

# **Law and the Public's Health**



# Law and the Public's Health

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## *Cases, Controversies, and Covid-19*

**Lars Noah**

CHESTERFIELD SMITH EMINENT SCHOLAR  
AND PROFESSOR OF LAW  
UNIVERSITY OF FLORIDA



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*In lieu of making a personal dedication, let us pause to remember all of the lives lost to Covid-19 — official reports put that number at 6.6 million worldwide so far (including more than 1.1 million just in the United States), though surely the actual death toll is a good deal higher — as well as the far greater number who have survived the pandemic with serious physical, emotional, and financial scars.*



# Contents

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Table of Cases	xvii
Preface	xxi
Acknowledgments	xxv

## PROLOGUE

<b>Chapter 1 • Golden Oldies to Set the Tone</b>	<b>3</b>
A. Managing People	4
1. Restrictions on Movement	4
<i>Wong Wai v. Williamson</i>	4
Notes and Questions	6
<i>People ex rel. Barmore v. Robertson</i>	8
<i>Kirk v. Wyman</i>	12
Notes and Questions	16
<i>O'Brien v. Cunard S.S. Co.</i>	17
2. Forced Medical Interventions	18
<i>Jacobson v. Massachusetts</i>	18
Notes and Questions	24
<i>Zucht v. King</i>	26
<i>Buck v. Bell</i>	27
Notes and Questions	28
B. Managing Places	29
<i>Globe School District No. 1 v. Board of Health</i>	29
Notes and Questions	32
<i>Compagnie Francaise de Navigation a Vapeur v. State Board of Health, Louisiana</i>	33
Notes and Questions	36
<i>Florida v. Becerra</i>	37
Notes and Questions	40
<i>Seavey v. Preble</i>	43
Notes and Questions	44
<i>Lochner v. New York</i>	45
Notes and Questions	51
C. Managing Things	53
<i>Mugler v. Kansas</i>	53
Notes and Questions	56
<i>North American Cold Storage Co. v. Chicago</i>	58
Notes and Questions	60

<i>Stubbs v. City of Rochester</i>	61
Notes and Questions	64
D. Managing Information	65
<i>American School of Magnetic Healing v. McAnnulty</i>	65
Notes and Questions	69
<i>Near v. Minnesota</i>	71

## PART I • MANAGING PEOPLE

<b>Chapter 2 • Restricting Freedom of Movement</b>	<b>79</b>
A. Emergency Declarations	79
<i>Desrosiers v. Governor</i>	79
Notes and Questions	81
<i>Fabick v. Evers</i>	83
Notes and Questions	88
<i>Cameron v. Beshear</i>	90
Notes and Questions	93
<i>Corman v. Pennsylvania Department of Health</i>	95
Notes and Questions	98
B. Lockdowns	99
<i>County of Butler v. Wolf</i>	99
Notes and Questions	103
<i>7020 Entertainment, LLC v. Miami-Dade County</i>	104
Notes and Questions	107
C. Quarantine, Isolation, and Exclusion	108
<i>Liberian Community Association v. Lamont</i>	108
Notes and Questions	114
<i>Coming Attractions Bridal &amp; Formal, Inc. v. Texas Health Resources</i>	117
<i>Speaker v. CDC</i>	118
Notes and Questions	121
<i>Bragdon v. Abbott</i>	124
Notes and Questions	131
D. Border Controls	134
<i>Bayley's Campground, Inc. v. Mills</i>	134
Notes and Questions	137
<i>Huisha-Huisha v. Mayorkas</i>	139
<i>Louisiana v. CDC</i>	144
Notes and Questions	148
<b>Chapter 3 • Dictating the Use of Safeguards</b>	<b>151</b>
A. Face Masks for Respiratory Illnesses	151
1. Requiring Masks in Schools	151
<i>Corman v. Pennsylvania Department of Health</i>	151
Notes and Questions	159
<i>Lloyd v. School Board of Palm Beach County</i>	160



