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ARTICLE

The Rise, Fall, and Resurrection of Public Health Law

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Abstract

This essay reflects upon the last thirty-five years of public health law. Part One begins by discussing the growth and maturation of the field of public health law since the 1980s. Part Two examines current challenges facing public health law, focusing on those posed by the conservative legal movement and a judiciary that is increasingly skeptical of efforts to use law to improve health and mitigate health inequities. Part Three discusses potential responses to the increasingly perilous judicial climate, including thoughts that emerged from a convening held on the subject by the Act for Public Health Partnership in May 2024.

Keywords: public health; public health law; the judiciary; conservative legal movement; public health law scholarship

In the inaugural issue of the *American Journal of Law and Medicine* ("AJLM"), whose fifty years we celebrate, John Morris described the publication as the "nation's first interdisciplinary periodical devoted exclusively to continuing medicolegal education."[1] The Journal's editors, he added, hoped it would become a "valued forum for constructive dialogue and source of information and understanding" about such difficult issues as "national health insurance, certificate of need, hospital labor relations, peer review, compulsory rate-setting, and alternatives to medical malpractice litigation."[2]

Notably absent from Norris' list are issues that we would today assign to public health law, including infectious disease control, the social determinants (or drivers) of health, health equity, tobacco control, unhealthy diets, firearm injuries, and climate change, to name just a few. Their omission from *AJLM's* founding mission is not surprising. *AJLM* was born during a time of optimism about the wonders of modern medicine, and the dawning recognition that the increasingly complex health care system raised a host of legal and ethical issues that demanded incisive legal analysis. In short, in 1975, health law appeared to overshadow public health law.

That eclipse did not last long. Six years after *AJLM* commenced publishing, the Centers for Disease Control and Prevention ("CDC") reported on the appearance of a mysterious condition that turned out to be AIDS.[3] The AIDS epidemic reminded the health law community of the centrality of infectious diseases and public health to human health, spurring a renaissance in public health law. By 1986, *AJLM* published a symposium entitled "*Public Health & the Law*," in which Lawrence O. Gostin argued that "the protection and preservation of the public health is among the most important government goals."[4]

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[1]John A. Norris, *Foreword*, 1 Am. J.L. & Med. vii (1975).

[2]*Id.*

[3]Center for Disease Control and Prevention, *First Report of AIDS*, 60 Morbidity & Mortality Weekly Rpt. 429 (2001).

[4]Lawrence O. Gostin, *The Future of Public Health*, 12 Am. J.L. & Med. 461, 461 (1986).

Almost forty years later, public health law continues to grow and evolve as a field. In the academy, it is more visible, vibrant, and diverse than ever. As a field of practice, it has grown and matured. But it also faces fearsome perils from an increasingly hostile judicial and political climate.[5]

Below, I chart public health law's trajectory over the past forty years, tracing its maturation and current challenges. I also offer some tentative suggestions for a path forward. In so doing, I attempt neither a comprehensive history nor complete analysis of public health law's past, present, or future. Rather, I offer some perspectives drawn from my own thirty-five plus years in the field.

The essay proceeds as follows: Part One reviews the revival and maturation of public health law since the 1980s; Part Two examines current challenges; Part Three discusses efforts to develop a strategy to protect public health in the courts and outlines my own thoughts about what should be included in that strategy; I then end with a very personal conclusion.

Part One: The Rebirth and Maturation of Public Health Law

For as long as there have been laws, there have been public health laws. As I have recounted elsewhere, laws aiming to protect communities from health threats date back to Biblical times.[6] Such laws were also surprisingly common during the colonial period and in the decades following the ratification of the United States Constitution.[7] In addition, although public health law as a *field* did not exist in the modern sense of the term,[8] nineteenth and early twentieth century treatise writers, such as James A. Tobey[9] and Leroy Parker and Robert H. Worthington[10], treated public health law as a distinct body of law. Courts likewise treated the preservation of public health as legally relevant to, if not dispositive of, a wide array of legal issues.[11]

Although statutes and regulations relating to public health continued to be enacted during the middle of the twentieth century, public health law's salience diminished[12] as medicine became more efficacious, the health care system more complex, and the field of public health suffered a decline.[13] Then, starting in the 1980s, public health law experienced a rebirth. Before describing that rebirth and the maturation that followed, it may be helpful to discuss why I consider public health law to be a field.

Public Health Law as A Field

Early in this century, health law scholars engaged in a vigorous debate about whether health law constituted a field.[14] Without revisiting that debate, I want to suggest that public health

[5]*See infra* text accompanying notes 62-112.

[6]Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 Hastings Constitutional L. Quarterly 267, 286-302 (1993).

[7]*See generally* William J. Novak, The People's Welfare: Law and Regulation in Nineteenth Century America (1996); *see also* Wendy E. Parmet, Constitutional Contagion: COVID, the Courts and Public Health 30-31 (2023).

[8]*See infra* text accompanying notes 14-26.

[9]James A. Tobey, Public Health Law: A Manual of Law for Sanitarians (1926).

[10]Leroy Parker and Robert H. Worthington, The Law of Public Health and Safety and the Powers and Duties of Boards of Health (1892).

[11]Parmet, *supra* note 7, at 34.

[12]*But see, e.g.*, Frank Grad, Public Health Law Manual: A Handbook on the Legal Aspect of Public Health Administration and Enforcement (1965).

[13]Ed Yong, *How Public Health Took Part in Its Own Downfall*, The Atlantic (Oct. 23, 2021), https://www.theatlantic.com/health/archive/2021/10/how-public-health-took-part-its-own-downfall/620457/.

[14]*E.g.*, Theodore Ruger, *Health Law's Coherence Anxiety*, 96 Geo. L.J. 625 (2008); Wendy K. Mariner, *Toward an Architecture of Health Law*, 35 Am. J.L. & Med. 67 (2009); Einer R. Elhauge, *Can Health Law Become A Coherent Field Of Law?* 41 Wake Forest L. Rev. 365 (2006).

