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The Prospect and Perils of Climate Preemption for Public Health

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**THE PROSPECT AND PERILS OF CLIMATE PREEMPTION FOR PUBLIC
HEALTH**

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ABSTRACT

Climate change is disrupting many communities in the United States and around the world. Climate events like heat waves, hurricanes, drought, fire, and flooding will become much more frequent, and with them will come the need for robust health care responses. Given the widespread and boundary-crossing nature of the problem, an ideal response would possibly originate at the federal or state level. As illustrated by the COVID-19 pandemic, however, there is little guarantee that such a response will be forthcoming. Recent foreclosures of federal options for handling climate change make such a response even less likely. Instead, it seems likely that local governments in many states will be left on their own to manage the necessary responses to the changing health needs and crises of their populations. Those local responses will be necessarily varied, challenging, and imperfect—even if local governments are allowed free rein in handling climate impacts.

However, as the pandemic response also demonstrated, in many cases, local governments have good reason to fear being barred by the state from implementing needed responses and resiliency efforts. In general, state legislatures have broad authority to preempt local action. In the same way that many states exercised that authority during the pandemic to block local measures such as mask mandates, states may also preempt local authority over climate response. Such preemption will overwhelmingly impact the populations already experiencing disparities in care and access that are going to be most reliant on a robust local response to changing health needs. An equitable public health response to climate change, therefore, likely depends on protecting local authority to act in the best interest of their citizens—and on a realistic assessment of when and whether local authority will be allowed.

INTRODUCTION

It is harder to avoid news of climate change than to encounter it. The past several years have brought new assessments of rapidly warming temperatures, expected environmental and health consequences of that warming, and the insufficiency of current efforts to curb these changes. The impacts of climate change are now and will continue to be widespread and varied, including heat waves, natural disasters, rising sea levels, and population displacement.¹ Many of those impacts will affect human health in both direct and attenuated ways. Of immediate concerns to health are worsening air quality and particulate matter pollution, extreme heat, reduced access to water, and impacts from flooding.² More attenuated disruptions include those to health care and community from those same events, as well as possible loss of home or community.³ Those impacts are likely to be concentrated in the Global South⁴ and will certainly exacerbate existing differentials in access to healthcare, quality of life, and expected lifespan.⁵ Within the United States, health impacts from climate change are expected to be felt unevenly and to be most severe for those communities already experiencing health differentials in terms of access to care, exposure to environmental pollutants, location outside the urban canopy, and other conditions correlated with poorer health outcomes.⁶

1 *Climate Change Impacts*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://www.noaa.gov/education/resource-collections/climate/climate-change-impacts> (last visited Jan. 28, 2023); *Climate Change and Disaster Displacement*, UNHCR, <https://www.unhcr.org/en-us/climate-change-and-disasters.html> (last visited Jan. 28, 2023).

2 *What You Need to Know About Climate Change and Air Pollution*, WORLD BANK (Sept. 1, 2022), <https://www.worldbank.org/en/news/feature/2022/09/01/what-you-need-to-know-about-climate-change-and-air-pollution>; *Heat and Health*, WORLD HEALTH ORG. (June 1, 2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-heat-and-health>; *How Climate Change Impacts Water Access*, NAT'L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/how-climate-change-impacts-water-access> (last visited Jan. 28, 2023).

3 See, e.g., Laura Millan Lombraña & Sam Dodge, *Whatever Climate Change Does to the World, Cities Will Be Hit Hardest*, BLOOMBERG (Apr. 18, 2021), <https://www.bloomberg.com/graphics/2021-cities-climate-victims/>.

4 Paul Hockenos, *The Global South Is Done Playing Mr. Nice Guy*, FOREIGN POL'Y (Oct. 24, 2022), <https://foreignpolicy.com/2022/10/24/global-south-climate-summit-cop-egypt-reparations/>.

5 Kristie L. Ebi & Jeremy J. Hess, *Health Risks Due to Climate Change: Inequity in Causes and Consequences*, 39 HEALTH AFFS. 2056 (2020) (discussing the ways in which climate change will have disparate impacts on the already vulnerable).

6 See, e.g., *Climate Change and Social Vulnerability in the United States: A Focus on Six*

If climate impacts are not surprising at this point, neither are expected differences in how climate impacts will be experienced. Not only do these differences mirror many existing discrepancies in how social burdens are distributed, but the COVID-19 pandemic also offered a recent and harsh lens into how health crises disproportionately impact communities of color, elderly populations, and other under-resourced groups.⁷ As seen in the nearly three years since the pandemic began, communities previously experiencing disproportionate negative health impacts also experienced the highest rates of serious illness and death throughout the pandemic.⁸ Health impacts from climate change are expected to only heighten these impacts.⁹

Given the expected negative consequences of climate change for the environment and for public health, it would make sense to mount a robust national and international response to reduce greenhouse gas emissions and to respond to the climate impacts already occurring. For a multitude of reasons, however, that response has been severely lacking.¹⁰ No amount of discussion at the international level has resulted in an enforceable global framework for reduction of greenhouse gas emissions. In the United States, the federal government has failed over the past several decades to develop a comprehensive climate plan of any kind. The Obama Administration's attempt to address greenhouse gas emissions from stationary sources through the Clean Air Act, known as the Clean Power Plan, was struck down by the Supreme Court in 2022, even though the plan had never gone into effect.¹¹ And discussions in

Impacts, U.S. ENV'T PROT. AGENCY at 4–5 (2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf.

7 See, e.g., *Risk of Severe Death or Illness from COVID-19: Racial and Ethnic Health Disparities*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/disparities-illness.html> (last updated July 1, 2022).

8 See, e.g., CLAIRE LAURIER DECOTEAU ET AL., DEADLY DISPARITIES IN THE DAYS OF COVID-19: HOW PUBLIC POLICY FAILS BLACK AND LATINX CHICAGOANS 1 (2021), https://news.wttw.com/sites/default/files/article/file-attachments/IRRPP_DeadlyDisparitiesReport_ScreenResolution_0.pdf.

9 See James D. Ford, et al., *Interactions Between Climate and COVID-19*, 6 THE LANCET e825 (2022) (describing ways in which climate change can increase vulnerabilities to COVID-19).

10 See, e.g., Thomas Frank, *Federal Government Is Failing on Climate Readiness*, *Watchdog Says*, SCI. AM. (Nov. 27, 2019), <https://www.scientificamerican.com/article/federal-government-is-failing-on-climate-readiness-watchdog-says/>; Elaine Kamarck, *The Challenging Politics of Climate Change*, BROOKINGS INST. (Sept. 23, 2019), <https://www.brookings.edu/research/the-challenging-politics-of-climate-change/>.

11 See generally *West Virginia v. EPA*, 142 S.Ct. 2587 (2022).

Congress to address climate change have seen limited success as well.¹² In 2022, Congress passed the Inflation Reduction Act,¹³ which provides billions of dollars for renewable energy sources and retrofitting existing buildings.¹⁴ That piece of legislation is the largest federal action on climate change to date.¹⁵ It does not, however, directly regulate greenhouse gas emissions, and the success of its incentive programs remain to be seen.¹⁶

In the absence of a robust international or national response, some states have stepped in to create climate action plans.¹⁷ And in the absence of state action in many places, local governments—used broadly here to mean any general purpose sub-state entity—have taken up the mantle of both climate mitigation and adaptation.¹⁸ The same kind of story can be told about the COVID-19 pandemic, where a fractured national response led states and many local governments to set their own policies for how to best protect their populations.¹⁹ In both contexts, local governments have attempted to fill policy gaps

12 See, e.g., Jim Tankersley et al., *How Inflation Upended Biden's Climate Agenda*, N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2022/07/15/climate/biden-inflation-climate-manchin.html>.

13 See Jim Tankersley, *Biden Signs Climate, Health Bill into Law as Other Economic Goals Remain*, N.Y. TIMES (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/us/politics/biden-climate-health-bill.html>.

14 Matt Simon, *How the Huge New US Climate Bill Will Save You Money*, WIRED (Aug. 16, 2022), <https://www.wired.com/story/how-inflation-reduction-act-climate-bill-save-you-money/>.

15 Melissa Barbanell, *A Brief Summary of the Climate and Energy Provisions of the Inflation Reduction Act of 2022*, WORLD RES. INST. (Oct. 28, 2022), [https://www.wri.org/update/brief-summary-climate-and-energy-provisions-inflation-reduction-act-2022#:~:text=The%20Inflation%20Reduction%20Act%20\(IRA,taken%20to%20address%20climate%20change](https://www.wri.org/update/brief-summary-climate-and-energy-provisions-inflation-reduction-act-2022#:~:text=The%20Inflation%20Reduction%20Act%20(IRA,taken%20to%20address%20climate%20change).

16 See Alejandro de la Garza, *The Inflation Reduction Act Includes a Bonanza for the Carbon Capture Industry*, TIME (Aug. 11, 2022), <https://time.com/6205570/inflation-reduction-act-carbon-capture/>.

17 Sarah Fox, *Localizing Environmental Federalism*, 54 U.C. DAVIS L. REV. 133, 147 (2020) (offering examples of state climate action).

