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## IS THERE A CONSTITUTIONAL DUTY FOR GOVERNMENT TO ASSURE PUBLIC HEALTH?

Todd Caldis<sup>†</sup>

*Public Health Law: Power, Duty, Restraint.* By Lawrence O. Gostin. *University of California Press*, 2001. 491 pages. \$24.95

The initial chapters of this book were originally published as a series of articles entitled "Public Health Law in a New Century" in the *Journal of the American Medical Association*.<sup>1</sup> The book, which is addressed primarily to an audience of public health professionals and lawyers, may be regarded as a fuller exposition of its author's conviction that public health law should be more than a supporting player in public health efforts of the 21st century.

Gostin provides a complicated definition of public health law, which amounts essentially to the study of government's legal powers and duties to assure conditions of population health through the identification and prevention of risks. The book contains some discussion of tort law and administrative law as tools of public health law, but in accord with its definition of public health law most of the analysis pertains to constitutional law. Government at both the state and federal levels is shown to have broad power to pursue programs to affect the public's health subject to important procedural and substantive protections for private rights of liberty and property. Gostin also argues that the federal government has a positive constitutional duty to promote public health, a notion that is likely to resound with public health

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1. Lawrence O. Gostin, *Public Health Law in a New Century: Part I*, 283 J. AM. MED. ASS'N 2837-41 (2000); Lawrence O. Gostin, *Public Health Law in a New Century: Part II*, J. AM. MED. ASS'N 2979-84 (2000); Lawrence O. Gostin, *Public Health Law in a New Century: Part III*, J. AM. MED. ASS'N 3118-22 (2000).

professionals, but that is certainly beyond the boundaries of recognized constitutional doctrine. The strengths and weaknesses of Gostin's constitutional approach to public health law and how his presentation of relevant constitutional law might work for different types of readers are the criteria on which evaluation of this book depends.

Gostin likely regards a constitutional grounding as the most useful foundation for considering the legal status of future accretions to public health powers and responsibilities. Increasingly public health scholars and practitioners are adopting an ecological model of disease transmission which assigns especial importance to alleged social causes of disease such as human inequality. Since interventions to address such social risk factors would involve redistribution of resources, it would be surprising if these new approaches fit neatly into the traditional constitutional order without impinging on conventional notions of government responsibility, individual rights, and property rights. No matter what one's stance is toward such new directions for public health and no matter whether one is a lawyer or a public health professional, constitutional law is a logical starting place for considering the legal viability of such interventions.

It is likely, however, that non-lawyer readers of this book will take away a distorted perception of constitutional law. Gostin refers to the place of "public health in the constitutional design" as if public health now holds some special position when in fact it is merely one of an infinity of objectives Congress may choose to pursue under the aegis of its enumerated powers. An argument from the preamble to the U.S. Constitution is likely to be especially confusing for previously untutored readers. Although the preamble has never been recognized as the source of any federal constitutional power, it is cited by Gostin as evidence of federal general welfare powers that are then deduced to include public health. An exaggerated estimate of where public health fits into existing constitutional arrangements may be agreeable or flattering to readers who work in public health, but it does not reflect currently established law and to suggest otherwise sows potentially dysfunctional preconceptions about the priority that may be asserted for public health agendas.

On the other hand, the book may fix misperceptions that can arise in legal education about the extent of government power. For lawyers who obtained the misimpression in their law school

courses that individual rights almost always prevail over government policies with which they conflict, much of Gostin's exposition will be a salutary corrective. Even in the bad old days when courts were striking down legislation because it conflicted with a putatively inviolable freedom of contract and substantive due process rights, the courts nevertheless deferred to legislative acts genuinely addressed to public health objectives despite attendant burdens on businesses or private individuals. What held true in the earliest cases, such as the classic compulsory immunization case handed down early in the twentieth century, holds true today in cases like those that uphold compulsory HIV testing for public workers. Coercive government efforts to address public health problems are likely to be upheld by the courts provided that the requirements to be enforced are not invidiously discriminatory or do not unduly burden the enjoyment of fundamental rights.

