

Legal Analysis of Opportunities to Address Obesity and Protect Public Health

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I. Introduction

Obesity, declared an epidemic by the Surgeon General of the United States,³ is associated with increased risk of type 2 diabetes, hypertension, coronary heart disease, stroke, certain cancers, and joint problems.⁴ This epidemic is so serious that children today may be the first generation, since data began being collected in 1900, to see a reversal in life expectancy resulting in shorter life spans than their parents.⁵

Public health advocates and agencies face considerable challenges in dealing with this obesity epidemic. This paper will look at opportunities and challenges in using the legal system to address this epidemic and to protect the public's health. First we will look at various types of public actions and policies that could possibly be put into place to affect obesity and public health. Next we will discuss several legal principles or issues which can arise and have the potential of blocking state and local obesity and health policies. And finally, we will discuss several observations which underpin our analysis of possible obesity and public health legal initiatives.

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³ See U.S. DEPT. OF HEALTH & HUMAN SERV., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001 15 (2001), available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

⁴ See generally L.F. Adams. et. al., *Overweight, Obesity and Mortality in a Large Prospective Cohort of Persons 50-71 Years Old*, 355 NEW ENG. J. MED. 763 (2006).

⁵ See generally S.J. Olshansky et. al., *A Potential Decline in Life Expectancy in the United States in the 21st Century*. 352 NEW ENG. J. MED. 1138 (2005).

II. Types of Public Action

There are various types of public actions and policies that can be put into place to affect obesity and public health. Four general areas are regulation, taxation, liability, and education. These categories along with examples are examined.

Regulation

Two examples of obesity/health regulation are prohibition and disclosure.

1) Prohibition

Prohibition is a law or order that forbids a certain action.⁶ The trans-fat ban in New York City where the City Board of Health voted to amend the Health Code to restrict service of unhealthful artificial trans-fats by food service establishments after July 1, 2007 is such an example.⁷ This ban was done under the authority of the Board of Health pursuant to their authority granted in the New York City Charter.⁸ A similar ban was considered by Los Angeles City Council and County Board of Supervisors, but was not introduced because the Los Angeles County Department of Public Health determined that only the state can regulate cooking oils used in restaurants.⁹

Another example of prohibition is the time and place restrictions on foods of minimal nutritional value (FMNV) sold during the lunch period in schools which have the federal school food programs.¹⁰ This regulation states that state agencies and school food authorities must establish rules that “shall prohibit the sale of foods of minimal nutritional value... in the food service areas during the lunch periods.”¹¹ As stated, the time is during the lunch period and the place is the food service area. Most public health advocates have a major problem with this

⁶ See Brian A. Garner, Editor, *Black's Law Dictionary* (8th ed. 2004).

⁷ See New York City Board of Health, Notice of an Adoption of an Amendment (§81.08) to Article 81 of the New York City Health Code, 1 (Dec. 5, 2006).

⁸ *Id.*

⁹ See Kerry Cavanaugh and Troy Anderson, *Voluntary Trans-fat Plan is Unveiled*, DAILY BREEZE, Jan. 31, 2007, A3.

¹⁰ See Competitive Food Service, 7 C.F.R. § 210.11 (a). According to USDA, Food of minimal nutritional value means: (i) In the case of artificially sweetened foods, a food which provides less than five percent of the Reference Daily Intakes (RDI) for each of eight specified nutrients per serving; and (ii) in the case of all other foods, a food which provides less than five percent of the RDI for each of eight specified nutrients per 100 calories and less than five percent of the RDI for each of eight specified nutrients per serving. The eight nutrients to be assessed for this purpose are--protein, vitamin A, vitamin C, niacin, riboflavin, thiamine, calcium, and iron.