18 See, e.g., ALL FOR A SUSTAINABLE FUTURE, MAYORS LEADING THE WAY ON CLIMATE: HOW CITIES LARGE AND SMALL ARE TAKING ACTION (2018), <http://www.usmayors.org/wp-content/uploads/2018/09/uscm-2018-alliance-building-report-baldwin-small-7.pdf>.

19 See *Local Government Responses to the Coronavirus (COVID-19) Pandemic, 2020*, BALLOTPEdia, [https://ballotpedia.org/Local_government_responses_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Local_government_responses_to_the_coronavirus_(COVID-19)_pandemic,_2020) (last visited Jan. 28, 2023) (cataloguing local responses); *State Action on Coronavirus*, NAT'L CONF. OF STATE LEGISLATORS (Dec. 1, 2022), <https://www.ncsl.org/health/state-action-on-coronavirus-covid-19> (offering searchable database of state actions).

left by actors at other levels of government. It cannot be said that local governments have enacted uniformly desirable policies in response to either the pandemic or climate change; there are copious examples of local inaction or obstruction for both issues. But the presence of local actors in both the COVID-19 pandemic and climate arenas has still played an important role within the U.S. federal system. When other governmental efforts have stalled or reversed, local governments have offered an arena for creative forward progress in policymaking.

In many states, however, that gap-filling role has been thwarted, both on the environmental front and in the public health realm. For over a decade now, legislatures in many states have engaged in concerted efforts to restrict local authority.²⁰ Through aggressive use of preemption, states have reduced local ability to enact policies on issues marked by inaction at the federal and state levels.²¹ This trend cuts across a variety of issue areas but has tended to take the form of conservative state legislatures targeting progressive local policies.²² Any discussion of the potential for local response to climate change, and the public health needs that will accompany it, must account for the reality of these preemption trends. What that means in practice is that the most fruitful conversations about public health in a climate-changed world will be localized, paying attention to the particularities of local authority in each place, rather than generalized discussion of local potential. And given the disparate realities for different parts of the country, climate equity and public health work will require an expansive toolkit that includes not only calls for local action but also a deep knowledge of state law regarding local authority, creativity regarding use of federal authority, reliance on private service providers, and many other policy tools.

I. THE POTENTIAL FOR LOCAL ACTION

Local governments in the United States are not an explicit part of the federal constitutional structure. The Constitution dictates the relationship between the federal government and states but has no

20 *See, e.g.*, Rich Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1164–67 (2018) (discussing the antagonistic preemptive actions taken by states against municipal governments).

21 *Id.*

22 RICHARD BRIFFAULT ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 524 (9th ed. 2021).

explicit textual commitment to local governments.²³ In consequence, the existence and scope of local authority in the United States has been fluid since the country's founding. Rather than looking to one federal constitution, analyses of local authority must consider 50 state constitutions. And without a controlling constitutional mandate, state judges played a large role in shaping state law on local governments in the early years of the United States.²⁴ Debates among such judges over the course of the 19th century culminated in widespread adoption of a doctrine known as Dillon's Rule—named for its originator, Judge John Dillon—in most of the country.²⁵ Under a Dillon's Rule framework, local governments have only the power delegated to them by the state.²⁶ Beyond that, Dillon's Rule narrowly construes any grant of local authority and incorporates a presumption that resolves any doubts about the existence of local authority in favor of the state.²⁷ Given those strictures, it is very difficult for local governments in a Dillon's Rule regime to exercise any kind of agency. These limits on local governance were intentional: "The purpose of Dillon's Rule was to ensure that the state maintained a tight leash on municipal activities."²⁸

The broad adoption of a Dillon's Rule-style model of local government meant that, going into the 20th century, the authority of most local governments was quite limited. With the growth of industry and the expansion of cities starting in the early part of the century, Dillon's Rule began to feel unworkable as a governance structure.²⁹ Cities had many needs that called for local action.³⁰ Beyond that, concerns about municipal corruption and special legislation at the state level led to many calls for reform.³¹

Campaigns began in several states calling for broader authority to be delegated to local governments.³² This idea of a more expansive

23 See, e.g., David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 487 (1999) ("The text of the Constitution does not mention local governments.").

24 Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591, 626 (2020).

25 Sharon L. Eiseman & Peter M. Friedman, *Five Things Every Lawyer Should Know About Representing a Local Government*, CBA REC., Apr. 2004, at 49, 49.

26 Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 190 (2017).

27 Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 640 (2001).

28 Su, *supra* note 26, at 190.

29 *Id.*

30 *Id.*

31 See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2286 (2003).

32 Su, *supra* note 26, at 191.

local authority is known as “home rule.”³³ In its earlier forms, home rule tended to involve a limited grant of authority to local governments over matters of a local nature, coupled with immunity from preemption within that local sphere.³⁴ These kinds of grants of home rule gave local governments some degree of authority to act on their own initiative.³⁵ However, because that grant was limited to matters of local concern, it became readily apparent that ultimately it was going to fall to judges to determine “local” matters from “state” matters.³⁶ Those decisions were highly variable, with courts often deferring to the state.³⁷

In response to the perceived deficiencies of this early form of home rule, in the 1950s the National League of Cities introduced and advocated for a different form of home rule grant.³⁸ This new version of home rule aimed both to broaden local authority and give local authorities more confidence in exercising that authority.³⁹ In its purest form, it would do so by moving away from the requirement that local governments act only in areas of “local” concern by granting local governments much fuller powers of initiative, provided that local laws did not conflict with state laws.⁴⁰ By eliminating the need to decide for each particular action whether the issue was local or state in nature, local governments could act with a greater degree of confidence. This expanded local authority was, however, paired with a lack of immunity from state interference.⁴¹ Where the judiciary had previously controlled the outcome of power disputes, in terms of deciding the state versus local question, now the state legislature had the ability to prevent local governments from taking actions with which they disagreed.⁴²

Many states adopted this new form of home rule—often referred to as “legislative” because of the shift in power it occasioned to the state legislature in deciding outcomes of state and local conflicts—or a blend of the legislative and imperio home rule forms.⁴³ With those adoptions

33 See, e.g., *Cities 101—Delegation of Power*, NAT'L LEAGUE OF CITIES, <https://www.nlc.org/resource/cities-101-delegation-of-power/>.

34 Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124 (2007).

35 *Id.*

36 See, e.g., Barron, *supra* note 23, at 2326.

37 See, e.g., BRIFFAULT ET AL., *supra* note 22, at 410; Su, *supra* note 26, at 193.

38 See, e.g., Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 5 (1975).

39 See, e.g., *id.* at 6–7.

40 See, e.g., *id.* at 7.

41 See, e.g., *id.*

42 See, e.g., *id.*

43 This form is often referred to as “hybrid” home rule. See, e.g., Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839, 863 n.106 (2018).

came a much greater scope of local authority and potential for local governments to take on a wide range of policy initiatives. Though Dillon's Rule persists in a small number of jurisdictions, home rule is now the dominant doctrine governing the state and local relationship.⁴⁴ While the current state and scope of home rule authority in the United States defies any easy summary, it is accurate to say that in a vast majority of the states, at least some of the local governments within the state have a fair degree of initiative authority.⁴⁵

Another possible source of authority for local governments is the police power—a separate, though often related, concept to home rule.⁴⁶ The police power, an amorphous concept that refers broadly to governmental powers exercised to support health, safety, and general welfare, can be delegated to local governments even without a grant of home rule authority.⁴⁷ For instance, many states delegate the authority to exercise police power authority in the form of zoning, separate from any grant of home rule authority.⁴⁸ Thus, at present, all states in the United States have some degree of authority that they can exercise, though the scope of that authority varies widely. Local authority is also nearly universally susceptible to interference by the state, as will be discussed in detail below. But in the absence of that kind of interference, local governments may undertake policy responses on a wide variety of issues. Most importantly for this Article, local governments may often exercise

44 See, e.g., Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 URB. L. 625, 636 (2015) (“Today, all but five states have some type of municipal home rule—though the type of home rule varies considerably from state to state.”).

45 See Diller, *supra* note 34, at 1127 n.65 (2007) (“Just as it is difficult to provide a precise count of Dillon’s Rule states, so is it difficult to count accurately home-rule states.”). Compare RICHARD BRIFFAULT ET AL., STATE AND LOCAL GOVERNMENT LAW 268 (6th ed. 2004) (finding that as of 1990, 48 states had some form of home rule for at least some cities and 37 states had some form of county home rule), with DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK 14 (2001) (finding that 45 states have home rule regimes) (citing Timothy D. Mead, *Federalism and State Law: Legal Factors Constraining and Facilitating Local Initiatives*, in HANDBOOK OF LOCAL GOVERNMENT ADMINISTRATION 31, 36 (John J. Gargan ed., 1997)). It is even more difficult to offer a precise head count of imperio versus legislative states. Professor Timothy Mead counts 26 legislative states and 19 imperio states, Mead, *supra* note 46, while David Barron has observed that “very few state[s]” have imperio regimes. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 392 (2001)).

46 *Id.* (“While local government’s ability to exercise the police power is often related to home rule, it is important to remember that they are separate concepts.”).

