Innovative Legal Approaches to Address Obesity

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Context: The law is a powerful public health tool with considerable potential to address the obesity issue. Scientific advances, gaps in the current regulatory environment, and new ways of conceptualizing rights and responsibilities offer a foundation for legal innovation.

Methods: This article connects developments in public health and nutrition with legal advances to define promising avenues for preventing obesity through the application of the law.

Findings: Two sets of approaches are defined: (1) direct application of the law to factors known to contribute to obesity and (2) original and innovative legal solutions that address the weak regulatory stance of government and the ineffectiveness of existing policies used to control obesity. Specific legal strategies are discussed for limiting children's food marketing, confronting the potential addictive properties of food, compelling industry speech, increasing government speech, regulating conduct, using tort litigation, applying nuisance law as a litigation strategy, and considering performance-based regulation as an alternative to typical regulatory actions. Finally, preemption is an overriding issue and can play both a facilitative and a hindering role in obesity policy.

Conclusions: Legal solutions are immediately available to the government to address obesity and should be considered at the federal, state, and local levels.

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New and innovative legal solutions represent opportunities to take the law in creative directions and to link legal, nutrition, and public health communities in constructive ways.

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Obesity, a crisis by any standard, cries out for creative solutions. It has been a public health issue in the United States for about fifty years and is now reported in all corners of the world. In the next twenty-five years, the rates of diabetes—nearly all driven by diet, inactivity, and obesity—are projected to increase by 37 percent in the United States, 76 percent in China, and 134 percent in India (Yach, Stuckler, and Brownell 2006). Weak government responses, defaults to attributions of personal responsibility, and calls for more education have been tried for years and have failed. Innovative thinking and real action are required.

Historically, the law has played an important role in promoting and protecting public health (Goodman et al. 2006; Gostin 2008). Indeed, many of the first public health laws were sanitary codes enacted to address communicable diseases, sanitation, and food handling (Messer 1914). In addition, auto safety standards precipitated by product liability litigation have been effective in reducing morbidity and mortality (Vernick et al. 2003). And tobacco lawsuits by attorneys general that resulted in the Master Settlement Agreement helped change public attitudes toward the tobacco industry when documents were released through the discovery process.

Only recently, however, has legal theory been applied to obesity. How the law could be used to prevent and control obesity was first described by Mello, Studdert, and Brennan (2006) and Gostin (2007), and the first federal and state legislative and regulatory responses were efforts to improve nutrition, physical activity, and health education in schools (Boehmer et al. 2007; National Conference of State Legislatures 2007; Wellever, Reichard, and Velasco 2004). Community-based interventions have supported activities such as farmers' markets and pedestrian and bicycle paths (Boehmer et al. 2007). From about 1999 to 2005, most of the legislation pertained to advisory resolutions, commissions, or studies,

but not to interventions (Boehmer et al. 2007; Wellever, Reichard, and Velasco 2004). Conditions now, however, are ripe for new legal interventions to prevent and control obesity.

Scientific advances, gaps in the current regulatory environment, and the increasingly pervasive toxic food environment all require novel legal approaches to address obesity. Our aim in this article is to present legal solutions (1) that are immediately relevant and applicable to the current environment or (2) that might be necessary because of the current regulatory gaps. The scope of this article does not permit a thorough explanation of legal theory or a complete review of relevant case law; rather, this article proposes and defends those *approaches* we believe are promising.

Immediately Relevant Policy Initiatives

Regulating Speech

Calls for regulating marketing to protect consumers have come in response to robust evidence that food marketing has a negative impact, particularly the pervasive marketing (IOM 2006) of nutrient-poor, calorie-dense food. Because the First Amendment gives industry broad protection for marketing practices, considered "commercial speech," it is important for legislators and regulators to understand this body of law if they attempt to limit marketing.

Given the First Amendment's protection against restricting commercial speech, we must consider alternatives. Among them are "compelled speech," which requires an industry to provide information to consumers, and "government speech," which means that the government uses speech to accomplish the same goal. The government may compel the disclosure of factual commercial information by commercial actors or may increase its own speech to ensure an informed consumer population and to counter protected commercial speech. The government may even tax the target of its speech to do so.

Commercial Speech. The U.S. Supreme Court has interpreted the Constitution's First Amendment protection of speech to extend to commercial speech.[1] Commercial speech merits this protection because it conveys information necessary for "public decision making" and "furthers the societal interest in the 'free flow of commercial information.'"[2] Although precise boundaries for the definition of commercial speech

do not exist (Post 2000), the Court explained that commercial speech is "speech that *proposes* a commercial transaction"[3] and has been found to include such communications as advertisements,[4] mailing flyers,[5] product labels,[6] and Tupperware parties.[7]

The First Amendment's protection for commercial speech collides, however, with calls to restrict food marketing, even to children. The reason is that restrictions on commercial speech can be seen as interfering with the constitutional value of commercial speech's "informational function"[8] because such restrictions would impede the flow of information to the public and so are subject to increasingly stringent judicial scrutiny.

Courts generally overturn laws that ban or restrict the accurate advertisement of consumer products of which the government does not approve (e.g., tobacco, alcohol). Courts perceive such restrictions on advertising to adults to be an unconstitutional way to keep "people in the dark for what the government perceives to be their own good."[9] Therefore, even when the state's goal is to protect children, the government cannot ban communication directed at adults regarding products legally purchasable by adults to accomplish this goal.[10]

Child protection laws may have a role to play in this arena, but Supreme Court precedent is not entirely clear on this topic. Most child protection laws that restrict speech deemed offensive to children arise in the context of obscenity or sexually explicit depictions. But even when it is related to sexually oriented businesses, legislation seeking to deny minors access to potentially harmful speech has been struck down because it would effectively suppress speech that adults have a constitutional right to receive.[11] This means that any child protection legislation must advance the government's interest in protecting children but must not restrict speech intended for adults.[12]

Since a portion of food and beverage advertising is directed at audiences primarily composed of children (e.g., on the Nickelodeon television network), it may be possible for the government to ban or otherwise regulate child-targeted advertising that reaches only this intended audience. In addition, government may entirely ban or otherwise regulate commercial speech that is false, deceptive, or misleading.[13] Some states have consumer protection laws, under which a private litigant or the attorney general can bring a claim of unfair, misleading, or deceptive acts or practices.[14] This claim can be used to target specific packaging, marketing, and advertising practices.

