limiting Portion Sizes of Sugary Drinks



Obesity: Limits on Portion Sizes of Sugary Drinks

Generated stiff Opposition from Many Quarters



Why Was Portion Control Regulation Enjoined & Held Invalid?

N.Y. State Supreme Court judge found rule:

- 1. Violated separation of powers (improperly asserted a legislative function), &**
- 2. Constituted an arbitrary exercise of power**



What's the Effect of This?

Water is No. 1 drink in U.S., toppling soda after 20 years

Associated Press

NEW YORK >> It wasn't too long ago that America had a love affair with soda. Now an old flame has the country's heart.

As New York City grapples with the legality of a ban on the sale of large cups of soda and other sugary drinks at some businesses, one thing is clear: Soda's run as the nation's beverage of choice has fizzled.

In its place? A favorite for much of history: plain old H₂O.

For more than two decades, soda was the No. 1 drink in the U.S. with per capita consumption peaking in 1998 at 54 gallons a year, according to industry tracker Beverage Digest. Americans drank just 42 gallons a year of water at the time.

But over the years, as

soda increasingly came under fire for fueling the nation's rising obesity rates, water quietly rose to knock it off the top spot.

Americans now drink an average of 44 gallons of soda a year, an 18 percent drop from the peak in 1998. Over the same time, the average amount of water people drink has increased 38 percent to about 58 gallons a year. Bottled water has led that growth, with consumption nearly doubling to 21 gallons a year.

Stephen Ngo, a civil defense attorney, quit drinking soda a year ago when he started running triathlons and wanted a healthier way to quench his thirst.

Ngo, 34, has a Brita filter for tap water and also keeps his pantry stocked with cases of bottled water.

"It might just be the placebo effect or marketing,

but it tastes crisper," said Ngo, who lives in Miami.

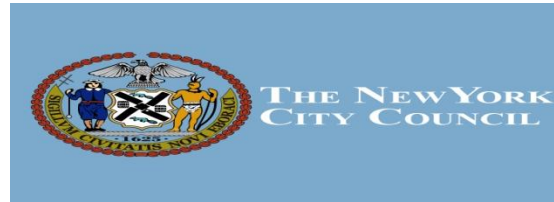
The trend reflects Americans' ever-changing tastes; it wasn't too far back in history that tap water was the top drink.

But in the 1980s, carbonated soft drinks overtook tap as the most popular drink, with Coca-Cola and PepsiCo putting their marketing muscle behind their colas with celebrity endorsements from the likes of pop star Michael Jackson and comedian Bill Cosby.

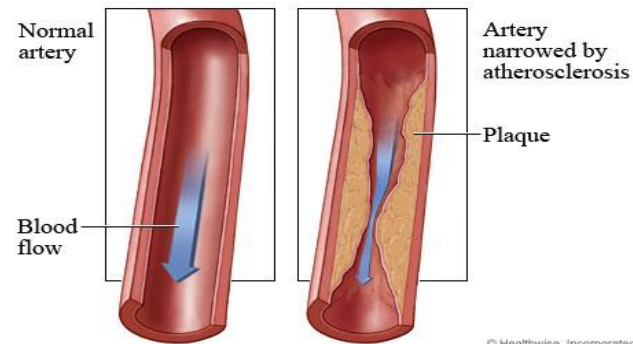
Americans kept drinking more of the carbonated, sugary drink for about a decade. Then, soda's magic started to fade: Everyone from doctors to health advocates to government officials was blaming soft drinks for making people fat. Consumption started declining after hitting a high in the late 1990s.

Why Did NYC's Artificial Trans-Fat Ban Not Meet the Same Fate?

- *No unlawful delegation issue* because City Council approved the measure



- *Causal connection* between trans-fats & coronary artery disease clearer therefore not arbitrary



- *Impact limited to restaurants*

- Nothing like the loss of mark-up on soda
- “Invisible” to patrons – no autonomy restriction



How Far Is Too Far?

Mississippi's Legislative Ban on Food Bans

Forbids municipalities to place local restrictions on food or drink



Useful References on Public Health Law for Non-Lawyers

- **LAWRENCE O.GOSTIN, PUBLIC HEALTH LAW AND ETHICS: A READER (University of California Press and Milbank Memorial Fund, 2002).**
- **LAWRENCE O.GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (University of California Press and Milbank Memorial Fund, 2000)**