

2024

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Recommended Citation

Sabrina Adler, Sara Bartel & Heather Wong, *Authority to Improve or Harm Health: The Public Health Front in a Decades-Long Battle Over Governmental Powers*, 17 St. Louis U. J. Health L. & Pol'y (2024).
Available at: <https://scholarship.law.slu.edu/jhlp/vol17/iss1/4>

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**AUTHORITY TO IMPROVE OR HARM HEALTH: THE PUBLIC
HEALTH FRONT IN A DECADES-LONG BATTLE OVER
GOVERNMENTAL POWERS**

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ABSTRACT

Backlash to local, state, and federal responses to combat COVID-19 has resulted in a small but vocal cohort of legislatures and courts trying to change long-settled and foundational principles of public health decision-making. They have shifted authority away from experts and local decision-makers, limiting emergency response in ways that also impact day-to-day public health efforts. Considering some examples of other recent preemption efforts, it is clear that COVID-era backlash is part of a longer-term deregulatory agenda, often framed as an effort to keep “big government” out of people’s lives and to preserve individual freedoms. However, the impact of such deregulation is clear: in the public health sphere, it harms those it purports to protect by limiting access to rights, services, and information that can improve people’s opportunities to live healthy lives. Nonetheless, we now have an opportunity to reinvigorate the public health system such that it better centers the needs of the entire population and serves all it intends to protect.

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I. INTRODUCTION

In early 2020, as the COVID-19 pandemic started to unfold, the public health systems and structures that have been in place for decades, operating largely behind the scenes, quickly took center stage. Public health officials, staff, researchers, and volunteers took actions that saved millions of lives and trillions of dollars in medical costs.¹ In most of the country, state and local governments rushed to shore up efforts by public health practitioners and other first responders by providing more hands to help, as well as materials, money, data, and new systems to meet the challenges of a rapidly developing crisis requiring collective action.² There was a clear need for collaboration and a community-wide response, for lifting up learnings from both science and lived experience, and for recognizing and addressing entrenched inequities in the distribution of health-promoting and health-protecting resources.³

Structural, systemic drivers of health inequity already disproportionately burden people from groups that historically have been underserved and marginalized, including populations of color, children, families with low incomes, and individuals with a low level of education.⁴ These drivers include structural discrimination (including structural racism), income inequality and poverty, disparities in access to opportunities like education and meaningful work, and disparities in political power and participation in decision-making.⁵ The pandemic exposed how our systems fail to fairly represent, serve, or involve people from marginalized groups. Not coincidentally, many of those populations were more likely to be in lower-paying, less flexible, and higher risk jobs, and therefore were hit hardest by COVID-19 and were slower to recover from its impacts.⁶

1. Meagan C. Fitzpatrick et al., *Two Years of U.S. COVID-19 Vaccines Have Prevented Millions of Hospitalizations and Deaths*, THE COMMONWEALTH FUND (Dec. 13, 2022), <https://www.commonwealthfund.org/blog/2022/two-years-covid-vaccines-prevented-millions-deaths-hospitalizations>.

2. ANNA PRICE & LOUIS MYERS, UNITED STATES: FEDERAL, STATE, AND LOCAL GOVERNMENT RESPONSES TO COVID-19 11 (The Law Library of Congress, Global Legal Research Directorate 2020), <https://www.loc.gov/item/2020725113/>.

3. Nele Jensen et al., *The COVID-19 Pandemic Underscores the Need for an Equity-Focused Global Health Agenda*, HUMANS. AND SOC. SCIS. COMMC'NS, Jan. 2021, at 1, 5.

4. CHANGELAB SOLS., A BLUEPRINT FOR CHANGEMAKERS: ACHIEVING HEALTH EQUITY THROUGH LAW & POLICY 8 (2019). Many scholars have argued that addressing these inequities is part of the government's role to protect health and safety. See Thomas R. Frieden, *Government's Role in Protecting Health and Safety*, 368 NEW ENG. J. MED. 1857 (2013).

5. *Id.* at 9–10.

6. Patrick Nana-Sinkam et al., *Health Disparities and Equity in the Era of COVID-19*, 5 J. CLINICAL TRANSLATIONAL SCI. e99, 1–2 (2021); ORG. FOR ECON. COOP. & DEV., THE UNEQUAL IMPACT OF COVID-19: A SPOTLIGHT ON FRONTLINE WORKERS, MIGRANTS AND RACIAL/ETHNIC MINORITIES 3 (Mar. 17, 2022), <https://www.oecd.org/coronavirus/policy-responses/the-unequal->

COVID-19 first responders made daily decisions that evoked a fundamental question about our democratic systems: how do we best strike the balance between furthering the common good and protecting our individual freedoms?⁷ Given the unfair distribution of access to support, power, and information during the pandemic, it is not surprising that most people—residents and decision-makers alike—supported the public health measures that were implemented to protect all people in our communities and mitigate the spread and severity of COVID-19. However, a vocal constituency took issue with interventions like masking, social distancing, and vaccination.⁸ This constituency caught the attention of the media, which quickly translated into a variety of responses.⁹ There were armed protests and attacks on public health officials.¹⁰ In legislatures and governors' offices, policy changes undermined the power of those who were most equipped, through their expertise and training, to protect the public's health.¹¹ In the courts, while many judges upheld the authority of public health officials to take various measures to combat COVID-19, others veered from long-standing precedent to find what they saw as overreach and struck down actions based on rationales that could have implications for the future of public health.¹²

Public health issues became intensely politicized. In some states, decades-old structures were dismantled through rushed and uninformed votes—votes that were often knee-jerk reactions to what some politicians viewed as infringements on personal liberty, irrespective of their proven effectiveness in service of the

impact-of-covid-19-a-spotlight-on-frontline-workers-migrants-and-racial-ethnic-minorities-f36e931e/.

7. Salvador Macip & Oriol Yuguero, *Individual Freedom in the Initial Response to Covid-19*, FRONTIERS PUB. HEALTH (MINI REVIEW), June 2022, at 1, 2.

8. Patrick van Kessel & Dennis Quinn, *Both Republicans and Democrats cite masks as a negative effect of COVID-19, but for very different reasons*, PEW RSCH. CTR. (Oct. 29, 2020), <https://www.pewresearch.org/short-reads/2020/10/29/both-republicans-and-democrats-cite-masks-as-a-negative-effect-of-covid-19-but-for-very-different-reasons/>.

9. Lauren Weber & Joel Achenbach, *Covid Backlash Hobbles Public Health and Future Pandemic Response: Lawsuits and Legislation Have Stripped Public Health Officials of Their Powers in Three Years*, WASH. POST (Mar. 8, 2023), <https://www.washingtonpost.com/health/2023/03/08/covid-public-health-backlash/>.