The Federal Trade Commission (FTC) is the federal agency responsible for regulating the advertisement of foods and beverages, including unfair and deceptive practices.[15] In 1978, the FTC initiated proposed rule making, called KidVid, based on the evidence that the televised advertising of sugared products to children of all ages may be unfair and deceptive under the FTC Act.[16] In the face of strong industry opposition to these rules, Congress withdrew the FTC's authority to regulate advertising to children under the "unfair" prong of the FTC Act, and the proposed rule making was terminated without action in 1981 (Westen 2006). This regulatory gap remains today.

Because public health evidence firmly supports the FTC's original conclusions, it is time to revisit these proposals. Children younger than seven or eight do not yet have the cognitive abilities to understand that advertising presents a biased point of view (Bjurstrom 1994; Wilcox et al. 2004). The corollary to this is that understanding an advertiser's intent in advertising helps older children defend against marketing messages (Harris et al. 2008). However, newer forms of marketing, including product placements, viral marketing, and sponsorships, circumvent the active processing of advertising information and thus deactivate skepticism or other defenses (Eisenberg 2002). Furthermore, although older children may be aware that such information is an advertisement, they still lack the ability to balance the desire for immediate gratification with the long-term health consequences (Westen 2006).[17] It is unclear whether the FTC could proceed under the legal definition of deception (misleading in a material respect; see Mello, Studdert, and Brennan 2006). Accordingly, the FTC's ability to proceed under the unfair prong of the FTC Act should be restored so it can protect children from the current marketing environment (Mello 2008).

KidVid originally failed because of political circumstances, and political resistance against its revival still exists. Note that no court has addressed whether the proposed restrictions would have met constitutional standards. Although the Supreme Court has resisted efforts to curtail commercial speech, if the restriction directly advanced the government's interest in protecting children and was not more extensive than necessary to serve this purpose, commercial speech jurisprudence states that the law would be constitutional.[18]

Compelled Speech. The Supreme Court's customary response to governmental attempts to restrict commercial speech is to recommend more speech in the commercial marketplace.[19]

The compelled disclosure of factual and uncontroversial commercial information is constitutional if it bears a reasonable relationship to an appropriate government interest.[20] In contrast to laws that restrict speech, laws requiring commercial actors to disclose commercial information *increase* the flow of information to consumers and thus serve the same constitutional purpose as does the commercial speech doctrine itself. Hence, innumerable federal and state regulatory programs require the disclosure of product and other commercial information.[21] For example, textile and wool products must be labeled with their fiber content, country of origin, and the identity of the business responsible for marketing or handling the item.[22] Similarly, the Nutrition Labeling and Education Act of 1990 (NLEA) required the creation of a Nutrition Facts Panel for processed foods and beverages.[23]

Many of these requirements are relevant to addressing the obesity crisis. Consumer protection law is routinely based on the belief that the disclosure of factual and uncontroversial information will enhance consumers' decision-making ability.[24] Moreover, compelled disclosures reduce the cost to consumers of obtaining accurate information about products, thereby increasing market efficiency (Pindyck and Rubinfeld 1998). In regard to food, factual disclosures enable consumers to make decisions to benefit their health and safety.

Food labeling is one area, therefore, in which compelled speech might advance the public's health. Perhaps the NLEA could be expanded to require factual disclosures on the front of food packages. Such disclosures could include information now in the Nutrition Facts Panel or could present new information indicating for processed foods, for example, high, medium, or low amounts of fat, saturated fat, sugars, and salt, in a format similar to the United Kingdom's traffic light system. Another possibility would be to state the number of servings per container or even to offer a warning label indicating high fat, sugar, or calories. Underlying this recommendation is the need for the FDA also to recommend a maximum daily value of added sugars, as it does for other nutrients, and mandate that this information be included on the Nutrition Facts Panel. Although restaurants do not need to supply nutrition information under the NLEA,[25] federal, state, and local governments could require them to do so. Such laws, commonly referred to as *menu label laws*, generally require that covered food-service establishments list the calorie content (and/or other nutritional information) right next to the item on the menu (Pomeranz and Brownell 2008). Although such laws have been

challenged by the restaurant industry, New York was the first city to successfully implement such a law,[26] and now other cities, counties, and states are trying to do the same.[27]

Compelled commercial speech can also correct information inequalities from advertising. For example, the government could mandate television and movie producers to reveal product placements on screen (Kang 2008). Another option would be to require networks to air public service announcements after the product placement and before the commercial break, to notify the public about such marketing techniques and/or to counter it with health promotion messages. In France, advertisements for processed, sweetened, or salted foods on television, radio, billboards, and the Internet must include health messages created by the government (Associated Press 2007). Those companies that refuse to publicize the health messages may be fined 1.5 percent of their advertising budget for that particular campaign, with the funds earmarked for the National Institute for Health Education.

Government Speech. The preceding options require commercial actors to disclose information about advertising methods and products. Government may also contribute information in the commercial marketplace by increasing its own speech. The "5 A Day" fruit and vegetable campaign sponsored by the Centers for Disease Control and Prevention (CDC) and the U.S. Department of Agriculture (USDA) (among other groups) is one such example.

