

# ARTICLES

## Health Care and the Constitution: Public Health and the Role of the State in the Framing Era

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### Introduction

Health care is a critical topic: to individuals who fear they may lose it, to the public whose well-being depends upon it, and to policy makers struggling to make it more affordable and accessible.<sup>1</sup> Health care is also a critical subject for constitutional law. Although cases concerning health care form a relatively small percentage of the Supreme Court's total caseload, they often dominate public and scholarly discussion of the Court. Issues such as abortion,<sup>2</sup> the right to die,<sup>3</sup> the treatment of severely disabled newborns,<sup>4</sup> the rights of those with infectious disease,<sup>5</sup>

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1. The health care cost and access crises was a major issue in the 1992 presidential election, Robin Toner, *The 1992 Elections: The President—The Overview: Clinton Captures Presidency with Huge Electoral Margin; Wins a Democratic Congress*, N.Y. TIMES, Nov. 4, 1992, at A1. The Clinton Administration has promised to propose a plan by May 3, 1993 that would guarantee access to health care to all Americans and control health care costs. See Robert Pear, *Clinton Considers Stopping Medicaid Under Health Plan*, N.Y. TIMES, Mar. 29, 1993, at A1, A12; see also Robert Pear, *Insurers' Turnaround on Health Benefits Only Opens New Set of Questions*, N.Y. TIMES, Dec. 4, 1992, at D17.

2. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter) (discussing the sustained debate of the Court's abortion cases and their impact on the Court's legitimacy). The public and political debate over abortion is chronicled in LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990). The scholarly debate over the Court's abortion decisions is multitudinous. See *infra* note 7. A complete bibliography would take several pages.

3. Although the Supreme Court did not decide a right-to-die case until 1990, *Cruzan v. Director, Missouri Dep't of Health*, 110 U.S. 261 (1990), judicial review of such issues has received unprecedented attention ever since the New Jersey Supreme Court decided in 1976 that Karen Ann Quinlan had a "constitutional right to die." *In re Quinlan*, 355 A.2d 647, 663 (N.J.), *cert. denied*, 429 U.S. 922 (1976).

4. See *Bowen v. American Hosp. Ass'n*, 476 U.S. 610 (1986). This issue received a great deal of publicity in the mid-1980s when the Reagan Administration sought to issue regulations that would require hospitals to treat severely disabled newborns despite parental opposition. See *id.*

5. *School Bd. v. Arline*, 480 U.S. 273 (1987) (analyzing the applicability of § 504 of the Rehabilitation Act of 1973 to an individual with tuberculosis). The major constitutional questions about the rights of individuals with infectious diseases, especially AIDS, have yet to be decided by the Supreme Court, although many commentators have speculated about such issues. See, e.g., Lawrence O. Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017 (1989); Deborah J. Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739 (1986); Wendy E. Parmet, *Legal Rights and Communicable Disease: AIDS, the Police Power, and Individual Liberty*, 14 J. HEALTH POL. POL'Y & L. 741 (1989). There are, however, many lower court decisions on point. E.g., *Doe v. Coughlin*, 518 N.E.2d 536 (N.Y. 1987) (state may constitutionally prohibit prisoners with AIDS from receiving conjugal visits), *cert. denied*, 488 U.S. 879 (1988); *City of New York v. New St. Mark's Baths*, 497 N.Y.S.2d 979 (Sup. Ct.), *aff'd*, 505

and the treatment of the mentally impaired<sup>6</sup> are inevitably the most urgently anticipated of all the Court's cases. Not only do these cases grab the headlines, they also influence the direction of larger doctrines and play a paramount role in scholarly debates over the legitimacy of judicial review and the proper methodology for constitutional interpretation.<sup>7</sup>

Despite the prevalence and prominence of health care issues in constitutional discourse, the unique role those issues have played is usually ignored by constitutional scholars.<sup>8</sup> Health law scholars, meanwhile, often do not ask what light these cases shed on the nature of constitutional rights. This Article is one step in a journey aimed at asking those

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N.Y.S.2d 1015 (N.Y. 1986) (upholding state authority to close gay bath). It is now likely that much of the need for constitutional analysis of this subject will be met by decisions under the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 42 U.S.C §§ 12101-12213 (Supp. II 1990). Lawrence O. Gostin, *Public Health Powers: Imminence of Radical Change, in THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE* 268, 269 (Jane West ed., 1991).

6. In the last 25 years, the Supreme Court has decided numerous cases concerning the rights of the mentally ill and mentally retarded. See RALPH REISNER, *LAW AND THE MENTAL HEALTH SYSTEM* (1985).

7. It does not seem like hyperbole to suggest that no modern decision, other than *Brown v. Board of Educ.*, 349 U.S. 294 (1955), has so affected constitutional analysis as has *Roe v. Wade*, 410 U.S. 113 (1973). See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2800-01 (1992) (joint opinion by Justices O'Connor, Kennedy, and Souter); Linda R. Hirshman, *Bronte, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 179 (1988). For examples of works that have used *Roe* as the starting point for a reexamination of the judicial role, see MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 144 (1982); John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J., 920, 937-43 (1973); Richard A. Epstein, *Substantive Due Process by any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 161-75. Of course, the privacy doctrine also concerns reproduction and sexuality. While it is undoubtedly true that *Roe* had as much to do with these subjects (not to mention gender discrimination) as with health, it is worth noting that the *Roe* Court emphasized that the right at issue was a right to treatment in consultation with a doctor. 410 U.S. at 164.

Cases concerning the rights of the mentally ill have also been pivotal to the formation of the procedural due process doctrine. See, e.g., *Zinermon v. Burch*, 494 U.S. 113 (1990) (holding that unauthorized commitment to mental hospital can violate the commands of procedural due process if commitment is foreseeable and a pre-deprivation remedy is practicable); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the institutionalized mentally retarded have a liberty interest in reasonably safe conditions of confinement, including freedom from unreasonable bodily restraints); *Addington v. Texas*, 441 U.S. 418 (1979) (requiring a "clear and convincing" standard of proof in a civil commitment hearing).

8. Scholars focusing specifically on cases concerning rights of public health officers or doctors usually discuss all of the above cases and search for judicial attitudes towards "health care." See Scott Burris, *Rationality Review and the Politics of Public Health*, 34 VILL. L. REV. 933 *passim* (1989); Lawrence O. Gostin, *The Future of Public Health Law*, 12 AM. J.L. & MED. 461, 468-71, 476-90 (1986); Merritt, *supra* note 5, at 754-783. What such articles usually do not consider are what those attitudes say about constitutional law and the connection between the constitutional rights enunciated in the cases and the policy debate over access to care.

questions<sup>9</sup> and exploring the relationship between constitutional law and the preservation of health.

The Article is predicated on the assumption that the constitutional cases arising in the health care context raise some common issues, whether those cases involve abortion or the rights of persons with AIDS. At their core, all of these cases question the relationship between the body politic and individuals who are facing the reality of physical vulnerability and, ultimately, biological mortality. These common issues highlight the drama and poignancy of health care cases; they may also offer some insight into the seemingly inordinate influence of these cases on constitutional law.

I suggest these cases are so influential because the relationship between the vulnerable individual and the body politic is more fundamental than we commonly assume. I argue that our constitutional heritage may recognize this, permitting a vision in which the relationship between law and health, the state and the individual, is more reciprocal, more elemental, than current doctrine or debate concedes.

In making these arguments, I limit my inquiry to an exploration of the relationship between the individual and the body politic during the colonial and framing eras. In so doing, I do not claim there can be a single authoritative understanding of the subject during the relevant times. Rather, I argue only that the experiences and theories of the framing generation did not assume a *laissez faire* or libertarian attitude about health. The framing generation assumed that governments had a significant role to play in protecting health and providing care to the ill. Perhaps more importantly, the Framers may have seen that protection and provision, authority and responsibility, were correlative: that governments were empowered to protect and, therefore, legitimate only when they protected the public health.

To begin, I review in Part I the understanding that informs current jurisprudence and has led me to this enterprise: that the Constitution primarily limits the government's power to restrain individual freedom without imposing affirmative obligations. Part II provides an introduction to the role that governments typically play with respect to health and the theories that explain such roles. In Part III, I review the status of public health law in the American colonies and during the confederation and early federalist eras.<sup>10</sup> In Part IV, I consider how the under-

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9. For my earlier views on some related issues, see Parmet, *supra* note 5, *passim*.

10. This inquiry is limited to a review of public health practices that were believed to affect physical, as opposed to mental health. The traditional treatment of mental health issues was in many ways different, although there were some overlapping themes. For a discussion of

standing of public health law in the framing era may have comported with the political theories prevalent at the time, especially liberalism, republicanism, and social contract theory. In that same section, I develop the outlines of a constitutional theory—based on social contract analysis, but compatible with other Eighteenth century theories—of the relationship between the body politic and health. In Part V, I ask why there is a dearth of explicit discussion of these views in the standard primary source documents, and I explore the role that federalism may have played in hiding the issue and misleading subsequent interpreters. In Part VI, I conclude with speculations about how this reconceptualization of constitutional assumptions can illuminate the issues we face today.

### I. Conventional Assumptions

In the century that has witnessed Auschwitz and Chernobyl, it is easy to see the dangers posed by state power. This recognition tempers enthusiasm for public authority and leads us to use law as a limiting device.<sup>11</sup> In our legal tradition, this view of law is integral to constitutional structure, with its emphasis on separation of powers, checks and balances, procedural protections, and individual rights. We rely on the Constitution to limit the power of the government to restrain our freedoms and cause us harm.<sup>12</sup> In this sense, law is a negative force that prevents the state from intruding upon the individual.

This negative conception of law, which sees legal rights as a restraint upon the state, has played a dominant role in the formulation of contemporary American public health law. It explains the central pillars of constitutional public health law: the search for limits on governmental authority to restrain individual freedoms in the name of public health, and the concomitant assumption that government has no obligation to promote public health.<sup>13</sup>

The search for limits on government's power to act to protect the public's health is a vast topic that can only be briefly surveyed here.<sup>14</sup> In

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the history of public policies towards mental health, see, e.g., GERALD N. GROB, *MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875* (1973); Joyce M. Ray & F.G. Gosling, *Historical Perspectives on the Treatment of Mental Illness in the United States*, J. PSYCHIATRY & L., Summer 1992, at 135.

11. See Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1345 (1987) (stating that law is the chaperon of distrust).

12. We also rely on law to protect our property. See *id.* at 1338.

13. I have explored these two sides of the same coin in greater detail in Parmet, *supra* note 5, at 754-62.

14. For a fuller treatment of the topic, see Burris, *supra* note 8, at 933-82; Parmet, *supra* note 5, at 743-48.

the nineteenth and early twentieth centuries, governmental public health authority fell under the rubric of the police power, which was considered to be a plenary source of state authority. Public health actions lay within the core of the police power. When states acted to protect public health, the police power usually authorized their actions, limiting the reach of other constitutional bars to state action, such as the Commerce Clause,<sup>15</sup> and later the Due Process Clause of the Fourteenth Amendment.<sup>16</sup> In this century, much of constitutional law has concerned limits on the police power in the name of individual rights. During the Warren and Burger Court eras, doctrines such as procedural due process,<sup>17</sup> equal protection,<sup>18</sup> and, privacy<sup>19</sup> were used by the courts to determine limits

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15. *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 109, 131-33 (1837). This is an oversimplification. The Court's commerce clause doctrine changed frequently throughout the 19th century. Not all courts and not all justices assumed that the police power always immunized state action. Chief Justice Marshall, for example, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 207-08 (1824), suggested that a state police power action would be preempted if it conflicted with a federal exercise of commerce authority. Thus, although Marshall saw the police power as a legitimating source of state action, he recognized that an action taken by a state in the name of public health could conceivably thwart a congressional commerce policy. *Id.* at 208-09; *see also* *Minnesota v. Barber*, 136 U.S. 13 (1890) (holding health regulation may be unconstitutional if it burdens interstate commerce).

16. Throughout the latter part of the 19th and early part of the 20th centuries, the Court consistently stated that public health actions under the police power did not violate the Due Process Clause. *See* Parmet, *supra* note 5, at 744. The central issue at the time was whether a state action, ostensibly taken in the name of public health, actually was within the police power or constituted, instead, unauthorized interference in social and economic affairs. *See* *Dobbins v. City of Los Angeles*, 195 U.S. 223, 236 (1904). The Justices at the time disagreed about the degree of deference due states in determining whether an action was reasonably taken to promote the public health, not whether states could protect public health. *Compare* *Lochner v. New York*, 198 U.S. 45, 53-64 (1905) *with id.* at 73 (Harlan, J., dissenting).

17. The procedural due process doctrine provides that where an individual interest in life, liberty, or property is at stake, the state must provide procedural protections. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). This doctrine has limited the authority of states to commit individuals, *see supra* note 6, and to quarantine those with contagious diseases, *Greene v. Edwards*, 263 S.E.2d 661, 663 (W. Va. 1980); Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 77-81 (1985).

18. *E.g.*, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (equal protection prohibits the forced sterilization of certain felons); *District 27 Community Sch. Bd. v. Board of Educ.*, 502 N.Y.S.2d 325, 337 (Sup. Ct. 1986) (equal protection prohibits the exclusion of HIV-positive children from the public schools).

19. Courts have used the privacy doctrine to prevent states from prohibiting or unduly burdening abortions, *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), from prohibiting the sale of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), and from forcing medical treatment on an unwilling patient, *e.g.*, *Brophy v. New England Sinai Hosp.*, 497 N.E.2d 626, 633 (Mass. 1986); *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976). In *Cruzan v. Director, Missouri Dep't of Health*, 110 U.S. 2841, 2851 (1990), the Supreme Court found that a patient possessed a liberty interest in determining whether to continue medical treatment. The majority, however, stopped far short of finding that the right to privacy placed any clear substantive limits on state requirements. *Id.* at 2852-56.

on state authority over matters once clearly assumed to be within the police power, including questions relating to health. More recently, the Court has given greater deference to legislative majorities. In the critical area of abortion, for example, a plurality of the Court has rejected strict scrutiny and opted to permit state regulations of abortion which do not place an "undue burden" on a woman's choice.<sup>20</sup> Four Justices have voted to go even further and uphold any state regulation of abortion as long as it is rational.<sup>21</sup> Under such a formulation, states may well have far greater leeway in regulating matters of health than they did prior to the New Deal, when the concept of the police power served to limit state action.<sup>22</sup>

Although the scope of individual protections is waning, current doctrine continues to assume that the sole function of constitutional law is to place limits—not obligations—upon government.<sup>23</sup> Chief Justice Rehnquist wrote in *DeShaney v. Winnebago County Department of Social Services* that "[t]he [Due Process] Clause is phrased as a limitation on the State's power to act."<sup>24</sup> In disparaging claims of a constitutional right to emergency medical care, Judge Easterbrook of the Seventh Circuit has been even more explicit. Discussing the Civil War Amendments, he stated that,

Amendments designed to protect the people from the government, to cut it down to size lest it repeat the excesses of George III and the slave states, amendments adopted when governmental services were more likely to be viewed as forbidden than as desirable, amendments phrased as prohibitions on governmental action rather than requirement of it, are not a plausible source of [rights to emergency medical care].<sup>25</sup>

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20. See *Casey*, 112 S. Ct. at 2806-10 (rejecting imposition of a judicial "straight jacket" on state regulation of abortion).

21. *Id.* at 2855 (opinion by Rehnquist, C.J.).

22. Cf. *Burris*, *supra* note 8, at 934-37. In the pre-New Deal era, courts determined whether state actions were truly within the police power. *Parmet*, *supra* note 5, at 744. This effectively imposed a reasonableness test on state public health actions. *Burris*, *supra* note 8, at 934-37. The Rehnquist Court appears to be limiting the privacy/substantive due process doctrine without reinstating the earlier police power doctrine. The result is a strongly majoritarian doctrine that effectively places few or no substantive counter-majoritarian limits on state action. *Parmet*, *supra* note 5, at 761-62.

23. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990).

24. 489 U.S. 189, 195 (1989).

25. *Archie v. City of Racine*, 847 F.2d. 1211, 1221 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989). Although Judge Easterbrook, like Justice Rehnquist in *DeShaney*, was referring to the Due Process Clause of the Fourteenth Amendment, his reference to George III in discussing a clause identical in language to the Due Process Clause of the Fifth Amendment, suggests that Judge Easterbrook would read the Bill of Rights, plus the Constitution of 1787,

The implication, according to what Susan Bandes has aptly called the "conventional wisdom,"<sup>26</sup> is that government has no affirmative obligation to provide protections. As Justice Rehnquist continued in *DeShaney*, the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligations in the latter area to the democratic political processes."<sup>27</sup>

In the area of public health, the assertion that the Constitution imposes no affirmative obligations has had a critical impact. Fundamentally, it implies that the government has no obligation to provide public health protection,<sup>28</sup> including access to medical care.<sup>29</sup> Thus, in the United States, the legal debate over access to medical care occurs within the framework of subconstitutional privilege.<sup>30</sup> The government has no obligation to provide health care; whatever is provided is a matter of statutory grace.

This conceptualization has several implications. It permits the current state of affairs in which over thirty million Americans lack any health insurance and over sixty million lack health insurance during some portion of each year.<sup>31</sup> It excludes from legal critique the severe inadequacy of public health programs and the resulting rapid rise in recent years of once-tamed communicable diseases, such as measles and tuberculosis.<sup>32</sup> Thus with respect to the re-emergent tuberculosis epidemic, the primary legal question appears to be whether the state can detain individuals with active disease who fail to take their medication,<sup>33</sup> not whether the state has an obligation to ameliorate the problems of

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as providing no rights to care and protection. For a discussion of the role played by the Fourteenth Amendment, see *infra* text accompanying notes 432-38.

26. Bandes, *supra* note 23, at 2274.

27. *DeShaney*, 489 U.S. at 196.

28. Thus, there is no obligation for the government to provide emergency ambulance service. See *Archie*, 847 F.2d at 1220-22. Nor is there any governmental obligation to protect citizens from dangerous schizophrenics. *Bowers v. DeVito*, 686 F.2d 616, 619 (7th Cir. 1982). It, of course, follows that there is no obligation to provide children with immunizations or to take other steps that protect the public's health.

29. *Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991); *Harris v. McRae*, 448 U.S. 297, 318 (1980); Charles J. Dougherty, *An Axiology for National Health Insurance*, L. MED. & HEALTH CARE, Spring-Summer 1992, at 82, 83; Parmet, *supra* note 5, at 754-57.

30. See Judith O. Brown, Wendy E. Parmet & Phyllis T. Baumann, *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573, 633, 639 (1987). Of course, politicians and citizens often discuss "rights" to health care.

31. Emily Friedman, *The Uninsured: From Dilemma to Crisis*, 265 JAMA 2491 (1991).

32. National Vaccine Advisory Committee, *The Measles Epidemic: The Problems Barriers and Recommendations*, 266 JAMA 1547, 1549-51 (1991); Lisa Belkin, *Top TB Peril: Not Taking The Medicine*, N.Y. TIMES, Nov. 18, 1991, at B1.

33. Roric Sherman, *TB Hysteria, Repeated?*, NAT'L L.J., June 29, 1992, at 1, 32.



homelessness, lack of access to health care, HIV infection, and substance abuse that have fueled the epidemic.<sup>34</sup>

The conventional assumption that government has no obligation to provide health care has had other less-recognized impacts. Because government need not provide care and protection, the Supreme Court has assumed that government may be selective in the benefits it provides. In *Harris v. McRae*,<sup>35</sup> the Supreme Court held that because there was no obligation on the part of government to provide medical care, Congress was free to exclude medically necessary abortions from the Medicaid program. The Court reached this result even though Medicaid paid medical expenses associated with childbirth and, at the time the decision was reached, freedom to have an abortion was considered a fundamental right. Thus, in effect, the Court held that because the government need not provide any health benefit, it can practice selective subsidization, even when so doing effectively skews individual choices pertaining to fundamental rights.

The tension between the Constitution's limits on government intrusions upon individual liberty and the Constitution's lack of affirmative obligations underlies the unconstitutional-conditions doctrine, which deals with the fact that strings attached to statutory benefits can effectively undermine otherwise recognized liberties.<sup>36</sup> The dilemma most recently surfaced in the health context in *Rust v. Sullivan*,<sup>37</sup> in which the Supreme Court upheld the right of the government to predicate Title X family planning grants on the requirement that grantee clinics not discuss the abortion option with their clients, even if abortion is medically advisable.<sup>38</sup> In *Rust*, the government was able to use the "privilege" of Title X grants to effectively "buy" the surrender of first amendment rights of free speech. This surrender of rights was justified by the Court on the assumption that Title X grants are mere gratuities, to which neither grantee nor client has any right. Chief Justice Rehnquist stated:

By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X

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34. UNITED HOSPITAL FUND OF NEW YORK, *THE TUBERCULOSIS REVIVAL: INDIVIDUAL RIGHTS AND SOCIETAL OBLIGATIONS IN A TIME OF AIDS* 5-6 (1992).

35. 448 U.S. 297, 318 (1980).

36. An extended discussion of the unconstitutional conditions doctrine is beyond the scope of this Article. For a full analysis, see Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

37. 111 S. Ct. 1759 (1991).

