

A Legal Primer for the Obesity Prevention Movement

| Seth E. Mermin, JD, MEd, and Samantha K. Graff, JD

Public health advocates and scientists working on obesity prevention policy face challenges in balancing legal rights, individual freedom, and societal health goals. In particular, the US Constitution and the 50 state constitutions place limits on the ability of government to act, even in the best interests of the public. To help policymakers avoid crossing constitutional boundaries, we distilled the legal concepts most relevant to formulating policies aimed at preventing obesity: police power; allocation of power among federal, state, and local governments; freedom of speech; property rights; privacy; equal protection; and contract rights. The goal is to allow policymakers to avoid potential constitutional problems in the formation of obesity prevention policy. (*Am J Public Health*. 2009;99:1799–1805. doi:10.2105/AJPH.2008.151183)

The epidemic of obesity besetting the United States is familiar—perhaps all too familiar—to the public health community. In recent years, the crisis has galvanized researchers and advocates into wide-ranging efforts to address a problem that, as the surgeon general has observed, “may soon cause as much preventable disease and death as cigarette smoking.”¹

Many of these proposed solutions involve legislative or regulatory efforts by government at the federal, state, and, especially, local levels. Advocates are keenly aware of the political obstacles that they face in attempting to persuade Congress, state legislatures, city councils, or school boards to enact policies addressing the obesity epidemic. However, they may be less familiar with the legal issues involved in trying to pass a new law, promulgate a new regulation, or enforce a new policy. That lack of familiarity may result in serious problems, including the passage of legislation that is unconstitutional and the resulting costs of defending the law in court and possibly paying the attorneys’ fees of those who successfully challenge it.

Many of those individuals proposing ideas to legislatures or agencies have heard lawyers use such ominous words as federal preemption and commercial speech but have had no ready way of determining what these terms might actually mean for their projects. More broadly, the obesity prevention movement lacks a concise reference guide setting out the basic legal concepts that are likely to arise in

the pursuit of policy change. This primer is an attempt to address that need.

THE AMERICAN LEGAL FRAMEWORK

The legal framework governing obesity prevention measures is the same structure that shapes all legislative and regulatory efforts in the United States. Laws are made by legislative bodies at every level of the political system. Just as a city council passes ordinances on quintessentially local matters such as parking or zoning, so Congress enacts statutes on such national issues as airline safety or packaged food labeling. In addition, local, state, and federal agencies promulgate regulations, which have the force of law.

The courts hear cases to decide whether a law or regulation has been broken. They often must determine whether a new law adheres to constitutional principles. If not, the law cannot be enforced. Finally, the courts also determine what the specific language in a law means. Therefore, it is often the courts that decide what the law is.²

The hierarchy of laws is fairly straightforward: the federal Constitution trumps everything else. No statute or regulation (or state constitutional provision) may contradict a provision of the US Constitution. Statutes passed by Congress occupy the next level, along with obligations under certain international treaties. Federal regulations and other pronouncements

of federal agencies occupy a lower rung on the federal legal ladder.

All of these forms of federal law represent the supreme law of the land, which must be followed by all courts, federal and state.³ State laws may be different from federal laws, but when there is an actual conflict, the federal law prevails. The hierarchy of state law is similar to the federal regime: state constitutional provisions trump state statutes, which in turn prevail over state regulations. Municipal and other local laws and policies are, in turn, subordinate to state laws, unless the state constitution provides for exceptions to this general principle.

In addition to codified laws, there also exists a background body of law, known as the common law, which is created by court decisions and fills in some of the spaces left by statutes and regulations. The concept of the common law stems from English law hundreds of years ago and has traditionally included whole areas of law, such as contracts, torts (civil wrongs as opposed to crimes), and property (real estate). For instance, the law of nuisance—the neighbor playing music too loudly, the factory spewing smoke across a town—has largely been shaped not by statutes but by the accumulated decisions of courts.

If federal law always supersedes conflicting state law, why do we enact state (not to mention local) laws? The federal government is, under the federal Constitution, a government of limited powers. It may exercise only the authority specifically assigned to it by the Constitution.⁴ State and local governments, by contrast, may legislate in any area from which they are not constitutionally barred, and it is this general authority that they exercise when they regulate in the interest of—to pick a particularly relevant example—public health.