10. Lauren Weber et al., *Public Health Officials Face Wave of Threats, Pressure Amid Coronavirus Response*, KFF HEALTH NEWS (June 12, 2020), <https://kffhealthnews.org/news/public-health-officials-face-wave-of-threats-pressure-amid-coronavirus-response/>.

11. DONNA LEVIN & JILL KRUEGER, STATE LAWS LIMITING PUBLIC HEALTH PROTECTIONS: HAZARDOUS FOR OUR HEALTH 3 (Oct. 2022), <https://www.networkforphl.org/resources/state-laws-limiting-public-health-protections-hazardous-for-our-health/>.

12. Wendy E. Parmet & Faith Khalik, *Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications*, 133 AM. J. PUB. HEALTH 280, 283–84 (2023).

common good.¹³ For some, every COVID-19 decision was an opportunity to distract from how the COVID-19 pandemic was affecting people's lives—especially among marginalized and oppressed groups—and instead to execute a national political, anti-science, deregulatory agenda long in the making.¹⁴ The pandemic provided an opportunity to undermine public health authority as a continuation and expansion of a broader effort that has been going on for years, in the context of a political climate and long-running agenda related to the role of government more broadly.¹⁵

This Article provides context on the broader deregulatory efforts that predated the COVID-19 pandemic and summarizes the deregulatory activities that sought to undermine the COVID-19 response. Throughout, it identifies how those activities impact public health practice and reinforces what comparative research on health outcomes increasingly makes clear: sweeping deregulatory and preemptive policies have harmful effects on health at the individual and community levels. On the other side of this politicized churn about governmental authority, there are examples of how public health can be used and refined to improve health outcomes, especially for historically marginalized and oppressed groups. This Article concludes with a suggestion to refocus the debate on how governmental authority is used by assessing how policies truly impact the people those policies aim to serve.

II. DEREGULATORY EFFORTS PREDATING COVID-19: A LONG-TERM STRATEGY BY POWERFUL VESTED INTERESTS OPPOSED TO HEALTH- AND EQUITY-ADVANCING LAWS AND POLICIES

Government regulation plays a vital role in protecting public health and safety and can be a powerful tool for addressing the fundamental drivers of health inequity.¹⁶ That being said, for decades, powerful public and private actors have used their wealth and influence to advance deregulatory agendas that weaken public protections and reinforce historical systems that produce unfair distributions of resources and health outcomes.¹⁷

This longstanding deregulatory campaign has spanned a wide range of approaches across virtually all social, political, and legal institutions. For example, since the rise of neoliberalism in the 1980s, wealthy anti-regulatory

13. Lauren Weber & Anna Maria Barry-Jester, *Over Half of States Have Rolled Back Public Health Powers in Pandemic*, KFF HEALTH NEWS (Sept. 15, 2021), <https://kffhealthnews.org/news/article/over-half-of-states-have-rolled-back-public-health-powers-in-pandemic/>.

14. Kerry Kretchmar & T. Jameson Brewer, *Neoliberalism, COVID, Anti-science, and the Politics of School Reopening*, EDUC. POL'Y ANALYSIS ARCHIVES, 2022, at 1, 4–5 (2022).

15. May Ci Van Schalkwyk et al., *Perspective, Our Postpandemic World: What Will It Take to Build a Better Future for People and Planet?*, 99 MILBANK Q. 467, 482 (2021).

16. Thomas R. Frieden, *Perspective, Government's Role in Protecting Health and Safety*, 368 NEW ENG. J. MED. 1857, 1859 (2013); CHANGE LAB SOLS., *supra* note 4, at 12.

17. Van Schalkwyk et al., *supra* note 15, at 483.

interests have been driving the privatization of core public services ranging from education to public health.¹⁸ Meanwhile, decades-long concerted efforts by a conservative legal movement have packed the federal courts with conservative judges identified and vetted by groups like the Federalist Society, the forty-year-old legal network that serves as a pipeline for Republican-appointed judges.¹⁹ This transformed judiciary has produced legal precedent that has furthered the deregulatory agenda in countless ways, including the erosion of foundational legal principles underpinning administrative agencies' authority to effectively exercise delegated regulatory powers and respond to evolving threats, like pandemics and climate change.²⁰ For example, the Supreme Court's formal elevation of the "major questions" doctrine, which holds that agencies may not regulate any matter of "vast economic and political significance" without explicit congressional authorization, effectively creates a judicial veto over policy decisions and further encodes status quo bias into the legal system.²¹

One of the trends in this broader deregulatory movement is the rising abuse of state preemption. Preemption is a legal doctrine that allows a higher level of government to limit or even eliminate the power of a lower level of government to regulate a specific issue.²² Preemption has factored heavily into the regulatory changes to public health authority during and in the wake of the COVID-19 pandemic.²³ State preemption of local government authority has been used frequently to stymie local laws and policies aimed precisely at advancing community health and undoing the fundamental drivers of health inequity. This Article uses three recent pre-COVID examples to illustrate the rising use of abusive state preemption, one of the many legal tools contributing to this coordinated deregulatory effort.

18. Valerie Strauss, *What and Who are Fueling the Movement to Privatize Public Education — And Why You Should Care*, WASH. POST (May 30, 2018), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/05/30/what-and-who-is-fueling-the-movement-to-privatize-public-education-and-why-you-should-care/>; Sarah E. Gollust & Peter D. Jacobson, *Privatization of Public Services: Organizational Reform Efforts in Public Education and Public Health*, 96 AM. J. PUB. HEALTH. 1733, 1733 (2006).

19. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L. J. 148, 156 (2019); Jackie Calmes, *How Republicans Have Packed the Courts for Years*, TIME (June 22, 2021), <https://time.com/6074707/republicans-courts-congress-mcconnell/>.

20. Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 175–76 (2022).

21. *Id.* at 187, 202, 204; Linda Greenhouse, *What the Supreme Court's Vaccine Case Was Really About*, N.Y. TIMES (Jan. 17, 2022), <https://www.nytimes.com/2022/01/17/opinion/supreme-court-vaccine-osha.html>.

22. CHANGELAB SOLS., FUNDAMENTALS OF PREEMPTION 2 (June 2019), https://www.changelabsolutions.org/sites/default/files/2019-07/Fundamentals_of_Preemption_FINAL_20190621.pdf.

23. *See Preemption, Public Health, & Equity in the Time of COVID-19*, CHANGELAB SOLS. (Feb. 11, 2021), <https://www.changelabsolutions.org/preemption-public-health-equity-time-covid-19>.