2. State Prohibitions on School Mandates	164
<i>Wilson ex rel. State v. City of Columbia</i>	164
Notes and Questions	167
<i>Dortch v. Alachua County School Board</i>	169
Notes and Questions	170
<i>E.T. v. Paxton</i>	172
Notes and Questions	179
3. Requiring Masks in Other Settings	181
<i>Delaney v. Baker</i>	181
<i>Green v. Alachua County</i>	183
Notes and Questions	191
B. Other Forms of Personal Protective Equipment	193
1. Seat Belts and Helmets	193
<i>State v. Hartog</i>	193
<i>ABATE of Georgia, Inc. v. Georgia</i>	196
Notes and Questions	197
2. Firearms?	199
<i>New York State Rifle &amp; Pistol Association v. Bruen</i>	199
Notes and Questions	217
C. Mandatory Prophylaxis	220
1. School Vaccination Requirements	222
<i>Nikolao v. Lyon</i>	222
Notes and Questions	225
<i>F.F. v. State</i>	229
Notes and Questions	233
<i>Klaassen v. Trustees of Indiana University</i>	235
Notes and Questions	236
2. Health Care Worker Vaccination Requirements	238
<i>Fallon v. Mercy Catholic Medical Center</i>	238
<i>Head v. Adams Farm Living, Inc.</i>	240
Notes and Questions	242
<i>Does 1–3 v. Mills</i>	243
Notes and Questions	246
3. Mandating Vaccines for Everyone in a Given Locale	248
<i>C.F. v. NYC Department of Health &amp; Mental Hygiene</i>	248
Notes and Questions	254
4. Businesses Demanding Customer Vaccination	255
<i>Norwegian Cruise Line Holdings, Ltd. v. Rivkees</i>	255
Notes and Questions	265
D. Mandatory Treatment	266
<i>In re J.J.</i>	269
Notes and Questions	271
<i>City of Newark v. J.S.</i>	273
<i>City of New York v. Antoinette R.</i>	279
Notes and Questions	281

<i>In re Washington</i>	285
Notes and Questions	288
E. Criminalizing Contagious Behaviors	290
<i>State v. Musser</i>	290
Notes and Questions	294
<i>People v. Adams</i>	297
Notes and Questions	301
<i>Ferguson v. City of Charleston</i>	302
Notes and Questions	310

## PART II • MANAGING PLACES

<b>Chapter 4 • Noncommercial Settings</b>	<b>315</b>
A. Schools	315
<i>James v. Heinrich</i>	315
Notes and Questions	320
B. Houses of Worship	322
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i>	322
<i>Tandon v. Newsom</i>	328
Notes and Questions	330
C. Private Homes and Land	332
1. Lead Paint	332
<i>Johnson v. City of Detroit</i>	332
Notes and Questions	334
<i>G.M.M. v. Kimpson</i>	335
Notes and Questions	338
2. Yard Debris	340
<i>Steffy v. City of Fort Smith</i>	340
<i>McNamara v. Department of Public Health</i>	342
Notes and Questions	344
D. Public Spaces	345
<i>NYC C.L.A.S.H., Inc. v. New York</i>	345
Notes and Questions	352
<i>United States v. Safehouse</i>	353
Notes and Questions	360
<i>Martin v. City of Boise</i>	362
Notes and Questions	364
E. Prisons	367
<i>Hines v. Youseff</i>	367
Notes and Questions	371
<i>Vega v. Semple</i>	372
 <b>Chapter 5 • Commercial Settings</b>	 <b>377</b>
A. Broad-Based Business Closures	377
<i>County of Butler v. Wolf</i>	377
Notes and Questions	381

<i>Hopkins Hawley, LLC v. Cuomo</i>	383
Notes and Questions	385
<i>Big Tyme Investments, L.L.C. v. Edwards</i>	387
B. Shutting Down Noxious Operations	391
<i>City of New York v. New St. Mark's Baths</i>	391
Notes and Questions	393
C. Workplace Safety	395
1. Private Ordering	395
<i>Virginia Mason Hospital v. Washington State Nurses Association</i>	395
<i>Miami Area Local, American Postal Workers Union v. U.S. Postal Service</i>	398
Notes and Questions	400
<i>Union Pacific Railroad Co. v. Nami</i>	403
Notes and Questions	407
2. Federal Mandates	407
<i>In re AFL-CIO</i>	408
Notes and Questions	408
<i>National Federation of Independent Business v. OSHA</i>	409
Notes and Questions	417
<i>Biden v. Missouri</i>	421
Notes and Questions	427
<i>Austin v. U.S. Navy SEALs 1–26</i>	431
Notes and Questions	435
<i>Braidwood Management Inc. v. Becerra</i>	436
Notes and Questions	442
D. Federal Restrictions on Business Operations	443
1. Landlords and Tenants	444
<i>Alabama Association of Realtors v. HHS</i>	444
Notes and Questions	450
2. Modes of Transportation	451
<i>Florida v. Becerra</i>	451
Notes and Questions	465
<i>Health Freedom Defense Fund, Inc. v. Biden</i>	468
Notes and Questions	477
E. Facilities Handling Pathogens	479
<i>Allen v. Boston Redevelopment Authority</i>	479
Notes and Questions	481
<i>United States v. Stevens</i>	483
Notes and Questions	485

