

# Teaching Public Health Law in a Time of Judicial Activism



**Micah Berman, JD**  
Professor  
The Ohio State University



**Scott Burris, JD**  
Professor & Director  
Temple University



**Marice Ashe, JD, MPH**  
Lecturer, Berkeley Law  
(Moderator)

HOSTED BY



Center for  
Public Health Law  
Research

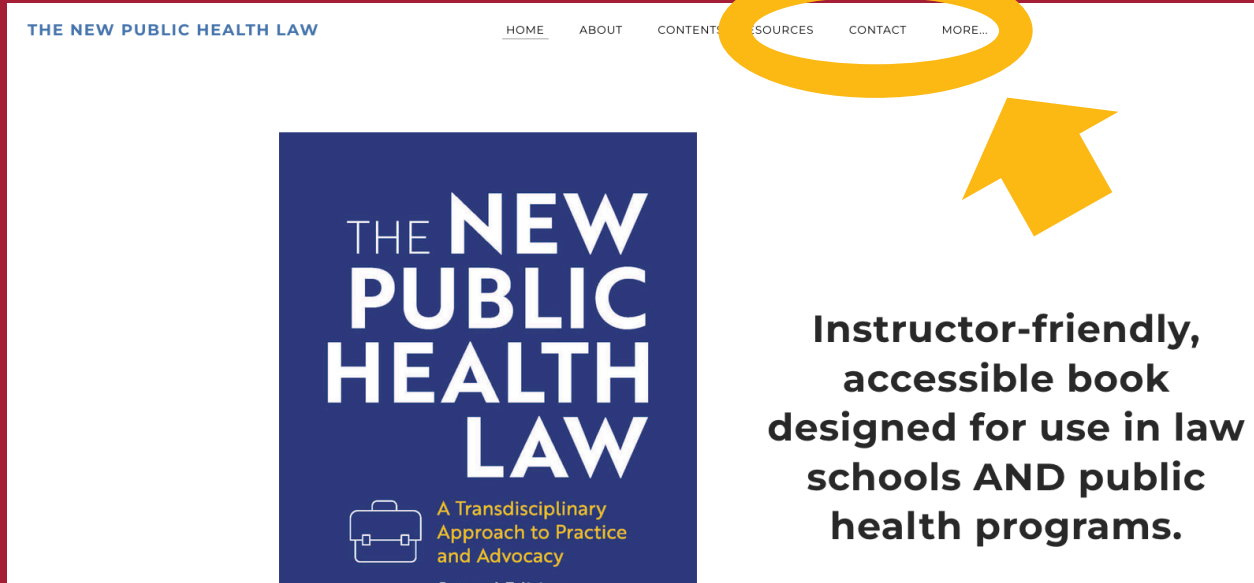
# Agenda

- Welcome and Introductions : Marice Ashe (5 mins)
- Pedagogy and guidance on key cases and judicial trends:  
Micah Berman and Scott Burris (30 mins)
  - State and local public health authority and preemption
  - Fifth and Fourteenth Amendments (due process and equal protection)
  - First and Second Amendments (religion and guns)
  - Authority of federal administrative agencies
- Practice and strategy skills for students: Marice Ashe (5 mins)
- Open Discussion (20 mins) – please use the chat function!!!

# The New Public Health Law\*

**\*Now Even Newer!**


**Request teaching materials through the  
contact link: [thenewpublichealthlaw.org](http://thenewpublichealthlaw.org)**




THE NEW PUBLIC HEALTH LAW

[HOME](#) [ABOUT](#) [CONTENT](#) [SOURCES](#) [CONTACT](#) [MORE...](#)

**THE NEW  
PUBLIC  
HEALTH  
LAW**

 **A Transdisciplinary  
Approach to Practice  
and Advocacy**

**Instructor-friendly,  
accessible book  
designed for use in law  
schools AND public  
health programs.**



# The Five Essential Public Health Law Services

**& outline of the book!**



# Section III: Legal Authority & Its Limitations

- Chapter 8: The Constitution, Federalism, and Federal Preemption
- Chapter 9: Federal Public Health Authority
- Chapter 10: State Public Health Authority
- Chapter 11: Due Process of Law
- Chapter 12: Equal Protection
- Chapter 13: The First and Second Amendments
- Chapter 14: Administrative Challenges

