

SYMPOSIUM

# Application of Law to the Childhood Obesity Epidemic

*Jess Alderman, Jason A. Smith,  
Ellen J. Fried, and  
Richard A. Daynard*

## I. Introduction

Childhood obesity is a national public health problem.<sup>1</sup> Regardless of gender, race, socioeconomic status, or geographic location, children are "gaining weight to a dangerous degree and at an alarming rate."<sup>2</sup> Since 1980, the number of overweight children has doubled; among adolescents the number has almost tripled.<sup>3</sup> Today, among children who are more than six years old, about nine million are obese.<sup>4</sup> Many of the factors that contribute to obesity occur at a societal level, prompting the Surgeon General to conclude that preventing obesity is a "community responsibility."<sup>5</sup>

Childhood obesity is, in many important respects, a result of legal policy. Law shapes the situational<sup>6</sup> and environmental influences that drive both dietary intake and physical activity. Government, public health advocates, and the food industry all use the law to alter these influences in furtherance of their respective goals. Public interest advocates attempt to persuade government and corporations to act in the interest of public health while the industry focuses on profit. For example, public health advocates have long sought to regulate marketing targeted to children and to improve the nutritional quality of school-provided food through legislation, while the industry has successfully lobbied against the Federal Trade Commission's (FTC) regulatory jurisdiction of advertising, opposed government regulation of foods sold in schools in addition to school-provided meals, and resisted restaurant menu nutritional labeling. Health advocates have filed or threatened lawsuits challenging the truthfulness of food advertisements and the presence of vending machines in public schools, while the industry sued the United States Department of Agriculture (USDA) to challenge the scope of the government's authority to regulate "competitive foods" in schools.

As the doctrine of law and economics has become increasingly dominant in judicial and regulatory analyses, legal approaches have become more individual in their focus at the expense of any serious accounting for situational factors. To be as effective as possible as a policy tool, the law should focus not only on frequently

**Jess Alderman, M.D., J.D.**, is a Senior Staff Attorney at the Public Health Advocacy Institute (PHAI) at Northeastern University School of Law in Boston, MA. She is also the Co-Director of the Public Health Legal Clinic at the law school and an Adjunct Professor in the Law, Policy, and Society program at Northeastern; **Jason A. Smith, J.D., M.A.**, is the Associate Executive Director of PHAI and an Adjunct Professor at Northeastern University School of Law; **Ellen J. Fried, J.D., M.A.**, is an Adjunct Clinical Assistant Professor at New York University; **Richard A. Daynard, J.D., Ph.D., M.A.**, is the President of PHAI and a Professor at Northeastern University School of Law and in the Law, Policy, and Society program at Northeastern.

illusory individual choices, but also on population-wide change and environmental conditions that affect individual decisions. This article articulates a conception of the law rooted in public health and public interest concerns and suggests effective policy approaches to combat obesity. Part II explains how legal interventions have followed a pattern of trying to address a complex web of proximate causes rather than focusing on reducing risk factors for the disease. Part III provides a specific overview of the current legal climate surrounding obesity and highlights the shortcomings of current

direct relationship between a potential cause and an illness made it difficult to understand or to control effectively complex diseases and illnesses that were not associated with a singular proximate cause.<sup>10</sup>

Current legal analysis tends to reflect a similar singular view of causation. Much current legal analysis is limited by rigid theoretical doctrines divorced from the social sciences that generated them.<sup>11</sup> The form of legal analysis dominant for the past thirty years has a certain idyllic quality as it imagines a world of rational actors, agents, autonomy, and liberty functioning

The form of legal analysis dominant for the past thirty years has a certain idyllic quality as it imagines a world of rational actors, agents, autonomy, and liberty functioning within a system of free markets. The social context of behavior and the role of law as a health determinant is not a focus of investigation.

legal strategies. Part IV further illustrates the limits of the rationale behind traditional legal strategies by providing a detailed review of one specific issue – marketing junk food to children. It then discusses the need for an orchestrated and effective legal strategy. Finally, Part V explores the complex interaction between using the law as a tool to promote public health and other legal doctrines and principles.

## II. Seeing the Forest through the Trees: A Theoretical View of Law and Obesity

There is no single cause of obesity. Typically, weight is determined by a person's balance of energy intake and expenditure: how much and what one eats and the amount of physical activity in which one engages.<sup>7</sup> While this simple formula explains why an individual might be overweight or obese, it does not easily explain why certain groups are overweight and why the occurrence of obesity has suddenly and sharply risen over the past twenty-five years. Studies have identified multiple environmental factors that influence overweight and obese people in a population.<sup>8</sup> These factors implicate complex policies and require a new model to understand appropriate policy interventions to reduce the trend.

Obesity is not a simple disease relying on traditional models, where a particular agent causes a disease or condition. Early models of causation relied heavily upon the germ theory and, in fact, grew out of the work of nineteenth century bacteriologists.<sup>9</sup> These theories conceptualized "cause" as one factor, the agent that caused a particular disease or condition. This theory gave rise to a circumscribed conception of causation that focused on biological processes. The notion of a

within a system of free markets.<sup>12</sup> The social context of behavior and the role of law as a health determinant is not a focus of investigation. Instead, it views the law as a corrective to failures in the free market.<sup>13</sup> It is this narrow view that has dominated discussions on legal strategies for controlling obesity. Current policy and legal analysis are singularly focused on individuals as rational choice makers or on breaking the chain of causation close to the individual and rarely takes a larger view. Environmental factors and the individual's social context are not considered.<sup>14</sup>

As we will see, legislative and regulatory efforts to control weight and obesity have focused on solutions which assume that individual choices regarding diet and exercise cause the problem. Therefore, discussions of obesity control through legislation and regulation have focused on policy interventions that seek to alter the behavior of the autonomous and rational consumer. Some have argued that certain foods should be taxed.<sup>15</sup> There have been calls to improve labeling of foods;<sup>16</sup> to improve nutrition education in schools;<sup>17</sup> to increase physical activity;<sup>18</sup> to urge children to exercise more through health communications;<sup>19</sup> to reformat the federal dietary guidelines;<sup>20</sup> and to change the type of food available to children.<sup>21</sup> Some of these proposals target environmental influences on individual behavior and some do not. What they have in common is their singular goal of altering the behavior of the individual and their focus on a singular risk factor in close causal proximity to the individual.

Legal approaches to the obesity epidemic should consider theories of social epidemiology and, in turn, incorporate larger, more strategic public health goals. Social epidemiology can be a better descriptor for the

use of law in facing the obesity epidemic. This theoretical approach in epidemiology is "distinguished by its insistence on explicitly investigating social determinants of population distributions of health, disease, and wellbeing, rather than treating such determinants as mere background to biomedical phenomena."<sup>22</sup> Social epidemiology does not reject the behavior of the autonomous individual but examines individual activity and the social context and their interaction.<sup>23</sup> A social epidemiologic view of law and public health would examine the role of law in creating and shaping the social systems that directly affect the health of individuals.<sup>24</sup> This view would use the law to create the social context and social capacity for health rather than focus on the actual attainment of health for the individual. In other words, it would require the law to address the production of risk factors at the societal level and also to break the causal chain connected to the individual.<sup>25</sup> With our colleagues, we have articulated this position generally<sup>26</sup> and in more narrowly structured applications.<sup>27</sup> What remains unexplored is the interaction of legal actors and the legal system and its effect on public health.

Much of the discussion of law and public health, including our own, has focused on using legal tools to combat the obesity epidemic by suggesting particular legal interventions – for example, taxation and regulation of foods. The discussion often identifies the problem, discusses a particular legal solution, and then investigates the potential effect of that solution. Consider competitive foods in schools, for example.<sup>28</sup> There are proposals at the state and federal level to control the availability and nutritional content of competitive foods through various forms of legislation and regulation.<sup>29</sup> These proposals identify the problem (i.e., junk food in school); identify the legal tool to affect this risk factor (i.e., USDA regulations); and then set forth new regulations. What is essential, and what is missing, is an understanding of how the law shapes the social context for behavior and how both the actions of individuals and the operation of the law as a system function together. For example, one might ask how the current system permitted junk food to enter schools, what the legal responsibility of schools to promote students' health should be, and how corporations came to influence the public school system. Considering questions like these would help inform the legal process by providing a social context and highlighting "big picture" issues.

While the law is a powerful determinant of behavior and a powerful force for shaping social context,<sup>30</sup> it also operates with its own set of principles and values.<sup>31</sup> These principles are often procedural, representing the internal workings of the legal system and affect health

and public health policy.<sup>32</sup> Sometimes, these legal principles reflect important substantive values that may override necessary public health interventions.<sup>33</sup> Creating effective policy interventions that alter the entire social context and the production of risk factors requires understanding how the law interacts with public health.

In this paper, we explore this interaction and the history of legal public health interventions concerning children's diets in schools and their level of physical activity, highlighting the complex interaction of advocates, policy makers, the food industry, and judiciary and legal doctrines. We then turn to a recent specific example, the marketing of junk food to children, to investigate the legal principles and social interactions that affect legal approaches to public health.

### III. Analysis of Existing Laws that Impact Childhood Obesity

#### A. Dietary Intake

Several major programs under the purview of the United States Department of Agriculture (USDA) address the nutritional needs of pre-school and school-age children in the United States. The primary programs are the National School Lunch Program (NSLP),<sup>34</sup> the School Breakfast Program (SBP),<sup>35</sup> the Child and Adult Care Food Program,<sup>36</sup> and the Summer Food Service Program.<sup>37</sup> The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) is intended as a nutritional safety net for children from infancy to five years of age.<sup>38</sup> Food stamps also work as a food safety net for millions of children.<sup>39</sup> All of these programs originally focused on the elimination of hunger and the prevention of malnutrition caused by caloric deficiencies. Recently, as medical complications resulting from obesity-related malnutrition and overconsumption are becoming as severe as those once related to under-nutrition, the government has acknowledged that its nutrition programs play an important role in combating obesity as well as in providing sufficient calories.<sup>40</sup> Because these feeding programs serve millions of children,<sup>41</sup> the creation and enforcement of positive nutritional guidelines as the cornerstones for all of these programs would likely have an enormous impact on childhood obesity.<sup>42</sup> This section focuses on school foods and beverages, which have been the subject of much recent legislative and media attention.

The NSLP, first created as a conduit to move surplus farm products purchased by the government from warehouses to hungry mouths, was codified in 1946. Subject almost from its inception to the competing interests of the food industry, farmers, educators, nutritionists, and children's health advocates, the NSLP has continually struggled to conform its regulations to

changing dietary guidelines and emerging nutritional science.<sup>43</sup> A persistent criticism aimed at the program is that school menus often feature commodity foods, purchased by the federal government, that are high in salt, fats, and calories.<sup>44</sup> Also, school lunchroom fare is subject to shifting political winds and Congressional budgets rather than a science-based approach to nutrition.<sup>45</sup> And because most school children in the United States consume the majority of their meals outside of the school environment, some educators and members of the food industry tend to discredit the potential impact on a child's total caloric intake of foods of poor nutritional value in schools.<sup>46</sup> Their contrary argument is that parents, not schools, bear the primary responsibility for feeding their children and teaching them proper nutrition.

The lack of regulation of foods sold outside the school lunch program, collectively known as "competitive foods" because their sale competes with federally funded school lunches, has fluctuated depending upon the degree of parental pressure on local school boards and the will of Congress to allow the USDA to restrict them.<sup>47</sup> Newspaper articles and editorials from the late 1970s reflect the ongoing struggle among parents, industry, and often school officials claiming dependency on the cash flow from vending machines, to oust sugary sodas and snack foods from schools.<sup>48</sup> During those years, buoyed by public sentiment and Carter administration support, the USDA attempted to amend the NSLP and to promulgate a regulation that would restrict the sale of sugary beverages and other poor nutrition products in schools.<sup>49</sup> Those regulatory efforts to alter the school food environment faced tremendous lobbying pressures from industry at both local and federal levels.<sup>50</sup> Many of the arguments voiced in opposition to the federal regulations are similar to those heard today, such as: all foods can be consumed in moderation; local control by school boards is preferable to federal interference; and science does not establish a link between sugary beverages and foods to ill health (at that time, dental decay; now, obesity).<sup>51</sup>

When industry lobbying was insufficient to derail federal regulatory efforts, the confectionery and beverage associations successfully sued the USDA.<sup>52</sup> A federal court ruled that the USDA had overstepped its bounds when the agency interpreted Congressional language allowing regulation of soda and junk food sales to mean the restriction of sales to after school and only in designated areas away from the cafeteria.<sup>53</sup> The industry argued, and the Court agreed, that what Congress really meant to do was to set limited "time and place" restrictions on the sales – that is, foods of minimal nutritional value (FMNV)<sup>54</sup> could not be sold in school cafeterias at lunchtime – but other school

venues and other times during the school day were permissible.<sup>55</sup>

That food industry victory opened the floodgates to aggressive marketing of an astonishing array of foods that are high in sugar, salt, fats, and calories in schools throughout the country.<sup>56</sup> Access to vending machines, once restricted to after the school day and distant from the cafeteria, multiplied, were accessed by students throughout the school day (against routinely broken rules),<sup>57</sup> and filled with foods collectively described as "junk." As processed foods outpaced the definition of FMNV – also a product of careful deliberation<sup>58</sup> – the universe of restricted foods seemed to steadily diminish while hundreds of new, highly processed food and beverage products became available in schools.

Commercialism, often in the guise of educational material<sup>59</sup> and increasingly in the form of branded foods and beverages, has also changed the composition of the school food environment.<sup>60</sup> While vending machines stocked with soft drinks have established and maintained a foothold in schools since the late 1960s,<sup>61</sup> the explosive growth of exclusive beverage or "pouring 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 total soft drink consumption more than doubled in fewer than twenty-five years.<sup>62</sup> The ubiquity of sugary beverages, successfully promoted in schools with financial and other desirable incentives such as scoreboards and band uniforms, has had an impact on children's caloric and nutritional intake.<sup>63</sup> 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 sixty percent.<sup>64</sup> Other researchers found that sugary soft drinks were replacing children's consumption of other liquids, most notably milk.<sup>65</sup> Watershed studies such as these contradicted beverage industry assertions that there is no link between sugary beverage consumption and childhood obesity<sup>66</sup> and undercut the industry response of "it's the couch, not the can" to criticism of its products in schools.<sup>67</sup>

Heightened awareness of the childhood obesity epidemic – eighty-four percent of Americans consider childhood obesity a major problem<sup>68</sup> – has renewed the call for regulatory and legislative action that has been relatively dormant for more than three decades.<sup>69</sup> Burgeoning media coverage of the rapid tripling of childhood obesity rates has often focused on unhealthy school food environments, and there is a growing movement to oust sugary soft drinks from schools.<sup>70</sup> Several large city school districts, most notably Los Angeles, New York, and Philadelphia, and all schools in the state of Texas, have succeeded in placing nutritional restrictions on beverage and junk food sales.