¹¹ Competitive Food Service, 7 C.F.R. § 210.11 (b).

prohibition because of the narrowness of the definition of FMNV which allows many unhealthy foods to be served.¹²

2) Disclosure

Disclosure is the making known something that was previously unknown.¹³

An example of a disclosure regulation is the national uniform nutrition labeling laws in the Federal Nutritional Labeling and Education Act (NLEA) which governs nutrition labeling of food products.¹⁴ In this regulation, nutrition information relating to a food must be disclosed on the label for all products intended for human consumption and offered for sale.¹⁵ Macro-nutrients, such as calories, protein, carbohydrate, and fat, along with other micro-nutrients must be listed in a defined format.¹⁶ The most recent addition to the disclosure requirement for nutrition labeling is the requirement for labeling of trans-fats which went into effect January 1, 2006.¹⁷

Taxation

Taxation on food products can become a public health policy alternative through two avenues. First, a steep tax on a product, such as soft drinks, can have the effect of reducing purchases and therefore consumption of less healthful products.¹⁸ Taxation can also provide revenue to be used for health measures.¹⁹ These taxes can be levied at either the wholesale or retail level and on either food volume or as a percent of sale price.²⁰

¹² Susan L. Roberts, Note, *School Food: Does the Future Call for New Food Policy or Can the Old Still Hold True?*, 7 DRAKE J. AGRIC. L. 587, 605 (2002).

¹³ See Garner, *supra* note 6.

¹⁴ See Nutrition Labeling and Education Act, 21 C.F.R. § 101.9.

¹⁵ See *id.* at (a).

¹⁶ See *id.* at (c).

¹⁷ See *id.* at (c) (2) (ii).

¹⁸ See generally Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854 (2000).

Some states and cities currently tax soft drinks, for example.²¹ But this tactic receives tough opposition as was recently shown with an American Medical Association (AMA) resolution calling for federal and state tax levies on sugary drinks being defeated for a more general resolution calling on the health community to collaborate with the beverage industry.²² The issues in implementing a tax on unhealthful food products are significant, from how to define what gets taxed to determining where the food gets taxed (i.e.: how do you tax soft drinks the same when eaten in food establishment as at home) to the administrative burden of such a tax.²³

Liability

Liability policy involves the imposition of liability against those who are responsible for the propagation of the foods that cause obesity, for example the fast food industry. These actions could rely on theories of defective design, product category liability, failure to warn, failure to provide nutritional information, deceptive advertising, and negligent marketing.²⁴ These actions however, unlike earlier tobacco litigation, will be blocked in over 20 states by state "commonsense consumption" laws (coined cheeseburger bills) which have been passed. These laws function to block all obesity suits at the summary judgment stage, that is, before costly

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² *See* Steve Stanek, AMA Drops Call for Soft Drinks Tax, Budget and Tax News, Jan. 1. 2007 available at <http://www.heartland.org/Article.cfm?artId=20404>.

²³ *See* Richard A. Epstein, *What (not) to do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J., 1361, 1376-77 (2005).

²⁴ *See* Richard C. Ausness, *Tell Me What You Eat, and I will Tell You Whom to Sue Big Problems Ahead for "Big Food"?*, 39 GA. L. REV. 839, 850-51 (2005)..

discovery or a trial kicks in.²⁵ A similar bill passed the US House of Representatives in 2004, but failed to pass in the Senate.²⁶

Advocates argue cheeseburger bills are wrong because the food industry should not get any special protection; that the lawsuits would often be about deceptive advertising and failure to warn rather than obesity per se; that the courts should determine when obesity lawsuits are frivolous, not legislatures; and that law makers should focus on real solutions to the obesity epidemic.²⁷

Guidelines or Voluntary Encouragement or Education

An example of guidelines to affect public action to decrease obesity is the *US Dietary Guidelines for Americans*.²⁸ Starting in 1980, and every 5 years since, the Secretaries of USDA and HHS jointly publish the Dietary Guidelines report to satisfy legislation.²⁹ The Dietary Guidelines, based on the latest scientific information including medical knowledge, provides authoritative advice for people two years and older about how proper dietary habits can promote health and reduce risk for major chronic diseases.³⁰ As implied in the name, these are guidelines, or a voluntary encouragement, to eat health promoting foods. There is no enforcement ability with this type of guideline.