# **Federal and State Public Health Authority**

**Increasingly stark examples of why PH authority matters**

# Federal, State & Local Authority

- Federal Preemption
  - BE ON ALERT: Comstock Act, EMTALA
- State Public Health Authority
  - State-by-state variation, but MAJOR (though not irreversible) changes in some states that limit executive & agency authority
  - Increasingly aggressive state-level preemption
  - Opportunity to introduce students to legal epidemiology

US COVID-19 LESSONS

Legal infrastructure for pandemic response: lessons not learnt in the US

**Michelle Mello and colleagues** argue that state legal reforms have generally exacerbated rather than improved weaknesses in US emergency powers revealed by covid-19, jeopardizing future responses

Michelle M Mello,<sup>1,2</sup> David Jiang,<sup>1</sup> Elizabeth Platt,<sup>3</sup> Katie Moran-McCabe,<sup>3</sup> Scott Burris<sup>3</sup> BMJ

# The (Un?)intended Consequences Of COVID-19-Era Judicial Decisions And New Public Health-Related Laws

[Sabrina Adler](#), [Darlene Huang Briggs](#), [Ross C. Brownson](#), [Scott Burris](#), [Paul C. Erwin](#), [Peter D. Jacobson](#), [Wendy E. Parmet](#)

MAY 23, 2024

10.1377/forefront.20240521.320592

## THE STATE STRIKES BACK: Death Star 2.0 Preemption

*Richard Briffault, Jorge Camacho,  
Nestor Davidson, Steven Nelson,  
Marissa Roy, and Rick Su*

November 2023

Legal Solutions Support Center

### Gov. DeSantis signs bill letting businesses sue local governments, halt 'arbitrary or unreasonable' ordinances



# **Due Process & Equal Protection**

**Integrating discussion of doctrine with recognition of PH impact and discussion of what comes next for lawyers and PH advocates.**

# The Big Picture

**SCOTUS is shifting toward tests that can produce the outcome it wants & that do not take public health evidence into account.**

**Difficult to teach cases that are fundamentally cruel & doctrine that is inconsistently applied (to put it nicely).**

**Precedent doesn't mean what it used to.**

**Supreme Court litigation may not be the most effective path for public health. Strategic thinking & broader skillset is needed.**

## ***Dobbs v. Jackson Women's Health Org. (2022)***

- **Doctrinal**

- Massive retrenchment of “fundamental rights” – calls all previously recognized rights into question
- Problematic “history and tradition” test that leaves no room for public health considerations
- Huge blow to the stability of law & the very idea of *stare decisis*

- **Human and public health impact**

- **Lawyering and public health practice**

- At what level of generality is the right characterized? Do you argue on the Supreme Court's terms?
- Other options for protecting rights, through litigation & otherwise
- Tracking PH impact and ongoing efforts to push *beyond* Dobbs

# Equal Protection

## ***Students for Fair Admission (2023) & “Color Blind” EP***

- **Doctrinal**
  - Similar issues with the “historical” approach
  - “Colorblind” EP now the law – unclear how far this will reach
- **Human and public health impact**
- **Lawyering and public health practice**
  - Tracking efforts to build on *SFFA* & their PH impact.
  - How to pursue health equity in this environment? How to counsel clients?

Health

## **Backlash to affirmative action hits pioneering maternal health program for Black women**

Conservative groups have sued to shut down the Abundant Birth Project, part of a national backlash against affirmative action in health care.

COMMENTARY

## **We’re Suing Health Affairs For Racial Discrimination**

BY DO NO HARM STAFF • SEPTEMBER 6, 2022

## ***United States v. Skrametti* (upcoming)**

- **Doctrinal**
  - Is anti-trans discrimination sex/gender discrimination? Will *Bostock* majority hold?
- **Human and public health impact**
- **Lawyering and public health practice**
  - Other options that do not rely on SCOTUS
  - How to “unflip” the EP clause

JURISPRUDENCE

## **Transgender Rights Advocates’ Last Best Hope Is Neil Gorsuch and John Roberts**

Slate, 6/24/24

BY MARK JOSEPH STERN JUNE 24, 2024 • 1:20 PM

# Free speech, religion, guns and the administrative state

In the legal world Micah has described, how do we get our students to understand the politics yet still feel good about law and legal work? (Should they?)