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law qualifies as a field, one that is related to, but distinct from, health law in three different ways.[15]

First, as Micah Berman explains, the *field* of public health law is marked by subject matter and methodological commonalities.[16] Although its boundaries are contested[17] — is it limited to infectious disease laws, laws that aim to protect population health, or all laws that may affect health? — academics and practitioners within the field generally accept that it focuses on the *health of populations*[18] rather than the health of individuals.[19] This distinguishes public health law "from much of contemporary legal discourse, which generally emphasizes the rights and interactions of individuals."[20] It also offers a methodological approach — an empirically-grounded population perspective —that is quite distinct from that employed in most other legal fields.[21]

Second, those within the field tend to share certain values that guide their work. Public health lawyers, as Scott Burris explains, "believe it is a fundamental purpose of government to create the conditions in which people can be healthy."[22] They also generally accept that the "promotion of public health [is] an important norm."[23] Indeed, Lawrence O. Gostin and Lindsay F. Wiley insert those values in their very definition of "public health law," writing "[t]he prime objective of public health law is to pursue the highest level of physical and mental health in the population, consistent with the values of social justice."[24]

Finally, public health law is a field because those who study, write about, advocate for, and practice it see it as such. There are communities of scholars and practitioners who identify themselves as public health lawyers and see others who work on similar issues as belonging to their professional community. Burris provides an apt encapsulation of what it means to be a public health lawyer: "lawyers who identify themselves with this field are doing research, developing interventions, providing technical assistance, organizing and acting politically, and writing briefs, and articles, and books."[25] Although working in diverse settings, these lawyers and the non-J.D. public health practitioners who work with law, constitute a transdisciplinary community of practitioners and scholars.[26] Public health law is a field because those whose work focuses on it view it as such.

Public Health Practitioners

Just as there have always been public health laws, there have always been public health practitioners. These include lawyers who work for local, state, Tribal, or federal public health agencies, as well as

[15]The frequent presence of public health law topics in health law journals, including the *American Journal of Public Health*, and at health law conferences attests to the relationship between public health law and health law. From my own experience, almost all public health law scholars also publish and teach in other areas of health law.

[16]Micah Berman, *Defining the Field of Public Health Law*, 15 DePaul J. Health Care L. 45, 52 (2013). In analyzing whether health law is a field, Berman draws upon Aagaard's discussion of whether environmental law is a field. *See* Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 Cornell L. Rev. 221 (2010).

[17]Wendy E. Parmet, *From Deference to Indifference: Judicial Review of the Scope of Public Health Authority During the COVID-19 Pandemic*, 17 St. L.J. Health L. & Pol'y 11-12 (2024).

[18]*See, e.g.*, Lawrence O. Gostin & Lindsay F. Wiley, Public Health Law: Power, Duty, Restraint (3d ed. 2016); Berman, *supra* note 16, at 80.

[19]Berman, *supra* note 16, at 76.

[20]Wendy E. Parmet, Populations, Public Health, and the Law 14 (2009).

[21]*Id.* at 53-59.

[22]Scott Burris, *What is A Public Health Lawyer Today? Acting for, Against, and Beyond Public Health*, 17 St. Louis. U. J. Health L. & Pol'y 113, 125 (2024).

[23]Parmet, *supra* note 20, at 56.

[24]Gostin & Wiley, *supra* note 18, at 4.

[25]Burris, *supra* note 22, at 115.

[26]Burris and colleagues advocate what they call a "transdisciplinary model" for public health law, in which lawyers "embrace and become competent in the language, concepts, and frameworks of public health science and tune their work to its scientific value," and public health practitioners "accept law as a mode of behavioral and environmental influence that can be scientifically theorized, measured, and manipulated like any other." Scott Burris et al., *A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology*, 37 Ann. Rev. Pub. Health 135, 140-41 (2016).

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lawyers in the offices of attorneys general or municipal counsel who are tasked with providing legal services to health agencies. More broadly, public health practitioners also include lawyers who work for advocacy groups that focus on public health issues, such as tobacco control, or for organizations, some of which are discussed below, that offer technical assistance to other public health practitioners.[27]

The process of turning this diverse group of practitioners into a field has been nurtured by the CDC's Public Health Law Program ("PHLP"), founded in 2000,[28] which seeks to "develop law-related tools and provide legal technical assistance to public health practitioners and policy makers in state, tribal, and territorial ("STLT") jurisdictions,"[29] and the Robert Wood Johnson Foundation ("RWJF"),[30] which has funded many organizations working on public health law, including the Network for Public Health Law ("Network"), which was established in 2010[31] to offer assistance to governmental and other public health lawyers.[32] Other organizations supporting public health practitioners include ChangeLab Solutions,[33] the Center for Public Health Law Research ("PHLR") at Temple University's Beasley School of Law,[34] and the Public Health Law Center at Mitchell Hamline Law School.[35] These organizations, alongside Public Health Law Watch ("PHLW"),[36] at my institution, form the Act for Public Health Partnership ("Partnership").[37]

Public health legal practice is also supported by numerous conferences, webinars, publicly available curricula,[38] and publications. The field also coheres around a shared understanding of the skills required and services rendered. Scott Burris and colleagues have identified these "five essential public health law services" as including: (1) "access to evidence and expertise," (2) "expertise in designing legal solutions," (3) "collaboration in engaging communities and building political will," (4) "support for enforcing and defending legal solutions," and (5) "monitoring policy surveillance and evaluation."[39]

In the Academy

Public health law has also grown as a field of academic study. According to the Association of Schools & Programs of Public Health, there are at least twenty-four JD/MPH programs.[40] In addition, as Burris notes, the publication of several texts and treatises, including three editions of Gostin's treatise (the last of which was co-authored with Lindsay Wiley),[41] reflect the field's increased presence and prominence in the academy.[42] So does the establishment of academic centers and institutes focused on public health law,

[27]*Id. at 141. See supra* text accompanying notes 28-35.

[28]Burris et al., *supra* note 26, at 139.

[29]Centers for Disease Control and Prevention, *About the Public Health Law Program* (May 15, 2024), https://www.cdc.gov/phlp/php/about/index.html [https://perma.cc/T3KM-8DP5].

[30]Robert Wood Johnson Found., https://www.rwjf.org/ (last visited Sept. 17, 2024).

[31]James G. Hodge, Jr., *Emergency Legal Preparedness and Response: A Decade of Unprecedented Challenges*, The Network for Public Health Law, (Mar. 30, 2021), https://www.networkforphl.org/news-insights/emergency-legal-preparedness-and-response-a-decade-of-unprecedented-challenges/.

[32]*What We Do*, The Network for Public Health Law, https://www.networkforphl.org/about-us/what-we-do/ (last visited July 25, 2024).

[33]ChangeLab Solutions, *Who We Are*, https://www.changelabsolutions.org/who-we-are (last visited July 25, 2024).

[34]Ctr. for Pub. Health L. Rsch., https://phlr.org/ (last visited Aug. 16, 2024).

[35]Public Health Law Center at Mitchell Hamline School of Law, https://www.publichealthlawcenter.org/ (last accessed July 25, 2024).

[36]Public Health Law Watch, https://www.publichealthlawwatch.org/ (last accessed July 25, 2024).

[37]Act for Public Health, *Support and Resources for Strengthening Public Health Protections*, https://actforpublichealth.org/ (last accessed July 25, 2024).

[38]*See* Alexis Etow & Rebecca Johnson, *Opportunities in Public Health Law: Supporting Current and Future Practitioners*, 52 J. L. Med. & Ethics 35 (2023).