38. *Id.* at 1773. The policy at issue in *Rust* was recently rescinded by President Clinton. Memorandum of Jan. 22, 1993, The Title X "Gag Rule," 56 Fed. Reg. 7455 (Feb. 5, 1993).

funds—subject to the Government's conditions . . . or declining the subsidy and financing their own unsubsidized program.<sup>39</sup>

The Chief Justice added, "The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the government had not enacted Title X."<sup>40</sup> In other words, because the government has no obligation to provide her with care, the woman is no worse off if the care the government chooses to provide comes with a restriction on the content of speech. The woman can always choose not to accept the deal and would be left no worse off than she would be in the state of nature, where no deal would be offered.<sup>41</sup>

The conventional wisdom, therefore, assumes that the constitutional baseline is a laissez faire state of nature.<sup>42</sup> Under this view, the fundamental relationship between individual and state embodied within the Constitution assumes no prior obligations on the part of the state to provide health protection. The state is like a wealthy, but not always benevolent, uncle. It can choose to provide or not to provide public health care. And if it chooses to provide care, the state can attach strings to the "gift."<sup>43</sup> The result is not only that the government has no obligation to provide care, but also that it can use its provision of care to "buy" itself an exemption from otherwise existing constitutional restrictions.

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39. 111 S. Ct. at 1775 n.5.

40. *Id.* at 1777.

41. Even if one accepts Chief Justice Rehnquist's premise that the woman had no "right" to the service, his conclusion remains questionable. As Justice Blackmun noted in his dissent, a Title X beneficiary may well be given an incomplete and even false impression of her medical condition and the options available to her as a result of the regulations. *Id.* at 1785 (Blackmun, J., dissenting). The idea that the rejection of Title X funds leaves the woman no worse off than she would have been in the state of nature is completely erroneous, if not ludicrous. It is hard to see a complex, regulated industrial society as akin to the state of nature. Wendy E. Parmet & Mary E. O'Connell, *Rehnquist's Road to Serfdom: The Ominous Message of Rust v. Sullivan*, AM. PROSPECT, Spring 1992, at 94, 96-97. As Bandes has pointed out, poverty and joblessness, which leave a Title X recipient unable to afford non-subsidized care, are at least partially the result of governmental policies. Bandes, *supra* note 23, at 2320-23 (describing government's effect on the economy through regulation, control of scarce resources, taxation policies, etc.). Moreover, access to health care is particularly influenced by government regulatory policies which influence the affordability of health care. *Surgery Needed: Last of the Big Spenders*, THE ECONOMIST, July 6, 1991, at 9-11 (discussing how governmental policies are responsible for the rapid rise of health care prices); Brown, Parmet & Baumann, *supra* note 30, at 630 (discussing how Medicare and other government health programs have exacerbated the difficulties the poor have in obtaining care); Parmet & O'Connell, *supra*, at 96-97.

42. Bandes, *supra* note 23, at 2343.

43. Parmet & O'Connell, *supra* note 41, at 96. Mary O'Connell has observed the telling analogy between the unconstitutional conditions doctrine under the Rehnquist Court and the law of spendthrift trusts, under which the grantor can set many restrictions on the beneficiary's receipt of trust income and neither the beneficiary nor his or her creditors has standing to complain.

Given the importance of these assumptions to cases concerning public health and the prominence of health cases within the unconstitutional-conditions doctrine generally,<sup>44</sup> a critical question must be asked: Are the underlying assumptions of the conventional view accurate? At first glance, they appear to receive support from the text of the Constitution itself.<sup>45</sup> After all, the document says nothing about the obligation of government to provide public benefits, much less to protect the public health.<sup>46</sup> True to the views of conventional assumptions, many of the constitutional provisions are phrased as injunctions against governmental authority,<sup>47</sup> or negative rights.<sup>48</sup>

Nevertheless, the leap from the text of the document to the conventional assumptions is a large one. The Constitution itself is remarkably silent about the relationship between individual and government. Nor does it specify the relationship between the restraints on governmental authority explicit in the document and the role of government assumed by its creators. Thus, the Framers' actual understanding of the relationship between individual and state with respect to health must be gleaned from sources other than the text itself.

The balance of this Article explores other sources of interpretation, primarily the public laws and political theory of the framing era. As I argue, those sources suggest that the framing generation held a very different view of public health than the conventional assumptions assert. In the framing generation, governments were expected to furnish disease prevention programs and provisions to secure the public health because the Framers believed that governmental authority was tied to the protection of health and safety.<sup>49</sup>

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44. *E.g.*, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Harris v. McCrae*, 448 U.S. 297 (1980); Kathleen Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327, 332-36 (1989).

45. *Archie v. City of Racine*, 847 F.2d 1211, 1220-22 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989); Bandes, *supra* note 23, at 2309-11 (discussing the textual argument in support of the proposition that the constitution creates no "positive rights").

46. Note, however, that the Constitution does provide the federal government with the means to tax and spend "for the general welfare," an authority which appears to assume that the welfare of the citizenry is at least a legitimate, if not obligatory, responsibility of the federal government.

47. This is discussed at length in David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, (1986).

48. The term "negative rights" refers to rights against governmental interference which presumably leave individuals free to pursue their own preferences. The primacy of negative rights over positive rights, whereby government provides the content of freedom, was most powerfully explicated by Isaiah Berlin in his influential essay *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1970).

49. Even if the conventional assumptions do accurately reflect the originalist assumptions of the drafters of the Philadelphia Convention, that does not settle the question whether those

## II. Health and Governments: Background Understandings

Current legal analysis assumes that the relationship between individual and state is primarily negative.<sup>50</sup> The Constitution imposes no obligation upon government to protect the public health. Instead, the Constitution's role is to empower government while, at the same time, limiting its ability to impinge upon individual interests. Under constitutional theory, public goals play a role only indirectly in determining whether governmental restraints upon individuals are justified by the weight of the public interest at stake. Public goals do not form the basis of public duties. Under this view, the dilemma for judicial review is how to justify limits placed upon majoritarian policies for the protection of individual rights.<sup>51</sup>

This conventional view presupposes that the role of law and legal rights is to restrain governmental action. It also assumes that individual liberty is prior to law. Whatever the general merit of this conceptualization of rights and law, in the context of health care it overlooks two fundamental facts. First, if liberty is prior to states, so is mortality. Disease, injury, and threats to health constrain freedom without the help of any state, although states can surely exacerbate such dangers.<sup>52</sup> Thus, there is no ideal state of nature in which the only threat to freedom is the one libertarians identify: aggression towards property.<sup>53</sup> Rather, any hypothetical state of nature would have to include dangers and threats to liberty posed by the inevitability of disease.<sup>54</sup> Second, whatever the theoretical role of the law, it has always had to deal with the constraints imposed by disease and mortality. Law has always had to respond to the

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assumptions should bind us over two hundred years later. To assume that they do would be to adopt a rather rigid originalist position, one that is controversial. Compare, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990) with H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). In any event, an argument that relies on original intent to deny affirmative obligations of state governments must also look to the intentions of the drafters and ratifiers of the Fourteenth Amendment, a task that is often overlooked. See Bandes, *supra* note 23, at 2312-13. Robin West, for example, makes the interesting argument that protection by government was precisely the right contemplated by the drafters of the Fourteenth Amendment's Equal Protection Clause. Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 142 (1991). The following analysis focuses on the assumptions and understandings of the federalist generation, not to provide an originalist answer to current dilemmas, but to question the conventional assumptions underlying current jurisprudence.

50. See *supra* part I.

51. This has been the central issue for the scholarly debate about *Roe v. Wade*. See *supra* note 7.

52. See *infra* text accompanying notes 56-58.

53. See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 5 (1985).

54. See *infra* notes 310-51 and accompanying text.

constraints imposed by disease. Governments typically have assumed an active role with respect to health care, acting as if their role were obligatory.<sup>55</sup>

While disease is omnipresent and prior to social organization, communal life can create special hazards. The effects of trade, urbanization, and the consequent problems of sanitation and pollution show that while the organization of society can reduce the dangers of disease, it can also exacerbate them. This epidemiological phenomenon can be seen most starkly in the colonization of the New World by Europeans. As is well known, European settlement wrecked havoc on the native population by exposing it to Old World diseases.<sup>56</sup> What may be less well known is that even within the white settlements of North America, it was urbanization (without adequate sanitation) accompanied by international trade that brought forth repeated epidemics of yellow fever and cholera epidemics,<sup>57</sup> and, later, the enduring epidemic of tuberculosis.<sup>58</sup>

The reality is that the dangers of ill health will always exist. Even in the mid-twentieth century industrialized world, during the brief calm between the polio and AIDS epidemics when communicable disease seemed anachronistic, threats such as carcinogens in air pollution<sup>59</sup> suggested that health risks are part and parcel of the human condition.

To the economist, efforts to combat these risks are at least partially public goods.<sup>60</sup> The benefits from public goods are indivisible among beneficiaries. A sole private purchaser of health care would give others

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55. See *infra* notes 66-266 and accompanying text.

56. WILLIAM MCNEIL, *PLAGUES AND PEOPLE* 176-207 (1976).

57. CHARLES ROSENBERG, *THE CHOLERA YEARS: THE UNITED STATES IN 1832, 1849, AND 1866*, at 17-39 (1964). Lack of clean drinking water and inadequate sewage disposal are also cited as the major cause of the recent cholera outbreak in South America, the first cholera epidemic in the Americas in nearly a century. The rapid growth and destructiveness of the disease results from the large numbers of urban poor in Peru and Brazil. James Brooks, *Cholera Kills 1000 in Peru*, N.Y. TIMES, Apr. 19, 1991, at A3.

58. JOHN B. BLAKE, *PUBLIC HEALTH IN THE TOWN OF BOSTON 1630-1822*, at 220 (1959); JOHN DUFFY, *A HISTORY OF PUBLIC HEALTH IN NEW YORK CITY 1625-1866*, at 457-58 (1968) [hereinafter DUFFY, NEW YORK].

59. I have suggested elsewhere that the decline of infectious diseases in the early part of this century reduced perceptions of shared vulnerability and appreciation of the importance of public health. Parmet, *supra* note 5, at 748.

60. ROBIN BRADWAY & NEIL BRUCE, *WELFARE ECONOMICS* 14, 118 (1984). Public health may be considered a "mixed good" with aspects of both public and private goods. Musgrave and Musgrave, for example, cite polio vaccination as a classic example of a mixed good for which public subsidization is the most efficient economic policy. RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 78-80 (1980). Rawls cites communicable disease prevention as a prime example of a public good. JOHN RAWLS, *A THEORY OF JUSTICE* 266-68 (1971).

in society a "free ride" with respect to the benefits obtained.<sup>61</sup> For example, one's vaccination protects another from infection. Conversely, the costs of failing to pay for such goods may be reaped by others. If I have active tuberculosis and fail to take my medication, you may become ill. If I lack the resources to pay for my medication and neither you nor the state help me to purchase it, you may also become ill. To market theorists, such goods are legitimate objects of governmental intervention in the market. As Amartya Sen has written, "The market can indeed be a great ally of individual freedom in many fields, but the freedom to live long without succumbing to preventable morbidity and mortality calls for a broader class of social instruments."<sup>62</sup>

While the theory of public goods helps explain aspects of public health law and assists in fitting it into modern economic theory,<sup>63</sup> it omits a critical point. Ill health is not a mere byproduct of economic activity. It is an inevitable concomitant of human existence. As a result, wherever there is human society, there will be public health. Every society has to face the risks of disease. And because it must, every society searches to make disease, like mortality, comprehensible within the context of the society's own particular culture, theology, or science.<sup>64</sup> In this sense, health care is public not only because its benefits are indivisible and threats to it arise from factors outside of the individual, but also because communal life gives individuals the cultural context in which to understand it.

Contemporary Americans who are used to thinking of illness as a personal and private matter<sup>65</sup> are apt to forget that almost all societies

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61. MUSGRAVE & MUSGRAVE, *supra* note 60, at 57-61; *see also* JOSHUA I. SCHWARTZ, PUBLIC HEALTH: CASE STUDIES ON THE ORIGINS OF GOVERNMENT RESPONSIBILITY FOR HEALTH SERVICES IN THE UNITED STATES 124-25 (1977) (arguing that public health is an analogue to the phenomenon of externalities).

62. Amartya Sen, *Individual Freedom as a Social Commitment*, N.Y. REV. BOOKS, June 14, 1990, at 49, 53.

63. The influence of this mode of analysis has been particularly significant in environmental law, *see, e.g.*, FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION LAW AND POLICY 19-51 (2d ed. 1990), but could be used more broadly to justify many activities of the modern welfare state. Robert E. Goodin, *Reasons for Welfare, Sociological and Political-But Ultimately Moral*, in RESPONSIBILITY, RIGHTS AND THE WELFARE STATE 24-26 (Donald Moon ed., 1988).

64. *See* SUSAN SONTAG, ILLNESS AS METAPHOR (1978), for a discussion of how disease obtains social meaning within the context of a particular culture.

65. I have discussed elsewhere the transformation of the perception of illness from a public matter to a private one. *See* Parmet, *supra* note 5, at 750-52; *see also* Deborah A. Stone, *The Resistible Rise of Preventive Medicine*, 11 J. HEALTH POL. POL'Y & L. 671 (1986). Perhaps the recent reemergence of national health insurance as a political issue signals a decline in seeing health as a private matter. *See, e.g.*, *How Wafford Rode Health Care to Washington*, WASH. POST NAT'L WKLY. EDITION, Dec. 1, 1991, at 14-15.

have public policies for the control and alleviation of disease. All societies must come to terms with illness. They seek to do so in the ways understood by their society: strengthening community bonds and their statehood in the process.

Throughout history, the need to deal with disease has been an accepted role of civil society. As legal scholar James Tobey said over sixty years ago, "The protection and promotion of the public health has long been recognized as the responsibility of the sovereign power. Government is, in fact, organized for the express purpose, among others, of conserving the public health and can not divest itself of this important duty."<sup>66</sup>

How governments have fulfilled that duty has varied throughout time and across societies, affected always by the wealth, scientific sophistication, and fundamental values of the culture.<sup>67</sup> Because health is defined in part by a community's belief system, public health measures reflect cultural norms. In highly religious societies, the preservation and regulation of health is intermingled with theological considerations. Heavenly appeal is sought in time of plague.<sup>68</sup> In Puritan New England, for example, fear of disease was met with official days of prayer and fasting.<sup>69</sup> In our more secular era, governments rely on less theistic approaches, such as investment in medical research.<sup>70</sup>

Throughout history, governments have performed their public health role by providing care for the indigent and by taking steps to prevent the spread of epidemics. Although many of the steps taken were not efficacious<sup>71</sup> and the care provided may even have been harmful given the poor quality of medical knowledge,<sup>72</sup> states acted in the only way they could, relying on the practices and theories of the day to protect the public health. The Hellenic city-states had public physicians who were paid from the public coffers and likely treated the indigent, as well as serving

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66. James A. Tobey, *Public Health and the Police Power*, 4 N.Y.U. L. REV. 126 (1927).

67. MICHAEL WALZER, *SPHERES OF JUSTICE; A DEFENSE OF PLURALISM AND EQUALITY* 87 (1983).

68. See Parmet, *supra* note 5, at 747-48.

69. BLAKE, *supra* note 58, at 3-6; *see also* Acts of Massachusetts Bay Colony, Jan. 3, 1677; May 8, 1678; Oct. 15, 1679; *reprinted in* 3 THE LAWS AND LIBERTIES OF MASSACHUSETTS 1641-1691, at 525, 529, 545 (John D. Cushing ed., 1976) [hereinafter LAWS AND LIBERTIES OF MASSACHUSETTS].

70. For an example of a secular approach, see REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC *passim* (1988).

71. For example, isolation of individuals may have done little to stem plague. See Parmet, *supra* note 17, at 56 n.16. Indeed, it may have exacerbated the problem. ANNE CARMICHAEL, *PLAGUE AND THE POOR IN RENAISSANCE FLORENCE* 130 (1986).

72. For a discussion of the poor state of medical knowledge and the limited benefits of medical care prior to recent times, see MCNEIL, *supra* note 56, at 208-12.

all, in times of plague.<sup>73</sup> The Romans built aqueducts and sewers and regulated food and sanitation.<sup>74</sup> Medieval Jewish communities established hospitals and paid communal midwives and physicians.<sup>75</sup>

During the late Medieval and Renaissance eras, many European states developed complex laws to prevent and treat communicable diseases, especially plague.<sup>76</sup> Italian city-states enacted detailed systems of mercantile quarantines, while individuals stricken, especially the poor, were isolated and treated in the *listeria*.<sup>77</sup> In Calvinist Geneva, the City Council ran the famous hospital, which cared for the sick and poor.<sup>78</sup>

In England, the nation with which our own Framers would have been most familiar, the government's role to protect public health was long established in both theory and practice.<sup>79</sup> Long before the American revolution, English political theorists recognized the need for a government role in health protection. To Hobbes, life without government was one of "continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short."<sup>80</sup> To the more sanguine Locke, people unite "for their mutual *Preservation* of their Lives, Liberties and Estates."<sup>81</sup> These theoretical statements fit comfortably with actual public health practices in England.<sup>82</sup>

Although urbanization and sophisticated systems of public health probably appeared later in England than in Italy, ordinances designed to abate nuisances in England date back to 1350.<sup>83</sup> Recognition of the dan-

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73. WALZER, *supra* note 67, at 69.

74. JOHN DUFFY, *THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH* 6 (1990) [hereinafter DUFFY, *SANITARIANS*].

75. WALZER, *supra* note 67, at 73.

76. Of course, non-European societies also developed methods to respond to disease. My focus here is limited to Western societies, which would have been the greatest influence on our own Framers.

77. CARMICHAEL, *supra* note 71, at 108-26.

78. JEANNINE E. OLSON, *CALVIN AND SOCIAL WELFARE, DEACONS AND THE BOURSE FRANCAISE* 24-25 (1989). City and church were in many ways inseparable in Geneva. While some health care functions, such as maintenance of the hospital, were carried out by formally civic authorities, many others were carried out by the church deacons. *Id.* at 25-30. Officials of the municipal hospital, however, also partook of the title "deacon." *Id.* at 30. Olson points out that in general Protestant states relied more upon secular authorities to care for the sick and poor while Catholic states relied more upon the church. *Id.* at 2.

79. *See infra* text accompanying notes 80-101.

80. THOMAS HOBBS, *LEVIATHAN* 100 (Michael Oakshott ed., 1962) (discussing the war of all against all in the absence of civil authority).

81. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 123, *reprinted in TWO TREATISES OF GOVERNMENT* 368 (Peter Laslett ed., 2d ed. 1967).

82. *See infra* text accompanying notes 83-97.

83. BLAKE, *supra* note 58, at 11. Nuisance law has long been closely associated with public health law. BERNARD SCHWARTZ, *THE LAW IN AMERICA* 45-46 (1974). At common law, a public nuisance was that which interfered with the rights of the community-at-large. W.



ger of unsanitary conditions also came surprisingly early.<sup>84</sup> In the fifteenth century, the royal government established a commission on sewerage.<sup>85</sup> Henry VII forbade slaughterhouses in cities or towns "lest it might engender sickness."<sup>86</sup>

As elsewhere, fear of plague was an early impetus for the establishment of English public health laws. In 1518, a royal proclamation was issued to control those "contagious infections" which were "likely to continue if remedy by the sufferance of Almighty God was not provided."<sup>87</sup> The proclamation, devised by Cardinal Woolsey for London, required contagion houses to be identified by marking them with straw for forty days<sup>88</sup> and inmates of plague houses to carry white sticks when walking the streets.<sup>89</sup> Enforcement of the proclamation was left to the justices of the peace.<sup>90</sup>

Between 1544 and 1577, hospitals were established by London's leaders to provide for the diseased and disabled as well as foundling children and "idle rogues."<sup>91</sup> In 1578, the Privy Council issued its first book of Plague Orders, prepared with the cooperation of the College of Physicians.<sup>92</sup> The orders, directed to the justices of the peace, contained a typical feature of early public health laws: they intermingled prevention and restrictions of freedom with care and protections. They required the

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PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 643 (5th ed. 1989). Those rights have long included rights to public health and safety. *Id.* at 643-44 (listing cases). Statutory and bureaucratic police power responses could be seen as simply paralleling the common law view that there can be no individual right in property when property endangers others. *Cf.* *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851) ("We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others.").

84. Sewage disposal was provided for in Europe as early as the 14th century. Privies, cesspools, and public latrines existed, even though they were far from adequate and did not replace open street sewers. In addition, town ordinances provided construction requirements for cesspools and privies such as mandatory distances between the cesspools and neighboring houses. However, even though the contents of privies (except household urinals) were prohibited from draining into street sewers, public disregard for the ordinances was common and was more to blame for unsanitary conditions than was inadequate technology. BARBARA W. TUCHMAN, *A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY* 107 (1978).

85. BLAKE, *supra* note 58, at 11.

86. *Id.* at 11-12.

87. PAUL SLACK, *THE IMPACT OF PLAGUE IN TUDOR AND STUART ENGLAND* 20 (1985) [hereinafter SLACK, IMPACT].

88. Forty days was the traditional quarantine term for plague in medieval Europe. MCNEIL, *supra* note 56, at 151 (1976).

89. SLACK, IMPACT, *supra* note 87, at 201.

90. *Id.*

91. PAUL SLACK, *THE ENGLISH POOR LAW 1531-1782*, at 16 (1990).

92. SLACK, IMPACT, *supra* note 87, at 209.

justices to meet every three weeks to receive updates on plague infections, to assess general taxes for the provision of care to plague victims, and to quarantine<sup>93</sup> victims and their families for up to six weeks.<sup>94</sup> The orders were codified in 1604 and made perpetual in 1641.<sup>95</sup> Although Parliament modified the regulations continually throughout the seventeenth century,<sup>96</sup> it consistently provided for isolation and the provision of care for the infected, especially the indigent.<sup>97</sup>

Those actions taken to protect public health did not likely derive from feelings of altruism toward the poor or ill. The laws providing medical care were related to the poor laws, which are not remembered for their compassion.<sup>98</sup> Rather, far stronger motivations such as fear and necessity may have spurred seventeenth and eighteenth century public health regulations and may explain why such laws were not seen as mere “gratuities” which could be easily repealed.