The government may also compel the funding of its own speech. Citizens currently fund government speech through their taxes, but directed taxation programs also can be used to fund particular speech. One prominent example is California's Tobacco Tax and Health Protection Act of 1988, which imposes a surtax on the distributors of cigarettes.[28] The revenues from the excise tax are then used to fund health education programs, including commercials that portray the industry as deceptive and an enemy of public health.[29] In 2005, the Ninth Circuit upheld the act, explaining that "if the tobacco companies were permitted to object to government speech simply because they pay an excise tax used to fund speech contrary to their interests, the result could be not only to reduce government's ability to disseminate ideas but also an explosion of litigation that could allow private interests to control public messages."[30]

The Supreme Court held that mandates to compel assessments to fund certain government speech are not susceptible to traditional First

Amendment challenges.[31] In *Johanns v. Livestock Marketing Association* (2005), the Court upheld an act that imposes assessments on the sale and importation of cattle to pay for the promotion and marketing of beef products.[32] Because the assessments fund government rather than private speech, the Court held that they did not raise First Amendment concerns: "'The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties.'"[33] A party may be required to support government speech through targeted taxation, "whether or not the reasonable viewer would identify the speech as the government's."[34] Few people realize that the slogan "Beef, It's What's for Dinner" is speech controlled by the USDA but is paid for by the cattle industry through targeted assessments imposed by the secretary of agriculture.[35]

Although perhaps politically challenging, the government could use a similar financial scheme to fund healthy eating campaigns even if they disparaged the products of the targeted industry. For example, public health experts agree that the consumption of sugared soft drinks is an important contributory factor to the increased incidence of obesity in the United States (Ludwig, Peterson, and Gortmaker 2001; Nielson and Popkin 2004; Vartanian, Schwartz, and Brownell 2007). The government accordingly could tax soft drink manufacturers and distributors to fund campaigns aimed at reducing the consumption of soft drinks paid for with revenue dedicated to both public health improvement practices (Jacobson and Brownell 2000) and the speech to advance such efforts.[36] Another option would be to tax a particular ingredient, such as the sugar or high fructose corn syrup used in processed food products, to fund the same government activities and speech.

Regulating Conduct

Several regulatory/legislative options focus on conduct, as opposed to speech. For example, both consumer and industry conduct could be regulated in an attempt to address both the supply and the demand side of the obesity equation. Note that such regulations must be aimed at nonexpressive conduct, that is, changes in behavior that do not impinge on speech interests. In 1996, the Supreme Court explained:

> The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous

> than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends. These basic First Amendment principles clearly apply to commercial speech.[37]

Laws that regulate nonexpressive conduct (conduct not expressing an idea) are not subject to First Amendment scrutiny. For example, burning a flag to protest war is expressive conduct,[38] but placing items near a checkout counter in order to prevent them from being shoplifted is not.[39]

In *Lorillard v. Reilly* (2001), the Court upheld the attempt by Massachusetts to prevent minors from obtaining tobacco by means of regulations banning "the use of self-service displays" and requiring that "tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons."[40] Even though the Court assumed that petitioners had "a cognizable speech interest in a particular means of displaying their products,"[41] the Court sustained the regulations because "Massachusetts' sales practices provisions regulate conduct that may have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas."[42]

Public health practitioners have suggested that based on this distinction, retail establishments could be required to place fresh produce at the front of the store and processed products toward the back and have junk food–free checkout aisles. Although regulations like these have yet to be tested in the courts, governments defending such action would have a valid argument that they are regulations of nonexpressive conduct to benefit public health.

As alternatives to regulating speech, the Supreme Court has suggested regulations targeting conduct that are especially likely to withstand constitutional scrutiny. In *44 Liquormart, Inc. v. Rhode Island* (1996), the Court explained that a ban on advertising prices was an unconstitutional restriction on commercial speech but proposed the regulation of conduct as a viable alternative: "[H]igher prices can be maintained either by direct regulation or by increased taxation. Per capita purchases could be limited as is the case with prescription drugs."[43]

As the Court pointed out, taxation can change behavior. For instance, excise taxes reduce smoking (Cauchon 2007). Taxes on processed foods and vending-machine items have been implemented across the country (Chriqui et al. 2008) but generally not at levels to change behavior. There is, however, a concern about the regressive nature of such a tax if healthier foods are not at the same time made more available and affordable. Taxing a certain ingredient may therefore have a better outcome because manufacturers and retailers will have to respond to the higher taxes. If, for example, a tax is assessed on increasing levels of sugar or high fructose corn syrup, the manufacturer must decide whether to pass on this tax to consumers, reduce the amount of the ingredient, or accept the higher prices. In any case, the proceeds from a tax could be earmarked for improving public health.

An alternative to taxing an ingredient would be to limit its amount in processed foods. The Supreme Court specifically noted that the government could limit the alcohol content of beer in order to reduce its consumption.[44] Government could likewise limit the amount of sugar permitted in processed foods and beverages.

The government might also place a per-capita limit on the amount of a product that a minor could purchase. The Supreme Court has stated that per-capita purchases of certain items (e.g., prescription drugs) can be limited.[45] Government thus could similarly enact a law making it illegal for children to buy more than one 12-ounce container of a sugar-sweetened beverage at one time.

Government can also regulate where certain retail establishments are located within a community, as the Supreme Court has held that zoning to protect public health is a proper exercise of the government's traditional police power.[46] Government officials can alter the built environment through zoning to advance their community's public health. Possible zoning ordinances include banning fast-food outlets and drive-through service or zoning them into or out of certain districts. Communities can zone in grocery stores and farmers' markets and zone fast-food outlets away from schools and playgrounds or use zoning to control the density of fast-food outlets through per-unit space or spacing requirements (Mair, Pierce, and Teret 2005).

Because the right to sell or purchase items is subject to minimal due process protection,[47] the government can make, and has made, it illegal for minors to buy products that it deems harmful (e.g., tobacco and alcohol). Why couldn't this also apply to products that science has shown

to be especially obesogenic to children? Just as school districts decide what is healthy and allowable under their wellness policies, governments can define what products are not fit for consumption by children and restrict their sales. The argument for such a regulation would be even stronger for products or additives found to be harmful or even addictive in certain quantities.