[39]Scott Burris et al., *Better Health Faster: The 5 Essential Public Health Law Services*, 131 Pub. Health Rpts. 747, https://journals.sagepub.com/doi/10.1177/0033354916667496.

[40]*Academic Program Finder*, Ass'n of Schs. & Programs of Pub. Health, https://programfinder.aspph.org/ (last visited Sept. 17, 2024).

[41]Gostin & Wiley, *supra* note 18.

[42]*See* Burris, *supra* note 22, at 120 n.30.

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including at Georgetown Law Center, Temple University's Beasley School of Law, and Mitchell-Hamline Law School.[43]

The proliferation of public health law scholarship has been impressive.[44] As a rough indication, Figure 1 shows the number of law review articles containing the term "public health law" started growing around 1985 as law reviews featured articles about the AIDS epidemic.[45] Growth continued in the 1990s, as the "success of lawsuits against the tobacco industry"[46] prompted scholarship on litigation's potential to serve as a public health tool.[47] Later, concerns about bioterrorism, SARS, and a possible avian flu pandemic prompted new waves of scholarship.[48] Not surprisingly, the COVID-19 pandemic led to yet more scholarship employing the term "public health law."[49] Of course, some papers relating to public health law may not use that term, suggesting that the body of literature on public health law is likely far higher than is apparent in Figure 1.

As public health law scholarship has flourished, the field has coalesced. In 2012, a meeting of public health law academics and practitioners sponsored by PHLR and hosted by my colleague Leo Beletsky and I at Northeastern University School of Law, led to the formation of the George Consortium, a loose network of scholars and practitioners dedicated to advancing public health law's place in the academy as well as the law's capacity to secure public health.[50] Since then, the consortium has met numerous times, promoted public health law scholarship, and through its PHLW project, leveraged the expertise of public health law scholars in support of public health law practice.[51]

Public health law's visibility has also increased within health law. Burris writes, "academics who attend the annual American Society of Law, Medicine and Ethics ("ASLME") Health Law Teacher's meetings will likely agree that public health law has become a much bigger part of the work presented."[52] The same point could be made about many other academic meetings.

As it has matured, public health law scholarship has become more interesting, interdisciplinary, and diverse. Space precludes a discussion of all the notable contributions that have appeared over the past four decades,[53] but two developments deserve special mention. The first is the exposition of legal epidemiology, which the CDC defines as "the study of law as a factor in the cause, distribution, and prevention of disease and injury. It applies rigorous, scientific methods to translate complex legal language into data that can be used to evaluate how laws affect health."[54] Whereas public health law scholarship was once largely doctrinal, legal epidemiology's influence is now commonplace in law reviews and scientific journals.[55] Hence, claims about the health impact of legal interventions, as well as their prevalence, are now more likely to be supported by sophisticated empirical evidence than was the case decades ago.

[43]Berman, *supra* note 16, at 90.

[44]For a list of scholarly papers published in one journal alone, *see* James G. Hodge Jr., *Reminiscences of Public Health Law and JLME*, 50 J.L. Med. & Ethics 190, 191-92 (2022).

[45]Berman, *supra* note 16, at 46-47.

[46]*Id.*

[47]Wendy E. Parmet & Richard A. Daynard, *The New Public Health Litigation*, 21 Ann. Rev. Pub. Health 437, 441-43 (2000).

[48]Berman, *supra* note 16, at 46.

[49]*See* Figure 1.

[50]*About the George Consortium*, Pub. Health L. Watch, https://www.publichealthlawwatch.org/about-gc (last visited August 3, 2024).

[51]Pub. Health L. Watch, https://www.publichealthlawwatch.org/ (last visited August 3, 2024).

[52]Burris, *supra* note 22, at 120.

[53]Apologies to all of the great scholars whose works I have not mentioned.

[54]Cardiovascular Disease Data, Tools, and Evaluation Resources: Legal Epidemiology, https://www.cdc.gov/cardiovascular-resources/php/toolkit/legal-epidemiology.html. (*See also* Legal Epidemiology: Theory and Methods (Alexander C. Wagenaar et al eds., 2d ed. 2023).

[55]As associate editor for law and ethics for the *American Journal of Public Health*, I can attest that the vast majority of submissions to the journal relating to law either embrace legal epidemiology explicitly or shows its footprints implicitly.

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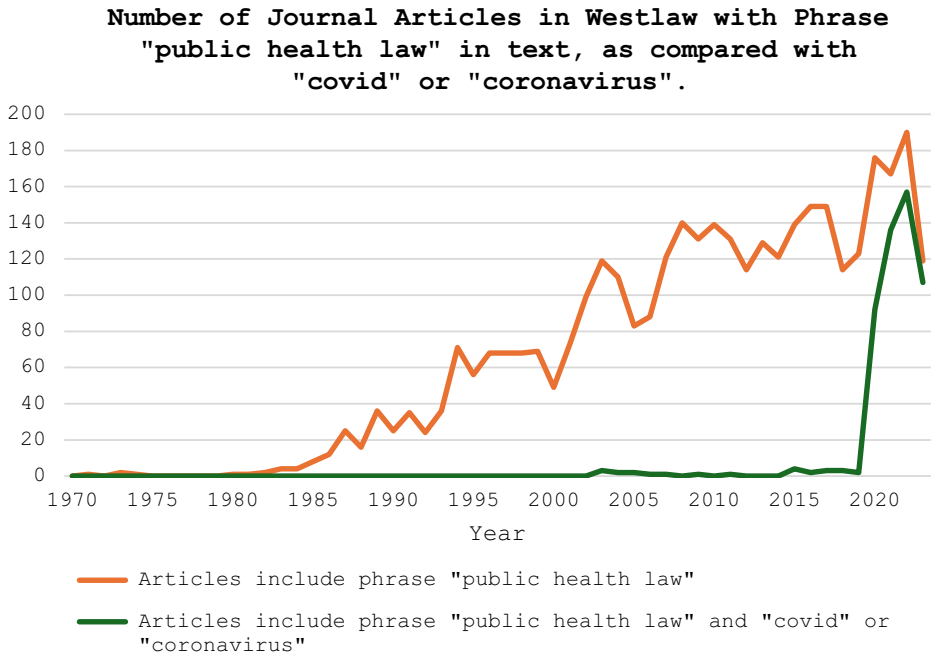

Figure 1.

Second, is the diversification of public health law scholarship. By this, I do not simply mean to suggest that the field has diversified demographically, though thankfully it has.[56] I also mean to include the diversification of topics and perspectives that have followed the field's migration from its roots in communicable disease law to an embrace of the study of social determinants of health.[57] It also includes the inclusion of different perspectives, including feminist[58] and critical race theories[59] that have helped to move equity to the forefront of public health law scholarship and conversations.[60]

Part Two: The Perils Facing Public Health

Even as the *field* of public health law has prospered, the law's capacity to protect population health and health equity has faltered. This has dire implications for the public's well-being, as many of the most important advances in public health have resulted from legal interventions such as tobacco control laws, motor vehicle safety laws, and occupational health laws.[61] More recently, law also played an important

[56] *But see infra* text accompanying note 120-22.