However, these actions were exceptional. Many attempts by other school districts to restrict in-school sales of sugary beverages and junk food faltered in the face of fierce resistance.<sup>71</sup>

Nevertheless, local movements, social pressure, and the federal regulation vacuum have given rise to state legislative action and a large number of school nutrition bills. Tracking services that follow the proliferation of bills, such as one provided by the National Conference of State Legislatures (NCSL), optimistically reported that 2005 was "a watershed year for state legislation dealing with school nutrition."<sup>72</sup> The Health Policy Tracking Service (HPTS) was equally upbeat; it reported that for "[t]his year alone [2005], 42 state legislatures have enacted or proposed measures that require or recommend nutritional guidance for schools."<sup>73</sup> In all, twenty-one states were successful in passing a total of thirty-four bills.<sup>74</sup> Bill provisions vary widely and demonstrate the broad disparity of approaches to setting school nutritional guidelines at the local level; many restrictions apply to the sale of sugary sodas but allow sports drinks, very few limit sales of whole fat milk, some limit portion sizes of snack foods, and even those with nutritional guidelines do not apply them uniformly to all grade levels. In its recently published "School Foods Report Card,"<sup>75</sup> the Center for Science in the Public Interest analyzed nationwide competitive school food and awarded "grades" based on five elements including beverage and nutrition standards, the age groups to which the policies apply, and time and place restrictions for the sale of permitted beverages. Only one state, Kentucky, earned an A minus,<sup>76</sup> and twenty-three failed entirely. The report noted that "while positive, [the changes] are fragmented, incremental, and not happening quickly enough to reach all schools in a timely way."<sup>77</sup> Because it is difficult to monitor the health impact of vending machine-related interventions, most studies, primarily anecdotal, focus on the financial impact of a school's changeover to healthier food choices.<sup>78</sup> It is far too early to ascertain whether recently enacted state legislation will be "an effective policy vehicle for changing the school food environment and ultimately improving children's health."<sup>79</sup>

The number of federal bills related to obesity prevention or treatment that began as a trickle in the 106<sup>th</sup> Congress - there were twelve - has steadily increased through the current 109<sup>th</sup> Congress to eighty-six bills. Bills that focus specifically on childhood obesity have similarly increased from three to thirteen in the current Congress.<sup>80</sup> With descriptive names such as the Prevention of Childhood Obesity Act,<sup>81</sup> the Childhood Obesity Reduction Act,<sup>82</sup> the Improved Nutrition and Physical Activity Act (IMPACT Act),<sup>83</sup> and the Healthy

Lifestyles and Prevention America Act (HeLP America Act),<sup>84</sup> laws are approaching obesity in two ways: by proposing to provide funding for additional research or by using an environmental approach that begins with prevention-focused prenatal care and extends throughout a lifetime of sound nutrition and physical exercise. However, to date, none of these acts have become law. While there are numerous proposed bills, just a handful call for comprehensive regulations that could have a significant impact on schools' nutritional environments.<sup>85</sup>

One such bill, the most recent WIC reauthorization act, requires local school districts to establish wellness policies by the beginning of the 2006-07 school year.<sup>86</sup> While a laudable first step in the environmental approach to setting nation-wide nutritional standards, it is dependent primarily on local activity and lacks any enforcement mechanism.<sup>87</sup> In addition, an agreement that was announced in May 2006 between the Clinton Foundation Alliance for a Healthier Generation<sup>88</sup> and the American Beverage Association (ABA) to reformulate products and phase out sugary beverages sold in schools (albeit voluntary and non-enforceable), coupled with action by district-wide wellness committees, might in fact constitute a first step toward environmental approaches to reducing children's caloric and sugar consumption within a school setting.<sup>89</sup>

However, critics have raised doubts about the agreement. Touted as a societal effort at combating obesity that will target thirty-five million school children, the agreement is in marked contrast to the industry's previous public posturing.<sup>90</sup> A combination of parental disapprobation, increasingly bad press, and declining sales for carbonated beverages<sup>91</sup> in all likelihood played a role in the decision to phase out sugary drinks. In addition, the imminent risk of class-action litigation<sup>92</sup> increased the pressure upon the big three beverage companies,<sup>93</sup> whose representatives were secretly in simultaneous negotiations with both nutrition advocates and the Clinton Foundation,<sup>94</sup> to reconsider the current mix of school products. However, because school boards and bottlers must re-negotiate contracts on an individual basis, the potential for lack of national uniformity continues, especially because the voluntary agreement lacks any enforcement mechanism.<sup>95</sup> Local wellness committees can propose stricter guidelines by prohibiting artificial sweeteners and sports drinks from remaining in their school vending portfolios, but school boards must endorse and enforce such measures. The immediate impact of the soda "phase-out" is also open to doubt, because the ABA has stated that companies will work to implement the changes at seventy-five percent of public and private schools they have contracts with before the 2008-2009 school year

and at all of the schools a year later.<sup>96</sup> This is in marked contrast to the impression created by most media headlines that changes in the school nutrition environment will be immediate and dramatic as a result of the agreement. In addition, there is concern among grass-roots advocates that the Clinton/ABA agreement may have a negative effect by convincing legislators that school nutrition regulations are no longer necessary.<sup>97</sup>

Nevertheless, federal efforts to establish consistent nutrition standards nationwide for all foods and beverages sold in schools continue. In May 2006 both houses of Congress made a bipartisan effort with the introduction of the "Child Nutrition Promotion and School Lunch Protection Act of 2006."<sup>98</sup> The bills seek, *inter alia*, to expand the current limited "time and place" to include all school areas (not just the cafeteria) and the whole school day and to update the definition of foods of minimal nutritional value to include the myriad poor choices currently on sale in schools across the country.<sup>99</sup> If the health of the nation's children is not enough of a motivator, perhaps the bills' second stated intent, "to protect the Federal investment in the national school lunch and breakfast program,"<sup>100</sup> will convince legislators that it is time to act.

### B. Physical Activity and Inactivity

The federal government has long recognized the importance of exercise and encouraged Americans to engage in physical activity. A 1915 report warned that modern life was making Americans too sedentary.<sup>101</sup> Following World War II, the government encouraged Americans to be active for twenty minutes per day,<sup>102</sup> but by the 1980s, it concluded that daily exercise was not realistic for many people and switched its focus to encourage biking and walking generally.<sup>103</sup>

Today, children in the United States are increasingly sedentary: fewer children walk or bike to school; television, video games, and the internet dominate leisure time; and a lack of appropriate space limits opportunities for outdoor play. In response to the growing prevalence of obesity, some cities and states have developed physical education or recreational programs for children.<sup>104</sup> For example, West Virginia provides equipment to one hundred schools to run "Dance Dance Revolution," a video game requiring physical activity,<sup>105</sup> and New York City sponsors a program to teach children how to incorporate exercise into daily life.<sup>106</sup> A few states have gone further and proposed exercise-related tax breaks.<sup>107</sup> These well-intentioned programs follow

a pattern of using the law to target individual behavior without considering the environment in which behavior occurs. While it is certainly appropriate to encourage children to be physically active, the law could have more impact if it sought to transform the underlying environmental conditions that discourage such activity. The built environment is one example.<sup>108</sup>

Legislation can have a significant effect on the built environment. In fact, urban design presents a unique opportunity to use the law to address obesity: "Although questions about the role of government in influenc-

In May 2006 both houses of Congress made a bipartisan effort with the introduction of the "Child Nutrition Promotion and School Lunch Protection Act of 2006." If the health of the nation's children is not enough of a motivator, perhaps the bills' second stated intent, "to protect the Federal investment in the national school lunch and breakfast program," will convince legislators that it is time to act.

ing human decisions are difficult,...[they] do not exist with respect to the built environment. Government is already highly involved....Thus, the political choice is...how...[to] benefit the population."<sup>109</sup> It is thus useful to consider the history of this governmental role in designing the physical environment.

Historically, public health has been central to urban planning.<sup>110</sup> In the early 1800s, epidemics of infectious illnesses like yellow fever and cholera were rampant in the United States due to crowding, lack of sanitation, and industrial pollutants in urban areas.<sup>111</sup> As scientists learned more about disease, the need to centralize sources of contamination like animal slaughtering to protect the water supply was apparent,<sup>112</sup> and it became essential to separate residential and industrial zones.<sup>113</sup> This type of physical planning, along with improvement in sanitation and the water supply, were understood to be the primary means of disease control until the mid-twentieth century, when developments in medicine (including the discovery of antibiotics) reduced these problems<sup>114</sup> and created the impression that public health was a matter of individual risk factors and treatments.<sup>115</sup> As a result, city planning became a matter of economics or aesthetics rather than health.<sup>116</sup>

Separating residential and commercial zones was a very effective public health measure because it slowed the spread of disease. This arrangement can work well in a situation where people can walk easily between the two zones. However, once highways and automobiles

became central features in cities, the utility of this arrangement changed.<sup>117</sup> While prevention of epidemics is no longer the primary concern of urban planners, people's homes are still isolated from the areas where they work, shop, and perform other daily tasks, requiring travel by automobile and decreasing opportunities for physical exercise.<sup>118</sup> Public health-focused solutions must be flexible enough to respond to constantly changing social conditions.

Unfortunately, the current built environment is not well suited for modern health concerns. Many features of the current urban environment discourage even the most basic forms of physical activity. In 1936, the Federal Housing Commission endorsed designing residential areas in *cul de sacs* connected to major roads, using this model for suburban development after World War II.<sup>119</sup> Such an arrangement favored travel by car over other methods of transport.<sup>120</sup> It also afforded young people fewer leisure options and made them dependent upon others for transport.<sup>121</sup> The primary means of transportation for Americans have evolved over time from walking to public transportation to automobiles.<sup>122</sup>

This transformation was closely related to the federal Interstate Highway Act of 1956, which passed after intense lobbying by the automotive and other industries and had a dramatic impact on our physical environment.<sup>123</sup> Automobiles became prevalent in cities, leading to the dominance of cars over all other forms of transportation. The auto industry not only supported the development of a national highway system, it also sought to undermine public transportation. The automotive company General Motors (GM) played a central role in the decline of public transportation and dependence on cars. Recognizing that an efficient public railway system was a threat to their sales, GM and several other concerned companies deliberately set out to destroy urban mass transportation, gaining control of urban railway systems in forty-five cities through a single operating company and then demolishing them.<sup>124</sup> The rise of the automobile had severe consequences for urban planning. "Where all-out efforts have been made to accommodate the car...urban aesthetics have suffered, and the quality of life has eroded....The automobile has taken over,...and everyone is a victim of the damaging side effects of the conflict between the car and the community."<sup>125</sup>

A major influence on physical activity level is what scholars call "walkability," the ease with which one can walk as a primary means of transport.<sup>126</sup> The walkability of the built environment particularly affects children's activity levels.<sup>127</sup> While almost sixteen percent of children's activity in 1977 involved walking or biking, this percentage had dropped to just under ten percent by 1995.<sup>128</sup> In one study, seventy percent of the

parents reported having walked to school but said only twenty-two percent of their children did; the parents cited distance (66%) and traffic (17%) as reasons.<sup>129</sup> A comprehensive approach to promoting physical activity thus must address walkability.<sup>130</sup>

It is difficult for pedestrians to walk in an area with congested street plans with dead ends and highway ramps. Dense traffic patterns with many fast-moving cars make it dangerous to walk or bike.<sup>131</sup> Zoning for mixed use – combining areas of high residential density with easy pedestrian access to stores, etc. – would encourage walking and biking.<sup>132</sup> The design of streets themselves can also have an impact: interconnected roads with ample sidewalks and crosswalks and narrow roads to discourage fast driving all create a more hospitable pedestrian environment.<sup>133</sup> There is some evidence that residents of walkable neighborhoods are healthier.<sup>134</sup> However, many people simply do not have time to exercise, so allowing them to walk to necessary destinations such as school or work is one of the most crucial ways to increase physical activity.<sup>135</sup>

Environmental, population-wide promotion of physical activity is a complicated task. Altering the urban environment is particularly difficult – and costly – because it involves constructing or changing physical structures and requires much time. Most importantly, while support for making newly constructed areas more walkable may increase, it is not politically feasible to make significant changes to the existing urban environment; tearing down and rebuilding large portions of cities is not realistic. It is also not clear whether increased physical activity resulting from a more pedestrian-friendly environment would be enough to counter the large amount of calories the average American consumes.<sup>136</sup>

However, encouraging physical activity tends to be less politically controversial than regulating food intake. The current anti-regulatory atmosphere<sup>137</sup> is less of an obstacle because the government is already extensively involved in urban planning. Further, some food companies who fear they will be blamed for the obesity epidemic are eager to support physical activity programs because they can appear to be confronting the issue without implicating their own behavior. Nonetheless, it remains to be seen whether solutions focused on the built environment rather than on individual activity will garner widespread support.

#### IV. A Case Study of Law Addressing Obesity: Marketing to Children

To better illustrate the complex political and social influences that necessarily affect any legal approach to obesity, this section will explore the specific issue of marketing junk food to children. We will explore not

only how law can affect the social production of risk factors but also the interaction of public health and legal principles.

Food and beverage industry marketing to children has been clearly identified as an influence on youth food preferences, purchase requests, and nutrition beliefs; the extent of the impact varies by age.<sup>138</sup> Marketing to children is not a new phenomenon; characters appealing to children have appeared on cereal boxes since the 1930s.<sup>139</sup> The intensity and ubiquity of children's advertising and financial support for it have developed more recently. Child-focused marketing and children's disposable income (or influence on spending) have steadily increased; expenditures on marketing passed the \$1 billion mark in 1998<sup>140</sup> and target a market niche that is "responsible for a whopping \$680 billion of household spending per year."<sup>141</sup> When the FTC first set out to analyze children's advertising, only one television show<sup>142</sup> was aimed primarily at two- to six-year-olds.<sup>143</sup> Today, cable and satellite television are available twenty-four hours a day and entire channels offer programming that is almost exclusively for children. This has helped increase the estimated number of television advertisements viewed by the average child to an extraordinary 40,000 a year.<sup>144</sup> The industry's success at targeting children and advertising's contribution to poor diet and over consumption have drawn the attention of the public health, medical, and legal communities and have led to renewed calls for regulation.<sup>145</sup>

It is worth briefly revisiting previous efforts at government regulation of child-focused advertising and industry efforts at self-regulation.<sup>146</sup> Advertising to children on television was, and remains, the catalyst for advocacy movements and government regulation.<sup>147</sup> Following World War II, television, and the ads that came with it, rapidly found their way into homes. By 1977 it was estimated that children aged two through five were viewing about 25.5 hours of television per week, or 3.67 hours per day (children aged six to eleven watched slightly more); while watching, children through age eleven were exposed to approximately 20,000 advertisements a year.<sup>148</sup> Although the early advertisements seem amateurish and limited in scope by contemporary standards, studies throughout the 1960s, 70s and 80s found that children were responsive to television advertising;<sup>149</sup> advertising was increasingly directed at children, rather than their parents;<sup>150</sup> the majority of advertisements were for low nutrition, highly sugared foods such as candy and breakfast cereals;<sup>151</sup> and children's health was suffering as a result of increased consumption of foods of poor nutritional value.<sup>152</sup>

In the early 1970s, advocacy groups, especially Action for Children's Television (ACT) and the Center

for Science in the Public Interest (CSPI), criticized the advertising and television industries for their virtually unregulated pitching of sugary junk food to children.<sup>153</sup> ACT petitioned both the FTC and the FCC to limit television advertising to children.<sup>154</sup> After several years, the FCC ultimately imposed time restrictions on the amount of advertising permitted on children's programs, restricted host selling (where program characters pitch products in their shows commercials), and required clear separations or "bumpers" between program content and commercials.<sup>155</sup> As consumer and parental anger over child-focused advertising increased, even members of Congress encouraged the FTC and its then Chair, Michael Pertschuk,<sup>156</sup> to investigate and potentially use its broad powers to stringently regulate advertising to children.<sup>157</sup>

Leery of potential government oversight,<sup>158</sup> the advertising industry created the self-regulatory Children's Advertising Review Unit (CARU) in 1974.<sup>159</sup> The industry touted CARU as going a step beyond its own established standard of review for truth and accuracy in advertisements. CARU's guidelines were to assess "fairness in dealing with a child's limited and still-developing perception and understanding of the world around him."<sup>160</sup> CARU was intended to respond to mounting research studies reaching the conclusion that all advertising to young children was inherently unfair<sup>161</sup> because they are incapable of understanding the persuasive selling intent of advertisements.<sup>162</sup> CARU's creation, however, did not quell public and governmental unhappiness over the state of children's advertising. Rather, in response to petitions filed by ACT and CSPI to ban the advertising of sugary products to children, the FTC conducted extensive fact-finding and concluded that rule-making was warranted because "televised advertising of sugared products to children...too young to understand the selling purpose...violate[s] the FTC Act."<sup>163</sup>

