

THE CONTAGION OF GOVERNMENTAL LEADERSHIP: A RENEWED CALL FOR INCREASED FEDERAL PRESENCE IN COMMUNICABLE DISEASE EMERGENCIES

I. INTRODUCTION	114
II. CURRENT STATE OF AFFAIRS: THE CONCURRENT JURISDICTION CONUNDRUM	117
A. LOUISIANA STATE LAW AND EXECUTIVE POWER AND ACTION	117
1. LOUISIANA’S COMMUNICABLE DISEASE STATUTES	117
2. LOUISIANA’S HEALTH EMERGENCY POWERS ACT ..	119
3. THE LOUISIANA EMERGENCY OPERATIONS PLAN ..	120
B. FEDERAL COMMUNICABLE DISEASE LAW	121
1. FEDERAL STATUTES AND EXECUTIVE AGENCY REGULATIONS	122
2. THE NATIONAL RESPONSE FRAMEWORK	124
C. FEDERAL SUPREME COURT PRECEDENT CONCERNING COMMUNICABLE DISEASE LAW AND THE INTERACTION OF STATE AND FEDERAL LAW AND THE CONSTITUTION	125
1. FOUR SEMINAL SUPREME COURT CASES ON WHICH TO BUILD FEDERAL REFORM	126
2. THE COURT’S MODERN COMMERCE CLAUSE JURISPRUDENCE	129
3. CONGRESS’S SPENDING POWER: AN ALTERNATIVE PLATFORM FOR REFORM	133
III. ANALYSIS	135
A. THE PROBLEMS PRESENTED BY THE CURRENT STATE OF AFFAIRS	135
1. OUTBREAKS, EPIDEMICS, AND PANDEMICS: COMMUNICABLE DISEASE EMERGENCIES ARE INTERSTATE COMMERCE	136
2. THE STATE AND FEDERAL RESPONSES DURING THE 2014 EBOLA OUTBREAK ARE CAUSE FOR CONCERN	138
B. CONSTITUTIONAL BASIS FOR CHANGE: COMMERCE POWER OR SPENDING POWER?	141

1. COMMERCE CLAUSE JUSTIFICATION FOR REFORM	142
a. Channels of Interstate Commerce	143
b. Instrumentalities of Interstate Commerce	144
c. Activities that Substantially Affect Interstate Commerce.....	145
2. SPENDING POWER JUSTIFICATION FOR REFORM...	147
IV. PROPOSAL	148
A. COMMERCE CLAUSE-BASED REFORM.....	148
B. SPENDING POWER-BASED REFORM	150
V. CONCLUSION.....	153

I. INTRODUCTION

Contagion is most commonly defined as a “contagious disease” or “the transmission of a disease by direct or indirect contact.”¹ However, the word contagion also describes phenomena of human behavior such as a “contagious influence . . . [, a] corrupting influence . . . [, or a]” “rapid communication of” an [emotional] influence.”² Sometimes, the spread of communicable diseases produces such influences.³ In other words, contagion can create contagion. When fear and hysteria result from communicable disease emergencies, the American public looks to its local, state, and federal governments for guidance, support, and protection. As evidenced by recent events, however, the same fear and hysteria—contagion—that grips the general public during these emergencies, often grips elected government officials as well. Because the current state of communicable disease law leaves the roles of local, state, and federal officials unclear during these emergencies, the contagion of the general public often leads to the contagion of governmental leadership.⁴ This contagion of leadership could have dire

1. *Contagion*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/contagion> (last visited on Apr. 4, 2015).

2. *Id.*

3. A “communicable disease[] means an illness[] due to infectious agents or their toxic products, which may be transmitted from a reservoir to a susceptible host either directly as from an infected person or animal or indirectly through the agency of an intermediate plant of animal host, vector, or the inanimate environment.” 42 C.F.R. § 70.1 (2015).

4. The inspiration for this phrase is taken from Justin Menkes’s description of the “Contagion of Leadership” in the business environment. See Justin Menkes, *The Contagion of Leadership*, HARV. BUS. REV. (Sept. 6, 2011), <https://hbr.org/2011/09/the>

consequences for the American public in the future, which can be avoided by effecting reform now. The potential for catastrophe due to poorly crafted legislation and uncertainty regarding the appropriate government actor warrants meaningful review of communicable disease law.⁵

Several episodes following the first confirmed case of Ebola in the United States during the 2014 West African Ebola outbreak⁶ demonstrate how easily communicable disease emergencies can lead to the contagion of governmental leadership. Texas, the state with the first diagnosed case of Ebola within the United States, did not have a communicable disease policy in place until after the first diagnosis, which exposed others both inside and outside its borders to the disease.⁷ When Texas wanted to respond to the emergency, its efforts were partially blocked by neighboring Louisiana.⁸ Louisiana's response following the first domestic case of Ebola would prove to have little basis in scientific or medical knowledge, or even in logic. Louisiana was unwilling to help Texas; and, in a separate incident, it went as far as warning researchers who had traveled to West Africa to study the outbreak to stay out of the state or risk confinement against their will, regardless of whether or not they had ever had contact with an Ebola patient.⁹ However, the

-contagion-of-leadersh.

5. "Communicable disease law" is used throughout this Comment to refer to the power of a government to enact measures to prevent the introduction or spread of communicable diseases within a jurisdiction and to conduct mitigation efforts following such an emergency. At different times the states, federal government, and the various courts refer to these laws as "public health laws," "quarantine and isolation provisions or laws," "interstate and foreign quarantine provisions or laws," and other similar terms. "Communicable disease law" encompasses all these terms.

6. The Centers for Disease Control and Prevention (CDC) designated the 2014 Ebola outbreak as "the largest in history." *2014 Ebola Outbreak in West Africa*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/index.html> (last updated March 3, 2016). As of February 28, 2016, the CDC had identified 11,316 deaths among 28,639 suspected, probable, and confirmed cases of Ebola. *Id.*

7. See Edgar Walters & Jay Root, *Control Eluded State Leaders in Ebola Crisis*, TEX. TRIB. (Oct. 22, 2014), <http://www.texastribune.org/2014/10/22/texas-issued-few-control-orders-ebola-crisis/>.

8. Cole Avery, *Buddy Caldwell Gets Temporary Restraining Order to Keep Ebola Waste Ashes from Louisiana*, NOLA.COM/TIMES-PICAYUNE (Oct. 13, 2014, 8:51 PM), http://www.nola.com/politics/index.ssf/2014/10/buddy_caldwell_gets_restrainin.html.

9. John Laureman, *Louisiana's Message to Top Ebola Researchers? Stay Away*, BLOOMBERG BUS. (Oct. 29, 2014, 11:01 PM), <http://www.bloomberg.com/news/articles/2014-10-29/louisianas-message-to-top-ebola-researchers-dont-come>; see also Daniel

states are not the only governmental actors to blame; the federal government possesses significant power over communicable disease emergencies, yet it failed to use this power or act as a mediator among the states.

The 2014 Ebola outbreak raised many important questions regarding which level of government is the appropriate leader in emergencies of national and international proportions. The 2015 Measles outbreak raised the same questions, as have more recent communicable disease emergencies.¹⁰ The Centers for Disease Control and Prevention (CDC) reported that in 2015, 189 people from twenty-four states and the District of Columbia were infected with measles.¹¹ Most of the measles cases originated from a single amusement park in California.¹² Due to the nature of national and international trade and travel today, the recent Ebola and Measles outbreaks demonstrate just how quickly disease can spread and how poorly states deal with emergencies of this magnitude. Currently, the federal government shares jurisdiction with the states over the regulation of communicable disease emergencies, but the federal government yields to the states as the first lines of defense. The problems presented by the current state of affairs and the inherent nature of communicable disease emergencies warrants a stronger role for the federal government where it acts proactively ahead of communicable disease emergencies rather than reactively after these crises occur.

Bausch et al., Opinion, *Louisiana's Policy on Ebola and Travel is Harmful*, TIMES-PICAYUNE (New Orleans), (Oct. 31, 2014, 3:45 PM), http://www.nola.com/health/index.ssf/2014/10/louisianas_policy_on_ebola_and.html (providing the professional opinion of three experts in tropical medicine).

10. Although this Comment highlights the 2014 West African Ebola and 2015 Measles outbreaks to demonstrate the problems with the current state of affairs, these outbreaks should not be seen as extreme examples. For example, on January 22, 2016, the CDC activated its Incident Management System in response to the recent Zika virus disease outbreak, and on February 1, 2016, the World Health Organization declared a Public Health Emergency of International Concern due to the spread of the Zika virus disease. *Areas with Zika*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/zika/geo/index.html> (last visited Feb. 29, 2016). According to the CDC, over 250 cases of Zika virus disease have been reported in the U.S. and its territories. *Zika Virus Disease in the United States, 2015–2016*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/zika/geo/united-states.html> (last updated Mar. 3, 2016).

11. *Measles Cases and Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/measles/cases-outbreaks.html> (last updated Feb. 10, 2016).

12. *Id.*

This Comment explores the interplay of federal and state law regarding communicable diseases in order to demonstrate the need to increase the federal presence in emergencies of this magnitude. Section II outlines communicable disease law and policy at both the state and federal levels, using Louisiana communicable disease law as an example. Next, Section III analyzes the problems presented by the concurrent jurisdiction during communicable disease emergencies and outlines the constitutional basis for federal reform. Finally, Section IV proposes a change in federal law that would vastly improve the country's preparedness for and response to communicable disease emergencies.

II. CURRENT STATE OF AFFAIRS: THE CONCURRENT JURISDICTION CONUNDRUM

Although the fifty states each have laws governing communicable disease emergencies, for the sake of clarity the legal discussion in this Comment is confined to Louisiana law and its interaction with federal law.¹³ The first subsection outlines Louisiana law, state executive action, and the state's emergency response plan in the event of a communicable disease emergency. The second subsection summarizes federal communicable disease law, federal executive action, and the National Response Framework—the framework which provides the federal emergency response plan in the event of a communicable disease emergency.

A. LOUISIANA STATE LAW AND EXECUTIVE POWER AND ACTION

This subsection identifies and outlines Louisiana's communicable disease statutes, the power of the governor once a state of emergency is declared, and the state's executive policy in preparing for and responding to a communicable disease emergency.

1. LOUISIANA'S COMMUNICABLE DISEASE STATUTES

The Louisiana Legislature has conferred significant power to the executive branch of the state to regulate communicable

13. For a comparison of the communicable disease laws of the fifty states, see Lainie Rutkow et al., *The Public Health Workforce and Willingness to Respond to Emergencies: A 50-State Analysis of Potentially Influential Laws*, 42 J.L. MED. & ETHICS 64 (2014).

diseases. Louisiana's Sanitary Code currently grants the state health officer¹⁴ and the Office of Public Health of the Louisiana Department of Health and Hospitals (State Department of Health)¹⁵ the "exclusive jurisdiction, control, and authority . . . [t]o isolate or quarantine for the care and control of communicable disease within the state."¹⁶ Further, the State Department of Health has the power to "take such action as is necessary to accomplish the subsidence and suppression of diseases of all kinds in order to prevent their spread."¹⁷ In the event that an infection with a communicable disease is discovered within a Louisiana parish, municipality, or a portion of either, and the disease could be spread to other portions of the state, the state health officer is authorized to quarantine the area infected area.¹⁸ The state health officer also has discretionary power to prevent persons from entering the affected area(s) of the state if the "persons would increase the prevalence of the disease."¹⁹

Louisiana law permissively grants state and parish health officers the power to issue arrest warrants during epidemics, a role generally relegated to judges.²⁰ A violation of the provisions pertaining to isolation or quarantine is punishable by a fine between fifty and one hundred dollars or imprisonment of up to two years, or both.²¹ The powers outlined above give the state health officer quasi-judicial and quasi-legislative powers in addition to his executive powers. While Louisiana law gives parish and state health officers significant power over communicable diseases, the state legislature has conferred even greater power on the governor in emergency situations.