47 See, e.g., Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1354–55 (2009).

48 Ohm, *supra* note 44, at 636.

their authority to address both climate and public health questions.

A. *Local Climate Action*

Climate change is, in many ways, the opposite of a local issue. It is the epitome of a complex, global problem with both causes and solutions that lie far beyond local boundaries.⁴⁹ Even so, local governments have a substantial role to play in addressing climate change, both in terms of mitigating the worst impacts of climate change and responding to its impacts on the community. And while this local role would be important regardless of actions at other levels of government, the need for local action is elevated by the absence of federal and state government policy described above.⁵⁰

For many years, local governments have been helping to close the gap in climate action left at the state and federal levels.⁵¹ As described, local authority to act on climate change in any given state depends on the law of that state as written and interpreted. Broadly speaking, however, local climate action can be said to encompass several main categories: land use-based climate adaptation responses; local climate advocacy and legal instruments; exercise of local proprietary capacity; and mitigation-oriented regulatory responses.⁵²

Land use-based climate adaptation responses might include actions like creating urban growth areas that limit development in areas sensitive to climate impacts,⁵³ protecting and improving local

49 Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159 (2009) (describing elements that make climate change a “super wicked” problem).

50 See, e.g., Sarah J. Fox, *Why Localizing Climate Federalism Matters (Even) During A Biden Administration*, 99 TEX. L. REV. ONLINE 122, 124 (2021), <https://texaslawreview.org/why-localizing-climate-federalism-matters-even-during-a-biden-administration/>.

51 Cynthia R. Harris, *Best Practices in Local Climate Action Planning*, Part I, ENV. L. INST. (Jan. 10, 2022), <https://www.eli.org/vibrant-environment-blog/best-practices-local-climate-action-planning-part-i-introduction> (describing local governments as “well-positioned to assess local climate hazards and risks, identify opportunities to reduce GHG emissions, and engage the community in identifying priorities”).

52 *Id.*

53 Alec LeSher, *Urban Growth Area*, SUSTAINABLE DEV. CODE, <https://sustainablecitycode.org/brief/create-urban-growth-area-2/> (last visited Sept. 24, 2022) (“Urban Growth Areas are designated areas in which development is permitted. Ordinances creating Urban Growth Areas often set legal boundaries separating urban, developable land from rural, conservation, preservation, non-developable land.”).

tree canopy cover,⁵⁴ encouraging infill development,⁵⁵ incorporating expected climate impacts into local comprehensive plans,⁵⁶ and many others. These kinds of actions rely on local land use authority, which is generally well within local control because of home rule power and/or delegated police power or zoning authority.⁵⁷

Local climate litigation is another avenue by which local governments may be able to address the impacts that climate change is having on their citizens. In recent years, several local governments have initiated or joined lawsuits against oil companies in an effort to hold companies accountable for losses from climate change.⁵⁸ While federal courts have routinely declined to hear these kinds of actions, many are currently pending in state court, with the results on the merits yet to be decided at the time of writing.⁵⁹

54 Alec LaSher, *Tree Canopy Cover*, SUSTAINABLE DEV. CODE, <https://sustainablecitycode.org/brief/expand-tree-canopy-cover-2/> (last visited Sept. 24, 2022) (“A local government’s tree canopy is the jurisdiction’s area that is shaded by trees. Typically, as land is developed, the tree canopy is reduced because trees are removed to clear space for development. One study estimates that urban areas across the United States lost 36 million trees per year from 2009 to 2014. Tree canopies provide numerous public and private benefits, including reduced air pollution, reduced heating and cooling demands, increased property values, improved physical and mental health, and reduced storm water runoff.”).

55 Tyler Adams, *Encourage Infill Development*, SUSTAINABLE DEV. CODE, <https://sustainablecitycode.org/brief/encourage-infill-development-2/> (last visited Sept. 24, 2022) (“Infill development is the process of developing vacant or under-developed parcels within areas that are already largely developed. As populations fluctuate and the needs of a community transform, vacant land becomes increasingly common place. Instead of directing development outward, infill development helps replace existing vacant lots and promotes land conservation through the reduction of greenfield development. Successful infill development programs often focus on improving neighborhoods, creating more efficient mixes of jobs and housing, reducing blight, and reinvesting in the community. Infill can return cultural, social, and recreational vitality to dilapidated areas within a community.”).

56 See, e.g., Fox, *supra* note 50, at 127–28 (2021) (citing examples of climate responses in local comprehensive plans).

57 See, e.g., John R. Nolon & Emma Alvarez Campbell, *Broad Local Powers to Deal with the Pandemic and Climate Change: The Death of Dillon’s Rule*, 44 NO. 2 ZONING AND PLANNING L. REPORTS NL 1, Feb. 2021.

58 Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1238 (2018); John Schwartz, *Climate Lawsuits, Once Limited to the Coasts, Jump Inland*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/climate/exxon-climate-lawsuit-colorado.html>.

59 See, e.g., Nate Raymond, *Chevron, Other Energy Giants Must Face California Climate Change Cases in State Court*, REUTERS (Apr. 19, 2022), <https://www.reuters.com/legal/government/chevron-other-energy-giants-must-face-california-climate->

Local governments can also act on climate change in their proprietary capacities.⁶⁰ For instance, local governments can exercise proprietary authority over local public procurement policies,⁶¹ municipal provision of power and waste management,⁶² retrofitting municipal lighting,⁶³ and modifying other municipal operations.⁶⁴ Exercising this kind of proprietary authority allows local governments to make their own operations responsive to climate change in ways generally removed from state control.

Finally, local governments can take mitigation-oriented regulatory actions. This type of local action might include emissions reductions and net zero emissions targets;⁶⁵ taxes to fund greenhouse gas reduction initiatives;⁶⁶ and many others.⁶⁷ These kinds of regulatory actions are different from the prior categories. “Unlike

change-cases-state-2022-04-19/.

60 See, e.g., Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 723 (2010) (“Local governments’ most direct (and likely least politically challenging) route to reducing downstream energy consumption is through targeting their own resources and operations. Potential reductions from proprietary activities alone may be substantial given the sheer number of local governments, the size of their operations, and the types of things that they own and operate.”); Fox, *supra* note 50, at 130.

61 See, e.g., Jason J. Czarnecki, *Green Public Procurement: Legal Instruments for Promoting Environmental Interests in the United States and European Union* (Dec. 12, 2009) (Ph.D. dissertation, Pace University School of Law), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504676.

62 Katherine A. Trisolini, *What Local Climate Change Plans Can Teach Us About City Power*, 36 FORDHAM URB. L.J. 863, 886 (2009); see also, e.g., Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 271 (2017); Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 586 (2018); Alexandra B. Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. 93, 101, 135–36, 138 (2022).

63 Trisolini, *supra* note 60, at 876.

64 *Id.* at 877.

65 See, e.g., CLIMATE MAYORS, CITIES CLIMATE ACTION COMPENDIUM, https://climatemayors.org/wp-content/uploads/2020/11/Cities_Climate_Action_Compendum_180105-1.pdf (listing numerous examples of cities adopting emissions reductions and net zero targets); Jonathan Mingle, *To Cut Carbon Emissions, a Movement Grows to ‘Electrify Everything.’* YALE ENV’T 360 (Apr. 14, 2020), <https://e360.yale.edu/features/to-cut-carbon-emissions-a-movement-grows-to-electrify-everything> (noting that cities like Takoma Park, Maryland, and Ann Arbor, Michigan, have recently adopted net zero policies).

66 See, e.g., CLIMATE MAYORS, *supra* note 65, at 6 (citing the example of Boulder, Colorado Climate Action Plan tax).

67 For a resource compiling many best practices for local action on climate change, see SUSTAINABLE DEVELOPMENT CODE, <https://sustainablecitycode.org/> (last visited Feb. 3, 2023).

adaptation efforts, they are not focused on the particular impact of climate change in the community; unlike litigation efforts, they often incentivize or require action on the part of the local population; and unlike proprietary functions, they are outside the realm of core service delivery or functions.”⁶⁸ The point of local regulatory actions is to reduce contributions to climate change at the local level. While this kind of local action is, of course, not sufficient to address global climate change, local contributions can play an incremental but important role where broader climate responses at the state and federal level are lacking. As an example, in 2022, the City of Chicago released an updated Climate Action Plan that includes many initiatives to reduce municipal emissions: improvement of transit networks, diversion of commercial and residential waste, building retrofits, and others.⁶⁹ The City estimates that its efforts will reduce its greenhouse gas emissions by at least 62 percent by 2040.⁷⁰ In a more aggressive approach, in November 2021, the citizens of the City of Ithaca, New York voted to decarbonize the City’s buildings by 2030.⁷¹ The City plans to decarbonize primarily by moving entirely away from natural gas and propane as sources of energy and instead relying on electricity derived from renewable sources.⁷²

That typology of local climate action is not comprehensive but provides examples of some actions that local governments have taken and may continue to take to combat climate change. To be sure, local climate actions cannot and should not be seen as a “substitute for a coordinated national strategy.”⁷³ Many local governments have chosen not to act at all on climate change or have acted in counterproductive ways. For instance, zoning laws in many local jurisdictions contribute to climate change by promoting low-density housing patterns and heavy reliance on automobiles, thereby contributing to high greenhouse gas emissions.⁷⁴ And some local governments that have responded to the

68 Fox, *supra* note 50, at 132.

69 See MAYOR LORI E. LIGHTFOOT, CHICAGO CLIMATE ACTION PLAN (2022), https://www.chicago.gov/content/dam/city/sites/climate-action-plan/documents/CHICAGO_CAP_20220429.pdf.