²⁵ See Epstein, *supra* note 23 at 1380.

²⁶ See BBC News, *U.S. Approves Cheeseburger Bill*, (Mar. 12, 2004) available at <http://news.bbc.co.uk/2/hi/americas/3500388.stm>.

²⁷ See Public Health Advocacy Institute, *Talking Points in Opposition To Special Rights for the Food Industry*, 2005 available at <http://www.phaionline.org/downloads/shield/talkingpoints.pdf>.

²⁸ See generally USDA and DHHS, *DIETARY GUIDELINES FOR AMERICANS 2005*, available at <http://www.healthierus.gov/dietaryguidelines> (accessed Feb. 2007).

²⁹ See National Nutrition Monitoring and Related Research Act of 1990 § 301, 7 U.S.C. § 5341 (2004).

³⁰ See USDA, *supra* note 28.

Self Regulation

Self regulation is organizations or industry's control, oversight, or direction of itself according to rules and standards that it establishes.³¹ An example of self regulation is the Children's Advertising Review Unit (CARU) which came into being in the mid-1970s to address advertising practices directed toward children.³² CARU is funded and partially directed by industry members as a self regulatory body of the advertising industry.³³ Self-regulation, according to CARU, results in the "review and evaluation of child-directed advertising in all media, and online privacy practices as they affect children."³⁴ When practices "are found to be misleading, inaccurate, or inconsistent with CARU's Self-Regulatory Guidelines for Children's Advertising or relevant laws, CARU seeks change through the voluntary cooperation of advertisers."³⁵

In a case study analysis of CARU actions, Fried determined that industry does cooperate with the CARU voluntary process.³⁶ However, "there is a lack of adherence to the guidelines and case decisions issued by the industry's self-regulatory body."³⁷ This is likely because CARU has no power to stop specific ads from running and no ability to sanction advertisers that break the rules, a potential problem with self-regulation.³⁸

³¹ See Garner, *supra* note 6.

³² See Ellen Fried, *Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit*, 39 LOY. L.A. REV. 93, 95 (2006).

³³ See *id.* at 93.

³⁴ Nat'l Adver. Review Council, GUIDANCE FOR FOOD ADVERTISING SELF-REGULATION: AN HISTORICAL OVERVIEW OF THE INVESTIGATIONS OF FOOD, NUTRITION AND WEIGHT-LOSS ADVERTISING OF THE CHILDREN'S ADVERTISING REVIEW UNIT (CARU) AND THE NATIONAL ADVERTISING DIVISION (NAD) 10 (2004), *available at* http://www.narcpartners.org/reports/NARC_White_Paper_6-1-04.pdf.

³⁵ *Id.* at 10-11.

³⁶ See Fried, *supra* note 32 at 137.

³⁷ Fried, *supra* note 32 at 137.

³⁸ See Fried, *supra* note 32 at 136.

III. Legal Issues Which Can Arise with Obesity and Health Policy

There are several legal principles or issues which can arise and have the potential of blocking state and local obesity and health policies. Some of these potential legal issues are discussed.

Preemption

Preemption is the principle that a federal law can supersede or supplant any inconsistent state law or regulation.³⁹ This principle is derived from the Supremacy Clause of the United States Constitution and puts a limit on state power.⁴⁰ The doctrine of pre-emption under which state laws in conflict with federal laws are "preempted" defines the situations in which states may legislate or regulate within areas governed broadly by federal statutes.⁴¹

Congress may preempt state law in several different ways:

- (1) express preemption - Congress may do so expressly in the statute;
- (2) implied preemption (field)- in the absence of express preemptive text, Congress' intent to preempt an entire field of state law may be inferred where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law;
- (3) implied preemption (conflict) - state law is preempted when compliance with both state and federal law is impossible, or if the operation of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.⁴²

³⁹ See Garner, *supra* note 6.

⁴⁰ See United States Const, art. VI cl. 2.

⁴¹ See Bienenfeld, *Federal Pre-emption-- A Possible Route to Uniformity in the Food Drug and Cosmetic Law Area*, 28 FOOD DRUG COSM. L. J. 373 (1973).