14. In Louisiana, the state health officer is appointed by the Secretary of the Department of Health and Human Services and must be "a licensed and practicing physician in the State of Louisiana . . . [and] a full time employee of the Department of Health and Hospitals." LA. STAT. ANN. § 40:2 (2012).

15. In Louisiana, this department is commonly referred to as the DHH. *See About DHH*, LA. DEP'T HEALTH & HOSPS., <http://new.dhh.louisiana.gov/index.cfm/page/2/n/392> (last visited Feb. 7, 2016).

16. LA. STAT. ANN. § 40:5(1) (2012).

17. *Id.* § 40:5(2).

18. *Id.* § 40:7; *see also id.* § 40:15 (barring parish health officers from establishing quarantines without first obtaining the approval of the state health officer and establishing the supervisory power of the state health officer over all parish quarantines); *id.* § 40:16 (establishing the superiority of the state health officer over parish health officers).

19. *Id.* § 40:7.

20. *Id.* § 40:3; *id.* § 40:24.

21. *Id.* § 40:6.

2. LOUISIANA'S HEALTH EMERGENCY POWERS ACT²²

Louisiana's governor enjoys significant powers during times of emergency.²³ One of the emergency powers granted to the governor is contained in the Louisiana Health Emergency Powers Act (LHEPA).²⁴ LHEPA was designed to help Louisiana control communicable disease outbreaks quickly and efficiently.²⁵ To activate these emergency powers, the governor must declare a state of public health emergency.²⁶ After that, the governor may: (1) suspend any state agency regulatory scheme; (2) commandeer all available local, parish, or state resources; (3) control the personnel, direction, and function of any state agency; (4) commandeer any private property he "finds [. . .] necessary to cope with the [. . .] emergency;" (5) order evacuations; (6) mandate routes of transportation, modes of transportation, and specific destinations for evacuees; (7) control ingress and egress to and from affected areas and the movement of persons and the occupancy of any premises; (8) terminate the ability to sell, distribute, or transport alcoholic beverages, firearms, explosives, and combustibles; and (9) make emergency housing available.²⁷

In addition to the powers outlined above, the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP)²⁸ and the State Department of Health have the right to take possession of materials and facilities that include things

22. Louisiana Health Emergency Powers Act, LA. STAT. ANN. §§ 29:760–772 (2007 & Supp. 2016).

23. See LA. STAT. ANN. § 29:724 (Supp. 2016) (making the governor responsible "for meeting the dangers to the state and people presented by emergencies or disasters," giving power to the governor to "issue executive orders, proclamations, and regulations . . . [that] shall have the force and effect of law," and outlining the procedure for the governor to declare an emergency by executive order).

24. LA. STAT. ANN. § 29:760 (2007).

25. OFFICE OF THE ATTORNEY GEN., LA. DEPT OF JUSTICE, EMERGENCY PREPAREDNESS & RESPONSE REFERENCE MANUAL 43 (2009).

26. See LA. STAT. ANN. § 29:766(A)–(B) (Supp. 2016) (providing for declaration "by executive order or proclamation of the governor" and requiring that the order or proclamation indicate "the nature of the public health emergency, the areas or areas which are or may be affected, and the conditions which have brought it about").

27. *Id.* § 29:766(D).

28. GOHSEP is "the agency responsible for coordinating the State's efforts throughout the emergency management cycle to prepare for, prevent where possible, respond to, recover from and mitigate against to lessen the effects of man-made or natural disasters that threaten our State." *What We Do*, GOVERNOR'S OFF. HOMELAND SEC. & EMERGENCY PREPAREDNESS, <http://gohsep.la.gov/ABOUT/OVERVIEW> (last visited Feb. 2, 2016).

like cell phones, carriers, fuel, food and clothing, and real estate.²⁹ The state health officer may also use “any means to control the use of food, fuel, clothing, and other commodities . . . includ[ing] rationing, quotas, allocations, [and] prohibitions of shipments.”³⁰

However, LHEPA fails to outline how Louisiana’s efforts will coordinate with federal efforts, the procedure for deciding when state efforts yield to federal efforts, or how Louisiana’s efforts should interact with those of other states. Moreover, the law outlines what state executive actors and entities can do, but not what they should do during an outbreak. While Louisiana law is unclear as to what the state will actually do during a communicable disease emergency, the state’s Emergency Operations Plan answers some of these questions.

3. THE LOUISIANA EMERGENCY OPERATIONS PLAN

The Louisiana Emergency Operations Plan (State Plan)³¹ is designed to work in tandem with the National Response Framework, its federal counterpart.³² The purpose of the State Plan is to establish a “comprehensive, all-hazards approach to all phases of emergencies and disasters.”³³ The State Plan binds all state and local government entities “authorized or directed to conduct . . . emergency management operations.”³⁴ The State Plan provides a skeletal framework for the state’s response to emergencies while the Functional Annexes and Supplements provide “discipline-specific” and “hazard-specific” policies and procedures, respectively.³⁵ The State Plan emphasizes that Louisiana is the primary responsible party for natural emergencies but notes that the state shares responsibility with the federal government during more catastrophic scenarios.³⁶

The Ebola Virus Disease Response Plan Annex (State Ebola

29. LA. STAT. ANN. § 29:766(B)(1) (Supp. 2016).

30. *Id.* § 29:766(B)(3).

31. GOVERNOR’S OFFICE OF HOMELAND SEC. AND EMERGENCY PREPAREDNESS, STATE OF LOUISIANA EMERGENCY OPERATIONS PLAN (2014) [hereinafter STATE PLAN], http://gohsep.la.gov/Portals/0/2014_State_EOP_Final_Copy_Updated_1272015.pdf.

32. *Id.* at 23; *see also infra* Part II.B.ii.

33. STATE PLAN, *supra* note 31, at 23.

34. Emergency Operations Plan, La. Exec. Order No. BJ 14-9, § 2(A) (Aug. 6, 2014), <http://doa.la.gov/osr/other/bj14-9.htm>.

35. STATE PLAN, *supra* note 31, at 22.

36. *Id.* at 24.

Plan) acknowledges that local governments have the “primary responsibility to provide initial emergency response” during communicable disease emergencies and that the state will provide or augment that response when necessary.³⁷ Further, it provides specific, step-by-step instructions (complete with flow-charts) for the assessment and confirmation of Ebola cases within the state, the notification process after confirmation of an Ebola case, the state response following a confirmed case or a suspected case, the treatment of the close contacts of the suspected or confirmed Ebola patient, and, most importantly, the organization and assignment of responsibilities during an Ebola crisis.³⁸

Interestingly enough, in an Executive Order issued just after the 2014 Ebola outbreak, Louisiana Governor Bobby Jindal blamed the introduction of Ebola to the United States on the federal government’s lack of guidance and action on the issue.³⁹ The next subsection outlines the power that the federal government currently possesses during communicable disease emergencies.

B. FEDERAL COMMUNICABLE DISEASE LAW

Federal communicable disease law is more general and vague than its Louisiana counterpart. Nonetheless, the United States is a nation of dual governments—the state and federal governments. The federal government is the “supreme” government,⁴⁰ but it is also a government of limited powers.⁴¹

37. GOVERNOR’S OFFICE OF HOMELAND SEC. AND EMERGENCY PREPAREDNESS, LOUISIANA EBOLA VIRUS DISEASE RESPONSE PLAN 5 (2014) [hereinafter LOUISIANA EBOLA PLAN].

38. *Id.* at 9–17.

39. Travel to Areas Impacted by Ebola Virus Disease, La. Exec. Order No. BJ 14-13 (Oct. 20, 2014) [hereinafter Ebola Order], http://gohsep.la.gov/Portals/0/Documents/BJ_202014_20-2013_20Travel_20to_20Areas_20Impacted_20by_20Ebola_20Virus_20Disease.pdf (“[T]he federal government, to date, has failed to implement protections at the national level to prevent the entry of the Ebola Virus Disease into the United States of America.”); see also Marianna Sotomayor, *Gov. Jindal Orders Restrictions for West Africa*, CNN (Oct. 21, 2014, 1:26 PM), <http://www.cnn.com/2014/10/21/politics/jindal-signs-executive-order-amid-ebola-fears/> (describing the executive order).

40. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States [. . .] shall be the supreme Law of the Land . . .”).

41. See *id.* art. I, § 8 (listing Congress’s enumerated powers); *id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are

Particularly, the federal government is limited to the powers enumerated in the Constitution; all other powers are reserved to the states or the people. Consequently, federal policy-making in areas of law that are traditionally reserved to the states⁴² is a minefield. This subsection outlines federal communicable disease statutes and the national communicable disease emergency regulations that fill in some gaps left by the statutes.

1. FEDERAL STATUTES AND EXECUTIVE AGENCY REGULATIONS

Like Louisiana's legislature, Congress has delegated significant authority to federal executive agencies. The Public Health Service Act (PHSA) authorizes the Surgeon General to promulgate regulations that he deems necessary to "prevent the introduction, transmission, or spread of communicable diseases" into the United States or between the states.⁴³ This grant of authority also limits the breadth and scope of any regulations promulgated under it.⁴⁴ For example, the statute clarifies that the regulations regarding detention may only apply to communicable diseases specified in executive orders.⁴⁵ Further, the regulations must relate to the ingress and egress to or from the United States or among the states.⁴⁶ Most importantly, however, federal communicable disease regulations promulgated under the PHSA will preempt state law only when the two are in conflict with one another.⁴⁷

The Secretary of Health and Human Services has also

reserved to the States respectively or to the people.").

42. The police power of states historically includes the power to enact laws to protect the health, safety, and general welfare of a state's residents. *See* U.S. CONST. amend. X; *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905) ("[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety"); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851) ("The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws . . . for the good and welfare of the commonwealth . . .").

43. 42 U.S.C. § 264(a) (2012).

44. *See id.* § 264(b).

45. *Id.*

46. *Id.* § 264(c)–(d).

47. *Id.* § 264(e); *see also id.* § 266 (giving the federal government quarantine power in times of war to protect "the military and naval forces and war workers of the United States, against any communicable disease specified in Executive orders as provided in" 42 U.S.C. § 264(b)).

delegated the authority to make regulations concerning quarantine of persons to the Centers for Disease Control.⁴⁸ Accordingly, the CDC has enacted regulations covering interstate and foreign quarantine.⁴⁹ The regulations authorize the isolation, quarantine, and detention of individuals to prevent the spread, introduction, and transmission, of a certain set of communicable diseases set forth by the President in an executive order.⁵⁰ Importantly, these provisions also give the director of the CDC the power to take over state efforts when those efforts are insufficient.⁵¹

While federal law gives certain executive agencies and government actors the power to act, nothing requires them to act. In fact, throughout the nation's history, the states have been the primary defenders against the spread of communicable diseases even though the federal power to regulate and supplant the states in this area has been recognized.⁵² The National Response Framework, the nation's response plan to emergencies and

48. Control of Communicable Diseases, 65 Fed. Reg. 49906 (Aug. 16, 2000) (reassigning the regulations from the FDA to the CDC). Federal executive agencies like the CDC are collectively known as the "fourth branch of government." See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 n.15 (1984). Congress creates these agencies by statute; agencies can only act pursuant to the authority assigned to them by Congress. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472–73 (1977).