POLICE POWER

States and many localities have broad authority to act in the interest of the health, safety, and welfare of the public. This police

power—which despite the name does not rest with police officers or departments—is what gives governments the ability to issue laws or regulations that address public health issues in general and obesity in particular. Indeed, protection of public health is a core exercise of the police power.⁵

State and local governments have used their authority under the police power to develop and enact measures to counter obesity, including requiring disclosure of the nutritional content of food served in restaurants; imposing restrictions on the advertising of junk food to children; mandating school nutrition and physical education programs; calling on schools to measure, monitor, and report students' body mass index; regulating the sale of junk food in schools; enforcing mixed-use zoning rules to encourage the dispersal of supermarkets and prevent the aggregation of fast food outlets; and improving opportunities and incentives for nonmotorized transportation, including safe routes to school.⁶

The federal government has in theory no such general police power, because the powers that Congress and the president may exercise are limited to those that are enumerated, or specified, in the US Constitution.⁷ But enumerated powers—such as Congress's ability to regulate interstate and international commerce and to enact laws “necessary and proper” to carry out the powers vested in the federal government—have been interpreted very broadly. So the federal government's exercise of its authority, including in the public health context, has become effectively as broad as that of the states.⁸ For example, federal laws address nutrition labeling on packaged foods and the content of public school lunches.⁹

Although the government's authority to enact and enforce laws is broad at the local, state, and federal levels, it is not unlimited. The US Constitution and states' own constitutions restrict the police power (and the power to regulate commerce) in important ways. The 2 basic types of limitation involve the structure of government and the rights of individuals.

LIMITS ON STATE AND LOCAL AUTHORITY

The US Constitution allocates authority between the federal government and the states.

All powers that are not specifically assigned to the federal government are reserved to “the States . . . or the People.”¹⁰ State governments have little if any authority, however, in areas reserved for the national government.

State constitutions, in turn, may provide specific powers to localities.¹¹ But these local governments are constrained in their exercise of the police power when local laws conflict with the laws of the state or federal government. The general rule for such conflicts is that the higher level of government prevails. The limitation on local authority also comes into play even when there is no conflict, if the relevant constitution reserves the policy area to the higher level of government—as, for example, with the federal government's exclusive regulation of patents, bankruptcy, and foreign affairs.¹²

Preemption

As a general matter, federal law prevails over contrary state (or local) law.¹³ This outcome stems directly from the Supremacy Clause of the US Constitution, which establishes that federal law—whether the Constitution, congressional enactments, or agency regulations—is “the supreme law of the land.”¹⁴ The rationale for the preemption of state law by federal law is to prevent, in areas of particular national import, the development of a patchwork of dissimilar local laws.

Federal preemption of state law. The federal government may exercise its supremacy over state and local government in several ways. First, if a federal law or regulation explicitly provides that no state may regulate in a given area, then any relevant state law is preempted and cannot be enforced. The same is true for any pertinent local law.¹⁵ This doctrine is known as express preemption.

For example, the federal Nutrition Labeling and Education Act of 1990 and its implementing regulations require that particular formats and type sizes be used for nutrition disclosures on most packaged foods.¹⁶ The act contains an express preemption provision that prohibits any state or local disclosure requirement that is different from the federal standards.¹⁷ As a result, no state could mandate that packaged foods display the number of calories in a larger font than other nutritional information.

When Congress expressly preempts state law, it often also includes a “savings clause” in

the legislation providing that although certain types of state laws are preempted, other types are not. A broad savings clause may set a floor providing that relevant state laws are not preempted as long as they are more restrictive than the federal law. The federal law regarding the privacy of medical records contains this kind of savings clause.¹⁸ A narrower savings clause may provide that state laws are not preempted as long as they apply a standard identical to the federal standard. A state (or city or county) might pass a law identical to a preexisting federal law to allow individuals—in addition to federal agencies—to enforce it in court. Federal laws governing packaged food labeling fall into this category.¹⁹

The second type of federal preemption is known as field preemption. Even where Congress has not spoken explicitly, if an area has been so comprehensively regulated by the federal government that Congress plainly intended not to leave room for states or localities to legislate, the whole field is said to be preempted. Immigration issues and employee benefits plans fall into the field preemption category. Most topics relating to childhood obesity do not.