Health laws went to the heart of the governmental role. Referring to England’s complex system of plague regulations, Blackstone stated that they were “of the highest importance.”<sup>99</sup> More fundamentally, in describing the “rights and liberties” recognized by the laws of England, Blackstone declared that: “The rights of personal security consist in a person’s legal and uninterrupted enjoyment of his life, limbs, his body, his health, and his reputation.”<sup>100</sup> He included as among an Englishman’s rights “[t]he preservation of a man’s health from such practices as may prejudice or annoy it.”<sup>101</sup> Thus, preservation of the public’s health

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93. In modern public health parlance, quarantine refers to the prophylactic detention of an individual who is not yet symptomatic but is suspected of carrying a communicable disease. The Anglo-American legal tradition, however, has typically also used the term to refer to the enforced isolation of individuals ill with an infectious disease as well as the forced detention of goods suspected of harboring sources of contagion.

94. SLACK, *IMPACT*, *supra* note 87, at 210.

95. *Id.* at 211.

96. *Id.* at 211-23.

97. For example, in 1625 Parliament passed orders doubling the poor rate in London in order to benefit plague victims, and enacted a general collection to finance plague charity. *Id.* at 216.

98. According to Paul Slack, the poor laws took their inspiration both from traditional views about charity, as well as from humanist beliefs in the possibility of reform, especially moral reform, through public intervention. SLACK, *supra* note 91, at 14-15, 49. Thus, the poor law repeatedly distinguished between the idle and able-bodied poor, who were to be punished or reformed, and the worthy poor, who were given cash relief. *Id.* at 15-18. Consequently, while the laws had their charitable and reformist roots, they can also be seen as punitive in intent, at least to some of the poor.

99. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*161.

100. 1 *id.* at \*125.

101. 1 *id.* at \*130.

was essential and traditional to the law's role. It was upon this understanding that colonial practices developed.

### III. Public Health Practices in the Colonial and Federalist Periods

In considering views about government's role with respect to health care in the colonial and federalist eras, the social and political institutions of the time must be kept in mind. Today when we imagine "activist public health," we conceive of large standing bureaucracies, usually located somewhere within the I-495 Beltway in Washington, D.C. Criticizing the United States for not providing health care to all of its citizens, critics assume that the provision of health care refers to insurance coverage for the costs of medical expenses. By those standards, pre-constitutional America lacked any significant conception of public health law.

Nevertheless, it would be a fallacy to assume that the absence of institutionalized bureaucracy or of established legal entitlements during the eighteenth century precluded states from playing an active role in the protection of health. Nor would it be correct to conclude that the protection of health during that era was considered a matter of private, as opposed to public, responsibility. Indeed, in comparison to the general paucity of bureaucratic organization in pre-industrial America, the vast extent of health regulation and provision stands out as remarkable.<sup>102</sup>

The public role in the protection and regulation of eighteenth century health was carried out in ways quite different from those of today. Organizations responsible for health regulation were less stable than modern bureaucracies.<sup>103</sup> They tended to appear in crises and wither away in periods of calm.<sup>104</sup> The focus was on epidemics which were seen as unnatural and warranting a response, not to the many endemic and chronic conditions which were accepted as part and parcel of colonial life.<sup>105</sup> Not surprisingly, religious influence was significant, especially in the seventeenth century.<sup>106</sup> Additionally, in an era which lacked sharp demarcations between private bodies and governmental establishments, many public responsibilities were carried out by what we would now con-

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102. Health regulation and provision was most notable in the New England and the Mid-Atlantic colonies. *See infra* part III.A-B.

103. DUFFY, *SANITARIANS*, *supra* note 74, at 25, 35-50; DUFFY, *NEW YORK*, *supra* note 58, at xvii.

104. DUFFY, *NEW YORK*, *supra* note 58, at xvii.

105. DUFFY, *SANITARIANS*, *supra* note 74, at 2. It should be noted, however, that there was a significant amount of sanitary regulations, which protected the public from endemic as well as epidemic conditions. *See infra* text accompanying notes 154-67.

106. SCHWARTZ, *supra* note 61, at 92 (1977); BLAKE, *supra* note 58, at 21-25.

sider private associations.<sup>107</sup> Nevertheless, the extent of public health regulation long before the dawn of the welfare state is remarkable and suggests that the founding generation's assumptions about the relationship between government and health were more complex than is commonly assumed.<sup>108</sup> I examine these issues by looking at practices in New England, the mid-Atlantic states, and, finally, the South.<sup>109</sup>

#### A. Public Health Laws in Colonial New England

Public responsibility for the prevention of disease and the care of the ill was rooted most firmly in the New England colonies and especially in the Massachusetts Bay Colony. Puritan theology stressed God's role in all earthly occurrences.<sup>110</sup> Disease was seen as God's chastisement for sin.<sup>111</sup> Sieges of illness were viewed as evidence that God's "[a]nger [had] not yet turned away from us, appearing as in other respects, so also in a signal manner in the contagious spreading Disease of the Small Pox, and other Distempers."<sup>112</sup> In response to such "[c]ommissions to the destroying Angel,"<sup>113</sup> the General Court of Massachusetts Bay Colony<sup>114</sup> would invariably proclaim days of fasting, prayer, and humiliation.<sup>115</sup>

Theology sometimes impeded what today we would consider reasonable public health actions. Health, like almost everything else in Puritan society, was intermingled with religious belief. That the belief systems of the era attributed different etiologies to disease than we do today does not, however, negate the fact that there was public responsibility for health. After all, it is no more surprising that the Puritans relied upon theology to explain disease and suggest responses than it is that we rely upon medical science. The important point is that despite their faith, public authorities provided civil responses which assumed preventative and palliative roles.

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107. Daniel Fox, *The Politics of Physician's Responsibility in Epidemics: A Note on History*, 18 HASTINGS CTR. RPT. 5-10 (1988) (Special Supplement: AIDS: The Responsibilities of Health Professionals); see also SCHWARTZ, *supra* note 61, at 118-124 (arguing that public health follows from private organizational responses).

108. See *supra* notes 26-49 and accompanying text.

109. See *infra* text part III.A-C.

110. BLAKE, *supra* note 58, at 3.

111. *Id.*

112. Act of May 8, 1678, 3 LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 69, at 529.

113. Act of Oct. 15, 1679, 3 LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 69, at 545.

114. The General Court was the Colony's legislature.

115. BLAKE, *supra* note 58, at 3-4.

These public responses went beyond prayer. Puritan theology assumed that God acted not only through natural causes but through the "secondary causes" of man.<sup>116</sup> Early New Englanders saw no inconsistency in using prayer, medicine,<sup>117</sup> and law in attempting to preserve health.<sup>118</sup> To Puritan New Englanders, the social covenant through which earthly governments received their authority was established to enforce God's laws.<sup>119</sup> Moral law obliged people to live within a society which aimed for the good of all its members.<sup>120</sup> The welfare of each was not irrelevant, but it was subordinate to the welfare of the whole.<sup>121</sup> And law provided for the general welfare.

This earthly jurisprudence is evident in the colony's early public health policy. As far back as 1629, the General Court of Massachusetts Bay Colony acted to protect the public health by limiting the number of passengers on each ship carrying migrants to the new colony.<sup>122</sup> In 1647, when the General Court learned of epidemics in the West Indies, it ordered a quarantine of all ships arriving from those ports.<sup>123</sup> That order began a pattern of maritime quarantines in response to threats of epidemics. The General Court attempted to codify the practice in 1699, but the English Privy Council rejected the measure as too harsh.<sup>124</sup> In

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116. BLAKE, *supra* note 58, at 5-6; *see also* Perry Miller, *The Puritans*, in PURITANISM IN SEVENTEENTH CENTURY MASSACHUSETTS 10-11 (David Hall ed., 1968) (discussing how, despite their belief in divine causation, the Puritans endeavored to understand, within the limits of human capacities, the logic and reason of events).

117. Medical care in the New England colonies came primarily from physicians who had accompanied the settlers from England. BLAKE, *supra* note 58, at 6. These doctors, relying on the accumulated experience which they brought with them, *id.* at 10, attributed disease and epidemics to geographic and meteorological conditions. JOHN DUFFY, EPIDEMICS IN COLONIAL AMERICA 5 (1953) [hereinafter DUFFY, EPIDEMICS]. Disease was thought to come from miasma, a noxious gas emanating from filth, putrefying vegetation, or from the bowels of the earth. DUFFY, THE SANITARIANS, *supra* note 74, at 4. In addition, sweating, purging, and bleeding were common remedies used to alleviate sickness and disease. *Id.* at 5. Furthermore, few colonial doctors were medical school graduates. *Id.* at 7. Because the economy of colonial America could not support many medical schools or hospitals, BLAKE, *supra* note 58, at 8, medical education was relegated to the apprenticeship system.

118. BLAKE, *supra* note 58, at 36.

119. Edmund S. Morgan, *The Puritan Dilemma: The Story of John Winthrop*, in Hall, *supra* note 116, at 44-45, 47-48.

120. Bernard Bailyn, *The New England Merchants in the Seventeenth Century*, in Hall, *supra* note 116, at 86.

121. *Id.*

122. *Id.*; BLAKE, *supra* note 58, at 1.

123. BLAKE, *supra* note 58, at 18; *see also* DONALD R. HOPKINS, PRINCES AND PEASANTS, SMALLPOX IN HISTORY 238 (1983).

124. An Act for the Better Preventing of the Spreading of Infectious Sickness, 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY ch. 7, at 376-77 (1699-1700); BLAKE, *supra* note 58, at 32.

1701, legislation was finally enacted.<sup>125</sup>

The quarantine legislation was a blueprint for the era. Relying on the assumption that certain illnesses were contagious, the statute aimed at preventing epidemics by restraining the social contacts of infectious individuals or goods. The legislation not only called for the quarantine of potentially infectious ships, it also empowered local selectmen to remove to a separate house or isolate anyone with plague, smallpox, or other "pestilential or malignant fever[s]."<sup>126</sup> As was evident in the English laws and earlier informal local practice,<sup>127</sup> the statute did not merely restrain the freedom of those stricken. It also authorized selectmen to provide for the care of the ill by impressing housing, nurses, or whatever was necessary.<sup>128</sup>

The quarantine policies established by the 1701 law were carried out and modified throughout the colonial period.<sup>129</sup> The law was followed in the smallpox epidemic of 1702.<sup>130</sup> In 1717, a pesthouse hospital was built with public money on Spectacle Island in Boston Harbor.<sup>131</sup> By the 1720s, the Massachusetts quarantine system had become regularized.<sup>132</sup> Some public health historians feel that this system may have helped to reduce the incidence of disease in New England.<sup>133</sup>

The interconnection between restraint and provision was also apparent in the colony's approach to inoculation. The story of the spread of inoculation in New England is a fascinating one.<sup>134</sup> The idea of inoculating individuals who had never contracted smallpox with smallpox pus, so that they would contract a relatively mild form of the illness and thereby gain resistance to a severe episode, was introduced to the colonies in 1716 by the Puritan theologian Cotton Mather.<sup>135</sup> Mather, who first learned of the practice from a slave and later read about it in the *Transactions of the Royal Philosophical Society*,<sup>136</sup> called a consultation of physicians to

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125. An Act Providing In Case of Sickness, 1 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY ch. 9, at 469-70 (1701).

126. *Id.*; BLAKE, *supra* note 58, at 33.

127. In the 1690s, for example, selectmen in Salem were active in providing care and provisions for the sick. DUFFY, EPIDEMICS, *supra* note 117, at 48.

128. BLAKE, *supra* note 58, at 34.

129. Indeed, a contemporary Massachusetts statute follows the basic outline by permitting selectman to isolate and care for the contagious. *See* MASS. GEN. L. ch. 111, § 95 (1988).

130. BLAKE, *supra* note 58, at 34.

131. *Id.* at 35.

132. *Id.* at 36.

133. *Id.* at 109-13.

134. The story is told in OLA E. WINSLOW, *A DESTROYING ANGEL: THE CONQUEST OF SMALLPOX IN COLONIAL MASSACHUSETTS* (1974).

135. *Id.* at 37.

136. *Id.* at 32-37.

consider inoculation.<sup>137</sup> Most physicians were opposed, but one, Zabdiel Boylston, began to inoculate patients.<sup>138</sup> As word of Boylston's practice spread, the Boston selectmen and the justices of the peace warned him not to continue the inoculations.<sup>139</sup> Several ministers, including Increase and Cotton Mather, then published a signed letter in the newspaper supporting Boylston and the practice of inoculation.<sup>140</sup> A furious pamphlet war ensued as Boylston disregarded the selectmen's warnings and continued to use inoculation in his practice.<sup>141</sup>

In response, the selectmen enacted the first of many regulations respecting inoculation. The ordinance did not prohibit the act, but regulated it, requiring the inoculated to be sent to pesthouses or isolated in their homes during the course of their outbreak.<sup>142</sup> This regulation was not foolish: although inoculated individuals tended to develop mild forms of the disease, they had active cases and were capable of spreading the virulent form.<sup>143</sup> During the next half century, as the popularity of inoculation grew, the selectmen and the General Court gave inoculation their frequent attention. Regulations of inoculation were often accompanied by provisions for free inoculation of the poor. By 1764, the city of Boston was actively involved in providing free inoculations and follow-up care for the poor.<sup>144</sup> With the aid of local physicians who agreed to inoculate the poor free of charge, almost 5000 Bostonians were inoculated during the epidemic of 1764.<sup>145</sup> Poor inhabitants received treatment either gratis from physicians or with the support of the municipal overseers of the poor.<sup>146</sup> By the end of the 1764 epidemic, almost every-

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137. *Id.* at 46-47.

138. BLAKE, *supra* note 58, at 56-57; *see also* WINSLOW, *supra* note 134, at 48.

139. BLAKE, *supra* note 58, at 57.

140. *Id.*

141. *Id.* at 58.

142. *Id.* at 60.

143. There is significant debate as to whether inoculation aided or exacerbated colonial epidemics. *Compare* BLAKE, *supra* note 58, at 115 *with id.* at 113-14 (while inoculation may have benefited those who could obtain it, it may have had an overall effect of spreading the disease). Unlike the later vaccination with cowpox virus, *see infra* text accompanying notes 170-73, the inoculation practiced in the early 18th century used live smallpox virus. Because those inoculated had mild forms of the illness, they often did not consider themselves sick and did not confine themselves to their homes. Instead, they went about spreading the disease. BLAKE, *supra* note 58, at 113. As a result, the regulation, aimed at confining those who were inoculated, actually constituted sound public health policy.

144. *Id.* at 94, 116.

145. *Id.* at 94.

146. *Id.* Blake states that 1025 poor persons were treated, but he is unclear as to how many of these were provided with inoculations and how many were treated for natural episodes of the disease. *Id.* at 94.

one had acquired some form of immunity to the disease.<sup>147</sup>

As the public health historian John Blake has noted, Boston's regulation of smallpox inoculation implicitly expressed the principle that government has a role to play in protecting the health of the public.<sup>148</sup> As with the quarantine regulations, that role invariably contained both regulatory and care-providing aspects. In the case of smallpox, the two were almost inseparable. Although many of the well-to-do who could afford private inoculations displayed little concern for their less wealthy neighbors,<sup>149</sup> public officials understood implicitly the public nature of contagious disease. Unless inoculation was monitored and made available to all, it would actually spread the disease and pose a greater harm to the public's health.<sup>150</sup> In the face of a casually contagious disease such as smallpox, only inclusive public policies could actually benefit the public health.<sup>151</sup>

The public role in protecting health was also reflected in the wide range of public health regulations in colonial Massachusetts. Although governmental activity was quite limited as compared to our own era,<sup>152</sup> the colonial public bodies were extremely active in regulating and providing for the public health.<sup>153</sup> For example, public sanitation regulations in Massachusetts go back as far as 1634, when Boston authorities ordered that "[n]o person shall leave any fish or garbage near the said Bridge or common landing place between the two creeks whereby any annoyance may come to the people that pass that way . . . ."<sup>154</sup> Laws regulating the

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147. *Id.*

148. *Id.* at 115.

149. *Id.* at 108.

150. *See supra* note 143.

151. This was particularly apparent with smallpox, which was one of the only diseases whose contagious nature was clearly understood before the development of the germ theory in the 19th century. Because smallpox was so easily transmissible, it placed all at risk. The bioethicist John Arras has referred to diseases such as smallpox as "democratic epidemics." John Arras, *The Fragile Web of Responsibility: AIDS and the Duty to Treat*, 18 HASTINGS CTR. RPT. 10-20 (1988) (Special Supplement: AIDS: The Responsibilities of Health Professionals); *see also* Parmet, *supra* note 5, at 746-47. This does not mean that the rich were not better off. They always were. In the case of smallpox, they were able to afford private inoculation and treatment. In addition, throughout the colonial period, they frequently were able to leave areas facing epidemics. BLAKE, *supra* note 58, at 113. However, with a disease such as smallpox that was particularly likely to affect small children, there was no way that anyone could insure that his or her own family was fully safe, unless the community at large was safe.

152. This fact has caused one historian to suggest that colonial Massachusetts resembled the classical economist's dream *laissez faire* state. ROBERT ZEMSKY, *MERCHANTS, FARMERS AND RIVER GODS: AN ESSAY ON EIGHTEENTH CENTURY AMERICAN POLITICS* 8 (1971).

153. Indeed, even Zemsky, who sees colonial Massachusetts as a *laissez faire* state, concedes that the General Court raised and appropriated funds for localities "[o]nly in times of genuine calamity, usually caused by an outbreak of smallpox." *Id.* at 7.

154. BLAKE, *supra* note 58, at 13.



quality of bread date from 1646,<sup>155</sup> and those aimed at preventing fires go back as far as 1679.<sup>156</sup>

The middle of the seventeenth century witnessed the rapid growth of public health regulation. In 1649, the legislature regulated the practice of medicine “[f]orasmuch as the Law of God allows no man to impair the Life or Limbs, of any Person, but in a judicial way.”<sup>157</sup> Furthermore, in an era when filth was believed to be the cause of much disease,<sup>158</sup> the General Court enacted legislation aimed at preventing the pollution of Boston Harbor.<sup>159</sup> In 1666, Boston appointed a public scavenger to keep the streets free of live and dead animals.<sup>160</sup> In 1684, slaughterhouses, seen as a source of filth and thereby disease,<sup>161</sup> were regulated.<sup>162</sup>

By the eighteenth century, public health regulations had become a common feature of colonial life. These regulations were completely intermeshed with a mercantilist society’s regulation of trade.<sup>163</sup> For example, the distillation of rum through lead was forbidden, probably to protect the rum trade as well as to protect the public’s health.<sup>164</sup> After the Revolution, the sale of unwholesome food was forbidden.<sup>165</sup> Sanita-

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155. THE GENERAL LAWS OF THE MASSACHUSETTS COLONY (1647), reprinted in 1 LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 69, at 9.

156. Act of Oct. 15, 1679, reprinted in 3 LAWS AND LIBERTIES OF MASSACHUSETTS *supra* note 69, at 547.

157. THE GENERAL LAWS OF THE MASSACHUSETTS COLONY (1649), reprinted in 1 LAWS AND LIBERTIES OF MASSACHUSETTS, *supra* note 69, at 87-88; WINSLOW, *supra* note 134, at 3.

158. BLAKE, *supra* note 58, at 101-03; DUFFY, THE SANITARIANS, *supra* note 74, at 20-22.

159. COLONIAL LAWS OF MASSACHUSETTS ch. 9, § 1 (1676); W.G. SMILLE, PUBLIC HEALTH ADMINISTRATION IN THE UNITED STATES 11 (1940).

160. DUFFY, SANITARIANS, *supra* note 74, at 13.

161. The early regulation of slaughterhouses casts an interesting light on the famous *Slaughterhouse Cases*, 83 U.S. 36 (1872). The municipal regulation at issue, which confined the practice of butchering to certain parts of New Orleans, is commonly seen today as an example of economic protectionism. The question before the Court was whether the newly enacted Fourteenth Amendment protected individual butchers’ rights to engage in their profession against the regulatory claim of the state. *Id.* at 60. In fact, the history of public health regulation shows that the practice of butchering was traditionally regulated in accordance with public health policies. What was new in the 1870s was not the regulation of slaughterhouses, but the *laissez faire* assertion that the right to engage in a trade provided the right to do so in an unregulated manner.

162. BLAKE, *supra* note 58, at 29.

163. DUFFY, SANITARIANS, *supra* note 74, at 33 (noting that many early public health laws were probably designed to protect trade as well as health). For a discussion of the influence of mercantilism on the framing generation’s thought and practice, see FOREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 18 (1985).

164. DUFFY, SANITARIANS, *supra* note 74, at 33.

165. ACTS AND RESOLVES OF MASSACHUSETTS ch. 50 (1784). Blake suggests that unwholesome food was regulated even earlier, although the penalty was raised after the Revolution. BLAKE, *supra* note 58, at 145-46. I have not been able to find clear statutory evidence of

tion became an increasing concern. In 1786, Boston appointed salaried inspectors to police the sanitation of the streets.<sup>166</sup> Although the system never worked well, the public authorities continued to focus on sanitation with increased effort after the yellow fever epidemic of 1795.