Since the Reagan administration, there has been a growing trend toward framing individual action in moral terms of "personal responsibility." As applied to obesity, this framework suggests that whether one is obese or normal weight is a result of personal choices made; obesity is a failure of will. This rhetoric of responsibility takes place in a decades-long transformation of policy and politics in the United States. In this changing political climate, reflected by the *Washington Post* dubbing the FTC as the "nation's nanny,"<sup>164</sup> members of Congress threatened to abolish the FTC,<sup>165</sup> slashed its budget, and bludgeoned the agency into silence and non-action for decades.<sup>166</sup> In addition, the staff's withdrawal of the rule-making report reflected a shift in analysis; the process had become derailed when it attempted to specify unhealthy foods and tar-



get programs aimed at children rather than ban all advertising to children under a specific age.<sup>167</sup> Under these conditions, the FTC's subsequent regulatory efforts ultimately ended when the proposed rulemaking was withdrawn.<sup>168</sup> Eventually, the FTC Improvements Act<sup>169</sup> stripped the agency of its unfairness jurisdiction in child-related advertising issues; oversight of children's advertising has essentially defaulted to CARU ever since.<sup>170</sup> In view of this negative climate, the staff intentionally crafted its final report with an eye toward the future and a time when regulatory action would be re-attempted.<sup>171</sup> That time may be rapidly approaching.<sup>172</sup>

Many companies, motivated in part by the threat of litigation, have expended considerable resources to develop and publicize shifts in their product portfolios. Their advertising campaigns tout healthier products, provide nutritional messages about healthy eating, and emphasize the need for moderation and exercise in children's daily lives. However, researchers at City University in London recently reviewed the performance of twenty-five of the largest global food companies and found that there was far more talk than action with regard to creating healthier food products.<sup>173</sup>

For now, industry essentially self-determines what constitutes a "healthier" product and the marketing of "healthier" products for children.<sup>174</sup> Moreover, multiple studies have established that food advertisements are likely to lead to confusion rather than education about sound nutritional choices.<sup>175</sup>

Imposing minimum nutritional standards on products marketed to children is one approach currently under consideration.<sup>176</sup> Whether marketing to children should be banned, whether a ban should be age- or product-driven, and whether industry self-regulation will continue to play a role in the process are questions being hotly debated in the United States and around the world.<sup>177</sup> Although many countries already have varying restrictions on advertising to children,<sup>178</sup> debate continues worldwide on the best approach to regulating child-focused marketing. For example, the British Food Standards Agency (FSA) has criticized Ofcom, the U.K.'s independent communications regulator, for proposing restrictions on all food advertising to children because the restriction included fruits and vegetables and drew the protective line at age nine instead of age fifteen.<sup>179</sup> For its part, the British advertising industry (Food Advertising Unit or FAU) threatened to sue the FSA for suggesting a too restrictive pre-watershed (that is, prior to 9 P.M.) food advertising ban.<sup>180</sup> The British National Heart Foundation also

threatened to sue Ofcom, but for the opposite reason – that the proposed bans did not go far enough.<sup>181</sup>

In the United States, the Institute of Medicine's comprehensive report on marketing to children urges industry to take voluntary steps to promote healthful food choices for children and recommends action by Congress in the event industry fails to act within the next two years.<sup>182</sup> This recommendation for government regulation is in marked contrast to the remarks of Deborah Platt Majoras, Chair of the FTC, who stated in 2005, "I want to be clear that from the FTC's perspective, this [conference on obesity and advertising] is not the first step toward new government regulations to ban or restrict children's food advertising and marketing. The FTC tried that approach in the 1970s, and it failed for good reasons."<sup>183</sup> Industry influence over government can occur when industry and government

**Unless significant policy changes are forthcoming, food marketing to children promises to become increasingly more sophisticated and invasive. Renewed regulatory action is warranted and must move beyond television.**

representatives are closely associated or are the same people over time ("capture"). The FTC's presentation of the issue had shifted from government monitoring of industry behavior to respecting advertisers' "free speech," reflecting the ability of industry to influence not only the agency but the framework of the debate itself.<sup>184</sup>

Weary of a lack of response to its petition filings, CSPI embarked on a litigation initiative that so far includes the threat of a lawsuit against Kellogg and Viacom for their marketing of junk food to children.<sup>185</sup> Legislators have proposed restoring unfairness jurisdiction to the FTC,<sup>186</sup> which would allow more sweeping regulation of marketing to children beyond current guidelines that result in single ad, post-appearance attempts at regulation.<sup>187</sup> Rather than decry potential federal regulation as nannyism, recent newspaper editorials have called for more federal regulatory oversight of children's advertising.<sup>188</sup> At the same time, the regulatory agencies themselves do not envision taking a greater regulatory role; instead, the FTC report that summarized its public workshop on current food marketing practices<sup>189</sup> reinforces the prevailing governmental attitude that industry can be relied upon to act responsibly through self-regulation. Unless significant policy changes are forthcoming, food marketing to children promises to become increasingly more sophisticated and invasive.

However, renewed regulatory action is warranted and must move beyond television. A veritable explosion of advertising and marketing techniques and venues has dramatically increased children's exposure to advertisements. Cell phones, text messaging, viral and buzz marketing, internet game websites, product placements, children's television stations, and in-school advertising all bombard children with advertisements. Advertisers increasingly focus on herding children from TV and other marketing venues to their internet game sites, where children often spend more than twenty minutes per visit.<sup>190</sup>

In addition, analog TV will soon be obsolete; digital TV, with potential for increased inter-media advertisement, will be the vehicle for all television programming in American homes by February 2009.<sup>191</sup> Digital television technology offers enhanced reception and allows one station to simultaneously broadcast six or more programs at once (multicasting). The technology also permits access to additional information, ranging from educational articles to stock quotes during a program (datacasting) to interactive activities that include the ability to purchase merchandise or order food delivery (T-commerce).<sup>192</sup> Child-focused marketing would also be transformed. The advocacy group Children Now describes "the power of interactivity" as "advertisers' [ability] to target children based on gender, age, household incomes, and/or race by tracking the history of their individual television viewing habits."<sup>193</sup>

The FCC and children's advocates recognized early on that this conversion to digital television would require new protections for children and proposed revisions to its regulation of children's programming.<sup>194</sup> In October 2000, the FCC issued a Notice of Proposed Rulemaking (NPRM) seeking comment on "how...existing children's television obligations [for broadcasters], developed with analog technology in mind, should be adapted to apply to digital television broadcasting."<sup>195</sup> The FCC also sought comment on whether interactive advertising during children's programming should be banned.<sup>196</sup> After receiving comments, the FCC issued an order (Order) in 2004 updating its children's television rules, effective January 2006, for the transition from analog to digital television.<sup>197</sup>

In early 2005, the FCC received multiple requests to reconsider its new rules.<sup>198</sup> When it was clear that the FCC would not reconsider the rules before the effective date, the television industry again petitioned the FCC for a stay.<sup>199</sup> In late 2005, the broadcast and cable television company Viacom and, leading the coalition of children's advocates, the Office of Communications of the United Church of Christ withdrew their petitions for reconsideration and instead sought judicial review of the Order.<sup>200</sup> Soon after these filings, the Walt Disney

Co. also sought judicial review separately.<sup>201</sup> The industry opposed the FCC Order on grounds ranging from procedural irregularities to jurisdictional overreaching to First Amendment violations.<sup>202</sup> Advocates asserted that the Order did not violate First Amendment principles but were still unacceptable because they were too insubstantial to adequately protect children.<sup>203</sup> Before any of this legal activity progressed, the industry and children's advocates entered into negotiations and reached an agreement under which, if the FCC adopted the mutually recommended modifications, both sides would withdraw their appeals.<sup>204</sup> The FCC agreed to extend the effective date of the rules until it considered the new joint recommendations.<sup>205</sup> In March 2006, the FCC issued a Second Further Notice of Proposed Rule Making seeking public comment on the joint proposal.<sup>206</sup> While the consideration process of regulating digital television continues, for our purposes, it is worth examining the industry position on commercial speech and regulation in its filings.

While the restriction or banning of advertising directed at children will raise First Amendment issues, industry claims about undue restrictions on speech are often hyperbolic and overestimate the level of protection that the Constitution affords commercial speech.<sup>207</sup> In support of its original proposed rulemaking, the FCC argued that its website rules, which limited the display of commercial website addresses during children's programming, were permissible because they advanced a substantial governmental interest – protecting children – and were narrowly tailored to achieve that end.<sup>208</sup> Regulation of commercial speech to achieve an appropriate public health goal is not only constitutionally permissible but draws an essential line between commercial speech and other protected speech in First Amendment jurisprudence.<sup>209</sup>

The industry has also taken such absolutist positions on the First Amendment during the FTC workshops reviewing regulation of marketing to children.<sup>210</sup> The current ambiguity in this area of the First Amendment jurisprudence provides opportunities for both advocates and industry to exploit the legal situation.<sup>211</sup> Poll results on the issue of whether government regulation of advertising to children is warranted tend to be contradictory; often they reflect the public's embrace of personal responsibility as the core of dietary beliefs, yet at the same time public opinion tends to oppose child-targeted junk food advertisements.<sup>212</sup> Even many advertisers feel that marketing to children should be curtailed.<sup>213</sup> Poll results also indicate that litigation is not a preferred method to solve any aspect of the marketing-obesity connection,<sup>214</sup> although deceptive marketing practices, particularly those aimed at children, have been repeatedly identified as prime litigation targets.<sup>215</sup>

The legal skirmishes surrounding the FCC's rulemaking for children's advertising on digital TV included a heavy reliance upon litigation, a legal tool relevant to the regulation of children's advertising.

For its part, despite itself using litigation to advance its interests, the food industry carefully cultivates anti-litigation and anti-lawyer sentiment, using advertisements to ridicule attempts to achieve social change through litigation<sup>216</sup> and advertorials that depict plaintiffs' lawyers as dedicated to the destruction of capitalism while seeking to capture windfall fees.<sup>217</sup> It has also managed to gain immunity from "obesity" lawsuits in more than two dozen states.<sup>218</sup> Despite this, litigation remains a critical public health tool. Experience with other public health problems, especially tobacco, demonstrates that it is often the most effective tactic against an industry with tremendous financial resources and governmental influence.<sup>219</sup> Further, litigation is most effective when it occurs in the context of a broader public health strategy.<sup>220</sup>

### V. Law as a Public Health Tool: Impact on Other Legal Doctrines

We have argued for a comprehensive and systemic view and use of the law in controlling the obesity epidemic. We have explored how the law and public health often interact, but we have not discussed how law as a public health tool interacts with other legal doctrines.

Legal systems are inherently complex, and a complicated set of procedural and substantive doctrines has developed that govern the practice and operation of law. These doctrines often interact with each other, resulting in a complex set of phenomena in legal practice. As we move to use law comprehensively as a tool to control obesity, we must acknowledge that legal solutions will often produce additional legal problems or will be constrained by legal doctrines in ways that are rarely anticipated by public health policy makers. The call for increased government regulation of advertising to children discussed in the previous section of this paper is a prime example. Such regulation will itself raise a host of legal complications as it occurs in the context of the existing legal environment. In this section, we explore some of the legal doctrines that will shape law as a public health tool in general and marketing to children in particular.

#### *Federalism*

Any attempt to limit marketing messages directed at children must consider the constitutional doctrines collectively known as "federalism." The Constitution grants the federal government jurisdiction over specific matters, leaving other matters to the states. Federalism is the doctrine which attempts to delin-

eat this allocation. The complexity of legal doctrine in this area raises significant issues for public health action. Policy makers must weigh the legal principles of federalism and of public health to achieve a result that preserves not only an effective and valued legal structure but also provides legal authority for effective public health policy.<sup>221</sup>

Public health has traditionally been the responsibility of state governments,<sup>222</sup> although some public health issues such as food and drug law have been addressed principally at the federal level. As public health problems and their solutions become more complex, both state and federal governments should seek to address them. The law can be used cooperatively at both levels of government to address serious social problems. While the system of federalism in the United States allows for creative solutions on multiple levels, it also allows players who are well connected or possess significant resources to block effective solutions on multiple fronts. While "federalism" represents a varied set of doctrines, two are worth mentioning here as likely areas of activity should advocates seek state or federal action in controlling food marketing to children.

The Commerce Clause and the legal doctrine surrounding it pose two potential barriers to effective public health action. First, Congress derives the power to establish the FTC and FCC from the Commerce Clause, which states that the federal government has the power to legislate matters pertaining to interstate commerce.<sup>223</sup> Recent cases have questioned the scope of Congress's ability to protect the public health under its Commerce Clause authority,<sup>224</sup> and any federal legislation that seeks to regulate advertising will necessarily implicate this issue and must be reasonably related to commerce among the states. Second, the clause's court-defined corollary, the so-called "Dormant Commerce Clause," prevents states from burdening interstate commerce.<sup>225</sup> Dormant Commerce Clause jurisprudence perhaps is poised to exert a pernicious influence on state efforts to control marketing targeting children because courts may view state laws that restrict the content of nationally broadcasted programs and advertising as unduly burdening interstate commerce.<sup>226</sup>

Preemption poses another potential barrier to public health policy. Laws at a higher level often supersede others (for example, state laws may preempt local ones pertaining to the same issue.)<sup>227</sup> The media that convey food marketing and information about food are heavily regulated at the federal level. Doctrines of preemption may limit the ability of states to regulate information about food.<sup>228</sup> These principles, while a potential set of obstacles, are not insurmountable.<sup>229</sup> They should be thoroughly considered when crafting legal solutions to public health problems.

### *Individual Liberties*

Some legal principles work to protect either the rights of individual citizens or the values that resonate deeply and inhere in civil society.<sup>230</sup> As discussed previously, attempts to regulate the marketing of unhealthy foods targeting children will implicate the First Amendment.<sup>231</sup> Courts have recognized that the First Amendment does protect “commercial speech” but have also held that it does not provide the same amount of protection as it does to political or personal speech.<sup>232</sup>

To address public health effectively, lawyers must employ a broader legal strategy that considers cases’ impact on the entire population and focuses on cases that expose the broader public health consequences of the defendants’ behavior.

Hence, the government can regulate advertising to children without violating the First Amendment.

Public health policy often may impact the legal rights of individuals. In these cases, policy makers must carefully balance competing values.<sup>233</sup> In this example, courts must balance free speech with the need to protect children. In some cases, individual liberties have not been sufficiently protected and have led to significant abuses by public health advocates.<sup>234</sup> In others, absolutist positions on some constitutional rights, e.g. commercial speech and the First Amendment, have used the language of individual liberty to the detriment of public health and to the diminishment of the rights of the individual ostensibly protected.<sup>235</sup> Courts and other public health policy makers must carefully weigh individual liberties and public health to create effective public health solutions that also protect civil liberties.

### *Private Enforcement through Litigation*

Litigation can be an effective public health tool. Industry lobbying and political compromise often limit legislation and regulation at both the state and national levels.<sup>236</sup> Lawsuits can help by calling public attention to a problem, making the industry pay its share of costs, changing industry behavior, and promoting justice.<sup>237</sup> However, to best effect change in public health, litigation should focus on the needs of the population rather than of individual clients.

From a public health perspective, the efficacy of litigation can be reduced by an individual focus in circumstances where the interests of the client and the public are not aligned.<sup>238</sup> The availability of information is another problem. When parties settle, the plaintiffs and their attorneys may be properly compensated, but if the defendant’s behavior remains secret and uncor-

rected, the case will not benefit anyone else. Several courts have invalidated secrecy clauses that could pose a threat to public welfare<sup>239</sup> by shielding industry behavior from public and governmental scrutiny.<sup>240</sup> A lawyer’s duty is to the client rather than to society at large. Therefore, to address public health effectively, lawyers must employ a broader legal strategy that considers cases’ impact on the entire population and focuses on cases that expose the broader public health consequences of the defendants’ behavior.<sup>241</sup>

### *Role of Industry*

Confronting a public health problem like obesity requires understanding the role of the food industry.<sup>242</sup> Corporations and private market groups are fundamentally oriented toward one singular goal: profit. This is the singular purpose of these institutions as defined by the law. This profit-seeking purpose was fundamentally laid out in *Dodge v. Ford*:

[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.<sup>243</sup>

This requirement is still the law today. The food industry exerts enormous influence over the environment and what foods are offered. There have been calls to “partner” with industry to seek solutions to the pressing public health problem represented by the prevalence of obesity. Corporations and the associations that represent their interests are governed by one fundamental goal – profit – and under *Dodge*, they can pursue other goals only under the requirements of law. When the goal of public health is incommensurate with this profit-seeking end, it will be set aside. The behavior of industry over the past few years demonstrates this general principle repeatedly.<sup>244</sup> As discussed in Part IV, CARU is a striking example. Ostensibly set up to monitor advertising to children, it is a tool that the advertising industry uses to resist more stringent government regulations.