[57] Burris notes this move, while criticizing the field for talking about it more than acting upon it. *See* Burris, *supra* note 22, at 135.

[58] Feminist Judgements: Health Law Rewritten (Seema Mohapatra & Lindsay F. Wiley eds., 2022).

[59] Ruqaiijah Yearby, *Structural Racism and Health Disparities: Reconfiguring the Social Determinants of Health Framework to Include the Root Cause*, 48 J.L. Med. & Ethics 518, 521 (2020).

[60] *E.g.*, Brian A. Smith et al., *Public Health Law in the 21st Century: Evolution, Emerging Issues, and Equity*, 65 How. L.J. 353, 374-83 (2022).

[61] Centers for Disease Control and Prevention, *Ten Great Public Health Achievements — United States, 2001–2010*, 60 Morbidity & Mortality Weekly Rpt. 619-623 (May 20, 2011), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6019a5.htm [https://perma.cc/N54S-CTZY].

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role in mitigating the COVID-19 pandemic.[62] If government loses its capacity to implement health-improving measures, the public's health will suffer.

Less critically, but still worth noting, threats to the government's capacity to protect health are likely to reverberate to the field of public health law. If law can no longer protect public health, the academy may lose interest in training students for a no-longer vibrant field of practice. And while scholarship will continue, it may become increasingly disconnected from positive law, raising concerns about its relevance. In short, the fate of the field of public health law is inextricably tied to the fate of public health laws.

The Conservative Legal Movement's Attack on Public Health Laws

Public health law's shared tenet — that law should be used to promote population health — often appears to clash with individualistic and libertarian perspectives that are deeply-seated in American popular and legal cultures.[63] More prosaically, efforts to protect health through law often impose costs on powerful industries, such as the tobacco, fast food, or fossil fuel industries.[64] They have the incentive and means to reframe public health laws as paternalistic impositions of the "nanny state"[65] and support a conservative legal movement ("CLM"), led by the Federalist Society, that over the past forty years has succeeded in advancing a series of jurisprudential and doctrinal shifts[66] that weaken government's capacity to protect health.

This retrenchment of public health powers is especially evident in state houses. Even before COVID-19, public health law scholars called attention to the often-successful efforts by industry-supported groups, including the American Legislative Exchange Council ("ALEC"), to convince state legislatures to preempt local public health initiatives.[67] Since the pandemic, at least twenty-five states have enacted legislation curbing public health legal powers.[68] These laws range from limits on the scope and/or duration of emergency laws (which states relied on during the pandemic) to restrictions on vaccine or mask mandates.[69]

[62] *E.g.*, Christopher J. Ruhm, *US State Restrictions and Excess COVID-19 Pandemic Deaths*, 5 JAMA HEALTH FORUM e242006 (2024) Beyond the stay-at-home orders and mandates, law played an important role in developing and disseminating vaccines and medical countermeasures, blunting the pandemic's economic consequences, and supporting the health care system. Indeed, it is hard to point to any pandemic interventions that did not, to some extent, rely on law. *See* COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE (Scott Burris et al., eds. 2021).

[63] *See, e.g.*, Neil Fulton, *COVID, Constitution, Individualism, and Death*, 27 WIDENER L. REV. 123, 133, 139-48 (2021); David A. Super, *Community, Society, and Individualism in Constitutional Law*, 111 GEO. L.J. 761, 761 (2023).

[64] As far back as 1971, Lewis F. Powell, before he was appointed to the Supreme Court, argued that business interests were under attack and should organize to assert their influence in the courts. *See* Lewis F. Powell, *The Memo, Powell Memorandum Attack on American Free Enterprise*, Lewis F. Powell Papers, Aug. 23, 1971.

[65] Lindsay F. Wiley, Wendy E. Parmet & Peter Jacobson, *Adventures in Nannydom: Reclaiming Collective Action for the Public's Health*, 43 J.L. MED. & ETHICS 73, 73 (Supp. Spring 2015).

[66] *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2014). *See also* David Daley, *The OTHER Memo That Started the Conservative Legal Movement*, THE ATLANTIC (July 30, 2024), *https://www.theatlantic.com/ideas/archive/2024/07/michael-j-horowitz-report-1980/679236/*. *See also* 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. L. U. J. HEALTH L. & POL'Y 35, 38-39 (2024).

[67] Adler, Bartel & Wong, *supra* note 66, at 40-48; *See also* Jennifer L. Pomeranz et al., *State Preemption: Threat to Democracy, Essential Regulation, and Public Health*, 109 AM. J. PUB. HEALTH, 251-52 (2019).

[68] Sabrina Adler et al., *The (Un?)intended Consequences Of COVID-19-Era Judicial Decisions And New Public Health-Related Laws*, HEALTH AFFS., (May 23, 2024) https://www.healthaffairs.org/content/forefront/un-intended-consequences-covid-19-era-judicial-decisions-and-new-public-health-related.

[69] Darlene Huang Briggs, Elizabeth Platt & Leslie Zellers, *Recent State Legislative Attempts to Restructure Public Health Authority: The Good, The Bad, and The Way Forward*, 52 J.L. MED. & ETHICS 43 (2023); Robert Gatter, *The Model Public-Health Emergency Authority Act*, 17 ST. L. UNIV. J. HEALTH L. & POL'Y 55, 61-62 (2024).

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Although courts rejected most challenges to public health laws during the pandemic,[70] the tide shifted across a range of doctrines.[71] One striking example is the Supreme Court's treatment of its 1905 decision in *Jacobson v. Massachusetts*,[72] long seen as "the most important judicial decision in public health."[73] While the Court's "Delphic" opinion upholding a smallpox vaccine mandate is open to multiple interpretations,[74] *Jacobson* has generally been read as affirming public health's importance to the social compact and reminding courts to give at least some deference to state public health measures, even while charting a path for protecting individual rights.[75] That was the approach that courts generally took in early 2020, as they looked to *Jacobson* in rejecting challenges to COVID-19-related orders.[76]

But in July 2020, in a dissent to a decision rejecting an emergency petition to block a Nevada order restricting worship, Justice Alito dismissed the state's reliance on *Jacobson*, arguing that because it involved a substantive due process claim, it was irrelevant to a Free Exercise claim.[77] In so doing, Alito ignored the many times that the Court had applied *Jacobson* to Free Exercises cases.[78] Nevertheless, a few months later, after Justice Amy Coney Barrett was elevated to the Supreme Court, the newly constituted conservative majority seemed to accept Alito's view, enjoining a New York law limiting the number of people who could attend in-person worship in COVID hot zones on Free Exercise grounds without citing *Jacobson*.[79] Since then, the majority has neither discussed nor cited *Jacobson*.