Food and Addiction

Scientific progress often creates an opportunity for legal advances and may apply to the issue of food and addiction. Despite the inference in public discourse that food clearly is addictive (as in terms like *chocoholic* and *carbohydrate cravings*), until recently this issue has not been studied scientifically. Now, however, evidence from scientific research is converging in ways that could have stunning social and legal implications (Rudd Center for Food Policy and Obesity 2007).

Scientific Basis. Researchers using animal models have used methods derived from studies of drugs to examine potential addictive properties of food, especially sugar. Much of this work was reviewed by Avena, Rada, and Hoebel, who concluded that "rats with intermittent access to a sugar solution can show both a constellation of behaviors and parallel brain changes that are characteristic of rats that voluntarily administer addictive drugs. In conclusion, this is evidence that under some circumstances, sugar can be addictive" (Avena, Rada, and Hoebel 2008, p. 32). Other work has documented interactive pathways for appetite and cravings (Kalra and Kalra 2004) and has shown that food deprivation can affect reward systems (Thanos et al. 2008).

Considerable evidence pertaining to the issue of food and addiction comes from studies using brain-imaging techniques to compare the responses of obese and nonobese individuals to food (Wang et al. 2004), as well as studies examining brain reward pathways and their role in addiction, with a particular focus on dopamine (e.g., DiMarzo and Matias 2005; Kalivas and Volkow 2005; Kelley and Berridge 2002). The premise is that brain reward circuitry can create strong cravings for substances once activated by exposure and that this can lead to the brain being "hijacked" by substances in ways that overwhelm cognitive and social controls (Volkow and Li 2005). Studies also show that neural circuitry and food reward (Adam and Epel 2007; Drewnowski et al. 1995;

Epstein et al. 2004; Volkow and Wise 2005) may be especially powerful because food is necessary for survival (Kelley and Berridge 2002). Science thus far suggests that food may create an addictive process, with underlying physiology similar to that seen with classic addictive substances.

Social and Legal Implications. The fact that the metaphor of a hijacked brain has now been applied to food by some leaders in the addiction field (Volkow and Wise 2005) has powerful meaning. Public awareness that a substance can overwhelm will, judgment, and personal freedom could lead people to question industry behavior and start inquiry into whether industry intentionally manipulated these ingredients.

One legal measure might be regulating additives or capping or banning ingredients. Warning labels could be required to advise consumers of certain additives, ingredients, or products' potential for addiction. Studies confirming that these additives or ingredients are addictive would support strong regulations. Because structured controls are already in place for products and behaviors considered addictive (e.g., age requirements to enter casinos[48] as well as to purchase tobacco[49] and alcohol;[50] per-capita purchase restrictions on prescription drugs[51]), these could be extended to other areas with similar concerns. If science continues to support the possibility of an addictive process triggered by food, legal and regulatory action is likely to follow.

One such legal avenue may be litigation. Questions such as what and when food manufacturers and marketers knew this information and whether they acted on it are important in this context. Here litigation may prove to be a useful tool through information disclosure triggered by the discovery process. Even if early cases in a controversial area of litigation are not found in favor of plaintiffs, the information acquired through the discovery process could lead to future litigation successes and a change in public opinion. The publicity surrounding such information could also facilitate legislation and regulation, especially if child-oriented food is involved.

Actual tort liability is a separate issue, and a number of challenging issues would have to be addressed before it could be considered in the context of food and addiction. If a litigant proceeded under a theory of "design defect," he or she would have to allege that the product was defectively designed and the defect would have to be defined. A design defect that causes harm could be remedied by regulating sales, perhaps

to children, or redesign—reformulation in the case of foods (e.g., reduce sugar, remove caffeine). To mandate such changes would require proof that individuals have been harmed by specific products, not an easy task given that diets consist of many foods. A market share strategy might be possible, in which groups of individuals have been harmed by a class of products. Another approach might be failure to warn litigation. This case would need evidence that foods are addictive enough to warrant a warning and a justifiable claim that victims would have acted differently if they had been warned and that future warnings would have a beneficial impact.

Finally, liability might be possible if companies knowingly designed their products so that the public would overconsume them. This would be analogous to tobacco companies manipulating the nicotine levels in their products to increase the potential for addiction. With categories of foods such as fast foods and soft drinks contributing to obesity and ill health, industry's knowledge of ingredients' addictive properties, and its intentional manipulation of these ingredients, could make industry vulnerable to claims of deceptive and unfair business practices or personal injury lawsuits.

Innovation to Address the Existing Regulatory Gap

Thus far, the federal government has taken little regulatory action to deal with obesity issues. This gap might be filled by innovative legal approaches. Two areas, litigation using nuisance law and performance-based regulation, merit further development.

Innovative Litigation

The Need for Litigation. Litigating for the public's health is a well-recognized and often utilized tool of public health advocates, involving various forms of lawsuits (e.g., personal injury claims and class actions) against many types of products and practices that allegedly cause harm. Litigation was first used strategically at a time when such actions were rarely considered (Teret 1981, 1986), but its use has now become widespread and sometimes controversial, involving products such as automobiles, cigarettes, alcohol, and guns.

The proponents of public health litigation perceive several benefits derived from lawsuits. First and most important is that litigation can help transfer the cost of injury and illness back from those harmed to the maker of the product. This provides a powerful incentive for the product manufacturer to invest in prevention, rather than pay the penalty for neglect.

Litigation can also benefit the public's health through the discovery process. By having access to a manufacturer's data, the epidemiology of harm can be better understood. This can generate publicity alerting consumers and regulators to the dangers of a product and sometimes even embolden regulators to address such problems (Vernick et al. 2003).