### *Erosion of Regulatory Culture*

Public support for legal solutions to public health problems closely mirrors the political climate towards regulation generally. Historically, support for regulation has risen and then fallen in cycles.<sup>245</sup> After the Great Depression, the government took an active role in policing industries,<sup>246</sup> but eventually concerns about abuse of agency power led to the limitation of agency discretion.<sup>247</sup> Support for regulation surged again during Johnson's Great Society,<sup>248</sup> but in the 1970s public attitudes began to change<sup>249</sup> and the federal government slowly began to decrease regulation of industry.<sup>250</sup>

In 1980,<sup>251</sup> Ronald Reagan promised less regulation during his presidential campaign and pursued massive deregulation of industry,<sup>252</sup> reducing the power of federal agencies to regulate without executive approval.<sup>253</sup> In Part IV we discussed how this political climate undermined the ability of the FTC to regulate children's advertising and ultimately caused the FTC to lose jurisdiction, leaving the industry-created CARU to monitor itself. This anti-regulation culture has continued since the Reagan years.<sup>254</sup> There has been a backlash against deregulation in light of corporate scandals over the past two decades, prompting Congress to reinstitute some regulation of the involved industries.<sup>255</sup> Overall, however, the current political climate continues to favor deregulation.<sup>256</sup>

This regulatory atmosphere poses a challenge to using law to address a public health problem like obesity. When the public perceives governmental involvement as intrusion rather than protection, it will resist legal attempts to influence both personal behavior and the social environment. The moral tone of "personal responsibility" rhetoric is one of pure negative freedom. In this view, the only function of the state is non-interference. The affected business interests will argue that the market is the proper force to create and change the cultural landscape; in a free market, consumers will ultimately get the social conditions they want and deserve. This ignores the illusory nature of many of the choices consumers supposedly make. Most poor Americans do not have convenient access to healthy foods, and both immaturity and peer pressure lead children to choose nutritionally worthless "competitive" foods. The entities that benefit most from the current social environment are large corporations, but these are the same entities which promote and support deregulation. They convince consumers that the environment is a result of their choices rather than a reflection of corporate desires; industry encourages consumers to be wary of government regulation of their private lives to draw attention away from their own power in creating and defining existing social conditions.

### *Deep Capture*

Another problem with using the law to address obesity on a population-wide level is the issue of "deep capture." Governmental entities often pass laws or regulations that benefit the entities they oversee rather than the public they represent. This industry influence is called "capture."<sup>257</sup> In "deep capture," a powerful entity exerts self-serving influence over not only a situation but also the terms by which the situation is evaluated and understood.<sup>258</sup> Most people interpret events in a dispositional way,<sup>259</sup> believing that obesity results from a series of their own bad decisions, rather than understanding how, for example, industry lobbies for a scenario where advertising to children is largely unregulated and then uses this environment to manipulate children and undermine parental protection. The history of the FTC's attempts to regulate advertising to children provides an example of deep capture. Under Michael Pertschuk, the agency began the process of developing strict rules for children's advertising. However, the rise of "personal responsibility" rhetoric shifted the focus away from the role of industry, ultimately undermining the power of the FTC. Under Deborah Platt Majoras, the agency endorsed this cultural shift, saying it would not attempt to regulate due in part to First Amendment concerns.

Corporations wield vast influence over not only the political process but also how the public perceives the obesity problem, encouraging consumers to view the epidemic as a result of their own decisions rather than of industry-shaped social conditions and beliefs.<sup>260</sup> This corporate-driven tendency to overemphasize disposition while not questioning the role the environment plays in shaping individual choices is a major obstacle to developing a legal framework that can address the obesity epidemic in a meaningful way.<sup>261</sup>

## **VI. Conclusion**

The law has tremendous potential to combat the childhood obesity epidemic in the United States, but traditional approaches have not resulted in a coherent and effective strategy. To address the problem fully, the law must shift focus away from individual risk factors alone and seek instead to shape the situational and environmental influences that create an environment conducive to health. We have discussed the inadequacy of current laws affecting both calories consumed and calories expended and also examined marketing to children in detail to illustrate the complexity of developing an orchestrated legal strategy that can truly impact a public health issue. As we have suggested, partnering with industry is rarely an effective way of promoting public health because the ultimate goals of advocates and industry are often fundamentally

opposed. Instead, advocates must ensure that all of their endeavors promote a population-wide model of public health and coordinate their efforts to attain this goal. In turn, judges and other policy makers need to critically examine the fashionable rhetoric of consumer choice and address the underlying forces that ultimately will determine the course of the obesity epidemic.

#### Acknowledgments

The authors would like to thank Robert J. Moore and Carolyn Blake for their invaluable research assistance with this project.

#### References

- The term "obese" is difficult – and controversial – to define in children because they are in various stages of physical growth and development. Doctors typically compare a child's Body Mass Index (BMI) to those of others of the same age and gender to determine the normal BMI range. Office of the Surgeon General, Public Health Service, U.S. Department of Health and Human Services, *The Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity* (Rockville, MD: U.S. Department of Health and Human Services, Public Health Service, Office of the Surgeon General, 2001): at 1, 6. BMI is calculated by dividing weight in kg by height in meters squared. *Id.* at 4. Throughout this article we use the term "obese" to refer to children who exceed the clinically accepted BMI range for their age and gender.
- Institute of Medicine, *Preventing Childhood Obesity: Health in the Balance* (Washington, D.C.: National Academies Press, 2005): at 22.
- See Surgeon General, *supra* note 1, at XIII.
- See Institute of Medicine, *supra* note 2, at 22.
- See Surgeon General, *supra* note 1, at XIII.
- Our use of the term "situational" echoes the use of the term by David Yosifon. D. G. Yosifon, "Resisting Deep Capture: The Commercial Speech Doctrine and Junk Food Advertising to Children," *Loyola of Los Angeles Law Review* 39, no. 1 (2006): 507-602.
- See Surgeon General, *supra* note 1, at 1.
- Id.* at 2.
- T. Tulchinsky and E. Varavikova, *The New Public Health* (San Diego: Academic Press, 2000): at 30-33.
- Compare N. Krieger, "Epidemiology and the Web of Causation: Has Anyone Seen the Spider?" *Social Science & Medicine* 39 (1994): 887-903, at 892. (Krieger's description of the "biomedical individualism" of traditional descriptions of cause implies difficulties with conditions unrelated to traditional pathogens.)
- See, e.g., T. H. Frank, "A Taxonomy of Obesity Litigation," *University of Arkansas at Little Rock Law Review* 28 (2006): 427-441, at 437 (relying upon clinical sources to demonstrate insufficiency of legal causation in describing epidemiological problems). But see J. A. Smith, "Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity," *University of Arkansas at Little Rock Law Review* 28 (2006): 443-455, at 451-452.
- Richard Epstein provides an excellent example of this position in relation to the obesity epidemic. He suggests that the state only intervene when a system of private rights in a free-market system fails to provide a solution. His paper suggests that occurs only in situations of infectious disease that fit models of causation described by Henle-Koch. R. A. Epstein, "Let the Shoemaker Stick to His Last: A Defense of the 'Old' Public Health," *Perspectives in Biology and Medicine* 46 (2003): S138-159, at S143.
- See, e.g., S. M. Milkis, "The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism," *Antitrust Law Journal* 72 (2005): 911-941, at 930ff.
- By "social individual" we mean the conception of the individual that describes his or her autonomy very much as a product of the environment. A legal focus on the social individual would alter the environment that constructs and manipulates individual actions. See Yosifon, *supra* note 6.
- E.g., J. Strnad, "Conceptualizing the 'Fat Tax': The Role of Food Taxes in Developed Economies," *Southern California Law Review* 78 (2005): 1221-1326.
- E.g., K. D. Brownell and K. B. Horgen, *Food Fight* (Chicago: Contemporary Books, 2004): at 194-196.
- Child Nutrition and WIC Reauthorization Act of 2004, §204, Public Law 108-265, 118 Stat. 729 (codified generally in sections of U.S. Code, vol. 42), available at <[http://www.fns.usda.gov/end/Governance/Legislation/Historical/PL\\_108-265.pdf](http://www.fns.usda.gov/end/Governance/Legislation/Historical/PL_108-265.pdf)> (last visited October 27, 2006).
- E.g., Verb campaign, available at <<http://www.cdc.gov/youth-campaign/>> (last visited October 27, 2006).
- Id.*
- See M. Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (Berkeley and Los Angeles: University of California Press, 2002): at 29ff.
- See, e.g., S. A. French et al., "Food Environment in Secondary Schools: À La Carte, Vending Machines, and Food Policies and Practices," *American Journal of Public Health* 93 (2003): 1161-1167.
- N. Krieger, "A Glossary for Social Epidemiology," *Journal of Epidemiology & Community Health* 55 (2001): 693-700, at 693.
- See Krieger, *supra* note 10, at 897-898.
- S. Burris, I. Kawachi, and A. Sarat, "Integrating Law and Social Epidemiology," *Journal of Law, Medicine, & Ethics* 30 (2002): 510-521. Benforado, Hanson, and Yosifon explored in depth the effect of the social situation on behavior and policy in relation to obesity. A. Benforado, J. Hanson, and D. Yosifon, "Broken Scales: Obesity and Justice in America," *Emory Law Journal* 53 (2004): 1645-1806, at 1648.
- T. A. Glass and M. J. McAtee, "Behavioral Science at the Crossroad in Public Health: Extending Horizons, Envisioning the Future," *Social Science & Medicine* 62 (2006): 1650-1671, at 1659-1660.
- See, e.g., R. A. Daynard, "Regulating Tobacco: The Need for a Public Health Judicial Decision-making Canon," *Journal of Law, Medicine & Ethics* 30 (2002): 281-289; W. E. Parmet and A. Robbins, "Public Health Literacy for Lawyers," *Journal of Law, Medicine & Ethics* 31 (2003): 701-713.
- See, e.g., J. Alderman and R. A. Daynard, "Applying Lessons from Tobacco Litigation to Obesity Lawsuits," *American Journal of Preventive Medicine* 30 (2006): 82-88; W. E. Parmet and J. A. Smith, "Free Speech and Public Health: A Population-based Approach to the First Amendment," *Loyola of Los Angeles Law Review* 39, no. 1 (2006): 363-446; W. E. Parmet and C. N. Banthin, "Public Health Protection and the Commerce Clause: Controlling Tobacco in the Internet Age," *New Mexico Law Review* 35 (2005): 81-122, at 84.
- See part IIIA for a discussion of competitive foods.
- E.g., Child Nutrition Promotion and School Lunch Protection Act, S. 2592 IS, 109th Cong. (2006) (seeking to revise the definition of FMNV in accordance with scientific recommendations and apply the new regulations to all foods wherever and whenever sold in schools, with an exception for fundraisers).
- See e.g., Burris, Kawachi and Sarat, *supra* note 24.
- See W. K. Mariner, "Law and Public Health: Beyond Emergency Preparedness," *Journal of Health Law* 38 (2005): 247-285, at 277-282.
- See Parmet and Banthin, *supra* note 27, at 84.
- See Mariner, *supra* note 31, at 281-283.
- "The National School Lunch Program (NSLP) is a federally assisted meal program operating in public and nonprofit private schools and residential child care institutions. It provides nutritionally balanced, low-cost or free lunches to children each school day. The program was established under the National School Lunch Act, signed by President Harry Truman in 1946." USDA, *National School Lunch Program*, available at <<http://www.fns.usda.gov/end/program/>> (last visited October 27, 2006).
- "The National School Breakfast Program (SBP) provides cash assistance to States to operate nonprofit breakfast programs in schools and residential childcare institutions. The program operates in more

- than 72,000 schools and institutions, serving a daily average of some 8.4 million children. It is administered at the Federal level by FNS. State education agencies administer the SBP at the State level, and local school food authorities operate it in schools." USDA, *School Breakfast Program*, available at <<http://www.fns.usda.gov/cnd/breakfast>> (last visited October 27, 2006). However, foods offered as part of a "grab-n-go" breakfast contain sugary cereals, animal and snack crackers, and apple juice. All of the items are branded. See Breakfast Breaks, available at <<http://www.breakfastbreaks.com/school/index.php>> (last visited October 27, 2006).
36. "CACFP plays a vital role in improving the quality of day care for children and elderly adults by making care more affordable for many low-income families. Through CACFP, 2.9 million children and 86,000 adults receive nutritious meals and snacks each day as part of their day care." USDA, *Child and Adult Care Food Program*, available at <<http://www.fns.usda.gov/cnd/care/>> (last visited October 27, 2006).
  37. "The Summer Food Service Program was created to ensure that children in lower-income areas could continue to receive nutritious meals during long school vacations, when they do not have access to school lunch or breakfast...SFSP sponsors receive payments for serving healthy meals and snacks to children and teenagers, 18 years and younger, at approved sites in low-income areas." USDA, *Summer Food Service Program*, available at <<http://www.fns.usda.gov/cnd/summer/about/index.html>> (last visited October 27, 2006). In 2005, the summer program served 115.8 million meals. USDA, *SFS Summary*, available at <<http://www.fns.usda.gov/pd/sfsummar.htm>> (last visited October 27, 2006).
  38. "The Special Supplemental Nutrition Program for Women, Infants, and Children - better known as the WIC Program - serves to safeguard the health of low-income women, infants, & children up to age 5 who are at nutritional risk by providing nutritious foods to supplement diets, information on healthy eating, and referrals to health care." USDA, *About WIC*, available at <<http://www.fns.usda.gov/wic/aboutwic/default.htm>> (last visited October 27, 2006).
  39. "The Food Stamp Program helped put food on the table for some 10.3 million households and 23.9 million individuals each day in Fiscal Year 2004. It provides low-income households with coupons or electronic benefits they can use like cash at most grocery stores to ensure that they have access to a healthy diet." USDA, *Food Stamp Program FAQs*, available at <<http://www.fns.usda.gov/fsp/faqs.htm>> (last visited October 27, 2006). A history of this program is available online. USDA, *A Short History of the Food Stamp Program*, available at <<http://www.fns.usda.gov/fsp/rules/Legislation/history.htm>> (last visited October 27, 2006).
  40. "The Federal nutrition assistance programs can play a critical role in combating this [obesity] epidemic by providing not just access to healthful food, but also promoting better health through nutrition education and promotion of physical activity." USDA, Food and Nutrition Service, "Newsroom: Statement of Eric M. Bost, Under Secretary of Food, Nutrition, and Consumer Services, Before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies," March 10, 2005, available at <<http://www.fns.usda.gov/cga/Speeches/CT031005-a.html>> (last visited October 27, 2006).
  41. For example, participation in the NSLP has grown from 7.1 million at its inception in the 1946-47 school year to 28.4 million in 2003. The SBP is much smaller, although current efforts, including a publicity campaign spearheaded by former Senators McGovern and Dole, are aimed at increasing participation. C. Dell'Amore, "McGovern Rallies for Hunger Initiative," May 17, 2006, available at <[http://www.gotbreakfast.org/news/United\\_Press\\_International.html](http://www.gotbreakfast.org/news/United_Press_International.html)> (last visited October 27, 2006).
  42. Nestle, Food Politics, *supra* note 20, at 367, 370; M. Nestle and M. F. Jacobson, "Halting the Obesity Epidemic: A Public Health Policy Approach," *Public Health Reports* 115 (2000): 12-24.
  43. See, e.g., WIC Reauthorization Act, *supra* note 17: "The Secretary shall issue guidance to States and school food authorities to increase the consumption of foods and food ingredients that are recommended for increased serving consumption in the most recent Dietary Guidelines for Americans..."
  44. See, e.g., L. Shapiro, "School Food: What's in a Lunch," *Newsweek* 117, Special Issue (1991): 66-68. Efforts are being made to reduce the fat and sodium content of purchases commodities and schools are receiving fresh fruits under an arrangement with the Department of Defense. USDA, *Food Distribution Programs*, available at <<http://www.fns.usda.gov/FDD/programs/dod/default.htm>> (last visited October 27, 2006). The USDA is also working to establish Farm to School programs. USDA, Agricultural Marketing Service, *How Local Farmers and School Food Service Buyers are Building Alliances*, available at <<http://www.ams.usda.gov/tmd/MSB/PDFpubList/localfarmsandschool.pdf>> (last visited October 27, 2006).
  45. M. Burros, "A Victory for Vending: Can Vigilance Veto Junk Foods?" *Washington Post*, June 9, 1977, at F1. The article quotes from an editorial in the trade journal *Candy and Snack Industry*: "The National Confectioners Association and the National Candy Wholesalers Association have worked together effectively to prevent anti candy rulings from becoming part of the National School Lunch Act over the year..."
  46. "[T]he vast majority of most kids' calorie and fat intake comes not from school lunch, but from family dinners at fast food restaurants or high fat foods from the home freezer." J. Lawn, "School Foodservice Faces a Growing Communication Gap," available at <[www.food-management.com/article/2130](http://www.food-management.com/article/2130)> (last visited October 27, 2006); The Grocery Manufacturers of America, an industry trade group, has steadfastly opposed state legislation it characterizes as "food and beverage restriction" in schools. See, e.g., K. Fisk, "RE: GMA Letter in Opposition of Texas Food and Beverage Restrictions," available at <<http://www.gmabrands.com/publicpolicy/docs/comment.cfm?DocID=1510>> (last visited October 27, 2006).
  47. Nestle provides a succinct and detailed history of regulations aimed at controlling the sale of competitive and other food of minimal nutritional value. See Nestle, Food Politics, *supra* note 20, at 207-211.
  48. "AB 1755 would have banned the sale of junk foods at public school...The prevailing argument against the bill was that the issue should be resolved at the local level. Unfortunately, the high profits from the sales of such foods are not easily relinquished by school boards facing increasing costs and inadequate revenues. An exception to this is the Las Virgines Unified School District, which has adopted a nutrition policy for the sale of foods in all of its schools...No soft drinks, no artificial coloring or flavoring, or sodium nitrate is allowed. Breads must contain no less than 25% whole wheat and no more than 10% of the calories of any food may be derived from added sugar." E. S. Harris, "Consumer Advocate: Comprehensive State Food Plan," *Los Angeles Times*, August 21, 1977, Part V, at F5.
  49. USDA, National School Lunch Program and School Breakfast Program, Proposed rule, 44 Fed. Reg. 40004-40014 (July 6, 1979); Final rule, 45 Fed. Reg. 6758-6772 (January 29, 1980); USDA, "National School Lunch Program and School Breakfast Program: Competitive Foods, Final Rule," *Federal Register* 50 (1985): 20545-20547.
  50. See Nestle, *supra* note 20, at 207.
  51. "There's no reason why a child should not have a soft drink or a candy bar...School authorities should teach moderation rather than try to prohibit the sale of these items...Tooth decay is caused by a combination of factors...If those advocating curtailment of school sales were as interested in encouraging children to brush their teeth...as they are in trying to take candy away from them, they would accomplish much more." Interview with James E. Mack; President and General Counsel, National Confectioners Association, "Curb 'Junk Foods' in Schools?: NO - Everything We Eat Need Not have a Scientific, Medical, Nutritional Reason," *U.S. News and World Report* 87, no. 13 (1979): at 59; "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..." Edito-