⁴² See *Quon v. Arch Wireless Operating Co., Inc.*, 445 F.Supp.2d 1116 (C.D. CA. 2006).

Examples of express pre-emption are the federal food statutes governing meat and poultry inspection.⁴³ Another example is the national uniform nutrition labeling laws in the Federal Nutritional Labeling and Education Act (NLEA) discussed above.

In two recent cases, fast-food sellers argued that the Federal NLEA preempted state tort claims. This argument was based on the fact that the NLEA exempts restaurants and also on the express preemption provision, which declares that no state may require nutrition labeling that is not identical to that mandated by the Act.⁴⁴

In one case, *Pelman v. McDonald's Corp.*, McDonalds argued that the NLEA preempted the plaintiffs' claim that failure to provide nutritional information in its restaurants violated New York's Consumer Protection Act.⁴⁵ The Pelman court rejected the preemption argument because the NLEA expressly permitted states to impose nutritional labeling requirements for food that was not covered by federal law (i.e.: restaurants) and the FDA had acknowledged that states were free to enforce their own consumer protection laws against restaurants whose menus contained false or misleading information.⁴⁶

However, in an Illinois case, *Cohen v. McDonald*, the preemption argument was more successful.⁴⁷ This case revolved around McDonalds not having nutrition information for Happy Meals. The ruling stated, because FDA did not have nutrient standards for children under the age of 4, McDonalds would be forced to develop its own nutritional labeling system. This would result in a nonuniform system of nutrition labeling that is inconsistent with the NLEA's policy of uniform nutritional labeling. The plaintiffs claim was preempted by the NLEA.⁴⁸

⁴³ See 21 U.S.C.A. § 678.

⁴⁴ See Ausness, *supra* note 24 at 878-79.

⁴⁵ See *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 525 (S.D.N.Y. 2003).

⁴⁶ See Ausness, *supra* note 24 at 879,

⁴⁷ See *id.*

⁴⁸ See *id.* at 881.

Implied preemption from conflict is the principle that federal or state law can supersede or supplant state or local law that stands as an obstacle to accomplishing the full purposes and objectives of the overriding federal or state law.⁴⁹ In *Jones v. Rath Packing Co.* a California statute and regulation governing net weight labeling which made no allowance for loss of weight resulting from moisture loss during course of good distribution and transportation was challenged by meat packers and flour millers.⁵⁰ With regard to the flour millers, this statute was not ‘expressly’ preempted by Fair Packaging and Labeling Act. However, the application of the California statute and regulation to flour would prevent accomplishment and execution of the full purposes and objectives of Congress and was required to yield to federal law, because, in light of the physical attributes of flour, enforcement of the California statute and regulation would frustrate the congressional purpose of facilitating value comparisons among similar products (implied preemption from conflict).⁵¹

Today, a federal court is less likely to permit a state to impose different rules upon a nationally distributed product, since it recognizes the need to look at interstate goods from a truly national perspective.⁵² But, at the same time on some issues, the FDA consciously leaves regulation to the states, e.g., recycling into animal feed of wasted and spoiled scraps of human foods, and milk regulation.⁵³ In addition, state or local regulation of matters related to health and safety is not presumed invalidated under supremacy clause.⁵⁴

⁴⁹ See Garner, *supra* note 6.

⁵⁰ See generally *Jones v. Rath Packing Co.*, 97 S. Ct. 1305 (1977).

⁵¹ *Id.*

⁵² See James T. O’Reilly, *Preemption of State Regulations by Federal Action*, FOOD & DRUG ADMIN. Vol. 2 § 25.5 (2006).

⁵³ See *id.*

⁵⁴ See *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.* 105 S. Ct. 2371 (1985).