The sidelining of *Jacobson* signaled a shift in the Court's Free Exercise jurisprudence that may require states to offer religious exemptions to public health laws as long as they impose less stringent requirements on *any* secular activity that a court (rather than health officials) deems comparable.[80] The Court has also held that laws that grant state officials discretion to offer exemptions are subject to strict scrutiny when challenged under the Free Exercise clause.[81] As a result, the long-settled question of whether vaccine mandates must include religious exemptions has been upended,[82] with lower courts disagreeing about the constitutionality of the denial of religious exemptions.[83] Concomitantly, the Supreme Court's 2023 decision in *Groff v. DeJoy*[84] altered the standard for determining when a religious

[70]Wendy E. Parmet & Faith Khalik, *Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications*, 113 Am. J. Pub. Health 280 (2023).

[71]The discussion that follows focuses on relatively recent cases that go to the core of public health powers. Other recent doctrinal shifts, including the overturning of *Roe v. Wade*, Dobbs v. Jackson Women's Health Ctr., 597 U.S. 215 (2022), and the Court's embrace of the Second Amendment, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), also raise significant risks for public health. For a broader discussion of how constitutional law affects health, *see* Parmet, *supra* note 7, at 27-49.

[72]197 U.S. 11 (1905).

[73]Gostin & Wiley, *supra* note 18, at 121.

[74]Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. Rev. Online 117, 119 (2020).

[75]*Id.* at 128. *See also* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613-14 (2020)(Roberts, C.J. concurring); Gostin & Wiley, *supra* note 18, at 122-26.

[76]Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic*, 57 S. Diego L. Rev. 999 (2020).

[77]Calvary Christian Dayton Valley v. Sisolak, 140 S. Ct. 2603 (Alito, J., dissenting).

[78]Wendy E. Parmet, *From the Shadows: The Public Health Implications of the Supreme Court's COVID-Free Exercise Cases*, 49 J.L. Med. & Ethics 564, 566 (2021).

[79]Roman Cath. Dioc. v. Cuomo, 141 S. Ct. 63 (2020). Concurring, Justice Gorsuch wrote that *Jacobson* was a "modest" decision that had erroneously been treated as a "towering authority." *Id.* at 71 (Gorsuch, J., concurring).

[80]Tandon v. Newsom, 593 U.S. 61 (2021) (per curiam); Michelle M. Mello, David H. Jiang & Wendy E. Parmet, *Judicial Decisions Constraining Public Health Powers*, 43 Health Affs. 759, 765 (2024).

[81]Fulton v. Philadelphia, 593 U.S. 522 (2021).

[82]Mello, Jiang & Parmet, *supra* note 80, at 765.

[83]*Compare* We the Patriots v. Conn. Off. Early Childhood Dev., 76 F. 4 th 130 (2nd Cir. 2023) with Bosarge v. Edney, 669 F. Supp. 598 (S.D. Miss. 2023). *See* also Spivak v. City of Philadelphia, No. 23-1212 (3d Cir. July 29, 2023) (denying summary judgement in constitutional challenge to denial of religious exemption, but also holding that the existence of a medical exemption does not undermine a mandate's "general applicability").

[84]Groff v. DeJoy, 600 U.S. 447 (2023).

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accommodation could be denied as an "undue hardship" under Title VII, making it easier for employees to demand exemptions from employer-imposed vaccine mandates.[85]

Doctrinal shifts have not been confined to religious liberty cases. In the last thirty years, the Court has granted ever-more rigorous protections to commercial speech.[86] Indeed, while the Court has not overruled the landmark *Central Hudson* case, which required a type of intermediate scrutiny for laws regulating commercial speech,[87] it has suggested that all laws that regulate speech based on its content must be subject to strict scrutiny.[88] The Court has also narrowed the reach of its 1985 decision in *Zauderer v. Office of Disciplinary Counsel*, which applied rational basis review to a range of laws compelling disclosures or warning labels on commercial speech.[89] Such decisions have undermined government's ability to require warning labels on health-harming products, including tobacco products and sugary beverages.[90]

Another doctrinal change relates to affirmative action.[91] As noted above, in recent years public health law has come to view equity as a central part of its mission.[92] This goal is threatened by the Supreme Court's 2023 decision in *Students for Fair Admission v. Harvard*, holding that race-conscious admissions in higher education violates the Fourteenth Amendment.[93] Although the decision can be narrowly read as concerning admissions in higher education, conservative groups are relying on it to challenge race-based efforts to increase diversity and improve equity in health care[94] and public health.[95] In a related, but doctrinally distinct development, a federal district court in Louisiana recently enjoined the Environmental Protection Agency and Department of Justice from enforcing Title VI disparate impact regulations in an environmental justice lawsuit aimed at reducing pollution that endangered Black communities in Louisiana's "cancer alley."[96]

Changes in administrative law are especially perilous to public health measures. Chief among them is a series of cases "canonizing" the major questions doctrine,[97] which holds that administrative agencies cannot "exercise powers of 'vast economic and political significance,'" without explicit authorization

[85] *E.g.*, McDonald v. Oregon Health & Sci. Univ., 689 F. Supp. 3d 906 (D. Or. 2023); *but see* Chavez v. San Francisco Bay Area Rapid Transit Dt., 2024 WL 334741 (N.D. Cal. 2024).

[86] *E.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

[87] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[88] *Sorrell*, 564 U.S. at 572.

[89] Zauderer v. Off. Disciplinary Couns., 471 U.S. 626 (1985). The key case narrowing but not overruling *Zauderer* is Nat'l. Inst. Fam. & Life Advoc. v. Becerra, 585 U.S. 755 (2018).

[90] *E.g.*, Am. Bev. Ass'n v. City & Cty. San Francisco, 916 F.3d 749 (9 th Cir. 2019) (en banc); Cigar Ass'n Am. v. U.S. Food & Drug Admin., 317 F. Supp. 3d 555 (2024). *But see* R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 96 F.4th 863 (5th Cir. 2024) (applying rational basis review to challenge of FDA regulations requiring warning labels on cigarettes).

[91] As James G. Hodge Jr. and colleagues note, state "anti-equity" legislation also poses a threat to public health. *See* James G. Hodge et al., *Assessing Impacts of "Anti-Equity" Legislation on Health Care and Public Health Services*, 52 J.L. Med. & Ethics 172 (2024).

[92] *See supra* text accompanying notes 59-60; Alexis Etow & Rebecca Johnson, *Opportunities in Public Health Law: Supporting Current and Future Practitioners*, 52 J.L. Med. & Ethics 35 (2024).

