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THIRTY-SEVENTH ANNUAL ADMINISTRATIVE LAW ISSUE: Essay: THE COMPETITIVE FOOD CONUNDRUM: CAN GOVERNMENT REGULATIONS IMPROVE SCHOOL FOOD?

NAME: Ellen Fried+ Michele Simon++

+ Adjunct Assistant Clinical Professor, New York University Dep't of Nutrition, Food Studies & Public Health. M.A., New York University; J.D., Fordham University Law School; A.B., Barnard College (Columbia University).

++ Adjunct Assistant Professor, University of California, Hastings College of the Law. Research and Policy Director, Marin Institute. J.D., University of California, Hastings College of the Law; M.P.H., Yale School of Medicine; B.S., Carnegie Mellon University. Special thanks to Mark Hancock (Stanford Law School, Class of 2007) for his impeccable research assistance on state laws and regulations.

SUMMARY:
... Increasing concerns over children's health have focused the nation's attention on what children are eating, especially in school. ... Lawmakers and advocates have cause to be optimistic that the intense focus on children's health and school nutrition will create of wave of competitive food reforms; previous determined efforts met with a modicum of success. ... Essentially, regulation of competitive foods was rolled back to its 1970 status, with the addition of a new narrow category of Foods of Minimal Nutritional Value (FMNV). ... The burgeoning junk food and soda sales that followed inexorably led to worsening student health. ... Soda-ban organizers, aware of the financial arguments that ultimately jettisoned previous competitive food restrictions, insisted this time that health issues be paramount and considered apart from financial ones and described the need to "break the pernicious link between unhealthy products and supplemental funding for schools. ... Studies have increasingly connected competitive foods in general, and soft drink consumption in particular, to weight gain and nutritional deficits. ... There must be a national conversation about how best to ensure children's health, a conversation that embraces not only the radical improvement of school food, but includes all unhealthy societal influences that have proven detrimental to children's nutritional and developmental well-being.

HIGHLIGHT: - Winston Churchill [n1]
The longer you can look back, the farther you can look forward.

TEXT:
[*1491]

Introduction

Increasing concerns over children's health have focused the nation's attention on what children are eating, especially in school. According to federal statistics, between 1963 and 2004, obesity rates quadrupled for children ages six to eleven, and rates tripled for adolescents ages twelve to nineteen. [n2] This alarming trend continues, with the latest data showing that more than one-third of American **[*1492]** children - roughly nine million children over age six [n3] - are either obese or at risk for becoming obese. [n4] Equally disturbing is the increasing diagnosis of Type 2 diabetes (formerly called "adult-onset") in young people. [n5] For those born in 2000, the lifetime risk of developing diabetes, barring major changes in diet and lifestyle, is 33 percent for males and 39 percent for females; it is even higher for Hispanics. [n6] Because obesity and diabetes are linked to myriad health problems in adulthood, prevention through ensuring proper eating habits in early stages of life is critical.

Although the public is still divided over whether obesity is a public health issue or personal problem, many people believe schools carry a substantial burden of responsibility - just behind parents and individuals - when it comes to addressing childhood obesity. [n7] This belief is well justified. The National School Lunch Program (NSLP) serves twenty-nine million school children every day and costs American taxpayers more than $ 7 billion a year to provide purportedly "nutritionally balanced" meals. [n8] Many students, however, fill up on items such as soft drinks, chips, and cookies, which are high **[*1493]** in added sugars, fats, calories, and sodium, but low in nutrition. [n9] Such "junk foods" sold in vending machines, cafeteria a la carte lines, [n10] and school stores are known as "competitive foods" because they compete with federally funded meals. [n11] Although NSLP meals are required to meet nutritional standards based upon recommendations from the United States Department of Agriculture (USDA) Dietary Guidelines for Americans, which recommend limiting total fat to 35 percent of calories and limiting saturated fat to less than 10 percent of calories, [n12] competitive foods are not. [n13] As awareness of the nutritional wasteland in schools has increased, [n14] the scrutiny of unhealthy food and beverages available in public schools has intensified and reignited political firestorms all over the nation. [n15]

[*1494] Virtually all schools sell competitive foods. [n16] The overwhelming majority of schools - nearly nine out of ten - sell food in cafeteria a la carte lines, vending machines, and school stores. [n17] Although a la carte lines sell a range of healthy and unhealthy foods, [n18] vending machines contain mostly poor nutritional choices. [n19] School stores primarily sell candy. [n20]

With 83 percent of elementary schools, 97 percent of middle and junior high schools, and 99 percent of high schools selling competitive junk foods, the potential impact on children's health is enormous. [n21] This is particularly true for adolescents who consume 35-40 percent of their daily calories at school. [n22]

As of the 2003-04 school year, 75 percent of high schools, 65 percent of middle schools, and 30 percent of elementary schools had "pouring rights" contracts, [n23] agreements in which schools receive cash and other incentives in return for granting exclusive beverage sales rights to the benefactor. Beverages most commonly sold in schools, as reported by the soft drink industry, are "non-diet soft drinks, juice drinks, ... sports drinks, and water." [n24]

Children's health measures continue to worsen. Although obesity was cited decades ago as a negative impact of competitive foods, the focus was primarily centered on the epidemic of dental caries. [n25] **[*1495]** Diabetes has also become a significant health issue for children. A 2003 study found the prevalence of children overweight at the onset of Type 1 diabetes had tripled from the 1980s to 1990s. [n26] This may suggest that obesity is contributing to the rise of both Type 1 and Type 2 diabetes in children. The condition known as "double diabetes," previously only studied in adults, has also been reported for the first time in children. [n27] In addition, an estimated 61 percent of overweight youth have at least one additional risk factor for heart disease, such as high cholesterol or high blood pressure. [n28]

As school funding gaps increase, so does the pressure to sell competitive foods, which are considered to generate a substantial revenue stream for schools. Although this argument has been one of the standard explanations for why schools must sell competitive foods, the amount of actual school profits - measured against losses in NSLP reimbursement [n29] and percentage of profits that inure to vending and snack suppliers - has been shown to be less than

previously assumed. [n30]

This combination of adverse impacts on children's health and concern more generally over junk food marketing to children is creating increased political pressure on the federal government to act. [n31] In the prolonged absence of federal action, many state legislatures have jumped into the fray to try and fix the problem. But the grassroots momentum that has been building, [n32] bubbling up to the **[*1496]** state legislative level, has resulted in little meaningful change so far. [n33] Some groups are rallying for federal intervention, whereas others are content to let the grassroots momentum build and spread.

Questions loom large about effective policymaking and how to leverage government agency power to improve school food. Is federal intervention the best path, or should school food remain almost exclusively under the purview of local school boards? What role can state laws and regulatory agencies play? As we will show, given the complex politics and economics of school food, there are no easy answers.

Whereas some parents and health advocates are trying to curb competitive food sales in schools, the food industry, along with many school officials, is attempting to maintain the status quo. Given the limited federal activity, the food industry has been mostly successful. Although proposed legislation at the state level has dramatically increased, [n34] few bills have become law. Those that have been enacted are inconsistent and weak. [n35] This policy impasse has left regulators at all governmental levels to face contemporary nutrition issues armed with decades-old regulations based on outdated science. The resulting tangle of administrative rules and regulations, created amid political and economic pressures and a general lack of strategic planning, confounds concerted progress toward healthier school foods.

This Article examines how federal, state, and local policymakers, health advocates, and industry have employed myriad legislative and administrative mechanisms in their efforts to influence competitive food sales. The results sometimes create a healthier school food environment, yet more often serve to thwart that goal. The analysis of current policymaking is assessed against the broader historical, political, and economic context. Overshadowing the uneven results engendered by the lack of a cohesive policy is a foreboding sense that the spate of hard-won victories could be short-lived, as was the fate of several earlier efforts to oust junk foods and sugary beverages from schools. Lawmakers and advocates have cause to be optimistic that the intense focus on children's health and school nutrition will create of wave of competitive food reforms; previous determined efforts met **[*1497]** with a modicum of success. [n36] It would be myopic, however, not to examine why, after sodas and junk foods were removed from some schools, they not only returned but flourished. Perhaps they were never fully required to leave.

The virtually unchecked sale of competitive foods in schools is a core component in the national debate to reduce and ultimately reverse childhood obesity and diabetes. As competitive foods take center stage in the national debate over how schools can reverse rising rates of childhood obesity and diabetes, our purpose is to ask if the current regulatory approaches are valid public health policy tools to improve school nutrition. Although the effort is still in its early stages, rulemaking inconsistency, the lack of rational nutrition standards, and the virtual absence of a meaningful enforcement mechanism all suggest the need for more effective, public health-focused strategies. We propose as the ultimate solution a complete ban on all competitive foods, in all grades, at all times. Given the obstacles, inconsistencies, and limitations of current policies and proposals, only a complete ban would accomplish meaningful public health reform and truly protect children's well-being.

I. The Evolution of Competitive Foods

A. Impacts of Competitive Foods

Competitive foods add sugars, fats, and empty calories to students' diets; however, the impact of their sale in schools goes beyond poor nutrition. Junk food sales infuse the school environment with commercialism and marketing that affect food choices into adulthood. Competitive food sales also have an adverse impact on the economic health of a school's participation in the NSLP.

1. Health and Nutrition Impacts. Although vending machines stocked with soft drinks have maintained a presence in schools since the 1960s, [n37] the explosive growth of exclusive beverage or "pouring **[*1498]** rights" contracts in schools in the 1990s ushered in a period of almost total saturation and increased consumption both in and out of school. Children's intake of added sugars in their diets from soft drink consumption has soared; [n38] from 1985 to 1997 school district purchases of sodas increased by an astonishing 1,100 percent. [n39] The ubiquity of sugary beverages, successfully promoted in schools with financial and other incentives such as scoreboards and band uniforms, has also had an impact on children's caloric and nutritional intake. [n40] One study found that the consumption by a child of just one additional sugary beverage per day increased the risk of obesity for that child by 60 percent. [n41] Watershed studies such as these contradicted beverage industry assertions downplaying the link between sugary beverage consumption and ill health. [n42]

Competitive foods have also been a source of increased calorie consumption; the growth of portion sizes includes larger packaged snacks and beverage containers. [n43] Many schools provide competitive foods sales from large fast food chains, [n44] even though fast food meals are generally high in fat and calories. One study concluded that competitive foods had a decidedly negative effect on students' nutrient consumption. [n45] Students who ate competitive foods consumed 20 percent more calories and twice as much fat and sugar **[*1499]** as students who did not eat competitive foods. A long-term study that tracked the eating habits and weights of young adolescents revealed that each additional fast food meal consumed correlated with a substantial increase in body mass index (BMI). [n46]

Competitive foods also adversely impact learning; poor nutrition and obesity have both been shown to correlate to poor academic performance. Several studies have found that overweight children are more likely to have behavioral problems, [n47] score lower on math and reading tests in kindergarten and first grade, [n48] and are twice as likely to be tagged for remedial and special education classes. [n49]

Purchase of competitive foods displaces the consumption of fruits, vegetables, and other healthful foods; as the number of vending machines increases, the consumption of fruit - especially as part of the school meal - decreases. [n50] Fat intake also increases when elementary school students find themselves with greater opportunities to purchase junk foods at middle school snack bars. [n51] Despite the lingering problems with school meal quality, when children are limited to school meal programs, they consume more healthful nutrients than children who do not eat school foods. [n52] This effect is significant because of the enormous number of children who participate in these programs: 83 percent of all public and private schools participate in the NSLP, and approximately 60 percent of children in those participating schools eat the NSLP lunch on a typical school day. [n53] School lunches also continue to combat hunger **[*1500]** for many children who eat their primary, and sometimes only, meals at school. [n54]

2. Marketing and Commercialism Impacts.

Competitive foods, especially soft drinks sold under "pouring rights" contracts, bring ubiquitous commercialism and marketing to schools. Vending machines are covered with advertising, serving as de facto billboards. Moreover, one survey of Texas schools found a plethora of branded merchandise associated with soda contracts, including shirts, book covers, sports bags, sunglasses, clocks, cups, coolers, and hats. The study concluded that "students are surrounded by advertising and brand logos ... . The true purpose of these contracts is to develop brand loyalty in students at an early age." [n55] The sale of fast food brands in school also establishes lifelong tastes and eating habits that favor commercial interests. The inclusion of McDonald's or Pizza Hut inside schools implies endorsement of the products and the approval by school authority figures.

3. Economic Impacts.

The adverse nutritional impact of competitive foods has negative economic effects. When competitive foods are available, participation in NSLP declines. Also, children who would otherwise purchase school lunch often purchase competitive foods instead. Thus, competitive foods tend to decrease revenue "on two levels, first by diverting revenue away from school food authorities, and second by replacing federal school breakfast and lunch reimbursements with family income." [n56] The lack of NSLP participation hurts schools financially because food service departments receive

reimbursement for each federal meal. [n57] Federal reimbursement rates, however, do not cover school meal costs adequately; the percentage of expenses covered by federal reimbursement fell from 54 percent to 51 percent between 1996 and **[*1501]** 2001. [n58] School administrators have limited options for increasing meal program revenues: (1) increasing student participation in school meals; (2) increasing the cost of a meal to children who pay full price; and (3) offering more competitive foods and beverages for sale, even though this often has the paradoxical effect of decreasing NSLP income. [n59] Many food service operators choose the last option both to keep students on campus and to compete with food sold through vending machines and fundraisers that benefit other school programs. Even if revenue does increase, it is at the expense of student health.