Commerce Clause

The Constitution gives Congress the power to regulate commerce among states.⁵⁵ This power is the source of most Congressional authority and acts implicitly as a limitation on state legislative power. State and local health policy can be deemed unconstitutional and invalid if it interferes with interstate commerce. Along with the Commerce Clause's affirmative grant of authority is an implied "negative" or "dormant" constraint on the power of the States to enact legislation that interferes with or burdens interstate commerce.⁵⁶ The Dormant Commerce Clause is the constitutional principle that the Commerce Clause prevents state regulation of interstate commercial activity even when Congress has not acted under its Commerce Clause power to regulate that activity.⁵⁷ The United States Supreme Court has stated, "the negative or dormant implication of the Commerce Clause prohibits state taxation ... or regulation ... that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'"⁵⁸

For example, in *Minnesota v. Clover Leaf Creamery*, brought by milk sellers and others challenging the constitutionality of a Minnesota statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons, the Supreme Court ruled to uphold the state law.⁵⁹ "Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause."⁶⁰

Recently, however, the commerce clause is stalking the land being used to strike down state

⁵⁵ See U.S. CONST. art. 1 § 8.

⁵⁶ See *Brooks v. Vassar*, 462 F.3d 341 C.A.4.Va., 2006.

⁵⁷ See *Garner, supra*, note 6.

⁵⁸ *General Motors Corp. v. Tracy*, 117 S. Ct. 811 (1997).

⁵⁹ See *Minnesota v. Clover Leaf Creamery Co.*, 101 S. Ct. 715 (1981).

⁶⁰ *Id.* at 729.

and local legislation – often times laws which have been on the books for decades and were believed to be constitutional. Perhaps the best example of this is two recent circuit court decisions striking down state laws regulating the ownership of farmland and operation of farms by various forms of corporations. In December, 2006, the 8th Circuit struck a blow against local legislative actions in *Jones v. Gale*, holding Nebraska’s constitutional amendment from 1982⁶¹ on this issue in violation of various provisions of the constitution including the commerce clause.⁶²

This follows the 8th Circuits’ similar action against an Iowa law restricting corporations from being both meat packers and livestock feeders.⁶³ Both decisions find their basis in the 8th Circuit’s 2003 ruling in *South Dakota Farm Bureau v. Hazeltine* which used the dormant commerce clause analysis to strike down a recently enacted constitutional provisions limiting corporate feeding of livestock in South Dakota.⁶⁴ The court’s theory was it discriminated against producers who wanted to contract with out of state businesses.⁶⁵

These decisions raise a significant bar for states considering enacting legislation possibly objectionable to business interests who can charge it treats them differently than they are treated elsewhere or than in-state residents are treated. This would clearly be the claim against much locally inspired obesity related legislation.

However the analysis is not as simple as federal commerce protections override all local law – even though some businesses would like it to be so simple. Instead the analysis focuses on the possible discriminatory effect of the state law and whether there was an intent to favor local

⁶¹ The Nebraska constitutional amendment prohibited farming and ranching by corporations and syndicates except for family farm or ranch corporations or limited partnerships in which at least one family member was a person residing on or actively engaged in the day to day labor and management of the farm or ranch.

⁶² See generally *Jones v. Gale*, 470 F.3d 1261, 8th Cir. (Neb.), Dec 13, 2006 (NO. 06-1308).

⁶³ See generally *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061 (2004).

⁶⁴ See generally *South Dakota Farm Bureau v. Hazeltine*, 340 F.3d 583, cert denied 541 U.S. 1037 (2004).

⁶⁵ *Id.*

interests over those with an out of state connection. A recent decision by the 5th Circuit upheld a Texas state law prohibiting the processing of horse meat in the state.⁶⁶ The court reversed a district court ruling which held the law violated the federal commerce clause.⁶⁷ Instead, the 5th Circuit upheld the state ban on the processing of horse meat, ruling it applied equally to Texas based companies and those from out of state.⁶⁸ Thus the underlying issue – could a state prohibit a certain action – in this case slaughtering and processing of horses, was not held to be the exclusive domain of the federal government.