49. 42 C.F.R. §§ 70.1–.9 (2015) (regulating interstate quarantine); *id.* §§ 71.1–.56 (regulating foreign quarantine).

50. *Id.* § 70.6. In July of 2014, President Barack Obama amended the list of communicable diseases; the list currently includes: "Cholera, Diphtheria; infectious Tuberculosis, Plague, Smallpox, Yellow Fever, Viral Hemorrhagic Fevers (including Lassa, Marburg, Ebola, Crimean-Congo, South American, and others 'not yet isolated or named')," "severe acute respiratory syndromes," and certain types of Influenza. Exec. Order No. 13674, 79 Fed. Reg. 45671 (July 31, 2014), *amending* Exec. Order No. 13375, 70 Fed. Reg. 17299 (Apr. 1, 2005) and Exec. Order No. 13295, 68 Fed. Reg. 17255 (Apr. 4, 2003), *revoking* Exec. Order No. 12452, 48 Fed. Reg. 56927 (Dec. 22, 1983), *revoking* Exec. Order No. 11070, 27 Fed. Reg. 12393 (Dec. 12, 1962), Exec. Order No. 10532, 19 Fed. Reg. 3209 (May 28, 1954), and Exec. Order No. 9708, 11 Fed. Reg. 3241 (Mar. 26, 1946).

51. 42 C.F.R. § 70.2 (2015).

52. See *Quarantine Regulations*, 20 Op. Att'y Gen. 468, 471, 474–75 (1892) (explaining the interaction of federal and state quarantine regulations, recognizing the supremacy of federal authority "in case of conflict" and that "[t]he only limitation is that the Federal regulations must not interfere with the State laws"); see also *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health*, 186 U.S. 380, 387–88 (1902) (delineating that Congress has long recognized the power of the states to enact quarantine laws but that when Congress does decide to "exercise its power on the subject" then "all state laws on the subject will be abrogated" (quoting *Morgan's La. & Tex. R.R. & S.S. Co. v. Bd. of Health*, 118 U.S. 455, 464 (1886))).

disasters of various types, also reflects the passive nature of the federal response to these emergencies. This strategy leaves the federal government waiting in the wings, watching as the states take first aim, all the while possessing greater knowledge, resources, and communicative capacity to respond to communicable disease emergencies.

2. THE NATIONAL RESPONSE FRAMEWORK

The National Response Framework (Federal Plan), the federal counterpart to Louisiana's State Plan, guides the national response to various disasters and emergencies, including communicable disease emergencies.⁵³ Importantly, the Federal Plan describes the roles and responsibilities of local, state, and federal authorities during these emergencies,⁵⁴ covering a gap left by state and federal communicable disease law. The Federal Plan further states, "[t]his Framework is always in effect, and elements can be implemented at any time . . . [and] can be partially or fully implemented."⁵⁵ Emergency Support Function and Incident Annexes outline the federal government's response in discipline-specific fields and with regard to specific hazards.⁵⁶

The annexes most relevant to communicable disease emergencies are the Public Health and Medical Services Annex and the Biological Incident Annex.⁵⁷ The former provides a mechanism for "[f]ederal assistance to supplement local [and] state . . . resources in response to a disaster, emergency, or incident that may lead to a public health . . . emergency"⁵⁸ The latter, however, outlines the roles and responsibilities of the federal government in response to "a human disease outbreak . . .

53. DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK i (2d ed. 2013), http://www.fema.gov/media-library-data/20130726-1914-25045-1246/final_national_response_framework_20130501.pdf.

54. *See id.* at 11–20.

55. *Id.* at i.

56. *Id.* at 2; *see also National Preparedness Resource Library*, FEDERAL EMERGENCY MGMT. AGENCY, <http://www.fema.gov/national-preparedness-resource-library> (last updated Dec. 23, 2015, 1:33 PM) (collecting these documents).

57. *See* DEP'T OF HOMELAND SEC., EMERGENCY SUPPORT FUNCTION # 8—PUBLIC HEALTH AND MEDICAL SERVICES ANNEX (2013) [hereinafter PUBLIC HEALTH ANNEX], http://www.fema.gov/media-library-data/20130726-1914-25045-5673/final_esf_8_public_health_medical_20130501.pdf; DEP'T OF HOMELAND SEC., BIOLOGICAL INCIDENT ANNEX (2008) [hereinafter BIOLOGICAL INCIDENT ANNEX], http://www.fema.gov/media-library-data/20130726-1825-25045-1567/biological_incident_annex_2008.pdf.

58. PUBLIC HEALTH ANNEX, *supra* note 57, at 1.

requiring Federal Assistance.”⁵⁹

These Annexes both outline available federal resources, and clarify roles and responsibilities of various government agencies and actors.⁶⁰ However, the states remain the primary leader in combating communicable disease emergencies.⁶¹ The Public Health and Medical Services Annex acknowledges that during a “major public health or medical emergency” the need for medical resources may be beyond local and state capabilities, but also notes that federal efforts were only designed to “augment the support provided by the private healthcare sector when requested by . . . state . . . governments.”⁶²

Interestingly enough, the Biological Incident Annex acknowledges the conundrum created by concurrent jurisdiction.⁶³ It notes that no level of government possesses the “authority, expertise, and resources to act unilaterally on the many complex issues that may arise in response to a nonroutine disease outbreak and loss of containment affecting a multijurisdictional area.”⁶⁴ Yet in the next paragraph, the Biological Incident Annex reveals that the federal government’s role in biological incidents is to support state and local health jurisdictions “as requested or required.”⁶⁵ While the Biological Incident Annex notes the lack of clear authority, it further solidifies the federal government’s role as one confined to playing second fiddle to the states.⁶⁶

C. FEDERAL SUPREME COURT PRECEDENT CONCERNING COMMUNICABLE DISEASE LAW AND THE INTERACTION OF STATE AND FEDERAL LAW AND THE CONSTITUTION

The four seminal United States Supreme Court cases construing the interaction of state and federal communicable disease law were handed down well over a hundred years ago. These cases accurately depict the current interaction of federal

59. BIOLOGICAL INCIDENT ANNEX, *supra* note 57, at 1.

60. *See generally* BIOLOGICAL INCIDENT ANNEX, *supra* note 57; PUBLIC HEALTH ANNEX, *supra* note 57.

61. BIOLOGICAL INCIDENT ANNEX, *supra* note 57, at 5, 9; PUBLIC HEALTH ANNEX, *supra* note 57, at 1.

62. PUBLIC HEALTH ANNEX, *supra* note 57, at 3.

63. BIOLOGICAL INCIDENT ANNEX, *supra* note 57, at 5.

64. *Id.*

65. *Id.*

66. *Id.*

and state law in this area. Nevertheless, the basis for federal communicable disease law is the Commerce Clause,⁶⁷ and the Court's view of the clause changed significantly in the final decade of the twentieth century. Thus, to justify reform of communicable disease law, one must keep in mind potential alternative bases, such as the spending power.

1. FOUR SEMINAL SUPREME COURT CASES ON WHICH TO BUILD FEDERAL REFORM

In 1824, the Court recognized the power of the states to enact quarantine laws in *Gibbons v. Ogden*.⁶⁸ There, Chief Justice John Marshall proffered that “[i]nspection laws, quarantine laws, [and] health laws” were “most advantageously exercised by the States themselves.”⁶⁹ Marshall went on to classify quarantine and health laws “of every description” as examples of laws that fall squarely under the police power of the states.⁷⁰ However, the Chief Justice's opinion also laid the groundwork for federal communicable disease law to preempt state law:

If the legislative power of the Union can reach [areas over which states have police power], it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a state, in the exercise of its acknowledged powers . . . of

67. Control of Communicable Disease, 70 Fed. Reg. 71892, 71893 (proposed Nov. 30, 2005) (“[A]uthority of the federal government to enact quarantine rules and regulations is based on the Commerce Clause . . .”).

68. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

69. *Id.* at 203 (emphasis added) (“The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.”).

70. *Id.*

regulating commerce within the State.⁷¹

Since Chief Justice Marshall's pronouncement in *Gibbons*, however, the Court and Congress have generally deferred to the states in the fight against communicable diseases.⁷² It is noteworthy that while *Gibbons* recognized the states as the primary actor with regard to public health laws, the case was decided in an era when Congress, the Court, and the nation had an extremely narrow view of Congress's commerce power.⁷³

In *Morgan's Louisiana & Texas Railroad & Steamship Co. v. Board of Health*, the Court's view of the federal government's power to preempt state quarantine law began to evolve.⁷⁴ The case challenged the constitutionality of a statute within Louisiana's system of quarantine laws because it allegedly conflicted with federal authority to regulate interstate commerce.⁷⁵ Ultimately, the Court upheld the state statute because no conflict existed.⁷⁶ The Court recognized, however, that state quarantine laws in the maritime field were regulations of commerce.⁷⁷ The Court expounded on the Chief Justice's rhetoric from *Gibbons*, noting that state quarantine laws were "valid until displaced or contravened by some legislation of Congress[.]"⁷⁸ Yet, the Court noted its long line of cases recognizing deference to states in the regulation of public health within their borders.⁷⁹

71. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203–04 (1824).

72. See BIOLOGICAL INCIDENT ANNEX, *supra* note 57, at 5, 9; PUBLIC HEALTH ANNEX, *supra* note 57, at 1; Quarantine Regulations—Power of State—Federal Power, 20 Op. Att'y Gen. 468, 470, 474 (Sept. 10, 1892) (opining that the "only limitation" on the quarantine powers conferred to the Surgeon General and the Secretary of the Treasury was that any regulation promulgated "must not interfere with State laws").

73. See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1129 (2000) ("Before the 1930s, Congress simply did not attempt to push the theory [of the stream of commerce] any further.").

74. *Morgan's La. & Tex. R.R. & S.S. Co. v. Bd. of Health*, 118 U.S. 455 (1886).

75. *Id.* at 456. The alleged conflict in *Morgan* was between a set of Louisiana statutes, which allowed the collection of fees by the Louisiana Board of Health, and several constitutional provisions including the Commerce Clause and the prohibitions on state import duties. *Id.* (citing U.S. CONST. art. I, § 8, cl. 3, § 9, cl. 6, § 10, cl. 3).

76. *Id.* at 465, 467.

77. *Id.* at 465. ("[W]hether passed with intent to regulate commerce or not, [maritime quarantine laws] must be admitted to have that effect . . .").