PART III • MANAGING THINGS

<b>Chapter 6 • Products and Services</b>	<b>489</b>
A. Supplying Medical Countermeasures	489
1. Developing Products	489
Notes and Questions	490

<i>Graham v. American Cyanamid Co.</i>	492
Notes and Questions	499
Lars Noah, <i>This Is Your Products Liability Restatement on Drugs</i>	500
Notes and Questions	503
2. Managing Shortages	505
Lars Noah, <i>Triage in the Nation's Medicine Cabinet: The Puzzling Scarcity of Vaccines and Other Drugs</i>	505
Notes and Questions	509
<i>In re Abbott</i>	514
Notes and Questions	518
<i>Atkins v. Parker</i>	520
Notes and Questions	525
B. Food and Drink	526
1. Sanitation	526
<i>Supreme Beef Processors, Inc. v. USDA</i>	526
<i>Almquist v. Finley School District No. 53</i>	528
Notes and Questions	531
<i>Guertin v. Michigan</i>	532
<i>In re Flint Water Cases</i>	542
Notes and Questions	545
2. Formulation and Fortification	547
<i>McAfee v. FDA</i>	547
Notes and Questions	550
<i>Minnesota State Board of Health v. City of Brainerd</i>	551
Notes and Questions	555
C. Animals	557
1. Livestock	557
<i>Rose Acre Farms, Inc. v. United States</i>	557
Notes and Questions	561
<i>Ranchers Cattlemen Action Legal Fund v. USDA</i>	562
Notes and Questions	565
<i>Natural Resources Defense Council, Inc. v. FDA</i>	566
Notes and Questions	569
2. Companion Animals	571
<i>Independent Turtle Farmers of La., Inc. v. United States</i>	571
Notes and Questions	573
<i>NYC Friends of Ferrets v. City of New York</i>	575
Notes and Questions	580
D. Consumer Goods	581
1. Prohibitions	581
<i>City of Cleveland v. State</i>	583
Notes and Questions	585
<i>Reliable Consultants, Inc. v. Earle</i>	585
Notes and Questions	588

2. Capacity Limitations	590
<i>New York Statewide Coalition of Hispanic Chambers of Commerce</i>	
<i>v. NYC Department of Health &amp; Mental Hygiene</i>	590
Notes and Questions	598
<i>Duncan v. Bonta</i>	599
Notes and Questions	606
3. Sin Taxes	607
<i>Williams v. City of Philadelphia</i>	607
Notes and Questions	609
4. Design Standards	611
<i>Nicopure Labs, LLC v. FDA</i>	611
Notes and Questions	615
<i>American Shooting Sports Council, Inc. v. Attorney General</i>	618
Notes and Questions	620
<i>Evans v. Lorillard Tobacco Co.</i>	621
Notes and Questions	629
5. Minimum Age Rules	630
<i>Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms, and Explosives</i>	630
Notes and Questions	637
E. Public Entity Nuisance Litigation	640
<i>People v. ConAgra Grocery Products Co.</i>	640
Notes and Questions	650
<i>State ex rel. Hunter v. Johnson &amp; Johnson</i>	651
Notes and Questions	658
<b>Chapter 7 • Environmental Threats</b>	<b>661</b>
A. Vectors of Disease	661
<i>Kaso v. Ohio Department of Health</i>	661
Notes and Questions	664
<i>DiChristopher v. Board of County Commissioners</i>	665
<i>Yawn v. Dorchester County</i>	666
<i>Druyan v. Village Board of Trustees of Cayuga Heights</i>	669
Notes and Questions	669
B. Sources of Pollution	671
<i>West Virginia v. EPA</i>	671
Notes and Questions	687