The test which a state regulation affecting commerce must meet to be upheld is:

- 1) the regulation must pursue a legitimate state end – health, safety and welfare are legitimate, economics are not;
and
- 2) the regulation must be “merely” rationally related to the state’s end;
and
- 3) the regulatory burden on commerce and any discrimination against interstate commerce must be out weighed by the state’s interest in enforcing its regulation:
 - a) balancing – skewed toward state – only overcome by clear showing that national interest in uniformity or commerce more important
 - b) if the state could use a less restrictive alternative to their objective, the Court is more likely to find national commerce outweighs state interest.

⁶⁶ See generally *Empacadora de Carnes de Fresnillo v. Curry*, U.S. App. LEXIS 1178 (5th Cir. 2007).

⁶⁷ See *id.*

⁶⁸ See *id.*

First Amendment

The 1st Amendment gives rights related to the freedom of expression through speech, press, assembly and petition.⁶⁹ There are two restrictions on expression: 1) Content based restrictions (not protected are obscenity, fraudulent misrepresentation, advocacy of imminent lawless behavior, defamation, or fighting words) and 2) Non-content based restrictions (government can regulate time, place or manner).

A central issue pertaining to the 1st Amendment and obesity regulation will likely be whether actions taken by local or state governments – for example an attempt to restrict communication aimed at a particular group, such as advertising to children – infringes on the free speech rights of the party making the speech. Advertising to children is “commercial speech” which in recent years has enjoyed enhanced protection by the Courts. The courts typically employ a four part test set out by the U.S. Supreme Court in *Central Hudson* which generally operates as a broad protection for commercial speech and conversely a significant restraint on the possible reach of governments.⁷⁰ This test to determine if a regulation over commercial speech violates 1st Amendment is:

- 1) Is the commercial speech lawful and not misleading?
- 2) Is there ‘substantial’ government interest behind the regulation?
- 3) Does the regulation directly advance a government interest?
- 4) Is the regulation no more extensive than necessary?

In *Lorillard Tobacco Co. v. Reilly*, the constitutionality of a comprehensive set of regulations designed to shield children from advertisements for cigars and smokeless tobacco

⁶⁹ See U.S. CONST. amend. I.

⁷⁰ See generally *Central Hudson Gas v. Pub. Serv. Comm. of N.Y.* 447 U.S. 557 (1980).

were challenged.⁷¹ The Court protected the commercial speech of the tobacco company because the regulations were too burdensome, not allowing advertisers to convey information to adult consumers.⁷²

In another recent case, *Thompson v. Western States Medical Center*, the Court stated that bans on truthful advertising cannot be sustained based on paternalistic principles as commercial speech was information that individuals could use for their own interest.⁷³

An area where public health may get more traction is “compelled speech.” Compelled speech is where Government seeks to counter the negative impact of the absence of information by compelling individuals and entities to disclose information of public health interest. Informed consent is one such example.⁷⁴ “This information can enter the public realm ... affect not only the health of the individual consumers ... but others, as the information enters the culture and influences social norms and public policies.”⁷⁵ Labeling of trans-fat is an example as the ‘compelled’ labeling disclosure has led to trans-fat education, disappearance of trans-fats from products, and policies to control trans-fats.

Tolerance to compelled speech was shown in *Glickman v. Wileman Bros. & Elliott*, where the Court reviewed a 1st Amendment challenge to USDA regulations assessing fruit growers to finance generic advertising for the industry.⁷⁶ In upholding the regulations, the Court stated the regulations imposed “no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political

⁷¹ See generally *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

⁷² See *id.* at 562.

⁷³ See *Thompson v. Western States Medical Center*, 535 U.S. 357, 375 (2002).

⁷⁴ See Wendy Parmet & J. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment* 39 *Loy. L.A. L. Rev.* 363, 422 (May 2006).

⁷⁵ *Id.* at 421.