In the early years of the Republic, long before the sanitary and progressive movements of the late 1800s, the General Court had chartered a public aqueduct corporation to supply fresh water to the city of Boston,<sup>167</sup> and had enacted legislation providing for a standing board of health for Boston<sup>168</sup> and health powers for other local officials. Once again the statutory scheme interwove regulation and protection. A statute of 1797 authorized selectmen to

take care and make effectual provision in the best way they can, for the preservation of the inhabitants, by removing such sick or infected person or persons, and placing him or them in a separate house or houses, and by providing nurses, attendance, and other assistance and necessaries for them; which . . . shall be at the charge of the parties themselves, their parents or masters (if able) or otherwise at the charge of the town or place whereto they belong: and in case such person or persons are not inhabitants of any town or place within the State, then at the charge of the Commonwealth.<sup>169</sup>

Once Edward Jenner's new smallpox vaccine was introduced into the Commonwealth,<sup>170</sup> the General Court enacted a law requiring every town lacking a board of health to appoint a vaccination commission, effectively providing at least partial public subsidy for the vaccination of all inhabitants.<sup>171</sup> Although the success of this mandate was questionable,<sup>172</sup> thousands were vaccinated and the incidence of smallpox continued to decline.<sup>173</sup> Moreover, the public bodies of Massachusetts had shown once again the necessity of public health regulation and the relationship between limits on freedom and provision of care.

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pre-Revolutionary regulation of unwholesomeness, although clearly the quality of bread was long regulated. *See supra* note 155.

166. BLAKE, *supra* note 58, at 148-49.

167. *Id.* at 156.

168. ACTS AND RESOLVES OF MASSACHUSETTS ch. 47 (1789); BLAKE, *supra* note 58, at 167.

169. ACTS AND RESOLVES OF MASSACHUSETTS ch. 16 (1797).

170. The vaccine was introduced into the United States in 1800 and was in use in Boston at least by 1802. BLAKE, *supra* note 58, at 179-81. For a discussion of Jenner's discovery of the vaccine and its introduction in Massachusetts, see WINSLOW, *supra* note 134, at 94-111.

171. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS ch. 116 (1809-12); BLAKE, *supra* note 58, at 186-87.

172. BLAKE, *supra* note 58, at 187.

173. *Id.* at 190-91.

## B. New York and the Mid-Atlantic Colonies

The pervasiveness of public health regulation and provision in colonial Massachusetts was unique among the colonies. The pattern of such laws, however, was not unique. Quarantines were features of most port towns.<sup>174</sup> By 1700, almost every large town provided health care for the poor.<sup>175</sup> Regulation and provision of care was commonplace. The story of public health law in New York is illustrative.

As in New England, public health regulation in colonial New York was not the province of professionals or bureaucrats. It was ad hoc, disorganized, and often reactive to the threats facing the colony. Only as the population grew and the need intensified<sup>176</sup> did structure emerge.<sup>177</sup> Nevertheless, responsibility predated organization. As in Massachusetts, it was often intermingled with mercantile trade regulations.<sup>178</sup> Yet, it was part and parcel of the colonial landscape. The protection of health and the provision of care were simply assumed to be responsibilities of local and provincial governments.<sup>179</sup>

The early years of the European settlements of what became New York saw few public health or sanitary problems. The small population, combined with a favorable climate and harbor, kept public health problems to a minimum.<sup>180</sup> When epidemics did arrive, officials usually reacted. In response to a smallpox threat in 1622, authorities of the English settlement at East Hampton, Long Island instituted what might have been the earliest recorded local quarantine of individuals in the European colonies in North America.<sup>181</sup>

Extensive public health regulations in the New Amsterdam settlement, later to become New York City, date back to the 1650s. Although the Dutch West India Company did not provide for the care of the sick or poor,<sup>182</sup> a small hospital had been built by 1658.<sup>183</sup> That same year also saw the first of many attempts to regulate privies.<sup>184</sup> Butchering and

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174. DUFFY, *SANITARIANS*, *supra* note 74, at 24-6.

175. *Id.* at 31.

176. Duffy, for example, notes that public health problems intensify in direct, if not geometric, proportion to population density. DUFFY, *NEW YORK*, *supra* note 58, at XIX.

177. DUFFY, *SANITARIANS*, *supra* note 74, at 37-50.

178. SCHWARTZ, *supra* note 61, at 75; *see also supra* note 163.

179. DUFFY, *NEW YORK*, *supra* note 58, at XVII; SCHWARTZ, *supra* note 61, at 77.

180. DUFFY, *NEW YORK*, *supra* note 58, at 6-7.

181. HOPKINS, *supra* note 123, at 239.

182. DUFFY, *NEW YORK*, *supra* note 58, at 9.

183. *Id.* at 9-10.

184. *Id.* at 18.

fire regulations were also among the earliest of public health laws.<sup>185</sup>

After England conquered the Dutch colony in 1664, public health regulations increasingly resembled the British and New England pattern. Governmental authority to regulate for the preservation of health was assumed. Activities that were seen as affecting the public health, such as the practice of medicine<sup>186</sup> or the provision of public-drinking water,<sup>187</sup> were subject to legal control. When necessary, individual freedom of movement was restricted by quarantine regulations.<sup>188</sup> Inoculation, thought to be a hazard to public health, was banned in New York City in 1747, although enforcement was difficult.<sup>189</sup>

As in New England, these restrictive measures were merely one side of a coin whose other side consisted of prevention and provision. Inhabitants of the colony benefited, at least theoretically,<sup>190</sup> from the disease prevention brought by the restrictions. Those who became ill and suffered the further deprivations wrought by nature and restrictive laws received care, even when they could not afford it on their own. By the late 1680s, the city of New York not only paid the salary of a physician for the poor,<sup>191</sup> it also frequently appropriated funds to pay private physicians for similar efforts.<sup>192</sup> Although their care differed in comfort, if not in quality,<sup>193</sup> from that given to those who could pay, individuals who were quarantined were inevitably provided with care.<sup>194</sup>

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185. *Id.* at 12-15. Duffy also notes that there were extensive regulations of flour, grains, and meat, but that these regulations were designed more to ensure quality than to protect the health of the consuming public. *Id.* at 10, 12-14.

186. *Id.* at 33.

187. *Id.* at 30.

188. *Id.* at 60-62. New York's pesthouse at Bedlow's Island was built in 1760. *Id.* at 61. New York's first provincial maritime quarantine law was enacted in 1755. 3 NEW YORK COLONIAL LAWS ch. 973 (1755).

189. DUFFY, NEW YORK, *supra* note 58, at 56.

190. *See supra* text accompanying note 72 and *infra* note 193.

191. DUFFY, NEW YORK, *supra* note 58, at 34.

192. *Id.* at 67.

193. The medical care provided during that era was of such poor quality, however, that it is difficult to say if anyone actually benefited from medical treatment. It might well be said that those who had less access to care suffered less physically, than those "privileged" to afford such treatments as extensive bleeding. *See* J.H. POWELL, BRING OUT YOUR DEAD, THE GREAT PLAGUE OF YELLOW FEVER IN PHILADELPHIA IN 1793, at 130-32 (1949) (discussing how the medical cures of Dr. Benjamin Rush may well have caused fatalities). Nevertheless, such comments are obviously anachronistic and not useful for assessing the attitudes toward public health care held during the colonial era. It is clear that at the time, people felt that care, whether from physicians or from any of the other caregivers, was often useful.

194. DUFFY, NEW YORK, *supra* note 58, at 70. In discussing public health in early post-Revolutionary Philadelphia, Hawke makes the point that while the poor received care, they were not cared for in the comfort of their own homes as were the well-to-do. DAVID FREEMAN HAWKE, BENJAMIN RUSH: REVOLUTIONARY GADFLY 520-21 (1971). Indeed, as the

This regulatory pattern was augmented in the eighteenth century by an increasing concern with sanitation. Although seventeenth century physicians understood that smallpox was contagious, the etiology of yellow fever and other diseases remained unknown. As the seventeenth century progressed, scientists increasingly disputed whether epidemics or "pestilential fevers" could be attributed to contagious contacts or the putrefaction of organic matter, known as miasma.<sup>195</sup> While this debate between the "contagionists" and "sanitarians" was quite fierce and lasted into the nineteenth century,<sup>196</sup> historians have noted that public officials followed a pragmatic and politically safe policy: they tended to pursue both contagionist and sanitary policies.<sup>197</sup> While quarantine laws and isolation requirements were kept in place, sanitary laws were strengthened. After a prominent member of the Governor's Council reported that yellow fever resulted from "slimy wet grounds" and inadequate sewerage, the Provincial Assembly responded by passing a comprehensive sanitary act prohibiting certain noxious trades from working in parts of the city and placing restrictions on the disposal of waste.<sup>198</sup> In that same year of 1744, the Common Council passed a sweeping sanitary ordinance which increased the fines for violations of the sanitary laws and divided the fines collected between private prosecutors and provision for the poor.<sup>199</sup> The sanitary movement continued in 1774 when money was appropriated to build a public reservoir.<sup>200</sup> That project, however, was derailed by the outbreak of the Revolution.<sup>201</sup>

The years following the Revolution saw an increase in some types of public health regulation despite the gradual rejection of mercantilism. The first influences of laissez faire<sup>202</sup> led in the 1780s to the relaxation of

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historian Charles Rosenberg has extensively documented, hospitals were but extensions of almshouses and primarily provided care for the indigent until at least the mid-19th century. See CHARLES ROSENBERG, *THE CARE OF STRANGERS, THE RISE OF AMERICA'S HOSPITAL SYSTEM* 15-121 (1987).

195. DUFFY, *NEW YORK*, *supra* note 58, at 41. For a discussion of the dispute between contagionists and "localists" during the Philadelphia epidemic of 1793, see Martin S. Pernick, *Politics, Parties, and Pestilence: Epidemic Yellow Fever in Philadelphia and the Rise of the First Party System*, in *SICKNESS AND HEALTH IN AMERICA: READINGS IN THE HISTORY OF MEDICINE AND PUBLIC HEALTH* 241, 242-45 (Judith Walzer Leavitt & Ronald L. Numbers eds., 2d ed. 1985).

196. See ROSENBERG, *supra* note 57, at 75 (noting that by the 1830s most physicians believed cholera was not contagious).

197. See PERNICK, *supra* note 195, at 245.

198. DUFFY, *NEW YORK*, *supra* note 58, at 42-44.

199. *Id.* at 45.

200. *Id.* at 49-50.

201. *Id.* at 50.

202. Adam Smith's *The Wealth of Nations* was imported to the American colonies in 1789. ADAM SMITH AND THE WEALTH OF NATIONS, 1776-1976 BICENTENNIAL ESSAYS 1 (Fred R.

older mercantile regulations affecting trades such as butchering and baking.<sup>203</sup> At the same time, the post-Revolutionary era saw renewed civic attention to the problems of health and sanitation.<sup>204</sup> In 1784, the colonial quarantine laws were officially reenacted by the state of New York.<sup>205</sup> A new and stringent medical licensing law was enacted.<sup>206</sup> In 1790, the New York City Dispensary was established with private and public monies to provide free medical care for the poor.<sup>207</sup> Public money also helped support private institutions which provided vaccinations for the poor in the early years of the nineteenth century.<sup>208</sup>

The yellow fever epidemics of the 1790s greatly influenced public health policies in the mid-Atlantic states and led to more structured and vigilant approaches.<sup>209</sup> New York City responded to the crisis by isolating the ill<sup>210</sup> and enacting sanitation orders.<sup>211</sup> In 1796, New York State enacted comprehensive health legislation which created the New York City Health Office, granted the city authority to enact sanitary ordinances, and further developed the city's quarantine system.<sup>212</sup> When another major epidemic struck in 1798, the city council appointed a special health committee with almost unlimited powers.<sup>213</sup> Care for the ill and provision for the poor were among the committee's major objectives.<sup>214</sup> During the 1798 epidemic, New York City spent \$11,600 and the state spent \$45,000.<sup>215</sup> A report following the epidemic urged that the city be given even more authority to inspect buildings, enforce sanitation, and plan for a fresh water supply. The report stressed that the public good had to take precedence over any individual inconveniences that might occur.<sup>216</sup> Following receipt of the report, the city council drafted and the state legislature enacted legislation authorizing the appointment of street commissioners to carry out all laws for "the cleansing of the City and

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Gelahel ed., 1978). Its *laissez faire* ideology met with a receptive audience among the new commercial and entrepreneurial classes. See MCDONALD, *supra* note 163, at 128.

203. See DUFFY, *NEW YORK*, *supra* note 58, at 85-86.

204. *Id.* at 78-79.

205. *Id.* at 86.

206. *Id.* at 89.

207. *Id.* at 89.

208. DUFFY, *SANITARIANS*, *supra* note 74, at 55.

209. *Id.* at 48, 52-53.

210. DUFFY, *NEW YORK*, *supra* note 58, at 102.

211. *Id.* at 106-07.

212. DUFFY, *SANITARIANS*, *supra* note 74, at 42-43.

213. *Id.* at 43.

214. DUFFY, *NEW YORK*, *supra* note 58, at 108.

215. DUFFY, *SANITARIANS*, *supra* note 74, at 44.

216. *Id.*

promoting the Health thereof."<sup>217</sup>

New York's response to the yellow fever epidemic can be contrasted with Philadelphia's response to the calamitous yellow fever epidemic of 1793. Public health regulation was less firmly entrenched in Philadelphia than in New York and the New England states. Throughout the eighteenth century, fewer measures were taken in Philadelphia than elsewhere to prevent the spread of smallpox and inoculation was not regulated.<sup>218</sup> Although the city had quarantine laws and a port physician, sufficient money was not appropriated to ensure compliance with the procedures.<sup>219</sup> Perhaps as a result, smallpox ravaged the city repeatedly.<sup>220</sup> Given that history, it was not surprising that disaster ensued when yellow fever struck in 1793. Many municipal officials fled the city.<sup>221</sup> For a time, civil authority effectively broke down.<sup>222</sup>

The legislature initially responded to the crisis by reenacting the quarantine laws and granting the Governor extraordinary powers.<sup>223</sup> When official response proved inadequate, however, as public officials either died or fled, Mayor Matthew Clarkson hastily convened a special civic committee of citizen volunteers with himself as president.<sup>224</sup> It was given extraordinary authority to control the situation.<sup>225</sup> The committee commandeered a vacant estate to establish a hospital and orphanage.<sup>226</sup> It distributed food, firewood, clothing, and medicine.<sup>227</sup> It buried the dead and cleaned up the city.<sup>228</sup> Without any understanding of the transmission of yellow fever, however, the committee's efforts proved ineffective. Before the epidemic was over, some ten to fifteen percent of the population had died of the disease.<sup>229</sup>

The story of the 1793 epidemic raises several key points about public health regulation during the colonial and early federal periods. First, as was universally evident throughout the period, the response to disease

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217. *Id.*; Act of Mar. 30, 1798, THE LAWS OF THE STATE OF NEW YORK ch. 65 (1798).

218. BLAKE, *supra* note 58, at 111-12.

219. DUFFY, SANITARIANS, *supra* note 74, at 39.

220. *Id.*

221. *Id.* These municipal officials were not alone. Pernick estimates that some 20,000 Philadelphians fled the city, Pernick, *supra* note 195, at 241, which at that time was also the federal capital. Many federal officials also panicked and left. See POWELL, *supra* note 193, at 110-19.

222. BLAKE, *supra* note 58, at 152.

223. POWELL, *supra* note 193, at 71.

224. *Id.* at 151-54.

225. DUFFY, SANITARIANS, *supra* note 74, at 39.

226. Pernick, *supra* note 195, at 241.

227. *Id.*

228. *Id.*

229. *Id.*

was ad hoc.<sup>230</sup> There was no standing bureaucracy. As was common, a citizen's committee performed much of the work.<sup>231</sup>

This lack of organized structure, however, was not an expression of laissez faire ideology. Although the Mayor of Philadelphia eventually called upon a citizen's committee to help the city through the epidemic, the authorities did not assume the epidemic to be a matter of private responsibility. In fact, in the beginning of the crisis, the Governor promised public funding and the municipal Guardians of the Poor took responsibility for the establishment of a poor hospital.<sup>232</sup> The citizens committee took over only after civil authority had prove inadequate.<sup>233</sup> Moreover, the committee, with the mayor at its helm, clearly acted as a public body wielding de facto public authority.<sup>234</sup>

The inhabitants of federalist Philadelphia, like others facing epidemics during this period, never questioned whether government should exercise extraordinary authority in response to the epidemic. The debate was over the nature of the response. Positions depended upon views of the etiology of the disease as well as politics. Contagionists, who were most often Federalists, favored quarantine and the closing of the port, which just coincidentally would have helped keep out the French refugees from the Haitian revolution.<sup>235</sup> Sanitarians, also known as localists, were most often Jeffersonian Republicans. Not surprisingly, they favored sanitary reform and keeping the port open to the French.<sup>236</sup> But almost everyone agreed on the need for some public response.<sup>237</sup> In fact, a year after the epidemic, a standing board of public health was finally established to prevent the type of crisis that had occurred.<sup>238</sup>

The practice actually followed in Philadelphia paralleled the pattern evident in New England and New York. Extraordinary authority was

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230. See *supra* text accompanying notes 103-04.

231. Schwartz argues that volunteer committees often constituted the first stage of public health organization. SCHWARTZ, *supra* note 61, at 118-23. Only when population and industrialization increased to the point where the problems were too complex for ad hoc committees, did government bureaucracies arise. *Id.* at 73-74. Fox makes the more subtle point that in the pre-industrial age government authority was often exercised through negotiation and cooperation with private physicians and citizen groups. Fox, *supra* note 107, at 6-7.

232. POWELL, *supra* note 193, at 56-57.

233. *Id.* at 151.

234. *Id.* at 152-53.

235. Pernick, *supra* note 195, at 242-44.

236. *Id.*

237. The exception may have been Thomas Jefferson, who saw the silver lining in the epidemic. Years after, he expressed with approval the view that "yellow fever will discourage the growth of great cities in our nation." *Id.* at 245. He seems to have practiced what he preached. He fled Philadelphia during the epidemic. POWELL, *supra* note 193, at 249.

238. Tobey, *supra* note 66, at 128.



wielded, although ultimately through unusual channels. Individual rights of property and movement were subordinated.<sup>239</sup> At the same time, care was provided, especially to the growing numbers of poor.<sup>240</sup> Once again, the forfeiture of liberty was tied to protection and provision. The exercise of governmental authority was connected to public obligation.

### C. Public Health in the South

In the South, public health was less developed during the colonial period than it was in New England and the mid-Atlantic states.<sup>241</sup> Several factors seem to have contributed to the relative paucity of public health regulations. One, undoubtedly, was the rural character of the region.<sup>242</sup> As has been noted above, public health is integrally related to urbanization and population density, which makes it obvious that public health measures such as sanitation are public goods.<sup>243</sup> In a rural environment, a community's interdependency and mutual vulnerability with respect to disease is less obvious.

The second unique feature of Southern life was the pervasiveness of slavery. Although slaveholders had a private self-interest in maintaining to some degree the health of their slaves, attitudes toward public health likely differed in a society in which a large part of the population was not

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239. For example, the privately owned Bush Hill mansion was impressed by the Guardians of the Poor to serve as a hospital for the poor. POWELL, *supra* note 193, at 64-66.

240. *Id.* at 63, 258-64. This is not to say that the care was adequate or helpful. It was not. *Id.* at 73-74. It was this very breakdown of the government's ability to fulfill its responsibility in the face of the severe epidemic that made the Philadelphia experience so calamitous.

241. There is far more literature on the development of public health in the South in the mid to late 18th century, a period which saw first resistance to and then gradual development of sanitary reform. See James O. Breeden, *Disease as a Factor in Southern Distinctiveness, in DISEASE AND DISTINCTIVENESS IN THE AMERICAN SOUTH* (Todd Savitt & James H. Young eds., 1988); John H. Ellis, *Businessmen and Public Health in the Urban South During the Nineteenth Century: New Orleans, Memphis, and Atlanta*, 44 BULL. HIST. MED. 197 (1970). There is also a considerable body of literature pertaining to the health of African-Americans enslaved in the South. See, e.g., Richard H. Steckel, *A Peculiar Population: The Nutrition, Health, and Mortality of American Slaves from Childhood to Maturity*, 46 J. ECON. HIST. 721 (1986).

242. John Duffy, *The Impact of Malaria on the South*, in *DISEASE AND DISTINCTIVENESS IN THE AMERICAN SOUTH* 44 (Todd Savitt & James H. Young, eds., 1988).

243. See *supra* text accompanying notes 60-63. This is not to say that the South lacked public health problems. Indeed, while the region appeared to be extremely healthful in the early years of European colonization, it quickly became known for its high incidence of disease, especially malaria and yellow fever. See Duffy, *supra* note 242, at 34. Breeden argues that the widespread presence of disease contributed to the image of Southern backwardness. Breeden, *supra* note 241, at 8.

considered to be citizens,<sup>244</sup> but rather property.<sup>245</sup> In a slave-maintaining society, the health of the population enslaved was less a matter of public responsibility than of the slaveowner's self-interest. Given the economic and social organization of the ante-bellum South, it is not surprising that government assistance for the poor and ill was less common than in other parts of the country.<sup>246</sup>

Despite these distinctions, governments in the pre-Revolutionary South were assumed to possess, and did exercise, public health authority. For example, in 1620 the Privy Council ordered that guest houses be built in Virginia for care of the sick.<sup>247</sup> Towns paid local physicians to care for the poor.<sup>248</sup>

One of the earliest recorded cases of individuals being isolated for purposes of disease prevention occurred in West Hampton County, Virginia in 1667, where a colonel, acting as public health officer, issued a proclamation warning all families infected with smallpox not to go out until thirty days after their infection.<sup>249</sup> In 1698, a maritime quarantine was instituted in Charleston.<sup>250</sup> Another law of the same year required charterers of vessels to care for sick or injured seamen.<sup>251</sup> By the mid-

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244. Of course, there were slaves held and racism rampant in other parts of the country. The extensive reliance on slavery and the slave economy, however, distinguished the South and made the caste distinctions between individuals far more obvious and central to the region's social organization.