Competitive foods are continually cited by legislators and school administrators alike as undermining the nutritional purpose of NSLP and thereby wasting taxpayer money. One bill to restrict competitive food sales offers in its support that "as children consume more and more of the foods typically sold through school vending machines and snack bars, it undermines the nearly $ 10 billion in Federal reimbursements that we spend on nutritionally balanced school meals." [n60] There is also the enormous cost of "plate waste" - NSLP food served or selected but thrown away when children fill up on snacks and sodas. [n61]

Although participation in the NSLP declines as children move on to secondary schools, the presence of competitive foods is also responsible for decreased participation in school lunch programs there as well. [n62] In states where the sale of competitive foods has been restricted, participation in NSLP has exceeded the national average. [n63]

[*1502]

B. Brief History of Competitive Food and the National School Lunch Program

The National School Lunch Program was enacted in 1946; [n64] its first stated aim was to "safeguard the health and well-being of the Nation's children." [n65] The program was considered necessary for national security; figures from the Selective Service revealed that one-third of men rejected for military service during World War II suffered from significant nutritional deficiencies. [n66] Despite this laudable goal, from its inception the program has been subject to the competing interests of the food industry, farmers, agribusiness, school administrators, nutritionists, and children's health advocates. In addition, chronic underfunding of schools in general - and school meals in particular - has resulted in the unfettered proliferation of competitive foods in schools. Ironically, increased rates of obesity render a substantial number of potential recruits unfit for military service. [n67]

When first enacted in 1946, the NSLP contained no specific statutory or regulatory provisions relating to the sale of foods outside the program. The USDA took the position that it was not feasible to federally regulate sales in thousands of schools that were subject to widely varying circumstances. [n68] This demurrer to local administrators resulted in schools that were increasingly filled with unhealthy foods, even as the number of schools that participated in the program, and were thereby subject to NSLP regulations, rapidly grew. [n69] It also set in motion a forty-year battle for control over competitive foods in school. Newspaper reports of candy sold to raise funds for athletic **[*1503]** uniforms in the early 1960s [n70] were soon followed by articles decrying the presence of candy machines in elementary schools and the efforts of dentists and parents to have them removed. [n71] The availability of junk food and soda in schools has fluctuated depending upon the degree of parental pressure on local school boards [n72] and the will of Congress to direct the USDA to restrict them. [n73]

One of the NSLP's initial functions - turning surplus commodities into school food - did not always result in healthy menu items. For example, inclusions of high-fat, high-calorie items, such as surplus whole-milk cheese, have been criticized since the program's inception. [n74] The first step toward a healthier school lunch was congressional amendment to the NLSP through the Child Nutrition Act of 1966, [n75] which directed the USDA to develop nutritional standards for school lunch. The result was dubbed the "Type A" lunch formula, intended to provide children with one-third of their daily nutritional requirements. [n76] The USDA guidelines were deliberately basic; schools were expected to create menus that followed those guidelines, adapted for their local communities. [n77]

Unregulated sales of snacks, candies, and sodas continued to grow and adversely affect the NSLP by reducing sales of reimbursable **[*1504]** meals and undermining the program's nutritional goals. In 1970, reacting to pressure from parents and school administrators, Congress directed the USDA to first define and then regulate competitive foods. [n78] Implementing regulations continued to allow the sale of foods that either met Type A lunch pattern requirements or were served along with the Type A lunch. That meant a la carte or snack line items - such as french fries, cake, ice cream, and other high-fat, high-calorie foods that had been offered for sale by schools without previous USDA restriction - would continue to be available in the lunchroom at lunchtime, as long as the income "inured to the benefit of the lunch program." [n79] Thus, popular foods were grandfathered into the lunchroom and permitted to be sold in competition with NSLP lunches as long as the income went to the school food service.

Another result was that sales of soft drinks and candies in the lunchroom at lunchtime were restricted because those items had rarely been served with school meals and did not meet basic nutrition requirements. [n80] Yet regulation of the sale of competitive foods outside of school serving areas at lunchtime - mostly sugary soft drinks and junk food often sold in vending machines - were, in effect, left entirely to state and local officials. [n81] Although localities could establish stricter rules and point to federal standards in the lunchroom to do so, [n82] few did. As a result, competitive food sales flourished. Thus, initial attempts to rein in competitive sales of foods with little or no nutritional value effectively targeted only soda and **[*1505]** candy, and even then, local school districts could still continue to sell them outside the lunchroom and during the school day. [n83]

Despite the limited scope of the 1970 USDA regulations, these restrictions still created controversy. The debate centered on school finances, [n84] lost profits for both schools and industry, [n85] student choice, [n86] and opposition to federal control. [n87] As a result of these political pressures, a 1972 amendment to the NSLP shifted the USDA's regulatory authority over competitive foods entirely back to state and local control. [n88] The barely two-year-old USDA regulations that effectively banned lunchroom vending machines selling soda and candy during lunchtime were scuttled. [n89] News commentators, school officials, and members of Congress were furious over the amendment; Senator Clifford Case, a vocal proponent of healthy school food, vowed to "give back to the Department of Agriculture the authority to regulate competitive foods in the school lunchroom." [n90]

[*1506] The Senate immediately held hearings. [n91] Many national health organizations issued formal policy statements opposing the amendment because of its adverse impact on children's health. [n92] Local school administrators testified that they were already feeling pressure to install vending machines, especially from Coca-Cola. [n93] Industry interests described vending machines as merely neutral mechanical devices that benefited the war effort by allowing hungry workers to be nourished on around the clock factory shifts. [n94]

Senators repeatedly introduced bills to reestablish federal authority to regulate competitive foods; the aim was to eliminate junk food sales in schools that participated in the NSLP. [n95] They all failed. [n96] Sales of junk foods soared. [n97] By 1977, several states and local school boards had acted to restrict junk food sales. [n98] The public momentum to ban competitive food sales, in turn, led to renewed pressure on Congress, [n99] which acted to again restore regulatory authority to the USDA, this time successfully passing the National School Lunch Act **[*1507]** and Child Nutrition Amendments of 1977. [n100] Yet "Congress demanded and received assurances from the USDA that the agency would not actually ban competitive foods but would only restrict sales of soft drinks and other foods of minimal nutritional value that "did not make a positive contribution to children's diets.'" [n101]

The promulgation of final regulations took two years, two sets of proposed rules, public hearings, and the review of thousands of comments. A core controversy centered on the definitional standards created by the USDA and the identification of foods that fit them. Confectionery interests, having the most revenue to lose, publicly fought the hardest against their products' inclusion. [n102] Other arguments voiced in opposition to federal regulation were: all foods can be consumed in moderation; local control by school boards is preferable to federal interference; and science does not definitively establish a causal link between candy, sugary beverages, and dental disease. [n103] When the USDA ultimately acted to restrict the sales, primarily of soda and candy, [n104] from the beginning of the school day until the end of the last lunch period, the National Soft Drink Association (later called the American Beverage Association) and

others sued.

In Community Nutrition Institute v. Bergland, [n105] industry plaintiffs argued that Congress intended to restrict sales only within school cafeterias at lunchtime. [n106] The court rejected plaintiffs' analysis, determined that "the statute itself contains no precise time and place limitation," and was "unpersuaded" that Congress had such a **[*1508]** narrow intent. [n107] The court's review of legislative history failed to support plaintiffs' argument but instead revealed that "Congressional debates ... contain some references suggesting that individual legislators may have contemplated restrictions limited to the cafeteria itself. Legislative reports are ... silent on the subject, and an early version of the amendment which referred specifically to time and place limitations was stricken." [n108] The appellate court, too, upheld the USDA's nutrition standards, but overturned the time and place restrictions on the ground that the USDA had overstepped statutory bounds. [n109] Unlike the district court, two of the three appellate judges were persuaded by the industry's argument that the statute contained time and place limitations and that the restrictions were limited by the language ""in food service facilities or areas during the time of food service."' [n110] In addition, the appellate court was presented with "a plethora of quotes from various members of Congress, selected from the legislative history" that Congress really intended to set limited "time and place" restrictions on sales. [n111] Although not entirely convinced by the legislative history, the court invalidated the regulations. [n112] The dissenting judge disagreed with his colleagues' analysis and suggested that it was up to the legislature to decide which judicial interpretation it preferred. [n113]

The National Soft Drink Association had succeeded in convincing the court that its products could not be sold in the school cafeteria at lunchtime but were permissible in all other school venues and at other times during the school day. Essentially, regulation of competitive foods was rolled back to its 1970 status, with the addition of a new narrow category of Foods of Minimal Nutritional Value (FMNV). [n114] This industry victory opened the floodgates to a renewal of aggressive marketing of junk foods in schools, accentuated in the late 1990s by a marked increase in sugary soft drink vending via exclusive "pouring rights" contracts. [n115]

[*1509] Because only the National Soft Drink Association appealed, the appellate court limited its examination of the USDA regulations as they applied to the sale of soft drinks. The USDA, however, amended its regulations on competitive foods the following year not only to conform to the court rulings, but also to extend protection beyond soda to the sale of candies. [n116] The shift in political winds that had led Congress to restrict sales was at an end, and the expansion of the regulation to allow even more competitive foods to be sold was not surprising in light of an administration and secretary of agriculture that sought to entirely revoke USDA restrictions on FMNV. [n117] Congressional efforts to control competitive food sales virtually ceased until 1994, when Senator Patrick Leahy introduced legislation not to mandate a ban, but rather to "encourage local school authorities to restrict or ban the sale of soft drinks and other items of "minimal nutritional value"' until the end of the last lunch period. [n118] Industry interests and school financial pressures derailed these efforts by reviving the same counterarguments; Coca-Cola even led a letter-writing campaign against the bill. [n119] A compromise bill passed instead that merely directed the USDA to provide "model language that bans the sale of [FMNV] anywhere on elementary school grounds before the end of the last lunch period" and to provide state agencies with copies of USDA regulations for distribution to secondary schools. [n120] To allay fears of federal preemption of stricter state bans, Congress left "the choice of when and whether to offer competitive foods squarely in the hands of State of [sic] local officials." [n121]

[*1510] Congressional efforts related to competitive foods included a provision in the 2004 Child Nutrition and Women, Infants, and Children (WIC) Reauthorization Act that requires local school districts to establish wellness committees by the beginning of the 2006-07 school year. [n122] Additional bipartisan efforts led by Senator Tom Harkin directed the USDA to update and expand the definition of FMNV to reflect advances in nutritional science and apply those updated standards to all competitive food sales throughout the school day in all school venues. [n123]

II. Can Federal Regulation Fix the Competitive Foods Problem?

Federal and local officials have grappled with the impact of competitive foods on their children's health and school finances virtually since the inception of the NSLP. For forty years, the USDA and local school officials, by

congressional mandate, traded the authority to first define and then regulate the sale of competitive foods. Table 1 outlines the evolution of NSLP laws and regulations. A broad pattern emerges: grants of congressional power, intended to rein in unfettered sales of junk food, are diminished either by compromise due to political pressure or regulations that leave too much discretion to school districts. The districts in turn wind up beset by financial pressures and soon return to junk food sales. The USDA then finds itself in the diminished role of information clearinghouse, rather than effective enforcer of NSLP regulations.

The obesity and diabetes epidemics are swinging the pendulum back toward federal control under which a mandate of congressional authority and effective USDA regulation could quickly be applied nationwide. To understand whether federal efforts can improve school food, we analyze resulting federal legislation seeking to do just that.

As of March 2007, federal efforts to establish consistent nationwide nutrition standards for all competitive foods and beverages sold in schools were embodied in the Child Nutrition **[*1511]** Promotion and School Lunch Protection Act of 2007. First introduced in both houses in May 2006, [n124] the bill was reintroduced in the 110th Congress and continued to enjoy bipartisan support from numerous cosponsors. [n125] Although a plethora of bills have sought to improve school food over the years, none have been as specific: the bill targets gaps in NSLP statutory authority identified by the appellate court decision in National Soft Drink Association v. Block, and the USDA's failure to update the definition of FMNV.

Table 1. Federal Regulation of Competitive Foods [n126]

Year	Regulation
1966	Child Nutrition Act requires USDA to develop nutritional guidelines for NSLP; USDA establishes Type A lunch.
1970	USDA granted authority to enact regulations regarding competitive foods; sale of competitive foods banned in or near cafeterias during lunchtime. No soft drinks or candy sales permitted in cafeteria or allowed elsewhere in school unless States and localities establish more restrictive rules. "Extra food items" were acceptable anywhere in school if ever sold with Type A lunch; competitive cafeteria sales benefited school food service.
1972-1973	USDA authority over competitive foods rescinded; sale of soda and candy in lunchroom at lunchtime if profits go to school groups. State agencies and school food authorities delegated authority to set regulations. Lunchroom competition permitted if profits go to school groups. Competitive sales through vending machines increase.
1973	Hearings on Vending Machine Competition with National School Lunch Program take place, revealing loss of NSLP revenue to competitive food sales, industry pressures on local administrators, and poor nutritional impact on children's diets.
1973-1975	Senator Case introduces bills to restore USDA authority to regulate competitive foods. Bills fail; competitive foods

	increase. Local groups pressure boards and legislatures to oust junk foods and sodas.
1977	USDA authority to regulate competitive foods restored; competitive foods must be approved by the Secretary.
1978	Proposed rule defines specific foods not approved as competitive. Rule withdrawn after protests; additional input sought from public.
Year	Regulation
1979	Amended rule establishes category "foods of minimal nutritional value" and creates petition process for exemptions.
1980-1981	Final rule issued. Child health advocates and soft drink industry sue; USDA prevails in district court.
1983	USDA loses appeal; lacks statutory authority to promulgate "time and place" restrictions on soda sales outside cafeteria other than lunchtime.
1985	Issues regulations even less restrictive than court ruling; soda and FMNV sales prohibited only in cafeteria at lunchtime; no restrictions on allocation of revenues.
1994	Senate introduces bill encouraging elementary schools to ban soda and junk food sales; compromise bill directs USDA to provide only model language.
2004	WIC Reauthorization Act requires local school districts to establish wellness committees by the beginning of the 2006-07 school year.
2006	Bipartisan Child Nutrition and School Lunch Protection Act introduced; would direct USDA to update FMNV definition and grant statutory authority to impose expanded time and place restrictions-all day and all school venues.