A third type of federal preemption—conflict preemption—occurs when there is a conflict between federal and state or local law. When it is not possible for a regulated entity to comply with both a federal and a state mandate, then a court will find the state law invalid. Even in the absence of a direct conflict, the state law will be held preempted if it stands as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress” expressed in the federal law.²⁰ Therefore, because the National School Lunch Act specifically provides that private food service companies will handle à la carte lunch programs,²¹ a state law banning the use of such companies would presumably be preempted.

Particularly in conflict preemption cases involving the exercise of states' police power, the US Supreme Court has traditionally expressed a strong presumption against preemption, permitting invalidation of state law only when “that was the clear and manifest purpose of Congress.”²² This principle has frequently been invoked (and sometimes followed), particularly when public health or safety has been at issue.²³ Its practical effect—in view of the many decisions

that have found state or local law preempted—has been difficult to discern.

State preemption of local law. Local ordinances face a further hurdle: in addition to the threat of federal preemption, they may be preempted by state law. State statutes can expressly preempt local ordinances on the same topic. For example, California enacted a law that requires chain restaurants to disclose nutritional information on their menus and menu boards; this law explicitly bars localities in the state, including those that had already passed similar measures, from regulating in this area.²⁴ State statutes may also invalidate local measures by field or conflict preemption. So even if it does not contain an express preemption provision, a comprehensive state retail food code might be interpreted as preempting a local ordinance regulating the ingredients of restaurant food.

Dormant Commerce Clause

Preemption is not the only federal law hazard that state and municipal legislation must avoid. A related but distinct peril is found in the Commerce Clause of the US Constitution, which provides that Congress has the “power . . . to regulate commerce . . . among the several states.”²⁵ The courts have found in this provision a dormant, or implicit, limitation on the ability of states and localities to pass regulations that affect interstate commerce. In short, even if Congress has not legislated in a particular area, state or local regulatory efforts may be invalidated on 1 of 2 grounds.

First, if a state or local regulation discriminates against out-of-state businesses—if it amounts to economic protectionism for in-state businesses—then the regulation will likely be struck down as discriminatory. Most policies now contemplated by obesity prevention advocates would not be discriminatory under the Commerce Clause. But the burgeoning movement to encourage the consumption of locally grown foods could run up against accusations of discrimination. For example, a state law barring the sale of foods shipped more than 100 miles might be struck down as discriminating against out-of-state companies.²⁶ A municipal law barring all fast-food chain restaurants could be construed as a discriminatory effort to protect local nonchain restaurants.²⁷

Second, if a state or local regulation is non-discriminatory but still has an effect on interstate commerce, a court will use a balancing test to determine whether the burden imposed on interstate commerce outweighs the local benefits.²⁸ Courts are generally inclined to tip the scale in favor of the regulation when the local benefits involve the quintessential police power function of protecting public health.²⁹ This does not prevent businesses from including the Commerce Clause among their claims against state or local measures that have some bearing on interstate commerce. So a municipal law that benefited air quality and promoted physical activity by barring all motor vehicles from the city center would probably face a challenge (albeit a weak one) from trucking and delivery companies arguing that the measure unduly burdened the interstate movement of goods. The scale tends to tip against state and local laws regulating conduct that occurs wholly outside the state in question. Therefore Connecticut could not try to protect the health of in-state consumers by passing a law prohibiting any supplier from selling produce in another state for a lower price than it charges in Hartford or New Haven.³⁰

A challenge under the dormant Commerce Clause will not succeed when Congress has explicitly stated that states may regulate in the area. The dormant Commerce Clause also generally does not apply when the state or locality is itself a participant in the market. The government may choose to contract only with in-state businesses for its own operations, such as running school programs or parks.³¹

LIMITS ON FEDERAL, STATE, AND LOCAL AUTHORITY

Constitutional limitations on government authority result not just from the interplay of various levels of government but also from the individual rights guaranteed in the Bill of Rights and in analogous provisions in state charters. The protections of life, liberty, and property secured by the US Constitution and its state analogs may stand in the way even of legislation beneficial to public health.