245. It is possible that public health strategies are most effectively implemented in societies that are at least partially egalitarian and democratic, where the common nature of the threat can be perceived, and where individual classes cannot escape the problem at the expense of other classes. Blake, for example, argues that Philadelphia's relatively ineffective public health strategies, as compared with those used in New England, resulted from the less democratic and more class stratified nature of Philadelphia society. BLAKE, *supra* note 58, at 110-12. I have argued elsewhere that in heterogeneous and divisive societies, public health policies may readily be misused to scapegoat minority groups. See Parmet, *supra* note 5, at 748-49.

246. DUFFY, *SANITARIANS*, *supra* note 74, at 32; Richard H. Shryock, *Medical Practice in the Old South*, 29 S. ATLANTIC Q. 176-77 (1930). This point was made in 1798 in congressional debates over a proposed act to provide health care to seamen. Representative Sewall from Massachusetts noted in Congress that in New England all of the sick were provided for, but that sailors traveling to the South faced a problem, since such states did not always provide relief. 8 ANNALS OF CONG. 1386 (1798).

247. DUFFY, *SANITARIANS*, *supra* note 74, at 16. There is no evidence that the houses were actually built.

248. *Id.* at 24-25.

249. DUFFY, *EPIDEMICS*, *supra* note 117, at 102.

250. JOSEPH WARING, *A HISTORY OF MEDICINE IN SOUTH CAROLINA 1670-1825*, at 13 (1964) (An Act for the Raising of a Publick Store of Powder for the Defense of this Province (1698)).

251. *Id.* at 18 (An Additional Act for the Poor; Preventing as much as may be the spreading of Contagious Distempers (1698)).

nineteenth century, quarantines were widely employed in most port cities.<sup>252</sup>

The history of public health laws in Charleston, one of the South's largest urban areas, provides insight into the region's views and practices. Legislation attempting to prevent disease and provide care was commonplace.<sup>253</sup> Public authority over sanitation dates back to 1704 when a law regulating slaughterhouses and privies was prefaced by the statement that "[t]he air is greatly infected and many maladies and other intolerable diseases daily happen."<sup>254</sup> An act to build a pesthouse was passed in 1707<sup>255</sup> and an act to provide medical care for the poor in 1712.<sup>256</sup> Throughout the eighteenth century, the South Carolina legislature was continually revisiting the question of provision for the poor, but despite repeated legislation, the inadequacy of the care was widely recognized.<sup>257</sup>

By the late eighteenth century, inoculation was also regulated in Charleston<sup>258</sup> and most Southern states, although to less effect than in New England.<sup>259</sup> An important example is Virginia's 1760 law imposing severe penalties upon any person who imported any "various or infectious matter" for the purpose of inoculating against smallpox while also creating a strict licensing regime for administering inoculations.<sup>260</sup> The law was amended in 1777<sup>261</sup> to replace the licensing scheme with one which permitted greater access to inoculation but required strict quarantining during the procedure.<sup>262</sup> It also provided that the state would pay the expenses of anyone who could not afford the procedure.<sup>263</sup> Some governments went further, conducting mass inoculations.<sup>264</sup>

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252. David R. Goldfield, *The Business of Health Planning: Disease Prevention in the Old South*, 42 J.S. HIST. 557, 562 (1976).

253. WARING, *supra* note 250, at 13-110.

254. DUFFY, *SANITARIANS*, *supra* note 74, at 16.

255. WARING, *supra* note 250, at 23 (An Act for Raising a Publick Store of Powder for Defense of this Province (1707)).

256. *Id.* at 25-26 (An Act for the Better Relief of the Poor (1712)). The Act raised the property tax to provide care and directed that the vestrymen pay for the medical care of the poor.

257. *See* WARING, *supra* note 250, at 37, 49, 78.

258. *Id.* at 43, 76-77. Charleston's first inoculation regulation appears to have been enacted in 1738. It forbade inoculation outright. *Id.* at 43. In 1768, the colony had granted the Governor authority to waive the prohibition in individual cases. *Id.* at 78.

259. DUFFY, *EPIDEMICS*, *supra* note 117, at 40.

260. Bill Concerning Inoculation for Small Pox (Dec. 27, 1777), *reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON, at 122-24 (Julian P. Boyd ed., 1950).

261. This bill may have been drafted by Thomas Jefferson. *Id.*

262. *Id.*

263. *Id.*

264. DUFFY, *EPIDEMICS*, *supra* note 117, at 34. Duffy reports that Charleston conducted a mass inoculation of whites and blacks in 1738.

The history of colonial and early federal public health in the South is sketchy and somewhat atypical. Public health regulation appears to have been less extensive there than elsewhere. Provision for the poor was made only inconsistently. The reforms and centralization that followed the yellow fever epidemics of the 1790s did not occur throughout the region.<sup>265</sup> The regulations that did exist, however, demonstrate that there was little doubt about the government's authority to provide public health protection, even though the continual need to do so may have been less clearly appreciated in a largely rural environment. Moreover, the relationship between public health and the provision of care was established less firmly in a society skewed by the slave system.<sup>266</sup>

#### IV. Public Health Law and the Political Theory of the Framers

What is the significance of the colonial and early federalist public health laws? What do they say about the era's understanding of the role of public health and the individual's relationship to the state with respect to health? At a minimum, the pervasiveness of public health regulation suggests that the populace saw no significant problem with government exercising public health authority.<sup>267</sup> Nor did they see any fundamental problem with provision of health care to the poor.<sup>268</sup> Thus, at least with respect to public health, the Framers did not come from a *laissez faire*

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265. DUFFY, *SANITARIANS*, *supra* note 74, at 46.

266. The effect of slave ideology on southern public health should not be underestimated. In the early part of the 19th century, for example, southern physicians, eager to defend the powerful slave-owning class, developed epidemiological theories to justify slavery and the distinctiveness of southern medicine. Southern physicians argued that African-Americans were biologically distinct from whites, suffered from different diseases, and therefore required southern-trained physicians. John Duffy, *A Note on Ante-Bellum Southern Nationalism and Medical Practice*, 34 J.S. HIST. 266, 269-71 (1968). Such theories undoubtedly not only reflected the racism and increasing separatism of the region, but also served, either intentionally or unintentionally, to discredit northern critics of the slave system. They also had the effect of isolating the South medically and discouraging southern practitioners from receiving their education at northern medical schools. *Id.* at 273.

267. Of course, it is possible that the Framers believed in a political theory radically at odds with their own actual experience. Thus, they could have preferred a *laissez faire* state even if that was not one with which they were familiar. In fact, however, as is discussed below, there is significant reason to believe that the Framers sought a constitution that would preserve, rather than alter, the conditions then existing between individual and state. Daniel W. Howe, *The Political Psychology of The Federalist*, 44 WM. & MARY Q. 485, 506 (1987).

268. Redistribution in general was an object of controversy during the constitutional era. See JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 30-31 (1990). Madison, in particular, was vehement in his opposition to redistributive laws. *Id.*; Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1331 (1987). Nevertheless, it seems clear that even he accepted that certain regulations or limits on

world and they would have had no reason to assume that a minimal state was the norm. This suggests that the Framers might not have shared the libertarian assumptions underlying current constitutional doctrine.<sup>269</sup>

The question remains, however, whether the Framers merely tolerated an active role for government in the protection of public health, or whether they went further and actually assumed that government was somehow obliged to fulfill such a role. In other words, did the Framers, like Justice Rehnquist,<sup>270</sup> see public health care and protection as a mere privilege which government can, but need not, provide. Or did they see it as some type of government obligation?<sup>271</sup>

The answer cannot be definitively stated. The participants of the Constitutional Convention left little evidence of their views on the topic.<sup>272</sup> The text of the document they produced certainly does not speak of public health, nor of an obligation on the part of the government to provide protection from dread diseases. Nevertheless, such a belief would not only have been compatible with their own experience, it would have comported with their more general political vision. In parts IV.A and IV.B below, I discuss the political theory of the Framers. In Part IV.C, I suggest how public health provision and disease prevention may have been seen in light of the Framers' political views.

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property were valid; and that there were obligations upon the public to provide for the poor. NEDELSKY, *supra*, at 46.

269. See *supra* text accompanying notes 23-49.

270. See *supra* notes 24, 39-43. Justice Rehnquist is most fundamentally a positivist who believes in judicial deference to the political branches. He has never suggested that government cannot choose to provide health protection if it so wishes. Rather, he asserts that government has no obligation to so provide, and he treats any decision to provide care as a "mere gratuity." See *supra* text accompanying notes 35-48. Rehnquist would also see the Fifth Amendment Takings Clause as a limit on government power to legislate for public health reasons. He recently joined Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), which held that the Takings Clause requires states to compensate landowners for regulatory takings which deprive the landowner of all economic value unless the prohibited land use would constitute a nuisance at common law. *Id.* at 2886-901. In other words, Justice Rehnquist and the *Lucas* majority would implicitly limit the governments' ability to protect public health by common law understandings, at least in those cases where regulations deprive property of all value. Professor Epstein would go further. He claims that all regulatory programs which depart from common law baselines may violate the Takings Clause of the Constitution. EPSTEIN, *supra* note 53, *passim*.

271. This is not the same thing as asking whether they assumed an entitlement to health care in the modern sense. Obviously, in an era long before the development of modern insurance, the Framers could not have imagined something like an entitlement to universal health insurance. Rather, the question I am asking is whether the Framers conceived of the protection of health as among the fundamental reasons for and obligations upon government so that the provision of care would be part of the constitutional structure and, as is discussed below, connected to the conceptions of rights against the government.

272. For speculation as to why, see part V.A.

### A. The Debate Over the Political Theory of the Framing Era

In recent years there has been considerable debate, first in the historical and then in the legal literature, about the political views of the framing generation.<sup>273</sup> In particular, the debate has focused on whether the Framers were predominantly Lockean liberals, as has been traditionally assumed,<sup>274</sup> or were predominantly classical republicans in their political theory.<sup>275</sup>

The view that the Framers were primarily Lockean liberals stresses the influence of John Locke and his emphasis on individual, natural rights.<sup>276</sup> According to this view, the Framers followed Locke in believing that individuals and their rights are prior to government, and that the primary role of law is to protect those rights.<sup>277</sup> As a result, it is argued that the Constitution is primarily about limits on government. Taken to the extreme,<sup>278</sup> this view can be used to support contemporary doctrine's assumption that constitutional rights are merely negative restrictions on

273. This debate is discussed in Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989). Linda R. Hirschman notes that legal theories tend to follow, and often adopt, scholarly trends just as they wither in other fields. Linda R. Hirschman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 988-90 (1990).

274. The classical statement of this view appears in LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 78-86 (1955). More recently, the Lockean influence has been stressed by JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984); ISAAC KRAMNICK, *REPUBLICANS AND BOURGEOIS RADICALISM: POLITICAL IDEOLOGY IN LATE EIGHTEENTH CENTURY ENGLAND AND AMERICA* (1990); David A.J. Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy*, 51 LAW & CONTEMP. PROBS. 123, 124 (1988).

275. Advocates of this position among legal scholars include Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1515-24 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term—Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 23-24, 47 (1986) [hereinafter Michelman, *Traces*]; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 552 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 47-48 (1985). These legal scholars trace their position to: BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); J.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969). Other scholars stress the republican influence on anti-federalist thought. Daniel W. Howe, *Anti-Federalist, Federalist Dialogue and Its Implications for Constitutional Understanding* 84 NW. U. L. REV. 1, 2 (1990).

276. David Schultz, *The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence*, 13 W. NEW ENG. L. REV. 155, 155-56 (1991).

277. Brown, Parmet & Baumann, *supra* note 30, at 619.

278. Of course, Locke's own views may have been more complex. See Schultz, *supra* note 276, at 161. The conventional reading stresses the laissez faire, bourgeois aspect of Locke, with its emphasis on "possessive individualism," to borrow C.B. Macpherson's phrase. See C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 195-262 (1962). This is not the only reading of Locke, nor was it necessarily the view understood in the 18th century. See Schultz, *supra* note 276, at 161; *infra* text accompanying notes 305-09.

governmental authority.<sup>279</sup> The Constitution posits no duties or affirmative responsibilities on the part of government, and assumes a laissez faire state as the baseline norm.<sup>280</sup>

In contrast, those scholars who argue that the Framers were primarily republicans de-emphasize Locke's influence and stress instead the influence of classical republican theory as modified by the English country party.<sup>281</sup> That so-called civic humanist tradition stressed the primacy of political life. It saw individual freedom as emerging only within the context of communal life.<sup>282</sup> Public participation in the self-government of the community was essential.<sup>283</sup> The danger to republican values lay in self-interestedness or corruption, which could destroy the virtue and freedom of any republic.<sup>284</sup>

Given its anti-individualistic orientation and its reliance on the works of seventeenth-century English theorist Thomas Harrington, who feared maldistribution of wealth as likely to breed self-interestedness or corruption,<sup>285</sup> the argument that the Framers were primarily republican has served lately as a foil for the libertarian assumptions of conventional constitutional jurisprudence and has been particularly associated with a search for affirmative or welfare rights.<sup>286</sup> As a political theory which stresses the communal good and the role of public life in the attainment of individual fulfillment, classical republicanism obviously conflicts with the starkly libertarian judgments of today's constitutional doctrine. Further, republican theory's emphasis on communal concern and public caretaking<sup>287</sup> seems to support a reading of the Constitution supportive

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279. It is implicitly used by Chief Justice Rehnquist in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).

280. See *supra* text accompanying notes 28-43.

281. See POCOCK, *supra* note 275, at 506-22.

282. JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA*, reprinted in *THE POLITICAL WRITINGS OF JAMES HARRINGTON: REPRESENTATIVE SELECTIONS* 56-60 (Charles Blitzer ed., 1955); POCOCK, *supra* note 275, at 49-80; Kathryn Abrams, *Law's Republicanism*, 97 *YALE L.J.* 1591, 1592 (1988).

283. Michelman, *Traces*, *supra* note 275, at 56.

284. Schultz, *supra* note 276, at 156; see also Gregory S. Alexander, *Time and Property in the American Legal Culture*, 66 *N.Y.U. L. REV.* 273, 280-81 (1991).

285. HARRINGTON, *supra* note 282, at 119-31 (arguing for the division of large estates).

286. See, e.g., Hirshman, *supra* note 273, at 1023-24. Yet the republican critique has come from the ideological right as well as the left. See KRAMNICK, *supra* note 274, at 369. Kramnick calls the use of the republican thesis by the left ironic, because he believes that the tradition was originally reactionary. Today it may provide an alternative to the now-entrenched Lockean world-view. *Id.* at 39. It is that entrenched and, I would claim, distorted version of Locke that lies behind the conventional assumptions underpinning contemporary constitutional and health law jurisprudence.

287. Thus, feminist theorists have attempted to connect the republican strand in American constitutional theory with a supposedly feminine voice that stresses social connectedness and

of mutual caring and the primacy of public values.<sup>288</sup>

This radical, if not utopian, view of the republican influence on the framing era is certainly vulnerable to dispute. Overstated, it overlooks the all too evident influence of Locke in eighteenth century American thought and the Framers' concern with the preservation of property.<sup>289</sup> And it is not easily reconciled with the text of *The Federalist Papers* and its partial preoccupation with the problem of self-interest and the need to check power.<sup>290</sup> Moreover, even if the Framers were card-carrying civic republicans, that hardly means that they were advocates for the Great Society or any other version of modern welfare statism. As Linda Hirschman has noted correctly, the republican revisionists have been far more successful in demonstrating the republican influence on the Framers' beliefs about political participation and self-government than they have been in connecting its influence to any substantive values or policies.<sup>291</sup>

The assertion that the Framers assumed a public health obligation on the part of government depends, however, neither on the acceptance nor on the rejection of the Lockean or republican hypotheses. The assertion is surprisingly compatible with modified versions of both theories, and may even highlight the ways in which the framing generation interwove theories that, considered abstractly, appear antagonistic.

The key to understanding why eighteenth century thought may have presumed a public health obligation lies first in the recognition that the Framers were primarily practical politicians and only secondarily political theorists. The purity of their theory was less important to them than its ability to resolve the problems they faced,<sup>292</sup> legitimate the govern-

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nurturing values. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 486-95; Sherry, *supra* note 275, at 530-37. Of course, there is nothing in classical republican theory itself which stresses values of nurturance. Communalism need not be empathetic and can easily be intolerant. See Abrams, *supra* note 282, at 1606-07; Howe, *supra* note 275, at 3.

288. I take this to be a greatly oversimplified statement of Beauchamp's view. See DAN E. BEAUCHAMP, *THE HEALTH OF THE REPUBLIC: EPIDEMICS, MEDICINE, AND MORALISM AS CHALLENGES TO DEMOCRACY* (1988).

289. See Richards, *supra* note 274, at 128. The classic statement on the Framers' concern for their economic self-interest is CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1935).

290. See, e.g., THE FEDERALIST NO. 10 (James Madison).

291. Hirschman, *supra* note 273, at 985.

292. This obviously raises a significant hurdle for any theory that purports to interpret the Constitution solely in accordance with the original understanding of the Framers. Even as to those issues on which there was substantial agreement among the Framers, their views often are not subject to logical deduction, because they were eclectic and often contradictory. Their preference for pragmatism over purity stands in sharp contrast to the formalism characteristic of the Rehnquist court. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 38.



ment they needed,<sup>293</sup> and provide a stable political order.<sup>294</sup> As a result, the Framers, unlike many modern-day scholars, drew from a variety of sources: from the republican to the liberal, the classical to the Enlightenment.<sup>295</sup> Protestant morality,<sup>296</sup> as well as the English common law, especially their reading of Blackstone, guided their beliefs and framed their vision.<sup>297</sup> As Isaac Kramnick has written, "There was a profusion and confusion of political tongues among the founders. They lived easily with that clatter; it is we, two hundred and more years later, who chafe at their inconsistency."<sup>298</sup>

The Framers could borrow from many theories because they did not appear as incompatible to them as the theories do to us. Of course, the differences between liberal and republican, not to mention federalist and anti-federalist,<sup>299</sup> were real and were of critical consequence to a number of issues. Theoretically, the republican and liberal strands differed over the relationship between the common good and the sum of individual goods,<sup>300</sup> and which was instrumental to which.<sup>301</sup> Another significant

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293. Thad W. Tate, *The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 375, 385-87, 391 (1965).

294. McDONALD, *supra* note 163, at 291.

295. *Id.*; Howe, *supra* note 275, at 1-2; Schultz, *supra* note 276, at 157-58. McDonald stresses the divisions and wide range of influences within American republican thought. McDONALD, *supra* note 163, at 66-67. He argues that the founding generation held a variety of beliefs stemming from a plurality of influences that to us would seem contradictory. *Id.* Joyce Oldham Appleby stresses the Enlightenment influence on the framing generation, especially upon Jefferson. Joyce Oldham Appleby, *What Is Still American in the Political Philosophy of Thomas Jefferson*, 39 WM. & MARY Q. 287, 290-94 (1982) (tracing Montesquieu's influence on Jefferson and Madison).

296. McDONALD, *supra* note 163, at 70-72.

297. *Id.* at 59; J. JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* (1988) (stressing the English common law tradition in American constitutional thought); see also Schultz, *supra* note 276, at 169-70 (emphasizing Blackstone's influence on American views of property).

298. KRAMNICK, *supra* note 274, at 261.

299. For a discussion of the federalist/anti-federalist debate, see Howe, *supra* note 275, *passim*.

300. The republican strand clearly emphasized that the common good was greater than the sum of individual goods. RONALD PETERS JR., *THE MASSACHUSETTS CONSTITUTION OF 1780* 94-98 (1978). Incipient individualists saw the matter somewhat differently. As John Trenchard, a veteran of the "paper war" of 1698, and his protege Thomas Gordon wrote in *Cato's Letters*, "What is the Publick, but the collective Body of private Men, as every private Man is a member of the Publick? And as the Whole ought to be concerned for the Preservation of every private Individual, it is the Duty of every Individual to be concerned for the Whole, in which himself is included." CATO'S LETTERS, No. 38, reprinted in *THE ENGLISH LIBERTARIAN HERITAGE* 93, 99 (David L. Jacobson ed., 3d ed. 1965).

301. Stephen Holmes notes that individualism was critical to early liberals as a way of breaking down the loyalties of caste, clan, ethnicity, and family. Stephen Holmes, *Liberal Guilt: Some Theoretical Origins of the Welfare State*, in *RESPONSIBILITY, RIGHTS, AND WELFARE: THE THEORY OF THE WELFARE STATE* 77, 96 (J. Moon ed., 1988).

difference concerned what constituted freedom in the state of nature,<sup>302</sup> which is but another way of asking whether individuals are primarily political or apolitical, communal or self-interested.<sup>303</sup>

What our current preoccupation with these very real differences obscures is that in the eighteenth century, before industrialization and urbanization irrevocably altered social life,<sup>304</sup> there was still much upon which all sides of the republican-liberal debate could agree.<sup>305</sup> Moreover, there was a political construct—with its own shared language and assumptions—to which all sides subscribed. Social contract theory was that construct.<sup>306</sup>

## B. Social Contract Theory

Social contract theory is typically associated with Thomas Hobbes, John Locke, and a liberal tradition that assumes the primacy of individuals. Although liberal individualism clearly formed a significant strand of the theory, social contract theory was amorphous and elastic enough to accommodate a variety of political psychologies and ideologies. That Thomas Hobbes and John Locke, James Madison and Jean Jacques Rousseau could all speak in the language of social contract suggests that the theory did not exclude either liberals or republicans, utopians or pessimists, individualists or communitarians. It was, rather, a bridge by which the separate and often contradictory strands of eighteenth century political theory could come together.<sup>307</sup>

At its most general level, the one upon which all could agree, social contract theory stressed that political legitimacy derived from the consent of the governed.<sup>308</sup> Radically, the theory postulated that individuals

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302. Many at the time saw liberty as existing only within the social contract. REID, *supra* note 297, at 80. Lockean thought broke with earlier views by considering an abstracted liberty that could be conceptualized, even if not fully realized, apart from the sovereign. APPLEBY, *supra* note 274, at 18-19. From this conception, government can be a threat to liberty, since liberty can preexist the social contract. Such a possibility cannot be fathomed from a classical republican, or indeed traditional common law, perspective. REID, *supra* note 297, at 5-6.