It is worth noting that preemption as a legal concept is not inherently adversarial to public health, equity, or good governance. For example, preemptive federal civil rights laws—such as the Civil Rights Act of 1964,²⁴ the Voting Rights Act of 1965,²⁵ and the Fair Housing Act²⁶—curbed government-sanctioned discrimination by states and localities.²⁷ Similarly, preemptive state laws can restrict inequitable local laws and policies, such as exclusionary zoning.²⁸ Although it is often framed as a *solution* to government overreach, this context demonstrates that preemption is merely a tool to be wielded, just like other types of government intervention. With this context in mind, this Article analyzes more recent examples of preemption and discusses their effects on people's lives—namely, how abusive preemption harms the individuals whose freedom it purportedly protects.

State legislatures across the country have used preemption in increasingly dramatic and brazen ways to remove local authority to regulate not just in public health, but in numerous areas that affect health.²⁹ This shift has roots in efforts by the tobacco industry and the National Rifle Association³⁰ to fight local regulation of their products, and powerful trade associations and industries continue to drive preemption efforts today using their lobbying dollars and influence.³¹ Today, many of these preemptive state laws are based on model legislation crafted by the American Legislative Exchange Council (ALEC), an organization whose members include corporations and state lawmakers.³²

24. 42 U.S.C. § 2000d.

25. 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702.

26. 42 U.S.C. §§ 3601–3619.

27. Thomas Silverstein, *Combating State Preemption without Falling into the Local Control Trap*, POVERTY & RACE RSCH. ACTION COUNCIL, Oct.–Dec. 2017, at 2, 3.

28. *Id.* at 2.

29. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997, 2000, 2007 (2018).

30. See Yussuf Saloojee & Elif Dagli, *Tobacco industry tactics for resisting public policy on health*, 78 BULL. WORLD HEALTH ORG. 902 (2000) (“The tactics used by the tobacco industry to resist government regulation of its products include conducting public relations campaigns, buying scientific and other expertise to create controversy about established facts, funding political parties, hiring lobbyists to influence policy, using front groups and allied industries to oppose tobacco control measures, preventing strong legislation by pressing for the adoption of voluntary codes or weaker laws, and corrupting public officials. Formerly secret internal tobacco industry documents provide evidence of a 50-year conspiracy to ‘resist smoking restrictions, restore smoker confidence and preserve product liability defence.’”); LAURA HUIZAR & YANNET LATHROP, *FIGHTING WAGE PREEMPTION: HOW WORKERS HAVE LOST BILLIONS IN WAGES AND HOW WE CAN RESTORE LOCAL DEMOCRACY* 9, <https://www.nelp.org/wp-content/uploads/Fighting-Wage-Preemption-Report-7-19.pdf>.

31. HUIZAR & LATHROP, *supra* note 30, at 9; Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1170–71 (2018).

32. Jennifer L. Pomeranz et al., *State Preemption: Threat to Democracy, Essential Regulation, and Public Health*, 109 AM. J. PUB. HEALTH 251, 252 (2019).

Proponents of this practice often attempt to justify preemption as necessary to prevent a patchwork of regulatory environments across a state, but research has shown these arguments to be without merit.³³ More often, they are motivated by ideological and practical opposition to specific policies—or a general push towards deregulation—rather than a true need for uniform statewide regulation.³⁴

The trend of new preemption laws sweeping the country represents a coordinated assault on the political power of communities of color, low-income workers, and other marginalized groups.³⁵ The following three examples are illustrative of the growing breadth of new preemptive state laws and their discriminatory impacts.

A. *Preemption of Local Minimum Wage Regulation in Alabama*

In 2016, the Alabama state legislature responded to the Birmingham City Council's adoption of an ordinance raising the minimum wage within city limits by broadly preempting all localities across the state, including Birmingham, from regulating not just wages, but also benefits and work schedules.³⁶ The NAACP challenged the preemptive law in federal court, arguing in part that the law was discriminatory and violated the Equal Protection Clause.³⁷ In support of this claim, the plaintiffs noted that nearly seventy-five percent of Birmingham's population is Black, that the city's Black hourly-wage workers earn disproportionately less than their White counterparts, and that not a single Black state legislator voted in favor of the preemptive state law.³⁸

Notably, a three-judge panel of the Eleventh Circuit held that the equal protection claim was sufficiently plausible to survive a motion to dismiss in light of "the disproportionate effect of the Minimum Wage Act on Birmingham's poorest black residents; the rushed, reactionary, and racially polarized nature of the legislative process; and Alabama's historical use of state power to deny local black majorities authority over economic decision-making."³⁹ Ultimately, the

33. MARK TRESKON ET AL., DO THE EFFECTS OF A REGULATORY PATCHWORK JUSTIFY STATE PREEMPTION OF LOCAL LAWS? AN EXAMINATION OF THE MERITS OF THE PATCHWORK ARGUMENT, URB. INST. 1, 15 (2021), <https://www.urban.org/sites/default/files/publication/103422/do-the-effects-of-a-regulatory-patchwork-justify-state-preemption-of-local-law.pdf>.

34. Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 L. CONTEMP. PROBS., no. 3, 2016, at 115, 136 (2016).

35. *Id.* at 137.

36. *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1292 (11th Cir. 2019) (en banc); Alabama Uniform Minimum Wage and Right to Work Act, ALA. CODE § 25-7-45(b) (2016).

37. *Lewis*, 944 F.3d at 1294.

38. *Id.* at 1294–95 n.2.

39. *Lewis v. Governor of Alabama*, 896 F.3d 1282, 1295 (11th Cir. 2018), *on reh'g en banc*, 944 F.3d 1287 (11th Cir. 2019).

Eleventh Circuit dismissed the case without a decision on the merits of the equal protection claim, holding that the plaintiffs lacked standing.⁴⁰

Alabama's preemptive law is part of a larger story. Local minimum wage laws are currently preempted in about half of the states.⁴¹ The majority of these states' preemptive laws were enacted in the years following the emergence of the worker-led "Fight for \$15" movement in 2012, which prompted ALEC to convene a meeting to address what it characterized as the "onslaught" of local proposals to raise the minimum wage.⁴² Such minimum wage preemption laws disproportionately impact communities of color, who are overrepresented among low-wage workers and often represent majorities in cities and large metro areas.⁴³ These examples illustrate the coordinated abuse of preemption to further an agenda with no concern for local health and equity implications.

B. *Preemption of Local Source-of-Income Discrimination Protections in Texas*

The next preemptive law was similarly sparked by local efforts to address the fundamental drivers of health inequity within the community, this time by focusing on housing opportunity. In December 2014, the Austin City Council passed a local ordinance prohibiting landlords from discriminating against voucher holders based on their source of income.⁴⁴ The effort was based on studies documenting extensive discrimination by landlords in 2012 and 2013, as well as on policy recommendations from a local work group on affordable housing.⁴⁵ Austin's ordinance, and a similar measure being developed by the City of Dallas, prompted swift counterefforts by state and local landlord associations, including aggressive lobbying efforts in the state legislature.⁴⁶ State lobbying efforts culminated in the 2015 passage of a preemptive law expressly prohibiting source-of-income discrimination protections for voucher holders statewide.⁴⁷ This preemptive law was particularly harmful in light of the fact that state law provided no such protections for recipients of housing assistance and the clear evidence that source-of-income discrimination

40. *Lewis*, 944 F.3d at 1306.