PART IV • MANAGING INFORMATION

<b>Chapter 8 • Acquiring and Sharing Particularized Information</b>	<b>695</b>
A. Screening and Surveillance	695
1. Children	695
<i>Spiering v. Heineman</i>	695
<i>Bearder v. State</i>	697
Notes and Questions	701

<i>Uhr v. East Greenbush Central School District</i>	702
Notes and Questions	704
2. Adults	704
<i>New York State Society of Surgeons v. Axelrod</i>	705
Notes and Questions	708
<i>ACT-UP Triangle v. Commission for Health Services</i>	709
<i>Middlebrooks v. State Board of Health</i>	710
Notes and Questions	711
<i>Caronia v. Philip Morris USA, Inc.</i>	715
Notes and Questions	719
B. Notification Obligations	720
<i>Creason v. State Department of Health Services</i>	720
Notes and Questions	725
<i>Reisner v. Regents of the University of California</i>	725
Notes and Questions	728
<i>Bradshaw v. Daniel</i>	729
<i>Munn v. Hotchkiss School</i>	730
Notes and Questions	737
C. Public Safety Alerts	738
<i>Dimare Fresh, Inc. v. United States</i>	738
<i>Seaside Farm, Inc. v. United States</i>	741
Notes and Questions	744
<b>Chapter 9 • Regulating and Communicating General Information</b>	747
A. Product Disclosure Requirements	747
<i>American Beverage Association v. San Francisco</i>	747
<i>National Restaurant Association v. NYC Department of Health &amp; Mental Hygiene</i>	751
Notes and Questions	754
B. Restrictions on Product Advertising	756
<i>Bolger v. Youngs Drug Products Corp.</i>	756
Notes and Questions	762
<i>Lorillard Tobacco Co. v. Reilly</i>	764
<i>Lars Noah, Truth or Consequences?: Commercial Free Speech vs. Public Health Promotion (at the FDA)</i>	769
<i>Pelman v. McDonald's Corp.</i>	771
Notes and Questions	776
C. Public Service Announcements	778
<i>R.J. Reynolds Tobacco Co. v. Shewry</i>	778
Notes and Questions	781
<i>Christ's Bride Ministries, Inc. v. SEPTA</i>	785
Notes and Questions	789
<i>AIDS Action Committee of Massachusetts, Inc. v. MBTA</i>	791
D. Messaging in the Classroom	795
<i>Leebaert v. Harrington</i>	795

<i>Brown v. Hot, Sexy, and Safer Productions, Inc.</i>	798
<i>Curtis v. School Committee of Falmouth</i>	802
Notes and Questions	805
E. Messaging in the Exam Room and Beyond	807
<i>Wollschlaeger v. Governor, Florida</i>	807
Notes and Questions	815
<i>JB &amp; Associates, Inc. v. Nebraska Cancer Coalition</i>	817
Notes and Questions	820
<i>Gorran v. Atkins Nutritionals, Inc.</i>	821
Notes and Questions	824

EPILOGUE

<b>Chapter 10 • Multifaceted Policy Design</b>	<b>829</b>
A. Opioid Analgesics	830
Lars Noah, <i>Federal Regulatory Responses to the Prescription Opioid Crisis: Too Little, Too Late?</i>	830
Lars Noah, <i>State Regulatory Responses to the Prescription Opioid Crisis: Too Much to Bear?</i>	834
Notes and Questions	840
B. Zika Virus	841
Jacqueline Fox, <i>Zika and the Failure to Act Under the Police Power</i>	841
Notes and Questions	846
C. Gun Violence	847
Lars Noah, <i>Time to Bite the Bullet? How an Emboldened FDA Could Take Aim at the Firearms Industry</i>	847
Notes and Questions	857
D. Tooth Decay	858
Jacqueline Fox, <i>The Epidemic of Children's Dental Diseases: Putting Teeth into the Law</i>	858
Notes and Questions	864
E. Antibiotic Resistance	865
William M. Sage & David A. Hyman, <i>Combating Antimicrobial Resistance: Regulatory Strategies and Institutional Capacity</i>	865
Notes and Questions	874
F. Pandemic Postscript	877
<b>Index</b>	<b>881</b>





# Table of Cases

---

(Showing only principal cases and only where excerpted.)