Some scholars argue that the public's health is better protected by regulation and that substituting litigation for regulation is a misuse of litigation. Although such criticism has appeared in the public health literature, it is more common in the scholarly legal literature. Timothy Lytton summarized the arguments against the use of litigation as a surrogate for regulation:

> [C]ommentators have cautioned that regulation through litigation can be inefficient and ineffective. Compared to other forms of regulation, litigation is often unnecessarily complex, protracted, costly, unpredictable, and inconsistent. Moreover, courts are generally less well equipped than legislatures and administrative agencies to evaluate technical information, implement regulations, monitor results, and make adjustments. Policies resulting from litigation may involve less public input and accountability than government regulation, serving the private or political interests of litigants rather than the public interest. Litigation can also be counterproductive to policy reform, generating a legislative backlash against regulation. (Lytton 2008, pp. 1837–38)

In *Regulation through Litigation*, W. Kip Viscusi added to the worries about this type of litigation, stating that "government regulations will usually provide a more sound approach to promoting health than litigation does, which by its nature focuses on individual circumstances rather than the functioning of an entire product market" and that "ideally, one would like to discourage litigation that has undesirable consequences, such as usurping the traditional role of government regulation agencies" (Viscusi 2002, pp. 2, 20).

These criticisms have some merit. Mistakes can be made in litigation, such as having a jury and even an appellate court erroneously find a

causal relationship between exposure to a substance and a subsequent harm. Regulatory bodies have greater expertise in assessing scientific association and causation than a jury does. Also, litigation presents a moving target for industry because outcomes of lawsuits may vary by time and place. The argument against litigation, however, assumes the existence of an effective regulatory process that renders litigation unnecessary, which does not seem to be the case. Regulatory agencies are notoriously understaffed and underfunded, so they often are unable to carry out their regulatory purpose (Martin 2006). An obvious example of this occurred in 2006, when an outbreak of *E. coli* associated with contaminated spinach resulted in 205 confirmed illnesses and three deaths (FDA 2007).

Standard tort litigation, such as claims against fast-food companies accused of causing obesity and ensuing ill health, has not been very successful,[52] as linking obesity to one or a few companies poses difficult problems regarding proof of causation. Therefore, innovative approaches are needed in this arena. One such approach is using nuisance law in the obesity context.

Nuisance Law. Given the problems associated with garden-variety tort claims, nuisance litigation may be a more successful strategy. Nuisance law is closely connected with protecting the public's health, and in recent years such litigation has been used in a variety of health threatening situations. In *City of Gary v. Smith & Wesson Corp.*, the Indiana Supreme Court found that the makers and sellers of handguns could be held liable for the public nuisance of providing enough guns to supply the illegal market. The Court wrote:

> [A] nuisance is an activity that generates injury or inconvenience to others that is both sufficiently grave and sufficiently foreseeable that it renders it unreasonable to proceed without compensation to those that are harmed. Whether it is unreasonable turns on whether the activity, even if lawful, can be expected to impose such costs or inconvenience on others that those costs should be borne by the generator of the activity, or the activity must be stopped or modified.[53]

A federal appellate court reached a similar conclusion in *Ileto v. Glock* regarding the oversupply of guns as a public nuisance.[54]

For other areas of public health, however, nuisance law has not proved to be a successful tool. Public nuisance litigation efforts to transfer

the costs of lead-paint abatement programs from the public to the companies that produced the paint have not fared well in recent times. For example, on July 1, 2008, the Supreme Court of Rhode Island reversed a lower court ruling imposing billions of dollars of such costs on paint companies.[55] In part, the basis of the court's ruling was that no "public right" had been compromised by the conduct of the defendants; instead, it was believed that the lawsuit was based on typical product liability theory and had failed in its inability to prove all the necessary elements of that type of cause of action.

The sale and vigorous promotion of calorie-dense, nutrient-poor foods, especially if the promotion is geared toward a vulnerable group such as children, when combined with the emerging knowledge of the massive harms associated with obesity, can arguably be deemed a nuisance that can and should be controlled by the courts. Food is a necessity of life, and in modern society, most of the population is dependent on others to produce and distribute food. For companies to process and promote foods that are unhealthy owing to additives and ingredients that make the foods obesogenic is not so different from a company's pollution of the air or water, which is the traditional form of nuisance. Safe, nutritious food that is free from processed ingredients that cause ill health is as much of a public good as clean air and water. The courts thus might consider the conduct of industry that impairs the health of groups or populations as an actionable nuisance.

Innovative Regulation

Performance-Based Regulation and Industry Mandates. Performance-based regulation (PBR) is a new approach to promoting public health (Sugarman 2005, 2008). Traditional "command and control" regulation tells businesses what to do, whereas PBR tells businesses what to achieve but leaves it to them to get there. Traditional regulation focuses on inputs, assumes that public health professionals know best, and demands things like installing air bags in motor vehicles, putting warnings on cigarette packs, posting calorie counts on product labels and menus, and training store clerks not to sell alcohol to minors (Mello, Studdert, and Brennan 2006). PBR emphasizes outcomes and demands outcomes like reduced highway fatalities, lower smoking rates, fewer obese children, and less drunk driving. PBR enlists public health professionals as

advisers but relies on innovation and experimentation that come from private competition and financial capabilities to accomplish society's objectives.

Economists often propose replacing (or supplementing) command and control regulation with taxation, forcing products and activities to internalize all their costs, including their public health costs. This conventional excise tax strategy counts primarily on changed consumer behavior in response to higher prices and secondarily on firms reformulating their products and activities to limit their tax burden. For example, if salt were taxed in hopes of reducing the public's ingestion of sodium, consumers might eat fewer potato chips, compared with carrots and strawberries, because the chips would cost more because of the tax. As a consequence, some potato chip makers might reduce the amount of salt and/or produce salt-free potato chips, hoping that at least some consumers would favor these now-cheaper alternatives.