41. HUIZAR & LATHROP, *supra* note 30, at 3.

42. *Id.* at 13.

43. *Id.* at 3.

44. Mary Tuma, *Landlords Sue to Block Section 8 Renters*, AUSTIN CHRONICLE (Dec. 19, 2014), <https://www.austinchronicle.com/news/2014-12-19/landlords-sue-to-block-section-8-renters/>.

45. MARTHA GALVEZ ET AL., PROTECTING HOUSING CHOICE VOUCHER HOLDERS FROM DISCRIMINATION: LESSONS FROM OREGON AND TEXAS 11 (Oct. 2020), https://www.urban.org/sites/default/files/publication/103088/protecting-housing-choice-voucher-holders-from-discrimination_3.pdf.

46. *Id.* at 12–14; Robert G. Schwemm, *State and Local Laws Banning Source-of-Income Discrimination*, 28 J. AFFORDABLE HOUS. CMTY. DEV. L. 373, 381 (2019).

47. Schwemm, *supra* note 46, at 381.

disproportionately harms people of color.⁴⁸ Following the law's passage, the Dallas City Council had no choice but to exempt vouchers from the protections of its local source-of-income ordinance, which was adopted in late 2016.⁴⁹

In 2017, the City of Austin filed a federal lawsuit challenging Texas's preemptive law, which—as with the NAACP lawsuit in the Alabama example above—survived a motion to dismiss only to be dismissed without a decision on the merits.⁵⁰ In its complaint, the city argued that Texas's preemptive law was itself preempted by the federal Fair Housing Act, which invalidates any state or local law that permits a “discriminatory housing practice.”⁵¹ Notably, the federal district court ruled that this preemption claim was sufficiently plausible to survive a motion to dismiss.⁵² The Fifth Circuit subsequently reversed and ordered the case dismissed on grounds that the City's suit was barred by the Eleventh Amendment's sovereign immunity doctrine, which bars states from being sued in federal court without their consent.⁵³ A parallel lawsuit brought by Inclusive Communities Project, a Dallas-based fair housing nonprofit, also sought to invalidate the state preemptive law, but was likewise dismissed on sovereign immunity grounds.⁵⁴

Even as preemption is being misused in some states to preclude local source-of-income discrimination protections, other states are permitting localities to adopt such protections—or even affirmatively using floor preemption—to mandate such protections statewide.⁵⁵ This example illustrates how preemption can be wielded in different ways, highlighting the need for further refinement and adoption of a framework that evaluates preemption based on its goals and outcomes.⁵⁶

48. 2015 Tex. Gen. Laws 3850 (codified as amended at TEX. LOC. GOV'T CODE ANN. § 250.007); J. Rosie Tighe et al., *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE 3, 6 (2017).

49. See GALVEZ ET AL., *supra* note 45, at 14; DALLAS, TEX., ORDINANCE ch. 20A, art. I, §§ 20A-3(21), 20A-4(a) (2016).

50. Schwemm, *supra* note 46, at 381.

51. City of Austin v. Paxton, 325 F. Supp. 3d 749, 757 (W.D. Tex. 2018), *rev'd and remanded*, 943 F.3d 993 (5th Cir. 2019).

52. *Id.* at 760.

53. City of Austin v. Paxton, 943 F.3d 993, 1004 (5th Cir. 2019).

54. Inclusive Communities Project, Inc. v. Abbott, No. 3:17-CV-0440-D, 2018 WL 2415034, at *1, *10 (N.D. Tex. May 29, 2018).

55. Schwemm, *supra* note 46, at 379; NAT'L MULTIFAMILY HOUSING COUNCIL, SOURCE OF INCOME LAWS BY STATE, COUNTY AND CITY 1 (2021), <https://www.nmhc.org/globalassets/research—insight/analysis-and-guidance/source-of-income-laws/source-of-income-laws-by-state-county-and-city-chart.pdf>.

56. Derek Carr et al., *Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health*, 98 MILBANK Q. 131, 143 (2020).

C. Preemption of Local Sugary Drink Taxes in California

California—the state with more local sugary drink taxes than any other—enacted a state law in 2018 preempting such taxes after what the press and many others referred to as blackmail of the state legislature.⁵⁷

Earlier that year, the beverage industry (among other industries) qualified a measure for the November ballot that would have made it nearly impossible for local governments to raise revenues for basic services.⁵⁸ The measure's onerous requirement that any local tax increase be approved by two-thirds of voters or an elected body could have had devastating consequences for cities in California.⁵⁹ A few days before the deadline to remove measures from the ballot, the beverage industry agreed to remove this potentially crippling measure in exchange for the legislature enacting a bill that would preempt local sugary drink taxes until 2031.⁶⁰

Meanwhile, several cities in California had been gearing up to enact sugary drink taxes to combat the inequitable health outcomes of sugary drink consumption and the targeted marketing of sugary drinks to low-income communities of color.⁶¹ As documented by numerous studies, the fast food and beverage industries have long targeted their marketing towards young people, particularly from lower-income communities and communities of color.⁶² These practices have contributed to racial health inequities, including higher rates of sugary beverage consumption and associated poor health outcomes.⁶³ Strikingly, a diverse group of youth from Stockton, who had been working for

57. Anahad O'Connor & Margot Sanger-Katz, *California, of All Places, Has Banned Soda Taxes. How a New Industry Strategy Is Succeeding*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/upshot/california-banning-soda-taxes-a-new-industry-strategy-is-stunning-some-lawmakers.html>.

58. *Id.*

59. *Id.*

60. Samantha Young, *Under Pressure, California Lawmakers Ban Soda Taxes For 12 Years*, CAL. HEALTHLINE (June 28, 2018), <https://californiahealthline.org/news/under-pressure-california-lawmakers-ban-soda-taxes-for-12-years/>.

61. David Washburn, *California's Soda Tax Ban Stalled a Grassroots Movement, but Didn't Kill It*, ED SOURCE (July 31, 2018), <https://edsources.org/2018/californias-soda-tax-ban-stalled-a-grassroots-movement-but-didnt-kill-it/600795>; CMTY. HEALTH COUNCILS, CALIFORNIA'S SWEETENED BEVERAGE TAX: A HEALTH IMPACT ASSESSMENT 9 (2017), https://www.pewtrusts.org/~media/Assets/External-Sites/Health-Impact-Project/CHC_SSB_HIA_2017_Final.pdf?la=en.