- ABATE of Georgia, Inc. v. Georgia*, 196  
*ACT-UP Triangle v. Commission for Health Services*, 709  
*AIDS Action Committee of Massachusetts, Inc. v. MBTA*, 791  
*Alabama Association of Realtors v. HHS*, 444  
*Allen v. Boston Redevelopment Authority*, 479  
*Almquist v. Finley School District No. 53*, 528  
*American Beverage Association v. San Francisco*, 747  
*American School of Magnetic Healing v. McAnnulty*, 65  
*American Shooting Sports Council, Inc. v. Attorney General*, 618  
*Atkins v. Parker*, 520  
*Austin v. U.S. Navy SEALs 1–26*, 431  
*Bayley’s Campground, Inc. v. Mills*, 134  
*Bearder v. State*, 697  
*Biden v. Missouri*, 421  
*Big Tyme Investments, L.L.C. v. Edwards*, 387  
*Bolger v. Youngs Drug Products Corp.*, 756  
*Bradshaw v. Daniel*, 729  
*Bragdon v. Abbott*, 124  
*Braidwood Management Inc. v. Becerra*, 436  
*Brown v. Hot, Sexy, and Safer Productions, Inc.*, 798  
*Buck v. Bell*, 27  
*Cameron v. Beshear*, 90  
*Caronia v. Philip Morris USA, Inc.*, 715  
*Christ’s Bride Ministries, Inc. v. SEPTA*, 785  
*City of Cleveland v. State*, 583  
*City of New York v. New St. Mark’s Baths*, 391  
*City of New York v. Antoinette R.*, 279  
*City of Newark v. J.S.*, 273  
*C.F. v. NYC Department of Health & Mental Hygiene*, 248  
*Coming Attractions Bridal & Formal, Inc. v. Texas Health Resources*, 117  
*Compagnie Francaise de Navigation a Vapeur v. State Board of Health, Louisiana*, 33  
*Corman v. Pennsylvania Department of Health*, 95, 151  
*County of Butler v. Wolf*, 99, 377  
*Creason v. State Department of Health Services*, 720  
*Curtis v. School Committee of Falmouth*, 802  
*Delaney v. Baker*, 181  
*Desrosiers v. Governor*, 79  
*DiChristopher v. Board of County Commissioners*, 665  
*Dimare Fresh, Inc. v. United States*, 738  
*Does 1–3 v. Mills*, 243  
*Dortch v. Alachua County School Board*, 169  
*Druyan v. Village Board of Trustees of Cayuga Heights*, 669  
*Duncan v. Bonta*, 599

- E.T. v. Paxton*, 172  
*Evans v. Lorillard Tobacco Co.*, 621  
*Fabick v. Evers*, 83  
*Fallon v. Mercy Catholic Medical Center*, 238  
*Ferguson v. City of Charleston*, 302  
*F.F. v. State*, 229  
*Florida v. Becerra*, 37, 451  
*Globe School District No. 1 v. Board of Health*, 29  
*G.M.M. v. Kimpson*, 335  
*Gorran v. Atkins Nutritionals, Inc.*, 821  
*Graham v. American Cyanamid Co.*, 492  
*Green v. Alachua County*, 183  
*Guertin v. Michigan*, 532  
*Head v. Adams Farm Living, Inc.*, 240  
*Health Freedom Defense Fund, Inc. v. Biden*, 468  
*Hines v. Youseff*, 367  
*Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 630  
*Hopkins Hawley, LLC v. Cuomo*, 383  
*Huisha-Huisha v. Mayorkas*, 139  
*In re Abbott*, 514  
*In re AFL-CIO*, 408  
*In re Flint Water Cases*, 542  
*In re J.J.*, 269  
*In re Washington*, 285  
*Independent Turtle Farmers of La., Inc. v. United States*, 571  
*Jacobson v. Massachusetts*, 18  
*James v. Heinrich*, 315  
*JB & Associates, Inc. v. Nebraska Cancer Coalition*, 817  
*Johnson v. City of Detroit*, 332  
*Kaso v. Ohio Department of Health*, 661  
*Kirk v. Wyman*, 12  
*Klaassen v. Trustees of Indiana University*, 235  
*Leebaert v. Harrington*, 795  
*Liberian Community Association v. Lamont*, 108  
*Lloyd v. School Board of Palm Beach County*, 160  
*Lochner v. New York*, 45  
*Lorillard Tobacco Co. v. Reilly*, 764  
*Louisiana v. CDC*, 144  
*Martin v. City of Boise*, 362  
*McAfee v. FDA*, 547  
*McNamara v. Department of Public Health*, 342  
*Miami Area Local, American Postal Workers Union v. U.S. Postal Service*, 398  
*Middlebrooks v. State Board of Health*, 710  
*Minnesota State Board of Health v. City of Brainerd*, 551  
*Mugler v. Kansas*, 53  
*Munn v. Hotchkiss School*, 730  
*National Federation of Independent Business v. OSHA*, 409  
*National Restaurant Association v. NYC Department of Health & Mental Hygiene*, 751  
*Natural Resources Defense Council, Inc. v. FDA*, 566  
*Near v. Minnesota*, 71  
*NYC C.L.A.S.H., Inc. v. New York*, 345  
*NYC Friends of Ferrets v. City of New York*, 575  
*New York State Rifle & Pistol Association v. Bruen*, 199  
*New York State Society of Surgeons v. Axelrod*, 705  
*New York Statewide Coalition of Hispanic Chambers of Commerce v. NYC Department of Health & Mental Hygiene*, 590  
*Nicopure Labs, LLC v. FDA*, 611  
*Nikolao v. Lyon*, 222  
*North American Cold Storage Co. v. Chicago*, 58  
*Norwegian Cruise Line Holdings, Ltd. v. Rivkees*, 255  
*O'Brien v. Cunard S.S. Co.* 17