70 *Id.* at 34.

71 Deepa Shivaram, *To Fight Climate Change, Ithaca Votes to Decarbonize its Buildings by 2030*, NPR (Nov. 6, 2021), <https://www.npr.org/2021/11/06/1052472759/to-fight-climate-change-ithaca-votes-to-decarbonize-its-buildings-by-2030>.

72 *Id.*

73 Maggie Astor, *As Federal Climate-Fighting Tools Are Taken Away, Cities and States Step Up*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/climate/climate-policies-cities-states-local.html>.

74 See, e.g., *State Preemption of Local Zoning Laws as Intersectional Climate Policy*, 135 HARV. L. REV. 1592, 1595, 1598 (2022), <https://harvardlawreview.org/2022/04/>

felt effects of the changing environment in their communities have done so in parochial ways. Building sea walls, for example, is a climate adaptive effort that can have long-term negative consequences for the environment and surrounding areas.⁷⁵ Finally, and perhaps most significantly, local climate responses rely on both adequate authority and financial resources, both of which may be lacking at times.⁷⁶ There are, therefore, many reasons to be clear-eyed about the limitations of local climate action, as well as the importance of and potential for local climate response.

B. Local Public Health Action

Local governments have long been on the forefront of public health action.⁷⁷ The exact parameters of local authority over public health depends on whether local governments within a particular jurisdiction rely on home rule, Dillon's Rule, or the police power for the source of their authority.⁷⁸ For all jurisdictions, local power over public health is often more clearly defined and heightened in times of emergency or

state-preemption-of-local-zoning-laws-as-intersectional-climate-policy/.

75 Rachel K. Gittman et al., *Ecological Consequences of Shoreline Hardening: A Meta-Analysis*, 66 *BIOSCIENCE* 763, 768–771 (2016).

76 See, e.g., Sarah Fox, *What Does it Take for a City to Decarbonize its Buildings?*, STATE & LOC. GOV'T L. BLOG (Nov. 22, 2021), <https://www.sloglaw.org/post/what-does-it-take-for-a-city-to-decarbonize-its-buildings> (“[W]hat does it take for a local government to decarbonize its building supply? Authority, implementation will and resources, and, likely, lots of money.”).

77 *Untapped Potential: Public Health Department Authority to Address the Fallout from the Pandemic, Structural Racism, and Other Public Health Crises*, LOC. SOL. SUPPORT CTR. (Oct. 22, 2020), <https://www.supportdemocracy.org/the-latest/untapped-potential-public-health-department-authority-to-address-the-fallout-from-the-pandemic-structural-racism-and-other-public-health-crises> (“Local public health agencies and officials have long had a critical place in protecting communities. Traditionally, their role has largely encompassed several core functions, such as tracking vital statistics, ensuring food safety and sanitation, overseeing certain laboratory services, and engaging in public health education.”); see also, e.g., James G. Hodge, Jr., *Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law*, 14 *J. CONTEMP. HEALTH L. & POL'Y* 93, 103 (1997) (describing history of local public health boards in the United States dating back to the late 1700s).

78 *Dillon's Rule, Home Rule, and Preemption*, PUB. HEALTH LAW CTR. AT MITCHELL HAMLIN SCH. OF LAW 3–6 (Nov. 2020), <https://publichealthlawcenter.org/sites/default/files/resources/Dillons-Rule-Home-Rule-Preemption.pdf>.

public health crisis.⁷⁹ For example, local governments have been on the front lines of health crises from yellow fever and cholera outbreaks to the more recent opioid epidemic.⁸⁰ They are also generally responsible for public health emergency responses in the case of terrorist attacks or natural disasters.⁸¹ And as in the climate context, local governments have been plaintiffs in the public health context.⁸²

Writing in 2022, the obvious and recent example of widespread exercise of local public health authority is the COVID-19 pandemic. As the pandemic unfolded in 2020, local governments took many measures to protect the health and safety of their residents, including mandating the use of masks,⁸³ providing vaccines against the disease once available, offering creative incentives to get people vaccinated,⁸⁴ imposing social distancing requirements in public spaces,⁸⁵ developing contact tracing

79 See, e.g., Nikki C. Day et al., *Governing Through the “New Normal”: Covid-19 Lessons Learned on Local Government Law, the Constitution, and Balancing Rights in Times of Crises*, 50 STETSON L. REV. 547, 548 (2021).

80 Elizabeth Pérez-Chiqués et al., *What Do Local Governments Need to Address Public Health Crises?*, ROCKEFELLER INST. OF GOV'T (Apr. 16, 2020), <https://rockinst.org/blog/what-do-local-governments-need-to-address-public-health-crises/>.

81 See, e.g., David L. Feinberg, *Hurricane Katrina and the Public Health-Based Argument for Greater Federal Involvement in Disaster Preparedness and Response*, 13 VA. J. SOC. POL'Y & L. 596, 607 (2006) (describing local governments as the “first line of defense” against natural disasters”); Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. L. 253, 257 (2004) (describing local role in responding to the September 11 terrorist attacks and the October 2001 anthrax scare).

82 In response to the ongoing opioid crisis in the United States, a number of local governments have sued the makers of these drugs on a theory that the cost of managing the public health crisis of opioid addiction entitles them to damages. See, e.g., Lance Gable, *Preemption and Privatization in the Opioid Litigation*, 13 NE. U. L. REV. 297, 308 (2021).

83 See, e.g., COVID-19 Joint Information Center, *Chicago Department of Public Health Announces New Indoor Mask Mandate with Continued Increase in New COVID-19 Cases in Chicago*, CITY OF CHI. (Aug. 17, 2021), https://www.chicago.gov/city/en/depts/cdph/provdrs/health_protection_and_response/news/2021/august/CDPH-announces-new-mask-mandate.html.

84 THE U.S. CONF. OF MAYORS, BLOOMBERG PHILANTHROPIES, *MAYORS CHALLENGE TO INCREASE COVID-19 VACCINATIONS 7* (2021), https://bloombergcities.jhu.edu/sites/default/files/2021-02/Vaccine%20Toolkit%20Role%20of%20Mayors_0.pdf.

85 See, e.g., Maura Calsyn et al., *Social Distancing to Fight Coronavirus: A Strategy that is Working and Must Continue*, CTR. FOR AM. PROGRESS (Mar. 25, 2020), <https://www.americanprogress.org/article/social-distancing-fight-coronavirus-strategy-working-must-continue/>.

systems,⁸⁶ and many others.⁸⁷ These actions likely strengthened not only local public health but also the overall health of surrounding communities and the state at large.

Like local work on climate change, local public health action has the potential to respond to problems on the ground unique to the community, as well as to fill in gaps in policy responses at the state and federal levels. Both roles can be seen in local responses to COVID-19, as well as in, for instance, the local role in addressing nutrition policy, paid leave, e-cigarettes and tobacco, minimum wage laws, and other health-related issues.⁸⁸ Additionally, as with local action on climate change, local ability to respond to public health problems does not mean that governments will do so in uniformly desirable ways. For instance, while many local governments worked to implement the kinds of COVID-19 prevention measures described above, some actors at the local level did not do so or even actively opposed state public health interventions.⁸⁹ Acknowledging the role that local governments can and do play in public health does not guarantee any particular use of those powers. Beyond that, without adequate funding, local public health authorities are hamstrung in what they can accomplish on any issue.⁹⁰ For better and for worse, however, local governments are an important actor for public health in the United States.⁹¹

C. *Local Public Health Actions in Response to Climate Change*

Climate change is a crisis for both the environment and for

86 See, e.g., Mo. Dep't. of Health and Senior Servs., *Local Government COVID-19 Contact Tracing Guidance*, <https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/pdf/contact-tracing-guidance-local-governments.pdf> (last visited Sept. 30, 2022).

87 See *Local Government Responses to the Coronavirus (COVID-19) Pandemic, 2020*, *supra* note 19.

88 PAUL DILLER & LORI FRESINA, PUBLIC HEALTH, LOCAL POWER & POLITICS REVIEW 7 (2020), <https://acrobat.adobe.com/link/review?uri=urn%3Aaadid%3Aascids%3AUS%3A09faf178-f59e-43f4-b5e5-f2fa60e3c372#pageNum=7>.

89 See, e.g., Melissa Chan, 'It's Unenforceable.' *The Problem with Trying to Police COVID-19 Restrictions*, TIME (Dec. 21, 2020), <https://time.com/5921863/police-enforce-covid-restrictions/> (describing local police opposition to enforcement of state public health mandates).

90 See, e.g., Noam N. Levey, *It's Not Just Coronavirus: America Repeatedly Fails at Public Health*, L.A. TIMES (July 2, 2020), <https://www.latimes.com/politics/story/2020-07-02/not-just-coronavirus-america-fails-public-health>.