[93] 600 U.S. at 181 (2023).

[94] Litigation, Do No Harm, https://donoharmmedicine.org/litigation/?location=all&case_status=all&topic=all (last visited Aug. 13, 2024).

[95] For example, the Pacific Legal Foundation sued New York City's Department of Health & Public Hygiene for instructing health-care providers in a note on how to prioritize the allocation of COVID-19 treatments that being non-White should be considered a risk-factor. Although the case was ultimately dismissed for lack of standing, Justice Alito penned a statement citing *Students for Fair Admission*, warning "in the event that any government again resorts to racial or ethnic classifications to rational medical treatment, there would be a very strong case for prompt review by this Court." *See* Roberts v. McDonald, 143 S. Ct. 2425 (2023) (statement of Alito J.).

[96] Louisiana v. EPA, No. 2:23-CV-00692, 2024 WL 3904868 (W.D. La. Aug. 22, 2024); Terry L. Jones, *Court Permanently Blocks Environmental Civil Rights Protections for Louisiana's Black Communities*, La. Illuminator (Aug. 24, 2024), https://lailluminator.com/2024/08/24/environment-civil-rights/[https://perma.cc/4SD7-KQA4].

[97] *See* Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174, 185 (2022).

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from Congress.[98] During the COVID-19 pandemic, the Supreme Court used this doctrine to strike the CDC's eviction moratorium[99] and an emergency temporary standard from the Occupational Safety and Health Administration requiring large employers to require vaccination or testing and masking.[100] Lower courts used the doctrine to strike the Biden Administration's vaccine mandate for the employees of federal contractors[101] and the CDC's mask mandate for airplanes and mass transit.[102] The Supreme Court's 2024 decision in *Loper Bright v. Raimondo*, overruling the forty year-old *Chevron* doctrine, which required courts to defer to agencies' plausible interpretations of their governing statutes, further erodes deference to administrative officials,[103] as do several other administrative law decisions rendered in 2024.[104]

I leave it to others to fully describe and analyze these decisions and others of their ilk. Here, I want to stress four points regarding their impact on public health law:

- The instability of the current moment — when long-settled precedents are being overturned or shoved to the sidelines with alarming frequency — makes it difficult for public health law practitioners to advise public health officials on how to craft statutes, regulations, and orders that can pass judicial muster. It also invites the sense that in some courts,[105] the game is stacked; almost any public health law, no matter how carefully drafted to comply with precedent may fall, if not on one novel claim, then on another. And there is always another. Hence, public health law expertise becomes less meaningful, as public health law experts have little to offer their clients other than to warn that litigation is likely and perilous.
- Across doctrines, courts have explicitly (as in *Loper Bright*) or implicitly (as in the Free Exercise cases) rejected the notion that public health or scientific expertise can be critical to understanding the "facts," and determining the appropriate application of broad and complex statutes to novel or technical questions.[106] In short, the courts appear to be aligning with the populist attack on science.[107]
- Courts appear increasingly indifferent about the health effects of their decisions.[108] To oversimplify, the Supreme Court and other conservative jurists now seem to reject public health law's normative and methodological tenets, while also weakening public health law's capacity to secure health.[109]

[98]Ala. Assoc. Realtors v. CDC, 141 S. Ct. 2489 (2021) (per curiam) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[99]*Id.*

[100]Nat'l Fed'n Indep. Bus. v. Dep't Lab., Occupational Safety and Health Admin., 595 U.S. 109, 112–13 (2022) (per curiam).

[101]Louisiana v. Biden, 55 F.4th 1017, 1029, 1031 (5th Cir. 2022); Georgia v. President of the United States, 46 F.4th 1283, 1294–95 (11th Cir. 2022). *See also* Kentucky v. Biden, 571 F. Supp. 3d 715, 719 (E.D. Ky. 2021), *aff'd sub nom.* Commonwealth v. Biden, 57 F.4th 545 (2023); Missouri v. Biden, 576 F. Supp. 3d 622, 632 (E.D. Mo. 2021).

[102]Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1175–76 (M.D. Fla. 2022), *vacated as moot sub nom.* Health Freedom Def. Fund v. President of U.S., 71 F.4th 888 (11th Cir. 2023).

[103]Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (overruling Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

[104]*See* Ohio v. Env't. Prot. Agency, 144 S. Ct. 2040 (EPA's regulation requiring states to consider downwind impact of pollution was arbitrary and capricious); Corner Post, Inc. v. Bd. of Govs., 144 S. Ct. 2440 (statute of limitations for facial challenges to regulations does not start to run until a party is initially subject to the regulation).

[105]Although the Court has overruled precedent throughout its history, it seems to be doing so more frequently and with more disdain for past rulings. *See* Austin Sarat, *The Supreme Court Has Never in Its History Had This Much Disdain for Precedent*, Slate (July 2, 2024), https://slate.com/news-and-politics/2024/07/supreme-court-john-roberts-alito-precedent-disdain-dobbs.html.

[106]Loper Bright, 144 S. Ct. at 2298-301 (Kagan, J., dissenting); Parmet, *From the Shadows, supra* note 78, at 572 (discussing the disregard of scientific evident in the Free Exercise cases).

[107]*The Supreme Court's Contempt for Facts Is a Betrayal of Justice*, Scientific Amer. (July 10, 2024), https://www.scientificamerican.com/article/the-supreme-courts-contempt-for-facts-is-a-betrayal-of-justice/.

[108]Parmet, *From Deference to Indifference*, *supra* note 17, at 25-27.

[109]*Id.*

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- Despite these trends, it is worth noting that during the pandemic, courts rejected most challenges to public health orders.[110] Moreover, public health fared better in state courts than in federal courts,[111] and state courts are not bound by the changes in federal administrative law wrought by the Supreme Court.[112] There is therefore reason to hope that state courts will continue to grant a degree of deference to state and local health initiatives. Nonetheless, the doctrinal changes of the past few years raise serious, if not existential, questions for public health law.

The Challenges from Within

The fields of public health and public health law have also played a role in their own endangerment. Among public health's errors, Ed Yong argues, was its self-identification "as a field of objective, outside observers of society instead of agents of social change," which left it "in a precarious position — still in medicine's shadow, but without the political base."[113] Relatedly, many within public health began to forgo the population perspective in favor of an individualistic lens that presented health threats as based on lifestyle choices.[114] Many health officials even discussed the pandemic in individualistic rather than communal terms.[115] By doing so, they inadvertently bolstered the libertarian critique of public health law.