- Pelman v. McDonald's Corp.*, 771  
*People v. Adams*, 297  
*People v. ConAgra Grocery Products Co.*,  
640  
*People ex rel. Barmore v. Robertson*, 8  
*Ranchers Cattlemen Action Legal Fund  
v. USDA*, 562  
*Reisner v. Regents of the University of  
California*, 725  
*Reliable Consultants, Inc. v. Earle*, 585  
*R.J. Reynolds Tobacco Co. v. Shewry*, 778  
*Roman Catholic Diocese of Brooklyn v.  
Cuomo*, 322  
*Rose Acre Farms, Inc. v. United States*,  
557  
*Seaside Farm, Inc. v. United States*, 741  
*Seavey v. Preble*, 43  
*7020 Entertainment, LLC v. Miami-  
Dade County*, 104  
*Speaker v. CDC*, 118  
*Spiering v. Heineman*, 695  
*State v. Hartog*, 193  
*State v. Musser*, 290  
*State ex rel. Hunter v. Johnson &  
Johnson*, 651  
*Steffy v. City of Fort Smith*, 340  
*Stubbs v. City of Rochester*, 61  
*Supreme Beef Processors, Inc. v. USDA*,  
526  
*Tandon v. Newsom*, 328  
*Uhr v. East Greenbush Central School  
District*, 702  
*Union Pacific Railroad Co. v. Nami*, 403  
*United States v. Safehouse*, 353  
*United States v. Stevens*, 483  
*Vega v. Semple*, 372  
*Virginia Mason Hospital v. Washington  
State Nurses Association*, 395  
*West Virginia v. EPA*, 671  
*Williams v. City of Philadelphia*, 607  
*Wilson ex rel. State v. City of Columbia*,  
164  
*Wollschlaeger v. Governor, Florida*, 807  
*Wong Wai v. Williamson*, 4  
*Yawn v. Dorchester County*, 666  
*Zucht v. King*, 26



# Preface

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*Salus populi suprema lex.*

—Cicero

According to this famous lawyer, scholar, and statesman of ancient Rome, “the welfare of the people should be the highest law.” Although translations of this Latin maxim may vary slightly (with *salus* rendered as “safety” or “health” rather than the evidently more encompassing “welfare”), it frequently gets invoked by judges when upholding public health measures.

The title chosen for this volume merits a bit of explanation. First, it rejects the view held in some circles that a distinct and coherent field of academic study called “public health law” exists. Instead, public health has long served as a rationale for a wide range of governmental interventions. Historically, courts often accepted this justification at face value, but it has increasingly become a contested and closely examined premise. Legal institutions confront the public’s health in all manner of loosely connected domains. Second, this casebook addresses “controversies” instead of “materials” because existing titles offer too much in the way of narrative — and the perspective of true believers preaching to the choir (in short, insufficient skepticism) — but too little in the way of judicial opinions that reflect the deep-seated tensions that drive these cases. Fair enough, perhaps, if teaching students enrolled in an MPH program but rather misplaced in the law school curriculum. Moreover, when existing casebooks include extended excerpts from the decisions of courts, far too many of these arise in adjacent settings (e.g., abortion, contraception, health insurance mandates, end-of-life choices); such cases spark interesting debates, of course, and their resolution may well impact the legal analysis of genuine public health disputes, but it strikes me as a rather roundabout way of illustrating what properly resides at the core of this already loosely-defined subject.