Freedom of Speech

Perhaps the most familiar of individual constitutional rights is the freedom of speech. The

First Amendment of the US Constitution and the free speech clauses of state constitutions restrict government's ability to restrain or compel the speech of individuals. Less well-known is that the freedom of speech also extends to corporations and other business speakers. This protection for commercial speech—that is, advertising and other marketing—has emerged from US Supreme Court decisions over the past 3 decades. The Court has struck down laws that prohibited businesses from advertising the price of their prescription drugs, the amount of alcohol in their beer, or (within 1000 feet of a school) the merits of their tobacco products.³²

The fact that advertising receives some constitutional protection does not mean that it is safeguarded as zealously as “pure” speech. Under the US Constitution and most state constitutions, commercial speech receives a lower (intermediate) level of protection. For ordinances and other local measures restricting advertising, that protection takes the form of a test first articulated by the US Supreme Court in 1980 in a case involving the Central Hudson Gas & Electric Corporation³³ and refined in later decisions. The Central Hudson test asks first if the advertising promotes illegal activity or is false or inherently misleading. If so, then it receives no particular constitutional protection. If not, then any government effort to restrict the advertising must meet a fairly exacting standard: the government must have declared a substantial interest that it intends to achieve with the advertising regulation, the regulation must directly and materially advance the government interest, and the regulation must not restrict substantially more speech than necessary to achieve the government's goals—that is, there must be a reasonable fit between the scope of the regulation and the accomplishment of the government's objectives.

In recent years, the Central Hudson test has become a significant hurdle to clear. The US Supreme Court has made clear that laws restricting commercial speech, even in the interest of public health, and even in the interest of children, face substantial constitutional obstacles. For example, the Supreme Court has struck down regulations prohibiting tobacco billboards and signs within 1000 feet of schools because the ban eliminated too much commercial speech directed to adults

about a legal product.³⁴ In the same case, the Court also invalidated a regulation forbidding in-store tobacco advertising below 5 feet high because it doubted the effectiveness of the measure in keeping children from seeing the ads.

There are ways to avoid these obstacles. As the first part of the Central Hudson test suggests, measures that address only deceptive speech or speech promoting illegal activities are subject to a much more lenient form of review. A ban on advertisements stating the incorrect number of calories in a fast food meal, or a prohibition on marketing contraband dietary supplements, would face no significant First Amendment hurdles.

Furthermore, laws and regulations restricting all speech, or broad categories of speech, invoke heightened scrutiny from courts when they apply to communications in public places such as city streets and parks. But similar laws restraining speech in places that are not traditionally open to all speakers do not raise the same concerns.³⁵ For example, restrictions on food and beverage advertising in public schools, which are forums not generally open to all advertisers, will likely be reviewed under a more lenient standard: they must be reasonable and must not discriminate against a particular viewpoint.³⁶ This is not a difficult standard to meet.

Courts look with greater favor on measures that do not restrict speech but rather add factual information to the marketplace of ideas so that consumers may make more informed decisions.³⁷ For this reason, a law requiring the disclosure of nutritional information on menu labels stands a much better chance of surviving a First Amendment challenge than would, for example, a law prohibiting restaurants from advertising the availability of supersized portions.³⁸

Finally, the First Amendment draws a distinction between laws that target conduct and those that affect speech. In a classic example, a government regulation that addressed expressive conduct by prohibiting the burning of a draft card received more lenient First Amendment review (which it survived) than it would have if it had targeted antiwar speech.³⁹ A regulation of expressive conduct may stand if its purpose is unrelated to the communication of ideas, if it furthers an important government interest, and if it incidentally restrains no more speech than necessary to further its goal. In a

recent case, for example, the US Supreme Court observed that there was no constitutional problem with a measure requiring that cigarettes and other tobacco products be sold only from behind the counter rather than in self-service displays. Although there might have been a “speech interest” in placing the products in accessible bins, the government’s purpose in enacting the “appropriately narrow” ban was to prevent shoplifting by minors, not to restrain the commercial communications of tobacco companies.⁴⁰ Thus measures governing the positioning in stores of particular types of low-nutrient, high-calorie foods would be more likely to survive First Amendment review if they were targeted not at the communicative aspects of the foods’ packaging but rather, for example, at the items’ accessibility.