Public health has faltered in other ways. Scott Burris notes, "[p]ublic health officials typically claim to make and defend policy as 'following the science' — by which they mean the epidemiology — and naively expect that a policy's roots in evidence or theory should compel compliance."[116] To Burris, this argues for the need for greater legal sophistication among public health officials, and more support for legal epidemiology.[117] It also suggests that public health practitioners have often been too quick to assume that the public will share their views about the tradeoffs between health and other goals. While the protection of health is a widely shared value, it is not the only good that people care about.

Public health also needs to confront its own long and ugly history of racism, xenophobia, and eugenics.[118] Despite the increasing diversity within the field, diversity remains lacking in leadership levels.[119] This creates hurdles for "community engagement and a more robust effort to address social determinants of health."[120] It can also impede efforts to connect with communities that do not share public health's views and values.[121]

Public health *law* shares some of these shortcomings. Despite significant strides, demographic and ideological diversity remain problematic in both public health practice and academic public health law.[122] The community of "public health lawyers" is, in my personal experience, disproportionately White and female. There is also a dearth of ideological diversity, as might be expected in a field that is defined by the sharing of certain normative principles — that population health is a good and that law

[110]Parmet & Khalik, *supra* note 70, at 280.
[111]*Id.* at 285-86.
[112]Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[113]Yong, *supra* note 13, at 4.
[114]Nicholas Freudenberg, *From Lifestyle of Social Determinants: New Directions for Community Health Promotion Research and Practice*, (2007), https://www.cdc.gov/pcd/issues/2007/jul/06_0194.htm [https://perma.cc/4KET-RLMT].
[115]Aziza Ahmed & Jason Jackson, *The Public/Private Distinction in Public Health: The Case of COVID-19*, 90 Fordham L. Rev. 2541, 2553 (2022).
[116]Burris, *supra* note 22, at 125.
[117]*Id.* at 123-24.
[118]Parmet, *supra* note 7, at 51-55.
[119]Burris, *supra* note 22, at 131-32.
[120]*Id.*
[121]For a critique of public health's ideological conformity, *see* Sandro Galea, Within Reason: A Liberal Public Health for an Illiberal Time (2023).
[122]Burris, *supra* note 22, at 131-132.

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ought to pursue it.[123] Thus, the shared values that help to make the field a field risks a type of insularity and conformity.

Further, although many scholars have stressed the importance of guardrails for public health powers, the benefits of judicial review, and the complementarity between human rights and population health,[124] there remains a tendency to overstate the utility of public health legal powers, viewing them as a type of "silver bullet" that can readily be used to "solve" public health threats.[125] This may lead officials to discount the complexity of implementation, underestimate litigation risks, and neglect building the type of evidence-based record that is most likely to withstand judicial review.[126] It may also dissuade officials from using less coercive mechanisms and doing the hard work needed to engage with communities and build public support.[127] Without this work, backlash and legal challenges can gain traction.

Part III: A Path Forward

Given the multitude of threats, how can public health law move forward? In a 2012 white paper reporting on the inaugural meeting of the George Consortium, Leo Beletsky, Scott Burris, and I discussed the barriers to public health law within the academy and the courts, and offered several broad recommendations.[128] These included the development of a "bold, uncompromising, and compelling narrative … to counter the 'personal responsibility' trope and shore up support for public health law and policy," continued research on law's impact on health, and bridging "disciplinary, disease-specific and other silos to formulate a 'united front' for community health improvement."[129] The report also identified several narrower, but important "support mechanisms," to help achieve those goals.[130] Among these were the development of a "rapid response approach to respond to doctrinal and polemical attacks on public health," "monitoring litigation trends and coordinated filing of amicus briefs," and finding "opportunities to collaborate with a number of stakeholders, including industry players."[131] The report also noted the importance of "long-term" strategies.[132]

In the twelve years since that report was written, numerous efforts — too many to mention — have been made to realize its recommendations.[133] Nevertheless, the threats to public health law from the CLM and a hostile judiciary have only increased.[134]

[123]Unquestionably, conservative scholars and practitioners write about and practice in areas relating to public health law. Indeed, they have led the assault on public health law in the courts. But although they work in public health law, most are unlikely to consider themselves members of the field, as described above. *See supra* text accompanying notes 16-26.

[124]*E.g.*, Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 Yale J. Health Pol'y, Law & Ethics 50, 60 (2020) (on the need for guardrails for public health measures); George J. Annas & Wendy K. Mariner, *(Public) Health and Human Rights in Practice*, 41 Health Affs. 129, 136 (2016) (arguing that public health should "welcome" the human rights framework); Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 Wake For. J.L. & Pol'y 1, 28-30 (2019)(respect for public health requires allowing for judicial review of quarantine orders).

[125]*See* Burris, *supra* note 22, at 126 (noting that "law is hard" and that "a number of strict conditions" must be met if the use of legal powers can achieve their aim).

[126]Mello, Jian & Parmet, *supra* note at 80, at 764-66.

[127]Scott Burris and colleagues also emphasize the need for more rigorous scientific study (through legal epidemiology) of the mechanisms and impacts of various policy tools, including law. Burris et al., *supra* note 26, at 142.

[128]Leo Beletsky, Wendy E. Parmet & Scott Burris, *Advancing Public Health Through Law: The Role of Legal Academics: Workshop Report*, Northeastern Public Law and Theory Faculty Research Papers Series No. 110-2012.

[129]*Id.*

[130]*Id.* at 4.

[131]*Id.*

[132]*Id.*

[133]*See supra* text accompanying notes 28-33.

[134]*See supra* text accompanying notes 63-112.

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In response, in May 2024, PHLW, in conjunction with the Partnership hosted a new convening in Boston, focused on developing an "action plan" to secure public health's position in the judiciary.[135] Attendees included public health law academics and practitioners, experienced litigators, and representatives from several foundations with an interest in public health and health equity. The candid discussions focused less on existing threats than on more on concrete actions that could be taken to meet those challenges.

At the convening's conclusion, my colleague Linda Tvrdy, PHLW's senior program manager, and I, committed to draft an action plan based on the convening's discussions. That plan has been shared with attendees and other key stakeholders and revised based on their feedback.

Although the plan remains a work in progress, I can share several personal observations based on the convening. The first is the need for a long-range strategy. The doctrinal changes that have imperiled public health were decades in the making; the strategy to unwind them must adopt a similar long time-horizon. But public health law cannot wait for the long-term. There are concrete actions that members of the field and its allies can begin to take today. These include developing a rapid litigation response capacity, and creating the infrastructure needed to coordinate, communicate, and strategize over the longer-term.