Even if a dearth of readily usable primary materials may have explained such editorial choices made by an earlier generation, Covid-19 has unleashed an avalanche of fascinating and controversial court decisions across much of this domain, accompanied by a surge in valuable academic commentary. More fundamentally, the pandemic has prompted something of a libertarian backlash with a growing chorus of elected officials questioning the very foundations of public health by insisting, for instance, that the use of protective measures should remain entirely a matter of private choice. Although I generally come out in favor of fairly robust government

responses to shared health hazards, it does no good to ignore the extent to which such a previously unremarkable position has come under siege. In short, public health has become politically charged and subject to abrupt reversals as the prevailing winds shift, making complacency about such matters a luxury of a bygone time. Cf. Renee M. Landers, *Teaching Constitutional Law, Administrative Law, and Health Law as Presidential Administrations Change*, 66 *St. Louis U. L.J.* 449 (2022).

Notwithstanding the efforts of some popularizers, public health law does not represent a discrete (doctrinally cabined) area of study, and practicing lawyers hardly specialize in this subject, though attorneys in government service may find themselves regularly occupied with such cases. In fact, public health issues may arise in all manner of other law school courses, most notably in Constitutional Law, Administrative Law, Torts, Environmental Law, Land Use Planning, and Local Government Law, but also occasionally in such disparate subjects as Immigration and Criminal Law.

By way of further illustration, no single federal agency attends to the public's health, though the U.S. Centers for Disease Control and Prevention (CDC) often get primary credit for doing so. In 1942, in response to mosquito-borne diseases affecting military bases in the southeastern United States and territories in tropical areas, the U.S. Public Health Service (PHS) established the Office of Malaria Control in War Areas. Four years later, it became the Communicable Disease Center. In 1970, CDC was renamed the Center for Disease Control to reflect its broader focus, though in 1992 Congress made the name plural "Centers" and tacked on to the end of its name "and Prevention" as a reminder of its public health orientation, without however altering its long-used acronym. See Elizabeth W. Etheridge, *Sentinel for Health: A History of the Centers for Disease Control* (1992); cf. Dan Diamond, *Officials Rethink HHS for Covid*, *Bos. Globe*, July 21, 2022, at A7 (discussing a planned departmental reorganization to elevate the office of "Preparedness and Response" into an independent division that would take over some of the CDC's tasks).

Its older sister agency, the Food and Drug Administration (FDA), is also housed within the massive U.S. Department of Health and Human Services (HHS), which until 1979 had been the still more sweeping Department of Health, Education, and Welfare (HEW). Like the CDC, the FDA also houses several centers, and its focus on both food and therapeutics (as well as tobacco since 2009) has obvious connections to public health, though it functions more like a traditional regulatory agency than does the CDC. See Lars Noah, *Law, Medicine, and Medical Technologies: Cases and Materials* ch. 1 (5th ed. 2022); see also Christina Jewett, *After Crises, FDA Seeks Outside Audit of Its Actions*, *N.Y. Times*, July 21, 2022, at A14 (reporting that the agency "has commissioned a review of its food and tobacco programs"); cf. Wendy K. Mariner & George J. Annas, *Public Health Law* 22 (2d ed. 2014) ("At the federal level, public health is what is done by a number of agencies . . . [including,] arguably, the [FDA] to the extent that it protects the safety and efficacy of drugs and medical devices."). Other federal agencies outside of HHS also attend to public health matters, including the Food Safety and Inspection Service (FSIS) housed within the U.S. Department of Agriculture (USDA), the Environmental Protection Agency (EPA), the Occupational

Safety and Health Administration (OSHA) housed within the Department of Labor, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) housed within the Department of Justice, to name just a few. State and local agencies, however, play an outsize role in public health — ranging from departments of health and environmental quality to school boards and zoning or code enforcement offices.