⁷⁶ See generally *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997).

or ideological views."⁷⁷ The Court then argued that its compelled speech doctrine only applied when the compelled speech required parties to express messages and associate themselves with ideas to which they do not subscribe.⁷⁸

In a similar compelled speech case, *Johanns v. Livestock Marketing Ass'n*, the Court upheld regulations assessing beef producers for generic advertisements.⁷⁹ The Court found that individuals have no right to refuse to pay taxes that support government speech.⁸⁰ Thus, government attempts to sponsor speech should be relatively free from 1st Amendment attack. At issue may be what speech the government is promoting; as here it is to eat beef which may not be totally in the public health interest.

However, in the 2nd Circuit ruling in *International Dairy Foods v. Amestoy* relating to Vermont's recombinant Bovine Somatotropin (rBST) legislation which required labeling of milk when rBST was used, the Court held that: 1) the Vermont statute "compelling speech" caused irreparable harm to manufacturers by requiring them to make an involuntary statement (against their 1st Amendment rights) when they sold their products, and 2) strong consumer concern alone was not a substantial state interest justifying restriction on commercial speech.⁸¹ The Court stated that Vermont ... "seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."⁸²

As stated by Parment and Smith, "The role of speech in determining health is especially salient in the case of childhood obesity.... The challenge is how to shape the informational

⁷⁷ *Id.* at 469-70.

⁷⁸ *See id.* at 470-71.

⁷⁹ *See generally* *Johanns v. Livestock Marketing Ass'n*, 125 U.S. 2055 (2005).

⁸⁰ *See id.* at 2062.

⁸¹ *See generally* *International Dairy Foods v. Amestoy*, 92 F. 3d 67 (2nd Cir. 1996).

⁸² *Id.* at 73, quoting *Edenfield v. Fane*, 507 US. 761, 770-71, 113 S. Ct.1792, 1800 (1993).

environment, formed by speech, to one that retards the epidemic without running afoul of the First Amendment and its strong preference for free speech.”⁸³ It is also important to remember that ... “Although speech may harm public health, it can also serve as a tool for protecting it.”⁸⁴ In discussing how to avoid a collision between public health and the 1st Amendment, Parmet and Smith recommend a population-based legal analysis which recognizes that “protecting and improving public health is an appropriate, if not essential, goal of legal and policy decision making.”⁸⁵

A population-based approach to the 1st Amendment, as suggested by Parmet and Smith, would take seriously empirical and epidemiological evidence that exists while at the same time requiring the state to provide empirically-based rationale for its regulation, but not require a conclusive causal relationship between a particular speech and public harm or public benefit which is often not possible to prove in public health.⁸⁶ This approach would likely permit some ... “regulation of food advertising, particularly the advertisements aimed at schoolchildren.”⁸⁷

IV. Observations about Legality of New Obesity and Health Initiatives

The following are observations we make associated with this legal analysis.

Trade-offs with Restrictions

The more restrictive a policy, (e.g. the prohibition of certain conduct or products), the more likely it is to raise legal questions and invite challenges, such as claimed violations of individual rights or challenges to the authority of the government to take the action. Conversely

⁸³ Parmet, *supra*, note 74 at 363.

⁸⁴ *Id.* at 364.

⁸⁵ *Id.* at 431-2.

⁸⁶ *See id.* at 437-43.

⁸⁷ *Id.* at 445.

if a program is more voluntary or positive, (e.g. the USDA fruit and vegetable snack program), the less likely it is to stimulate opposition or raise questions of authority.

Policies requiring authorizing legislation

Many proposed actions may require new authorizing legislation depending on a state's law on home rule. (i.e.: whether local jurisdictions have original legislative authority or can only exercise powers specifically granted them by the state). Being the first jurisdiction to enact legislation offers the opportunity to articulate the power and claim the ability to act. For example, the proliferation of local bans on trans-fats may stimulate a federal response to limit such local actions but the underlying question is whether they are a federal issue, e.g. stimulating commerce clause concerns, or represent a new version of the traditional authority of local governments to impact public health regulations. Implementing programs will address questions of who pays and how, factors which may influence whether challenges are brought.