In addition, as noted in the 2012 white paper, members of the field must develop and articulate in the media (including social media), court filings, and academia the downsides of unchecked individualism and the promise of collective well-being.[136] Importantly, that does not require an abandonment of individual rights, which in many instances can be supportive of public health and equity, but it does compel rebalancing individual rights with the common good and articulating why individuals should care about that common good. It also compels finding a way to convince the public that public health laws are very much within- the American constitutional tradition— they are not (and should not be seen as) the product of "the nanny state," — but rather one of the ways that "we the people" secure our individual rights and the common good.[137]

Public health law also needs to forge new partnerships and work in coalition with other groups whose areas of interest are similarly under threat from the judiciary.[138] Many of the doctrinal shifts that have imperiled public health law emerged from cases, such as *Loper Bright*, that were not about public health law.[139] Likewise, many recent decisions that relate to public health law have implications far beyond public health law.[140] Public health law needs to partner with groups that focus on these issues as well as groups that are further outside the tent. The defining values of public health law — that the health of populations matters, and that law should in part serve that end — are norms which most people can agree with, even if they disagree about policy tradeoffs and priorities.

Further, although much of the criticism leveled at public health law in recent years has traded in scientific falsehoods, public health laws have at times overreached or failed to recognize the complexities of enforcement and implementation.[141] Public health practice has also at times neglected the concerns of many communities. At the end of the day, if public health lawyers want to face a less hostile judicial landscape, they need to help public health practitioners regain the public's trust. This requires better messaging, but also better listening skills and the recognition that different communities have different

[135]Public Health Law Watch, 2024 Convening (May 22-23, 2024), https://www.publichealthlawwatch.org/2024-convening [https://perma.cc/H8L8-H7KK].

[136]Beletsky, Parmet & Burris, *supra* note 128, at 4.

[137]Wiley, Parmet & Jacobson, *supra* note 65, at 73.

[138]Ironically, this may require erosion of the field's cohesiveness as the boundaries between public health law and allied fields may dissolve.

[139]*Loper Bright Enters.*, 144 S. Ct. at 2272.

[140]For example, the Supreme Court relied on its decisions blocking CDC's eviction moratorium in later decisions striking environmental regulations and President Biden's student loan plans. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2371 (2023) (citing Ala. Assoc. Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) in blocking loan forgiveness plan); West Virginia v. Env't. Prot. Agency, 597 U.S. 697, 721 (2022) (citing Ala. Assoc. Realtors in striking EPA's clean energy rule).

[141]Burris, *supra* note 22, at 125.

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values and priorities. Although a more discerning use of public health powers and greater public acceptance of exercises of public health authority cannot assure greater success in court, a better political climate cannot hurt. For example, many of the most successful litigation attacks on public health powers were brought by Republican state officials against Democratic governors and President Biden.[142] Such cases might not have been brought or won if politicians did not think the politics were on their side.

Of course, public health practitioners and lawyers cannot control the political dynamics. But reaching out to and working with groups such as small businesses, faith communities, and rural communities, in addition to communities of color, while taking care not to command what the public has not yet come to accept, can help restore trust and lower the political temperature. Ideally, this will lead to less litigation and a less hostile judiciary. Admittedly, expanding the tent may undermine some of the cohesiveness that has characterized the field of public health law and helped it grow. But the field is now sufficiently mature to withstand that.

Finally, public health (and its allies) should take a lesson from the CLM by engaging in judicial selection and education. In some courtrooms today, neither a strong factual record, long-settled precedent, nor compelling legal arguments may suffice to protect public health in the courts. We need a judiciary that cares about the facts (and health) and is receptive to well-supported arguments made by public health lawyers. In short, we need a more even playing field. To achieve this, public health advocates and their allies may need to become involved in the judicial selection and nomination process by, for example, conducting voter education during judicial elections, creating public health report cards for judicial candidates, and presenting the case that public health law matters to elected officials and staff who nominate and confirm judges. There is also the case for expanding efforts to inform judges about the social determinants of health, health equity, and the ways in which their decisions can affect health.[143]

Ultimately, none of these efforts can succeed without more resources. Despite the very significant support provided to public health law by RWJF, CDC, and other organizations in recent years,[144] funding for public health law efforts pales in relationship to the resources available to the CLM.[145] Efforts to re-balance the judiciary's review of public health laws will never be able to match its funds, but given the "in-kind" support provided by academics and lawyers who work for non-profit institutions (such as the Network and ChangeLab),[146] the amount of money needed to achieve short and near-term goals may not be unobtainable. But what needs to happen first is that public health advocates need to realize that their efforts to promote health and equity may be vain unless the legal climate changes.

Conclusion

For public health law, this is undoubtedly the best and worst of times. Thanks to the financial and technical support provided by the CDC, RWJF, the Network, ChangeLab and other organizations, public health law practice thrives. A plethora of tools, trainings, technical assistance services, and resources are available to inform and support their work. And thanks to legal epidemiology, public health practitioners and policymakers know far more — though not yet enough — about the efficacy and impact of public health laws than they used to know.

[142]Parmet & Khalik, *supra* note 70, at 284.

[143]Since 2020, my colleagues and I at Northeastern have run a program, *Salus Populi*, that seeks to do this. Linda Tvrdy et al., *Salus Populi: Educating Judges on the Social Determinants of Health*, 108 Judicature 52 (2024). Other such efforts are sorely needed.

[144]*See supra*, text accompanying notes 28-35.

[145]*E.g.*, Heidi Przybyla, *Leonard Leo Used Federalist Society Contract to Obtain $1.6B Donation*, Politico, (May 2, 2023, 4:30 AM), https://www.politico.com/news/2023/05/02/leonard-leo-federalist-society-00094761. *See also* Joanna Wuest & Briana S. Last, *Church Against State: How Industry Groups Lead the Religious Liberty Assault on Civil Rights, Healthcare Policy and the Administrative State*, 52 J.L. Med. & Ethics 151 (2024).

[146]The Network, https://the-network.org/ (last visited Oct. 12, 2024); ChangeLab Solutions, https://www.changelabsolutions.org/ (last visited Oct. 12, 2024).

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Public health law is also thriving in the academy. As noted above, more courses and programs are being offered; scholarship is proliferating and become more diverse, empirical, and theoretically sophisticated. At the same time, the increasing saliency of public health laws during the pandemic helped shine a public spotlight on the field, giving scholars new opportunities to reach a wider audience.

Yet even as the field flourishes, the law's capacity to protect public health and advance health equity is under assault, both in legislatures and in courthouses. The threat to the health of individuals and communities — especially those that have experienced the greatest social marginalization — is palpable. For public health law lawyers, the enormity and nature of the threats —especially the Supreme Court's seeming indifference to precedent, expertise, and health — can feel existential. How can we even try to talk about or work in public health law when courts seem lawless, and the furtherance of public health no longer seems like a shared goal?

I lack satisfactory answers to those questions. But I do know that if public health lawyers care about public health's fate, they need to reflect on past mistakes and develop a path forward. The Action Plan does not have all the answers, and it will not be and should not be the last word. But it is a first step. If we want law to advance health, a first step is needed.

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