[*1512]

The secretary of agriculture as of 2007 cannot ban the sale of any food or drink, whether or not it fits within the definition of FMNV, outside the cafeteria or at any time other than mealtime. [n127] Also, many unhealthful competitive foods (but not FMNV) have been available on a la carte lines in the cafeteria at mealtime ever since they were approved by the USDA when it first set nutritional guidelines for Type A lunch. [n128] The secretary, however, has the authority to regulate nutritional standards of all school foods. Although the appellate court struck down the administrative attempt to put time and place restrictions on competitive food sales **[*1513]** throughout the entire school day, it never questioned the USDA's authority to set competitive food guidelines. [n129]

The definition of FMNV must be updated; if the USDA will not exercise its authority, then legislation must direct the agency to do so. Also, to exercise that authority meaningfully, the congressional mandate must clearly provide time and place regulatory powers to the USDA. Nutritional standards must be applied in all school venues throughout the

entire school day.

One cogent analysis (predating the act but still relevant to an analysis of competitive food) was offered by Carol Tucker Foreman, the administrator central to the proceedings that established the USDA definition of FMNV. [n130]

Foreman was appointed assistant secretary of agriculture for food and consumer services by President Carter and served in that capacity from 1977 to 1981. During her tenure, Congress shifted authority over junk food from local control back to the USDA through a 1977 amendment to the Child Nutrition Act requiring competitive foods be approved by the USDA. [n131] The return of regulatory powers directed the secretary to disallow only those foods that did "not make a positive nutritional contribution in terms of their overall impact on children's diets and dietary habits." [n132] The secretary was not given further direction on how to determine the standards to apply in identifying foods destined to be banned or restricted in schools that participated in the NSLP. By comparison, the 2006 Child Nutrition Promotion and School Lunch Protection Act offered several measures for the secretary to consider when viewing the entire nutritional picture. Even with the additional directives detailed in the bill, determining new nutritional standards requires the exercise of some discretion; this is one area in which regulators' decisions are potentially most vulnerable to challenge. The congressional directives, however, are intended to ensure that the USDA broadens the scope of the FMNV definition and employs a **[*1514]** strong science-based approach while attempting to stave off industry attacks on the methodology as arbitrary and capricious.

Speaking at a legal conference in 2005, Foreman pointed out that although constrained by governing statutes, "regulators can choose to read the law narrowly or view their mandate expansively, to use the bully pulpit to educate both public policy makers or hide in their offices." [n133] She described the first attempt by the USDA to identify categories of non-nutritious foods, followed by the broad application of time and place restrictions, as "based on the slimmest congressional mandate." [n134] In other words, USDA administrators at that time were focused on establishing bold initiatives that would make a difference by restricting the time and place of competitive food sales. After the appellate decision in Block struck down the secretary's broad application, USDA administrators never again sought to control competitive foods in any meaningful way. Whether administrators use the Harkin bill's grant of powers to effect meaningful change remains to be seen.

In assessing the school lunch situation across the nation in 2005, Foreman noted that "many school districts openly flout" nutrition requirements for school meals. [n135] A 2001 government review revealed that only 15 percent of elementary schools and 13 percent of secondary schools meet the NSLP program requirements for saturated fat. [n136] Schools can do this "without fear," Foreman pointed out, because the "USDA has very few tools to require compliance" and enforcement options are limited. [n137] For example, if the USDA refused to provide federal support to noncompliant school districts, "the burden would fall not on the school system personnel who've failed to meet the rules but on poor children who depend on school lunch to get enough calories." [n138] The same would be true with competitive food.

The litany of issues that lead schools to allow the sale of competitive foods has been consistent throughout the forty-year **[*1515]** attempt to curb junk food in schools. School administrators argue that a la carte lines in which foods do not meet the USDA's dietary guidelines "must stay because children don't like and won't eat the approved meals and the foodservice must [meet financial goals]." [n139] Some districts even threaten to have no school feeding programs at all rather than invest more money. [n140] Foreman notes: "This, they remind us, would hurt poor children who receive free lunches and often use school lunch as their primary meal of the day." [n141] These funding arguments must be resolved so that enforcement can improve.

Finally, Foreman suggested revising and updating the twenty-five-year-old definition of FMNV. She noted, "If USDA is nervous about this venture and fearful of the purveyors of candy, cookies, and soda, they could always defer to the [National Academy of Sciences] to set the standard." [n142]

To achieve these goals, the new bill specifically directs the USDA to update nutritional standards. [n143] Further, as part of its decisionmaking in revising the definition, the bill specifies that the USDA "shall" consider various nutrients,

scientific evidence of connection between diet and health, and recommendations from scientific organizations.

The bill requires the Secretary of Agriculture to apply the updated standards everywhere on school grounds and throughout the school day. The bill, however, would probably not affect school parties, classroom celebrations, or fundraisers taking place off school grounds. [n144] This has been a particularly contentious area throughout the history of regulating competitive foods; the bill allows these areas to remain in the discretion of local authorities, which could dilute the impact of new standards.

[*1516] The bill addresses the primary statutory deficiency identified in Block by specifically granting time and place regulatory authority to the USDA. To assess whether congressional action, followed by USDA administrative actions, will achieve the Act's stated goal "to improve the nutrition and health of schoolchildren," [n145] several issues must be analyzed and measured against the background of previous efforts to achieve the same goal.

Senator Harkin's bill addresses Foreman's suggestion and the lack of statutory authority cited by the appellate court. Statutory language explicitly establishes time and place rules that cover the entire school throughout the school day, so there should be no room for judicial interpretation of congressional intent on this issue. [n146] The bill directs the USDA to update the definition of FMNV. A time limit to accomplish this goal is mandated by statute. This reflects both the immediacy of the task and awareness that the USDA might otherwise be reluctant to tackle it. The specific nature of the considerations that the USDA must review should create a strong, science-driven basis for the updated definition of FMNV, one that will likely avert litigation. The political climate and building grassroots momentum may bode well for passage of this bill or a similar one. With the support of the scientific community, updated nutritional guidelines that apply throughout school and all day could become a reality. Even such an optimistic outcome, however, will likely take significant time and effort to achieve, and enforceability remains uncertain. There are also concerns about whether the bill might preempt states and school districts from having stronger policies. If it does, this bill could do more harm than good.

III. State Regulatory Attempts: Filling the Federal Void with Chaos

In recent years, state legislatures have taken center stage in the battle over the sale of soda and junk food in schools. In recent work, we found that, between 2003 and 2005, forty-five state legislatures **[*1517]** considered bills intended to limit the availability of soft drinks and junk food in public schools. [n147]

In 2005 alone, forty-two state legislatures proposed or enacted measures that require or recommend nutritional guidance for schools. [n148] Despite all this effort, results have been mixed. One analysis found that only sixteen states set nutrition standards on competitive foods, while twenty have time and place restrictions on junk food sales. [n149] According to another report, twenty-two states limit the sale of soft drinks at some grade level, but only ten states have both food and beverage standards that apply throughout the day, everywhere, and throughout all grades. [n150]

Moreover, the impact of the legislation varies significantly, from setting nutrition standards, to suggesting voluntary action. Our previous analysis of state legislation [n151] argues that political compromise is creating a form of "nutritional chaos" - a patchwork of laws and regulations that make little sense from a public health perspective. In at least ten states, legislatures passed bills with weaker language than was originally introduced, a result of political lobbying and the inevitable compromise of policymaking. In many other states, the bills introduced were already weak. [n152] The specific language of each bill also varies significantly. [n153]

What are some of the specific challenges that policymakers and advocates are coming up against? Although it may seem like commonsense policy to require that schools not sell unhealthy food **[*1518]** and beverages to children in the wake of an obesity epidemic, these bills have been far from easy to pass.

State legislatures all over the nation have faced fierce industry opposition. For example, in Connecticut, where one of the most heated battles took place, the house debate went on for eight hours, with some politicians making typical

industry arguments while displaying bottles of Coke on their desks. [n154] More than $ 200,000 was spent to lobby against the bill. The bill finally passed, only to be vetoed by the governor. [n155] Lobbying has been largely from the soft drink industry, which argues that school boards ("local control"), not state legislatures, should make these decisions. [n156] In some states, school administrators have also opposed state mandates mainly because they fear loss of revenue. [n157]

What are some examples of how legislative language gets compromised? Most often, a bill with mandatory language winds up being voluntary. Another common compromise is to exempt high schools - or sometimes even middle schools - so that the law only applies to elementary schools. Sometimes bills wind up only requiring a wellness policy, which is redundant to federal legislation already on the books. [n158]

A. Setting Nutrition Standards - Legislative or Regulatory Approach

States take a variety of approaches to setting school nutrition standards. These approaches break down as follows:

1. Passing a law with nutrition standards contained in the bill language; [n159]

2. Passing a law that defers responsibility to write the standards to a state regulatory body; [n160]

[*1519] 3. Passing a law that defers responsibility to local schools and districts; [n161]

4. Setting nutrition standards through a state regulatory body without enabling legislation; [n162] and

5. Some combination of the approaches described above. [n163]

Usually, either nutrition standards develop through the legislative process and appear in specific statutory language in the enacted final law, or the task is delegated to another body. In most states that have passed laws, the legislature takes initial action, and the education department or another administrative body (sometimes an ad hoc committee) then promulgates the standards.

There are pros and cons to each method. Because the legislative process is highly politicized and not always conducive to rational scientific evaluation, appointing a committee to flesh out nutritional requirements makes sense. Although potentially more limited in scope, the legislative process provides transparency and public accountability that administrative committee deliberations might not.

Although it may seem intuitive that the regulatory process would be less subject to political pressures than the legislative process (at least at the state level), this is not necessarily the case. In addition, what might seem like a relatively simple process of setting state regulations can often turn into a long, drawn-out affair.

Some states are bypassing the legislative process altogether and relying solely on administrative authority to make changes. In Texas, the Secretary of Agriculture implemented a number of school food **[*1520]** reforms to both meals and competitive foods. Texas also requires school districts to have localized policies that conform to state agency rules. [n164] New Jersey also went directly to the administrative route (without passing any enabling legislation) and requires all schools to conform to state guidelines. [n165]

Yet questions remain about the best way to go about solving this problem. Do states that bypass the legislative process have better success? What about a combined legislative/regulatory approach? Consider three examples of states that each followed a different path.

1. California's Statutory Soda Ban and Politics by Ultimatum. [n166]

Often a policy bellwether for the nation, California has been a hotbed of activity over school nutrition for years. The Los Angeles Unified School District (the nation's second-largest) unanimously passed a policy that took effect in 2004 and no longer allows the sale of soda in schools, becoming the first district in the nation to do so in a wave of public activism to improve school nutrition. [n167] In 2003, grassroots momentum resulted in proposed legislation that would have banned soda sales in all public schools throughout the entire state - kindergarten through twelfth grade. A nonprofit advocacy group, the California Center for Public Health Advocacy (CCPHA), led the charge to pass this groundbreaking bill, which was sponsored by California state Senator Deborah Ortiz. CCPHA and others presented overwhelming scientific evidence of a growing public health menace caused by children drinking too much soda, much of which is consumed at school. Wasting no time, the soda industry mounted strong opposition. A combination of behind-the-scenes and up-front industry lobbying on the soda-ban bill resulted in a proposed amendment that would allow high schools to be exempt. (Not coincidentally, most sodas in schools are sold at the high school level.) Such an exemption was never the intent of either the nutrition advocates or Senator Ortiz, the people actually proposing the policy in the first place. In the end, corporate lobbying forced an ultimatum. Either Ortiz's bill would die in its entirety, or it would survive and ban sodas only for kindergarten through 8th grade. Senator Ortiz and the advocates accepted the compromise. Advocates were again **[*1521]** successful two years later in 2005 when another law passed to finally get sodas out of California high schools, thanks in part to backing by Republican Governor Arnold Schwarzenegger. (Most other politicians backing these measures were Democrats.) But even that bill had compromises. For example, the bill permitted sugary "sports drinks" such as Gatorade. Interestingly, the reason was that the previous bill included a compromise, and so two years later a bill that only applied to high schools could not set stricter rules. The thinking was that it did not make sense to have stronger nutrition standards in high school than in middle and elementary schools. Also, the law allows for a long phase-in period, with full compliance not required until 2009. Thus, it is still unclear how successful this legislation will be in creating long-lasting change throughout the state, particularly beyond urban centers such as Los Angeles and San Francisco, where changes have already been made. (Such urban areas will be largely unaffected by the legislation because their existing policies are stronger.) California advocates have also expressed concern that a weaker federal bill might preempt the state law, essentially undoing the hard work advocates took six years to get into place. [n168]

2.Arkansas - Passing a Law, Followed by Regulations.

In thinking of states on the cutting edge of public health policy, Arkansas - ranked seventh-highest in the nation for obesity in 2006 [n169] - might not immediately spring to mind. But thanks in part to a high-profile governor [n170] who made health promotion a statewide priority, this perception is changing. Arkansas health policy leaders in 1999 first started to recognize the health burden that obesity was placing on the state's healthcare system. [n171] As a result of recommendations from the state health department, coupled with Governor Mike Huckabee's personal-turned-public health crusade, Arkansas passed a law in 2003 to address childhood obesity through a variety of policy mechanisms.

[*1522] The law created a fifteen-member statewide Child Health Advisory Committee (CHAC) to, among other things, (1) make recommendations to the state Board of Education and state Board of Health regarding nutrition standards in public schools, (2) eliminate access to vending machines in public elementary schools, (3) require that schools disclose contracts for competitive foods and beverages, (4) assess body mass index for all public school students, and (5) create school district level advisory committees to create local policies. [n172]

The legislative process involved placing in the bill provisions on which there was clear agreement, such as removing vending from elementary schools. But where issues became more controversial, such as vending in middle and high schools, the advisory committee was directed to make recommendations to the state Board of Education. This approach had the added benefit that the advisory committee could make independent recommendations without review or approval by either the legislature or the governor. [n173] The bill became law without controversy in April 2003.