Traditional Federal Issues vs. Traditional Local Issues

Some food and agricultural policies, traditionally (or by economic reality) have been federal issues, such as farm programs, the food stamp program, nutrition labeling of foods. The primary role of the federal government raises issues of preemption and may limit the ability of state and local governments to influence the law directly. Some laws, such as nutrition labeling, contain express language about uniformity or federal preemption as discussed supra. Public health and the operation of the food economy are inherently national issues so for many "obesity" policy questions the starting point will be the assumption that for regulations to be effective it will require federal action (or authority).

Another analysis finds that policies become federal or state issues because one entity is not doing their job. It could be argued that states and local governments are instituting policies (e.g.: smoking regulations) because of the lack of action on the federal governments part and its pro-business stance of the recent years. For example, tobacco regulations tend to be strictest at the local level and become weaker as you progress to the federal level where industry has more power.

Often the issue for states is how to supplement or stimulate federal efforts. For example, the WIC farmers' market nutrition program began as a state initiative and progressed to the federal level. Successful local or state pilot projects can become federal policy.

Finally, other traditional local areas of authority that are related to public health and obesity are land use and zoning laws (e.g. fast food distance from schools or community design) and school policy (e.g. regulation of competitive foods). Public health policies in these areas can be addressed at the local or state level, but it may take years to reach a tipping point where there are sufficient numbers of policies to significantly address a public health concern. In addition, the tradition of local leadership may limit the ability of higher levels of government to act directly. This might be countered with federal financial inducements, (e.g. federal grants to improve community design, such as trails to increase physical activity).

Role of Common Law and Authority of Courts

It is important to recognize and protect the role of the common law and the authority of courts to respond to public health issues, such as the McDonald's case on deceptive advertising and the tobacco litigation. But it is also important to acknowledge the limits on using court cases and settlements to establish comprehensive public policy. A good case settlement between parties is not a substitute for a state law applying to all citizens.

Power of Choice

There is power in choice. If issues are presented as mandatory in a “this is good for you” mode then they can easily be portrayed as the work of the food police and big brother. If instead issues are posed as new information, in the public interest and education-based they may be more powerful in motivating people, companies and governments to change and less time, energy and money will be spent fighting over issues of legal authority.

Is Public Policy Needed?

We should not assume all actions will require public legislation or regulation as opposed to voluntary or market driven (or responsive) approaches. This can be seen in food companies responding to public concerns about fast food and super-sizing, by changing product formulations and offering more food options. Where opportunities exist to build networks of allies rather than enlist opponents this should be considered.

Push Positive New Policy Rather than Fight to Change Old Policy

Direct attacks on the farm and commodity programs, such as price supports for corn, cotton and soybeans, will be difficult political battles and will pit public health advocates against powerful well-organized political entities. Such frontal attacks may be picking a fight we don't need to take on. Many other issues will continue to influence the commodity programs, such as the rapid shift to alternative fuel demand, regional fights over payments limitations, World Trade Organization (WTO) rules, and the need to fund conservation programs. Instead, public health should consider focusing on new positive forms of public health supporting policies – such as increasing availability of fresh fruit and vegetables for low-income populations, which don't require picking fights with commodity groups or the food industry.

Court's Recent Trends

The Court's recent trends in jurisprudence on the First Amendment (expansive reading of the protection of commercial speech) and on the dormant commerce clause (striking down state actions long considered legal, such as state limits on forms of corporate farming), both discussed above, don't bode well for a broadened view of state (and perhaps even federal) authority to enact new non-traditional forms of food regulations relating to obesity. These trends can not be ignored.

Public Education and Understanding

While the attention and concern of the public health community is focused on issues relating to obesity, it is clear the knowledge of the general public (the constituents of elected officials) is not as far advanced, either in recognizing the depth of the issue or the need for radical public policy shifts. Continual work needs to be done in education and public awareness, to help increase this understanding. This is an issue of years not months; change in public policy should be considered as a long-term strategy. Typically, legislation and government rules do not lead society's attitudes; rather, they are lagging indicators that reflect a consensus of public understanding. One of the challenges for public health is to shape that public understanding and lead with good programs and policies and not use legislation to drag people to places they don't want to be – yet.