- rial, "The Spoon-Feeding of Nonjunk," *Los Angeles Times*, May 1, 1978, at D4.
52. *National Soft Drink Association v. Block*, 721 F.2d 1348 (D.C. Cir. 1983).
  53. *Id.*; see also "Court Says U.S. Erred in School Junk Food Ban," *Los Angeles Times*, November 15, 1983, at A1.
  54. Competitive foods are defined as foods offered at school other than meals served through school lunch, school breakfast, and after-school snack programs. Current program regulations prohibit the sale of FMNV in the food service areas during the school meal periods. 7 C.F.R. § 210.11(b) (2005). The regulations do not prohibit their sale outside the food service area at any time during the school day. States and local school food authorities may impose additional restrictions. Foods of minimal nutritional value are defined at 7 C.F.R. § 210.11(a)(2) (2005). FMNV are soda water, ices without fruit, chewing gum, and certain hard candies. Appendix B of 7 C.F.R., Part 210 (2005).
  55. *National Soft Drink Association v. Block*, 721 F.2d 1348 (D.C. Cir. 1983).
  56. Local schools maintained the ability to control competitive junk foods, although few did so. United States General Accounting Office, *School Meal Programs: Competitive Foods are Available in Many Schools; Actions Taken to Restrict Them Differ by State and Locality*, available at <<http://www.gao.gov/new.items/d04673.pdf>> (last visited October 27, 2006).
  57. USDA, *Foods Sold in Competition with USDA School Meal Programs: A Report to Congress*, January 12, 2002, available at <[http://http://www.fns.usda.gov/cnd/Lunch/Competitive-Foods/report\\_congress.htm](http://http://www.fns.usda.gov/cnd/Lunch/Competitive-Foods/report_congress.htm)> (last visited October 27, 2006).
  58. See P. Girard, "School 'Junk Food' Restriction Delayed," *Los Angeles Times*, December 16, 1978, at A2.
  59. S. Harty, *Hucksters in the Classroom: A Review of Industry Propaganda in Schools* (Washington, D.C.: Center for Study of Responsive Law, 1979); United States General Accounting Office, *Public Education: Commercial Activities in Schools*, September 2000, available at <<http://www.gao.gov/new.items/he00156.pdf>> (last visited October 27, 2006).
  60. CSPI, *Dispensing Junk: How School Vending Undermines Efforts to Feed Children Well*, May 2004, available at <[http://cspinet.org/new/pdf/dispensing\\_junk.pdf](http://cspinet.org/new/pdf/dispensing_junk.pdf)> (last visited October 27, 2006); Consumers Union, *Captive Kids: A Report on Commercial Pressures on Kids at School*, available at <<http://www.consumersunion.org/other/captivekids/index.htm>> (last visited October 27, 2006).
  61. See Nestle, *supra* note 20, at 207; M. Nestle, "Soft Drink 'Pouring Rights': Marketing Empty Calories to Children," *Public Health Reports* 115 (2000): 308-319.
  62. S. J. Nielsen and B. M. Popkin, "Changes in Beverage Intake between 1977 and 2001," *American Journal of Preventive Medicine* 27 (2004): 205-210, at 207.
  63. S. A. French et al., "Food Environment in Secondary Schools: A La Carte, Vending Machines, Food Policies, and Practices," *American Journal of Public Health* 93 (2003): 1161-1168.
  64. D. S. Ludwig, K. E. Peterson, and S. L. Gortmaker, "Relation Between Consumption of Sugar-sweetened Drinks and Childhood Obesity: A Prospective, Observational Analysis," *Lancet* 357 (2001): 505-508.
  65. G. Wyshak, "Teenaged Girls, Carbonated Beverage Consumption and Bone Fractures," *Archives of Pediatrics and Adolescent Medicine* 154 (2000): 610-613.
  66. See e.g., the Center for Consumer Freedom's dismissal of scientific evidence linking soda consumption and obesity and the Coca-Cola company's discussion of the same topic: Coca-Cola Company, *Information Regarding Obesity and Soft Drinks*, available at <[http://www2.coca-cola.com/ourcompany/al\\_obesity\\_and\\_softdrinks.html](http://www2.coca-cola.com/ourcompany/al_obesity_and_softdrinks.html)> (last visited October 27, 2006). 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." Coca-Cola Company, Beverage Institute for Health and Wellness, *Research Focus*, available at <[http://www.thebeverageinstitute.org/about\\_us/research\\_focus.shtml](http://www.thebeverageinstitute.org/about_us/research_focus.shtml)> (last visited October 27, 2006).
  67. The soft drink industry continues to emphasize lack of exercise as the prime cause of childhood obesity, despite attempts to present a more nuanced understanding of the link between the consumption of sugary soft drinks and obesity. Compare S. Williams, "More Limits Sought on Soda Sales in Schools Health Experts Say Soft Drinks Lead to Obesity in Kids," *The Columbus Dispatch*, Friday, January 9, 2004, with this recent statement on the American Beverage Association website: "A main contributing factor of obesity is lack of exercise. University of North Carolina researchers found that in the past 20 years adolescent obesity rates climbed 10 percent, while calorie intake only rose one percent. During the same period, children's physical activity levels declined 13 percent." American Beverage Association, *Obesity*, available at <<http://www.ameribev.org/industry-issues/healthy-balanced-diet/obesity/index.aspx>> (last visited October 27, 2006).
  68. B. Bright, "More Americans See Childhood Obesity as Major Problem in U.S., Poll Finds," *Wall Street Journal*, July 5, 2006.
  69. See Nestle and Jacobson, *supra* note 42.
  70. E. J. Fried and M. Nestle, "The Growing Political Movement Against Soft Drinks in Schools," *JAMA* 288 (2002): 2181.
  71. The struggle to change the school food environment is illustrated by the historic nine hour debate in the Connecticut state legislature in which every conceivable argument against removing junk foods and sugary beverages was offered primarily by Republicans. The bill, passed by the Democratic majority in June 2005, was vetoed by the governor on the grounds, *inter alia*, that it improperly usurped control of local schools. An Act Concerning School Nutrition, available at <<http://www.cga.ct.gov/2005/act/Pa/2005PA-00117-R00SB-01309-PA.htm>> (last visited October 27, 2006); video of legislative debate available on Connecticut Network webpage, available at <<http://www.ctn.state.ct.us/>> (last visited October 27, 2006); SB 1309, May 15, 2005; Press Release, *Governor Rell Vetoes School Nutrition Bill*, June 14, 2005, available at <<http://www.ct.gov/governorrell/cwp/view.asp?Q=294564&A=1761>> (last visited October 27, 2006). The Connecticut legislature narrowly passed a similar bill that now includes financial incentives for schools to offer healthier food options and Governor Rell signed it into law on May 19, 2006. Connecticut, An Act Concerning Healthy Food and Beverages in Schools, S.B. 373 (May 19, 2006).
  72. National Council of State Legislatures, *Childhood Obesity - 2005 Update and Overview of Policy Options*, available at <<http://www.ncsl.org/programs/health/ChildhoodObesity-2005.htm>> (last visited October 27, 2006).
  73. N. Hellmich, "Health Movement Has School Cafeterias in a Food Fight: Concern about Child Obesity Triggers Slimmed-down Fare, but Will the Kids Go For It?" *USA Today*, August 22, 2005, at A1. See also L. Jacobson, "California Says 'No' to School Junk-Food Sales," *Education Week* 25, no. 5 (2005): 20-23.
  74. M. Simon and E. Fried, "State Laws on School Vending: A Progress Review and Call to Action," May 2006 [unpublished manuscript on file with author].
  75. Center for Science in the Public Interest, *School Foods Report Card: A State-by-State Evaluation of Policies for Foods and Beverages Sold through Vending Machines, School Stores, A La Carte, and Other Venues Outside of School Meals*, available at <[http://cspinet.org/new/pdf/school\\_foods\\_report\\_card.pdf](http://cspinet.org/new/pdf/school_foods_report_card.pdf)> (last visited October 27, 2006).
  76. Kentucky limits students to milk, water, juices, and beverages low in sugar out of vending machines or school stores during school hours. S.B. 172, 2005 Reg. Sess. (Ky. 2005).
  77. See Simon and Fried, *supra* note 74.
  78. See e.g., USDA, Food and Nutrition Service, *School Success Stories*, available at <<http://teammnutrition.usda.gov/success.html>> (last visited October 27, 2006); USDA, Food and Nutrition Service, *Resource Library*, available at <<http://teammnutrition.usda.gov/Resources/makingithappen.html>> (last visited October 27, 2006); Center for Science in the Public Interest, *Dispensing Junk*, available at <<http://www.cspinet.org/new/pdf/dispensing>



- junk.pdf> (last visited October 27, 2006); United States General Accounting Office, *School Lunch Program: Efforts Needed to Improve Nutrition and Encourage Healthy Eating*, May 2003, available at <<http://www.gao.gov/new.items/d03506.pdf>> (last visited October 27, 2006).
79. Simon and Fried, *supra* note 74.
  80. The Library of Congress, THOMAS website, available at <<http://thomas.loc.gov/>> (last visited October 27, 2006). Search conducted with word "obesity" and "childhood obesity" for legislative sessions. Numbers are current as of September 21, 2006.
  81. Prevention of Childhood Obesity Act, 109th Cong., 1st sess., S. 799. "A bill to amend the Public Health Service Act to provide for the coordination of Federal Government policies and activities to prevent obesity in childhood, to provide for State childhood obesity prevention and control, and to establish grant programs to prevent childhood obesity within homes, schools, and communities."
  82. Childhood Obesity Reduction Act, 109th Cong., S. 1324. "A bill to reduce and prevent childhood obesity by encouraging schools and school districts to develop and implement local, school-based programs designed to reduce and prevent childhood obesity, promote increased physical activity, and improve nutritional choices." Related bill: Childhood Obesity Reduction Act, 109th Cong., H.R. 4860.
  83. IMPACT Act, 109th Cong., S. 1325. "A bill to establish grants to provide health services for improved nutrition, increased physical activity, obesity and eating disorder prevention, and for other purposes."
  84. Healthy Lifestyles and Prevention America Act, 109th Cong., S. 1074. "A bill to improve the health of Americans and reduce health care costs by reorienting the Nation's health care system toward prevention, wellness, and self care."
  85. Child Nutrition Promotion and School Lunch Protection Act of 2006, 109th Cong., S. 2592. "A bill to amend the Child Nutrition Act of 1966 to improve the nutrition and health of schoolchildren by updating the definition of 'food of minimal nutritional value' to conform to current nutrition science and to protect the Federal investment in the national school lunch and breakfast programs."
  86. Child Nutrition and WIC Reauthorization Act of 2004, § 204, Public Law 108-265, 118 Stat. 729 (codified generally in sections of U.S. Code, vol. 42), available at <[http://www.fns.usda.gov/cnd/Governance/Legislation/Historical/PL\\_108-265.pdf](http://www.fns.usda.gov/cnd/Governance/Legislation/Historical/PL_108-265.pdf)> (last visited October 27, 2006).
  87. Much of the activity is directed from the federal to the local level. Team Nutrition and other federally funded educational outreach efforts have been created to teach parents and other wellness committee members to educate school boards. USDA, *Team Nutrition*, available at <<http://teamn nutrition.usda.gov/parents.html>> (last visited October 27, 2006).
  88. A joint initiative of the William J. Clinton Foundation and the American Heart Association. Clinton Foundation programs, *Alliance for a Healthier Generation*, available at <<http://www.clintonfoundation.org/cf-pgm-hs-hk-home.htm>> (last visited October 27, 2006).
  89. Although the wellness committees and the ABA/Clinton agreement are both quite new, media reports have appeared relating instances in which wellness committees are seeking to provide healthier vending machine options in their school districts. See, e.g., J. Farnam, "ISD 166 to Ban Soda Pop at School," *Cook County News-Herald*, June 22, 2006.
  90. See note 67.
  91. C. C. Berk, "Teens Seem to be Losing Interest in Carbonated Drinks Like Colas," *Wall Street Journal*, June 22, 2006, at B6B; H. Hartman, "The Death of Soda," *The Hartman Group - HartBeat*, March 15, 2006, available at <[http://www.hartman-group.com/products/HB/2006\\_03\\_15.html](http://www.hartman-group.com/products/HB/2006_03_15.html)> (last visited October 27, 2006).
  92. C. E. Mayer, "Lawyers Ready Suit Over Soda Case Being Built Linking Obesity to Sale in Schools," *Washington Post*, December 2, 2005, at D02; see Alderman and Daynard, *supra* note 27.
  93. Coca-Cola, PepsiCo, and Cadbury-Schweppes.
  94. J. Kluger, "How Bill Sealed the Soda Deal," *Time* 167, no. 20 (May 15, 2006); "Non-diet Sodas to be Pulled from Schools: Major Beverage Companies Sign Deal with Anti-Obesity Advocates," May 3, 2006, available at <<http://www.msnbc.msn.com/id/12604166/>> (last visited October 27, 2006).
  95. Contrast the statements by the ABA with the efforts by the local bottlers in Connecticut to defeat a bill that contained some of the strictest beverage guidelines in the nation. S. Stowe, "To Some in Hartford, Coke is a Real Evil Thing," *New York Times*, April 7, 2006.
  96. Memorandum of Understanding, available at <<http://www.clintonfoundation.org/pdf/062006-hs-hk-beverage-mou.pdf>> (last visited October 27, 2006).
  97. E.g., M. Simon, "Soda Deal with Clinton Foundation Latest PR Stunt," *Common Dreams*, available at <<http://www.commondreams.org/views06/0505-32.htm>> (last visited October 27, 2006).
  98. Child Nutrition Promotion and School Lunch Protection Act of 2006, 109th Cong., S. 2592, H.R. 5167.
  99. *Id.*
  100. *Id.*
  101. U.S. Treasury Department, *Exercise and Health* (May 7, 1915).
  102. L. Frank, *Health and Community Design* (Island Press, 2003): at 4.
  103. *Id.*, at 5.
  104. From 1989 to 1993, Congress seemed aware of the issue but did little beyond encouraging general public awareness. For example, the 101st Congress enacted programs such as National Checkup Week and National Weight Loss Month. It first mentioned the obesity epidemic in 1993, when the National Institutes of Health Revitalization Act of 1993 called upon the NIH to research obesity. Although many programs have been proposed at the state and local level, fewer have actually been enacted.
  105. R. R. Borja, "Dance Video Games Hit the Floor in Schools," *Education Week* 25, no. 22 (2006): 1-14, at 1.
  106. J. Lubell, "Big Apple Tackles Obesity," *Pediatric News* 40, no. 1 (2006): 48.
  107. For example, New York has proposed a tax credit of up to \$1,000 for health-related purchases like exercise equipment and gym memberships. Bill A09416 - an act to amend the tax law, in relation to providing a tax credit of up to \$1000 for certain health-related problems, cited in B. Waisanen, "Taxing Behavior," *State Legislatures* 30, no. 6 (2004): 30-31, at 31.
  108. There are not many studies on the issue, but a few have linked the built environment to obesity. See, e.g., R. J. Jackson and C. Kochtitzky, *Creating a Healthy Environment: The Impact of the Built Environment on Public Health*, available at <<http://www.cdc.gov/healthyplaces/articles/Creating%20A%20Healthy%20Environment.pdf>> (last visited October 27, 2006). However, it is possible that active people self-select by choosing to live in walkable areas. See Handy et al., "Self-Selection in the Relationship between the Built Environment and Walking," *Journal of the American Planning Association* 72 (2006): 55-74.
  109. W. C. Perdue, L. O. Gostin, and L. A. Stone, "Public Health and the Built Environment: Historical, Empirical, and Theoretical Foundations for an Expanded Role," *Journal of Law, Medicine & Ethics* 31 (2003): 557-566.
  110. J. Corburn, "Confronting the Challenges in Reconnecting Urban Planning and Public Health," *American Journal of Public Health* 94 (2004): 541-546, at 541.
  111. W. C. Perdue, L. A. Stone, and L. O. Gostin, "The Built Environment and its Relationship to the Public's Health: The Legal Framework," *American Journal of Public Health* 93 (2003): 1390-1394, at 1390.
  112. R. M. Labbee, "New Light on the Slaughterhouse Monopoly Act of 1869," in *Louisiana's Legal Heritage*, R. F. Haas, ed. (Pensacola, FL: Published for the Louisiana State Museum by Perdido Bay Press, 1983): 143-149.
  113. See Perdue, Stone and Gostin, *supra* note 111, at 1390.
  114. *Id.*
  115. See Corburn, *supra* note 110, at 542.