Although the author expresses qualms about how public health policies may impinge upon private interests (especially rights of personal autonomy and other civil liberties), he endorses the legitimacy of existing governmental powers to pursue public health objectives. Any other position would appear incongruous when juxtaposed with his claim that government may have an affirmative constitutional duty to pursue public health, a duty presumably prior to and more encompassing than the people's elected representatives have so far imagined. He anticipates public health interventions that are still more intrusive toward individual rights and individual behavior than those now in place and dismisses as naïve those who tell themselves that public health and individual rights are always mutually reinforcing objectives.

What Gostin says about the idea of positive government duties to promote public health is contained in a few pages discussing the "negative constitution," the traditional proposition that that despite broad potential powers the government has no affirmative duty to assure for individuals the conditions of life, liberty, or property except to the extent settled upon through democratic processes. Although he does not explicitly advocate abandonment of the idea of a negative constitution, he is critical of it. His essential premise seems to be that large government institutions that already exist have fundamentally changed the constitutional environment and require the recognition of still broader government duties. Because government already does a lot, it has created expectations that it is responsible for a whole range of additional issues and situations,

and attempts to abjure responsibility are likely to be the result of an underlying discriminatory purpose. One clear example is government-funded health services for the poor that do not include abortion services. The implication of these points is that Gostin wants recognition of at least some positive government duties to advance public health, though he does not make clear how far he would like to go supplanting the principle of a negative constitution.

Given the broad constitutional power the legislative branch already possesses to establish public health objectives, it will be hard for some readers to fathom how recognition of affirmative governmental duties would genuinely expand the constitutional power behind public health. The only apparent utility would be as a prod to other branches of government by creating wider options for pushing a public health agenda through the courts whenever the legislative and executive branches of government are perceived to be neglectful or otherwise unable to deliver results on such priorities, a possibility that Gostin does not really discuss. And although he acknowledges that precedent is against his views, no mention is made of the profound shift in power away from the democratically-elected branches of government that adopting his views might entail or the fiscal pressures that might be unleashed if positive duties for federal government action were generally recognized. Federal courts have enforced affirmative duties in extraordinary circumstances when fundamental constitutional rights have been at risk such as in the racial desegregation cases, and state courts on occasion will attempt to enforce affirmative duties textually recognized in their constitutions such as the right to an equal public education. But it appears that the kind of doctrine advocated by Gostin would reach far beyond such important special cases which themselves have generated enduring controversy about alleged judicial excesses. In advancing the position that he does, however tentatively, Gostin owed it to his readers to sketch why he believes obviously relevant countervailing considerations may be ignored.

A similar incompleteness characterizes Gostin's discussion of paternalism as a basis for public health laws. He holds, for example, that we should not attempt to justify seatbelt and motorcycle helmet laws out of some "strained" conception of general public welfare; instead he urges us to recognize and accept such laws for what they really are: paternalistic coercion of private

individuals by government for the benefit of those same private individuals. Such paternalism may not be problematic if it is the outcome of a democratic political process in which elected representatives have acted subject to constitutional protections for individuals. But Gostin has posited the possible existence of affirmative government duties to promote public health independent of democratic processes, in which case the issue of paternalistic law is likely to be more problematic. Who is to guard paternalistic guardians who are insulated from democratic processes?

*Public Health Law: Power, Duty, Restraint* conveys a distorted picture of the constitutional dimensions of public health law to readers not otherwise equipped with a background in constitutional law. For those readers who do come equipped with an appropriate background the book raises the idea of recognizing constitutional duties to assure the conditions of public health, but ignores important issues connected to what would be important changes in long settled constitutional doctrine. Perhaps in attempting to address disparate audiences the author was not able to do full justice to either.