PBR is in many ways like a tax. Businesses that fail to reach their outcome goals pay what might be termed fees, fines, or penalties but what are, in effect, taxes. It is a tax scheme with exemptions: the tax is activated only if the negative public health outcomes exceed a target level. Those subject to PBR will be directly induced to take an active role in changing behaviors in the socially desired direction. For example, tobacco companies required to reduce the number of smokers could employ a variety of methods to cut their consumer base (e.g., raising prices, subsidizing cessation aids and programs, advertising to discourage smoking initiation by teens). By contrast, a large excise tax imposed on cigarettes relies on reduced demand in the face of higher prices as the way to decrease smoking. The excise tax strategy also generates revenue that has to be collected and allocated, whereas PBR, if successful, does not result in the imposition of any new taxes.

Traditional tort litigation aimed at product sellers is analogous to command and control regulation. Victims ask the judicial system (judges and juries) to condemn the conduct of certain businesses as negligent, thereby having the public decree how business should act. PBR is more like true strict tort liability, under which business is held legally liable for the outcomes attributed to its products and services whether or not the business was at fault. Nonetheless, there is an important difference. Strict liability, like the excise tax strategy, imposes costs on business starting with the very first harm incurred. PBR, by contrast, sets a socially realistic target of harm reduction and exempts business from

liability for fees or penalties if the target is met. In effect, strict liability and excise taxes set the performance-based target at zero. PBR would have ambitious, but more realistic, harm-reduction targets, such as a 40 percent reduction in smoking rates or drunk-driving deaths within seven years.

Applied to childhood obesity, PBR could work like this (Sugarman and Sandman 2007). Junk-food sellers might be given the responsibility of cutting in half over ten years the incidence of obesity in schoolchildren. Junk food might be defined as products with a composition of more than 30 percent fat or 40 percent sugar. The regulated firms could include product makers like PepsiCo and Nestlé, chain restaurants like McDonalds and Wendy's, large retailers like Wal-Mart and 7-11, and large wholesalers (so as to cover unbranded junk-food products sold through small retailers and stand-alone restaurants). Together, these firms, which are not too numerous, would probably cover a large percentage of the junk food that is consumed.

A government agency would determine each regulated firm's share of the junk-food market. Perhaps market share would be based on total calories beyond established sugar/fat thresholds, so that those products with the highest concentrations of sugar and/or fat (like soft drinks) would attract an appropriately larger share of the responsibility. Based on its market share of the junk-food calories, a firm would then be given that share of the problem to solve. For example, if Coca-Cola were determined to have responsibility for 5 percent of the junk-food calories, it would have responsibility for 5 percent of the overall childhood obesity reduction goal.

Because children consume many different foods, in order to measure whether Coca-Cola is achieving its goal, the company would be responsible for reducing the obesity rate in a specific group of children. This could be done by the government making Coca-Cola responsible for children attending schools in a geographically contiguous area, say all Georgia schoolchildren (given the company's home base in Atlanta). A plan might set interim goals, requiring Coca-Cola to lower the obesity rate among these pupils by 15 percent after the first three years and then by 5 percent more for each of the next seven years, so as to reach its share of the overall goal within ten years. While junk-food consumption is not the only cause of childhood obesity, it is an important contribution, and fittingly, PBR would not ask junk-food sellers to eliminate childhood obesity, but only to reduce it significantly. Notice

that when using this way of defining the target, it would not matter whether Coca-Cola reduced the Coke drinking of any Georgia students (an input). Instead, the test would be whether fewer of those children were obese (an outcome). Rather than focus on soda drinking, Coca-Cola might instead increase fruit and vegetable consumption, promote exercise, or discourage preschoolers' TV viewing. Keeping those young children slim might turn out to be the best way of lowering obesity rates in schoolchildren later on, but it would be for Coca-Cola to decide, and its efforts might have little to do with its product. But that would be considered a fair burden to bear in return for its ability to profit from the sale of nutrient-poor, calorie-dense products. If Coca-Cola wanted to escape from the PBR plan, it could replace existing products with healthier versions, thereby taking itself out of the junk-food category.

Many difficult regulatory details would have to be worked out to make such plans operational. But if the basic principle were widely embraced, reaching agreement on the particulars would certainly be possible. We would need first to reframe the public health problems caused by products like junk food, cigarettes, and alcohol as not simply the responsibility of users (as industry would have it) but, instead, of those large companies that profit from these products (Lakoff 2002). This framing is consistent with the traditional public health outlook. Rather than blaming victims or their families, interventions seek to benefit people generally, such as by adding fluoride to drinking water. What is special about PBR as a public health strategy is its reliance on the business community to take the leadership role. PBR may be most promising for public health problems that do not yield to traditional approaches, and childhood obesity may well be just such a problem.

Preemption

Any discussion of public health legal strategies would be incomplete without alerting the reader to the issue of preemption, which can arise from litigation or legislative or regulatory intervention at the federal, state, or local level. Preemption refers to the ability of a higher level of government to prohibit certain actions by a lower level of government. The U.S. Constitution's Supremacy Clause explains that federal law is the supreme law of the land,[56] which means that federal legislation

or regulation can preempt state or local law. Local laws can also be preempted by state-level legislation or regulation. Because preemption can significantly impact the ability of those in lower jurisdictions to enact public health laws, it is important to understand the implications for obesity and food policy.

In rare instances, preemption can promote public health goals. This occurs when a strong federal law is enacted to protect or promote public health, if the alternative is weak or inconsistent state or local laws. The strong federal law that preempts state and local efforts will ensure the uniform application of a law throughout the United States. However, preemption at the federal level can seriously impede public health goals. Because public health problems are not evenly distributed throughout the population, states and localities may want to enact laws or regulations that respond to their particular circumstances (Teret, DeFrancesco, and Bailey 1993). But federal and state preemption may make this impossible because it prevents states and localities, respectively, from enacting stronger public health protections than those provided by a weak federal or state law. Federal legislators can recognize that states and localities benefit from local actions and will sometimes avoid preempting state or local law despite their ability to do so.