Takings

Other provisions of the Bill of Rights provide further protection to individuals (or, depending on one’s point of view, additional obstacles to obesity prevention policies). The Fifth Amendment, best known for guaranteeing people’s right to remain silent, also known as taking the Fifth, establishes that the government may not take private property for public use without just compensation to the owner. This takings principle applies primarily to real estate—both to eminent domain actions that condemn private property for public use and to regulations that functionally deprive owners of the use of their property.

Several principles guide the inquiry into whether a taking has occurred. First, if the government action includes a permanent physical occupation, then there is a taking and the state must pay just compensation to the owner for the value of the property appropriated.⁴¹ This standard would require payment, for example, if the government were to use private land to create a bike path to school. The obligation would hold regardless of whether the government actually appropriated the land or merely designated the course of the bike path and left the land in private hands. Courts have found a physical occupation in either case. Another strategy sometimes proposed by obesity prevention advocates—requiring that specific sections of supermarkets be set aside for the provision of nutritious food—might also be challenged as a taking of this type.

Second, a taking occurs whenever a regulation deprives owners of all economically viable use of their property.⁴² This standard is rarely met; courts have found very few regulations that rendered land wholly commercially nonviable. Little short of a zoning law prohibiting all development of any kind would fall under this standard.

Finally, the government may engage in a taking whenever a regulation goes too far—in other words, when it imposes burdens on the private landowner that in all justice and fairness should be borne by the public as a whole.⁴³ Unlike the other 2 standards, this is not a clear-cut inquiry but instead requires analysis and balancing of the facts and interests in each case.

Courts have determined a few factors that have particular significance in this third type of inquiry: (1) the economic impact of the regulation, (2) the degree of interference with reasonable “investment-backed expectations,” and (3) the character of the governmental action.⁴⁴ In practice, however, few land use restrictions are held to be compensable takings under this 3-factor inquiry.

A regulation runs more constitutional risk when it prohibits a use of land that was previously permitted. Indeed, several states’ laws specifically exempt preexisting uses of land that become nonconforming when local zoning ordinances are amended.⁴⁵ Other states provide a more limited guarantee, requiring that any new regulation not apply to existing concerns for a particular period.

Forward-looking ordinances are less likely to raise judicial concerns than are retroactive measures. A blanket ban on fast food restaurants in a county, or even a retroactive density rule requiring a certain number of feet between chain restaurants, would receive more searching judicial scrutiny than would a provision requiring, for example, that in the future developers set aside part of their property for a walking and biking trail or dedicate a portion of their supermarket shelf space to healthful foods. Such conditions on the approval of proposed developments will not trigger the compensation requirement as long as they (1) are strongly linked to a legitimate government interest that would have justified the denial of the permit in the first instance and (2) are roughly proportional to the anticipated

effect of the project for which the permit is sought.⁴⁶

If a court finds that a taking has occurred, it must then determine precisely what just compensation to the property owner would be. But the court may also disallow the government action entirely if it finds that the property has been taken not for a public use but rather to enrich special interests.

Finally, most state constitutions contain a takings clause that may be more protective of private property rights than is the US Constitution, either as to which purposes may count as a valid public use of private property or as to when government restrictions on private land use constitute a taking.⁴⁷

Substantive Due Process

Businesses and individuals are afforded additional protections by the Fifth and Fourteenth Amendments. The government is prohibited by these provisions from depriving people of life, liberty, or property without due process of law. The US Constitution guarantees 2 basic kinds of due process. The assurance of procedural due process requires that the state follow proper procedures—providing adequate notice, a fair trial, and so on—when it seeks to take away or limit a person's freedom or possessions.

Substantive due process refers to the principle that the government may not deprive people of fundamental liberty rights without a legitimate justification. The guarantee of substantive due process functions as something of a catch-all provision. Because the understanding of which rights are fundamental may change over time, substantive due process vests discretion in courts to determine which rights are so basic that they must be protected even without being specifically mentioned in the Constitution.

