

Public Health Mandates

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Or, yes the government can make
you buy broccoli.

■ But should it?

Overview

- What are public health mandates?
- Why do we have them?
- What forms do they take?
- What legal and political challenges do they take?

Public health mandate - defined

- Not a clear legal category
- "Laws designed to protect or promote health which compel an action or activity"
- 2 controversial claims about this definition
 - "designed to protect or promote health"
 - "which compel an action or activity"

"designed to protect or promote health"

- ▣ Actual purpose of the law is not always the espoused purpose
- ▣ Laws that have the purpose of protecting public health may not actually do so

"which compel an action or activity"

- ▣ Mandates seem distinguishable from other public health laws that prohibit action
- ▣ Fuzzy line between regulation of action and inaction

Public Health Mandates Feel Unique

- “When you are changing the relation of the individual to the government in this way that we can stipulate is, I think, unique....” Justice Kennedy, Oral Arguments in *DHHS v. Florida*, March 27, 2012.

But are common

- Federal mandates
 - EMTALA
 - Medicare
 - Seat-belt laws
- Examples of Massachusetts mandates
 - Immunization of School Children Before Admission to School
 - Blood Screening for Newborns for Treatable Diseases and Disorders
 - Protective Headgear for Motorcycle Operators and Passengers
 - Mandatory Helmet Use for Persons Years of Age 16 or Younger
 - Isolation and Quarantine Requirements

Why public health mandates?

- ▣ Sometimes they work
- ▣ Relatively inexpensive
- ▣ Resonate in our individualistic society

The problem with mandates

- ▣ Unfunded
- ▣ Displace other interventions
- ▣ Focus on the individual
- ▣ Paternalistic
- ▣ Invite legal challenges
- ▣ Invite political controversy

The form of a mandate relates to the:

- Jurisdiction or authority issuing it; and
- Degree of coerciveness

Jurisdiction/Authority – Federal v. State

- State police power
 - “Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State... are component parts of this mass.” *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824).
 - “Full power and authority are hereby given and granted to the said general court... to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes... so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth...” (Mass. Const. Pt. 2, C. 1, § 1, Art. IV).
- Limited authority of federal government
 - Regulation of commerce
 - Power to tax and spend

Jurisdiction/Authority – Legislature v. Health Department

- Many public health mandates are imposed by legislation, but some are regulations promulgated by health authorities
- 2 additional potential legal claims are possible when a mandate is promulgated by a health authority
 - Did the agency act within the scope of its statutory authority?
 - Did the agency follow the required process in promulgating its regulation?

Degrees of coercion: how mandatory is the mandate?

- Criteria to consider
 - Conditional or unconditional
(Tax & spend; regulation of other action, such as practice medicine)
 - Penalty – criminal or civil
 - Modes of enforcement – primary or secondary
 - Mandatory or nudge
- Highly coercive mandates incite greater backlash

Coercion and Liberty

- Liberty based constitutional challenges to mandates
 - Free exercise of religion – vaccine and health laws
 - Freedom of speech – menu labeling
 - Right to privacy and substantive due process – helmet cases
 - Takings – use of property

- But most of the times, public health mandates are upheld

Legal challenges to mandates

- **Morin v. MGH Inst. of Health Professions**, 15 Mass. L. Rptr. 417 (2002)
 - Speech pathology graduate student at the MGH Institute sought injunction prohibiting MGH from dismissing her for refusal to comply with a state law requiring students in a health science program who come in contact with patients to be immunized against various communicable diseases
 - “[T]o qualify for 1st Amendment protection under the free exercise clause, plaintiff must first show that the activity complained of is motivated and rooted in a legitimate and sincerely held religious belief...”
 - “The court is primarily concerned with the harm to the public... While the plaintiff may be willing to take the risk, the risk of endangering people is far too great to tip the scales in favor of granting this injunction.”

Legal challenges to mandates

- **Commonwealth v. Howie**, 354 Mass. 769 (1968)
 - MASS. GEN. LAWS c. 90, § 7 requires every person operating or riding a motorcycle to wear protective headgear
 - Defendant was found guilty for not wearing protective headgear while operating a motorcycle and appealed
 - "It lies within the power of the Legislature to adopt reasonable measures for the promotion of safety upon public ways in the interests of motorcycles who may use them"
 - The law "bears a real and substantial relation to the public health and general welfare and is thus a valid exercise of the police power."

Conclusion

- Mandates have unexpected costs
- The form of mandates matters

Questions?