91 See, e.g., Jay Varma, *How Public Health Failed America*, ATLANTIC (May 15, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/how-public-health-failed-america/629869/>.

public health. Environmental change on the scale expected in any realistic climate scenario carries with it a variety of negative health consequences. For example, air pollution is expected to increase and worsen with climate change. “Changes in climate, including temperature, humidity, precipitation, and other meteorological factors, can change concentrations of [particulate matter] and ozone, broadening the distribution of human exposures to these pollutants.”⁹² More warm days and climate-impacted natural phenomena, like wildfires, are also expected to increase the number of days with poor air quality.⁹³ The exacerbation of air pollution is expected to increase premature deaths among older populations and increase instances of asthma among children.⁹⁴ Higher temperatures associated with climate change are also expected to negatively impact mortality rates in some parts of the country.⁹⁵ Flooding will likely cause or exacerbate mold in buildings, contributing to worsened indoor air quality;⁹⁶ such flooding may also contribute to contaminated water and corresponding gastrointestinal infections.⁹⁷ The variations in temperature and rainfall associated with climate change are increasing the range of disease-carrying ticks, and correspondingly, the instances of Lyme disease.⁹⁸ Beyond those physical impacts, the mental toll of climate change-triggered disruptions and climate anxiety⁹⁹ is widespread. These and many other health impacts will occur alongside environmental harms, property destruction, and other impacts of climate change.

These impacts and others will be disproportionately experienced based on both geography and social vulnerability. Climate change has highly localized impacts, with great regional variation.¹⁰⁰ Beyond that, a

92 *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, *supra* note 6, at 20.

93 *Id.*

94 *Id.* at 21.

95 *Id.* at 34.

96 *Dampness and Mold from Severe Storms and Sea Level Rise*, INDOOR AIR QUALITY SCI. FINDINGS RES. BANK, <https://iaqscience.lbl.gov/dampness-and-mold-severe-storms-and-sea-level-rise> (last visited Nov. 3, 2022).

97 *Understanding the Connections Between Climate Change and Human Health* fig. 2, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/climate-indicators/understanding-connections-between-climate-change-and-human-health> (last updated Nov. 11, 2022).

98 *Id.*

99 *See, e.g.*, Tosin Thompson, *Young People's Climate Anxiety Revealed in Landmark Survey*, NATURE (Sept. 22, 2021), <https://www.nature.com/articles/d41586-021-02582-8>.

100 *Climate Change: Regional Impacts*, UCAR CTR. FOR SCI. EDUC., <https://scied.ucar>.

recent study by the Environmental Protection Agency (EPA) highlights that even within regions, many climate impacts will be disproportionately felt by historically marginalized groups.¹⁰¹ For instance:

In nearly all regions of the U.S., children in low income households are more likely than those in higher income households to currently live in areas with the highest projected increases in childhood asthma diagnoses due to climate-driven changes in [particulate matter]. In the Southern Great Plains, minority children are 77% more likely than non-minority children to currently live in high-impact areas.¹⁰²

The unequal distribution of climate impacts based on geography and demographics makes clear that while climate change is a global problem, responding to the health impacts of climate change is a highly local issue. In each state, the citizens of different localities will have varying needs when it comes to responding to climate change. Local flexibility will be key in responding to health needs brought on by climate change. Flexibility alone, of course, cannot guarantee that local governments will meet the needs of those most negatively impacted by climate change—uneven distribution of local resources has been well-documented with regard to COVID-19 and other issues.¹⁰³ But guaranteeing local governments the capacity to try to address these imbalances is still an important element of an overall strategy to address the disproportionate impacts of climate change.¹⁰⁴

Because of this, the aforementioned local actions aimed at mitigation of or adaptation to a changing climate are also, in key ways, public health actions. The differing impacts of climate change mean that new and varied health measures will be required at the local level. Depending on where they are located, local governments will have to do all or some of the following: grapple with increased health needs and corresponding strains on existing health resources; navigate access to cooling centers in areas likely to experience extreme heat; implement measures to improve air quality; respond to flooding; ensure access to

edu/learning-zone/climate-change-impacts/regional (last visited Jan. 28, 2023).

101 *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, *supra* note 6, at 59 (studying climate impacts on four socially vulnerable groups: low income, minority, no high school diploma, and over 65).

102 *Id.* at 29.

103 *See, e.g., Reducing the Disproportionate Impact of COVID-19 Among Communities of Color*, NAT'L GOVERNORS ASS'N (June 25, 2020), <https://www.nga.org/publications/impact-covid-19-communities-of-color/>.

104 Pérez-Chiqués, *supra* note 80 (describing local public health crises as crises of capacity).

water in times of increased drought; put in place water conservation measures; and many others.¹⁰⁵ Climate change will also mean population influxes for some cities and exoduses from others.¹⁰⁶ Such population changes will necessarily impact local resources in different ways. For example, local governments may need to increase public health services for a growing number of people or respond to extreme weather events with a declining budget.¹⁰⁷ For these reasons, climate change also means a change in public health responses and priorities.

II. STATE PREEMPTION OF LOCAL ACTION

The above discussion supports a high degree of flexibility when it comes to local authority over both climate and public health. Particularly where the federal and state governments fail to act on an issue, local governments can step in to protect their communities.¹⁰⁸ Given the unique ways in which the climate crisis will affect local governments, the kinds of responses that will work across the country vary widely. What's more, local governments have long served an innovation function within the federal system in the United States, experimenting with new ways of implementing policy responses.¹⁰⁹ If states can function as laboratories of democracy,¹¹⁰ then local governments can provide an even larger, and

105 See, e.g., *Climate Change and Health*, CLIMATE CENT. (Oct. 20, 2021), <https://www.climatecentral.org/climate-matters/climate-change-and-health> (describing range of possible local health impacts of climate change).

106 See, e.g., Erol Yayboke et al., *A New Framework for U.S. Leadership on Climate Migration*, CTR. FOR STRATEGIC & INT'L STUD., (Oct. 2020), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/201022_Yayboke_ClimateMigration_Brief_0.pdf.

107 See, e.g., Sarah Fox, *The 4th City*, ENV'T L. PROF BLOG (Oct. 12, 2021), https://lawprofessors.typepad.com/environmental_law/2021/10/the-4-city.html.

108 Fox, *supra* note 17, at 151 (describing local gap-filling function in the context of environmental law).

109 See Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 322, 362 ("Perhaps no feature of subfederal governance is lauded more frequently than its association with innovation. Local regulation often is considered more innovative than state regulation . . . whether because the sheer number of local governments increases the chances of a good idea emerging or because it is relatively easier to get a local law enacted and tested out in practice."); see also Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111, 1149 (2015) (likening "jurisdictional plurality to 'ecological niches in a forest . . . [j]ust as selection pressures . . . allow diversity to survive, the myriad horizontal and vertical interconnections between jurisdictions allow innovations to spread").

110 See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932).

more tailored environment for experimentation. As Professor Heather Gerken has noted, “It is hard to jumpstart a national movement. That is why virtually every national movement began as a local one.”¹¹¹ Local flexibility to enact policy solutions “allows policymakers to respond as needed to changing conditions, and to learn from other jurisdictions.”¹¹² In a time of rapid change, experimentation with a variety of policy responses may be helpful in finding successful climate and public health measures.

Nonetheless, while local governments are confronting unprecedented environmental and public health crises, many of them are losing authority at a rapid clip.¹¹³ As discussed, the home rule framework that exists in most states provides a great deal of initiative authority. Local governments operating in those states can act on many different issues, subject to conflicting state law. Historically, local governments had to worry primarily about their actions conflicting with state law already in existence and consequently being disallowed pursuant to implied preemption doctrine.¹¹⁴ Over the past decade, however, it has become commonplace in many parts of the United States for the state legislature to remove local authority in an express fashion, whether or not the state has acted on the issue.¹¹⁵ This style of preemption tends to be partisan, deregulatory in nature, and often punitive toward local governments.¹¹⁶ As a result of these preemption trends, local governments in many states

111 Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1713 (2017).

112 Fox, *supra* note 17, at 185.

113 See, e.g. KIM HADDOW, 2021: A SESSION LIKE NO OTHER, LOC. SOLS. SUPPORT CTR. 4, <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/61008bd090218d765c305c9a/1627425746934/ASessionLikeNoOther%E2%80%93932021-LocalSolutionsSupportCenter.pdf> (detailing the “torrent of legislation blocking, removing, or penalizing local authority from being introduced and passed primarily in Republican-controlled states,” and noting that the Local Solutions Support Center (LSSC) had “tracked over 400 such state preemption bills [in the 2021 legislative session], more than twice the number of bills LSSC tracked in 2019, the last full state legislative session”).

114 See, e.g., Diller, *supra* note 34, at 1140 (2007) (explaining implied preemption doctrine as applied to state and local conflicts).

115 See, e.g., Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995, 1997-98 (2018) (explaining dynamics of new forms of preemption).