78. *Id.*

79. *Id.*

The twentieth century would reveal an even greater evolution of constitutional ideology regarding public health law. In 1902, the Court followed *Morgan* with *Compagnie Francaise de Navigation a Vapeur v. Board of Health*.⁸⁰ In *Compagnie*, the Court reaffirmed *Morgan*, finding Louisiana's quarantine laws valid until Congress passed a superseding federal law.⁸¹ In 1913, however, the Court's description of the relationship between federal and state quarantine laws shifted in *The Minnesota Rate Cases*.⁸² There, the Court reaffirmed *Morgan* and *Compagnie* by stating that federal quarantine laws could preempt state law if Congress wished, but the Court, for the first time, recognized that quarantine laws "undoubtedly operate upon interstate and foreign commerce."⁸³ While earlier Supreme Court precedent had questioned whether quarantine laws fell under the ambit of "interstate commerce,"⁸⁴ *The Minnesota Rate Cases* solidified that communicable disease laws, especially those involving quarantine and isolation, did in fact regulate interstate commerce.⁸⁵

The Court first noted its willingness to recognize federal authority in the public health field in *Gibbons* but the true shift began in *Morgan* and *Compagnie*. The federal government's authority to preempt state measures then was solidified by the *Minnesota Rate Cases*.⁸⁶ With the modern Court's expansive view of the commerce power, constitutional authority for federal communicable disease law is hard to contest.⁸⁷ However, the Court's view of commerce has changed significantly since the early twentieth century and if the federal government effectuates

80. *Compagnie Francaise de Navigation a Vapeur v. Bd. of Health*, 186 U.S. 380 (1902).

81. *Id.* at 391. In *Compagnie*, neither party attempted to argue that Congress lacked the authority to regulate quarantine under the Commerce Clause. See Arjun K. Jaikumar, Comment, *Red Flags in Federal Quarantine: The Questionable Constitutionality of Federal Quarantine After NFIB v. Sebelius*, 114 COLUM. L. REV. 677, 691 (2014).

82. *The Minnesota Rate Cases*, 230 U.S. 352 (1913).

83. *Id.* at 406 (emphasis added) (reasoning that state quarantine laws would be subordinate to federal quarantine laws enacted under Congress's "paramount authority" if the federal government decided to preempt state law).

84. See *Morgan's La. & Tex. R.R. & S.S. Co. v. Bd. of Health*, 118 U.S. 455, 465–66 (1886); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

85. *Minnesota Rate Cases*, 230 U.S. at 406.

86. See *id.* at 411–12.

87. See Douglas W. Kmiec, *Gonzalez v. Raich: Wickard v. Filburn Displaced*, 2005 CATO SUP. CT. REV. 71, 98 ("A majority of the present Court finds no judicially enforceable limit on the federal commerce power.").

reform of communicable disease law, it must do so with the current Commerce Clause analysis in mind.

2. THE COURT'S MODERN COMMERCE CLAUSE JURISPRUDENCE

Federal communicable disease law is currently authorized by the Commerce Clause.⁸⁸ Thus, reform would likely reside there as well. With that in mind, this subsection illustrates the modern Commerce Clause doctrine.

The Supreme Court's post-1930s jurisprudence ushered in the most expansive view of the commerce power in the Nation's history,⁸⁹ culminating with its decision in *Wickard v. Filburn*. There, the Court dramatically expanded the commerce power when it found that Congress could regulate purely local activity, even though not considered "commerce," if the sum of those activities, "exert[ed] a substantial economic effect on interstate commerce[.]"⁹⁰ In fact, from 1937 until 1995 not a single federal law was struck down for being beyond the scope of Congress's commerce power.⁹¹

Wickard's five-decade run as a testament to Congress's broad commerce power came to an end in *United States v. Lopez*⁹² and

88. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power to . . . regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."); see also Control of Communicable Diseases, 70 Fed. Reg. 71892, 71893 (proposed Nov. 30, 2005) (noting that congressional authority to pass quarantine laws stems from the Commerce Clause).

89. See *United States v. Darby*, 312 U.S. 100, 113, 116, 125 (1941) (upholding the wage and hour provisions of the Fair Labor Standards Act as a valid exercise of Congress's "plenary" commerce power even though the manufacturing process at issue was "not of itself interstate commerce"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 26, 30–31, 43 (1937) (upholding a challenge to the National Labor Relations Act by finding that the steel company challenger was clearly involved in interstate commerce).

90. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (holding that a wheat grower's activities in harvesting wheat for his own consumption above the limit set by federal law, even though wholly intrastate, could be regulated by Congress because that activity, when viewed in the aggregate, had a substantial effect on interstate commerce).

91. Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766 (2006).

92. *United States v. Lopez*, 514 U.S. 549, 561–62 (1995) (the Court reasoned that, based on federalism principles, a statute that had "nothing to do with 'commerce'" was beyond Congress's power under the Commerce Clause and further noted that the statute at issue, which banned possession of firearms in school zones, lacked a nexus to interstate commerce "which would ensure" that the activity was affecting

United States v. Morrison.⁹³ Following *Lopez* and *Morrison*, under the Commerce Clause Congress could regulate: (1) the channels of interstate commerce;⁹⁴ (2) instrumentalities of interstate commerce;⁹⁵ and (3) “activities that have a substantial relation to interstate commerce.”⁹⁶ In order to determine whether an activity has a “substantial effect” on interstate commerce, the Court looked to whether the statute contained: (a) a jurisdictional nexus connecting the activity to interstate commerce;⁹⁷ (b) congressional findings of an activity’s effect on interstate commerce;⁹⁸ and (c) the inherent nature of the activity—whether the activity was economic or non-economic.⁹⁹ If an activity was considered noneconomic, then “Congress cannot justify [the] regulation . . . by finding that the cumulative impact . . . [had] a substantial effect on interstate commerce.”¹⁰⁰

However, if an activity was considered economic, substantial effects could be determined based on the aggregated impact of the activity.¹⁰¹ Thus, while *Lopez* and *Morrison* placed an outer limit on the reach that *Wickard* created, they also provided a clear

interstate commerce).

93. *United States v. Morrison*, 529 U.S. 598, 617 (2000) (rejecting the notion that Congress could regulate “noneconomic . . . conduct based solely on that conduct’s aggregate effect on interstate commerce” and noting that the “Constitution requires a distinction between what is truly national and what is truly local”); *see also* *Printz v. United States*, 521 U.S. 898, 925–27 (1997) (striking down federal legislation that forced states to perform background checks on prospective handgun purchasers on Tenth Amendment “anti-commandeering” grounds because it forced states to enforce a federal law); *New York v. United States*, 505 U.S. 144, 176 (1992) (striking down a federal law that forced states to claim title to waste because it violated state sovereignty by commandeering the state’s legislative process).

94. *United States v. Lopez*, 514 U.S. 549, 558 (1995) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)). For further discussion, see *infra* Part III.B.1.i.

95. *Lopez*, 514 U.S. at 558 (citing *The Shreveport Rate Cases*, 234 U.S. 342 (1914); *S. Ry. Co. v. United States*, 222 U.S. 20 (1911)). For further discussion, see *infra* Part III.B.1.ii.

96. *Lopez*, 514 U.S. at 558–59. The Supreme Court in *Lopez* uses “having a substantial relation” and “substantially affect” interchangeably. *See id.* For further discussion, see *infra* Part III.B.1.iii.

97. *Lopez*, 514 U.S. at 561–62.

98. *See Morrison*, 529 U.S. at 614.

99. *See Lopez*, 514 U.S. at 559–60; *Morrison*, 529 U.S. at 617–18.

100. Chemerinsky, *supra* note 91, at 1770; *see also Morrison*, 529 U.S. at 617–18 (“We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”).

101. *See Morrison*, 529 U.S. at 613; *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

framework.¹⁰² The jurisprudence that followed, however, would muddy the waters yet again.

Gonzales v. Raich swung the pendulum back in favor of a more expansive view of Congress's commerce power.¹⁰³ Relying on the Court's precedent from *Wickard*, the *Raich* Court held that Congress could regulate a wholly intrastate activity if Congress had a rational basis to conclude that the activity, when looked at cumulatively, had a substantial effect on interstate commerce.¹⁰⁴ Arguably *Raich* added very little to the Commerce Clause analysis because the Court found it easily distinguishable from *Lopez* and *Morrison*.¹⁰⁵ As Erwin Chemerinsky noted, when reconciled with *Wickard*, *Lopez*, and *Morrison*, all *Raich* added was that commodities produced wholly in-state are an economic activity and thus could fall under Congress's commerce power assuming the cumulative impact of the intrastate production produces substantial effects on interstate commerce.¹⁰⁶

More recently, in *National Federation of Independent Business v. Sebelius*, the Court held that the Commerce Clause could not justify the individual mandate of the Affordable Care Act (ACA).¹⁰⁷ Chief Justice Roberts argued that the mandate "does not regulate existing commercial activity," but instead requires persons to "become active in commerce by purchasing a product."¹⁰⁸ The Chief Justice further averred that allowing the Commerce Clause to "regulate individuals precisely because they are doing nothing" would allow Congress to regulate a significantly greater scope of activities or rather, "inactivities."¹⁰⁹

Although five members of the Court agreed that the

102. See *United States v. Morrison*, 529 U.S. 598, 613–18 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995).

103. *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding a federal law that banned the possession of marijuana by individuals even though California state law provided an exemption for persons with medical needs).

104. See *id.* at 22.

105. See *id.* at 23–33. Respondents in *Raich* asked the Court to hold specific, individual applications of a valid statutory scheme unconstitutional whereas *Lopez* and *Morrison* involved challenges to statutory schemes in their entirety. *Id.* at 23.

106. Chemerinsky, *supra* note 91, at 1780; see also *supra* notes 92–102 and accompanying text.

107. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) (Roberts, C.J.). Four Justices voted to uphold the mandate under the Commerce Clause; five Justices voted against doing so, but were divided as to the reasoning.

108. *Id.* at 2587.

109. *Id.* at 2587, 2589.

individual mandate could not be justified under Congress's commerce power, the other Justices did not agree with the Chief Justice's reasoning. The dissenting opinion of Justice Scalia, joined by Justices Kennedy, Thomas, and Alito, at least in principle, seemed to mirror the Chief Justice's reasoning.¹¹⁰ These Justices argued that to extend the federal government's power under the Commerce Clause to cover a person's failure to do something would make "breathing in and out" a basis for federal authority and would "extend federal power to virtually all human activity."¹¹¹ Because it was not joined by a majority of the Court, it is unclear whether the Chief Justice's rationale is binding on the Commerce Clause analysis.¹¹²

While *Sebelius's* impact on Commerce Clause analysis is still unclear, it has caused at least one commentator to question the constitutionality of the quarantine provisions in the PHSA.¹¹³ However, it is far more likely that *Sebelius* simply prevents Congress from justifying purchase mandates under the commerce power—a deviation that would be minimal.¹¹⁴ *Sebelius* is also important because it shows the Roberts Court's willingness to

110. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2642–43 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

111. *Id.* at 2643 (using the wheat growing example from *Wickard* to note that this understanding of the commerce power would cover a farmer's failure to grow wheat, which the Justices concluded "is not an economic activity, or any activity at all").

112. See Erwin Chemerinsky, National Federation of Independent Business v. Sebelius: *What Will It Mean?*, 39 PREVIEW U.S. SUP. CT. CASES 280, 281 (2012) ("One interesting question is whether Chief Justice Roberts's discussion of the individual mandate as being outside of the scope of the commerce power should be regarded as part of the holding or dicta."); Jaikumar, *supra* note 81, at 700 (noting the disagreement amongst scholars on the precedential value of Part III-A of the Chief Justice's opinion).