116. Perdue, Stone, and Gostin, *supra* note 111, at 1390.
117. A. C. King et al., "Theoretical Approaches to the Promotion of Physical Activity," *American Journal of Preventive Medicine* 23, no. 2, Supplement 1 (2002): 15-25.
118. See Frank, *supra* note 102, at 3-4.
119. Urban planner Clarence Perry first proposed the design adopted by the government. See Frank, *supra* note 102, at 124.
120. K. H. Schaeffer and E. Sclar, *Access for All* (Columbia University Press, 1975): at 56.
121. *Id.*, at 6.
122. *Id.*, at 10, 18, 25, 35, 37, 50.
123. B. Snell, "American Ground Transport," Hearings on the Industrial Reorganization Act, S. 1167, Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 93rd Cong., 2nd Sess., Part 4A (Washington, D.C.: GPO, 1974).
124. W. Adams and J. W. Brock, "Efficiency, Corporate Power, and the Bigness Complex," *The Journal of Economic Education* 21 (1990): 30-50, at 43; see also Snell, *supra* note 123. A federal court found GM guilty of criminal conspiracy for these actions. *United States v. National City Lines*, 186 F.2d 562 (7th Cir. 1951).
125. See Adams and Brock, *supra* note 124, at 42, quoting W. Owen, *The Accessible City* (Washington, D.C.: Brookings Institution, 1972): at 1.
126. See, e.g., T. A. Littman, "Economic Value of Walkability," Victoria Transport Policy Institute (October 12, 2004), available at <<http://www.vtpi.org/walkability.pdf>> (last visited October 27, 2006).
127. Walkability is determined both by the physical environment and by other factors such as weather and, most importantly, crime. A high crime rate is a major cause of lack of activity, especially for women. Doyle et al., "Active Community Environments and Health: The Relationship of Walkable and Safe Communities to Individual Health," *Journal of the American Planning Association* 72 (2006): 19-31. Residents of high crime areas are more likely to remain indoors, reducing both walking and outdoor play exercise opportunities for children. Studies have shown that walking increases as the crime rate decreases. The crime rate may also impact a person's general inclination to be active: people who grow up in low crime areas are more likely to walk than those who grow up in high crime areas but later move to safer neighborhoods. *Id.*
128. P. M. Anderson and K. F. Butcher, *Childhood Obesity: Trends and Potential Causes*, available at <[http://www.futureofchildren.org/information2826/information\\_show.htm?doc\\_id=351457](http://www.futureofchildren.org/information2826/information_show.htm?doc_id=351457)> (last visited October 27, 2006), citing J. Corless and G. Ohland, *Caught in the Crosswalk: Pedestrian Safety in California, Surface Transportation Policy Project Report* (San Francisco: Surface Transportation Policy Project, 1999), available at <[www.transact.org/ca/caught99/caught.htm](http://www.transact.org/ca/caught99/caught.htm)> (last visited October 27, 2006).
129. See Anderson and Butcher, *supra* note 128, citing B. Russonello and Stewart Research and Communications, *Americans' Attitudes toward Walking and Creating Better Walking Communities, Surface Transportation Policy Project Report* (Washington: B. Russonello & Stewart Research and Communications, 2003), available at <<http://www.transact.org/report.asp?id=205/>> (last visited October 27, 2006). An additional 6% mentioned crime as a reason. *Id.*
130. Interestingly, mention of the connection between obesity and the built environment did not appear in the Congressional record until 2001, House of Representatives, "Bicycle Riding is Efficient Means of Transportation and Promotes Wellness," March 13, 2001, although a recently proposed bill does address the issue. Sen. Barack Obama and Rep. Hilda L. Solis, Healthy Places Act of 2006.
131. See Doyle et al., *supra* note 127, at 20. For example, on one Atlanta highway, there were 34 pedestrian deaths and 305 injuries in a recent nine-year period. L. Copeland and H. El Nasser, "Georgia Tries to Improve Deadly Road for Walkers," *USA Today*, May 4, 2006, available at <[http://www.usatoday.com/news/nation/2006-04-05-suburban-roads\\_x.htm](http://www.usatoday.com/news/nation/2006-04-05-suburban-roads_x.htm)> (last visited October 27, 2006).
132. L. D. Frank et al., "Many Pathways from Land Use to Health: Associations between Neighborhood Walkability and Active Transportation, Body Mass Index, and Air Quality," *Journal of the American Planning Association* 72 (2006): 75-87.
133. *Id.*; Littman, *supra* note 126.
134. See Frank et al., *supra* note 132.
135. D. A. Rodriguez, A. J. Khattak, and K. R. Evenson, "Can New Urbanism Encourage Physical Activity? Comparing a New Urbanist Neighborhood with Conventional Suburbs," *Journal of the American Planning Association* 72 (2006): 43-54, at 43.
136. For example, by walking three miles a day (or about one hour), children would only burn an extra 260 calories per day. L. Williams, "Small Changes Not Enough to Halt Childhood Obesity," available at <[http://www.bcm.edu/findings/vol2/is1/04jan\\_n3.htm](http://www.bcm.edu/findings/vol2/is1/04jan_n3.htm)> (last visited October 27, 2006).
137. See sections IV and V for a discussion of the regulatory environment.
138. J. M. McGinnis, J. A. Gootman, and V. I. Kraak, eds., *Food Marketing to Children and Youth: Threat or Opportunity?* (Washington, D.C.: National Academies Press, 2006).
139. S. Roden and D. Goodsell, *Krazy Kids' Food! Vintage Food Graphics* (Germany: Taschen, 2003). Post Cereals licensed Mickey Mouse, who first appeared on a box of Post Toasties in 1935.
140. E. Preston and C. L. White, "Commodifying Kids: Branded Identities and the Selling of Adspace on Kids' Networks," *Communication Quarterly* 52 (Spring 2004): 115-128. This article discusses the enormous growth of the children's advertising market that led to its segmentation, first by gender and later by age groups (including the newly minted "twens" category). The authors note that children's marketing increasingly mimics adult segmentation such as distinctions between heavy and light users.
141. J. Comiteau, "When Does Brand Loyalty Start?" *Adweek*, March 24, 2003. "[J. U.] McNeal states that in 2000, American children age 4-12 spent \$30 billion of their own money, directly requested about \$310 billion of purchases by parents, and indirectly influenced another \$340 billion of parental spending, making them responsible for a whopping \$680 billion of household spending per year." California Pan-ethnic Health Network and Consumers Union, "Out of Balance," September 2005, footnote 52, available at <<http://www.consumersunion.org/pdf/OutOfBalance.pdf>> (last visited October 27, 2006).
142. The program was "Captain Kangaroo," an educational variety show for preschool children which aired from 1955 to 1984.
143. T. Westen, "Historical Perspective on FTC Rulemaking and Why It Failed," presented at Loyola Law School Symposium on Food Marketing to Children and the Law, Los Angeles, October 21, 2005, available at <<http://events.lls.edu/food-marketing-lr.html>> (last visited October 27, 2006).
144. Kaiser Family Foundation, Issue Brief, *The Role of Media in Childhood Obesity* (Menlo Park, CA: Henry J. Kaiser Family Foundation, 2004), available at <<http://www.kff.org/entmedia/7030.cfm>> (last visited November 30, 2006).
145. Editorial, "Selling To - and Selling Out - Children," *Lancet* 360 (2002): at 959; K. Horgen, M. Choate, and K. Brownell, "Television Food Advertising. Targeting Children in a Toxic Environment," in D. G. Singer and J. L. Singer, eds., *Handbook of Children and the Media* (Thousand Oaks, CA: Sage, 2001): 375-93.
146. National Advertising Review Council, *White Paper: Guidance for Food Advertising Self-Regulation* (2004) available at <<http://www.narcpartners.org/reports/whitepaper.asp>> (last visited October 27, 2006).
147. See M. K. Engle, Associate Director, Division of Advertising Practices, Federal Trade Commission, *Regulating Food Advertising to Children: An Historical Perspective*, presentation at the IOM Meeting on Food Marketing and the Diets of Children and Youth, October 14, 2004, available at <<http://www.iom.edu/Object.File/Master/23/031/0.pdf>> (last visited October 27,

- 2006) (providing an historical overview of the FTC's regulation of food advertising to children from the agency's current perspective).
148. FTC Staff Report on Television Advertising to Children, February, 1978, quoting statistics from National Science Foundation, Research on the Effects of Television Advertising on Children (1977) and A.C. Nielsen Company, Inc., The Television Audience (1977).
  149. A 1965 panel focusing on children's advertising, moderated by former FTC chairman Newton Minow, debated "whether advertisers are using five year olds to pressure parents into buying their products." J. M. Gavin, "Panel Doesn't Kid Around about Effectiveness of Children's Ads," *Chicago Tribune*, July 13, 1965, at C8. A subsequent FTC chair, Lewis Engman, chastised the ad industry, already spending \$400 million in the early 1970s on children's advertising, for its lack of effective self-regulatory standards. He predicted: "If television advertising...fosters dietary habits which endanger their health...I think TV ads directed at children will soon find itself circumscribed by legal restrictions and legal requirements." C. Shiffrin, "A Look at Children's TV Advertising," *Washington Post*, August 7, 1973, at B4. Minow subsequently wrote a scathing indictment of the FTC and industry's failure to adequately protect children. N. Minow and C. LaMay, *Abandoned in the Wasteland: Children, Television, & the First Amendment* (New York: Hill and Wang, 1996).
  150. See Preston and White, *supra* note 140, at 115-128.
  151. Program and Committee Staff, New York State Assembly, "Kids, Food and Television: The Compelling Case for State Action," March, 1977. The staff monitored television commercials on Saturday morning programs for children and conclude that "most of the commercials shown during children's programming are for food products - most of them highly sugared - highly processed food products."
  152. Testimony by nutritionists, dentists, and doctors on the negative health impacts of advertising foods led the Committee's conclusion that "[t]elevision advertises food to children which is bad for children's health...and are linked to major medical problems including obesity, diabetes, and heart disease." *Id.*, at 60-61. Many of the arguments currently offered in support of government regulation of children's advertising from a public health standpoint were already substantially developed decades ago.
  153. H. J. Uscinski, Comment, "Deregulating Commercial Television: Will the Marketplace Watch Out for Children?" *American University Law Review* 34 (1984): 141-173, at 147 (noting that a public interest group, Action for Children's Television (ACT), petitioned the Federal Communications Commission (FCC) for commercial advertising regulations in 1970). Another advocacy group, the Committee on Children's Television, brought suit in California against General Foods and other businesses that advertised sugary breakfast cereals to children. *Comm. on Children's Television, Inc. v. General Foods, Corp.*, 673 P.2d 660, 663-64 (Cal. 1983). The case settlement included the creation of a health program that still exists today. See M. F. Jacobson, "Tipping the Scales: Recipe for Reducing American Obesity Lists Labels, Legislation, and Litigation," *Legal Times*, March 1, 2004, at 34 (stating that the settlement allotted \$2 million to the creation of a children's health organization).
  154. Both agencies derive their authority to regulate advertising from the Commerce Clause of the Federal Constitution, which grants the federal government jurisdiction over commerce among states. The legal implications of Commerce Clause authority will be discussed in Part V. In 1974, CSPI (unsuccessfully) petitioned the FDA to require health warning labels on sugary cereals. W. Rice, "Proposing a Public Caveat on Sugar Cereals," *Washington Post*, August 2, 1974, at B1. Michael Jacobson had proposed that cereals that contained more than 10 percent sugar would have to be promoted as a snack rather than a breakfast cereal and carry a label stating "Contains...% Sugar[.] Frequent Use Contributes to Tooth Decay and Other Health Problems." *Id.* This predated the NLEA. At the time, cereal companies' practices differed with regard to the disclosure of sugar content in cereals and other foods.
  155. Children's Television Report and Policy Statement, 50 F.C.C. 2d 1 (1974) ("1974 Policy Statement"), *aff'd*, Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).
  156. Pertschuk's evaluation of the proceedings appear in M. Pertschuk, *Revolt Against Regulation: The Rise and Pause of the Consumer Movement* (University of California Press, October 1982).
  157. R. Zoglin, "The Coming Battle Over TV Ads for Kids," *New York Times*, January 1, 1978, at D1.
  158. For example, in 1975 the Federal Trade Commission (FTC) proposed a ban on television advertising of premiums directed at children. Annual report of the Federal Trade Commission, 1975, available at <<http://www.ftc.gov/os/annualreports/ar1975.pdf>> (last visited October 27, 2006). The use of premiums to sell products to children has long been a bane of government and industry regulators. See Children's Advertising Review Unit, *Sweepstakes Directed to Children*, available at <<http://www.caru.org/news/sweepstakes.asp>> (last visited October 27, 2006). Nevertheless, advertisers continue to use premiums to lure children to their products. E. Fried, "Assessing Effectiveness of Self-Regulation: A Case Study of the Children's Advertising Review Unit," *Loyola of Los Angeles Law Review* 39 (2006): 93-138.
  159. CARU was founded in 1974 as part of an alliance formed by the major advertising trade associations through the National Advertising Review Council. CARU, *About the Children's Advertising Review Unit (CARU)*, available at <<http://www.caru.org/about/index.asp>> (last visited October 27, 2006). It is the "children's arm of the advertising industry's self-regulation program." See also G. M. Armstrong, "An Evaluation of the Children's Advertising Review Unit," *Journal of Public Policy & Marketing* 3 (1984): 38-55, at 40.
  160. "Advertisers Slate Unit to Better Police their Pitch to Kids: FTC, Consumer Groups Say Industry Plan Doesn't Go Far Enough to Suit Them," *Wall Street Journal*, May 21, 1974, at 14.
  161. An advertisement can be unfair without being deceptive: that is, it may truthfully depict a product and its attributes. What makes it unfair is that 1) children don't realize it is a sales pitch, or 2) that the product could ultimately lead to health-related problems such as cavities, poor nutrition, or obesity.
  162. D. Kunkel, "Children and Television Advertising," in D. G. Singer and J. L. Singer, eds., *Handbook of Children and the Media* (Thousand Oaks, CA: Sage, 2001): 375-93.
  163. FTC, *FTC Staff Report on Television Advertising to Children, Recommendation: That the Commission Commence Rulemaking under Applicable Provisions of the Magnuson-Moss Federal Trade Commission Improvements Act to Eliminate Harms Arising Out of Television Advertising to Children*, February 1978.
  164. Editorial, "The FTC as National Nanny," *Washington Post*, March 1, 1978, at A22. This branding of the FTC's effort was viewed as the point at which public opinion turned against the FTC's regulatory efforts.
  165. P. Jennings, "How to Get Fat Without Really Trying," *Primetime Monday*, ABC News Special, December 8, 2003.
  166. In 1982, Timothy J. Muris, then Director of the FTC's Bureau of Consumer Protection, wrote: "When we arrived at the Commission, there was disrespect for the agency among businesses, on Capitol Hill, and in the legal community. This disrespect was well-earned. The Commission in the 1970s saw itself as the second most powerful legislature in Washington. The leaders of the previous administration had a deep distrust for business. Ill-considered proceedings resulted, such as the infamous children's advertising rulemaking." T. J. Muris, "The Consumer Protection Mission: Guiding Principles and Future Direction," *Antitrust Law Journal* 51 (1982): 625-632, at 625; see also A. Applbaum, *Mike Pertschuk and the Federal Trade Commission* (John F. Kennedy School of Government, Harvard University, 1981).
  167. The staff proposed several alternatives: ban all TV for any product young children below the age of 8, ban ads for sugared products for children below the age of 12, and require that TV