But when it came time for the advisory committee to get to work, the heated debate began. Immediately, local school administrators became nervous about additional "unfunded mandates" from the state on "non-educational"

matters. [n174] The usual battles over local control ensued. The advisory committee took a full year to review the evidence related to the impact of competitive foods and made its recommendations, including changes to both competitive and cafeteria food, in early 2005. [n175] The public comment period resulted in the Board of Education promulgating less stringent rules. One critical issue was whether the guidelines would be required or voluntary at the local level. Even the governor flip-flopped on this question: In 2004, he said there should be proof that the presence of vending machines in schools contributed to obesity and expressed a preference for local control, citing the usual concerns over loss of revenue. [n176] Yet after a second comment period, during which he **[*1523]** apparently felt some political heat, Governor Huckabee reversed course and called for mandatory regulatory language. [n177] The revised rules closely followed the committee's original recommendations. [n178] Most of the other challenges faced at the state level revolved around the requirement for BMI testing and concerns over implementation, funding, and privacy. [n179]

According to an account by several employees with the Arkansas Center for Health Improvement (the agency charged with overseeing BMI measurements), there are important lessons to be learned from the Arkansas experience, most notably the following:

A proposed policy (such as legislation) should be clear in its intent and in the mechanism with which to achieve the desired change, yet not attempt to prescribe in detail what the changes must be (for example, creating the CHAC to recommend rules and regulations provided a mechanism for future change without generating resistance to the proposed legislation). [n180]

3. Giving Up on Legislation, Turning to Regulation: Illinois and the Tug of War Between Legislators and Regulators. Since 2003, Illinois Governor Rod Blagojevich has tried to pass legislation to get soda and junk food out of public schools. [n181] A 2004 bill failed due to lobbying by the soft drink industry coupled with opposition from principals and coaches. [n182] Next, the governor turned to the regulatory process.

In November 2005, Governor Blagojevich started to put pressure on the Illinois State Board of Education (ISBE) to create new rules **[*1524]** for junk foods in school. [n183] The ISBE responded in early December of that year with some proposed definitions. [n184]

These definitions, however, also met with protest. According to one account,

Several advocates and board members worried out loud about lost school revenue and a loss of local school district control. They also wondered whether a proposed definition of "minimally nutritious" food could exclude the sale of higher calorie yogurt while allowing for the sale of lower calorie foods such as low fat Cheetos. [n185]

Nevertheless, the ISBE eventually approved the amendments in March 2006. [n186]

But the battle was not over. The Joint Committee on Administrative Rules (JCAR) - a legislative bipartisan committee within the Illinois General Assembly "authorized to conduct systematic reviews of administrative rules promulgated by state agencies" [n187] - voted ten to one to reject the ISBE's recommendations, saying the board should also consider school meal quality and suggesting the formation of a legislative "school wellness" task force devoted to children's health and nutrition. [n188]

Next, in June 2006, the Illinois State Board of Education submitted a revised proposal to the JCAR which still had final say over rule changes. To comply with the JCAR, the board consulted with school districts and several education associations and said it **[*1525]** would revise its nutritional standards once the School Wellness Policy Task Force issued a report in January 2007. [n189]

Notably, the revised rules, which apply only to kindergarten through eighth grade, were weakened in several respects including: allowing one-year exemptions for existing vending machine contracts; eliminating the restriction on beverage serving size; regulating food sales only during non-meal times (thus allowing junk food sales other than the federal FMNV allowed during meal times); and removing the reference to trans-fatty acids because information about their content is not readily available on all food packaging. [n190]

In October 2006, the JCAR lifted its objection [n191] and the modified rules were filed. [n192] But to complicate matters, the rulemaking did not end there. Instead, the proposed changes required the ISBE to revisit the nutrition standards by initiating a new rulemaking procedure that would align with the statewide nutrition standards to be recommended by the School Wellness Policy Task Force. [n193] The task force report, originally slated for release in January 2007, was past due. So an effort that started in 2003 was not finished four years later. Also, even with all this effort, the rules still failed to address high schools - where most of the soda and junk food is sold - despite the governor's call for a ban on soda and junk food in all schools. Thus, political and economic pressures remain, even at the regulatory level.

B. Evaluating Various State-Level Approaches to Policymaking

Given that states are setting policies related to competitive foods in various ways, the question arises: is there a preferred or "best" method? Answering this question depends on outcome measures. One measure should be whether the final nutrition standards are in the children's best health interests. Just as compromises that have no basis in nutrition are made in legislation, the standards that emerge from regulations are far from perfect from a health perspective. For example, why did Illinois leave out high schools? Moreover, why are **[*1526]** fruit smoothies allowed at a whopping 400 calorie limit - too much for any child? Clearly, children's health is still not being put first.

Moreover, comparing standards across states proves problematic because each set has its plusses and minuses, and more information is needed to evaluate them. For example, although it seems that Arkansas has a "good" provision because it does not allow vending in elementary schools, that does not explain the extent to which this was even a problem prior to the law. That the provision passed the state legislature so easily indicates its relatively minor importance.

Also, although Illinois can be criticized for only applying its regulations to kindergarten through eighth grade, it is unclear whether leaving out high schools was a result of the particular policy route that the state chose to take. Indeed, as California demonstrated, it was a political challenge to include high schools via the legislative route as well. Moreover, Illinois was unable to enact any legislation at all, so perhaps some regulation is better than nothing.

Finally, just looking at the nutrition standards on paper does not take into account the enforceability mechanism, which in each of these three case studies is unclear. State education departments often have standard oversight procedures in place for any rules. But how that oversight will be implemented regarding new school vending requirements remains to be seen. Moreover, national school meal nutrition standards, which states are responsible for monitoring, are consistently violated. [n194] So why would states do a better job of enforcing competitive food regulations?

Another outcome measure might be to simply ask which method is best in achieving lasting policy change, whatever that might be. This too is still speculative and can cut both ways. Because legislation is harder to pass, it might seem intuitive that it would also be harder to overturn. Thus, a state like California might be more stable than, say, a state like New Jersey, which only has regulations on the books. On the other hand, legislative bodies tend to change more rapidly and shift with political winds more frequently than regulatory agencies.

It seems that which approach is best depends on the particular politics of that state in that particular moment in history. For **[*1527]** example, who could have predicted that two Republican governors (in California and Arkansas) would provide the necessary leadership to resist industry pressure in their respective states? And in each of these two

cases, the path was different: California took an exclusively legislative approach, but Arkansas employed a combination of legislation and regulation.

In summary, although there is much activity in state legislatures, it can take a long time - often years - to get a significant bill and any related regulations passed, in part because this issue remains such a political battlefield. The results are a patchwork of compromised policies, with little connection to children's health, or sometimes even common sense. Moreover, the potential impact remains to be seen because of looming questions regarding enforcement and accountability.

IV. Local Activity: Convergence of Federal, State, and Grassroots

The grassroots momentum building at the school district level, particularly around soft drinks in schools, parallels state and federal activity. As mentioned earlier, Los Angeles was the first major school district in the nation to replace soda with healthier drinks. [n195] Other major cities around the country, including Seattle, Chicago, Boston, Philadelphia, and New York, have instituted similar beverage policies. [n196] Many major school districts have also implemented nutrition guidelines for snack foods, improved the school meal programs, or done both. [n197] Because there is still plenty of room for improvement in the rest of the nation's schools beyond urban centers, however, advocates keep pushing for change at the state and federal levels.

As discussed earlier, in some states this grassroots momentum has bubbled up to state legislatures or regulatory bodies, with mixed results. One compromise reached in state legislatures (instead of setting mandatory guidelines) has been to "encourage" schools and **[*1528]** districts to set their own nutrition standards. [n198] It is potentially counterproductive to pass such a voluntary bill, however, because it could result in lawmakers mistakenly thinking the problem has been solved. [n199] Other states, trying to go further than just voluntary language, have instead required school districts to set their own policies. [n200] The problem here is that such a law is redundant to the federal wellness policy requirement and potentially confusing to schools. [n201]

A. Wellness Policies and Local Control

In 2004, in lieu of setting federal standards, Congress mandated that by the start of the 2006-07 school year all schools participating in the NSLP must have local wellness policies in place that address nutrition and physical activity. [n202] Although the federal law is theoretically mandatory, the lack of punishment and enforcement mechanisms means that it is essentially voluntary.

With the wellness policies, the mixed messages coming from the federal government suggest that it does not want to touch this again, but it is going to require local schools to develop their own language rather than just provide models (although the federal government continues to do that too). No additional funding or other financial incentive was offered to schools with the wellness policy law. **[*1529]** Curiously, Congress did allocate four million dollars to the USDA for implementation, to be used for "technical assistance ... for guidance purposes only and not to be construed as binding or as a mandate to schools." [n203]

For example, the USDA's Team Nutrition website includes a plethora of materials, including sample guidelines that come with the following disclaimer: "These examples are being provided as references. USDA is not promoting one over another." [n204] On a very long webpage called "The Local Process: How to Create and Implement a Local Wellness Policy," the USDA lists no fewer than eight steps, under each of which are many more steps and links to numerous resources. [n205]

How are the wellness policies going? It may be too soon to tell, but there are early signs of challenges. According to one survey, only about half of all approved policies met even the minimum guidelines required by statute. Moreover, 40 percent of the policies did not specify who was in charge of implementation, and few indicated any timeline or measurable objectives. [n206] Another survey showed that although most wellness policies addressed nutrition standards

for competitive foods, only 16 percent of districts laid out "prescriptive/specific nutrition standards for [a] la carte and vending." [n207]

What are some of the specific challenges that schools are facing in complying with the federal wellness policy mandate? The Illinois State Board of Education went so far as to write an entire report on this very issue, listing no fewer than twenty-seven barriers identified by members of the School Wellness Policy Task Force. Topping the list of barriers to implementation were (1) the distraction of other priorities, such as No Child Left Behind requirements; (2) lack of **[*1530]** resources, including time, staff, and money; and (3) fear of losing revenue. [n208] Although some of these barriers, such as increased standardized testing, may be new, most of these arguments were raised in one form or another whenever attempts were made to curb sales of competitive junk foods in schools.

Even if schools can overcome these barriers to put a wellness policy in place, there are still many questions regarding enforcement. A representative of the Illinois Association of Regional School Superintendents and a member of the statewide task force (the body charged with oversight of the local wellness policies) admitted, "It's unclear how this is ever going to be enforced." [n209]

There are other signs that schools are too afraid of losing revenue to enact truly meaningful policies. For example, the Monongalia County Board of Education in West Virginia passed a school wellness policy without recommending a ban on candy sales at fundraisers because "it could hurt school groups' ability to raise money for uniforms and equipment." [n210] The school board president argued that even if schools did not sell it, candy would still be available elsewhere, and it is "important for the school district to offer more chances for kids to get exercise after school." [n211] Another board member said that districts should not dictate these policies, and "schools should make those decisions on a more local level." [n212] So the debate over local control has gone from the federal level to the state level, down even to the district level. Once again, disingenuous arguments over local control and exercise are deployed when the real concern is loss of funding. And although some arguments never appear to change, there is no denying that children's health has indeed changed - and for the worse.

[*1531]

B. Case Study in Local Control: Los Angeles

What does history show about the ability of local school districts to create lasting change? The history of competitive foods in Los Angeles is the quintessential example of an urban school district acting to ban competitive junk food sales in the interest of student health, only to find its best intentions undone by a lack of consistent federal or state nutrition policy and the lack of adequate funding for schools at every level.

Los Angeles schools have grappled since the 1960s with candy fundraisers and competitive sales of junk food and soda. [n213] The district has at times withstood opposition to grassroots activism that supported a ban on competitive food sales when meaningful federal regulatory action was thwarted by industry interests, [n214] and at other times it has jettisoned junk food restrictions in response to financial pressures. [n215] The decades-long debates over competitive food sales echo debates in school districts across the country; all arguments for and against competitive food sales have been dissected. The primary distinction is scale; unlike Los Angeles, most districts are not debating lost NSLP or competitive food sales in the millions of dollars. [n216] Otherwise, the impact of junk food sales on student health and school coffers is the same everywhere. Most startling is the timelessness of the arguments, which have changed little in the course of forty plus years. For example, California's Health and Welfare Secretary in 1975 proposed a soft drink tax of 4.5 [cents] per six-pack as part of a program that would "include advertising to discourage the purchase of "non-nutritious, sugar-dominated products' and a ban on "junk foods' in school." [n217] The collected funds were intended to fight dental decay. [n218]

Federal actions in the 1970s that sought to regulate FMNV had a positive impact on Los Angeles and other California schools. One **[*1532]** article noted that most schools were "scrapping the sale of junk foods" in anticipation

of a federal crackdown. [n219] When the USDA sought to use the regulatory power granted it by Congress, the Los Angeles Times editorial board voiced concern over student diets loaded with junk food, but opposed federal interference in local affairs, stating

We think it's a bad idea for Washington to spoon-feed such detailed regulations to schools all over the country ... . It is not the place of the Agriculture Department to be telling parents, school administrators and locally elected school boards how to schedule their cafeteria operations and vending-machine hours, or how to enforce their rules. [n220]

Instead, the Times editorial board endorsed grassroots action. [n221] And when federal regulations were limited by court decision, it was indeed grassroots pressure that overcame opposition based on the fear of lost revenue. The emphasis on healthier school foods, however, was short-lived. The subsequent rescissions - first of restrictions on soda and then of junk food bans - were blamed on increased financial pressures caused by federal budget cuts. The burgeoning junk food and soda sales that followed inexorably led to worsening student health. A 1999 study found that nearly half of children in low-income schools were obese or overweight, with black and Latino children particularly hard hit. [n222] School vending machines sold mostly junk, and branded fast food was available on a la carte lines. Any vestiges of nutritional standards policy were "not universally enforced." [n223]

Given the absence of meaningful federal regulatory authority and the building of national momentum to address children's worsening health, Los Angeles school board members, together with parents and local advocates, worked hard to reestablish nutrition standards that excluded sodas from schools. In 2002, the board **[*1533]** unanimously voted to ban soft drinks in all schools starting in 2004. [n224] Los Angeles had once again taken a leading national role.