113. Jaikumar, *supra* note 81, at 714 ("Though the PHSA's quarantine provisions have survived unchallenged for nearly seven decades, the Court's recent turn in Commerce Clause interpretation has thrown into doubt the constitutionality of a once widely accepted federal power."); see also Public Health Service Act, 42 U.S.C. §§ 264–272 (2012) (authorizing quarantines).

114. See Neil S. Siegel, *More Law Than Politics: The Chief, The "Mandate," Legality, and Statesmanship in THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 192, 204–05 (Nathaniel Persily et al. eds., 2013) (hypothesizing that *Sebelius* is limited only to purchase mandates and would not prohibit Congress's quarantine power); see also Michael C. Dorf, *Commerce, Death Panels, and Broccoli: Or Why The Activity/Inactivity Distinction in The Health Care Case Was Really About The Right To Bodily Integrity*, 29 GA. ST. U. L. REV. 897, 902–03 (2013) ("It is therefore difficult to believe that the no-mandate rule will seriously hamstring future Congresses in achieving important national objectives of the sort it has previously achieved using the Commerce Clause.").

uphold federal laws pursuant to an alternate enumerated power.¹¹⁵ Thus, *Sebelius* should prove instructive to the federal government in crafting reform for communicable disease law based on other enumerated and implied powers.

The next section discusses Congress's ability to increase its presence in communicable disease law by justifying reform solely on its spending power.

3. CONGRESS'S SPENDING POWER: AN ALTERNATIVE PLATFORM FOR REFORM

The spending power¹¹⁶ is arguably Congress's most expansive enumerated power.¹¹⁷ In *United States v. Butler*, the Supreme Court solidified this concept when it held that Congress's spending power was not limited to spending based on the other enumerated powers.¹¹⁸ In the cases following *Butler*, the Court reinforced the expansive view of Congress's spending powers as a basic constitutional principle.¹¹⁹

Congress thus has broad discretion to spend for the general welfare and is not limited to spending in the execution of Article I enumerated powers.¹²⁰ Further, contained within the spending power is Congress's ability to condition the grant of federal funds to state governments.¹²¹ By this means Congress, although it

115. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593–600 (2012) (upholding the ACA's individual mandate under Congress's Taxing Power rather than the Commerce Power).

116. U.S. CONST. art. I, § 8, cl. 1. ("The Congress shall have the Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."). This clause includes both the taxing and spending powers, but this Comment will focus only on Congress's spending power.

117. See Chemerinsky, *supra* note 112 at 281 ("Since 1936, not one exercise of Congress' taxing and spending power has been declared unconstitutional.").

118. *United States v. Butler*, 297 U.S. 1, 66 (1936).

119. See, e.g., *Sabri v. United States*, 541 U.S. 600, 608 (2004) (upholding a federal anti-bribery statute under the spending power because Congress has a legitimate interest in ensuring the funds it allocates are not misused); *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (holding that Congress had the authority to tax employers to set up an "old age" benefit system under the spending power because the problem Congress was attempting to remedy was national in nature and doing so was for the "common benefit").

120. See *Butler*, 297 U.S. at 65–66; see *supra* notes 123–38 and accompanying text.

121. *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) ("While the United States is not concerned with and has no power to regulate local political

cannot directly compel state action, can induce desired behavior.¹²²

The Court began to shape the modern spending power framework in *Pennhurst State School & Hospital v. Halderman*.¹²³ There, the Court held that in order to be a valid exercise of Congress's spending power, conditions on grants to states must be expressly stated and unambiguous.¹²⁴ Further, the *Pennhurst* Court stated that Congress's spending power "does not include surprising participating States with post-acceptance or 'retroactive' conditions."¹²⁵ In *South Dakota v. Dole*,¹²⁶ the Court required a close relationship between the proposed condition and the purpose of the federal funding.¹²⁷ The Court also hypothesized that the conditions placed on the receipt of federal funds could become "so coercive as to pass the point at which pressure turns into compulsion."¹²⁸

In *Sebelius* the Court created an additional wrinkle to the spending analysis.¹²⁹ One of the legal issues in *Sebelius* concerned a provision of the ACA that stripped states of existing Medicaid funding if they chose not to expand the program.¹³⁰ Originally, Medicaid was designed to cover only four classes of persons, but the Act's proposed expansion would remove the classification requirement and simply cover all those below a particular income level.¹³¹ The size of the program was important

activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.").

122. *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (upholding the constitutionality of a statutory provision that conditioned the receipt of federal funds on the states' adoption of civil service systems that limited certain political behaviors by state government officials).

123. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (holding that an implied condition upon funding was not mandatory but only an encouragement for states to provide better care for intellectually disabled residents).

124. *Id.* at 17.

125. *Id.* at 25.

126. *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding a spending program that conditioned the receipt of highway funding to states on states raising their minimum drinking age to twenty-one).

127. *Id.* at 208–09 (nothing that the raised drinking age and the highway funding both promoted the safe use of highways).

128. *Id.* at 211–12 (finding the condition at issue only "mild encouragement").

129. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605–07 (2012).

130. *Id.* at 2607.

131. *Id.* at 2605–06 (noting that Medicaid was originally designed to cover "the disabled, the blind, the elderly, and needy families with dependent children" (citing

to the Court, which found that the expansion was so large that it constituted an entirely new program.¹³² For this reason, and also because the provision at issue authorized the secretary to strip states of federal funds they had already accepted, the Court found the provision unconstitutional.¹³³ Importantly, the Court clearly noted that Congress could condition future funds on a state's acceptance of the expansion as long as the condition did not result in stripping federal funds already accepted.¹³⁴

In summary, in order for Congress to properly condition the receipt of funds, a program must benefit the general welfare without violating another constitutional provision;¹³⁵ the condition(s) placed on the grant must be unambiguous and expressly stated;¹³⁶ the condition(s) must be related to the purposes of the spending;¹³⁷ and Congress cannot condition the acceptance of a spending program that is so large that it amounts to a new program on the threat of stripping funds previously accepted by the states.¹³⁸

III. ANALYSIS

As Section II demonstrates, the concurrent jurisdiction over communicable disease emergencies raises significant questions: at which point during an outbreak will the federal government become the primary actor, if it will get involved at all; to what extent can the federal government get involved; and when the federal government does act, what rights are reserved by the states? This section explores the problems that the current state of affairs presents during these emergencies and provides two alternative constitutional justifications for the reform.

A. THE PROBLEMS PRESENTED BY THE CURRENT STATE OF AFFAIRS

This country's jurisprudence has long recognized the states

42 U.S.C. § 1396a(a)(10)).

132. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606 (2012).

133. *Id.* at 2606–07 (holding that, even without “fix[ing] the outermost line’ where persuasion gives way to coercion[,] . . . [t]his statute is surely beyond it” (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 591 (1937))).

134. *Id.* at 2607.

135. *United States v. Butler*, 297 U.S. 1, 68 (1936).

136. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

137. *See South Dakota v. Dole*, 483 U.S. 203, 207–09 (1987).

138. *See Sebelius*, 132 S. Ct. at 2605–08.

as the first lines of defense during communicable disease emergencies. However, such emergencies are no longer localized. Consequently, states are no longer in a better position to respond to them. First, this subsection outlines how communicable disease emergencies affect the national and global economy and thus require a federal response. Next, this subsection details how the lack of clear authority and guidance during the 2014 Ebola outbreak raised significant red flags for future communicable disease emergencies.

1. OUTBREAKS, EPIDEMICS, AND PANDEMICS: COMMUNICABLE DISEASE EMERGENCIES ARE INTERSTATE COMMERCE

The reality of travel today, the primary vehicle for spreading disease,¹³⁹ is that it has become much easier, and more common, for humans and goods to travel through multiple jurisdictions in a single day. The frequency of trade and travel today compounds the effect that communicable disease emergencies have on national and global economies. One World Bank study of the effects of communicable disease emergencies estimated a potential 4.8% decline in worldwide gross domestic product due to a widespread epidemic.¹⁴⁰ Another study performed by the Lowy Institute estimated that the net loss to the world's economy during an epidemic could be as high as \$4.4 trillion and could collapse national economies.¹⁴¹ In fact, according to a U.S. Census study, roughly 5.2 million employed Americans reported living in one state and commuting to another every day for work.¹⁴² Modern travel makes it impossible for fifty individual states to effectively respond to communicable disease emergencies.

139. Dirk Brockmann et al., *The Scaling Laws of Human Travel*, 439 NATURE 462, 462 (2006). Brockmann, a theoretical physicist at Northwestern University in Illinois, studied how epidemics could potentially spread in the United States by tracing human movement and the circulation of money through data collected on www.wheresgeorge.com, a bill-tracking system. *See id.* at 462–65.

140. ANDREW BURNS ET AL., WORLD BANK, EVALUATING THE ECONOMIC CONSEQUENCES OF AVIAN INFLUENZA 3 (2006), http://siteresources.worldbank.org/EXTAVIANFLU/Resources/EvaluatingAHIeconomics_2008.pdf.

141. WARWICK J. MCKIBBIN & ALEXANDRA A. SIDORENKO, LOWY INST. FOR INT'L POLICY, GLOBAL MACROECONOMIC CONSEQUENCES OF PANDEMIC INFLUENZA 26 (2006), <http://www.brookings.edu/~media/research/files/papers/2006/2/development-mckibbin/200602.pdf>.

142. BRIAN MCKENZIE, U.S. CENSUS BUREAU, OUT-OF-STATE AND LONG COMMUTES: 2011, at 10 (2013), <http://www.census.gov/hhes/commuting/files/2012/ACS-20.pdf>.

For example, according to the Brookings Institute, the 2014 Ebola outbreak had a significant impact on several economic areas, including mobility, agriculture, taxes, tariffs, mining and investments, banking, and tourism.¹⁴³ Brookings also estimated that in West Africa alone, the disease had a \$359 million short-term impact and significantly decreased the Gross Domestic Product of several countries.¹⁴⁴ Reportedly, the fear of contracting Ebola was the single most important factor affecting the West African economies.¹⁴⁵ Further, the United Nations and the World Bank recognized that it cost billions to contain the outbreak.¹⁴⁶

The United States is not insulated from the economic damage that a widespread communicable disease emergency would cause.¹⁴⁷ Scientists have projected that economic loss in the United States due to a pandemic could reach as high as \$250 billion.¹⁴⁸ The Congressional Budget Office further projected that a pandemic could cause recession in several sectors of the economy.¹⁴⁹

Because communicable disease emergencies have a significant impact on the national economy, they necessarily affect interstate commerce. When the national economic effect is combined with the frequency of trade and travel today, it becomes evident that communicable disease emergencies require a federal response. Plus, the federal government is better situated to

143. Amadou Sy & Amy Copley, *Understanding the Economic Effects of the 2014 Ebola Outbreak in West Africa*, BROOKINGS INST.: AFRICA IN FOCUS (Oct. 1, 2014, 3:41 PM), <http://www.brookings.edu/blogs/africa-in-focus/posts/2014/10/01-ebola-outbreak-west-africa-sy-copley>.

144. *Id.* GDP is “the total value of the goods and services produced by the people of a nation during a year.” *Gross Domestic Product*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/gross%20domestic%20product> (last visited on Mar. 5, 2015). The measure of a nation’s GDP includes government expenditures.

145. *See* Sy & Copley, *supra* note 143.

146. *See id.*

147. *See, e.g.*, Martin I. Meltzer et al., *The Economic Impact of Pandemic Influenza in the United States: Priorities for Intervention*, 5 EMERGING INFECTIOUS DISEASES 659 (1999), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2627723/pdf/10511522.pdf>.