- ads aimed at children older than 12 be balanced by nutritional or health disclosures. Each of these recommendations focused upon an environmental solution to prevent childhood disease by preventing television advertisements from entering the home as a public health intervention rather than requiring parents to act as a human shield against the bombardment. See *FTC Staff Report on Television and Advertising to Children*, *supra* note 163.
168. Termination of rulemaking proceeding, 46(191) Fed. Reg. 48710-02 (1981).
  169. Federal Trade Commission Improvements Act of 1980, Public Law 96-252, § 11, 94 Stat. 374 (amending 15 U.S.C. § 57a (1994)). The FTC Improvement Act of 1980, Public Law 96-252, 94 Stat. 378 (1980) added a section to the FTC Act which denies the Commission the "authority to promulgate any rule in the children's advertising proceeding...or in any substantially similar proceeding on the basis...that such advertising constitutes an unfair act or practice..." FTC Act § 18(i), 15 U.S.C. § 57(a) (i) (1976).
  170. Although CARU points to its ability (and sole "enforcement" mechanism) to refer cases it cannot satisfactorily resolve to the FTC, few are actually referred and barely any are initiated by the FTC. B. Kelley, Public Health Advocacy Institute, *Industry Controls Over Food Marketing to Children: Are They Effective?* (2005), available at <<http://www.phaonline.org/downloads/caru.analysis.pdf>> (last visited November 30, 2006).
  171. T. Westen, "Historical Perspective on FTC Rulemaking and Why It Failed," paper presented at Loyola Law School Symposium on Food Marketing to Children and the Law, Los Angeles, October 21, 2005, available at <<http://events.lls.edu/food-marketing-lr.html>> (last visited October 31, 2006).
  172. M. Nestle, "Food Marketing and Childhood Obesity - A Matter of Policy," *New England Journal of Medicine* 354 (2006): 2527-2529.
  173. T. Lang, G. Rayner and E. Kaelin, *The Food Industry, Diet, Physical Activity and Health: A Review of Reported Commitments and Practice of 25 of the World's Largest Food Companies* (London: Centre for Food Policy, City University, April 2006), available at <<http://www.city.ac.uk/press/The%20Food%20Industry%20Diet%20Physical%20Activity%20and%20Health.pdf>> (last visited October 31, 2006).
  174. Nestle points out that the scramble for a healthy product portfolio has resulted in "vitamin-enriched candy, whole-grain chocolate cereals, and trans fat-free salty snacks." See Nestle, *supra* note 172, at 2529.
  175. See Kaiser Family Foundation, *supra* note 144.
  176. Report on a Joint Workshop of the Federal Trade Commission and the Department of Health & Human Services, Perspectives on Marketing, Self-Regulation, & Childhood Obesity (April 2006), available at <<http://www.ftc.gov/os/2006/05/PerspectivesOnMarketingSelf-Regulation&ChildhoodObesityFTCandHHSReportonJointWorkshop.pdf>> (last visited October 31, 2006). Further, David Yosifon has proposed that advertising be required to adopt a "tombstone" format with a basic black-and-white, text only graphic. See D. Yosifon, *supra* note 6.
  177. See Nestle, *supra* note 172, at 2529.
  178. C. Hawkes, *Marketing Food to Children: The Global Regulatory Environment* (Geneva: World Health Organization, 2004), available at <<http://whqlibdoc.who.int/publications/2004/9241591579.pdf>> (last visited October 31, 2006).
  179. "FSA Board Responds to Ofcom Consultation," June 15, 2006, available at <<http://www.food.gov.uk/news/newsarchive/2006/jun/ofcom>> (last visited October 31, 2006).
  180. "The FAU Challenges the FSA Board's Call to Ban Food and Drink Advertising Before 9 pm," June 15, 2006, available at <[http://www.fau.org.uk/html/15\\_june\\_2006.html](http://www.fau.org.uk/html/15_june_2006.html)> (last visited October 31, 2006).
  181. S. Daniells, "Junk Food Legal Action Stopped by Heart Charity," June 23, 2006, available at <<http://www.nutraingredients.com/news/ng.asp?n=68627-junk-food-children-ofcom>> (last visited October 31, 2006).
  182. J. M. McGinnis, J. A. Gootman, and V. I. Kraak, eds., *Food Marketing to Children and Youth: Threat or Opportunity?* (Washington, D.C.: National Academies Press, 2006).
  183. Federal Trade Conferences, "Remarks at the Obesity Liability Conference," Chicago, May 11, 2005, available at <<http://www.ftc.gov/speeches/majoras/050511obesityliability.pdf>> (last visited October 31, 2006).
  184. Part V will include a more detailed discussion of this phenomenon, known as "deep capture."
  185. See Center for Science in the Public Interest, Press Release, *Parents and Advocates Will Sue Viacom & Kellogg*, Washington, D.C., January 18, 2006, available at <<http://www.cspinet.org/new/200601181.html>> (last visited October 31, 2006).
  186. Senator Tom Harkin's HeLP America Act, S. 1074, would restore the FTC's unfairness jurisdiction in rulemaking for children's advertising; the authority was removed by the U.S. Congress in the FTC Improvement Act.
  187. Campaign for a Commercial-free Childhood website, "Urge Congress to Restore the FTC's Authority," available at <<http://www.commercialexploitation.org/actions/ftc.htm>> (last visited October 31, 2006); American Psychological Association, *Report of the APA Task Force on Advertising and Children* (Washington, D.C.: APA, 2004), available at <<http://www.apa.org/releases/childrenads.pdf>> (last visited October 31, 2006).
  188. Compare Editorial, "Selling Junk Food to Toddlers," *New York Times*, February 23, 2006, which chastises government for ignoring adverse impact of children's television advertising, with *Washington Post* "national nanny" editorial (note 164).
  189. *Perspectives on Marketing, Self-Regulations, and Childhood Obesity*, A report on a joint workshop of the Federal Trade Commission and the Department of Health and Human Services (April 2006).
  190. M. Story and S. French, "Food Advertising and Marketing Directed at Children and Adolescents in the U.S.," *International Journal of Behavioral Nutrition and Physical Activity* 1 (2004): at 3, available at <<http://www.ijbnpa.org/content/pdf/1479-5868-1-3.pdf>> (last visited November 30, 2006).
  191. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 109th Cong., S. 1932, Title III, sec. 3002.
  192. Children Now, *Digital Television: Sharpening the Focus on Children*, Conference Report, Oakland, CA., available at <<http://publications.childrennow.org/assets/pdf/cmp/digital-tv/dtv-report-04.pdf>> (last visited October 31, 2006).
  193. Children Now, *Interactive Advertising and Children: Issues and Implications*, Oakland, CA., available at <[http://www.childrennow.org/assets/pdf/issues\\_media\\_iadbriief\\_2005.pdf](http://www.childrennow.org/assets/pdf/issues_media_iadbriief_2005.pdf)> (last visited October 31, 2006).
  194. See *Charting the Digital Broadcast Future*, Final Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, December 18, 1998, available at <<http://www.ntia.doc.gov/pubintadvcom/piacreport.pdf>> (last visited October 31, 2006).
  195. See Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking, 15 FCC Rcd 22946, 22950 (10) (2000) ("NPRM").
  196. *Id.*, at 22958.
  197. Children's Television Obligations of Digital Television, Report and Order, 19 FCC Rcd 22943 (2004) ("Order"), rule effective date extended by Children's Television Obligations of Digital Television Broadcasters, 20 FCC Rcd 2055 (2005).
  198. Order Extending Effective Date, FCC 05-211 at 1, MM Docket No. 00-167 (Rel. December 16, 2005).
  199. Motion of Viacom, Walt Disney, NBC Universal, and NBC Telemundo for Extension of Effective Date or, in the Alternative, Administrative Stay at 1, In the Matter of Children's Television Obligations of Digital Television Broadcasters (Federal Communications Commission) (No. 00-167) (September 26, 2005) ("Motion").
  200. Office of Communication of the United Church of Christ, Inc. v. FCC, No. 05-4189 (6th Cir., filed September 26, 2005); Viacom, Inc. v. FCC, No. 05-1387 (D.C. Cir., filed October 3, 2005).

201. In re Walt Disney, No. 05-1393 (D.C. Cir., filed October 11, 2005).
202. Motion of Viacom, Walt Disney, NBC Universal, and NBC Telemundo (see *supra* note 199); Viacom, Inc. v. FCC, No. 05-1387 (D.C. Cir., filed October 3, 2005).
203. Office of Communication of the United Church of Christ, Inc. v. FCC, No. 05-4189 (6th Cir., filed September 26, 2005).
204. In the Matter of: Children's Television Obligations of Digital Television Broadcasters; MM Docket No. 00-167, *Joint Proposal of Industry and Advocates on Reconsideration of Children's Television Rules*, available at <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-33A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-33A2.pdf)> (last visited October 31, 2006).
205. Order Extending Effective Date, FCC 05-211 at 1, MM Docket No. 00-167 (Rel. December 16, 2005).
206. Second Further Notice of Proposed Rule Making, FCC 06-33, MM Docket No. 00-167 (Rel. March 24, 2006).
207. In its Motion the industry relies on a series of cases to show irreparable harm. What is interesting is the industry's reliance on cases that involve political speech on the part of individuals. Industry seeks to collapse the appropriate distinction between the reduced protections for commercial speech and the high protections afforded the political speech of citizens. *Elrod v. Burns*, 427 U.S. 347 (1976) and *Newsom v. Norris*, 888 F. 2d 371 (6th Cir. 1989), cited in Motion at 27. While this language can be partially attributed to zealous advocacy, such an absolutist position by commercial interests is not uncommon.
208. See, e.g. Respondents brief in opposition to Motion for Stay Pending Judicial Review at 12, *Viacom, Inc. v. Federal Communications Commissions and the United States of America*, (No. 05-1387) (D.C. Cir.) (October 27, 2005) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 564-66 (1980)), available at <<http://www.fcc.gov/ogc/briefs/05-1387-102705.pdf>> (last visited October 31, 2006); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 564-66 (1980).
209. Collapsing the distinction between commercial speech and non-commercial speech and subjecting both to the same judicial scrutiny would undermine the state's ability to protect the health and welfare of the population. See Parmet and Smith, *supra* note 27.
210. See Testimony of Dick O'Brien, American Association of Advertising Agencies, Joint Workshop of FTC and HHS, *Perspectives on Marketing, Self-Regulation and Childhood Obesity*, July 14, 2005, at 79, available at <[http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript\\_050714.pdf](http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050714.pdf)> (last visited October 31, 2006).
211. See, e.g., S. Terilli, "Nike v. Kasky and the Running-but-Going-Nowhere Commercial Speech Debate," *Communications Law & Policy* 10 (2005): 383-432.
212. Research International USA, "Bad News for Lawyers: We're Responsible for Our Own Fat," September 24, 2003, available at <[http://www.globeinvestor.com/servlet/ArticleNews/story/PRNEWS/20030924/2003\\_09\\_24\\_10\\_4919\\_1008980](http://www.globeinvestor.com/servlet/ArticleNews/story/PRNEWS/20030924/2003_09_24_10_4919_1008980)> (last visited October 31, 2006).
213. Harris Interactive/Kid Power Poll of Youth Marketers, February 2004, available at <[http://www.harrisinteractive.com/services/pubs/KidPower\\_Poll\\_Results.pdf](http://www.harrisinteractive.com/services/pubs/KidPower_Poll_Results.pdf)> (last visited October 31, 2006). Fifty-eight percent of the marketers polled believe that there's too much marketing and advertising directed to children; sixty-one percent agree that marketing to children starts at too young an age. Youth marketers feel it is appropriate to begin marketing to kids at age seven. Harris Interactive online, *Trends and Tudes*, April 3, 2004, available at <[http://www.harrisinteractive.com/news/newsletters/k12news/HI\\_Trends&TudesNews2004\\_v3\\_iss04.pdf](http://www.harrisinteractive.com/news/newsletters/k12news/HI_Trends&TudesNews2004_v3_iss04.pdf)> (last visited October 31, 2006).
214. On the question of whether litigation should be employed as a means to force reformulation of fast foods or more complete and available nutritional information, industry promotes the oft-cited statistic that 89% of consumers "strongly disagree that lawsuits should be slowed against fast food chains" as a means of combating obesity. Fifty-four percent of those polled "believe that the individual, and not the corporation, is solely responsible for healthy eating." That leaves a sizable forty-six percent casting a critical eye on corporate responsibility. E. Fried, in D. Crawford and R. Jeffrey, eds., "The Potential for Policy Initiatives to Address the Obesity Epidemic: A Legal Perspective from the United States," in *Obesity Prevention in the 21st Century: Public Health Approaches to the Obesity Pandemic* (London: Oxford University Press, 2005): 265-283.
215. *Pelman v. McDonald's*, often derided as frivolous and the catalyst for legislation that shields the food industry from litigation based on claims of obesity, continues its journey through the courts four years after its predicted dismissal; claims of deceptive advertising remain to be adjudicated. *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2nd Cir. 2005); motion granted by *Pelman v. McDonald's Corp.*, 2005 U.S. Dist. LEXIS 24869 (S.D.N.Y. 2005).
216. Center for Consumer Freedom, "Lawyer Grills Girl, Sues Scout," available at <[http://www.consumerfreedom.com/advertisements\\_tv.cfm](http://www.consumerfreedom.com/advertisements_tv.cfm)> (last visited October 31, 2006).
217. D. J. Popeo and the Washington Legal Foundation, "WARNING: Beware of Activists, Plaintiffs' Lawyers, and State AGs who Use Children and Public Health to Attack Free Enterprise," November 21, 2005, available at <<http://www.wlf.org/upload/112105IAFWarning.pdf>> (last visited October 31, 2006); D. J. Popeo and the Washington Legal Foundation, "Exploiting Beer, Liquor & Food," April 25, 2005, available at <<http://www.wlf.org/upload/042505IAFBeer.pdf>> (last visited October 31, 2006).
218. National Restaurant Association, 2005 State Legislative Review, available at <<http://www.restaurant.org/pdfs/government/2005StateLegislativeReview.pdf>>; see also Public Health Advocacy Institute, "Legislation: Stop Special Protection for Industry," available at <[http://www.phaionline.org/projects\\_legis.intro.php](http://www.phaionline.org/projects_legis.intro.php)> (last visited October 31, 2006).
219. See Alderman and Daynard, *supra* note 27.
220. See Part V for a more complete discussion of litigation as a public health strategy.
221. See Mariner, *supra* note 31, at 281.
222. See Parmet and Banthin, *supra* note 27, at 84.
223. US Const, Art I, § 8, cl 3.
224. For a discussion of several of these cases, see W. Parmet, "After September 11: Rethinking Public Health Federalism," *Journal of Law, Medicine & Ethics* 30 (2002): 201-211, at 204.
225. See, e.g., *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981).
226. See, e.g., *id.* (invalidating state law mandating that interstate trucks be no more than 60 feet long as a burden on interstate commerce); see Parmet and Banthin, *supra* note 27 (discussing the difficulty of effectively controlling internet tobacco sales under modern dormant commerce clause doctrines); D. M. Allen, Annotation, "Validity Under Commerce Clause (Art I, § 8, cl 3), of State Statutes Regulating Labeling of Food," *American Law Reports Federal* 79 (2006): 246-272.
227. Preemption was an issue when public health advocates tried to protect the public by restricting smoking. The tobacco industry sometimes supported statewide anti-tobacco laws because the laws were weakened by political compromise and preempted stricter local measures. M. Siegel et al., "Preemption in Tobacco Control: Review of an Emerging Public Health Problem," *JAMA* 278 (1997): 858-863. This could also become a problem with obesity-related laws.
228. See, e.g., D. M. Allen, Annotation, "Federal Pre-emption of State Food Labeling Legislation or Regulation," *American Law Reports Federal* 79 (2006): 181-206.
229. Protection of public health has been and is a long-standing role of state and federal governments that has been a long-understood facet of state power. Public health has a rightful and traditional role in shaping the relations of the states and the federal government. See, e.g., W. Parmet, "From Slaughterhouse to Lochner: The Rise and Fall of the Constitutionaliza-