Preemptive legislation can also affect the ability of claimants to bring lawsuits in the name of public health. For example, two bills, the Personal Responsibility in Food Consumption Act and the Commonsense Consumption Act, were introduced in the U.S. House and Senate, both seeking to shield fast-food restaurants from being sued by individuals claiming civil damages.[57] The federal bills have failed to pass thus far, but between 2003 and 2006, twenty-four states enacted similar legislation shielding fast-food establishments from liability (Trust for America's Health Reports 2007). These laws preempt potential litigants' ability to bring such lawsuits. The Supreme Court has not ruled on the constitutionality of preemptive legislation, but federal district courts considering a similar law that makes it illegal to sue gun manufacturers for the misuse of a firearm[58] found it constitutional.[59]

Many industries urge courts, legislatures, and regulatory agencies to expand the preemptive force of federal and state laws, making preemption an increasingly important issue for advocates working at the state and local levels. Menu label laws, which require restaurants to display nutritional information on menus or menu boards, offer a useful lens to understand how preemption can affect food policy. Even though federal

or state preemption could have the effect of establishing a strong national or state standard for menu labeling, to date preemption has been used primarily to prevent localities from enacting their own menu-labeling regulations. For example, in May 2008, Georgia's governor signed a restaurant industry–supported bill into law, preempting local efforts to enact menu labeling regulations.[60] Georgia's law states that "no county board of health or political subdivision of this state shall enact any ordinance or issue any rules and regulations pertaining to the provision of food nutrition information at food service establishments."[61] As a result, the law preempts all of Georgia's localities from engaging in any menu-labeling efforts.

Some localities that already passed menu-labeling laws or regulations—including San Francisco, Santa Clara, and New York City—faced challenges by the industry alleging that the laws are preempted by the federal Nutrition Labeling and Education Act of 1990 (NLEA). New York City faced the first challenge on this front by the New York State Restaurant Association (NYSRA).[62] The NLEA clarifies the FDA's ability to require nutritional labels on packaged foods and set standards for claims, such as "low in fat," made about a food's nutritional content.

The NLEA preempts states and localities from enacting nutritional labeling laws, but it exempts certain entities, such as restaurants, from this requirement. Although the NYSRA urged a different interpretation, even the FDA has argued that the NLEA *does not* preempt states and localities from implementing nutritional or menu-labeling laws for restaurants.[63] A federal district court agreed with the city and the FDA and found that the NLEA's preemption clause does not apply to state or local laws requiring restaurants to disclose factual information about their products' nutritional content.[64] The NYSRA appealed this decision, which is currently pending in the circuit court. The NYSRA's challenge is emblematic of the type of preemption claims that state and local menu-labeling laws have been facing and are likely to face in the near future.

In September 2008, California became the first state to enact a statewide menu-labeling standard. The law, a compromise between industry and menu-labeling advocates, preempts local menu-labeling ordinances, like those previously passed in San Francisco and Santa Clara. According to the California law, by 2011, chain restaurants in California will have to display the calorie content for menu items using

a combination of menus, menu boards, display tags, and brochures.[65] All local ordinances in the state were rendered null and void.

As these menu-labeling examples demonstrate, preemption can have serious ramifications for obesity prevention efforts and food policy. Because both the federal and state governments have the ability to preempt local laws and regulations, those working at the local level may want to advocate for the inclusion of savings clauses in federal and state legislation. A savings clause is a explicit statement in legislation that the legislature did *not* intend to preempt certain aspects of state and local law. With the threat of preemption removed, localities can then pursue creative legal solutions to obesity relevant to their jurisdictions' needs. With an awareness of the issues raised by preemption, obesity prevention advocates can more effectively promote their interventions and also anticipate notable legal challenges they may face.

Conclusions

The law should be considered as a way to advance public health. In light of new scientific advances, gaps in the current regulatory environment, and the increasingly pervasive toxic food environment, this article proposed legal approaches to address obesity. New conceptualizations become possible when the issue is framed in terms of rights and responsibilities.

The law has a powerful role to play in confronting factors that contribute to obesity, including food marketing, the overabundance and overaccessibility of nonnutritious foods, the lack of nutrition information in restaurants, and the possible addictive properties of food. Due to regulatory gaps, the right of individuals to a nontoxic food environment and conditions that foster physical activity is not being realized, making innovative legal strategies important to consider. As examples, the application of nuisance law and the recognition of health as a property right are strategies that may set the stage for litigation. Responsibilities of both government and industry argue for the consideration of strategies such as performance-based regulation, in which industry ingenuity is harnessed to solve health problems caused by their products, along with vigilance to the issue of preemption, which can present both barriers and opportunities in the obesity arena.

Historically it has been the role of government to regulate public health, safety, and welfare. The "police power" of states and their political subdivisions gives them the ability to enact laws to protect the public and has roots back to the early twentieth century,[66] as evidenced by the consumer protection regulatory system currently in place. However, government institutions have failed in the face of obesity, relying on attributions of personal responsibility and weak attempts at education while protecting practices such as food marketing that contribute to the problem. It is important for legal scholars to devise innovative strategies to address obesity from new perspectives. The great potential for the law to rectify the status quo has yet to be fully explored. We hope this discussion is an impetus for the further development of the law in this key area of public health.

Endnotes

1. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
2. *Virginia State Board of Pharmacy v. Virginia Consumer Council, Inc*., 425 U.S. 748, 764–65 (1976).
3. *Board of Trustees of the State of New York University v. Fox*, 492 U.S. 469, 482 (1989) (italics in original).
4. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).
5. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60 (1983).
6. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).
7. *Board of Trustees of the State of New York University v. Fox*, 492 U.S. 469, 473–74 (1989).
8. *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557, 563 (1980).
9. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).
10. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (citing *Reno v. ACLU,* 521 U.S. 844, 875, (1997)); *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) ("The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children").
11. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).
12. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).
13. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980).
14. *See Williams v. Gerber Products Co*., 2008 U.S. App. LEXIS 8599 (April 21, 2008, 9th Cir).
15. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (as amended).
16. 46 FR 48710, Children's Advertising, codified at 16 CFR 461 (October 2, 1981).
17. *See also Ginsberg v. New York,* 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring) (A child "is not possessed of that full capacity for individual choice which is the presupposition

of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.").

18. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).
19. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (Even for political speech that is "reprehensible morally . . . the remedy to be applied is more speech, not enforced silence.").
20. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).
21. *National Electrical Manufacturers Association v. Sorrell,* 272 F.3d 104, 116 (2d Cir. 2001) (citing examples: "2 U.S.C. § 434 (reporting of federal election campaign contributions); 15 U.S.C. § 78l (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of pollutant concentrations in discharges to water); 42 U.S.C. § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code § 25249.6 ("Proposition 65"; warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (disclosure of pesticide formulas). *See also* Food Allergen Labeling and Consumer Protection Act of 2004 (Title II of Public Law 108–282) (August 2, 2004) (requiring that foods regulated by the FDA must be labeled with all ingredients that are derived from the eight most common food allergens [milk, eggs, fish, crustacean shellfish, tree nuts, peanuts, wheat, soybeans]).
22. Textile Fiber Products Identification Act (15 U.S.C. § 70, et seq.) and Wool Products Labeling Act of 1939 (15 U.S.C. § 68, et seq.); *see also* Fur Products Labeling Act (15 U.S.C. §§ 69–69j) (requiring that articles of apparel made of fur be labeled and that invoices and advertising for furs and fur products specify the true English name of the animal from which the fur was taken and whether the fur is dyed or previously used).
23. 21 U.S.C §343 (1990).
24. *See*, e.g., 15 U.S.C. 1451 (congressional declaration of the policy for the Fair Packaging and Labeling Act: "Informed consumers are essential to the fair and efficient functioning of a free market economy. Packages and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons.").
25. 21 C.F.R. 101.9(j)(2)(i).
26. *See* New York City Health Code §81.50 (January 22, 2008).
27. *See*, e.g., Philadelphia Health Code §§6-102, 6-308 (Amendment no. 080167) (2008); Chapter 708 of the Laws of Westchester County, "Calorie Labeling by Chain Service Food Establishments" (2008); California S.B. 1420 (California 2008).
28. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 911 (9th Cir. 2005).
29. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 912 (9th Cir. 2005).
30. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 922 (9th Cir. 2005).
31. *See Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005).
32. *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 553 (2005).
33. *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 559 (2005) (quoting *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 229 (2000)). ("Compelled support of government—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position.").
34. *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 564 n. 7 (2005).
35. *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 554 (2005).
36. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 922 (9th Cir. 2005).

37. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996).
38. *Texas v. Johnson*, 491 U.S. 397 (1989).
39. *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 496–97, n. 8 (1982).
40. *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 567 (2001) (citing 940 Code of Mass. Regs. §§ 21.04(2)(c)–(d), 22.06(2)(c)–(d) (2000)).
41. *Lorillard Tobacco v. Reilly*, 533 U.S. 525, 569 (2001).
42. *Lorillard Tobacco v. Reilly,* 533 U.S. 523, 570 (internal citations omitted).
43. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507 (1996) (internal citation omitted).
44. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995).
45. *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996).
46. *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).
47. *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 497 (1982) (A "retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection.").
48. *See*, e.g., N.J. Stat. § 5:12n119 (2008) (Gaming by certain persons prohibited; penalties; defenses).
49. *See*, e.g., N.Y. Pub. Health Law 1399-cc(1) (McKinney Supp. 2005) (Prohibiting the purchase of cigarettes by people under the age of eighteen).
50. *See*, e.g., N.Y. Alco. Bev. Cont. Law 65(1) (McKinney Supp. 2005) (Prohibiting the purchase of alcoholic beverages by people under the age of twenty-one).
51. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507 (1996).
52. *See*, e.g., *Pelman v. McDonald's Corp.,* no. 02 Civ. 7821, 2003 U.S. Dist. LEXIS 15202, 2003 WL 22052778 (S.D.N.Y. Sept. 3, 2003).
53. *City of Gary v. Smith & Wesson Corp.,* 801 N.E.2d 1222, 1231 (Ind., 2003).
54. *Ileto v. Glock,* 349 F. 3rd 1191 (9th Cir. 2003).
55. *Rhode Island v. Lead Industries Association, Inc.,* 2008 R.I. LEXIS 79 (R.I. July 1, 2008).
56. U.S. Constitution, Article VI.
57. Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2004); Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005); Commonsense Consumption Act of 2005, S. 908, 109th Cong. (2005); Commonsense Consumption Act of 2007 (Introduced in House) HR 2183 IH (110th Cong.) 1st sess.; and Commonsense Consumption Act of 2007 (Introduced in Senate) S 1323 IS (110th Cong.) 1st sess.
58. *See* Pub. L. no. 109–92, 119 Stat. 2095, Protection of Lawful Commerce in Arms Act (October 26, 2005).
59. *See City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005); *see also Ileto v. Glock, Inc*., 421 F. Supp. 2d 1274 (C.D. Cal. 2006).
60. Georgia H.B. 1303 (Georgia 2008).
61. Georgia H.B. 1303 (Georgia 2008).
62. *New York State Restaurant Association v. New York City Board of Health*, 2008 WL 1752455 (S.D.N.Y. 2008).
63. Brief of Amicus Curiae United States Food and Drug Administration, *New York State Restaurant Association v. New York City Board of Health*, 2008 WL 1752455 (S.D.N.Y. 2008) (no. 08-1892-cv).
64. *New York State Restaurant Association v. New York City Board of Health*, 2008 WL 1752455 (S.D.N.Y. 2008).
65. California S.B. 1420 (California 2008).
66. *Sligh v. Kirkwood*, 237 U.S. 52, 59 (1915); *see also, Hillsborough County v. Automated Medical Labs, Inc.,* 471 U.S. 707, 719 (1985) ("the regulation of health and safety matters is primarily, and historically, a matter of local concern").

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