The best-known current applications of substantive due process involve the right to privacy and personal autonomy.⁴⁸ Privacy protections also derive from state constitutional and statutory provisions that, unlike the federal Constitution, explicitly guarantee the right to privacy.⁴⁹

Courts may look with heightened scrutiny at obesity prevention measures that implicate the privacy or liberty of students, families, or consumers. For example, an ordinance forbidding

families from consuming junk food in their own homes would raise serious constitutional concerns. On the other hand, measures barring the sale of certain foods within city limits would likely withstand a challenge by people claiming the liberty to access those foods conveniently. This type of challenge might include politically potent arguments regarding consumer sovereignty or consumer disenfranchisement—that is, the asserted right of consumers to eat what they want—but as a legal matter the challenge is unlikely to succeed. It seems improbable that a court would find a fundamental right to easy access to the foods of one's choice.

With respect to children, a requirement that public schools determine students' body mass index would probably pass constitutional muster, because weighing and measuring a student involves relatively minimal intrusion. Compelled screening for diabetes might be a closer call, because it requires a more intrusive blood test and because the state interest in preventing the spread of illness is arguably reduced in the absence of a contagious disease.

As with other individual constitutional rights, the right to substantive due process is more likely to obstruct government actions when those actions are mandatory rather than voluntary and more intrusive or burdensome rather than less.

Equal Protection

In addition to due process, the Fifth and Fourteenth Amendments to the US Constitution guarantee that no person may be denied the equal protection of the laws.⁵⁰ This principle is best known for prohibiting discrimination on the basis of such characteristics as race, religion, or gender, but it may be invoked any time the government distinguishes between members of a group. A court will apply heightened scrutiny, however, only where the disfavored group (or individual) is a member of a protected class—that is, a category defined by inherent characteristics and historically subject to discrimination because of those characteristics. (Obese people have not been found to be such a class.) In other circumstances, all that the government must show is a rational basis—that is, a legitimate reason—for the distinction. In such instances, including almost all cases involving economic regulation, the legitimate reason need not even be one that was relied on at

the time of enactment.⁵¹ State constitutions' equal protection provisions are generally very similar or identical to the federal standard.

Just about all presently contemplated legislation targeting obesity would trigger only rational-basis scrutiny and therefore would survive an equal protection challenge. For instance, there should be no constitutional problem with requiring menu labeling only by restaurants with 15 or more outlets in the state. Such a distinction is made in the context of economic regulation under the state or locality's police power and can be justified by, for example, the increased resources available to larger businesses to engage in the nutritional analysis and menu design necessary to comply with the statute. More serious challenges might be raised to an explicitly race-based restriction on, for example, the number or density of fast food restaurants in largely African American or Latino neighborhoods. African Americans and Latinos have been disproportionately affected by the obesity epidemic⁵²; nonetheless, government measures targeted at a protected class—even with the best of intentions—are subject to particular scrutiny from the courts.

Contract Clause

A final constitutional provision that may affect local obesity prevention initiatives is the Contract Clause. Article I, section 10 of the US Constitution provides that "no State shall . . . pass any Law . . . impairing the Obligation of Contracts."⁵³ Therefore, a newly enacted law prohibiting carbonated soft drinks in vending machines in schools, for example, may raise constitutional issues regarding the effect of such a measure on preexisting contracts between school districts and soft drink companies.

Scrutiny under the Contract Clause is triggered only when a law substantially impairs a party's rights under an existing contract. To survive such scrutiny, a piece of legislation must (1) serve a significant and legitimate public interest "such as the remedying of a broad and general social or economic problem" to ensure that the state is exercising its police power rather than providing a benefit to special interests and (2) be a reasonable and focused means of promoting that interest.⁵⁴ With respect to this second requirement, courts generally defer to legislative judgment on the necessity and reasonableness of a particular measure. This

is especially true when the contract involves a highly regulated field where the possibility of legislative changes should reasonably have been contemplated by the parties to the contract. When the measure has been enacted for public health reasons, courts' deference is further enhanced.⁵⁵

On the other hand, when the government itself is a party to the contract, courts' scrutiny of a regulatory measure increases. Courts will take a closer look to ensure that the government does not unfairly use its legislative power to make unilateral modifications to its contracts.