Soda-ban organizers, aware of the financial arguments that ultimately jettisoned previous competitive food restrictions, insisted this time that health issues be paramount and considered apart from financial ones and described the need to "break the pernicious link between unhealthy products and supplemental funding for schools." [n225] They recognized that if fundamental changes in school funding were not forthcoming, financial pressures could once again lead to the reintroduction of sodas and junk food.

California enacted statewide laws after Los Angeles acted to ban soda; those laws, too, are applicable to Los Angeles. Although competitive food sales per se have not been banned, schools are acting to replace less nutritious items with more "healthful" ones. It is unknown if sales of new selections will provide the revenue that keeps school programs running. Federally mandated local wellness committees may also provide nutritional standards to keep healthier options in place, because federal standards are insufficient. But nutritional standards are only useful when they are consistent and enforced. Unless all three elements are present - adequate funding, meaningful nutrition standards at all levels, and enforcement mechanisms - Los Angeles schools could once again look to competitive junk food to raise funds. But this time, there will at least be the state laws in place, [n226] subject, of course, to enforcement and potential rescission.

V. Where Do We Go from Here?

In trying to solve a public health problem, many policymakers and well-meaning advocates lack a proper historical perspective. It can be easy for them to think they are the first ones to discover that a problem exists and then proceed by forging presumably new solutions. But as discussed, when it comes to improving school food, there has hardly been a new challenge, argument, or proposed strategy.

[*1534] Over the past forty years, public health experts, policymakers, and parents have grappled with the problem of competitive foods. So the questions become: How does everyone move forward in a way that learns from the past and avoids making the same mistakes? How can policymakers and advocates forge meaningful, long-lasting changes to ensure the problem does not wind up right back where it started decade after decade?

A. What Is Different Now?

A critical component going forward is an understanding of what circumstances have changed and how those changes may influence policymaking. Although most arguments for and against competitive foods in schools remain the same, several aspects of the issue have changed.

. Children's Health. Obesity, a very visible condition, has overtaken dental disease as the primary health issue in the current debate. Diet-related diseases, especially diabetes, have skyrocketed among children and can also be visibly recognized as more students require medication throughout the school day.

. Science. Nutritional science has progressed far beyond what regulators had available to them when the first FMNV definitions were established. Studies have increasingly connected competitive foods in general, and soft drink consumption in particular, to weight gain and nutritional deficits.

. Marketing. Commercialism in schools has exploded. "Pouring rights" contracts have not only increased consumption but also the number of vending machines and advertisements in all school venues. Fast-food chains serve branded items in a la carte lines and as a component of federal meal programs. Although exposure to the full extent of branded food sales and junk food vending has been shocking to many parents, it might be the norm.

. Advocacy. The Internet allows for stronger coalition-building and information-sharing. Also, government agencies are able to disseminate nutrition guidelines and information to schools more efficiently. Reports and studies are readily available to the public. Litigation, or the threat of litigation, resonates with the financial sector. Advocates **[*1535]** empowered by the Internet also are increasingly influencing industry behavior.

Yet with all of these differences, the questions remain: Will they make a difference? And what are the best strategies to effect change?

B. Levels of Policymaking

One way to approach the answer is to ask what level - federal, state, or local - is best for policymaking. Or is it best to have all three operating at once and just hope that effective policies result? In considering the best course of action from a public health perspective, it is usually wisest to have the strongest policy across the board. This leads us to conclude that federal action is best. Such matters do not take place in a vacuum, however, and the political context for policymaking must be considered.

Generally, there is an inverse relationship between feasibility and effectiveness. Although it may be more effective to set nationwide nutrition standards (and avoid the chaos that reigns at the local and state levels), it is also less feasible. A general rule of thumb is that it is harder politically to get things done at the federal level, somewhat less hard at the state level, and easiest at the local level. That is why so many public health advocates are fond of touting local policies as a critical strategy. [n227]

But another political challenge raises questions about the effectiveness of federal policymaking: agency capture. Can the USDA be expected to set meaningful nutrition standards when the agency has demonstrated time and again how much corporations influence it? [n228] Although it would seem that states are more immune to political pressures when it comes to the regulatory process, this is not always true. In Arkansas and Illinois, compromise and politics infused the state regulatory process as well. [n229]

What about the local level? Although political lobbyists do not tend to stalk the hallways of every school in the nation, for many **[*1536]** years [n230] they have shown up at strategic school board meetings. [n231] Local businesses may

curry favor simply as community members. Also, other challenges remain at the local level, particularly persuading school principals and other administrators who are so reliant on the money.

In their article Bottom-Up Federalism, [n232] Professors Charles Shipan and Craig Volden analyzed tobacco-control policymaking to determine whether local laws increase or decrease the likelihood of state-level action, a question that surprisingly has not been thoroughly studied given the overall strategic preference for local action. [n233] They found that laws can indeed bubble up or "snowball" from the local to state level by offering state legislatures success stories on which to build statewide policy. [n234] On the other hand, local policymaking can also operate as a "valve" by taking the pressure to act off the states. [n235] This is particularly true in states with large urban centers, which tend to have the most active policy proponents. It seems that once a problem is solved in one's backyard, the incentive is removed for wider action. Shipan and Volden conclude that it can go either way, depending on certain key conditions. [n236] Their recommendation is that in states without strong local leadership, policymaking should shift to the state rather than remaining at the local level. [n237] This is important because strategic planning is necessary to halt the scattershot approach happening simultaneously at every level. In the end, continuing down the current path is likely to remain ineffective.

[*1537]

C. What Are the Goals of Improving the School Food Environment?

One critical question often missing from a discussion of improving school food is simple: what are the goals? Obviously, goals must be established to determine the best policy strategies. For example, if the goal of school nutrition policymaking is to reduce childhood obesity rates and diet-related disease, is this even achievable through relatively minor changes to nutrition standards that are limited to schools? Alternately, if the goal is to reduce children's overall exposure to marketing of potentially harmful products, then an entirely different policy approach is warranted - one that is advocated by certain groups concerned more broadly with the commercialization of childhood and its negative impacts. [n238]

With our previous discussion of effectiveness and feasibility in mind, we offer the following goals for statutory and administrative policymaking: (1) ensure that schools do not contribute to children's exposure to commercialism in general, and specifically to the harmful marketing messages that come with competitive foods; (2) shore up the NSLP to be the main provider of truly healthy and appetizing food to children in schools that choose to participate in that program; and (3) identify alternative funding mechanisms for school programs so that once and for all, schools do not remain dependent on the income from competitive foods. To achieve these goals, we can envision only one effective policy option.

D. The Ultimate Solution: Ban All Competitive Food Sales

Based on this review of past and current strategies and the myriad limitations of policymaking going forward, only one option remains viable from a public health perspective: the complete elimination of competitive food from schools participating in the NSLP. That would include a la carte lines, vending, and school stores. Can this be done legally? Given congressional authority over the **[*1538]** fiscal viability of the NSLP, the answer seems clearly yes. Although the Harkin bill stops short of complete elimination, it exercises that authority by imposing nutritional standards on all competitive foods at all times and places. And it may be the best step forward based on an application of the feasibility and effectiveness calculus.

Of course, industry and possibly even local school districts may challenge the complete elimination of competitive foods. Although it may seem that such a proposal faces insurmountable political hurdles, ultimately it is unlikely that any alternative policy will achieve meaningful, long-lasting change. Some may counter that such a proposal is unrealistic, but why must there be room for compromise when it comes to children's health? Even from a practical (rather than theoretical) viewpoint, how is the alternative - to continue with past policy models - going to ensure

positive outcomes? With an approach that only tweaks the types of food sold, blatant violations will continue due to lack of oversight, in addition to potential flip-flopping due to political wind-shifting. Although a complete ban does not necessarily eliminate either of these obstacles, removing vending machines from schools, for example, is a much easier oversight mechanism than requiring that the items from by the machines meet nutritional guidelines. It would also eliminate a primary source of commercialism. Moreover, setting this high bar at the federal level would send a clear message on the issue's importance to every school in the nation. [n239]

But removing competitive foods from the picture will not solve the problem alone. At the same time, the quality of school meals must improve drastically, for example, by increasing the federal reimbursement rate, [n240] which in part will lessen schools' dependency on high-fat, low-nutrient commodity foods. Increasing the cost for those who can afford to pay for lunch should also be considered; school food services are expected to break even, yet are forced to undercharge students due to parental resistance. It is time for parents to accept that the axiom "you get what you pay for" does not stop at the schoolhouse door.

[*1539] Just as importantly, schools need better funding in general. Parents and advocacy groups do not even attempt the drastic approach of a complete ban because they often face so much resistance by school administrators to any proposed policy change that would cut off a revenue stream. It is not that principals do not care about children's health; rather, they have come to rely on competitive foods for funding, as have parents and students. Therefore, as long as schools are strapped for cash, the temptation to allow junk food sales will remain. Even with a federal ban, without proper oversight it is still possible that schools will defy the law, unless principals feel they have no need to. Proper funding of education, including extracurricular activities, is critical to address the economic challenges that schools face on daily basis. [n241]

Conclusion

Given the practical obstacles to this proposal, it is likely that various local and state battles will continue. A question remains about whether the effort expended in the fight to regulate competitive foods could be displacing other possibly more effective efforts. Although important, schools ultimately are just one part of the battle when it comes to improving children's eating habits and ensuring good health. Could all the emphasis on schools be coming at the cost of the proliferation of junk food marketing in other realms? More and more health organizations are taking strong stands against the problem of junk food marketing to children in general. [n242] With emerging forms of "new media," schools are hardly the only places that need strong action. There must be a national conversation about how best to ensure children's health, a conversation that embraces not only the radical improvement of school food, but includes all unhealthy societal influences that have proven detrimental to children's nutritional and developmental well-being.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawInstructionExtracurricular ActivitiesControl & RegulationGovernmentsAgriculture & FoodProduct PromotionPublic Health & Welfare LawFood & NutritionNutrition Programs for Children

FOOTNOTES:

n1. Winston S. Churchill, Speech to the Royal College of Physicians (Mar. 2, 1944), in 7 Winston S. Churchill: His Complete Speeches 1897-1963, at 6895, 6897 (Robert Rhodes James ed., 1974).

n2. Ctrs. for Disease Control and Prevention, Dep't of Health and Human Servs., Quickstats: Prevalence of Overweight Among Children and Teenagers, by Age Group and Selected Period - United States, 1963-2002, 54 Morbidity & Mortality Wkly. Rep. 194, 203 (2005).

n3. Inst. of Med., Childhood Obesity in the United States: Facts and Figures 1 (2004), available at http://www.iom.edu/Object.File/Master/22/606/FINALfactsandfigures2.pdf ("At present, approximately nine million children over 6 years of age are considered obese.").

n4. Inst. of Med., Progress in Preventing Childhood Obesity: How Do We Measure Up? 24 (Jeffrey P. Koplan et al. eds., 2006), available at http://books.nap.edu/openbook.php?record id=11722&page=R1.

n5. Ctrs. for Disease Control and Prevention, Dep't of Health and Human Servs., National Diabetes Fact Sheet 1, available at http://www.cdc.gov/diabetes/pubs/pdf/ndfs 2003.pdf. Diabetes is striking particularly hard among American Indians, African Americans, and Hispanic/Latino youth populations. Id.

n6. K.M. Venkat Narayan et al., Lifetime Risk for Diabetes Mellitus in the United States, 290 JAMA 1884, 1888 (2003).

n7. Research!America, Poll: Obesity 10 (2006), available at http://www.researchamerica.org/polldata/2006/endocrinepoll.pdf (counting those who responded that "some" or "a lot" of responsibility rested on the group in question); see also Press Release, Harvard Forums on Health 3 (June 11, 2003), available at http://www.phsi.harvard.edu/health reform/harvard forum release.pdf ("Two-thirds of Americans believe schools should play a major role in helping to fight the [childhood] obesity problem.").

n8. Food and Nutrition Serv., U.S. Dep't of Agric., National School Lunch Program 1, 3 (2006), available at http://www.fns.usda.gov/cnd/lunch/AboutLunch/NSLPFactSheet.pdf. Although the nutritional composition of NSLP meals is improving, advocates urge lower fat and sodium levels and recommend that the commodity foods fit dietary guidelines issued by the U.S. Department of Agriculture. Mary Story et al., The Role of Schools in Obesity Prevention, Future of Children, Spring 2006, at 109, 113. The School Breakfast Program, also funded by the federal government but much smaller in size, falls outside the scope of this Article.

n9. A California survey found that, among responding school districts, 60 percent of all food sales are a la carte items not covered by federal nutritional guidelines. Pub. Health Inst., The 2003 California High School Fast Food Survey 2, 5 (2004), available at http://www.phi.org/pdf-library/fastfoodsurvey2003.pdf.

n10. "< grav A> la carte" refers to individual food items sold outside the reimbursable school meal, generally at mealtime.

n11. 7 C.F.R. § 210.11(a)(1). Junk foods - officially, Foods of Minimal Nutritional Value (FMNV) - are currently defined as foods that provide less than 5 percent of the Reference Daily Intake (RDI) for eight specified nutrients per serving. 7 C.F.R. § 210.11(a)(2) (2006). They include soda water, water ices, chewing gum, and certain candies, including gum drops, jelly beans, and candy-coated popcorn. 7 C.F.R. pt. 210 app. B (2006).

n12. U.S. Dep't of Agric., Dietary Guidelines for Americans 29-30 (2005), available at http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2005/2005DGPolicyDocument.pdf.

n13. NSLP guidelines require that school meals provide no more than 30 percent of calories from fat and 10 percent of calories from saturated fat, and provide recommendations for Vitamin A, Vitamin C, iron, calcium, and calories. 7 C.F.R. § 210.10(b) (2006).