148. *Id.* at 664. The \$250 billion figure represents the high-end estimate for a 35% infection rate.

149. ROBERT ARNOLD ET AL., CONG. BUDGET OFFICE, A POTENTIAL INFLUENZA PANDEMIC: POSSIBLE MACROECONOMIC EFFECTS AND POLICY ISSUES 11–12 (rev. ed. 2006), <https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/12-08-birdflu.pdf>.

interact with the global economic actors. Allowing states to be the first line of defense in communicable disease emergencies is effectively allowing states to experiment and gamble with a significant portion of the national economy. Considering the effect that outbreaks have on economies and the domestic drama that unfolded following the recent Ebola outbreak, the federal government should consider ways to gain oversight and if necessary override state efforts during communicable disease emergencies.

2. THE STATE AND FEDERAL RESPONSES DURING THE 2014 EBOLA OUTBREAK ARE CAUSE FOR CONCERN

During the 2014 Ebola outbreak, federal and state policies failed to control the spread of the disease in the United States.¹⁵⁰ The first Ebola patient, Thomas Duncan, was diagnosed while living in Dallas, Texas.¹⁵¹ Following Mr. Duncan's Ebola diagnosis, two Texas healthcare workers who treated him traveled in interstate commerce—one to Ohio by air and another

150. See, e.g., Walters & Root, *supra* note 7. The problems raised by the 2014 West African Ebola outbreak in Louisiana were not unique to that event or by any measure rare or exclusive. In March of 2015, Louisiana suffered an *E. coli* outbreak in one parish and later that year a viral meningitis outbreak spanning six parishes, neither of which were timely reported by private hospitals to state public health officials as required by Louisiana law; in fact, the meningitis outbreak was not reported for over six weeks. Rebecca Catalanello, *Louisiana Infectious Disease Outbreaks Often Go Unreported*, NOLA.COM/TIMES-PICAYUNE (July 21, 2015, 9:30 AM), http://www.nola.com/health/index.ssf/2015/07/louisianas_infectious_disease.html (outlining the problems with Louisiana's communicable disease reporting system in that private physicians and hospitals often fail to report cases of infectious diseases to the state, and when they do the state fails to give them feedback). Dr. Raoult Ratard, an epidemiologist with the Louisiana Office of Public Health, reportedly drafted a letter to private healthcare providers rebuking the doctors and hospitals involved, stating, "Reporting of infectious diseases and outbreaks following the sanitary code is NOT a bureaucratic exercise' . . ." *Id.* However, in both cases the public was never informed of the hospitals' failure to timely report the outbreaks or which hospitals were involved because Dr. Jimmy Guidry, the state health officer and medical director for the Department of Health and Hospitals, apparently did not trust the public with this information, worrying instead that doing so would compromise patient identity and would stigmatize hospitals. See *id.* Dr. Guidry acknowledged that this "created the worst outcome, which is patients not getting [] checked." *Id.* Furthermore, enforcement of the reporting requirement is lax and the penalty for private healthcare providers appears to be no more than sternly worded letters. See *id.* So, it is unclear what the reporting system actually is other than a mere bureaucratic exercise, at least in the eyes of the State Health Department.

151. Manny Fernandez & Dave Philipps, *Death of Thomas Eric Duncan in Dallas Fuels Alarm over Ebola*, N.Y. TIMES (Oct. 8, 2014), <http://www.nytimes.com/2014/10/09/us/ebola-us-thomas-eric-duncan.html>.

on an international cruise.¹⁵² In fact, of the four confirmed cases of Ebola in the United States, two of the victims treated Mr. Duncan in Texas.¹⁵³ Even after Texas knew of the confirmed Ebola case within its borders, it failed to control the movement of those exposed to the disease.¹⁵⁴ It was not until after Mr. Duncan's diagnosis that Texas attempted to create a policy to prevent the spread of the disease.¹⁵⁵ The lack of existing policy allowed the nurses' movement and perpetuated the ensuing chaos. Luckily, those who treated Duncan did not infect anyone else, but luck is all the public has to thank for that fact. Next time, though, the public may not be so lucky.

Mr. Duncan entered the country through an airport,¹⁵⁶ which the federal government has the power to regulate.¹⁵⁷ Plus, the CDC had the power to control the interstate movement of the two nurses who treated Mr. Duncan,¹⁵⁸ but it failed to do so. Therefore, both Texas and the federal government share responsibility for the potential spread of Ebola in the United States. This incident stands as an example of how government actors can fail when there are no existing emergency policies or when such policies, if they do exist, are poorly crafted. As long as concurrent jurisdiction over the management of communicable

152. Walters & Root, *supra* note 7.

153. See Manny Fernandez, *Second Ebola Case in U.S. Stokes Fears of Health Care Workers*, N.Y. TIMES (Oct. 12, 2014), <http://www.nytimes.com/2014/10/13/us/texas-health-worker-tests-positive-for-ebola.html>; Fernandez & Philipps, *supra* note 151; see also James Gallagher, *Second Texas Health Worker Tests Positive for Ebola*, BBC NEWS (Oct. 15, 2014), <http://www.bbc.com/news/world-us-canada-29628622>.

154. See Walters & Root, *supra* note 7. Two of the healthcare workers who treated Mr. Duncan later became infected with Ebola, but only one traveled in interstate commerce. A third healthcare worker who treated Mr. Duncan also traveled through interstate commerce, but did not contract the disease. In all three cases, Texas failed to control the movement of the healthcare workers exposed to Mr. Duncan and his biological material. See *id.*

155. See *id.* ("As the Ebola scare turned into a full-blown media feeding frenzy, state and local health officials—who were consulting experts at the CDC—seemed to be drafting policies on the fly."). Louisiana did not promulgate its Ebola Virus Disease Response plan until after the confirmation of Ebola within Texas either. See *supra* Part II.A.iii.

156. Greg Botelho, *U.S. Ebola Patient: The Travels and Health Travails of Thomas Eric Duncan*, CNN (Oct. 2, 2014), <http://www.cnn.com/2014/10/01/health/us-ebola-patient/index.html>.

157. See, e.g., Notice of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled To, From, or Through Certain Ebola-Stricken Countries, 79 Fed. Reg. 63313 (Oct. 21, 2014).

158. See *supra* Part II.B.1.

disease emergencies exists, the government is likely to fail to properly quarantine individuals to stop the spread of disease.

The failure to control the situation in Texas following the confirmed case of Ebola raises several questions. If the federal government has the power to prevent the spread of disease through interstate commerce and states control the spread within their own borders, at what point does state jurisdiction end and federal jurisdiction begin? The answer is unclear and existing legislation and regulation perpetuates this uncertainty. The ambiguous policies of fifty states and the federal government's lack of guidance not only prevent a unified effort at home, but also have the potential to inflict loss abroad. The United States's failure to prevent infected persons from traveling abroad may force other countries to expend resources addressing an issue that could have been dealt with domestically. To prevent this catastrophic scenario, communicable disease policy needs to be unified into one comprehensive body with a clear control and command structure.¹⁵⁹

Another problem with the 2014 Ebola response in the United States arose when Louisiana chose to isolate itself instead of helping Texas. In late 2014, Louisiana Attorney General Buddy Caldwell successfully blocked the introduction of the incinerated ashes of Ebola victim Thomas Duncan's belongings even though the ashes posed no risk.¹⁶⁰ Instead of cooperating with Texas, Louisiana chose to isolate itself.

Around the same time, the Louisiana Department of Health sent a threatening letter to individuals who were scheduled to

159. It needs to be noted that one life is not insignificant and should make policymakers take notice. Although the CDC reports only one death in the United States due to Ebola, over 11,000 individuals died worldwide. *2014 Ebola Outbreak in West Africa*, *supra* note 6. Additionally, although deaths attributed to measles are rare in the United States, in 2014 alone 114,900 individuals died globally from the disease. *Measles Fact Sheet*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs286/en/> (updated Nov. 2015).

160. *See Louisiana v. Veolia Env'tl. Servs. N. Am., L.L.C.*, No. 634257, 2014 WL 5100303, at *1 (La. 19th Jud. Dist. Ct. Oct. 13, 2014) (granting a temporary restraining order preventing the landfill from accepting Duncan's ashes); *see also* Avery, *supra* note 8 (reporting that the landfill owner stated he would not have accepted the ashes even though he knew the ashes posed no risk); *Ebola-Associated Waste Management*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vhf/ebola/healthcare-us/cleaning/waste-management.html> (last updated Feb. 12, 2015) (stating that Ebola waste that has been incinerated poses no risk and is not infectious).

attend a conference in New Orleans warning them to stay out of Louisiana.¹⁶¹ This letter informed the scheduled attendees that if they stepped foot in Louisiana, they would be confined against their will, even if they “had no exposure to [Ebola] patients.”¹⁶² Surprisingly, the same letter acknowledged that “asymptomatic individuals are not at risk of exposing others.”¹⁶³ None of the scheduled attendees had symptoms of Ebola, so the only effect of the letter was to propagate the fear, hysteria, and paranoia that gripped Louisiana’s officials following the outbreak. The state effectively impeded interstate commerce because the scheduled attendees were primarily out-of-state or foreign visitors.¹⁶⁴

The questions raised by the events in Louisiana and Texas following the 2014 Ebola outbreak beg review of state and federal policies in this field. These questions along with the inherent nature of outbreaks and the economic suffering caused by communicable diseases are all reasons that the federal government should reconsider its passive role. Without a preemptive federal law, it is likely that similar events will recur during the next communicable disease emergency. The next subsection outlines two permissible constitutional bases for the federal government to effectuate reform in communicable disease law.

B. CONSTITUTIONAL BASIS FOR CHANGE: COMMERCE POWER OR SPENDING POWER?

Because outbreaks were “largely local in their character,” in the early twentieth century, states were considered better situated to deal with communicable diseases.¹⁶⁵ However, the

161. This conference was the sixty-third annual meeting of the American Society of Tropical Medicine and Hygiene. *See* Bausch et al., *supra* note 9. It is usually attended by practicing physicians, research physicians, research scientists, health care administrators, and international diplomats and is designed to be an information-sharing symposium. *Id.* Among the topics to be discussed was Ebola, as many of the doctors scheduled to attend had been to West Africa to study the outbreak. *Id.*

162. *Id.* (“We see no utility in you traveling to New Orleans to simply be confined to your room.” (quoting the Health Department letter)).

163. *See id.* (quoting the Health Department letter).

164. It is likely that most of the attendees had already spent money in Louisiana by booking hotels, car rentals, and the like, thereby implicating the Commerce Clause. *See id.*

165. 20 U.S. Op. Att’y Gen. 468, 470, 474 (Sept. 10, 1892) (opining that the only limitation on the quarantine powers conferred to the Surgeon General and the Secretary of the Treasury was that any regulation promulgated “must not interfere

century between the *Minnesota Rate Cases* and today has witnessed an ever-shrinking globe due to the growing ease and frequency of national and international travel. During that time period, the Supreme Court's view of the commerce power has expanded significantly. Therefore, in order for the federal government to enact reform in this area, it could base its justification on the Court's modern Commerce Clause jurisprudence. Alternatively, as demonstrated by Chief Justice Roberts's opinion in *Sebelius*, the Court may use the spending power to justify the law. Therefore, the first part of this subsection outlines a Commerce Clause justification for reform, while the second part outlines the spending power justification for reform.