303. According to David Howe, this is where *The Federalist Papers* departed from earlier classical theory. Classical republican theory assumed that human virtue could exist only through public life. The writers of *The Federalist Papers* were less sanguine. While they accepted the existence of virtue, they were cognizant of self-interest, and believed it provided a surer footing than virtue for obtaining the public good. Howe, *supra* note 267, at 507-08.

304. See *infra* text accompanying notes 414-16.

305. See MARK TUSHNET, RED, WHITE, AND BLUE 7 (1988).

306. Tate, *supra* note 293, at 386-87.

307. Peters explores these influences, especially the republican influences in social contract theory in his study of the Massachusetts constitution of 1780. PETERS, *supra* note 300, *passim*. Barker traces the theory back to Plato's era. SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU at vii (Ernest Barker ed., 1960).

308. PETERS, *supra* note 300, at 136-38.

came together from a pre-political state, first to form a social compact in which they agreed to live in society and then a governmental compact in which they granted authority to the government.<sup>309</sup>

As an abstract and general theory, social contract had much to offer both republicans and liberals. To republicans, social contract theory emphasized the need for a social contract<sup>310</sup> to enable passage out of the individualistic state of nature and into a civil society where the common good could be pursued.<sup>311</sup> Under this view, the goal of the social contract was the fulfillment of the common good.<sup>312</sup> As Samuel West stated in 1776, "Thus we see that both reason and relation perfectly agree in pointing out the nature, end, and design of government, viz., that it is to promote the welfare and happiness of the community."<sup>313</sup> Unless governments fulfill these obligations and pursue the common good, they lack legitimacy.<sup>314</sup>

In the eighteenth century, liberals did not disagree about the role or essential meaning of the social contract. After all, it was John Locke, that early individualist,<sup>315</sup> who wrote that the legislative power "can never be suppos'd to extend farther than the common good but is obliged to secure every one's Property"<sup>316</sup> and that the authority and powers of the state are "to be directed to no other end, but the *Peace, Safety, and public good* of the People."<sup>317</sup> The preservation of property as an individual right was emphasized by Locke, and later by Madison,<sup>318</sup> but property also played a critical role in the republican tradition.<sup>319</sup> Before

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309. See Barker, *supra* note 307, at xii; PETERS, *supra* note 300, at 95.

310. Peters discusses how the drafters of the Massachusetts constitution of 1780 followed Hobbes in seeing the state of nature as a bleak place in which there was constant war. PETERS, *supra* note 300, at 90-94.

311. See *id.* at 103.

312. THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 26 (Oscar Handlin & Mary Handlin eds., 1966).

313. PETERS, *supra* note 300, at 106 (quoting Samuel West).

314. *Id.*

315. Bussiere argues that Locke was ambiguous about societal obligations to the poor. Elizabeth Bussiere, *Social Welfare and the Courts: The Dilemmas of Liberalism* 59 (1989) (dissertation, Brandeis University, Univ. Microfilms No. 8910659). Stephen Holmes also emphasizes the continuity between the thinking of Locke and Hobbes and modern welfare state theories. Holmes, *supra* note 301, at 80, 86.

316. LOCKE, *supra* note 81, at 131. Barker argues that Locke believed that the government's obligations were closer to those placed upon a trustee, under equity doctrine, than those founded upon legal theories of contract. BARKER, *supra* note 307, at xxiii.

317. LOCKE, *supra* note 81, at 131.

318. NEDELSKY, *supra* note 268, at 22.

319. Michelman, *supra* note 268, at 1330; Sherry, *supra* note 275, at 556. The key difference between Lockeans and classical republicans was not the importance of property, but whether or not it should be tied to established forms of individual labor. KRAMNICK, *supra* note 274, at 193-99.

the triumph of laissez faire capitalism in the nineteenth century,<sup>320</sup> liberals and republicans alike could and did speak the language of social contract, which included an assertion that governments are created to fulfill the public good.

To Americans searching for a way to legitimate their separation from England, social contract theory provided an ideal inspiration. With its emphasis on the consent of the governed and its insistence that compacts made can be broken, the theory appeared to provide a legalistic justification for American independence from England.<sup>321</sup> It is thus not surprising that Jefferson relied upon the rhetoric of social contract theory in the Declaration of Independence.<sup>322</sup>

Social contract theory provided more than a justification for America's independence. It also helped to legitimate state, and eventually federal, authority once independence was achieved.<sup>323</sup> Although often misunderstanding the technical details of the theory, Americans after the Revolution perceived that their governmental contract had dissolved.<sup>324</sup> They thus turned to social contract theory to legitimate the governmental authority they sought. State constitutions,<sup>325</sup> and ultimately the federal one, were conceived as new social contracts among the people which would legitimate the authority of the state. This is most evident in the Constitution's preamble "We the People" and in its reliance on ratification by the states "in convention"<sup>326</sup> rather than by the legislatures. It was this ratification of the document by conventions that led Chief Justice Marshall years later to see the Constitution as deriving

320. Kramnick argues that the liberal, individualistic influence emerged earlier in American thought, although he does not disagree that in the framing generation it was still intermingled with notions of a common good and was not yet a theory of laissez faire. KRAMNICK, *supra* note 274, at 196.

321. Tate, *supra* note 293, at 378. Of course, the "law" was natural law, but the use of social contract theory envisioned a natural law that took much of the form, and indeed much of the substance, of prior positive law.

322. The Declaration states in relevant part:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness—That to secure these rights, governments are instituted among men, deriving their just Powers from the Consent of the Governed, that whenever any form of government becomes destructive of these Ends, it is the Right of the People to alter or abolish it, and to institute new government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

323. Tate, *supra* note 293, at 386.

324. *Id.* at 37; see also PETERS, *supra* note 300, at 66-69 (arguing that after the Revolution, Americans were confused as to whether they were in a state of nature or a civil society).

325. Tate, *supra* note 293, at 282-286.

326. U.S. CONST. art. VII.

its authority not from the states, but from the people as a whole.<sup>327</sup>

Social contract theory further provided a basis for judging governments. Implicit in the view that the compact between the British and Americans had been broken by the time of the Declaration of Independence was the theory that governments which fail to respect the social compact are, in effect, illegitimate. Further, to fulfill compact obligations, governments must serve the common good.<sup>328</sup> State constitutions of the confederation era were replete with such statements.<sup>329</sup> The Virginia Constitution of 1776 is illustrative:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . . and that which government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to public weal.<sup>330</sup>

Its words were echoed eleven years later in the Constitution's preamble: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution . . . ." <sup>331</sup> The same vision appears in *The Federalist Papers*, which states that "[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."<sup>332</sup>

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327. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819).

328. Respect for, if not protection of, pre-existing natural rights also played a role in contract theory's view of governmental legitimacy. Thus, Locke emphasized natural rights of property; *see supra* text accompanying notes 318-19. Jefferson, in the Declaration of Independence, pointed to England's violation of the colonists' "unalienable rights" as the reason for the colonists' Declaration of Independence. Social contract theory's recognition of negative rights did not exclude a purposeful or positive reason for the formation and legitimation of governments. Indeed, even the Declaration of Independence, which was perhaps the era's most libertarian exposition of social contract ideology, saw governments as being created to "effect" the People's "safety and happiness." As shown in this section, other statements of the era, including the Constitution, gave greater emphasis to the common good.

329. *See, e.g.*, MD. CONST. of 1776 ("That all government of right originates from the people, is founded in compact only, and instituted solely for the good of whole."); VT. CONST. of 1777 ("[A]ll government ought to be instituted and supported for the security and protection of the community"); MASS. CONST. of 1780, pmbl. ("The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.").

330. VA. CONST. of 1776, § 3.

331. U.S. CONST. pmbl.

332. THE FEDERALIST NO. 57, at 244 (James Madison) (Charles A. Beard ed., 1964).

### C. Public Health as a Common Good

The eighteenth century belief in government's compact obligation to fulfill the common good is consistent with the pattern of regulation and provision evident in colonial and early federalist public health regulations. More fundamentally, it suggests that the framing generation may have seen the duty to protect health as stemming from the social or governmental contract in which individual and state were related by mutual obligations.

Although social contract theorists, and the framing generation in general, spoke often about the public good, the common weal, and the general welfare, they provided remarkably little elucidation of those phrases. Social contract theory was eclectic and amorphous. While everyone might have agreed about the government's obligation to protect the public good, they often disagreed about exactly what that meant. To Locke, the concept was ultimately individualistic. Individuals agree to leave the state of nature "for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name *Property*."<sup>333</sup> Jefferson, echoing that language, saw preservation of "life, liberty and the pursuit of happiness" as the goal of government.<sup>334</sup> Madison saw the preservation of property as among the primary reasons for having government.<sup>335</sup> He may have seen that goal as largely instrumental, however, since he believed that the preservation of property was essential to maintaining the ability of government to achieve the common good.<sup>336</sup>

Despite the disagreement and uncertainty over the actual meaning of "the common good," it seems likely that the preservation of public health, as exemplified by protection against epidemics, was one meaning that all would share. Tradition and practice pointed to it. Theorists such as Montesquieu supported it.<sup>337</sup> So did popular political discourse. According to historian Ronald Peters, "the answer of the literature is unequivocal on this point: the only end of civil society is the common good. And the *sine qua non* of the common good is public safety—*salus populi suprem lex est*."<sup>338</sup> In an era of frequent epidemics, safety meant

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333. LOCKE, *supra* note 81, § 123, at 368.

334. *See supra* note 322.

335. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 49 (Marvin Meyers ed., 1973).

336. Michelman, *supra* note 268, at 1331-33.

337. MONTESQUIEU, *THE SPIRIT OF LAWS* bk. 23, ch. 29, at 316-18 (David W. Carrithers ed., 1977) (discussing public hospitals and stating that all states owe citizens life compatible with health).

338. PETERS, *supra* note 300, at 103.

more than protection from foes—it likely included, or was often associated with, preservation of health.<sup>339</sup>

The equation of public health with safety, and thereby with the common good, did not necessarily derive from any heightened sense of altruism.<sup>340</sup> To say that the framing generation believed that the social contract obligated government to protect the public's health and to provide care to the ill is not to say that they were utopians or even humanitarians. Many in the framing generation supported slavery. They also held negative views about the indigent.<sup>341</sup> Much of the care provided to the indigent ill emerged from the almshouse and poor law tradition,<sup>342</sup> a tradition not known for the dignity and respect it bestowed upon the poor.<sup>343</sup> It was, therefore, not altruism that caused public health to be part of the common good, but a tradition<sup>344</sup> motivated by the pragmatism and pessimism<sup>345</sup> derived from the insecurity of life in a preindustrial age.<sup>346</sup>

In an era of frequent epidemics, when an increasing number of physicians thought disease stemmed either from accumulated filth in public places or from contagion,<sup>347</sup> it likely appeared self-evident that public health protection constituted a core element of the common good. The idea commonly held today that health is a matter of individual life style choices and treatments determined privately by patients and physicians<sup>348</sup> would have seemed insufficient in the eighteenth century.<sup>349</sup> Government always had attempted to protect public health, and it al-

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339. This view was more clearly stated in later police power cases, where the courts invoked "*salus populi suprem lex est*" in support of government authority to isolate the ill. *Haverty v. Bass*, 66 Me. 71, 73-74 (1876). Indeed, in 19th century cases, health care was often posited as the clear example of government authority under the police power. Parmet, *supra* note 5, at 744-45.

340. Nonetheless, some early social moralists such as Richard Woodward and William Paley relied upon social contract theory to argue for increased rights for the poor. See Thomas Horne, *Welfare Rights as Property Rights*, in RESPONSIBILITY, RIGHTS, AND WELFARE, *supra* note 301, at 131-41; Bussiere, *supra* note 315, at 59-60.

341. Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 CAL. L. REV. 407, 416 (1966).

342. Thus, for example, the Guardians of the Poor, who kept the almshouse in Philadelphia, were responsible for caring for the poor during the epidemic of 1793. POWELL, *supra* note 193, at 57-58; see also ROSENBERG, *supra* note 194, at 29, 52.

343. See *supra* text accompanying notes 97-98.

344. See *supra* text accompanying notes 98-101.

345. See *infra* text accompanying notes 347-51.

346. APPLEBY, *supra* note 274, at 27.

347. See *supra* text accompanying notes 195-97.

348. See *supra* note 65.

349. Many, however, thought disease was God's chastisement and a matter of personal responsibility in that it fell upon the sinner. See *supra* text accompanying notes 110-12.

ways would.<sup>350</sup> Whether one endorsed a republican theory of communal virtue or a liberal theory of self-interest,<sup>351</sup> pragmatism compelled the same conclusion. Public health was a prerequisite to public safety. It constituted a part of the common good. As a result, under social contract theory, government was not only entitled, but also obligated, to protect public health.

The different schools of thought would have framed the issue from different theoretical perspectives. Those influenced by classical republican thought accepted communal obligations and their primacy over individual rights.<sup>352</sup> With such a view, in a time of repeated epidemics which could regularly kill a large percentage of the population, protection of public health fit easily within understanding of the public good.<sup>353</sup> Moreover, the classical republican emphasis on self-government would also have pointed to a further relationship between the public health and the common good.<sup>354</sup> As the framing generation knew only too well, self-government becomes insecure under the threat of epidemics. Colonial history, in which governments repeatedly had to adjourn in the face of epidemics, would have suggested to the Framers the dangers disease posed to self-rule.<sup>355</sup> Although it occurred after the ratification of the Constitution, the collapse of civil government in Philadelphia in 1793 followed a scenario that the Framers could have imagined.<sup>356</sup> Even without the total collapse of self-government, the republican ideal would have required government to care for the ill because individuals who lack health cannot participate in government.<sup>357</sup> Public health, therefore,

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350. See *supra* text accompanying notes 66-266.

351. Recall that the prevention of epidemics is at least partially a public good, which even modern market theory understands requires public action. See *supra* text accompanying notes 60-62.

352. See *supra* text accompanying notes 281-84.

353. BEAUCHAMP, *supra* note 288, tries to do just that, building upon WALZER, *supra* note 67, *passim*. The interesting question for 20th century republican theory is whether the decline of epidemics led to a decline in perceived social obligation. Duffy, for example, suggests that public concern always waned when threats of epidemics receded. DUFFY, SANITARIANS, *supra* note 74, at 53.

354. POCOCK, *supra* note 275, at 521. To many at the time, disease itself was seen as a sign of corruption and decline. Jefferson and his friend Dr. Benjamin Rush, for example, believed that certain diseases only occurred in corrupt monarchies. George Rosen, *Political Order and Human Health in Jeffersonian Thought*, 26 BULL. HIST. MED. 32-44 (1952).

355. DUFFY, EPIDEMICS, *supra* note 117, at 110.

356. See *supra* text accompanying notes 218-31.

357. Michelman has most extensively developed this aspect of the republican argument for welfare rights. According to Michelman, under a republican vision self-government requires a certain minimal provision. Michelman, *Possession vs. Distribution*, *supra* note 268, at 1329. Although Michelman makes his argument primarily with respect to real property rights, the same could well be said of health care. See also NORMAN DANIELS, JUST HEALTH CARE 36-



would have been a necessary part of the common good because it was a precondition to maintaining the republic wherein that good could flourish.<sup>358</sup>

Lockeans would also have seen public health protection as falling within their understanding of the common good. To Locke, for example, the social contract creating civil society was formed not because the state of nature was idyllic, but because it was insecure. Without social protections, individuals pose threats to one another. Individuals enter into society “only with an intention in every one the better to preserve himself his Liberty and Property.”<sup>359</sup> Included within Locke’s definition of an individual’s property was the individual’s “own *Person*.”<sup>360</sup> Although the protection of property was an essential element of Lockean thought, so too was the protection of self.

In a time of frequent epidemics, the preservation of self and property almost inevitably would have been seen as requiring public efforts to prevent the spread of disease. As individuals came into contact with each other, as commerce and population grew, epidemics developed.<sup>361</sup> Individuals faced death, commerce was destroyed, and property was threatened.<sup>362</sup> The preservation of individual interests thus necessarily required efforts to prevent disease. Whether contagionist or sanitarian, pragmatism—not benevolence—ultimately required the care of those who could not afford to care for themselves. Without provision for the poor, including their treatment during times of illness, and steps such as inoculation designed to prevent illness, other individual interests would have remained insecure.<sup>363</sup> Thus, individual preservation was inextricably linked to public health policies.<sup>364</sup> If the Lockean individualist en-

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57 (1985) (arguing that a certain minimum of health care is necessary to permit individuals to participate as members of human society).

358. Of course, this is circular. But then, as many have pointed out, there was an inherent circularity in 18th century republican thought. PETERS, *supra* note 300, at 103-07. Peters ultimately concludes from this circularity that there was no substantive content whatsoever to the idea of the common good and that the idea ultimately collapsed into majoritarianism—i.e., the common good was whatever the majority said it was. While this may have been the effective result, the conclusion that there was no meaning to the notion at all contrasts with the natural law underpinnings of social contract theory. BARKER, *supra* note 307, at x-xii.

359. LOCKE, *supra* note 81, § 131, at 371.

360. *Id.* § 27, at 305.

361. *See supra* text accompanying notes 56-58.

362. Thus, for example, during the 1793 Philadelphia epidemic, commerce in Philadelphia suffered. Thousands became poor because of the epidemic. POWELL, *supra* note 193, at 242, 264-77; *see also* DUFFY, EPIDEMICS, *supra* note 117, at 111.

363. *See* POWELL, *supra* note 193, at 58 (observing that unless the Philadelphia poor were treated, everyone was at risk).

364. This still applies today. Individual solutions remain incapable of servicing the public’s health, as the re-emergence of tuberculosis makes all too clear. *See* UNITED HOSPITAL FUND,

tered the social contract to preserve his or her own self and property, then the society's obligation under that contract would by necessity have included the protection of the public's health, the only way in which the individual's health could be reasonably protected.<sup>365</sup>

#### D. Social Contract Theory and Public Health Protection

Social contract theory, in both its individualistic and republican forms, supported an assumption that the public good required the protection of health. As a result, the state was not only empowered to protect the public's health, but was obligated to do so, at least under natural, if not positive, law.<sup>366</sup> A government that failed to protect health violated the terms of its compact and had no right to expect obedience. A government's authority was a function of its fulfillment of its duties.

Under social contract theory, individuals gave obedience or consent to society on the understanding that they would receive protection from it. Far from endorsing a laissez faire understanding of the relationship between individual and state, as is often mistakenly assumed,<sup>367</sup> social contract theory in its eighteenth century form actually assumed a reciprocal relationship between individual rights and governmental duties.

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*supra* note 34, at 5-6. The health of individuals depends, to a large degree, on public matters such as sanitation, the healthfulness of the environment, and the existence of communicable and infectious diseases in others. Victor W. Seidel, *Health Care in the United States, A Thousand Points of Blight*, 5 *ARTHRITIS CARE & RESEARCH* 63, 63-64 (1992).

365. Locke himself focused on the formation of the original social compact and gave little amplification to the secondary governmental contract. BARKER, *supra* note 307, at xiii, xxiii. Americans, however, tended to conflate the two, seeing their break with England, for example, as resulting from the violation of the social compact itself. Tate, *supra* note 293, at 378. As a result, Americans may have assumed that governments formed by the governmental compact incurred the obligations Locke placed upon society due to the social compact.

366. There is no doubt that the social contract views of the framing era were deeply infused with concepts of natural law. MCDONALD, *supra* note 163, at 65-66; PETERS, *supra* note 300, at 66-70. Thus, to the framing era, obligations under the social contract were indeed obligatory or law-like. They were not mere moral or subjective preferences. On the other hand, the Framers' belief that an obligation under the social contract derived from natural law does not imply that the Framers approved of the use of natural law by judges to review edicts of positive law. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398-400 (1798) (Iredell, J., dissenting); REID, *supra* note 297, at 28-29 (arguing that beliefs in natural law did not mean that natural law trumped positive law; rather, natural law was usually assumed to reside within positive law); compare Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1151-77 (1987) (arguing for judges to use natural law in constitutional cases) with ROBERT BORK, *THE TEMPTING OF AMERICA* 209-10 (1990). In more contemporary parlance, the Framers' belief that governments that did not protect public health were illegitimate does not imply that the Framers believed individuals had judicially enforceable rights against governments which breached that duty. For further discussion, see *infra* text accompanying notes 421-25.