We're going to make it as hard as possible for government to regulate for health, safety and the promotion public welfare.

- **The First Amendment**

- For decades, we've looked more and more closely at anything that comes close to anything that looks like speech. You can still argue that your rule or statute is the least restrictive, most efficacious and necessary means to secure a public good, but even if you get past our very high bar of First Amendment protection, **we're not sure how long we plan to accept means-end analysis anyway.** [See Second Amendment]

- **The Second Amendment**

- In *Bruen*, we said that the Framers made gun policy for all time and there is virtually nothing left to add
- We blinked in *Rahimi* – or did we? (More on this later.)

# The Majority is On a Mission: Ad Law

- **Corner Post:** We've given every potential plaintiff their own personal statute of limitations to challenge regulations, no matter how settled.
- **West Va. v. EPA:** Unless Congress explicitly, in detail, authorized the specific rule → MAJOR QUESTIONS DOCTRINE
- **Loper Bright:** If Congress properly delegated rulemaking authority, expect no deference on the interpretation of the law and, Skidmore to the contrary notwithstanding, don't be surprised if Justice Thomas knows more about machine gun technology than your agency experts (cf. *Garland v. Cargill*)
- **SEC v. Jarkesy:** Oh, and when you enforce the rules, keep in mind that any monetary penalties will require a jury trial before an Article III judge.



- **Does evidence matter?**

- Government can still argue that a restriction or requirement is justified through means-ends analysis – But winning is another matter
  - Advertising restrictions and labeling requirements are typically part of a multi-pronged effort to influence consumer behavior; their effects will be marginal and difficult to demonstrate, especially *before* implementation
  - The conservative justices are suspicious of science generally, apparently not well-informed about how it works, and will not defer to legislative or agency fact-finding

- **Do legal terms have a predictable meaning?**

- In compelled speech cases, *Zauderer’s* “non-controversial” prong may be like the “major” in Major Questions: if someone has brought a suit, the required speech must be controversial.
- ***But see RJ Reynolds. v. FDA (5<sup>th</sup> Cir. 2024), which discusses the meaning of the Zauderer prongs in lawyerly detail, rejects claims that images that trigger emotional reactions cannot be “factual” and concludes: “that the speaker does not like the message does not make it controversial; there must be something more.”***

# The Emerging Law of “Religious Discrimination”

- **Laws that are neutral and generally applicable (NAGA)**
  - State and federal variations on RFRA → high bar PLUS impact litigation (e.g., *Braidwood* – but also *Individual Members of the Medical Licensing Board of Indiana v. Anonymous* (upholding injunction against enforcement restrictive abortion law as applied to Jewish plaintiffs under state RFRA))
  - Anti-discrimination statutes → reasonable accommodation?
- **Laws that are NAGA but have exceptions for *someone***
  - Then why not for religious people? This is the vaccine issue, on which the long-settled acceptance of laws with health (see *We the Patriots USA v. CT* (2<sup>nd</sup> Cir. 2023)) but not religious exemptions has some cracks (see *Bosarge v. Edney* (SD Miss. 2023)).
  - *Tandon v. Newsom*: a law is not NAGA if it treats “any comparable secular activity more favorably than religious exercise.” Is this most-favored-nation treatment for religion?
- **Laws or enforcement actions that explicitly reference religious groups or activities**
  - The COVID cases, but DO they generalize? Lots of poor drafting and reasoning and some fair criticism of public health judgments
  - Going forward, be very careful to make evidentiary case for religious distinctions.