62. JENNIFER L. HARRIS ET AL., SUGARY DRINK ADVERTISING TO YOUTH: CONTINUED BARRIER TO PUBLIC HEALTH PROGRESS 8 (2020), https://www.sugarydrinkfacts.org/resources/Sugary%20Drink%20FACTS%202020/Sugary_Drink_FACTS_Full%20Report_final.pdf; Sonya A. Grier & Shiriki K. Kumanyika, *The Context for Choice: Health Implications of Targeted Food and Beverage Marketing to African Americans*, 98 AM. J. PUB. HEALTH 1616, 1626 (2008); Punam Ohri-Vachaspati et al., *Child-Directed Marketing Inside and on the Exterior of Fast Food Restaurants*, 48 AM. J. PREVENTIVE MED. 22, 22 (2015).

63. CMTY. HEALTH COUNCILS, *supra* note 61, at 23.

years to lay the groundwork for a local sugary drink tax, went to Sacramento to implore legislators to vote against preemption so local voters could determine what policy approach was best for their community.⁶⁴ But the state legislators' hands were tied; many were infuriated by this tactic and yet felt they had no choice but to vote in favor of preemption given the risk posed by the ballot measure.⁶⁵ Thus, legislators angrily voiced their opposition as they reluctantly voted for the bill.⁶⁶ This co-opting of the ballot initiative process is an example of a system intended to facilitate more self-governance and resident agency being ironically—yet strategically—overtaken by wealthy corporate interests.⁶⁷

Although California's preemptive law was expressly intended to prohibit all local sugary drink taxes until 2031, charter cities may still be able to enact new sugary drink taxes under their broad "home rule" authority guaranteed by the California Constitution. Under the home rule doctrine, a charter city's law is only preempted by a conflicting state law if the state law is shown to: (1) cover a subject of "statewide concern;" (2) be "reasonably related" to resolution of that concern; and (3) be "narrowly tailored" to avoid unnecessary interference in local governance.⁶⁸ Perhaps recognizing this possibility, the drafters of the preemptive law included a separate provision imposing a severe penalty—the loss of *all revenue* from sales and use taxes—on any charter city that validly enacted a sugary drink tax under its home rule authority.⁶⁹ This provision, a blatant effort to prevent charter cities from exercising their constitutional rights, was patently illegal, and was ultimately struck down when challenged in state court.⁷⁰ Unlike the Alabama and Texas examples, litigation was successful in limiting the scope of a harmful, industry-backed preemptive law, showing that, in some instances, the judicial system can still be a viable means by which to push back against harmful preemption.

The policy targets of the preemptive state laws in these three examples—minimum wage regulations, source-of-income discrimination protections, and sugary drink taxes—are just a few of the many areas that have been subject to increasing abuse of preemption in recent decades. The Local Solutions Support

64. Larry Cohen, *California Just Banned Soda Tax — It Should Set Off Alarm Bells Everywhere*, THE HILL (July 1, 2018), <https://thehill.com/opinion/healthcare/394947-california-just-banned-soda-tax-it-should-set-off-alarm-bells-everywhere/>.

65. Young, *supra* note 60.

66. O'Connor & Sanger-Katz, *supra* note 57.

67. Miriam Pawel, *California Ballot Initiatives Are Powerful. The Powerful Have Noticed.*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/11/05/opinion/california-ballot-initiatives-direct-democracy.html>; see Nadia Lopez, *'Bounty Hunters' Are Earning Money for Voter Signatures in California. Now, There's a Backlash.*, BLOOMBERG CITYLAB (June 5, 2023), <https://www.bloomberg.com/news/articles/2023-06-05/california-signature-hunters-for-ballot-initiatives-spark-outrage-legislation>.

68. *Cultiva La Salud v. State of California*, 306 Cal. Rptr. 3d 627, 632 (Cal. App. 2023).

69. *Id.* at 631.

70. *Id.* at 638.

Center has been tracking preemption trends over time.⁷¹ From 2013 to the beginning of the pandemic in 2020, there was a drastic rise in state preemption of local regulation on varied topics such as the gig economy, single-use plastic bags, and short-term rentals.⁷² Recent preemption data from the National League of Cities, which tracks preemption by state across various issues from paid leave to municipal broadband, also shows a sharp increase in state preemption laws between 2017 and 2018 linked to “lobbying efforts by special interests, the spatial sorting of political preferences between urban and rural areas, and single-party dominance in most state governments.”⁷³ This ongoing wave of “new” preemption is also taking on increasingly extreme and troubling characteristics, such as the inclusion of punitive provisions (like the severe sales tax penalty in California’s sugary drink law) and “nuclear” provisions that indiscriminately take aim at whole swaths of local authority at once.⁷⁴

This proliferation of abusive state preemption laws—which, as noted above, are often driven by corporate interests and right-wing groups like ALEC—has disproportionately impacted marginalized communities in states with Republican-controlled legislatures.⁷⁵ Research from the Economic Policy Institute has shown that abusive preemption is most prevalent across the South, where “[s]tate interference in local democracy is rooted in Confederate history and white supremacy.”⁷⁶ As in the Alabama minimum wage example, preemptive laws in the South are often passed by legislatures controlled by conservative, White lawmakers, and stymie local efforts to address fundamental drivers of health inequity in cities whose residents are predominately people of color.⁷⁷ Increasingly, abusive preemption legislation is also being used by conservative lawmakers to target hot-button culture war issues—including gun

71. See, e.g., *Tracking Abuse of Preemption Legislation: 2022 Legislative Session*, LOC. SOLS. SUPPORT CTR. (June 1, 2022), <https://www.supportdemocracy.org/the-latest/tracking-abuse-of-preemption-legislation-2022-legislative-session>.

72. Bruno Showers, *Passage of State Legislation Preempting Local Laws About: Gig Economy, Paid Leave, Minimum Wage, Single-Use Plastic Bags, Soda Taxes, Short-Term Rentals, Fair Scheduling* (graph), in Bruno Showers, *State Lawmakers Across The Country Thwart Local Democracy Through Preemption*, ARKANSAS ADVOCATES FOR CHILDREN AND FAMILIES (June 7, 2022), <https://www.aradvocates.org/state-lawmakers-across-the-country-thwart-local-democracy-through-preemption/>.

73. NICOLE DUPUIS ET AL., CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (2018 UPDATE), NAT’L LEAGUE OF CITIES 1, 3 (Feb. 2018), <https://www.nlc.org/post/2018/04/05/state-preemption-of-local-authority-continues-to-rise-according-to-new-data-from-the-national-league-of-cities/>.

