

NUTRITION ADVOCACY IN THE AMERICAN FEDERAL SYSTEM

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Nutrition Advocacy in the American Federal System

It is said that all politics are local, and in the effort to improve child nutrition and reverse the obesity epidemic, state and local advocacy offers particular benefits.¹ Most American children are enrolled in public schools, which presents a uniquely direct opportunity for educators and advocates to shape nutritional habits.² Through creative use of zoning and public-health regulations, states and municipalities can expand outdoor recreational space, limit the availability of fast food and encourage commerce in more nutritious alternatives.³

State and local advocacy also presents several tactical advantages over an exclusively federal focus. As in past conflicts over restricting access to tobacco and alcohol, industry opponents who exert stifling power at the federal level may simply not have the resources to monitor local initiatives or to influence municipal councils and school boards across the country.⁴ Even when industry power does seep down to the municipal level, outside lobbyists and trade associations may have relatively less sway over local politicians who make decisions directly affecting the communities in which they live.⁵ Furthermore, states and local communities may offer a more favorable political climate in which to advocate new, groundbreaking standards, such as California's Proposition 65 and New York City's recent ban on products containing trans-fats,⁶ which may then inspire other localities to adopt similar reforms.⁷ Tort lawsuits, although highly controversial even among nutrition advocates, undeniably give individual plaintiffs a powerful lever to redistribute the economic costs of obesity to the junk-food manufacturers and restaurant chains that promote and benefit from the poor nutrition habits of American children.⁸

In the American federal system, however, state and local governments often do not have the last regulatory word. There are many ways in which industry opponents to regulation can frustrate state and local nutrition reform efforts while circumventing local political processes, where they would otherwise suffer a disadvantage. Not only can opponents subject state and local initiatives to constitutional challenges in court, but, more insidiously, they can also use their political influence at higher levels of government to advance preemptive legislation, voiding strict state or local laws and even banning tort claims.

For example, the tobacco industry has deployed both strategies to defeat local anti-smoking efforts.⁹ With mixed results, the tobacco industry has sought to overturn local laws regulating tobacco advertisements by bringing suit in federal court, where they have claimed, among other things, that the Federal Cigarette Labeling and Advertising Act preempted state and local restrictions.¹⁰ At the state-government level, the tobacco industry has worked tirelessly to advance legislation to preempt local control measures. Among the more notorious examples, a major tobacco company conducted a stealth campaign to pass Proposition 188 in California, the so-called “California Uniform Tobacco Control Act”, which would have set lax statewide smoking regulations while preempting a broad swathe of stricter local ordinances.¹¹

Two recent examples illustrate the dangers of preemption to nutritional reform specifically. First, during the 109th Congress the House of Representatives passed, and the Senate considered, a bill to prohibit lawsuit against food manufacturers and retailers for obesity-related damages, even where suits involved purely *state-law* claims in *state* courts.¹² Second, the House passed The National Uniformity for Food Act of 2006,¹³

which would have set a national standard for food labeling that preempted all stricter state requirements—effectively nullifying state laws like Proposition 65 in California, which requires (among other things) warning labels on products sold within the state that contain certain chemicals known to cause cancer or birth defects.

Preemption is, however, a double-edged sword: while it can control state and local behavior, it also can improve this behavior and set uniform state standards. For example, a preemptive federal law that sets high nutrition requirements for competitive foods in public schools might ultimately prove better than a patchwork of state regulations in which the average standard is much lower. In particular, cooperative federalism—the principle whereby the federal government sets regulatory standards with enforcement assistance from state and local governments, while giving them the flexibility to raise local standards even higher—can be a powerful force in promoting better nutrition.

Accordingly, it is crucial for nutrition advocates to understand the doctrine of preemption and the situations in which preemption can manifest itself in both federal and state legislation. Part I of this paper will review preemption in its various forms at the federal level. Part II will then turn to the state level and consider both the nature of local lawmaking authority and the ability of state legislatures to preempt local action. Finally, Part III will consider other constitutional tactics besides preemption that opponents can use to frustrate state and local nutrition measures.

Part I. Federal Preemption

The doctrine of federal preemption is one of the more complicated areas of American constitutional law. Throughout U.S. history the Supreme Court has interpreted

the federal preemptive power in radically different ways,¹⁴ and even its recent decisions on preemption are not entirely consistent with one another.¹⁵ Legal scholars disagree not only on how to categorize the preemptive power in its myriad guises, but also on where to locate the specific constitutional sources of the preemption doctrine.¹⁶ Although it is beyond the scope of this paper to examine federal preemption in all its theoretical nuances or to consider the different ways in which it is applied across the federal judiciary, several useful concepts can be distilled from Supreme Court jurisprudence.

The common thread running through all manifestations of preemption is *conflict*—specifically, when a state law¹⁷ conflicts with a federal law, even though both Congress and the state legislature have acted within constitutional bounds. At one end on the spectrum, the conflict is blatant, as when Congress expressly declares that a statute will preempt state law. At the other end, in the realm of field preemption, a state law might not even clash with the terms of a federal statute; rather, a conflict exists because the state has legislated in a field over which the court has inferred a Congressional intent to dominate.

This Part will begin with a brief review of two preliminary matters—the prerequisite constitutional validity of a preemptive federal law¹⁸ and the oft-recited judicial presumption against preemption. The discussion will then proceed to analyze the two main categories of federal preemption and conclude with observations about the strategic uses of preemption.

1. The substantive constitutional validity of preemptive federal laws

A federal statute must itself be a constitutional exercise of Congressional power before it will have preemptive force over state law. In principle, the U.S. Constitution

limits the powers of Congress, which, unlike state legislatures, has no general police power.¹⁹ Moreover, the Tenth Amendment expressly reserves to the states any powers not delegated to Congress by the Constitution. As the Supreme Court has stated, “[t]he Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”²⁰ Accordingly, the first step in any analysis of preemption involves reviewing the constitutional basis for the federal law in question.