n14. A Centers for Disease Control and Prevention (CDC) survey found "a disturbing picture of the widespread availability of foods and beverages high in fat, sodium, and added sugars as [a] la carte choices, in vending machines, and in school stores." Howell Wechsler et al., Food Service and Foods and Beverages Available at School: Results from the School Health Policies and Programs Study, 71 J. Sch. Health 313, 322 (2001). "Nutrition, health, and education agencies and professional organizations are increasingly concerned about the widespread availability of foods and beverages sold on school campuses that are not part of federally regulated school meal programs." Id. at 313.

n15. Efforts to remove sugary snacks, beverages, and other low nutrition items periodically garner local, state, and federal attention, sparking hot debate. See, e.g., Lee Austin, Pasadena Restricts Candy Snacks, L.A. Times, Oct. 4, 1970, at SG B1 (noting the ban of candy in the Pasadena School District); Frances Cerra, Parents Close Tap on Soda in Westchester Schools Menu, N.Y. Times, Feb. 3, 1976, at 66 (highlighting efforts to remove artificial substances from school lunch foods); Laura Shapiro, What's in a Lunch?, Newsweek, Summer 1991, at 66 ("For today's kids, a balanced meal means a Coke in one hand and a Twinkie in the other."); Snack Bar Enforced to Aid Diets, L.A. Times, Oct. 13, 1963, at WS1 ("The district is in the midst of a controversial program to ... ban ... the sale of candy, soda pop and other confections in the schools.").

n16. U.S. Gov't Accountability Office, GAO-05-563, School Meal Programs: Competitive Foods Are Widely Available and Generate Substantial Revenues for Schools 3 (2005), available at http://www.gao.gov/new.items/d05563.pdf.

n17. Id.

n18. See Story et al., supra note 8, at 115.

n19. In the mid-1990s, the items most widely available in school vending machines were, in descending order, imitation juice drinks, carbonated beverages, fruit juice, candy bars, cookies, candy, cheese puffs, and potato chips. Mary Story et al., Availability of Foods in High Schools: Is There a Cause for Concern?, 96 J. Am. Dietetic Ass'n 123, 124 (1996).

n20. Marianne B. Wildey et al., Fat and Sugar Levels Are High in Snacks Purchased from Student Stores in Middle Schools, 100 J. Am. Dietetic Ass'n 319, 321 (2000).

n21. U.S. Gov't Accountability Office, supra note 16, at 14.

n22. Simone A. French et al., Food Environment in Secondary Schools: <grav A> La Carte, Vending Machines, and Food Policies and Practices, 93 Am. J. Pub. Health 1161, 1161 (2003).

n23. Joy Johanson et al., Ctr. for Sci. in the Pub. Interest & the Pub. Health Advocacy Inst., Raw Deal: School Beverage Contracts Less Lucrative Than They Seem 4 (2006), available at http://www.cspinet.org/beveragecontracts.pdf.

n24. Id. at 2.

n25. See Vending Machine Competition with the National School Lunch Program: Hearings Before the S. Select Comm. on Nutrition and Human Needs, 93d Cong. 34 (1973) (statement of Dr. Robert I. Kaplan, Member, Am. Dental Ass'n Council on Dental Health) ("Dental disease is ... rampant everywhere in the United States. Of the various manifestations of dental disease, tooth decay is by far the most common... . More than $ 2 billion is ... being spent annually [1973] to repair the ravages of tooth decay.").

n26. Ingrid M. Libman et al., Changing Prevalence of Overweight Children and Adolescents at Onset of Insulin-Treated Diabetes, 26 Diabetes Care 2871, 2873 (2003).

n27. Ingrid M. Libman et al., Evidence for Heterogeneous Pathogenesis of Insulin-Treated Diabetes in Black and White Children, 26 Diabetes Care 2876, 2876 (2003).

n28. David S. Freedman et al., The Relation of Overweight to Cardiovascular Risk Factors Among Children and Adolescents: The Bogalusa Heart Study, 103 Pediatrics 1175, 1179 (1999).

n29. A Texas Department of Agriculture survey estimated that food service departments lost more in reimbursable meal sales to competitive foods ($ 60 million) than annual revenue from vending contracts ($ 54 million) for a net loss. Tex. Dep't of Agric., School District Vending Contract Survey (2003), http://www.squaremeals.org/fn/render/channel/items/0,1249,2348 2515 0 0,00.html (last visited Mar. 18, 2007).

n30. See Johanson et al., supra note 23, at 15.

n31. The Institute of Medicine of the National Academies recently gathered information for a report on nutrition standards for foods in school; the report was completed in April 2007. Inst. of Med., Projects: Nutrition Standards for Foods in Schools, http://www.iom.edu/CMS/3788/30181.aspx (last visited Apr. 30, 2007).

n32. See infra Part IV.

n33. See infra Part IV.

n34. Michele Simon & Ellen J. Fried, State School Vending Laws: The Need for a Public Health Approach, 62 Food & Drug L.J. 139, 140-41 (2007).

n35. See id. at 140-45; infra Part IV.

n36. See Marion Burros, The Junk Food Amendment, Wash. Post, Oct. 27, 1977, at E7 ("The forces that have been trying to eliminate "junk food' from schools for four years now said they finally won this year because they keep fighting and because of a "growing interest generally in prevention and health matters.'").

n37. Marion Nestle, Food Politics 207 (2002); see generally Marion Nestle, Soft Drink "Pouring Rights": Marketing Empty Calories, 115 Pub. Health Rep. 308 (2000) (describing the availability in schools of vending machines stocked with soft drinks).

n38. See Joanne F. Guthrie & Joan F. Morton, Food Sources of Added Sweeteners in the Diets of Americans, 100 J. Am. Dietetic Ass'n 43, 51 (2000) ("Americans' intakes of added sweeteners exceed levels typically recommended for a diet that meets current recommendations. Intakes of adolescents are particularly high. The largest source of added sweeteners in American diets is regular soft drinks, and their consumption appears to be increasing.").

n39. Nestle, supra note 37, at 199.

n40. French et al., supra note 22, at 1165.

n41. David S. Ludwig et al., Relation Between Consumption of Sugar-Sweetened Drinks and Childhood Obesity: A Prospective, Observational Analysis, 357 Lancet 505, 507 (2001).

n42. Compare id., with The Coca-Cola Company, Information Regarding Obesity and Soft Drinks, http://www.thecoca-colacompany.com/ourcompany/al obesity and softdrinks.html (last visited Mar. 19, 2007). Also, Coca-Cola's Health and Wellness Institute turns to science in a positive vein; it "focuses on how beverages and beverage ingredients can improve health and help address significant health and nutrition problems around the world." Beverage Inst. for Health and Wellness, Research Focus, http://www.thebeverageinstitute.org/about us/research focus.shtml (last visited Mar. 19, 2007).

n43. Patricia M. Anderson & Kristin F. Butcher, Childhood Obesity Trends and Potential Causes, 16 Future of Children, Spring 2006, at 19,

31.

n44. Pub. Health Inst., supra note 9, at 9.

n45. Susan B. Templeton et al., Competitive Foods Increase the Intake of Energy and Decrease the Intake of Certain Nutrients by Adolescents Consuming School Lunch, 105 J. Am. Dietetic Ass'n 215, 219 (2005).

n46. Kiyah J. Duffey et al., Differential Associations of Fast Food and Restaurant Food Consumption with 3-y Change in Body Mass Index: The Coronary Artery Risk Development in Young Adults Study, 85 Am. J. Clinical Nutrition 201, 203 (2007).

n47. Andrew M. Tershakovec et al., Obesity, School Performance and Behaviour of Black, Urban Elementary School Children, 18 Int'l J. Obesity & Related Metabolic Disorders 323, 323, 325-26 (1994).

n48. Ashlesha Datar et al., Childhood Overweight and Academic Performance: National Study of Kindergartners and First-Graders, 12 Obesity Res. 58, 58, 60-67 (2004).

n49. Tershakovec et al., supra note 47, at 323.

n50. Martha Y. Kubik et al., The Association of the School Food Environment with Dietary Behaviors of Young Adolescents, 93 Am. J. Pub. Health 1168, 1171 (2003).

n51. Karen Weber Cullen & Issa Zakeri, Fruits, Vegetables, Milk, and Sweetened Beverages Consumption and Access to a la Carte/Snack Bar Meals at School, 94 Am. J. Pub. Health 463, 464 (2004).

n52. Story et al., supra note 8, at 113.

n53. Id. at 111.

n54. Food Research & Action Ctr., State of the States: 2005, at 12-13 (2005), available at http://www.frac.org/State Of States/2005/Report.pdf.

n55. Tex. Dep't of Agric., supra note 29.

n56. Democratic Staff of the Senate Comm. on Agric., Nutrition & Forestry, Food Choices at School: Risks to Child Nutrition and Health Call for Action 26 (2004), available at http://harkin.senate.gov/wellness/Food Choices at School.pdf.

n57. U.S. Gen. Accounting Office, GAO-03-569, School Meal Programs: Revenue and Expense Information from Selected States 5 (2003), available at http://www.gao.gov/new.items/d03569.pdf.

n58. Id. at 3.

n59. Id. at 22-23, 24. Schools may also contain costs in order to minimize their revenue shortfall. Id. at 20-22, 24.

n60. 152 Cong. Rec. S3240, 3241 (daily ed. Apr. 6, 2006) (statement of Sen. Harkin) (referring to the Child Nutrition Promotion and School Lunch Protection Act of 2006, Senate Bill 2592, 109th Cong., which would amend the Child Nutrition Act of 1966); see infra note 123 and accompanying text.

n61. U.S. Gen. Accounting Office, GAO/RCED-96-91, School Lunch Program: Cafeteria Managers' Views on Food Wasted by Students 1

(1996) available at http://www.gao.gov/archive/1996/rc96191.pdf.

n62. Approximately 65 percent of high school females and 54 percent of high school males do not consume lunches obtained through the National School Lunch Program. Mary Story & Dianne Neumark-Sztainer, Competitive Foods in Schools: Issues, Trends, and Future Directions, Topics in Clinical Nutrition 37, 37-38 (1999).

n63. U.S. Dep't of Agric., Foods Sold in Competition with USDA School Meal Programs: A Report to Congress 4 (2001), available at http://www.cspinet.org/nutritionpolicy/Foods Sold in Competition with USDA School Meal Programs.pdf.

n64. National School Lunch Act of 1946, ch. 281, Pub. L. No. 79-396, 60 Stat. 230 (codified as amended at 42 U.S.C.§§1751-1769 (2000)).

n65. 42 U.S.C. § 1751 (2000).

n66. Claudia Probart et al., Project PA, Preventing Childhood Overweight and Obesity: Parents Can Make a Difference 6 (2004), available at http://nutrition.psu.edu/projectpa/pdfs/parentManual/parentsManual.pdf.

n67. Associated Press, Obesity Takes Its Toll on the Military: Officials Increasingly Worried About Troops Being Too Fat to Fight, MSNBC.com, July 5, 2005, http://www.msnbc.msn.com/id/8423112 (last visited Mar. 19, 2007).

n68. Vending Machine Competition with the National School Lunch Program: Hearings Before the S. Select Comm. on Nutrition and Human Needs, 93d Cong. 20, 21 (1973) [hereinafter Hekman Statement] (statement of Edward Hekman, Administrator, Food and Nutrition Service).

n69. Rose Dosti, Type A School Lunch Programs Striving for Appetite Appeal, L.A. Times, Oct. 21, 1971, at J1. Enrollment grew from 24.8 percent of schools from inception in 1946 to 47.1 percent in 1970. Id.

n70. See, e.g., Sweets in Sylmar: Students Sell Candy to Help Repay Loans, L.A. Times, Nov. 9, 1961, at E2.

n71. See, e.g., School Board Delays Purchase of Candies, L.A. Times, Sept. 2, 1970, at SG7.

n72. See Ellen Stern Harris, Consumer Advocate: Comprehensive State Food Plan, L.A. Times, Aug. 21, 1977, at F5 ("PTAs that oppose junk foods can try to get action at the local level ... .").

n73. Congress directed the Secretary "to take a hard look" at foods that competed with the balanced school lunch. H.R. Rep. No. 91-81, at 3 (1969), as reprinted in 1970 U.S.C.C.A.N. 3014, 3016. "Many State and local school lunch directors will welcome this Federal interest in the impact on sound nutritional food services of the availability of candy bars, soft drinks and a snack line in the school cafeterias." Id.

n74. See Story et al., supra note 8, at 111 ("The program should ... offer ... healthful lower-fat foods ... .").

n75. Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (codified as amended at 42 U.S.C.§§1771-1785 (2000)).

n76. Type A lunch requirements included the following: "2 ounces of protein in the form of meat, poultry, cheese, fish, eggs, beans or peas; 1/2 cup fruit and vegetable; 1 serving bread; 1 teaspoon butter and 3/4 cup milk." Rose Dosti, Type A School Lunch Programs Striving for Appetite Appeal, L.A. Times, Oct. 21, 1971, at J1. Serving size was adjusted by school level. Id. Commodity-based lunch was another option. Id.

n77. A USDA official described Type A school lunch as a ""beautiful picture of what a balanced meal should be.' ... "It meets the needs of needy children, it is enormously flexible, it leaves the door wide open for imaginative use of the general meal pattern and it provides one-third of the nutrients needed daily for a growing body.'" Id.

n78. National School Lunch Act and Child Nutrition Amendments of 1970, Pub. L. No. 91-248, § 8, 84 Stat. 207, 212-13 (codified as amended at 42 U.S.C. § 1779 (2000)).

n79. Hekman Statement, supra note 68, at 22.

n80. Child Nutrition Programs: Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the H. Comm. on Education and Labor, 96th Cong. 175 (1979) (statement of Carol Tucker Foreman, assistant secretary for food and consumer services, United States Department of Agriculture).

n81. Hekman Statement, supra note 68, at 22.

n82. Id.; Vending Machine Competition with the National School Lunch Program: Hearings Before the S. Select Comm. on Nutrition and Human Needs, 93d Cong. 13 (1973) [hereinafter Plagge Statement] (statement of Gretchen Plagge, Food Service Director, Santa Fe, New Mexico). "[Federal regulations] did provide a standard under which we could develop programs." Vending Machine Competition with the National School Lunch Program: Hearings Before the S. Select Comm. on Nutrition and Human Needs, 93d Cong. 18 (1973) (statement of Josephine Martin, administrator, School Food Service Program, Georgia State Department of Education).

n83. Some schools chose to defy the regulations and kept soda on the menu and in the lunchroom. LaBarbara Bowman, Stop Soft Drink Sale, County Schools Told, Wash. Post, June 17, 1972, at B2.

n84. Plagge Statement, supra note 82, at 13.

n85. One United States Congressman charged that "Canteen Corporation, a subsidiary of International Telephone & Telegraph (ITT), is among [the] interests standing to make the biggest gain." Reuss Scores School Vendors, Wash. Post, Feb. 27, 1973, at A2. Canteen Corporation was one of the first vending companies to contract on a large scale with schools. See 75 Years: Canteen Was There from the Beginning, http://www.canteen.com/history.html (last visited Mar. 19, 2007).

n86. See Hekman Statement, supra note 68, at 41. A vending machine representative credited complaints to Congressmen from students unhappy with loss of vending machine sales for impetus that led to legislation stripping the USDA of regulatory authority. Id. ("As we understand the facts, the impetus for the amendment arose in Rochester, Minn., among the students at Mayo High School.").

n87. Id. at 21-22.

n88. The law was known as the "vending machine amendment" because the Senate Select Committee had announced:

The purpose of the hearing is to explore the impact of last year's congressional action removing the authority of the Secretary of Agriculture to regulate the use of vending machines in schools.