74. Briffault, *supra* note 29, at 1999, 2016.

75. HUNTER BLAIR ET AL., PREEMPTING PROGRESS: STATE INTERFERENCE IN LOCAL POLICYMAKING PREVENTS PEOPLE OF COLOR, WOMEN, AND LOW-INCOME WORKERS FROM MAKING ENDS MEET IN THE SOUTH 6–7 (2020), <https://www.epi.org/publication/preemption-in-the-south/>.

76. *Id.* at 4.

77. *Id.* at 11.

control, LGBTQ+ rights, immigration, climate change, and education—for partisan political gain at the expense of impacted communities and local democracy more generally.⁷⁸

Importantly, this preemption shifts power away from the communities impacted by policy decisions and places it in the hands of state legislators whose interests may differ from members of those communities. This is a clear illustration of what the World Health Organization (WHO) has called “political determinants of health,” a concept that highlights how the institutional and structural components of the social determinants of health should be understood as sites for organized and deliberate intervention—in other words, how the *power* to change things is itself a determinant of health.⁷⁹

Abusive state preemption also poses a grave threat to population health more broadly. The states that are the most aggressive in misusing preemption tend to be the same states that have historically underinvested in public services and have the highest poverty rates.⁸⁰ Poverty is associated with a wide range of poor health outcomes, including higher rates of physical limitation and chronic conditions such as heart disease, diabetes, and stroke.⁸¹ By suppressing local efforts to address discrimination and other barriers to economic security, abusive preemption worsens health outcomes for entire communities and can further geographic disparities. For example, recent studies by Wolf et al. have found that preempting local authorities from raising minimum wage or mandating paid sick leave contributes to higher infant mortality rates and higher working-age mortality from suicide, homicide, drug overdose, alcohol poisoning, and transport accidents in affected communities.⁸² Given this breadth, the ongoing wave of “new” preemption is likely to have numerous and wide-ranging impacts on population health. Thus, future research documenting the scope of these

78. Schragger, *supra* note 31, at 1213, 1228; Ken Stahl, *Contagion and Partisan Federalism*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS (May 8, 2020), <https://firearmslaw.duke.edu/2020/05/contagion-and-partisan-federalism/>.

79. CHANGLAB SOLS., *supra* note 4, at 9; COMM’N ON SOC. DETERMINANTS OF HEALTH, CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOC. DETERMINANTS OF HEALTH: FINAL REP. OF THE COMMISSION ON SOC. DETERMINANTS OF HEALTH, GENEVA, SWITZ.: WORLD HEALTH ORG. 1 (2008), www.who.int/social_determinants/thecommission/finalreport/en; Ilona Kickbusch, *The political determinants of health—10 years on*, 350 BRITISH MED. J. 1, 2 (Jan. 8, 2015).

80. BLAIR ET AL., *supra* note 75, at 28–29; World Population Review, *Poverty Rate by State* (2023), <https://worldpopulationreview.com/state-rankings/poverty-rate-by-state>.

81. DHRUV KHULLAR & DAVE A. CHOKSHI, *HEALTH, INCOME, & POVERTY: WHERE WE ARE & WHAT COULD HELP*, HEALTH AFFAIRS 1–2 (Oct. 4, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180817.901935/>.

82. Douglas A. Wolf et al., *Effects of US State Preemption Laws On Infant Mortality*, 145 PREVENTIVE MED., Apr. 2021, at 1, 5; Douglas A. Wolf et al., *U.S. State Preemption Laws and Working-Age Mortality*, 63 AM. J. PREVENTIVE MED. 681, 685 (2022).

impacts could help further the development of an effective, equity-first preemption framework to guide policymaking going forward.⁸³

III. COVID-19 BACKLASH AGAINST PUBLIC HEALTH AUTHORITIES

Protecting the public's health is a core function of government, and public health regulations play an integral—though often invisible—role in preventing injury and disease in everyday life. Among other things, regulations ensure the safety of everything from the food we eat, the water we drink, and the air we breathe to our homes, workplaces, schools, and roads.⁸⁴ Public health and emergency powers also enable governments at all levels to prepare for and effectively respond to public health emergencies, including infectious disease outbreaks, natural disasters, and environmental contamination.⁸⁵ For example, numerous epidemics have been stalled thanks to public health officials' swift and strategic use of proven interventions, including screening, reporting, contact tracing, isolation, quarantine, and vaccination.⁸⁶

When these longstanding governmental powers were abruptly thrust into the spotlight during the COVID-19 pandemic, they drew the attention of anti-regulatory interests and positioned public health as a new realm in which to continue the decades-long effort toward deregulation.⁸⁷ Public health authority came under attack in wave after wave of state legislation and litigation, often driven by the same anti-regulatory groups, such as ALEC and the State Policy Network,⁸⁸ that have driven the recent proliferation of preemption and other deregulatory activity.⁸⁹

These attacks on public health authority have run the gamut. In the courts, some judges' decisions narrowed the authority of administrative agencies

83. Carr et al., *supra* note 56, at 142; Y. Tony Yang & Carla J. Berg, *How Preemption Can Lead to Inequity*, 19 INT'L J. ENV'T RSCH. PUB. HEALTH, Sept. 2022, at 1, 3, 6, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9518357/#B25-ijerph-19-10476>.

84. See LAWRENCE O. GOSTIN ET AL., *ADVANCING THE RIGHT TO HEALTH: THE VITAL ROLE OF LAW* (2017), <https://scholarship.law.georgetown.edu/facpub/1973>.

85. *Id.* at 131, 147–48, 152.

86. *Id.* at xiii. See also Resolve to Save Lives, *Epidemics that Didn't Happen: These Stories Show that If We Invest in Global Preparedness, Epidemics Don't Have to Happen*, <https://prevent.epidemics.org/epidemics-that-didnt-happen/> (last visited Aug. 18, 2023).

87. Richard C. Schragger, *Localism All the Way Up: Federalism, State-City Conflict, and the Urban-Rural Divide*, 2021 WIS. L. REV. 1283, 1287–89 (2021).

88. The State Policy Network is a coalition of state-based libertarian and conservative think tanks and legal centers. See John McCormack, *Google Government Gone Viral*, WASH. EXAMINER (Dec. 21, 2007), <https://www.washingtonexaminer.com/?p=884177> (describing the State Policy Network as “a consortium of conservative and libertarian think tanks in 47 states”).