1. COMMERCE CLAUSE JUSTIFICATION FOR REFORM

During an oral argument at the Supreme Court, Justice Antonin Scalia stated, "if anything relates to interstate commerce, it's communicable diseases . . ."¹⁶⁶ During the same argument, Justice Kennedy also opined that communicable diseases are easily related to interstate commerce.¹⁶⁷ Although oral arguments are not binding Court opinions and Justices often hypothesize from the bench, this colloquy is highly instructive as to the current Court's view of communicable diseases under the commerce power.

Given the Court's more expansive view of the commerce power since the New Deal, the ability of the federal government to exercise authority over communicable diseases is hard to contest. With that in mind, the most difficult task is determining what the reform would actually regulate. In turn, this creates the additional problem of predicting how the Court would define what channel, instrumentality, or activity is being regulated. This subsection addresses the problem by discussing each Commerce Clause test: (a) the channels of interstate commerce; (b) the instrumentalities of interstate commerce; and (c) activities that have a substantial effect on interstate commerce.

with State laws").

166. Transcript of Oral Argument at 29, *United States v. Comstock*, 560 U.S. 126 (2010) (No. 08-1224), 2010 WL 97479.

167. *Id.* at 21.

a. Channels of Interstate Commerce

Generally speaking, channels of interstate commerce are the “routes through which commerce travels,”¹⁶⁸ or the “interstate transportation routes through which persons and goods move.”¹⁶⁹ These “routes” include highways, railroads, navigable waters, airspace, telecommunications networks, and stock markets.¹⁷⁰ While Congress’s power to regulate these channels is very broad, any regulation under this prong must be related to movement using these channels.¹⁷¹ This power encompasses the ability to regulate activities outside the flow of commerce and activities that are wholly local in nature.¹⁷² Further, the federal government can regulate the interstate and intrastate channels of commerce to prevent their injurious use and to prevent the spread of harm through said channels.¹⁷³ Finally, the activities regulated under the channels of commerce are not required to have a substantial relation or effect on interstate commerce.¹⁷⁴

The analysis here is simple and can be broken into two types of movement: (1) movement between the states or across national borders; and (2) movement within a state. The CDC already has

168. *United States v. Shahani-Harmoni*, 286 F. Supp. 2d 723, 732 (E.D. Va. 2003).

169. *United States v. Morrison*, 529 U.S. 598, 613 n.5 (2000) (quoting *United States v. Lankford*, 196 F.3d 563, 571–72 (5th Cir. 1999)).

170. *See United States v. Ballinger*, 395 F.3d 1218, 1225–26 (11th Cir. 2005) (collecting cases); *see also United States v. Sutcliffe*, 505 F.3d 944, 952–53 (the internet); *United States v. MacEwan*, 445 F.3d 237, 244–45 (3d Cir. 2006) (the internet).

171. *United States v. Patton*, 451 F.3d 615, 621–22 (10th Cir. 2006). “Using” includes noneconomic activities that “affect, impede, or utilize” the channels of interstate commerce. *United States v. Cummings*, 281 F.3d 1046, 1048 (9th Cir. 2002).

172. *Ballinger*, 395 F.3d at 1226 (citing *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (“[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.” (quoting *Caminetti v. United States*, 242 U.S. 470, 471 (1917))); *Brooks v. United States*, 267 U.S. 432, 436 (1925) (“Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin.”).

173. *See Heart of Atlanta Motel*, 379 U.S. at 257; *United States v. Lawrence*, 548 F.3d 1329, 1337 (10th Cir. 2008); *United States v. Bredimus*, 234 F. Supp. 2d 639, 644 (N.D. Tex. 2002), *aff’d*, 352 F.3d 200 (5th Cir. 2003).

174. *See United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002); *United States v. Kaechele*, 466 F. Supp. 2d 868, 897 (E.D. Mich. 2006).

the power to regulate the first type of movement.¹⁷⁵ The federal government's power to regulate the channels of commerce likely extends to the second type of movement as well.¹⁷⁶ Thus, the federal government would be justified in regulating wholly intrastate channels of interstate commerce to prevent the spread, introduction, or transmission of a communicable disease. Doing so would prevent the spread of harm and the injurious use of these channels, which are the primary vehicle for spreading diseases. Whether that harm or injurious use occurred outside the flow of interstate commerce or is purely within one state would be of no consequence to this analysis.¹⁷⁷

b. Instrumentalities of Interstate Commerce

The federal government can also regulate the instrumentalities of interstate commerce, which are persons and things engaged in interstate commerce.¹⁷⁸ More specifically "instrumentalities" have been defined to include the "means by which people or things" move through interstate commerce such as automobiles, airplanes, boats, railroads, pagers, telephones, cell phones, the internet, and the shipment of goods.¹⁷⁹ The instrumentality regulated under this power is not required to have a substantial effect on interstate commerce.¹⁸⁰ Similar to the channels of interstate commerce, the instrumentalities regulated can be wholly intrastate.¹⁸¹ Further, intrastate regulations of the instrumentalities engaged in commerce are valid when drafted to prevent harmful uses, even if that harm is purely local in nature and even when an activity only threatens the use of an instrumentality of interstate commerce.¹⁸²

175. See 42 C.F.R. §§ 70.1–.56 (2015).

176. See *supra* notes 179–82, 188–91 and accompanying text.

177. *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005).

178. See *id.*

179. *United States v. Shahani-Harmoni*, 286 F. Supp. 2d 723, 733 (E.D. Va. 2003); see also *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1054 (10th Cir. 2008); *United States v. Sutcliffe*, 505 F.3d 944, 952–53 (the internet); *United States v. MacEwan*, 445 F.3d 237, 244–45 (3d Cir. 2006) (the internet); *Ballinger*, 395 F.3d at 1226; *United States v. McCoy*, 678 F. Supp. 2d 1336, 1368–69 (M.D. Ga. 2009).

180. See *United States v. Gil*, 297 F.3d 93, 99–100 (2d Cir. 2002); *United States v. Kaechele*, 466 F. Supp. 2d 868, 897 (E.D. Mich. 2006).

181. See *Ballinger*, 395 F.3d at 1225–26.

182. See *United States v. Patton*, 451 F.3d 615, 622 (10th Cir. 2006); *Ballinger*, 395 F.3d at 1226.

Here, the federal government could regulate any of the classes of instrumentalities listed above by drafting legislation that prevents the use of those instrumentalities to introduce or spread a communicable disease within a state, between the states, and across national borders. The ability to control the movement of persons infected or reasonably suspected of being infected with a communicable disease would likely fall under this power as well. If individuals infected with a communicable disease are allowed to travel within a state, between the states, and across national borders, they are using instrumentalities of interstate commerce in a harmful manner. Further, when these persons travel using instrumentalities of interstate commerce like airplanes, buses, automobiles, and boats, they threaten the safe use of those instrumentalities for others. Because preventing the use of these instrumentalities by those infected, or reasonably suspected to be infected, would prevent their harmful use to spread disease to other areas and to others using the instrumentality, a regulation crafted under this prong would survive scrutiny.

Thus, under this test, the federal government could regulate the harmful use of any of the instrumentalities listed above. Additionally, the federal government could regulate any activity that threatens the use of said instrumentalities.¹⁸³ These regulations would prove significant in responding to communicable disease emergencies by regulating those closest to the disease outbreak and would be easily defensible under this prong of the Commerce Clause analysis.

c. Activities that Substantially Affect Interstate Commerce

Generally, Congress can regulate interstate and intrastate activities that have substantial effects on interstate commerce.¹⁸⁴ The factors courts have used to determine whether an activity substantially affects interstate commerce are: (a) whether the activity is itself related to commerce or is economic in nature; (b) whether the statute regulating the activity contains a jurisdictional nexus that connects the activity regulated to interstate commerce; (c) whether congressional findings exist

183. *See, e.g.,* *United States v. Marek*, 238 F.3d 310, 318–20 (5th Cir. 2001).

184. *See* *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 165 (3d Cir. 2001).

which conclude that the activity has a substantial effect on interstate commerce; and (d) whether the connection between the activity and its effect on interstate commerce is too attenuated.¹⁸⁵ Importantly, neither a jurisdictional nexus or Congressional findings are sufficient, standing alone, to justify “substantial effect.”¹⁸⁶

During communicable disease emergencies, the activity that has the largest effect on interstate commerce is the spread of the disease itself.¹⁸⁷ In order to effectively prevent the spread of a disease, the federal government would need to regulate those closest to it, including hospitals, clinics, healthcare workers, healthcare providers, and those with the disease or reasonably suspected of having the disease.

The first inquiry would be whether treatment of a disease is economic or noneconomic activity, while the second inquiry would be into the treatment’s effect on interstate commerce. Hospitals, clinics, healthcare workers, and healthcare providers are engaging in commerce when treating patients infected with disease. Their services are in large part bought or paid for. In other words, currency is exchanged for health care services. Further, most emergency services must be available to anyone.¹⁸⁸ Even if healthcare providers were wholly intrastate, the regulation would likely survive scrutiny because the federal power extends to intrastate economic activity if the activity’s aggregated effects impact interstate commerce.¹⁸⁹ However, merely having or being suspected of having a disease is not likely to be considered an economic activity.¹⁹⁰

The “substantial effects” test has been the battleground of

185. *United States v. Morrison*, 529 U.S. 598, 610–13 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 559–67 (1995)).

186. *Id.* at 612, 614; *United States v. Ho*, 311 F.3d 589, 600 (5th Cir. 2002).

187. *See supra* Part III.A.1.

188. *See* Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2012) (requiring any hospital that accepts Medicare payments to provide emergency health care to anyone regardless of citizenship, legal status, or inability to pay).

189. *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *see also* *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (“We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”).

190. *Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2587–91 (2012) (holding that inactivity is beyond the reach of the Commerce Power). By analogy, the absence of a disease or treatment would also likely be beyond that power.

most recent Supreme Court challenges. Pinning down exactly how the federal government could address the spread of diseases is a variable hard to account for under the Commerce Clause prongs. However, by regulating the channels, instrumentalities, and activities that are closest to the communicability of diseases, the federal government can get as close to meaningfully and effectively regulating the spread of diseases as possible.

2. SPENDING POWER JUSTIFICATION FOR REFORM

If the federal government chose the spending power to reform this field, the analysis would change. Easier than establishing pure dominion over the states in this field, the federal government could accomplish reform by conditioning the receipt of federal funds.

Without an existing framework regarding communicable diseases based on spending power, it is difficult to theorize exactly how such a program would work. One program should prove instructive as a useful template for the federal government—Medicaid. Congress created Medicaid in the 1960s during the “War on Poverty”¹⁹¹ in order to provide healthcare for millions of low-income individuals who either could not obtain or could not afford medical coverage.¹⁹²

Medicaid is a program that provides healthcare coverage to certain classes of persons in the United States.¹⁹³ It is administered by the states according to federal standards.¹⁹⁴ These federal standards set the minimum for what states must accomplish in the execution of the framework.¹⁹⁵ States have wide latitude to implement the program by establishing their own eligibility requirements, scope, services, and required

191. Dylan Matthews, *Everything You Need to Know About the War on Poverty*, WASH. POST (Jan. 8, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/01/08/everything-you-need-to-know-about-the-war-on-poverty> (reporting on a Columbia University study which demonstrates that poverty dropped 10% between 1967 and 2012 as a result of government interventions).