- The Court tripped over its own *Bruen* test in *Rahimi*
  - It was compelled to recast Justice Thomas' jurisprudentially inane and unworkable historical test as good old-fashioned common-law reasoning:
  - *"the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is 'relevantly similar'" to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'* Discerning and developing the law in this way is 'a commonplace task for any lawyer or judge.'"
- But it does not back away from its rejection of any sort of means-end reasoning; the dead hand of the past may grip just a little less tightly, but evidence about gun violence today still has no handhold at all

# Firearms and the Constitution

- Meanwhile, litigants and courts are advancing their own historical arguments
- Before, but consistent with, *Rahimi*, the First Circuit decided that it could look not only to analogous laws but analogous problems in upholding restrictions on large-capacity magazines [LCMs]
  - “Concern about the increasing frequency of LCM-aided mass shootings today prompted the Rhode Island legislature to pass HB 6614.6 And since the record contains no evidence that American society previously confronted -- much less settled on a resolution of -- this particular concern, we have no directly on-point tradition on which to rely in determining whether Rhode Island's ban is consistent with our history and tradition.”
    - *OCEAN STATE TACTICAL v. Rhode Island*

# Teaching and Working with *Loper*

- Focus on the doctrine:
  - Under the APA, it ‘remains the responsibility of the court to decide whether the law means what the agency says.’”
  - No deference unless the specific statute the agency is applying explicitly charges the agency with defining terms or filling gaps. (Shades of “Major Questions”)
  - *Skidmore* remains good law: courts *may* draw persuasive guidance from agencies
- Interrogate the Court’s drift towards judicial supremacy:
  - Justice Kagan’s dissent criticizes the Court for making itself “the country’s administrative czar,” with “exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law.”
  - And is it really a job it can do? Is there truly a singular “best” meaning of commonly used ambiguous terms like “necessary” or “appropriate,” or more substantive terms like “appropriate for public health,” “on the basis of sex,” or “dietary supplement.”

# Teaching and Working with *Loper*

Or take the politics head on:

- The positions of organizations like ALEC, Cause of Action and the Koch-funded Americans for Prosperity are great predictors of the Court's rulings – and they are bringing the cases that give the Court the opportunity to rule.
- All you need to wage a campaign for major legal change, according to a lawyer at the Pacific Legal Foundation, is “Money, legal personnel and a judiciary that’s receptive to strategically selected and timed legal arguments.”(NY Times, quoting Damien Schiff, 1/16/24)
- The amicus brief of Senator Whitehouse et al, submitted under Erwin Chemerinsky’s signature, describes the efforts of the fossil fuel industry to turn *Chevron* into a problem and then secure its demise.

# What I tell my students

- The evidence that unregulated markets do not deliver the social goods we need is all around you; likewise that social and economic inequity produces bad results for all – you could say that government’s main job is to produce the conditions in which we can all be healthy
- Policies that seek to create conditions in which we can be healthy work – see studies by Jennifer Karas Montez. See, e.g., *PLOS ONE* 2022;17(10):e0275466
- The answer is not always more regulation – see housing – but complex modern societies require robust and effective regulation to secure the common good, and lawyers have an important role in building healthy regulations and reforming or removing unhealthy ones.
- The Court may be going the wrong way, but there is plenty of work to do and more call for legal creativity and constructive, long-term thinking than ever.

***What the Hell?!?!?***



# Practice & Strategy Skills for Students

## Courses

- Administrative Law course required before graduation
- Legislation and/or Legislative Drafting
- Advocacy – perhaps at a SPH
- Externships with government agencies

## Legal and Practice Skills

- Drafting legislation:
  - Clearly state current & future agency authority
  - Check for use of racial categories/*SFFA*
  - Check for religious liberties/*Tandon*
- Reading dissents for roadmaps
- Employing impact litigation to limit damage and expand protections
- Writing *amicus* briefs to make public health arguments
- Engaging in political advocacy and movement building:
  - Keep asking questions
  - Don't settle for the status quo
  - Build communications muscle
  - Play the long game
  - Help originalism collapse under its own weight

# THE NEW PUBLIC HEALTH LAW



A Transdisciplinary  
Approach to Practice  
and Advocacy

Second Edition

SCOTT BURRIS  
MICAH L. BERMAN  
MATTHEW PENN  
TARA RAMANATHAN HOLIDAY

Use code  
**ALAUTHC4**  
for **30% discount**  
when buying from  
OUP.com

Access teacher resources and  
get your copy at  
[www.thenewpublichealthlaw.org](http://www.thenewpublichealthlaw.org)

## Time for Discussion

**Please use the Chat** to ask questions or  
provide resources to share