89. Weber & Achenbach, *supra* note 9; Weber & Barry-Jester, *supra* note 13; Lauren Weber & Anna Maria Barry-Jester, *Conservative Blocs Unleash Litigation to Curb Public Health Powers*, KFF HEALTH NEWS (July 18, 2022), <https://kffhealthnews.org/news/article/conservative-blocs-litigation-curb-public-health-powers/>.

charged with protecting public health.⁹⁰ This is part of a much larger trend, noted above in Section II, of courts—including the Supreme Court—presuming that delegations of power from legislative bodies to administrative agencies are limited.⁹¹ In addition to the reinterpretation of authorizing statutes, some courts are deferring less to the determinations of expert administrative agencies and raising evidentiary standards for agency decisions such that a great deal of very precise data is required to justify agency actions.⁹²

Additionally, some courts have broadened their use of strict scrutiny if any “free exercise” claim is made, even if a public health order does not mention religious activity or provide religious exemptions. Such orders are at risk of being struck down in some courts even when there is strong evidence to justify denying any religious exemptions requested.⁹³

Legislative attacks on public health authority are equally varied. Some states’ legislatures preempted local infection control measures like mask mandates, social distancing measures, and vaccine mandates.⁹⁴ Across many states, legislatures have proposed and enacted bills that reallocate public health authority from localities—where community-level needs and preferences can better inform responses and resource allocation—to the state.⁹⁵ They also have taken decision-making authority away from health departments, where officials and staff are equipped with specialized public health expertise and training, and placed it with legislative bodies that are more prone to political forces like lobbying that can sway their actions.⁹⁶

Some states went even further by punishing noncompliant localities, such as when Georgia’s governor sued Atlanta’s mayor over the city’s mandatory masking rule.⁹⁷ Some states also threatened to withhold funding to coerce localities in various ways, like when Nebraska’s governor warned local governments they would not receive federal COVID-19 funds if they imposed masking or other local rules.⁹⁸ Other states wielded power over localities through vaccine access, as when Texas threatened to cut the number of doses

90. Parmet & Khalik, *supra* note 12, at 284.

91. *Id.* at 286.

92. *Id.*

93. *Id.* at 285–86.

94. *Help Ensure That Public Health Professionals Can Continue to Protect Community Well-Being*, CHANGELAB SOLS. (2022), <https://www.changelabsolutions.org/product/preserving-local-public-health-powers>.

95. LEVIN & KRUEGER, *supra* note 11, at 10.

96. *Id.* at 8.

97. Nicholas Bogel-Burroughs & Campbell Robertson, *While Virus Surges, Georgia Governor Sues Atlanta Mayor to Block Mask Rules*, N.Y. TIMES (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/brian-kemp-georgia-keisha-lance-bottoms-atlanta.html>.

98. NAT’L LEAGUE OF CITIES, *PREEMPTION AND THE COVID-19 PANDEMIC: EXPLORING STATE INTERFERENCE BEFORE, DURING, & AFTER THE CRISIS* 15 (2020), https://www.nlc.org/wp-content/uploads/2020/11/COVID-19_Preemption_Report.pdf.

allocated to Dallas when the county proposed a plan to prioritize distribution in the hardest-hit neighborhoods.⁹⁹ Regardless of their specific legal and regulatory implications, these changes, coupled with attacks on public health staff and officials, have also had a chilling effect on government officials, who are left uncertain about the contours of their authority in light of recent changes or afraid of prompting additional backlash.¹⁰⁰

Importantly, while some of these changes were limited to the context of the COVID-19 pandemic, others are broader in scope and may impact the practice of public health beyond the confines of COVID-19 or infectious disease outbreaks.¹⁰¹

IV. HEALTH EQUITY IMPACTS AND STRATEGIES FOR THE FUTURE

The COVID-19 backlash against public health authority, in conjunction with the broader decade-plus surge in abusive state preemption laws and other deregulatory efforts, contributed to devastating health equity impacts over the course of the pandemic. From the outset, localities in states that preempted services like local paid sick leave or municipal broadband were already starting from behind when the pandemic hit in early 2020.¹⁰² Residents in those places did not have access to policies that were critical for ensuring equity in the face of a pandemic. Preexisting preemption also stifled the ability of some cities to enact emergency paid sick leave or eviction and foreclosure moratoria.¹⁰³ Subsequent research has indeed found striking relationships between COVID-19 outcomes and political environment. For example, higher exposure to political conservatism, abusive preemption, and COVID-19 backlash are strongly associated with higher mortality rates and stress on hospital intensive care unit capacity.¹⁰⁴ These findings are in line with the larger body of research

99. Emma Platoff & Juan Pablo Garnham, *Dallas County Axes Plan to Prioritize Vaccinating Communities of Color after State Threatens to Slash Allocation*, TEX. TRIB. (Jan. 20, 2021), <https://www.texastribune.org/2021/01/20/dallas-vaccine-plan-communities-of-color/#:~:text=Faced%20with%20the%20threat%20that,primarily%20in%20communities%20of%20color>.

100. CHANGLAB SOLS., *supra* note 94, at 5, 6.

101. See, e.g., *Public Health Preemption*, CTR. FOR PUB. HEALTH L. RSCH. (last updated May 20, 2022), <https://lawatlas.org/datasets/public-health-preemption> (showing vaccine-related authority-limiting bills applicable beyond COVID-19 vaccines, for example, those prohibiting information gathering and tracking activities).

102. SCOTT BURRIS ET AL., COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 70 (2021), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/606688d31123121bea8937a2/1617332441402/COVIDPolicyPlaybook-March2021.pdf>.

103. *Id.*

104. Nancy Krieger et al., *Relationship of Political Ideology of US Federal and State Elected Officials and Key COVID Pandemic Outcomes Following Vaccine Rollout to Adults: April 2021–March 2022*, 16 LANCET REG'L HEALTH – AM. ONLINE, Dec. 2022, at 1, 10; Julie VanDusky-Allen & Olga Shvetsova, *How America's Partisan Divide over Pandemic Responses Played Out*

demonstrating widening gaps in health outcomes associated with political environment, with counties that elect Republican candidates tending to experience worse outcomes, including higher mortality rates and fewer gains in life expectancy.¹⁰⁵

Yet amidst these troubling events, some encouraging developments point to promising strategies for preserving and strengthening public health authority for the future. Researchers at the Network for Public Health Law have been tracking innovative and protective public health policy efforts that stand in defiance of these harmful trends, showing how policymakers might improve the way public health activities promote not just community health, but the sharing of ideas and power that result in stronger solutions and more lasting change. Their recent report highlights a range of laws and policies that emerged in contraposition to legislative attacks on public health authority during the pandemic, including laws and policies aimed at improving public health funding, modernizing public health data and laboratories, strengthening public health governance, and reorienting public health to advance equity.¹⁰⁶ Many people, organizations, and public bodies have rallied to convene public health practitioners at the local¹⁰⁷ and state¹⁰⁸ levels,¹⁰⁹ along with advocates,¹¹⁰ lawyers,¹¹¹ and staff in related sectors (such as health care, education, civil rights, and environmental justice, to name a few). Public health is increasingly understood as an undercurrent that touches every aspect of our work and lives, and therefore is an essential part of

in the States, THE CONVERSATION (May 21, 2021), <https://theconversation.com/how-americas-partisan-divide-over-pandemic-responses-played-out-in-the-states-157565>; Xue Zhang et al., *Factors limiting US public health emergency authority during COVID-19*, 38 INT. J. HEALTH PLAN. MGMT., 1569, 1571 (2023).