192. *See* 42 U.S.C.A. § 1396a(a)(10)(A)(i) (Supp. 2015); *see generally* 42 U.S.C.A. §§ 1396–1396w-5 (2012 & Supp. 2015).

193. *See Medicaid*, MEDICAID.GOV, <http://www.medicaid.gov/medicaid-chip-program-information/medicaid-and-chip-program-information.html> (last visited Feb. 22, 2015).

194. *See id.*

195. *See, e.g.*, 42 U.S.C. § 1396g-1(a) (2012) (prescribing “[t]he laws relating to medical child support, which a State is required to have in effect”).

premiums.¹⁹⁶ Further, the program is co-funded by the federal government and the states.¹⁹⁷ However, if a state fails to comply with the federal standards, the federal government can withhold payments to the state until the state complies.¹⁹⁸ Thus, while the states have wide latitude they are also subject to significant federal control.¹⁹⁹ The program and its expansion have been largely successful though and should serve as a useful guide to the federal government in crafting reform of communicable disease law.²⁰⁰

IV. PROPOSAL

This Comment proposes two solutions to the problems presented by communicable disease emergencies. The first subsection outlines a proposal to give the federal government the power to oversee and override state efforts based on the Commerce Clause. The second proposal hypothesizes a type of spending program that would provide practical solutions to the problems presented in this field and avoiding additional problems associated with a reform based on the Commerce Clause.

A. COMMERCE CLAUSE-BASED REFORM

Arguably, the legal framework for increasing federal authority during communicable disease emergencies already exists. The preemption clause in 42 U.S.C. § 264(e) states that a proper exercise of federal authority would preempt state law.²⁰¹

196. 42 C.F.R. § 430.0 (2015).

197. *See id.* (“[Medicaid] is jointly financed by the Federal and State governments and administered by States.”).

198. 42 U.S.C. § 1396c (2012).

199. *See* 42 C.F.R. § 430.0 (2015) (“Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures.”); *see also* Equal Access for El Paso, Inc. v. Hawkins, 562 F.3d 724, 726 (5th Cir. 2009) (“The state maintains the responsibility for administering its Medicaid program, subject to federal oversight.”).

200. *See* Ezra Klein, *Medicaid Is Obamacare’s Biggest Success. But Neither Side Wants to Talk About It*, WASH. POST (Jan. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/01/06/medicaid-is-obamacares-biggest-success-but-neither-side-wants-to-talk-about-it/>; *see also* Benjamin F. Sommers & Donald Oellerich, *The Poverty-Reducing Effect of Medicaid*, 32 J. HEALTH ECON. 816 (2013) (concluding that being enrolled in Medicaid prevents between 2.6 and 3.4 million people from living in poverty).

201. 42 U.S.C. § 264(e) (2012) (“Nothing in this section . . . may be construed as superseding any provision under State law . . . , except to the extent that such a provision conflicts with an exercise of Federal authority under this section . . .”).

Because communicable disease laws are justified by the Commerce Clause, this preemption clause means that any rule or regulation promulgated by the federal government that affects interstate or foreign commerce would preempt state law.²⁰² Further, because preemption is based on the Supremacy Clause in the United States Constitution, any proper exercise of federal authority would supersede state action. Therefore, Congress could increase federal presence in communicable disease emergencies by requiring the CDC to enact regulations concerning the introduction and spread of communicable diseases through interstate commerce.²⁰³

Whether or not Congress makes the grant mandatory, the CDC should exercise the permissive grant of authority already present in the statute to enact regulations of this sort.²⁰⁴ These regulations would govern the inter- and intrastate use of interstates, highways, roads, air transportation, transportation by water, and other channels of interstate commerce to prevent the spread, introduction, and transmission of communicable diseases. Because travel is only one variable affecting the spread of communicable diseases, the CDC should also regulate the healthcare industry.

To be effective, the regulations would need to include hospitals, healthcare workers, and healthcare providers who have treated anyone who is infected or is reasonably suspected of being infected with a communicable disease. Further, the regulations would need to cover any persons outside the medical field infected or reasonably suspected of being infected with a communicable disease. Additionally, to ensure that the reform has the proper connection to interstate commerce, the CDC should conduct studies concerning the effects of communicable diseases on interstate commerce. These findings, in addition to the findings from existing studies, should be incorporated into the proffered regulations. These safeguards would ensure the federal government's exercise of authority is proper.

This reform would create one top-down approach to managing communicable disease emergencies. These regulations

202. See *supra* Part II.C.1–2.

203. The current grant of authority is phrased permissively, 42 U.S.C. § 264(a) (2012) (“is *authorized* to make . . . regulations” (emphasis added)), but Congress should make this mandatory (“*shall* make regulations”).

204. See *id.*

would bring some uniformity to this field and relieve the states of the burden of being the first lines of defense, taking some weight off of their budgets. The federal government has far more resources and capacity to enlist the help of world organizations, experts, and other countries during an outbreak. Further, this approach would be far more protective of individual constitutional rights by providing an additional forum for those affected to raise challenges and would ensure that states work together during a time of crisis.²⁰⁵ This reform would also modernize communicable disease efforts by placing them under the umbrella of the CDC, an agency charged with controlling diseases. Importantly, this approach also places ultimate accountability in one place—the federal executive branch. Additionally, this approach would allow the federal government to oversee a problem that has national and global implications.

It is important to note, however, that this approach has its shortcomings. Although difficult to weigh and analyze through the lens of a legal framework, politics may play the biggest role in reforming legislation. Sweeping federal legislation in this field would raise strong federalism concerns. This type of legislation could be seen as the federal government taking power away from states in an area where they have traditionally exercised control. Also, this approach would yield practical administration problems. States have greater control over local and state roads and private entities like hospitals. If states like Texas and Louisiana are closer to the problem and still cannot mount an adequate response, why should one expect a more attenuated federal government to respond more effectively? A one-size-fits-all model would also not account for differing state circumstances, like geography and resident and tourist demographics. These concerns should all be strong considerations in any communicable disease emergency reform at the federal level.

B. SPENDING POWER-BASED REFORM

One way to solve the practical problems presented by a one-size-fits-all approach is to fashion reform in this field as a

205. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 237 (1988) (“The role of the federal courts is to provide an alternative forum for the vindication of constitutional rights. . . . [S]uch an approach is desirable because it maximizes the opportunity for upholding the Constitution, increases litigant autonomy, enhances federalism, and is consistent with the constitutional and statutory structure.”).

spending program. Congress could craft a program like Medicaid, administered by the states based on federal regulations and co-funded by the states and the federal government. The federal program would set the minimum requirements that states must meet during a communicable disease emergency. A violation of any of the requirements could potentially result in the federal government taking administrative control over the offending state's communicable disease responses.

The federal and state governments already have frameworks in place that can be adapted to fit this conditional spending program. The federal government has the National Response Framework²⁰⁶ and states have their own response plans like the Louisiana Emergency Operations Plan.²⁰⁷ While the Federal Plan is relatively vague, its framework can be adapted to prescribe a floor of minimum requirements. The states would then be free to adopt certain measures specific to their state that go beyond the minimum requirements in the Federal Plan, just as they may do under the Medicaid program. These state programs, like the Louisiana State Plan, would be subject to federal approval before their use, similar to state Medicaid programs. Additionally, the federal government could require states to adopt provisions that address the constitutional rights of individuals. In addition to individual protections, the states should be required to adopt provisions requiring states to work together. Violating these provisions or the minimum requirements in the Federal Plan could then result in the federal government taking increasing control over the state's response, a penalty that could potentially cut out the state's voice during an emergency.

This approach would solve the practical problems of a one-size-fits-all program and would place states in charge of their own efforts. However, the more specific that federal reform in this field becomes, the less flexibility it leaves the federal and state governments. Because states would be allowed to craft their own measures, this plan would preserve the flexibility necessary to respond to dynamic emergencies. Fashioning the program as a conditional grant of funds gives states the power to refuse to accept the funds and would eliminate many of the federalism concerns that full-blown federal preemption would bring. Additionally, this approach would allow the federal government

206. *See supra* Part II.B.2.

207. *See supra* Part II.A.3.

to oversee state efforts. Federal oversight provides a mediator between states when they fail to cooperate with one another and a potential mechanism to force cooperation. This oversight is especially useful in situations where states block the efforts of another state or when various states' procedures conflict. Like the previous approach, a program of this type would open another court system to individuals affected by a restrictive measure applied imprudently.²⁰⁸

A program of this magnitude would not be without its own issues. On its face, this program would be costly.²⁰⁹ Second, because states could say no to the program, it is possible that some would. If a state opted out of the program, the federal government would then have gaps in its response effort, undercutting the purpose of the reform. However, this problem is minimized by existing law, which gives the federal government power to take over an inadequate state response.²¹⁰ Thus, should an "opt-out state" present a problem, the federal government could take over that state's response and unify the country's effort.

While a program of this magnitude would be criticized as growing government, it would minimize the federalism concerns that full-blown federal regulation would create. This would ensure national unity, uniformity, and modernity in

208. See *supra* note 205 and accompanying text.

209. On December 16, 2014, President Obama signed the Consolidated and Further Continuing Appropriations Act, 2015, which appropriated over \$1.77 billion to the CDC for Ebola preparedness and response through 2019, including \$576 million for domestic preparedness and response, \$603 million for the international response, and \$597 million for global health security. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, tit. VI, 128 Stat. 2130, 2520 (2014); see also *FY 2015–2019 Ebola Response Funding*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/budget/ebola/index.html> (last updated Jan. 6, 2016). Under this Comment's proposal, this number would likely grow significantly, which would likely deter some congressmen from undertaking such an endeavor. However, at least one conservative governor, Louisiana Governor Bobby Jindal, called for the federal government to spend more in the fight against communicable diseases. Bobby Jindal, *The Facts About Ebola Funding*, POLITICO (Oct. 12, 2014), <http://www.politico.com/magazine/story/2014/10/the-facts-about-ebola-funding-111820.html#.VUvSFKY6FSU> ("[O]ne would think that 'detecting and responding to infectious diseases and other public health threats' warrants a larger funding commitment. . . . Our Constitution states that the federal government 'shall protect each of [the States] against Invasion'—a statement that should apply as much to infectious disease as to foreign powers.").

210. 42 C.F.R. § 70.2 (2015).

communicable disease law. Further, conditioning the funding to states on compliance with federal law encourages state cooperation. Finally, this approach provides the most practical solution to communicable disease emergencies, the politics of the moment, and the administration of such a body of law.

V. CONCLUSION

The global nature of trade and travel and the ease by which they are accomplished begs review of our nation's policies regarding communicable disease emergencies. At one time, states may have been better situated to respond to these emergencies, but, due to the shrinking globe, state-led efforts no longer make sense during national and international events. Recent examples demonstrate just how poorly states are situated to adequately respond to or work together during communicable disease emergencies. This fact could prove costly to human life and to the nation's economy should a disease more easily-transmittable than Ebola hit our shores in the future. The contagion of local and state leadership during these emergencies exists because the ambiguity in this field exists. A stronger and clearer federal presence in this field is the proper vehicle through which to temper not only the contagion of communicable diseases but also the contagion of governmental leadership, which has long plagued efforts during communicable disease emergencies.

Thomas D. Kimball