116 See, e.g., *id.*; see generally Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1163 (2018) (providing comprehensive overview of weakening of city authority via preemption); RICHARD BRIFFAULT ET AL., *THE NEW PREEMPTION READER: LEGISLATION, CASES, AND COMMENTARY ON THE LEADING CHALLENGE IN TODAY’S STATE AND LOCAL GOVERNMENT LAW 11–14* (2019); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State and Local Relationship?*, 106 GEO. L.J. 1469, 1473–74 (2018) (providing comprehensive look at new, punitive forms of preemption).

no longer have the ability to act on a panoply of issues.¹¹⁷

Instead of relying on implied preemption doctrines, state legislators using these new forms of preemption expressly prohibit specific local actions. The goal of such measures is both to curtail or modify specific local responses and to discourage local governments from exercising policy authority altogether.¹¹⁸ As noted, they tend to take the form of conservative state politicians limiting specific progressive actions at the local level. For example, in the 2021 legislative session, state lawmakers engaged in actions such as banning “the discussion, training, and/or orientation that the United States is inherently racist, as well as any discussions about conscious and unconscious bias, privilege, discrimination, and oppression”; proposing legislation “that would ban transgender athletes from competing in school sports that match their gender identity”; and “enacting local budget control bills to prohibit, hamper, or punish localities that attempt to reallocate and reduce police budgets.”¹¹⁹ These are just some examples from more than 400 state preemption bills that were passed in 2021, more than double the number of bills from 2019.¹²⁰ With some exceptions, such moves by the state are difficult to combat.¹²¹ In consequence, local authority taking on a variety of policy challenges has become severely circumscribed.

These new forms of preemption can be seen frequently in both the climate and the public health context. As described above, there are

117 See *The Threat of State Preemption*, LOC. SOLS. SUPPORT CTR., <https://www.supportdemocracy.org/preemption> (last visited Sept. 30, 2022) (cataloguing loss of local authority, which includes: “25 states preempt local minimum wage laws . . . [;] 23 states ban local paid sick days laws . . . [;] 44 states ban local regulation of ride sharing networks[;] 43 states limit local authority to regulate guns or ammunition[;] 20 states block or ban municipal broadband networks[;] 23 states have banned local control over 5G technology[;] 15 states ban local plastic bag bans . . . [;] 31 states bar local rent control[;] at least 11 states preempt local sanctuary policies . . . [;] at least ten states preempt local regulation of e-cigarettes . . . [;] at least nine states preempt local fair, predictable scheduling laws[;] five states have preempted local fair hiring, ‘Ban the Box’ laws . . . [;] four states now ban soda taxes . . .”).

118 Scharff, *supra* note 116, at 1473 (explaining that “hyper preemption” seeks “not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place”).

119 See Haddow, *supra* note 113, at 4, 8, 14, 20 (detailing state legislative efforts to preempt and otherwise restrain local authority and noting that “the 2021 session was characterized by a sharp turn to the right”).

120 *Id.*

121 See, e.g., Briffault, *supra* note 115, at 2008 (noting that “[e]xisting legal doctrines provide local governments with few protections against state preemption”).

different categories of local action on climate—land use, proprietary action, litigation, and mitigation-based regulatory responses. Of those, the last is most vulnerable to preemption by the state. Climate mitigation actions—such as restrictions or bans on natural gas hookups in buildings—have been the target of a wave of recent preemptive action in many states.¹²² At least 20 states have passed state prohibitions on local limits on natural gas, with several more states considering similar actions.¹²³ Similar preemption of climate actions have occurred with respect to local fracking restrictions, bans on single use plastics, and other environmental measures.¹²⁴

While the other categories of local climate action noted above—exercise of proprietary functions, litigation, and land use—have historically been less subject to preemption, there are signs that some local governments may face removal of their authority with regard to those kinds of actions as well. For instance, to date, local proprietary activity has been rarely subject to preemption.¹²⁵ But the most recent legislative session in Virginia saw a bill introduced that would “prohibit any ‘public entity that provides natural gas utility service’ from discontinuing service ‘generally or to any commercial or industrial customers’ without providing three years of notice, undertaking certain negotiations and in some circumstances offering the system up for auction to the highest bidder.”¹²⁶ If similar restrictions begin to take hold in other states, local ability to exercise control over their own utilities to accomplish their climate goals will be considerably weakened.

While local litigation over climate has not yet been preempted,

122 See Ella Nilsen, *Cities Tried to Cut Natural Gas from New Homes. The GOP and Gas Lobby Preemptively Quashed Their Effort*, CNN (Feb. 17, 2022), <https://www.cnn.com/2022/02/17/politics/natural-gas-ban-preemptive-laws-gop-climate/index.html>.

123 *Id.*

124 See Tyler Wells Lynch, *All Politics Is Not Local: Conservative State Legislatures Are Acting Aggressively to Preempt Local Ordinances*, SIERRA (Mar. 10, 2020), <https://www.sierraclub.org/sierra/all-politics-not-local> (outlining fight over preemption of fracking in Denton, Texas); Samantha Maldonado et al., *Plastic Bags Have Lobbyists. They’re Winning*, POLITICO (Jan. 20, 2020), <https://www.politico.com/news/2020/01/20/plastic-bags-have-lobbyists-winning-100587> (detailing efforts to preempt local bans on plastics).

125 Fox, *supra* note 50, at 130–31 (2021) (citing Alexandra B. Klass & Rebecca Wilton, *Local Power*, 75 VAND. L. REV. 93 (2022), for the proposition that, as of the time of writing, no preemption of local proprietary functions had occurred).

126 See Sarah Vogel song, *Proposal to Forbid Local Gas Bans Dropped in Senate*, VA. MERCURY (Mar. 2, 2022), <https://www.virginiamercury.com/2022/03/02/proposal-to-forbid-local-gas-bans-dropped-in-senate/>.

local public health litigation has seen some attempted preemption by the state.¹²⁷ In at least two states—Tennessee and Arkansas—the state has intervened in lawsuits brought by local governments to argue that the local government did not have authority to bring a lawsuit on behalf of the state.¹²⁸ Given the aforementioned willingness of many states to impose preemption across many categories of local action, it may be unwise to assume that state legislatures will never attempt to restrict local participation in climate lawsuits. Finally, land use regulation has been historically left to local control.¹²⁹ However, a Florida law passed in 2021 requires every local government to “include in its comprehensive plan a property rights element to ensure that private property rights are considered in local decision[-]making.”¹³⁰ The law goes on to list several rights to be considered.¹³¹ None of the rights explicitly limit local authority to enact climate-responsive measures, and the law specifically states that private rights to “use, maintain, develop, and improve” property are subject to state law and local ordinances.¹³² However, the intrusion upon local land use functions and the focus on private property interests may signal greater involvement by Florida and other states in local land use decisions.

Preemption occurs often in the public health realm as well.¹³³ For decades, states have preempted local authority over tobacco products,¹³⁴ nutrition,¹³⁵ paid sick leave,¹³⁶ and other areas. This trend was heightened during the COVID-19 pandemic, when many power disputes occurred between states and local governments over mask mandates, school closures, vaccine requirements, and other aspects of

127 Gable, *supra* note 82, at 329–31.

128 *Id.*

129 John R. Nolon, *Introduction: Considering the Trend Toward Local Environmental Law*, 20 PACE ENV'T L. REV. 3, 5 (2002) (“Under state zoning and planning enabling acts, local governments have been given a key, if not the principal, role in land use regulation.”).

130 FLA. STAT. § 163.3177 (2021).

131 *Id.*

132 *Id.*

133 See, e.g., Courtnee Melton-Fant, et al., *Addressing Health Equity in the New Preemption Era*, HEALTH AFFS. FOREFRONT (Dec. 21, 2021), <https://www.healthaffairs.org/doi/10.1377/forefront.20211216.309941/full/>.

134 *Dillon’s Rule, Home Rule, and Preemption*, *supra* note 78.

135 Rob Waters, *Soda and Fast Food Lobbyists Push State Preemption Laws to Prevent Local Regulation*, FORBES (June 21, 2017), <https://www.forbes.com/sites/robwaters/2017/06/21/soda-and-fast-food-lobbyists-push-state-preemption-laws-to-prevent-local-regulation/?sh=71faa39c745d>.

136 Dilini Lankachandra, *Enacting Local Workplace Regulations in an Era of Preemption*, 122 W. VA. L. REV. 941, 944 (2020).

the pandemic response.¹³⁷ According to a recent survey:

[Twenty-four] states have or will consider bills that limit public health powers, some at both the state and local levels . . . These bills . . . seek to limit the emergency powers of the executive branch, strip public health officials of power, and defund local health departments or even dissolve them.¹³⁸

In all of these ways, express forms of preemption have become the new norm in many state and local relationships. Preemptive actions by the state halt local action on specific issues and can also be expected to chill the kinds of local innovation needed to respond to the climate crisis.¹³⁹ These forms of preemption also indicate that when discussing what local governments can do about the myriad public health needs created by a changing climate, the question of local authority is never far from the surface. And given the varied grants of local authority detailed above, the answer to that question varies widely, depending on the politics of the state and the realities of local authority within that state.