367. See *supra* text accompanying notes 23-30.

Under this understanding of the legitimacy of the state, individual rights, such as rights of property,<sup>368</sup> were necessarily curtailed by the social and governmental compacts.<sup>369</sup> In society, as opposed to the state of nature, individuals did not have unlimited or absolute control over themselves or their property.<sup>370</sup> Their rights were necessarily limited by social obligation. This fully accorded with the common law's understanding of property, especially the law of nuisance which limited property rights in the public interest.<sup>371</sup> It also accorded with the experiences of a mercantilist society in which regulation, not free enterprise, was the norm.<sup>372</sup> Most importantly, this view of rights would have been compatible with the era's public health practices, which limited and even impounded property in order to protect the public health.<sup>373</sup> The framing generation would have had no reason to see a conflict between rights of

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368. Reid and McDonald make the point that the common law's recognition of rights of property in the 18th century was not at all absolutist or incompatible with regulation for the common good. MCDONALD, *supra* note 163, at 14; REID, *supra* note 297, at 2, 32-39, 59. Only in the 19th century, after the advent of a far more laissez faire ideology, did governmental health regulations begin to appear to be in conflict with rights of property. Parmet, *supra* note 5, at 750.

369. The republican strand saw property rights as deriving from, or at least, dependent upon the social contract. See *supra* text accompanying notes 310-20. Locke's unique contribution was to define property as pre-existing the social contract. LOCKE, *supra* note 81, § 123, at 368. Hobbes saw rights existing pre-socially, but envisioned their complete subordination to the governmental compact enthroning the plenary sovereign. HOBBS, *supra* note 80, at 160-61.

370. PETERS, *supra* note 300, at 100 (citing William Whiting). Locke, ironically, did not fully support the idea of plenary property rights even in the state of nature. He recognized that even in the state nature, property rights were curtailed by the law of necessity. Bussiere, *supra* note 315, at 58.

371. See EPSTEIN, *supra* note 53, at 111-12 (discussing how nuisance limits private rights when those rights entail public wrongs); MCDONALD, *supra* note 163, at 63-65; SCHWARTZ, *supra* note 61, at 18-46; cf. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2898-901 (1992). Of course, the government's ability to limit property rights was itself limited by the idea of natural rights, which were inalienable under social contract theory. See PETERS, *supra* note 300, at 87. Eventually, in the 19th century, property rights began to be viewed as absolute and protected in their absolutism by natural law. This was the view of natural law that culminated in the substantive due process doctrine of the *Lochner*-era Court. See *Lochner v. New York*, 198 U.S. 45 (1905). This view may be returning, given the Court's recent holding that the Takings Clause limits certain uncompensated regulations to common law baselines, regardless of the strength of the state's justification. *Lucas*, 112 S. Ct. at 2889-901. This interpretation resembles *Lochner* in that it takes the common law as static, immune from reconsideration. *Id.* at 2921 (Stevens, J., dissenting). It fails to recognize the common law's broader imperative that private rights must be reconciled with the public good.

372. MCDONALD, *supra* note 163, at 13-41.

373. This practice accorded with the common law view of takings, which assumed that government could take private property for public, but not private, use. See EPSTEIN, *supra* note 54, at 111; Morton J. Horwitz, *1787: The Constitution Perspective: Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 68 (1987) [hereinafter Horwitz, *Republicanism*].

property and public health protection. Even opponents of redistribution, such as Madison,<sup>374</sup> would not have seen public health measures as redistributive.<sup>375</sup>

To Locke and the Framers, the social compact was a way of theoretically delineating the necessary relationship between individual, society, and the state. Individual rights were curtailed not because they were not recognized or respected, but only because they were ultimately to be realized by achieving the common good which government was obligated by compact to fulfill.

As a result, the sharp distinction that exists under modern doctrine between positive and negative rights<sup>376</sup> could not have existed in the framing era with respect to public health care. As many scholars have pointed out, eighteenth century thought did not generally distinguish between positive and negative rights and liberties the way we do today.<sup>377</sup> Under common law, in contrast to *DeShaney*, any person who gave allegiance to a government was entitled to have her health and security protected by it.<sup>378</sup> Allegiance and protection were reciprocal and even correlative.<sup>379</sup>

Thus, the pattern of colonial and early federalist public health laws accords with the understanding of rights and liberties, obligations and duties, prevailing at the time of the Constitution's framing. Governments were not only empowered to protect the public health, but were expected to do so. When crises occurred, they were expected to act. Their authority to do so was unquestioned.

Individual rights of property, travel, and even access to one's home gave way before the public health power. Those restraints were not seen as violations of individual liberties, as we might see them today. Rather, they were part and parcel of the relationship under the social or governmental contract: a construct which gave society a claim upon individuals

374. NEDELSKY, *supra* note 268, at 30; Horwitz, *Republicanism*, *supra* note 373, at 64.

375. Remnants of this view persisted until the 1930s. Under the classical view of the police power, government did not violate individual rights as long as government acted to promote the public's health, morals, or welfare. See Parmet, *supra* note 5, at 744. Regulations to benefit particular rather than public interests, however, were seen as redistributive and ultimately ultra vires. See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905); Horwitz, *Republicanism*, *supra* note 373, at 59-60.

376. See *supra* text accompanying notes 11-27.

377. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 25-26 (1988); REID, *supra* note 297, at 2; Bussiere, *supra* note 315, at 49.

378. NELSON, *supra* note 377, at 25.

379. *Id.* at 26 (quoting from THEODORE D. WELD, *SLAVERY IN THE DISTRICT OF COLUMBIA* 278 (1838)).

only in return for the fulfillment of its obligation to provide care and protection. Thus, when ships arrived from plague-infested ports, they could be quarantined. Homes could be impounded; privies regulated. When individuals were sick, they were cared for. When they could not afford care, it was usually provided. As members of the society, individuals lacked absolute rights; instead, they received the benefits of the epidemics or plagues that were prevented by the authority of government acting to preserve the common good.

## V. Explaining the Silence: The Impact of Federalism

### A. The Federal Debate

My conclusion that the framing generation assumed a governmental obligation to protect the public is compatible with the practice and theory of the time. A mystery, however, remains. Why does the Constitution not simply say "the government is obligated to protect the health of citizens?" The answer to that question may lie in the self-evident nature of the public health obligation from the Framers' perspective. The duty was not controversial and was not a subject of debate. States and local governments acted to protect the public health. Their authority and obligation to do so was not on the table.

The years between the Declaration of Independence and the ratification of the Constitution were characterized by intense political debate in America. As a new nation engaged in the uniquely self-conscious act of nation-making, many issues were open for discussion: the relationship between the states; the role of the federal government; the degree of protection to be afforded to creditors as opposed to debtors; the power of the national executive; the role of the judiciary; and what to do about the evil of slavery. Little discussion, however, focused upon those matters, primarily considered to be local, which were not subject to controversy nor in need of change. As the historian David Howe has emphasized, the theory of *The Federalist Papers*, and one might add of the Constitution itself, was never meant to be a complete political theory.<sup>380</sup> It was not a comprehensive analysis of the relationship of individual to government or of the nature of rights themselves. Those issues, understood through the teachings of the common law and the experience of communities, and developed in the theory of social contract, were simply irrelevant to the debate of 1787.<sup>381</sup> There was, therefore, no need to discuss them in the

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380. HOWE, *supra* note 267, at 506.

381. *Id.*; see also Tate, *supra* note 293, at 389-90 (Framers assumed that the laws would continue).

debates and pamphlets surrounding the Constitution's ratification.

Federalism, moreover, provides another key to understanding the paucity of discussion about the public health obligation. The central issue in the constitutional debates of 1787 was the reformulation of the relationship between the states and the central government. Federalists saw the need for a strengthened national government to preserve national unity, and ultimately to secure the rights of property<sup>382</sup> and fruits of commerce.<sup>383</sup> For a variety of reasons, the anti-federalists distrusted increased centralization and feared that the federal scheme would jeopardize the role of the states.<sup>384</sup> The federalists responded by justifying the need for increased nationalization and dismissed the anti-federalist fears. They argued against a bill of rights, claiming it would be misread as constituting the exclusive list of federal rights.<sup>385</sup> Neither federalists nor anti-federalists, however, felt the need to debate the obligations of local governments. Thus, a state or local government's obligation to protect the public health was not at issue.

John Jay's discussion in *The Federalist No. 3* provides a good example of how national issues hid the assumption of a public health obligation. Echoing Locke, Jay begins his analysis with a discussion of the reasons why governments are necessary. He writes, "Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first."<sup>386</sup> He then goes on to concede that "[t]he *safety* of the people doubtless has relation to a great variety of circumstances and considerations, and consequently affords great latitude to those who wish to define it precisely and comprehensively."<sup>387</sup> Discussing all the ways in which governments must provide for safety, however, is not his goal; instead, he focuses his discussion on only one form: "the preservation of peace and tranquillity, as well as against dangers from *foreign arms and influence*, as from dangers of the *like kind* arising from domestic causes."<sup>388</sup>

This form of protection is addressed because it forms the basis for the federalists' call for increased national strength. Protection from for-

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382. NEDELSKY, *supra* note 268, at 185-86.

383. Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 86-87 (1989); KRAMNICK, *supra* note 274, at 265.

384. Rose, *supra* note 383, at 84. And, of course, the anti-federalists may have proven the better prophets.

385. Randy E. Barnett, *Reconceiving The Ninth Amendment*, 74 CORNELL L. REV. 1, 8 (1988).

386. THE FEDERALIST NO. 3, *supra* note 332, at 42

387. *Id.*

388. *Id.*

eign armies requires greater national strength and unity in foreign dealings.<sup>389</sup> Safety from domestic uprisings also requires national unity because states that are not unified are either too weak to repel uprisings (as in the case of Shay's rebellion)<sup>390</sup> or more prone to inevitable conflict against each other.<sup>391</sup> None of this negates the fact that states and local governments were assumed to have an obligation to protect safety in other ways, such as by protecting the public health. Jay initially suggests that there are other protective roles for governments—presumably state and local governments—to play.<sup>392</sup> Those other roles, however, were not relevant to the question of national unity and, therefore, not very pertinent to the debate at hand.<sup>393</sup> As Hamilton stated in *The Federalist No. 17*:

The variety of more minute interests, which will necessarily fall under the superintendence of the *local* administrations, and which will form so many rivulets of influence, running through every part of the society, cannot be particularized, without involving a detail too tedious and uninteresting to compensate for the instruction it might afford.<sup>394</sup>

With a new governmental structure to design, there was no need to debate such a timeless and inevitable function as preservation of health.

## B. The Framers' Views of Positive Rights

The framing generation's focus on the problems attendant to developing a national state suggests not only why the constitutional text and debates are silent about the public health obligation, but also why the Constitution apparently emphasizes negative rights and limitations on governmental authority. Today, we often attribute the Constitution's seeming obsession with limiting authority to the influences of Lockean individualism.<sup>395</sup>

Although the constitutional debates were filled with concerns about limits on governmental authority,<sup>396</sup> these concerns did not necessarily stem from a libertarian or radically individualistic assumption about the

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389. THE FEDERALIST NOS. 3-5 (John Jay), No. 6 (Alexander Hamilton).

390. THE FEDERALIST NO. 6 (Alexander Hamilton).

391. THE FEDERALIST NOS. 6-8 (Alexander Hamilton). Madison's argument in *The Federalist No. 10* can be seen as an extension of this view. Small states may be captured by factions and are less likely to respect the common peace.

392. THE FEDERALIST NO. 3 (John Jay).

393. It was only later, after ratification, that the apparent conflict between protection of health and national unity in commerce became evident. See Parmet, *supra* note 5, at 745.

394. THE FEDERALIST NO. 17 (Alexander Hamilton).

395. See *supra* text accompanying notes 273-80.

396. THE FEDERALIST NO. 10 (James Madison); Rose, *supra* note 383, at 84.

relationship between individual and government. The Lockeanism of the eighteenth century was completely compatible with and even supportive of an assertion of an affirmative role for the body politic.<sup>397</sup> The reciprocal relationship between individual and community, however, was not part of the federal structure. It preceded the federal structure because it was embedded in the prior social or governmental compact that articulated the relationship and obligations between individuals and their state or local governments. Thus, if there were reciprocal rights and obligations between individuals and political authorities, they existed not at the federal level, but at the more intimate level of the state or the local government.<sup>398</sup> The federal constitution was silent about public health and lends itself to being interpreted as a negative document not because the Framers meant to alter the practices common in states and towns, but precisely because the Framers saw the positive obligation to protect the public health as deriving from a prior contract, which the federal constitution did not displace.

That a Constitution filled with limits upon government was not seen as a critique of the obligation of states and localities to protect the public health becomes clearer by reviewing what happened after ratification. Throughout the 1790s, states expanded their role in protecting the public health.<sup>399</sup> At the same time, the national debate focused on the expansion of national authority, not the existence of state obligations. In opposing the passage of a bill to regulate cod fishery in 1792, James Madison warned against a broad reading of the Constitution's "national welfare" clause. He stated that if that clause were given a broad meaning, Congress could

take into their own hands the education of children, establishing in like manner schools throughout the Union; they may assume the provision for the poor; they may undertake the regulation of all roads other than post-roads; in short, everything from the highest object of state legislation down to the most minute object of police,

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397. See *supra* text accompanying notes 315-17, 328-32; Horwitz, *supra* note 373, at 66-72.

398. The obligation to provide for public education, for example, was explicitly stated in the Massachusetts constitution of 1787. However, according to Oscar and Mary Handlin, the provision was controversial, not because people doubted the public obligation to provide for education, but because they felt that the obligation lay within the province of local communities rather than state governments. DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION, *supra* note 312, at 29. Similarly with public health protection, it is not always apparent whether 18th century Americans saw the primary governmental contract as existing at the state or local level.

399. See *supra* text accompanying notes 163-66, 202-17.



would be thrown under the power of Congress . . . ."<sup>400</sup>

The result would be the diminution of the role of the states.

The history of Congress's actions with respect to public health legislation itself sheds further light on how federalism affected the debate.<sup>401</sup> For example, in 1796, with the Philadelphia yellow fever epidemic fresh in everyone's mind, Congress debated a law authorizing the President to institute maritime quarantines.<sup>402</sup> The question before Congress was not whether governments were obligated to protect the public health, but rather to which jurisdiction, federal or state, the task of regulating ports fell.<sup>403</sup> Opponents of the bill objected not to the idea of quarantine, nor to the assertion of public authority over individual right, but to the expansion of *federal* authority. Representative Hester argued that "[m]any of the States lay very distant from the seat of Government, and before information could be given to the President of the apprehension of any pestilence being introduced, and his answer received, the disease might be introduced into the country, and great havoc made amongst our citizens."<sup>404</sup> Representative Sitgreaves disagreed, arguing that:

the strongest and best reason for a law, such as the one proposed, is, that it is a matter of very serious doubt whether, upon this subject, the States had any authority at all, and whether all such power is not vested by the Constitution in the Congress, under their general authority to regulate commerce and navigation.<sup>405</sup>

Representative Gallatin responded that the "regulation of quarantine had nothing to do with commerce. It was a regulation of internal police. It was to preserve the health of a certain place, by preventing the introduction of pestilential diseases, by preventing persons coming from coun-

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400. Remarks of James Madison in the House of Representatives (Feb. 7, 1792), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 429 (Jonathan Elliot ed., 1881).

401. See generally Michael S. Morgenstern, *The Role of the Federal Government in Protecting Citizens from Communicable Diseases*, 47 U. CIN. L. REV. 537 (1978).

402. BESS FURMAN, A PROFILE OF THE UNITED STATES PUBLIC HEALTH SERVICE 1798-1948, at 10-11 (1973).

403. This problem magnified as the years passed. An early warning came in the "petition of sundry merchants residing in the City and State of New York" who appealed to Congress to relieve them of the burdens of New York's quarantine laws. 11 ANNALS OF CONG. 991 (1802). Justice Marshall provided the first judicial discussion of the issue in *Gibbons v. Ogden* when he recognized that state power to protect the public health might at times conflict with and have to give way to Congressional regulation of commerce. 22 U.S. (9 Wheat.) 1, 235-37 (1824). By the end of the 19th century, the tension between local police powers and nationalization of commerce had become a significant problem for constitutional law. E.g., Blewett H. Lee, *Limitations Imposed by the Federal Constitution on the Right of the States to Enact Quarantine Laws*, 2 HARV. L. REV. 267 (1889); William H. Cowles, *State Quarantine Laws and the Federal Constitution*, 25 AM. U. L. REV. 45 (1891).

404. 5 ANNALS OF CONG. 1347-48 (1796).

405. 5 *id.* at 1350; see also 5 *id.* at 1348 (remarks of Rep. Smith).

tries where they were prevalent.”<sup>406</sup> He added that “when the Legislatures of different States had legislated on the subject, they had thought it an important branch of their duty.”<sup>407</sup> Ultimately, a compromise was reached. The section of the bill authorizing the President to enforce quarantines was stricken<sup>408</sup> and the bill was enacted giving the President power to assist states seeking cooperation in the enforcement of their own quarantine laws.<sup>409</sup>

Two years later, Congress enacted the Act for the Relief of the Sick and Disabled Seamen.<sup>410</sup> This Act was an early federal social insurance program, creating a payroll tax for sailors to provide for their medical care. Opposition to the Act was again primarily predicated on federalism grounds.<sup>411</sup> According to a Representative of Massachusetts, the Act was unnecessary because “provision is already made for sick and disabled persons of every description, sailors as well as others, with which every person in the community is charged.”<sup>412</sup>

Thus, the Congress of the 1790s, which included many of the Framers, maintained the assumption that the obligation to protect health was a public one. For them, the only constitutional question was which government had the obligation: federal, state, or local?

In focusing on issues related to their experiment in federalism, the Framers may have led succeeding generations astray as to their intentions. We look to their debates on the structure of the federal government, the relationship between the federal government and the states, and the limitations placed on governmental authority. We see in the Constitution, particularly after its amendment by the Bill of Rights, the architecture of government and the rights of individuals against that limited government. The Constitution and the debates surrounding it appear on their face to support current conventional assumptions that the Framers did not believe in public duties. After all, when we look at the Constitution, we see no mention of governmental obligations and perceive no more than a hint of a social contract creating reciprocal rights and obligations between individual and community.

We see such a “negative Constitution” not because the eighteenth century was an age of libertarianism, but because the Constitution we are

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406. 5 *id.* at 1353.

407. *Id.*

408. 5 *id.* at 1359.

409. Act of May 27, 1796, ch. 31, 1 Stat. 474.

410. Act of July 16, 1798, ch. 77, 1 Stat. 605.

411. 8 ANNALS OF CONG. 1391 (1798) (remarks of Rep. Varnum).

412. 8 *id.* at 1386 (remarks of Rep. Sewall). Representative Sewall acknowledged that this was not always the case in the southern states. *Id.*

looking at was never meant to deal with the relationship between individual and community, nor define or delimit the scope of public authority. These issues were not addressed in the constitutional debates because their answers were unchallenged and assumed to be what they had always been.<sup>413</sup> Local governments were assumed to have the authority and reciprocal obligation to protect the public health and the Constitution simply did not speak to the issue.

Since 1787, much has happened. In the years following the Constitution's ratification, America industrialized. The mercantilist society withered as a more laissez faire ideology developed.<sup>414</sup> Regulations and economic protections were repealed.<sup>415</sup> The understanding of the social contract changed. The idea of a public health duty integral to the legitimacy of the state may have faded, only to be "rediscovered" through the sanitary movements of the Progressive Era and eventually the New Deal.<sup>416</sup>

The dramatic changes in federal-state relations wrought first by the Civil War and then by the New Deal complicated our attempt to recall the framing generation's views about public health. In the post-New Deal world, we look to the federal government and the federal bureaucracy to supply many of the needs that local governments once filled. In assuming a greater national role in social provision, and in accepting the incorporation of most provisions of the Bill of Rights into the Fourteenth Amendment, we are liable to err with Judge Easterbrook in assuming that the Framers' conception of the role of the national government supplies us with the Framers' views on the nature of governments.<sup>417</sup> We forget that while the Framers assumed that the national government had a very limited and quite negative role to play, they also assumed that a

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413. Peters's study of the Massachusetts state constitution shows that there was an assumption that the role of government was to better the public good. PETERS, *supra* note 300, at 45. Most state documents expressed the common assertion that government must provide for the protection of life or security without ever amplifying what that meant. *See supra* text accompanying notes 328-32.

414. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 102 (1977).

415. For example, while the practice of medicine was routinely regulated in the 18th century, it was generally deregulated in the early to mid-19th century, only to be re-regulated in the late 19th century. The problem is that we forget that 20th century regulations of the Progressive Era were not America's initial acquaintance with activist government. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 102-12 (1982); *see also* DANIEL CALLAHAN, *WHAT KIND OF LIFE: THE LIMITS OF MEDICAL PROGRESS* 193 (1990). Nor were the provisions of the New Deal our first taste of social provision.

416. It is a common error to assume that government's active involvement with health care began only in this century, and to forget the far earlier and far deeper obligation. *See supra* note 415.

417. *See supra* note 25 and accompanying text.

very different social contract existed between the individual and body politic at the local level. At that level, rights were not merely negative, they were correlated to obligations. Local governments not only had limits, they also had duties. And among those duties were the care and protection of those who consented to the government's authority: the obligation to protect the public's health.

## VI. Applying the Framers' Vision Today

### A. Barriers to a Right to Protection

What is the significance of the Framers' views about public health? What do they mean for contemporary constitutional law?

The Framers assumed that governments are obligated under the social contract to protect the public health and that such protection necessarily includes care to the ill, including the indigent ill. But this interpretation does not necessarily prove any constitutional right to a particular form of public health provision today. Nevertheless, the recognition that the Framers may have seen public health protection as integral to governmental legitimacy offers significant insights into contemporary dilemmas.<sup>418</sup> In this section, I sketch briefly the hurdles to converting the framing era's assumptions into a modern constitutional "right." In Part VI.B, I offer some speculations as to how recognition of the eighteenth century's assumptions might alter contemporary discourse.