Although the hypothetical vending machine law involves food provided in public schools—a highly regulated area—the fact that the school district is one of the contracting parties might cause a court to look more searchingly at the motivation for and process of adoption of the measure. If the contracting entity and regulating entity are entirely different—as would be the case, for instance, with a state law and a school district contract—then the chances of the measure's being upheld would increase. The measure's chances would also be enhanced by the fact that it was passed to foster public health.

CONCLUSION

Public health advocates contemplating local, state, and federal measures to combat obesity have a good deal of leeway in which to operate. It is useful, however, to be aware of the constitutional and statutory pitfalls that may lie in wait.

The federal structure of government and the guarantee of individual constitutional rights are cherished features of the American system. These honored and abstract principles, however, may have very concrete consequences for those seeking to combat the epidemic of obesity in children.

This primer is meant not to deter obesity prevention efforts but to foster them. A basic awareness of potential constitutional and statutory obstacles may assist in developing legislative and regulatory measures that stand a better chance of being enacted and of ultimately going into effect. Each such measure seeks, after all, to enhance the well-being of precisely those People whose welfare the

drafters of the Constitution and founders of our legal system sought to protect. ■

About the Authors

Seth E. Mermin is a consultant with Public Health Law & Policy, Oakland, CA, and is also with the School of Law, University of California, Berkeley. Samantha K. Graff is with Public Health Law & Policy, Oakland.

Correspondence should be sent to Samantha K. Graff, Public Health Law & Policy, 2201 Broadway, Suite 502, Oakland, CA 94612 (e-mail: sgraff@phlpm.org). Reprints can be ordered at <http://www.ajph.aphapublications.org> by clicking the "Reprints/Eprints" link.

This article was accepted January 12, 2009.

Contributors

S.E. Mermin wrote the article. S.K. Graff originated the study idea and structure and edited the article.

Acknowledgments

The Robert Wood Johnson Foundation provided funding for this work through the National Policy & Legal Analysis Network to Prevent Childhood Obesity (grant 62083).

We thank Nora L. Howley and Jerome Williams for their insightful comments on an early version of this article.

Human Participant Participation

No protocol approval was required because data were obtained from secondary sources.

References

1. Office of the Surgeon General, *The Surgeon General's Call to Action to Prevent Overweight and Obesity* (Washington, DC: Department of Health and Human Services, 2001), xii.
2. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
3. U.S. Constitution, art. 6.
4. U.S. Constitution, amend. 10. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.")
5. See *Kroplin v. Truax*, 119 Ohio 610, 621 (1929); *Patrick v. Riley*, 209 Cal. 350, 354 (1930).
6. See Tegan K. Boehmer, et al., "Patterns of Childhood Obesity Prevention Legislation in the United States," *Preventing Chronic Disease* 4, no. 3 (2007): 2, Table 1, http://www.cdc.gov/ped/issues/2007/jul/06_0082.htm (accessed August 5, 2009).
7. U.S. Constitution, art. 1, sec. 8; U.S. Constitution, art. 2, sec. 2.
8. U.S. Constitution, art. 1, sec. 8; *Gonzales v. Raich*, 545 U.S. 1 (2005).
9. *Nutrition Labeling and Education Act of 1990*, U.S. Code 21 (2008), sec. 343-1(a)(4); *National School Lunch Act*, U.S. Code 42 (2008), sec. 1751.
10. U.S. Constitution, amend. 10.
11. E.g., California Constitution, art. 11; Minnesota Constitution, art. 12.
12. U.S. Constitution, art. 1, sec. 8.
13. *Gibbons v. Ogden*, 22 U.S. 1 (1824).
14. U.S. Constitution, art. 6.
15. *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 713 (1985).
16. *Nutrition Labeling and Education Act of 1990*, sec. 343-1; *Code of Federal Regulations* 21, sec. 101.2–101.18 (2008).
17. *Nutrition Labeling and Education Act of 1990*, sec. 343-1(a)(4).
18. *Health Insurance Portability and Accountability Act (HIPAA)*, Public Law 104-19142, sec. 264(c)(2) (2008), codified in note at *U.S. Code* 42 (2008), sec. 1320d-2; and *Code of Federal Regulations* 45, sec. 160.201–160.205.
19. E.g., *Nutrition Labeling and Education Act of 1990*, sec. 343-1(a)(4).
20. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
21. See *U.S. Code* 42 (2008), sec. 1758(e).
22. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978).
23. E.g., *Altria Group, Inc. v. Good*, 129 S.Ct. 528 (2008). Note that this presumption has little effect in areas where the federal government has traditionally regulated extensively, such as national banks, highway safety, and medical devices. Nor does it apply when, as has increasingly been the case, Congress includes broad and explicit preemption provisions in federal legislation. See U.S. House of Representatives, Committee on Government Reform, Minority Staff Special Investigations Division, *Congressional Preemption of State Laws and Regulations* (June 2006) (finding House and Senate had voted 57 times in previous 5 years to preempt state laws and regulations, with 27 of the bills having been enacted as statutes). <http://oversight.house.gov/documents/20060606095331-23055.pdf> (accessed August 5, 2009).
24. *Cal. Health & Safety Code*, sec. 114094 (West 2008).
25. U.S. Constitution, art. 1, sec. 8, cl. 2.
26. See *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). A state is free under the Commerce Clause to disadvantage its own producers. A state may require, for example, that all in-state chain restaurants post nutritional information on their menu boards, even though competitors across the state line face no such requirement. The Constitution envisions that these businesses will be able to have their say in the state's political process and will not therefore require further protection.
27. See *Cachia v. Islamorada*, 542 F. 3d 839 (11th Cir. 2008).
28. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).
29. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).
30. Cf. *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1984).
31. *Reeves v. William Stake*, 447 U.S. 429 (1980).
32. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).
33. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).
34. *Lorillard*, 533 U.S. 565.