III. LOCALIZING THE CLIMATE, HEALTH, AND JUSTICE CONVERSATION

Climate change will introduce a new set of variables into local public health needs and exacerbate those already in place. The physical impacts from climate change will vary widely across the country. Local public health needs due to climate change will continue to diverge based on two key variables of the population: physical location and

137 See, e.g., Jenny Rough & Andy Markowitz, *List of Coronavirus-Related Restrictions in Every State*, AARP, <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html> (Sept. 21, 2022) (detailing each state's vaccine, testing, and mask requirements—including many restrictions on local governments).

138 KIM HADDOW, UNDER THE COVER OF COVID: A SURVEY OF 2020-2021 STATE PREEMPTION TRENDS, LOC. SOLS. SUPPORT CTR. 14 (2021), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/604faee2e641222b084316ff/1615834855353/LSSC-UndertheCoverofCovid-March2021.pdf>.

139 Briffault, *supra* note 115, at 1997 (“[P]reemption measures frequently displace local action without replacing it with substantive state requirements.”); Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333, 381 (2017) (“A vision of precautionary federalism should motivate both legislators and courts to narrow the scope of preemption at the federal and state levels to permit experimentation and learning at this time of uncertainty.”); Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CAL. L. REV. 305, 349 (2020) (“In thinking about how the scope for municipal innovation could be enhanced under the existing federal and state legal framework, it is important to keep in view . . . the thicket of legal constraints on cities . . .”).

socioeconomic characteristics. And, interacting with all those variables, each local government will have to navigate these climate and health needs within the particular confines of its own authority.

All those simultaneous yet independent factors mean that when talking about local public health responses to climate change, sweeping generalizations about what local governments should or should not do, or could or could not do, are not particularly useful. Instead, conversations about local responses to climate change and public health should be localized by “explicitly acknowledg[ing] and account[ing] for local actors, and for the vulnerabilities in authority that they may confront.”¹⁴⁰ The localized standpoint is not *localist*—it does not subscribe to or promote any particular allocation of power between the levels of government. But it frames the conversation about local authority in a way that is more reflective of reality. That framing is a necessary step in arriving at an accurate understanding of the ways that local governments will—and will not—be able to take action on the public health needs that may arise from climate change.

A. *Varied Climate and Health Impacts*

Environmental impacts from climate change in the United States are and will continue to be widespread¹⁴¹ but not experienced equally.¹⁴² Just as the United States currently experiences different weather patterns in different parts of the country, climate change will impact regions in non-uniform ways. For instance, some areas will face massive flooding, while others will be subject to prolonged drought; in some areas warmer temperatures will degrade air quality, while in other areas, wildfire risk exacerbated by excessive heat may be the biggest threat to person and property; sea level rise will affect coastal regions and changes in

140 See, e.g., Fox, *supra* note 17, at 178 (explaining concept of localizing in the context of local government analyses).

141 CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT, U.S. GLOB. CHANGE RSCH. PROGRAM 1 (2014), <https://www.nrc.gov/docs/ML1412/ML14129A233.pdf> (“Corn producers in Iowa, oyster growers in Washington State, and maple syrup producers in Vermont are all observing climate-related changes that are outside of recent experience. So, too, are coastal planners in Florida, water managers in the arid Southwest, city dwellers from Phoenix to New York, and Native Peoples on tribal lands from Louisiana to Alaska.”).

142 See, e.g., *Climate Change Impacts by Region*, U.S. ENV’T PROT. AGENCY (Jan. 19, 2017), https://19january2017snapshot.epa.gov/climate-impacts/climate-change-impacts-region_.html (highlighting the specific climate impacts expected for eight different parts of the United States).

growing seasons will affect agricultural regions.¹⁴³ These effects vary by population density, community type (e.g., rural, suburban, urban), and geographic location.¹⁴⁴

Unsurprisingly, as with other environmental impacts and their associated public health consequences, these impacts are also not expected to be evenly distributed across the population. Systemic legacies of oppression, discrimination, siting of polluting industries, and the negative health impacts of all of these and other interrelated factors mean that communities of color will be disproportionately harmed by climate impacts.¹⁴⁵ The United States Department of Health and Human Services (HHS) has developed a list of factors that “can affect someone’s ability to prepare for, respond to, and cope with the impacts of climate change on health” that include:

1. living in areas particularly vulnerable to climate change (like communities along the coast or extreme weather);
2. coping with higher levels of existing health risks when compared to other groups;
3. living in low-income communities with limited access to healthcare services;
4. limited access to quality healthcare;
5. limited availability of information and resources in a person’s native language; [and]
6. limited ability to relocate or rebuild after a disaster.¹⁴⁶

Those falling into one or more of those categories may be particularly vulnerable to climate impacts.¹⁴⁷ These factors highlight the core

143 See generally U.S. GLOB. CHANGE RSCH. PROGRAM, *supra* note 141.

144 See, e.g., *Climate Change Impacts and Emerging Population Trends: A Recipe for Disaster?*, POPULATION REFERENCE BUREAU (Oct. 1, 2001), <https://www.prb.org/resources/climate-change-impacts-emerging-population-trends-disaster/>; *Climate Change: Regional Impacts*, *supra* note 100 (explaining geographic differences in climate impacts).

145 See, e.g., Beth Gardiner, *Unequal Impact: The Deep Links Between Racism and Climate Change*, YALE ENV’T 360 (June 9, 2020), <https://e360.yale.edu/features/unequal-impact-the-deep-links-between-inequality-and-climate-change>.

146 *Climate Change and Health Equity*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/climate-change-health-equity-environmental-justice/climate-change-health-equity/index.html> (last visited Sept. 27, 2022).

147 See, e.g., Clifford J. Villa, *Letting Go of 2° C, Letting Go of Race?: What Does Climate Justice Mean at 4° C?*, ENV’T L. PROF BLOG (Oct. 21, 2021), https://lawprofessors.typepad.com/environmental_law/2021/10/letting-go-og-2c-letting-go-of-2c-letting-go-of-race-what-does-climate-justice-mean-at-4c.html (introducing idea of vulnerability theory to think about which populations are likely to be most impacted by climate change).

reality that “impacts of climate change are largely determined by the population’s vulnerability and resilience,” and are therefore “more likely to be felt disproportionately by those who suffer socioeconomic inequalities.”¹⁴⁸

Given the history of racial violence and discrimination in the United States, “people of color are found to be particularly more vulnerable to heatwaves, extreme weather events, environmental degradation, and subsequent labor market dislocations.”¹⁴⁹ Thus, regional variability in climate impacts and variability in impacts from the associated public health risks create a highly fragmented set of experiences of climate change across the United States. For local governments, then, a key aspect of responding to climate change is understanding the particular needs of their jurisdiction and then acting upon those needs.

B. *Varied Local Authority*

Further complicating the story is the reality described above: not every local government in every state will have the ability to take similar actions with climate change and public health. Because there is no federally recognized right to local self-government,¹⁵⁰ the difference in abilities between communities in states where many climate and health actions are preempted (e.g., Texas)¹⁵¹ versus communities where such preemption is not widespread (e.g., California)¹⁵² is marked. And the amount of policy action among those states is varied as well. Indeed, “it is local governments in states that are disinclined to take action on climate change that are most vulnerable to preemption of their climate efforts,” leading to “certain regions where very little climate action is taking place at any level of government.”¹⁵³ This patchwork of possibility for local climate health equity is the current reality in the United States.

148 Aneesh Patnaik et al., *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020), <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change>.

149 *Id.*

150 *See* *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907).

151 *See* Joan Fitzgerald, *Preemption of Green Cities in Red States*, PLANETIZEN (Sept. 7, 2021), <https://www.planetizen.com/blogs/114584-preemption-green-cities-red-states> (noting that Texas has preempted cities from banning or limiting fossil fuel hookups and from banning fracking).

152 *See, e.g.*, Nilsen, *supra* note 122 (noting the city of Berkeley’s success in banning natural gas hookups in new buildings).

153 Fox, *supra* note 50, at 138.

For that reason, effective advocacy surrounding health equity should be aided by the development of a deep understanding of local authority in any particular area, including the particulars of grants of home rule authority, police powers, and political status in each state.

For all the reasons outlined above, and as the COVID-19 pandemic demonstrated, state-level preemption means that local governments may be unable to respond to climate change, and the public health needs it creates, in the ways they would like or need to. That lack of authority is important to acknowledge. For while it may be tempting to place local actors at the center of calls for responses to the climate crisis and corresponding public health needs, that placement is hollow in jurisdictions where local governments either currently lack needed authority or have reason to think that their authority could be taken away by the state. For those jurisdictions, a continued focus on the need for local action may offer cover to crippling action or inaction at the state or federal level. Thus, public health responses to climate change should be expected to differ based on the varying degrees of authority and functionality that local governments have and on the willingness of state and federal actors to play a role in climate response.