Great concern has been expressed to the committee that the unregulated use of vending machines dispensing snacks and soft drinks, especially during the lunch period, will seriously undermine the nutritional effectiveness of the School Lunch Program.

Vending Machine Competition with the National School Lunch Program: Hearings Before the S. Select Comm. on Nutrition and Human Needs, 93d Cong. vi (1973).

n89. See School Vending Machines Assailed for "Junk Food', N.Y. Times, Apr. 18, 1973, at 12.

n90. Vending Machine Competition with the National School Lunch Program: Hearings Before the S. Select Comm. on Nutrition and Human Needs, 93d Cong. 3 (1973) (statement of Senator Clifford Case). Case's earlier bill to ban the competitive lunchroom sales passed in the Senate; he blamed USDA's lack of support for its demise. Id.

n91. See supra note 88.

n92. Opponents included the American School Food Service Association, the American Parent Committee, Inc., and the American Dental Association. Vending Machine Competition with the National School Lunch Program: Hearings Before the S. Select Comm. on Nutrition and Human Needs, 93d Cong. 3 (1973) (statement of Senator Clifford Case).

n93. See Plagge Statement, supra note 82, at 10 ("The pressures of private vending interests ... are incredible at the local level.").

n94. Vending Machine Competition with the National School Lunch Program: Hearings Before the S. Select Comm. on Nutrition and Human Needs, 93d Cong. 43 (1973) (statement of G. Richard Schrieber, president, National Automatic Merchandising Association).

n95. Marion Burros, A Victory for Vending: Can Vigilance Veto Junk Foods?, Wash. Post, June 9, 1977, at F1.

n96. Id. The National Confectioners Association and National Candy Wholesales Association often took credit for working "together effectively to prevent anticandy rulings from becoming part of the National School Lunch Act over the years." Id.

n97. Jean Mayer & Johanna Dwyer, Flunk Junk Food Out of School Vending Machines, L.A. Times, June 30, 1977, at I40 ("As every parent knows, vending machines have proliferated in the last few years and now can be found in school corridors, locker rooms, gyms and even some study halls.").

n98. " Junk" Food in School, U.S. News & World Rep., Nov. 14, 1977, at 94 (citing junk food bans in Gilroy, California; Bloomington, Indiana; Burlington, Wisconsin; Dallas, Texas; Washington, D.C.; and the states of West Virginia and Massachusetts, as well as junk food restrictions in twenty-three other states).

n99. Marlene Cimons, Citizens Begin Drive to Upgrade School Lunch, Breakfast Programs, L.A. Times, Mar. 17, 1977, at H25.

n100. National School Lunch Act and Child Nutrition Amendments of 1977, Pub. L. No. 95-166, 91 Stat. 1325 (codified as amended at 42 U.S.C. §§1751, 1753-1759a, 1760-1762a, 1763, 1766, 1769, 1771-1776, 1779, 1784, 1786, 1788 (2000)).

n101. Nestle, supra note 37, at 209 (quoting H.R. Rep. No. 95-281, at 57 (1977), as reprinted in 1977 U.S.C.C.A.N. 3517, 3573).

n102. See Curb Junk Foods in Schools?, U.S. News & World Rep., Sept. 24, 1979, at 59 (interview with James E. Mack). Peanuts and other confectionery ingredients were cited for their nutritional benefits; if nutrition was inadequate, industry spokesmen presented other justifications for candy's continued presence in schools, such as preventing children from wandering off campus where "they may tend to turn to some other things instead of candy." Id.

n103. Id.

n104. 45 Fed. Reg. 6,758, 6,772 (Jan. 29, 1980) (codified, as amended, at 7 C.F.R. § 220 app. B (2006)). Some local administrators feared the USDA proposal was "weak" and might preempt stronger local bans. Marian Burros, Junking Some Junk Food, Wash. Post, May 18, 1978, at E4.

n105. Cmty. Nutrition Inst. v. Bergland, 493 F. Supp. 488 (D.D.C. 1980).

n106. Id.

n107. Id. at 495.

n108. Id.

n109. Nat'l Soft Drink Ass'n v. Block, 721 F.2d 1348, 1353 (D.C. Cir. 1983).

n110. Id. at 1352 (quoting Child Nutrition Act of 1966, § 7 Pub. L. No. 92-433, 86 Stat. 724 (1972) (codified as amended at 42 U.S.C. § 1779 (2000)).

n111. Id.

n112. Id. at 1353.

n113. Id. at 1355 (Wilkey, J., dissenting).

n114. See supra text accompanying note 81.

n115. Nestle, supra note 37, at 197-218.

n116. Softer Rules for Junk Food, Wash. Post, Mar. 14, 1984, at A25 ("The court's ruling, in a suit filed by soft drink manufactures, said the restriction was not reasonable in the case of soft drinks; yesterday's proposal extends the same logic to other sweets.").

n117. After the district court affirmation of the regulations in 1980 and before the appellate court's reversal of time and place rules in 1983, the Food and Nutrition Services Administrator under the Reagan Administration declared that "the department ... plans to rescind a rule that prohibits the sale of so-called junk food, such as soda and hard candies, in competition with school lunch." Marion Burros, New Federal Policies Alter Food Programs, N.Y. Times, Oct. 21, 1981, at C1. The administrator added, the rule "has merit, but ... is impossible to enforce or administer." Id.

n118. Robert Pear, Soda Industry Tries to Avert a School Ban, N.Y. Times, May 17, 1994, at A15.

n119. Robert Pear, Senator, Promoting Student Nutrition, Battles Coca-Cola, N.Y. Times. Apr. 26, 1994, at A20.

n120. Better Nutrition and Health for Children Act of 1994, Pub. L. 103-448, § 203, 108 Stat. 4699, 4738 (codified as amended at 42 U.S.C. § 1779 (2000)). The model language concept is similar to the USDA's role of providing guidance to federally mandated wellness committees.

n121. S. Rep. No. 103-300, at 35 (1994).

n122. Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 204, 118 Stat. 729, 780-81 (2004).

n123. See Child Nutrition Promotion and School Lunch Protection Act of 2006, S. 2592, 109th Cong. (2006) (aiming "to improve the nutrition and health of school children by updating the definition of [FMNV]"); Child Nutrition Promotion and School Lunch Protection Act of 2006, H.R. 5167, 109th Cong. (2006) (same).

n124. S. 2592; H.R. 5167.

n125. Child Nutrition Promotion and School Lunch Protection Act of 2007, S. 771, 110th Cong. (2007).

n126. Table 1 is liberally adapted from Nestle, supra note 37, at 208-09.

n127. See supra notes 105-16 and accompanying text.

n128. It is difficult to get a precise measure of how much and where competitive foods are sold. USDA's Food and Nutrition Service found that most competitive foods are sold in the cafeteria at lunchtime and that the same foods, such as fruit drinks, salty snacks, baked goods, "are sold simultaneously by the [a] la carte cafeteria venues and vending machines." Office of Analysis, Nutrition & Evaluation, U.S. Dep't of Agric. Measuring Competitive Foods in Schools 3-4 (2004), available at http://www.fns.usda.gov/oane/MENU/Published/CNP/FILES/CompFoodSum.pdf.

n129. See Nat'l Soft Drink Ass'n v. Block, 721 F.2d 1348, 1355 (D.C. Cir. 1983) (granting "deference to the expertise" of the Secretary of Agriculture to set competitive food guidelines).

n130. Carol Tucker Foreman, Remarks at the University of Arkansas Conference on Legal and Policy Issues Related to Obesity: The Uses of the Law to Address the Epidemic (May 5, 2005) (transcript on file with the Duke Law Journal).

n131. National School Lunch Act and Child Nutrition Amendments of 1977, Pub. L. No. 95-166, 91 Stat. 1325 (1977) (codified as amended at 42 U.S.C. § 1771 (2000)).

n132. H.R. Rep. No. 95-708, at 26 (1977) (Conf. Rep.), as reprinted in 1977 U.S.C.C.A.N. 3555, 3573.

n133. Foreman, supra note 130, at 2.

n134. Id. at 3.

n135. Id. at 6.

n136. Office of Analysis, Nutrition & Evaluation, U.S. Dep't of Agric. Food & Nutrition Serv., School Nutrition Dietary Assessment Study-II Final Report 89 (2001), available at http://www.fns.usda.gov/oane/menu/Published/CNP/FILES/sndaII.pdf.

n137. Foreman, supra note 130, at 6.

n138. Id.

n139. Id.

n140. Id.

n141. Id.

n142. Id. at 8. An Institute of Medicine committee report providing these definitions and setting nutrition standards in schools was released April 2007. Inst. of Med., Projects: Nutrition Standards for Foods in Schools, http://www.iom.edu/CMS/3788/30181.aspx (last visited Apr. 30, 2007).

n143. For the full text of the new bill, see Child Nutrition Promotion and School Lunch Protection Act of 2007, S. 771, 110th Cong. (2007).

n144. See Press Release, Senator Tom Harkin, The Child Nutrition Promotion and School Lunch Protection Act of 2006, available at http://www.harkin.senate.gov/documents/pdf/schoolfood.pdf ("The proposed legislation does not affect school parties and classroom celebrations and also provide [sic] exemptions for school fundraisers.").

n145. Child Nutrition Promotion and School Lunch Protection Act of 2007, S. 771, 110th Cong. (2007).

n146. See Nat'l Soft Drink Ass'n v. Block, 721 F.2d 1348, 1353 (D.C. Cir. 1983) ("An examination of the legislative history leads to the conclusion, albeit inconclusively, that the Congressional intent was to confine the control of junk food sales to the food service areas during the period of actual meals service.").

n147. Simon & Fried, supra note 35, at 140-41. For a summary of the various state legislation, see generally Michele Simon, Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children's Health, 39 Loy. L.A. L. Rev. 169 (2006).

n148. Nanci Hellmich, Health Movement Has School Cafeterias in a Food Fight, USA Today, Aug. 22, 2005, at A1; see also Linda Jacobson, Calif. Says "No' to School Junk-Food Sales, Educ. Wk., Sept. 28, 2005, at 20 (describing restrictions in California legislation on food and drinks sold in schools).

n149. Trust for America's Health, F as in Fat: How Obesity Policies are Failing in America 32 (2006), available at http://healthyamericans.org/reports/obesity2006/Obesity2006Report.pdf.

n150. Margo Wootan et al., Ctr. for Sci. in the Pub. Interest, School Foods Report Card 3 (2006), available at http://cspinet.org/new/pdf/school foods report card.pdf. Such "report cards" that simply catalogue bills fail to tell the entire story. The devil is truly in the details.

n151. Simon & Fried, supra note 34, at 139, 150.

n152. Id.

n153. Id. at 140.

n154. Michele Simon, Appetite for Profit 230-33 (2006).

n155. Id. The governor would later sign a compromise bill.

n156. Id.

n157. Id.

n158. See infra Part III.D.

n159. Examples include California, The Pupil Nutrition, Health, and Achievement Act of 2001, Cal. Educ. Code § 49430 (West 2005), and Indiana, Ind. Code § 20-26-9 (2005).

n160. The twelve states that to date have considered or passed legislation that requires regulations to be set by another regulatory body are Arizona, Ariz. Rev. Stat. Ann. § 15-242 (2006), Arkansas, Ark. Code Ann. § 20-7-133 (2005), Kansas, Kan. Stat. Ann. § 72-5128 (2006), Kentucky, Ky. Rev. Stat. Ann. §§158.852, 158.854 (West 2005), Louisiana, La. Rev. Stat. Ann. § 17:197 (2007), Maine, Me. Rev. Stat. Ann. tit. 20-A § 6602 (2006), New Mexico, N.M. Stat. § 22-13-13.1 (2005), North Carolina, N.C. Gen. Stat. § 115C-264.3 (2006), South Carolina, H. 3346, 2005-2006 Gen. Assem., 116th Sess. (S.C. 2005), Tennessee, Tenn. Code Ann. § 49-6-1401 (2006), Vermont, H. 272, 2003-2004 Leg., Reg. Sess. (Vt. 2004), and West Virginia, W. Va. Code Ann. § 5-1E-3 (LexisNexis 2006).