35. See *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).
36. See Samantha K. Graff, "First Amendment Implications of Restricting Food and Beverage Marketing in Schools," *Annals of the American Academy of Political and Social Science* 615 (2008): 157–177.
37. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *National Electrical Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001).
38. See *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114, (2d Cir. 2009).
39. *United States v. O'Brien*, 391 U.S. 367 (1968).
40. *Lorillard*, 533 U.S. 569–570.
41. See *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419 (1982).
42. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
43. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).
44. *Penn Central Transportation Company Co. v. City of New York*, 438 U.S. 104, 123, 127 (1978).
45. E.g., *Syracuse Aggregate Corp. v. Weise*, 72 A.D. 2d 254 (N.Y. App. Div. 4th Dep't 1980), *aff'd*, 414 N.E. 2d 651 (N.Y. 1980).
46. See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
47. E.g., Texas Constitution, art. 1, sec. 17; Arizona Constitution, art. 2, sec. 17; Colorado Constitution, art. 2, sec. 14; Missouri Constitution, art. 1, sec. 28; Washington Constitution, art. 1, sec. 16.
48. E.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (access to birth control); *Roe v. Wade*, 410 U.S. 113 (1973) (access to abortion); *Lawrence v. Texas*, 539 U.S. 558 (2003) (consensual sexual activity).
49. The implicit federal constitutional right to privacy is grounded in several provisions of the Constitution (e.g., the Third, Fourth, and Ninth Amendments), but most firmly in the Due Process clauses of the Fifth and Fourteenth amendments. See *Lawrence v Texas*, 539 U.S. 558. Although the federal Constitution does not mention privacy per se, several state constitutions do (see Alaska Constitution, art. 1, sec. 22; California Constitution, art. 1, sec. 1; Florida Constitution, art. 1, sec. 23; Hawaii Constitution, art. 1, sec. 6; Montana Constitution, art. 2, sec. 10), and many other states expressly protect privacy by statute.
50. Although only the Fourteenth Amendment states this explicitly, the Fifth Amendment has been held to contain an implicit equal protection component as well. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).
51. E.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976).
52. See, e.g., Centers for Disease Control and Prevention, Chronic Diseases: The Leading Causes of Death (Atlanta, GA: CDC, 2005), <http://www.cdc.gov/nccdphp/publications/factsheets/ChronicDisease/california.htm> (accessed March 18, 2009).
53. The Constitution contains no such limitation on the federal government. See Michael W. McConnell, "Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure," *California Law Review* 76(1988): 267–295.
54. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983).
55. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).