The first hurdle to converting the eighteenth century's public health views to modern rights derives from the tenuousness of originalism itself. Constitutional law today looks very different than it did in 1787. The Framers' belief that there was a social contract to protect the public health does not bind us to such a contract today anymore than we are bound to follow the Framers' views about the establishment of religion or property qualifications for the franchise.<sup>419</sup>

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418. Present day versions of social contract theory can also be used to articulate some version of a right to health care. *E.g.*, DANIELS, *supra* note 357, *passim*; Dougherty, *supra* note 29, *passim*. It is not my purpose here to develop or critique such philosophical constructs. Rather, I seek only to discuss how consideration of social contract theory's role in our constitutional tradition can illuminate current legal issues.

419. See James A. Gardner, *The Positivist Foundations of Originalism*, 71 B.U. L. REV. 1, 1-4 (1991) (surveying arguments as to why constitutional interpretation should not be bound to the original intention of the Framers); see also Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727-39 (1988) (showing examples of doctrinal departures from original intent); Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 BUFF. L. REV. 217, 218-22 (1987) (discussing difficulties of following original intent).

Even if we were compelled to follow the Framers' views, it is not clear what that would entail. Although a belief in a governmental public health obligation was wide spread in the eighteenth century, the Framers had little reason to focus upon what that obligation meant in precise terms. Just what protections the government was obligated to provide and how they were to be implemented was not answered by social contract theory, nor were these questions posed in the debate over federalism. Although public health regulations in contemporary America are woefully deficient in many ways, especially with respect to the lack of universal access to health care, and prevention of communicable diseases such as AIDS and tuberculosis, they are far more complex than anything that could have been imagined two centuries ago.<sup>420</sup> Just which of today's measures would have been seen as necessary to the fulfillment of the social compact by a generation that could never envision such issues is surely unanswerable.

This uncertainty points to a second hurdle: the changing nature of rights. Although the public health obligation was likely seen by the framing generation as part of the social or governmental contract,<sup>421</sup> it was not necessarily conceived of as a "right" in the way we use the word. As noted above, it was more likely seen as a political, natural right emanating from the social contract and integral to constitutional legitimacy. It was not necessarily a judicially enforceable, adjudicative right.

By contrast, today we rarely speak of political rights apart from adjudicative rights. We assume that legal rights are definite, objectively ascertainable, and capable of judicial enforcement.<sup>422</sup> Rights that lack such capacities cannot be "rights" at all. As many have pointed out, obligations upon government, or positive rights, rarely take on this character.<sup>423</sup> Positive rights are seldom easily enforceable by courts, except perhaps where government has already acted, thereby opening its performance up to scrutiny.<sup>424</sup> The difficulties of envisioning or even enforcing a judge-declared "right to health care" in the absence of statutory law seem insurmountable to the point of making the very idea of such a

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420. For a discussion of the inadequacies of our current prevention program, see UNITED HOSPITAL FUND, *supra* note 34, at 6. Despite these failings, no 18th century program can begin to compare to modern programs such as Medicare in terms of complexity.

421. See *supra* text accompanying notes 337-65. For example, no 18th century program can begin to compare to Medicare in terms of complexity.

422. Michelman, *Possession vs. Distribution*, *supra* note 268, at 1321.

423. *Id.*; see also CHARLES FRIED, *RIGHT AND WRONG* 110-14 (1978); Charles L. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1111-12 (1986); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 663.

424. Michelman, *supra* note 423, at 663.

“right” appear absurd.<sup>425</sup>

The third barrier to applying the eighteenth century’s understanding of the public health obligation to the creation of any contemporary constitutional rights is federalism. If the Framers believed that the obligation to protect the public health was part of the social contract and fundamental to the relationship between individual and body politic, they did not believe that it was relevant to the relationship between individuals and the newly formed federal government.<sup>426</sup> Rather, the obligation lay at some prior, undefined level, perhaps as part of the civil contract or as part of the governmental contract forming state or local entities.<sup>427</sup> Thus, the intentions of the Framers alone cannot be used in a single step to justify a federal obligation to protect health.

Nor can the views of 1787 easily support a theory requiring states to provide such protection. It is not clear that the Framers actually saw the obligation as one resting with the states, as opposed to more local or less formal political entities.<sup>428</sup> More importantly, even if they did believe that the obligation rested with the states,<sup>429</sup> the Framers certainly did not believe that the Constitution of 1787 significantly altered or guaranteed the relationship between individuals and states.<sup>430</sup> Duties owed by the states to their citizens were owed as part of the social contract, not as part of a federal constitutional guarantee.<sup>431</sup>

Soon after the Constitution was enacted, the relevance of the relationship between individuals and states to constitutional law became apparent. In delineating the respective jurisdictions of the federal and state governments, the courts necessarily had to consider the nature of proper state functions.<sup>432</sup> Moreover, the enactment of the Fourteenth Amendment provided a richer constitutional dimension to the relationship be-

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425. See Brown, Parmet, & Baumann, *supra* note 30, at 622-23 (1987).

426. See *supra* text accompanying notes 397-413.

427. See *supra* text accompanying notes 380-94.

428. See *supra* text accompanying note 398.

429. This view has much merit given the extensive colonial and state legislation enacted to protect the public health. See *supra* part III.A-B.

430. See THE FEDERALIST NO. 45 (James Madison) (explaining how the states will retain most of their authority and the primary loyalty of the people.)

431. Of course, the original Constitution of 1787 did provide a few limited rights against states. The Ninth Amendment can be read as assuming that others existed. See Barnett, *supra* note 385, at 36. The Tenth Amendment also ensured that states retained powers not given to the newly created federal authority. Just what obligations states were expected to fulfill using that authority was never spelled out by the Framers. Nor did it have to be, because it was widely assumed to be known and, in any event, irrelevant to the framing of the federal constitution.

432. See Parmet, *supra* note 5, at 744.

tween states and their own citizens.<sup>433</sup> With the incorporation of many of the provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, we now readily assume that the fundamental law governing the individual's relationship to the federal government is almost identical to the law governing the individual's relationship to state governments.<sup>434</sup> But that parity leaves a hole: what about the obligations that in 1787 were assumed to belong to the states as a matter of fundamental law, but not federal constitutional law? By applying the Framers' assumptions about the federal government to state obligations, as incorporation teaches us to do, we overlook the earlier understanding of what constitutes the contract between local governments and individuals.<sup>435</sup>

One solution would be to read the Fourteenth Amendment as providing a federal guarantee of the framing era's understanding of the relationship between local governments and individuals, rather than merely using the Fourteenth Amendment to apply federal norms to local relationships to the states. To do that and stay within an originalist paradigm, we would also need to ask what were the assumptions of 1868 when the Fourteenth Amendment was enacted. It is not at all clear that

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433. *Ex parte Virginia*, 100 U.S. 339, 344-48 (1879).

434. For example, the federal abortion cases make no distinction between the right of privacy against the federal government and the right of privacy against state governments. *Compare Harris v. McRae*, 448 U.S. 297 (1980) with *Maher v. Roe*, 432 U.S. 464 (1977). The recent trend by state courts to interpret their own constitutions differently, see Daan Braveman, *Children, Poverty, and State Constitutions*, 38 EMORY L.J. 577, 578 (1989); Adam S. Cohen, *More Myths of Parity, State Court Forums and Constitutional Actions for the Right to Shelter*, 38 EMORY L.J. 615, 621-25 (1989), suggests that the simple equation between federal and state rights might be withering away.

435. One potential solution is to see these issues not primarily as matters of federal law, but as questions of state constitutional law. Under this view, the public health obligation might fall under the state constitutional doctrines. Indeed, to some extent, state courts have been moving in this direction, finding obligations on the part of states, particularly in the area of education, which the federal courts have not found within the federal constitution. See Hirshman, *supra* note 273, at 1020. Even in the area of health care, many state courts have disagreed with the Supreme Court's decisions on Medicaid funding of abortion. See Brown, Parmet, & Baumann, *supra* note 30, at 637 n.397. The problem, however, is that today it is difficult, if not impossible, for states to protect public health by themselves precisely because of federalism doctrines, which have allowed the federal government to preempt much of the area. See Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461; *Metropolitan Life Insur. Co. v. Massachusetts*, 471 U.S. 724 (1985) (analyzing ERISA preemption of state laws mandating health insurance benefits); *United Wire, Metal & Mach. Health & Welfare Fund v. Morristown Memorial Hosp.*, 793 F. Supp. 524 (D.N.J.), *app. pend'g*, No. 92-5312 (3d Cir. 1992); Wendy E. Parmet, *Regulation & Federalism: Legal Impediments to State Health Care Reform*, AM. J.L. & MED. (forthcoming 1993); Deborah Stone, *Why the States Can't Solve the Health Care Crisis*, AM. PROSPECT, Spring 1992, at 51, 55-58. The irony is, thus, that the federal government has limited the states' ability to fulfill the social contract without taking on that obligation itself.

by the 1860s the public health obligation remained intact. The early part of the nineteenth century saw significant deregulation of health care.<sup>436</sup> The Fourteenth Amendment was enacted during the industrial revolution, when understandings about the role of government and the relationship between individual and society had changed greatly.<sup>437</sup> The Framers' understanding of the social contract was not necessarily shared by either citizens or politicians in 1868.<sup>438</sup>

Thus there are many steps, some of them missing, between the argument that public health protection was assumed by social contract theory in 1787 and the argument that there is today an enforceable right to health care. That does not mean that the eighteenth century's understandings are of no practical import. In the final section, I suggest briefly how the social contract theory of public health care can alter our current debates.

## B. Recognizing the Public Health Obligation Today

Recognition of the Framers' views about the public health obligation casts into question the conventional assumptions that underpin constitutional health law. Much of contemporary constitutional law is predicated on the constitutional tradition of *laissez faire*, providing only negative rights.<sup>439</sup> Existing doctrine presupposes that the starting point or baseline of analysis is that government has no obligations at all. Constitutional rights are predominantly negative: limiting the scope of governmental authority and preserving individual freedom.<sup>440</sup>

An examination of the public health activities and social contract theories of the eighteenth century casts doubt on the historical accuracy of those assumptions. It demonstrates that while *laissez faire* may or may not be an appropriate ideal, it was not our nation's historical starting point. Contrary to the perceived history, active government did not emerge for the first time during the Progressive and New Deal eras. In the area of public health, government was highly active long before the framing of the Constitution. The public health status quo of 1787 was a regulatory one, supported by the prevailing political theories and even by

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436. See *supra* text accompanying notes 414-16.

437. I have previously discussed in detail how some of the changes in the latter part of the 19th century altered the courts' understanding of the police power. Parmet, *supra* note 5, at 748-52.

438. This is not to say that by 1868 the government was assumed to have no obligation to secure the public health. The point is that the obligations understood in 1868 may have differed from those assumed in 1787.

439. See *supra* notes 23-30 and accompanying text.

440. See *supra* text accompanying notes 11-42.



the early liberalism of the era. The age of *laissez faire* came later, if at all.

Consideration of the framing generation's views about public health law does more than call into question the starting point of contemporary case law.<sup>441</sup> It also provides a counter-tradition from which to draw.<sup>442</sup> In contrast to a jurisprudence that sees individual freedom from government as the highest value, it offers the fundamental insight of social contract and public health theory: the state of nature is not a safe or healthy place. Both Lockean individualists and civic republicans can agree that individual lives and health are forever insecure. Only when human beings work together and protect one another can any modest security be found.

For the Framers, recognition of the precariousness of human health did not imply total submission to state authority.<sup>443</sup> Governments were necessary and rights had to be subsumed, but only in exchange for protections to be afforded.<sup>444</sup> Thus, rights were not purely negative: they were dependent upon reciprocal obligations.

While this vision of the interdependence of rights and obligations might not compel the existence of a judicially enforceable constitutional right to health care,<sup>445</sup> we can still imagine it as part of *our* social contract—as an obligation inextricably connected to our understanding of public authority and individual rights.<sup>446</sup> If, with the Framers, we recognized that governments have authority *because* they have obligations, then their fulfillment of those obligations to further the common good and to protect the public health could well be seen as part of the political measure by which we as a society judge the legitimacy of our laws.<sup>447</sup>

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441. See, e.g., *Rust v. Sullivan*, 111 S. Ct 1759 (1991); *Harris v. McRae*, 448 U.S. 297 (1980).

442. See, e.g., West, *supra* note 49, at 123-24 (observing that examination of constitutional history may offer insight into "imaginings more worthy than our own," even if it provides no determinative answer to contemporary issues).

443. The Framers never accepted the idea of unlimited government. See, e.g., THE FEDERALIST No. 51 (James Madison).

444. See *supra* text accompanying notes 328-32.

445. See *supra* text accompanying notes 418-38. For an attempt to use social-contract theory to develop an ethical, as opposed to constitutional, right to health care, see DANIELS, *supra* note 357, *passim*.

446. Cf. Sen, *supra* note 62, at 50 ("The social commitment to individual freedom has to be concerned with both positive and negative freedoms.").

447. Peters, for example, says that as far as individual rights are concerned, social contract theory ultimately erodes to a proceduralist theory, under which majoritarian laws are assumed to be in the public good. He goes on to argue that there remains, nonetheless, a social understanding of the public good, against which laws in general, even majoritarian ones, can be tested. PETERS, *supra* note 290, at 179. This view would suggest that while a particular individual may not claim a right to protection greater than that which the legislature has chosen to

While this view may not translate easily into the language of constitutional doctrine,<sup>448</sup> a recognition, even if not judicially enforceable, that public health protection is obligatory, fundamental, and related to the legitimacy of governmental authority would carry political debate and constitutional jurisprudence far from the language of privileges, gratuities, and policies that characterize contemporary discussion of public health law.

Moreover, such a change in discourse has a more concrete doctrinal impact than is at first evident.<sup>449</sup> Consider the paradigmatic constitutional law public health case, in which the government proposes to interfere with individual freedom by criminalizing abortions or detaining tuberculosis patients who fail to take their medication.<sup>450</sup> In such negative rights cases, which would likely be debated under the rubric of privacy or procedural due process, the critical question is whether the individual has a negative right limiting the government's actions.<sup>451</sup> For much of this century, the answer lay in the importance and nature of the individual interest.<sup>452</sup> Thus, in *Roe v. Wade*, the Court found that a woman had a privacy interest in having an abortion only after stressing the significance of the interest to the woman.<sup>453</sup> This approach was recently confirmed in *Casey*.<sup>454</sup> Privacy analysis celebrates the individual's free-

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provide, society as a whole retains the right under natural law to test the legitimacy of the legislature's actions to see if they fulfill the government contract obligation to protect the public good.

448. A non-legal approach might be to use social contract paradigms to determine the content of the obligations. Rawls, of course, is the most important modern day social contract theorist. RAWLS, *supra* note 60. He attempts to develop a social contract theory by asking what individuals placed behind a veil of ignorance would see as just. DANIELS, *supra* note 357, and Dougherty, *supra* note 29, apply Rawlsian logic to the health care context. Here, in contrast, I seek only to apply our far more general constitutional understanding of social contract theory to constitutional interpretation. I do not intend to develop a position as to what a "true" or "just" abstract social contract would entail with respect to health care.

449. I hope to explore the modern applications of the public health view more fully in a later piece.

450. *E.g.*, *Greene v. Edwards*, 263 S.E.2d 661 (W. Va. 1920); *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952); *UNITED HOSPITAL FUND*, *supra* note 34, at 25-26.

451. This was not always the case. Earlier in the century, the key question was whether the government's action fell within the proper parameters of the police power. *See* Parmet, *supra* note 5, at 744. Today, the question of governmental purpose has become subsumed by the balancing of medical reasonableness against the individual's interest. *See* Burris, *supra* note 8, at 978.

452. *See, e.g.*, *Casey*, 112 S. Ct. at 2807-08 (joint opinion of Justices O'Connor, Kennedy, and Souter); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

453. *Roe*, 410 U.S. at 142-54. The Court also considered whether a fetus was a person and then, deciding it was not for constitutional purposes, analyzed the nature of the state's remaining interests. *Id.* at 158, 162.

454. *Casey*, 112 S. Ct. at 2808.

dom or autonomy.<sup>455</sup> The power of government to restrain that autonomy is limited by law.

In recent years, the Supreme Court has moved away from vigilant protection of individual interests. Questioning both the scope and the existence of "non-textual" rights, some justices have increasingly affirmed acts of government, regardless of their impact on individual interests.<sup>456</sup>

What the current approach has in common with its predecessor is the assumption that individual rights are distinct from governmental duties. Both approaches are predicated on the assumption that government has no obligation, that individual rights are only negative ones against government, and that the question is whether the negative right trumps the governmental power. Taken abstractly, both sides look unappealing.<sup>457</sup>

A public health view would change the assumptions and analysis. Under such a vision, the government's right to interfere with the individual's freedom could not be divorced from its obligation to care for and protect her. The strength and importance of the governmental purpose, as well as the ways in which the individual was receiving care and protection, would become an integral part of the analysis. Thus, in an abortion case, the question of whether a woman has a right to have an abortion would invariably depend not only upon whether the state has the right to infringe upon her liberty, but also upon whether the state was fulfilling its obligations to her.<sup>458</sup> Similarly, in a case concerning whether the state can detain a tuberculosis patient who failed to take her medications,<sup>459</sup> the court would look not only at the infringement of individual liberty,

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455. On the individualism of *Roe*, see Parmet, *supra* note 5, at 759. See also William Mathie, *Reason, Revelation, and Liberal Justice: Reflections on George Grant's Analysis of Roe v. Wade*, 19 CANADA J. POL. SCI. 443, 444 (1986).

456. See, e.g., *Casey*, 112 S. Ct. at 2859-60 (Rehnquist, C.J., dissenting in part and concurring in part); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Scalia, J., plurality opinion); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

457. Thus, polls suggest that the majority of Americans favor neither unconditional rights to abortion, nor strict regulation of it. They may see abortion as an evil, but one which women should be free to choose, given harsh circumstances. KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 224-28 (1984).

458. Ruth Colker has argued that abortion is an especially important right in a society in which there is little provision for contraception, pre-natal care, or child health care. Ruth Colker, *Abortion & Dialogue*, 63 TUL. L. REV. 1363, 1380 (1989). Mary Ann Glendon has also pointed out how differently abortion regulations appear in the European context, where nations provide greater maternity and child-care services than do American states. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 17, 20, 53-57 (1987).

459. See *supra* note 450.

but also whether the state has met its responsibilities to her and the community to assure the provision of medicine and the protection of health.

This introduction of social contract ideas can radically alter the jurisprudence of public health. It could force a consideration of the ways in which our states provide or fail to provide for the care and protection of those vulnerable to ill health. It could suggest that even if individuals have no absolute, positive constitutional "rights" to health care, government still cannot restrain their liberties without fulfilling its obligation to provide care.

A public health view can also alter the analysis of unconstitutional conditions cases.<sup>460</sup> At first, these cases in which the government restricts freedom in return for the provision of a benefit would appear to follow social contract theory. In fact, however, the current cases retain only the form and not the understandings of the public health view.

Consider *Rust v. Sullivan*,<sup>461</sup> in which the Supreme Court affirmed that clinics receiving federal family planning grants can be barred from providing abortion counseling. The Court suggested that the denial of the right to speak freely about abortion followed from the fact that the government did not have to subsidize the clinic at all. In effect, the government was giving the clinic a gratuity which might be conditioned upon the forfeiture of First Amendment rights.<sup>462</sup> Under a public health view that basic assumption would have to be challenged. The starting point for the analysis would not be a state of nature in which a laissez faire government has no obligations. Instead, the starting point would be the contract under which government is fundamentally obligated to protect the public health. Under this analysis, the patients of the clinic would have a prior right, even if not judicially enforceable, to receive some care and protection; this right derives from the governmental contract, not from the government's decision to subsidize the clinic.

Using the public health view radically changes the constitutional focus. Rather than seeing the individual as having no rights prior to the exchange of protected speech for care, a court would have to consider the restriction on speech in light of a baseline understanding in which the individual has some prior rights to care grounded in an obligation critical to the legitimacy of the government.

This analysis does not guarantee that the clinic would win. The question would remain whether the provision of Title X services was part of the public health obligation—a question for which there is no clear

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460. See *supra* text accompanying notes 36-41.

461. 111 S. Ct. at 1759.

462. See *supra* text accompanying notes 37-41.

and obvious answer. Moreover, the validity of the abridgement of free speech would have to be considered. Was it part of the initial surrender of rights undertaken to form the social contract? Is the case like that of shouting "fire" in the proverbial crowded theater, in which there is no longer any freedom because the public's safety must be protected? Or, is this a case, as the language in *Rust* seems to concede, in which speech would be protected in the absence of any federal subsidy? If so, then under a public health view, it appears that government is upping the ante on the social contract. It is extracting sacrifice of an extra liberty—freedom of speech—as a quid pro quo for providing that which society already owes.

In offering this answer, I do not contend that it is the only one, nor that any particular outcome inevitably follows from the public health view. I wish only to suggest that the recognition of a social obligation to protect public health is fundamental to the legitimacy of governmental authority and must change the analysis and alter the way we think about public health law and the relationship between individuals and the state. This view forces us to see that rights are connected to duties and that the surrender of rights is not a price paid for discretionary benefits bestowed, but part of a far more fundamental understanding of the legitimation of governmental authority itself.

Ultimately, an understanding of the public health vision casts light not only on health care cases, but on constitutional law itself. Cases about abortion, the right to die, and AIDS weigh heavily in constitutional debate not only because they are poignant, but because they are about the relationship between individual and state in the face of threats to life and health. They bring into sharp focus the very reasons for having governments and law: to care for and protect each other, as best we can, without intruding too gravely upon the autonomy of each. By forgetting what the framing generation understood—that our own health is ultimately dependent on the care we give each other—we threaten the legitimacy of the state, and, in the final analysis, of our laws.