n161. This model is very similar to the wellness policy approach of the federal government. Examples include Maryland, Md. Code Ann., Educ. § 7-401 (LexisNexis 2006), Oregon, S. 860, 73rd Leg. Assem., Reg. Sess. (Or. 2005), and Rhode Island, R.I. Gen. Laws § 16-21-28 (2006).

n162. Examples include Illinois, Ill. Admin. Code tit. 23, § 305 (2006), New Jersey, State of N.J. Dep't of Agric., Model School Nutrition Policy, http://www.nj.gov/agriculture/divisions/fn/childadult/school model.html (last visited Mar. 19, 2007), and Texas, Tex. Dep't of Agric., Texas Public School Nutrition Policy (2004), available at http://www.squaremeals.org/vgn/tda/files/2348/2538 Texas%20Public%20School%20Nutrition%20Policy.pdf.

n163. For example, Texas set regulations first, then later passed a law to grant certain exemptions; Kentucky set minimum standards on beverages in law and directed regulatory body to set remaining regulations. See Simon & Fried, supra note 34, at 141-43. Arkansas legislation appointed an advisory committee to make recommendations to the State Board of Education. Infra notes 169-73 and accompanying text.

n164. Tex. Dep't of Agric., supra note 162, at 1.

n165. State of N.J. Dep't of Agric., supra note 162.

n166. For full detail of the California episode, see Simon, supra note 155, at 224-28.

n167. See infra Part IV.A.

n168. E-mail from Harold Goldstein, Executive Director, California Center for Public Health Advocacy, to Michele Simon (Dec. 21, 2006, 3:30 PM) (on file with the Duke Law Journal).

n169. Trust for America's Health, supra note 149, at 6.

n170. After losing 110 pounds, Republican Governor Mike Huckabee went public with his experience by promoting his book, Mike Huckabee, Quit Digging Your Grave with a Knife and Fork: A 12-Stop Program to End Bad Habits and Begin a Healthy Lifestyle (2005).

n171. Kevin W. Ryan et al., Arkansas Fights Fat: Translating Research into Policy to Combat Childhood and Adolescent Obesity, 25 Health Aff. 992, 995 (2006).

n172. Ark. Code Ann. §§20-7-133 to -135 (2003).

n173. Ryan et al., supra note 171, at 997.

n174. Id.

n175. Id.

n176. See Arkansas Gov. Mike Huckabee Wants Proof that Vending Machines Lead to Childhood Obesity Before Enacting Regulations, Vending Market Watch, June 22, 2004, http://www.amonline.com/article/archive article.jsp?siteSection=1&displayMonth=June&displayYear=2004 (last visited Apr. 6, 2007) (follow the hyperlink titled "Arkansas Gov. Mike Huckabee wants proof that vending machines lead to childhood obesity before enacting regulations").

n177. Ryan et al., supra note 171, at 998.

n178. See id.

n179. Id. at 998-1000.

n180. Id. at 1001.

n181. See Krista Kafer, Vending Machine Bills Defeated in Colorado, Illinois, Sch. Reform News, July 1, 2006, available at http://www.heartland.org/Article.cfm?artId=19262 (last visited Apr. 6, 2007).

n182. See Susan Jones, Groups Blast Proposed Junk Food Ban in Schools, CNSNews.com, Feb. 12, 2004, http://www.cnsnews.com/ViewNation.asp?Page=%5CNation%5Carchive%5C200402%5CNAT20040212a.html (last visited Apr. 6, 2007).

n183. Dave McKinney & Rosalind Rossi, Gov Renews Fight Against Junk Food, Chi. Sun-Times, Nov. 29, 2005, at 16.

n184. See Press Release, State of Illinois, Illinois State Board of Education Unveils New Proposed Rules Banning Junk Food from Illinois Elementary and Middle Schools (Dec. 9, 2005), available at www.isbe.state.il.us/news/2005/dec9 05.pdf; see also Rosalind Rossi, State School Board May Ban Whole Milk, Allow Chips, Chi. Sun-Times,Dec. 10, 2005, at 5 (explaining that "unlike current Illinois rules, which specifically crack down on "candy' and "potato chips,' the new rules would not ban any specific junk food ... . [but] instead, the rules create a definition of what junk food is, based on nutritional content).

n185. Kate N. Grossman, Proposed Junk-Food Ban "Goes too Far': Critics Fear Loss of School Revenue, District Control, Chi. Sun-Times, Dec. 15, 2005, at 23.

n186. See Maudlyne Ihejirika, Ban on Junk Food Sales at Schools Starts this Fall, Chi. Sun-Times, Mar. 17, 2006, at 24.

n187. See Legislative Support Servs., 2005-2006 Illinois Blue Book 1 (2005-06), available at http://www.cyberdriveillinois.com/publications/illinois bluebook/2005 2006/legislative branch/legsupport.pdf.

n188. Ann Sanner, State Panel Rejects Ban on School Junk Food, Chi. Sun-Times, Apr. 12, 2006, at 14.

n189. See Kate N. Grossman, State Board Passes New School Junk-Food Ban, Chi. Sun-Times, June 23, 2006, at 24.

n190. 30 Ill. Reg. 15832 (Sept. 29, 2006).

n191. 30 Ill. Reg. 17132 (Oct. 27, 2006).

n192. 30 Ill. Reg. 17475 (Nov. 3, 2006).

n193. Id. at 17484.

n194. The federal government reports that three-quarters of schools have not met the USDA's 30 percent limit for calories from fat in school lunches. See U.S. Gen. Accounting Office, GAO-03-506, School Lunch Program: Efforts Needed to Improve Nutrition and Encourage Healthy Eating 3 (2003) available at http://www.gao.gov/new.items/d03506.pdf.

n195. Kim Severson, L.A. Schools To Stop Soda Sales: District Takes Cue from Oakland Ban, S.F. Chron., Aug. 28, 2002, at A1.

n196. See Simon, supra note 147, at 173.

n197. For example, the Farm to School Program has connected these school lunch programs with local farms in an effort to improve the nutrition of school lunches. See Farm to School Program, About the National Farm to School Program, http://www.farmtoschool.org/about.htm (last visited Apr. 6, 2007).

n198. For these voluntary bills, some states have provided model guidelines for schools to follow. See, e.g., Child Nutrition & Wellness, Kansas State Dep't of Educ., Kansas School Wellness Policy Model Guidelines (2005), available at http://www.kn-eat.org/SNP/SNPDocs/Wellness/Wellness Policy Guidelines Booklet Final.pdf; Colorado Dep't of Educ., Nutritious School Vending: Step-By-Step Guide to Implementing Colorado Senate Bill 04-103 (2004), available at http://www.cde.state.co.us/cdenutritran/download/pdf/VendingGuide.pdf.

n199. Sometimes a champion legislator might follow up with a mandatory bill, but not always.

n200. See, e.g., S.B. 437, 423d Leg., Reg. Sess. (Md. 2005), available at http://www.mlis.state.md.us/2005rs/bills/sb/sb0473f.pdf; S.B. 860, 73d Leg., Reg. Sess. (Or. 2005).

n201. In an email exchange a local district food service director clarified to a local school advocate in Kansas exactly what the state required of districts, given that the Kansas State Department of Education (KSDE) has model guidelines on their website, but the bill language does not require schools to act. Here is the director's reply: "KSDE developed model policy guidelines, but it's up to each individual school district to develop their own policy ... . Each district has the option to choose the model, which has different levels (Basic, Advanced and Exemplary). It's confusing, I know." E-mail from Cindy Foley, Food Service Director, Salina Kansas Public Schools, to Bette Sue, local school advocate in Kansas, (Dec. 19, 2006, 12:00 CST) (on file with the Duke Law Journal).

n202. See Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 204, 118 Stat. 729, 780-81 (2004).

n203. § 204(b)(2)-(3), 118 Stat. at 781.

n204. U.S. Dep't of Agric. Food & Nutrition Serv., Examples: Local Wellness Policy, http://www.fns.usda.gov/tn/Healthy/wellnesspolicy examples.html (last visited Apr. 6, 2007).

n205. U.S. Dep't of Agric. Food & Nutrition Serv., The Local Process: How to Create and Implement a Local Wellness Policy, http://www.fns.usda.gov/tn/Healthy/wellnesspolicy steps.html (last visited Mar. 16, 2007).

n206. See Press Release, Action for Healthy Kids, Study Finds that Half of Local Wellness Policies Fall Short of Federally Mandated Requirements 1 (Aug. 21, 2006), available at http://www.actionforhealthykids.org/filelib/pr/WP%20preview%20release%208-21-06.pdf.

n207. Sch. Nutrition Ass'n, A Foundation for the Future II: Analysis of Local Wellness Policies from 140 School Districts in 49 States 8 (2006), available at http://www.schoolnutrition.org/uploadedFiles/SchoolNutrition.org/News & Publications/School Foodservice News/New Folder/Regional%20LWP%20Report.pdf.

n208. Ill. State Bd. of Educ., Report on Barriers to Implementing School Wellness Policies and Recommendations to Reduce Those Barriers, S. 162, 95th Gen. Assem., Reg. Sess. (Ill. 2006), at 7-11, available at http://www.isfsa.net/Wellness%20Policy%20Report%20Draft%202.pdf.

n209. Madhu Krishnamurthy, District Calls on Parents: Lake Zurich Schools Puts Onus on Parents to Keep its Students Healthy, Chi. Daily Herald, Oct. 30, 2006, at 1.

n210. Eric Bowen, BOE Sours on Candy Ban, Dominion Post (Morgantown, W.Va.), Nov. 15, 2006, at A1.

n211. Id.

n212. Id.

n213. See Snack Bar Enforced to Aid Diets, supra note 15; Sweets in Sylmar: Students Sell Candy to Help Repay Loans, supra note 70.

n214. Robert J. Allan, Most Schools are Scrapping the Sale of Junk Foods, L.A. Times, Jan. 29, 1978, at CS1; The Spoon-Feeding of Nonjunk, L.A. Times, May 1, 1978, at D4.

n215. David G. Savage, L.A. Board Lifts Soft Drink Ban, L.A. Times, May 14, 1985, at OC A8.

n216. Los Angeles Schools Lift Junk Food Ban, Wash. Post, May 2, 1990, at A10.

n217. Soft Drink Tax for Tooth Care Proposed, L.A. Times, Oct. 17, 1975, at B36.

n218. Id. Calls for taxes on junk foods continue today. See, e.g., Michael F. Jacobson & Kelly D. Brownell, Small Taxes on Soft Drinks and Snack Foods to Promote Health, 90 Am. J. Pub. Health 854 (2000).

n219. Allan, supra note 214.

n220. The Spoon-Feeding of Nonjunk, supra note 214.

n221. Id.

n222. Ctr. for Food and Justice, Urban & Envtl. Policy Inst., Challenging the Soda Companies: The Los Angeles Unified School District Soda Ban 5 (2002), available at http://departments.oxy.edu/uepi/cfj/publications/Challenging the Soda Companies.pdf.

n223. Id.

n224. Reuters, L.A. Schools Ban Sodas, CNN.com, Aug. 27, 2002, http://www.cnn.com/2002/fyi/teachers.ednews/08/27/la.soda.reut/ (last visited Apr. 30, 2007).

n225. Id. at 11.

n226. See supra Part III.

n227. See Randolph Kline et al., Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control, 39 Loy. L.A. L. Rev. 603, 610 n.27 (2006) (describing the "broad powers enjoyed by public health officials" as delegated to local governments).

n228. See generally, Nestle, supra note 37 (positing that the food industry provides sufficient political pressure to influence legislation about nutrition and health).

n229. See supra Part III.A.

n230. One New Mexico school administrator complained to Congress in 1973 about the influence of Coca-Cola representatives on the state school board decision to allow soda vending machines in New Mexico schools. Plagge Statement, supra note 82, at 11.

n231. Lobbyists sent a scientific expert to testify against a soda ban in Philadelphia public schools; that expert failed to reveal her corporate bias. See Simon, supra note 155, at 225.

n232. Charles R. Shipan & Craig Volden, Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States, 50 Am. J. Pol. Sci. 825 (2006).

n233. See id. at 825-26 ("Because studies of the interaction between state and local policies so far have been limited ... we currently have no systematic understanding of whether, when, and how local actions might influence state politics and policy adoptions."). The authors do say that states inspire other state action. See id. at 825 ("Political scientists have ... found evidence of policies spreading from neighbor to neighbor or across similar states ... .").

n234. Id. at 826.

n235. Id. at 827-28.

n236. Id. at 840.

n237. Id.

n238. Such groups include the Campaign for a Commercial-Free Childhood, Campaign for a Commercial-Free Childhood Home Page, http://www.commercialexploitation.org (last visited Apr. 6, 2007), and Commercial Alert, Commercial Alert Home Page, http://www.commercialalert.org (last visited Apr. 6, 2007), both of whom have taken stronger stands against marketing to children than other groups such as Action for Healthy Kids, Action for Healthy Kids Home Page, http://www.actionforhealthykids.org (last visited Apr. 6, 2007), and Center for Science in the Public Interest, Center for Science in the Public Interest Home Page, http://www.cspinet.org (last visited Apr. 6, 2007), the later being more concerned about nutrition than commercialism per se.

n239. Unfortunately, this proposal will only address those schools that participate in the NSLP, but this is the majority of public schools, so the potential impact is still significant.

n240. Connecticut is currently engaged in a unique experiment in which schools are given an incentive of 10 cents extra per meal if they adhere to certain guidelines for competitive foods. See Conn. Gen. Stat. § 10-215b (2007).

n241. The specific policy approaches to accomplishing this goal are beyond the scope of this Article.

n242. For two recent examples, see Am. Acad. of Pediatrics, Children, Adolescents, and Advertising (2006), available at http://aappolicy.aappublications.org/cgi/reprint/pediatrics; 118/6/2563.pdf; World Health Org., Marketing of Food and Non-Alcoholic Beverages to Children (2006), available at http://www.who.int/dietphysicalactivity/publications/Oslo%20meeting%20layout%2027%20NOVEMBER.pdf.