C. Climate Preemption and Health Justice

Environmental impacts from a changing climate will be coupled with unevenly distributed public health impacts. Local governments may be able to “minimize[e] health disparities and ensur[e] equitable distribution of health outcomes,”¹⁵⁴ whether in the climate context or not. As the level of government nearest to those experiencing climate impacts, local governments can prioritize getting needed services to their most under-resourced populations. Seen in that way, local power is an important piece of environmental and public health justice.¹⁵⁵ But the varied nature of local authority’s ability to respond to disparities in health needs also means that access to appropriate health care and resources will depend in large part on jurisdiction. For those located in jurisdictions with either strong local authority or that benefit from a strong state or federal response, focusing on local authority to act in response to climate change makes sense. For those not located in such a jurisdiction, focusing on local authority as the primary form of needed action hides the reality that the federalist system has been used to make

¹⁵⁴ *Dillon’s Rule, Home Rule, and Preemption*, *supra* note 78.

¹⁵⁵ *See, e.g., Fox*, *supra* note 17, at 187.

it impossible for local governments to respond to these disparities.

In some states, populations most vulnerable to climate change will be located in jurisdictions that lack authority or are most reluctant to take needed actions.¹⁵⁶ And there is reason to believe that “state willingness to preempt tends to limit rapid-response policymaking at both the local and state level.”¹⁵⁷ Thus, preemption seems likely to result in little or no action on climate and health for many parts of the country that may need it most. When viewed through that lens, the struggle for health equity has much in common with many other issues over which both local authority and state willingness to address them are greatly varied. While these variations have always been a hallmark of the federalist system in the United States, that system has also long relied on the availability of gap-filling by one actor or another.¹⁵⁸ Much new scholarship on federalism tends to focus on the importance of that kind of dynamism in ways that are “both descriptive and normative,” with the general elements of theories of dynamic federalism including “plurality, dialogue, and redundancy.”¹⁵⁹ These theories make clear the importance of interplay between and among the federal and state levels of government—and, perhaps, local governments as well.¹⁶⁰

State efforts to eliminate that interplay through preemption, removing the ability of a local government to act without any

156 See, e.g., Reid Wilson, *Climate Change Likely to Hit Red States Hardest*, HILL (Jan. 29, 2019), <https://thehill.com/policy/energy-environment/427479-climate-change-likely-to-hit-red-states-hardest/>; see also 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*, ECON. POL’Y INST. (Sept. 30, 2020), <https://www.epi.org/publication/preemption-in-the-south/> (explaining that “Southern states are more likely than states in other regions to use preemption to stop local governments” from taking a variety of actions).

157 MARK TRESKON & BENJAMIN DOCTER, PREEMPTION AND ITS IMPACT ON POLICY RESPONSES TO COVID-19: LOCAL AUTONOMY DURING THE PANDEMIC, URB. INST. 1 (Sept. 2020), <https://www.urban.org/sites/default/files/publication/102879/preemption-and-its-impact-on-policy-responses-to-covid-19.pdf>.

158 See Fox, *supra* note 17, at 137 (describing gap-filling in context of environmental law).

159 *Id.* at 160–61; see also Gerken, *supra* note III, at 1700, 1707; R. A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 95 (2009); DANIEL J. ELAZAR, *Cooperative Federalism*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 65, 77 (Daphne A. Kenyon & John Kincaid eds., 1991) (“Any proper theory of cooperative federalism must have a dynamic dimension; in other words, it must be able to track the sources of change in the system.”).

160 See, e.g., Fox, *supra* note 17, at 165–66 (offering a theory for incorporating local governments into the federalism conversation).

corresponding action by the state to fill the policy space, constitute an attack on the functionality of that federal system. In such places, public health advocacy in a climate-changed world may need to include not only substantive support for the relevant health needs but also a broader focus on strengthening home rule for local governments. Coalitions of actors working on a broad spectrum of issues have formed to advocate for changes to home rule grants of authority.¹⁶¹ While it may be an uphill battle in states that do not wish to see local governments exercising greater authority, that kind of advocacy is sorely needed to advance health equity goals.

Depending on the federal administration that is in office, climate health equity advocates may also be able to keep the federal government in the mix of possible allies. The federal government may have an important role to play in the face of state intransigence. The federal government's ability to support local climate and health actions over the objections of the state has not yet been fully decided.¹⁶² There is some case law that might leave an opening for federal statutory and regulatory support of local governments even in the face of state preemption action.¹⁶³ Given the current make-up of the Supreme Court and its focus on shrinking federal power,¹⁶⁴ it seems questionable, at best, whether a case testing these theories would result in a win for local governments at this time.

Instead, climate health advocates might be wise to focus on the more modest yet important question of how to get important federal funding support. It is generally accepted—though again, not fully tested—that the federal government can attach conditions to the funds that it disperses, and that those conditions will be enforced even in the face of state objection.¹⁶⁵ Thus, federal funding may provide an important source of local empowerment. The Biden Administration has already taken certain steps to channel federal aid to climate health equity efforts. For instance, soon after taking office, President Biden signed Executive Order 14,008, which, among other things, established the Administration's Justice40 Initiative.¹⁶⁶ The Justice40 Initiative “sets

161 See, e.g., Melton-Fant, *supra* note 133.

162 See Sarah J. Fox, *Why Localizing Climate Federalism Matters (Even) During a Biden Administration*, 99 TEX. L. REV. ONLINE 122, 137–38 (2021).

163 Fox, *supra* note 50, at 137 (2021) (summarizing the state of the law).

164 See, e.g., Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative>.

165 Cf. *Lawrence Cty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269–70 (1985).

166 Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7631 (Feb. 1, 2021), <https://www>.

a goal for disadvantaged communities most impacted by climate change and pollution to receive at least 40 percent of overall benefits from federal investments in climate and clean energy.”¹⁶⁷ In July 2021, the Biden Administration published its Interim Implementation Guidance¹⁶⁸ regarding Justice40. While the factors for implementing Justice40 are not entirely straightforward,¹⁶⁹ the Initiative has the potential to provide an important mechanism for funneling federal climate money to communities that need it most. And, as noted, because it comes in the form of federal money, it also carries with it the potential to provide assistance, even to communities that might otherwise have their climate health work stymied by state preemption.

Moreover, in the same week that Justice40 was announced, President Biden signed another Executive Order creating the Office of Climate Change and Health Equity (OCCHE) within the United States Department of Health and Human Services.¹⁷⁰ The OCCHE creates a new focus on climate health within HHS, with an explicit mission to “protect the health of people throughout the US in the face of climate change, especially those experiencing a higher share of exposures and impacts.”¹⁷¹ In particular, OCCHE resources identify communities of color, older adults, children, and low income communities “among the most exposed, most sensitive, and [having] the least individual and community resources to prepare for and respond to health threats.”¹⁷² The HHS Office of Environmental Justice was created at the same time.¹⁷³

whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/.

167 Alina Gonzalez, *How Big of a Deal is Biden’s Justice40 Initiative?*, CTR. FOR PROGRESSIVE REFORM (Aug. 9, 2021), <https://progressivereform.org/cpr-blog/biden-justice40-initiative-big-deal/>.

168 Memorandum for the Heads of Departments and Agencies from The Exec. Office of the President, Office of Mgmt. and Budget (July 20, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf>.

169 See Gonzalez, *supra* note 167.

170 Press Release, U.S. Dep’t of Health and Hum. Servs., Biden-Harris Administration Establishes HHS Office of Environmental Justice (May 31, 2022), <https://www.hhs.gov/about/news/2022/05/31/biden-harris-administration-establishes-hhs-office-of-environmental-justice.html>

171 U.S. DEP’T OF HEALTH AND HUM. SERVS., *About the Office of Climate Change and Health Equity (OCCHE)*, OFFICE OF THE ASSISTANT SEC’Y FOR HEALTH, <https://www.hhs.gov/ash/ocche/about/index.html>.

172 See *Fourth National Climate Assessment, Chapter 14: Human Health*, U.S. GLOB. CHANGE RSCH. PROGRAM, <https://nca2018.globalchange.gov/chapter/14/> (last updated Mar. 2021).

173 U.S. DEP’T OF HEALTH AND HUM. SERVS., *The Office of Environmental Justice*, OFFICE OF THE ASSISTANT SEC’Y FOR HEALTH, <https://www.hhs.gov/ash/oej/index.html>.

Together, these two new HHS Offices suggest a greater federal focus on health equity in the face of climate change. They are both very new, and it remains to be seen how they will implement their mission and how courts will respond to any challenges to the ability of federal agencies to empower local action. But having a dedicated federal focus on climate health equity may be an important step towards ensuring that federal responses acknowledge the public health impacts of climate change and the uneven distribution of those impacts. And, at the very least, it may offer an important additional source of pressure on states that seek to quash climate action at the local level.

CONCLUSION

Neither targeted advocacy nor federal funding offers a total solution to the problem of unequal distribution of climate effects and corresponding health impacts. What this discussion aims to do is not solve or simplify that problem. Instead, it aims to point out another level of complication in addressing climate health impacts and working toward equity in the face of those impacts. The varied authorities that local governments have to address climate health issues—and the varied appetites that state governments have either for engaging with that question or for allowing local governments within their borders to address it—mean that climate change looks radically different in terms of physical effects, felt impacts, and political power depending on where in the country a person is located. Acknowledging the reality of those disparate impacts, and of the likelihood of additional attacks on local ability to address them, is a necessary part of any climate health response.