105. Haider J. Warraich et al., Special Paper, *Political Environment and Mortality Rates in the United States, 2001-19: Population Based Cross Sectional Analysis*, 377 BMJ 1, 6 (May 17, 2022).

106. See NETWORK FOR PUB. HEALTH L., INNOVATIVE LAWS AND POLICIES FOR A POST-PANDEMIC PUBLIC HEALTH SYSTEM 7, 12, 14, 17 (Jun. 2023), <https://www.networkforphl.org/wp-content/uploads/2023/06/Innovative-Laws-and-Policies-for-a-Post-Pandemic-Public-Health-System.pdf>.

107. *Public Health Law and Policy*, NAT'L ASS'N CNTY. CITY HEALTH OFF., <https://www.naccho.org/programs/public-health-infrastructure/law> (last visited Aug. 18, 2023).

108. *Strengthening Public Health Agencies for Safe and Healthy Communities*, ASS'N STATE TERRITORIAL HEALTH OFF. (Dec. 12, 2022), <https://www.astho.org/advocacy/state-health-policy/legislative-prospectus-series/public-health-infrastructure/>.

109. *State and Regional Affiliates*, AM. PUB. HEALTH ASS'N, <https://www.apha.org/APHA-Communities/Affiliates> (last visited Mar. 22, 2024).

110. Martha Katz et al., *Fighting for Public Health: Findings, Opportunities, and Next Steps from a Feasibility Study to Strengthen Public Health Advocacy*, NETWORK FOR PUB. HEALTH L. 1, 1 (2022), <https://www.networkforphl.org/wp-content/uploads/2022/11/Fighting-for-Public-Health.pdf>; *Advocacy for Public Health*, AM. PUB. HEALTH ASS'N, <https://www.apha.org/Policies-and-Advocacy/Advocacy-for-Public-Health> (last visited Aug. 18, 2023).

111. *About Us*, ACT FOR PUB. HEALTH, <https://actforpublichealth.org/about-us/> (last visited Aug. 18, 2023).

any conversation about improving the health and well-being of everyone in our communities.

As public health has become increasingly politicized, public health voices must counter harmful, misleading narratives with affirmative messages about the value of public health and government regulation to serve and protect all people. Various communications researchers and experts have turned their attention to the current attacks on public health authority and have recommended responses to support public health practitioners to communicate more effectively about the essential work they do.¹¹² Highlighted strategies include reframing harmful narratives that public health is antithetical to individual liberties with “landscape framing,” which emphasizes the full picture of systems and conditions by which public health supports our collective well-being and freedom.¹¹³ This work is complementary to larger efforts to shift the conversation around government powers and reframe regulation as indispensable to freedom. This reframing is especially important when access to information, opportunities, and other resources are unfairly distributed, thereby further entrenching those who already hold knowledge, power, and wealth.¹¹⁴

Finally, the development of powerful new health justice frameworks is underway. For example, the civil rights of health framework advanced by Harris and Pamukcu describes how public health advocates, civil rights lawyers, and social justice leaders can work together to educate policymakers and the public about the health effects of structural inequities, create new legal tools for challenging subordination, and ultimately reduce or eliminate unjust health disparities.¹¹⁵ ChangeLab Solutions’ five fundamental drivers of health inequity provides a framework for maximizing the impact of policy interventions in advancing health and equity.¹¹⁶ The equity-first preemption framework proposed by Carr et al. provides a foundation for a research agenda that can

112. SHADDAI MARTINEZ CUESTAS ET AL., CHAMPIONING PUBLIC HEALTH AMONG LEGAL AND LEGISLATIVE THREATS: FRAMING AND LANGUAGE RECOMMENDATIONS 1, 3 (Berkeley Media Studies Group 2022), https://www.bmsg.org/wp-content/uploads/2022/09/bmsg_act_for_public_health.pdf; *About Us*, PUBLIC HEALTH RESEARCHING ACROSS SECTORS, <https://www.phrases.org/> (last visited Aug. 18, 2023); *Becoming Better Messengers*, NETWORK FOR PUB. HEALTH L., <https://www.networkforphl.org/resources/topics/trainings/becoming-better-messengers/> (last visited Aug. 18, 2023).

113. CUESTAS ET AL., *supra* note 112, at 5.

114. See Daniel Carpenter, *Changing the Conversation About Regulation*, WASH. MONTHLY, (Mar. 13, 2016), <https://washingtonmonthly.com/2016/03/13/changing-the-conversation-about-regulation/>; *Senator Warren Delivers Speech on Dangers of Deregulation*, WARREN SENATE (June 5, 2018), <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-delivers-speech-on-dangers-of-deregulation>.

115. See Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758 (2020).

116. CHANGELAB SOLS., *supra* note 4, at 9. For a similar framework, see Nana-Sinkam et al., *supra* note 6, at 2.

guide the use of preemption to help ensure that local governments remain places of innovation while allowing restrictions on local actions likely to create or perpetuate inequities.¹¹⁷

V. CONCLUSION

For legal scholars, the call to action is to continue applying and disseminating legal strategies that embed principles of public health and health equity. The ways we interpret, craft, implement, teach, and evaluate laws and policies can help improve the practice of public health. We may be united in our experiences of the politicization of these conversations, but the nuance and diversity of these issues and their repercussions are unfathomable. That is why we are working to collect examples and create models that support our shared goals and policy successes across jurisdictions. We are coordinating with national partners to facilitate connections across the states and localities responding to these harmful preemption efforts. We are committed to exploring questions like:

- How can we create change at a high level without limiting local adaptation?
- How can we protect public health activities from being co-opted by actors with purely political motivations?
- How can we get data, legal skills, and other workforce supports to identify and spread those strategies proven to improve lives and save money?

While the changes to public health authority during the COVID-19 pandemic were problematic, as they lacked grounding in evidence and were motivated by the broader, long-running anti-regulatory agenda, it is important to recognize that the public health system that was in place before COVID-19 was not perfect. The five fundamental drivers of health inequities were reflected in—and at times exacerbated by—existing systems and structures. But gutting the system in a rushed, reactionary way only made things worse. Fortunately, we have an opportunity to begin to answer some of the questions posed in the preceding paragraph and move towards a system that addresses power differentials and marginalization head on, that prioritizes addressing both the social determinants of health and the fundamental drivers of health inequity as critical elements of public health, and that centers the needs and desires of the communities being served.

117. Carr et al., *supra* note 56, at 133.