- tion of Public Health," *American Journal of Legal History* 40 (1996): 476-505.
230. See Mariner, *supra* note 31, at 279.
231. See section IV.
232. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).
233. Compare L. Gostin, "When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?" *Florida Law Review* 55 (2003): 1105-1170; with W. E. Parmet, "Liberalism, Communitarianism, and Public Health: Comments on Lawrence O. Gostin's Lecture," *Florida Law Review* 55 (2003): 1221-1240; and see Mariner, *supra* note 31. Also see R. A. Daynard, "Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon," *Journal of Law, Medicine & Ethics* 30 (2002): 281-289 (discussing the importance of judicial training to ensure that courts can recognize this tension when presented with it).
234. See, e.g., Press Release, *The White House, Office of the Press Secretary, Remarks by the President in Apology for Study Done in Tuskegee* (May 16, 1997) (President Clinton apologizes for survivors of Tuskegee Study for behavior of United States government) [on file with author]; *Buck v. Bell*, 274 U.S. 200 (1927) (allowing forced sterilization of "feeble-minded" woman).
235. See Parmet and Smith, *supra* note 27.
236. See Alderman and Daynard, *supra* note 27, at 84.
237. *Id.*, at 84-85. It is also important to mention the transaction costs of litigation. Facing large expenses and small awards, many lawyers may be reluctant to bring such lawsuits even if they are highly beneficial to the public. E. Brunet, "Debunking Wholesale Private Enforcement of Environmental Rights," *Harvard Journal of Law & Public Policy* 15 (1992): 311-324, at 313. Likewise, if fees are too high, lawyers may encourage clients to bring cases of limited merit. Further, causation requirements and damage calculation in tort law are designed for individual plaintiffs. See Smith, "Setting the Stage," *supra* note 11. Class actions may help address this problem, but they are not always appropriate for plaintiffs whose exposure to an agent or severity of disease varies, e.g., A. Lin, "Beyond Tort: Compensating Victims of Environmental Toxic Injury," *Southern California Law Review* 78 (2005): 1439-1528, at 1516-1517, and can end up benefiting lawyers more than class members. J. C. Coffee, Jr., "Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions," *Columbia Law Review* 86 (1986): 669-727, at 678-79.
238. *Pelman v. McDonald's* is a good example. The court dismissed many of the plaintiff's individually-focused claims but allowed a consumer protection claim based on harmful advertising to proceed. The court ruled that the plaintiffs did not need to allege highly specific causation, only a general connection between their injuries and McDonald's conduct. *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2nd Cir. 2005). The court thus directed the plaintiffs' focus to broader issues than their own personal experiences. See Smith, "Setting the Stage," *supra* note 11.
239. See, e.g., *Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89, 96 (2d Cir. 1996) (invalidating a clause in a utility worker's settlement agreement that undermined federal whistleblower protection law); *United States v. Northrop Corp.*, 59 F.3d 953, 968 (9th Cir. 1995), *cert. denied*; *Northrop Grumman Corp. v. United States ex rel. Green*, 518 U.S. 1018 (1996) (invalidating a clause prohibiting an employee from exposing violations of the federal False Claims Act); *Bowman v. Parma Board of Education*, 542 N.E.2d 663, 666 (Ohio Ct. App. 1988) (invalidating secrecy provision that sought to bind school district to silence regarding pedophilia investigation of teacher).
240. Advocates and the public need information to ascertain the true costs of health-affecting behaviors, e.g., D. Givelber and A. Robbins, "Public Health Versus Court-sponsored Secrecy," *Law and Contemporary Problems* 69, no. 3 (2006): 131-139, available at <[http://www.law.duke.edu/shell/cite.pl?69+Law+&+Conte+mp.+Probs.+131+\(summer+2006\)](http://www.law.duke.edu/shell/cite.pl?69+Law+&+Conte+mp.+Probs.+131+(summer+2006))> (last visited November 30, 2006), and if there is enough causation to settle, there may also be enough to necessitate action on the part of public health officials. *Id.* Settlements may be beneficial to plaintiffs, who can then avoid a long and expensive lawsuit, and to defendants, who can reduce exposure that would lead to future litigation or regulation, but they pose a problem for the public. For example, an asbestos producer settled with 11 plaintiffs in 1933 but continued to use asbestos for the next 40 years because the settlement was unknown to the government or to the public. *Id.*
241. See Smith, "Setting the Stage," *supra* note 11.
242. Here we refer to not only the food industry as corporations but also to business associations, trade groups, and self-regulatory bodies that represent purely free market interests and public interests secondarily if at all.
243. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) For the modern expression of this principle see, e.g., 1 Principles of Corporate Governance §2.01 (1992).
244. See Yosifon, *supra* note 6.
245. In the Civil War era, consumers enforced their rights mostly through private litigation, suing tort law to protect their property. Courts were resistant to governmental regulation (as in *Lochner*), and when regulation did occur it was highly susceptible to corruption, such as bribery. E. L. Glaeser and A. Shleifer, "The Rise of the Regulatory State," *Journal of Economic Literature* XLI (2003): 401-425, at 404-05. Regulatory oversight began slowly beginning in the late 1860s and greatly expanded during the first two decades of the 19th century. Examples include the Interstate Commerce Act of 1887 (restricting railroad contracts), the Sherman Act of 1890 (establishing federal oversight of monopolies and trusts), the Pure Food and Drug law of 1906 (controlling the sale of medicine), the Federal Reserve Act of 1913 (implementing controls on banking), and the Clayton Act of 1914 (further regulating monopolies). *Id.* However, during World War I, though the federal government continued to pass laws controlling industry, support for regulation again decreased as efficiency of production became the primary goal. The head of the Food Administration at this time, Herbert Hoover, viewed the role of regulatory agencies as facilitating cooperation between private entities. R. L. Rabin, "Federal Regulation in Historical Perspective," *Stanford Law Review* 38 (1986): 1189-1326, at 1235-1237. In the 1920s, regulations were oriented more towards allowing government and industry to work together. *Id.*, at 1235-41.
246. See Glaeser and Shleifer, *supra* note 245.
247. Administrative Procedures Act of 1946; see Rabin, *supra* note 245, at 1265.
248. See Rabin, *supra* note 245, at 1272. In the Civil War era, consumers enforced their rights mostly through private litigation, using tort law to protect their property. Courts were resistant to governmental regulation, and when regulation did occur it was highly susceptible to corruption, such as bribery.
249. Some postulated that industry capture of agencies made regulation inefficient and ineffective. J. Hanson and D. Yosifon, "The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture," *University of Pennsylvania Law Review* 152 (2003): 129-346, at 203-04. However, powerful entities like the Teamsters opposed deregulation, as did Congress. T. G. Moore, "Moving Ahead," *Regulation* 25, no. 2 (2002): 6-13, at 6-7. But in general, the public was opposed to regulation: "[T]he deregulation movement was...a one-shot response to the peculiar...political conditions of the late 1970s[...]:disillusion[ment] with the efficacy of government intervention." S. Peltzman, "The Economic Theory of Regulation after a Decade of Deregulation," *Brookings Papers on Economic Activity*, Special Issue (1989): 1-59, at 2.
250. For example, the Motor Carrier Act of 1980 relaxed licensing requirements for the trucking industry. See Moore, *supra* note 249, at 6-10.
251. From the late 1970s to the late 1980s, the market rose to global prominence. Capitalism began to spread throughout developing countries, socialist regimes fell, and in the United States LBOs and hostile takeovers "washed away...many of the failed conglomerates." R. J. Gilson and R. Kraakman, "Takeovers in

- the Boardroom: Burke versus Schumpeter," *Business Lawyer* 60 (2005): 1419-1433, at 1433.
252. E. L. Rubin, "The Myth of Accountability and the Anti-Administrative Impulse," *Michigan Law Review* 103 (2005): 2073-2136, at 2081; see also C. E. Mayer, "How 5 Agencies are Changing Direction; Five Federal agencies Re-Examine Consumer-Protection Programs," *Washington Post*, November 1, 1981, at H1.
253. S. Croley, "White House Review of Agency Rulemaking: An Empirical Investigation," *University of Chicago Law Review* 70 (2003): 821-885, at 824-825.
254. Some commentators credited deregulation with the creation of massive wealth in the United States. See, e.g., B. Barnard, "Freeing Europe's Economy: Deregulation Could Save Europeans Billions but Proponents Worry the Drive to Cut Red Tape is Running Out of Steam," *Europe* (April 2002): 16-17 (comparing the growth in the 1990s of the deregulated American economy to that of heavily-regulated Europe). In the 1970s and 1980s, many supporters of deregulation argued that regulating industries, whether through price controls, licensing, or setting minimum standards, inhibits competition and leads to economic inefficiency. See Rabin, *supra* note 245, at 1317-1318. Some see the growth of the American economy in the 1990s as a vindication of this viewpoint. As public trust in industry increased, industry has become bolder, emphasizing "self-regulation and voluntary compliance." C. Estlund, "Rebuilding the Law of the Workplace in an Era of Self-Regulation," *Columbia Law Review* 105 (2005): 319-404, at 340-341. Nonetheless, deregulation is hardly a simple solution. Some scholars believe that deregulation in one sector of the economy can lead to "bottlenecks and market imperfections" in other sectors, necessitating further regulation. S. Rose-Ackerman, "Defending the State: A Skeptical Look at 'Regulatory Reform' in the Eighties," *University of Colorado Law Review* 61 (1990): 517-535, at 520-22 (discussing the airline deregulation efforts).
255. Such scandals include The Savings and Loan crisis and more recent incidents involving Worldcom and Enron. F. S. Kahn, "Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001," *Tulane Law Review* 76 (2002): 1579-1643, at 1623, n. 123.
256. E. F. Gerding, "The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation," *Connecticut Law Review* 38 (2006): 393-450, at 393-394.
257. Economist George Stigler first introduced the notion of capture. G. Stigler, *Memoirs of an Unregulated Economist* (New York: Basic Books, 1988): at 8.
258. Jon Hanson and David Yosifon referred to Stigler's concept as "shallow capture" and coined the term "deep capture" to develop the concept further. See Hanson and Yosifon, *supra* note 249, at 218.
259. See Hanson and Yosifon, *supra* note 249, at 157.
260. *Id.*, at 214, 220-223.
261. *Id.*, at 299-303.

**PART II: PREVENTION AND TREATMENT: SOLUTIONS BEYOND THE INDIVIDUAL**

78

**Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change**

*Marlene B. Schwartz and Kelly D. Brownell*

Childhood obesity has become a public health epidemic, and currently a battle exists over how to frame and address this problem. This paper explores how public policy approaches can be employed to address obesity. We present the argument that obesity should be viewed as the consequence of a "toxic environment" rather than the result of the population failing to take enough "personal responsibility." In order to make progress in decreasing the prevalence of obesity, we must shift our view of obesity away from the medical model (which focuses on the individual) to a public health model (which focuses on the population). At the same time, we must be sensitive to the problem of weight bias. Potential obstacles to taking a public policy approach are identified, as well as suggestions on how to overcome them.

90

**Application of Law to the Childhood Obesity Epidemic**

*Jess Alderman, Jason A. Smith, Ellen J. Fried, and Richard A. Daynard*

Childhood obesity in important respects a result of legal policies that influence both dietary intake and physical activity. The law must shift focus away from individual risk factors alone and seek instead to promote situational and environmental influences that create an atmosphere conducive to health. To attain this goal, advocates should embrace a population-wide model of public health, and policymakers must critically examine the fashionable rhetoric of consumer choice.

113

**Addressing the Epidemic of Childhood Obesity Through School-Based Interventions: What Has Been Done and Where Do We Go From Here?**

*Karen E. Peterson and Mary Kay Fox*

Schools are ideal settings for implementing multi-component programs to prevent and control childhood obesity. Thoughtful improvements to proven strategies, coupled with careful evaluation, can contribute to accumulation of evidence needed to design and implement the next generation of optimal interventions.

131

**Community Interventions: A Brief Overview and Their Application to the Obesity Epidemic**

*Christina Economos and Sonya Irish-Hauser*

Community-based interventions built on theory and informed by community members produce potent, sustainable change. This intervention model mobilizes inherent community assets and pinpoints specific needs. Advancing community-based research to address obesity will require training of future leaders in this methodology, funding to conduct rigorous trials, and scientific acceptance of this model.

138

**Local Venues for Change: Legal Strategies for Healthy Environments**

*Marice Ashe, Lisa M. Feldstein, Samantha Graff, Randolph Kline, Debora Pinkas, and Leslie Zellers*

Mounting evidence documents the extraordinary toll on human health resulting from the consumption of unhealthy food products and physical inactivity. In response to America's growing obesity problem, local policymakers have been looking for legal strategies that can be adopted in their communities to encourage healthful behaviors. In order to provide practical tools to policymakers, this article examines four possible venues for local policy change to improve the health of a community: (1) the school environment (2) the built environment (3) community facilities and (4) the point of sale environment. Finally, the article examines the use of taxes or fees as a means of paying for nutrition policy work as well as potentially reducing the consumption of unhealthy products. This article illustrates that local laws and policies can be a valuable tool in changing a community's environment in order to improve nutritional options and increase opportunities for physical activity.

148

**Trends in Childhood Obesity Research: A Brief Analysis of NIH-Supported Efforts**

*Terry T-K Huang and Mary N. Horlick*

Childhood obesity is an increasing health threat. The National Institutes of Health (NIH) is the primary funding agency for research into the causes, mechanisms, consequences, and prevention and treatment of childhood obesity. Using the NIH Strategic Plan for Obesity Research as the framework, this article summarizes the research that has been funded in the past five years as well as new research areas with great potential.