“Public health” itself, as a discipline apart from its legal context, also suffers from a catch-all quality. Its roots trace back to classic threats of contagion (e.g., bubonic plague, cholera, malaria, smallpox, typhoid, and yellow fever). See Jonathan Kennedy, *Pathogenesis: How Germs Made History* (2023); Lawrence O. Gostin et al., *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 Colum. L. Rev. 59 (1999). Public health has, however, also turned its attention to noncontagious chronic diseases (NCDs) such as various cancers and cardiovascular problems often associated with unhealthy behaviors. See Lindsay F. Wiley, *Rethinking the New Public Health*, 69 Wash. & Lee L. Rev. 207 (2012).

Nonetheless, communicable diseases remain of central interest to those who toil in this field: as older threats have faded from the scene, it seems that new ones stand ready to take their place (e.g., chikungunya, dengue, Ebola, West Nile, and Zika). For instance, just among the sexually transmitted infections (STIs), some of the classics (e.g., gonorrhea and syphilis) have prompted renewed concerns because of growing antibiotic resistance, relatively newer scourges (e.g., human immunodeficiency virus (HIV)) persist, and new worries have come to light about the potential long-term consequences of fairly common STIs (e.g., human papillomavirus (HPV) and herpes). Bacterial, viral, fungal, and parasitic threats extend far beyond the proverbial bedroom. Indeed, if you are looking for something to give that special germophobe (or -phile) in your life, then GIANTmicrobes, Inc. might just have the ticket, offering an impressive lineup of plushy pathogens, including boxed sets (e.g., “Plagues from History”), available at some medical school bookstores, museum gift shops, and online. See Susan Aschoff, *Fuzzy, Cute, Cuddly — Germs?*, St. Pete. Times (FL), Dec. 9, 2004, at 1E (reporting that a Connecticut lawyer turned entrepreneur had founded this company, which aims to educate with its toys).

The twenty-first century dawned with acute fears of bioterrorism — namely, the threat that a biological agent (e.g., anthrax or smallpox) might become weaponized — coupled with an unfortunate tendency to label all manner of pressing social problems as “epidemics,” including smoking (and now vaping), obesity, sleep deprivation, inactivity, drug and alcohol abuse, gun violence, loneliness (and/or social isolation), and suicide. See Zachary Siegel, *Is the U.S. Knee-Deep in “Epidemics,” or Is That Just Wishful Thinking?*, N.Y. Times Mag. (online), Aug. 14, 2018 (discussing the increased “public-health framing” with such metaphors); see also Karen Zraick, *Resolution Declares Racism to Be a Public Health Crisis*, N.Y. Times, Oct. 20, 2021, at A15 (“More than 200 similar declarations have been made by municipalities, health agencies and elected officials across the country . . .”). Misinformation (and not solely about health matters) represents only the latest scourge viewed by some commentators in public health terms — falsehoods are nothing new, of course, but

the latest information technologies and social media platforms have allowed false and misleading information to “go viral” and even prompt suggestions for trying to better inoculate the population. Cf. Alan Rappeport, *Yellen Says Contagion Worries Prompted Government Action*, N.Y. Times, Mar. 17, 2023, at B4 (discussing sudden runs on a pair of regional banks that led to their failures). Overlaying a novel infectious agent (SARS-CoV-2) in 2020 only magnified all of these existing problems, and it also prompted a deluge of lawsuits.

Although multifaceted, I do not mean that public health issues warrant treatment under the umbrella of the law of (almost) everything. Nonetheless, consolidating them as a subject of study poses daunting organizational challenges. Instead of focusing on either discrete issue areas or clusters of legal rules, I prefer isolating for consideration the various tools available for promoting the public’s health, reserving consideration of their interactions (and lengthier excerpts from scholarly articles) for the final chapter. One downside of this organizational approach: repeated encounters with recurring issues (e.g., free exercise of religion) in slightly different guises, though that might promote deeper appreciation and understanding.

Lastly, a note on editing: Deletions from materials are indicated by asterisk ellipses except when the omitted material consists only of subheadings, paragraph structure, citations, footnotes, or other minor alterations designed to improve readability; any citations retained in the text of excerpted material may have been altered to more closely approximate the formatting conventions of *The Bluebook*; retained footnotes are numbered as in the original while any footnotes added by the editor use characters. Covid-19 cases include the precise date rather than simply the year of decision in order to better situate them relative to rapidly changing developments in the course of the pandemic and the shifting signals from the U.S. Supreme Court.



# Acknowledgments

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