In practice, it is unlikely that either nutrition advocates or industry opponents could successfully challenge a preemptive federal nutrition statute as an unconstitutional extension of Congressional power. Although not boundless, Congress’s legislative powers are nonetheless extensive and intertwining. Two Congressional powers bear particular relevance to nutrition laws. First, the so-called Commerce Clause²¹ in Article I of the Constitution gives Congress the power to regulate commerce between the states, which includes the ability to regulate purely intrastate economic activity that substantially affects interstate commerce,²² as well as the channels and instrumentalities of commerce.²³ More specifically, Congress has the power to set commercial standards in the interest of national uniformity, which was one of the original motivations behind the Commerce Clause.²⁴ The National Uniformity in Food Act is a prime example of Congress’s power in this regard. The Supreme Court interprets the Commerce Clause broadly—it upheld every exercise of the Congress’s commerce power from 1937 to 1994, and although it subsequently found that Congress exceeded constitutional limits in passing the Violence Against Women Act²⁵, the Court recently backtracked and reaffirmed its tendency to allow an extremely broad federal reach under this clause.²⁶

Second, Congress has an even more expansive power to tax and spend for the general welfare.²⁷ By attaching conditions to the receipt of money, Congress can coerce states into accepting preemptive standards, even where the resulting regulatory regime might otherwise exceed Congressional powers under other provisions like the Commerce Clause.²⁸ As with preemption in general, a coercive use of Congress's spending power beyond ordinary constitutional limits can also benefit the goals of the nutrition movement. For example, U.S. Department of Agriculture regulations set minimum nutritional requirements for competitive foods sold during school lunch periods (foods of minimum nutritional value, or "FMNV standards"). Local school districts must at least meet these admittedly lax and out-of-date standards if they wish to participate in the federal school lunch program, even though Congress might not otherwise have the Commerce Clause power to regulate purely intrastate sales of food that did not substantially affect interstate commerce.²⁹ The benefits of coercive spending become clear when one considers that Congress or the Department of Agriculture could, in one act, improve child nutrition nationwide simply by raising the minimum nutritional requirements for competitive foods.

2. The judicial presumption against preemption

In reviewing claims of preemption against state law, a court will begin its analysis with a presumption *against* preemption if states rather than the federal government have traditionally regulated the field in question, or if the judicial analysis involves implied preemption (i.e., if the federal statute in question contains no express preemption clause). According to the Supreme Court, this presumption ensures that the traditional balance of power between the federal government and the states would "not be disturbed unintentionally by Congress or unnecessarily by the courts."³⁰ To rebut the presumption,

the party advancing a claim of preemption must demonstrate the “clear and manifest” intent of Congress to preempt state law.³¹

As a practical matter, the effect of this presumption on the outcome of a preemption claim is unclear. The foundational case in the area of implied preemption, *Rice v. Santa Fe Elevator Corp.*,³² states that a “clear and manifest purpose” may be inferred from several factors, including the pervasiveness of the federal scheme of regulation, a dominant federal interest in regulating a certain area, or even the frustration of a federal statutory objective by state law.³³ In recent cases, however, the Supreme Court has found Congressional intent even where the presumption would seem to require judicial reticence. As will be discussed below, the Court in *Geier v. American Honda Motor Corp.*³⁴ held that a federal motor vehicle safety standard preempted a state-law tort action even though (1) the statute under which the standard was promulgated expressly provided that compliance with federal rules would not preclude liability under state common law, and (2) the Court found no overt Congressional intent to preempt tort actions.

3. Categories of federal preemption: Express preemption

The Federal Preemption Doctrine is most straightforward in situations where Congress includes statutory language expressly restricting or voiding state law. In such circumstances, Congressional intent is obvious, and consequently the presumption against preemption does not apply.³⁵

Express preemption finds its direct constitutional basis in the so-called “Supremacy Clause” in Article VI of the U.S. Constitution, which provides that federal law, together with the Constitution and treaties with foreign nations, are “the supreme

law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding.”³⁶ The clause has its historical roots in the disastrous experiment of the Articles of Confederation, where states jealously pursued their narrow self-interests and thwarted the development of coherent national foreign policy, among other things.³⁷ Since the early nineteenth century, the Supreme Court has held that federal statutes prevail over any conflicting provision in state law by virtue of the Supremacy Clause.

Express statutory preemption clauses are fairly common, although they may be couched in ambiguous language or buried deep within the text of a bill. The proposed National Food Uniformity Act, an amendment to the Food, Drug and Cosmetics Act, contained a straightforward example:

[N]o State or political subdivision of a State may, directly or indirectly, establish or continue in effect under any authority any notification requirement for a food that provides for a warning concerning the safety of the food, or any component or package of the food, unless such a notification requirement has been prescribed under the authority of this Act and the State or political subdivision notification requirement is identical to the notification requirement prescribed under the authority of this Act.³⁸

In addition, the bill specified a procedure whereby the Secretary of Health and Human Services would review state labeling requirements and determine whether they conflicted with the new federal statute.

Just as federal lawmakers may override state law by adding preemption clauses to legislation, Congress and regulatory agencies may also expressly limit the preemptive reach of a statute by including a savings clause which allows states to regulate in addition to federal regulation. For example, the regulations to the Child Nutrition Act, issued by the Department of Agriculture under a statutory grant of authority from Congress, provide that “[s]tate agencies and school food authorities may impose additional

restrictions on the sale of and income from all foods sold at any time throughout schools participating in the [School Lunch Program].”³⁹ Indeed, savings clauses are a crucial mechanism in cooperative federalist regulation, where the federal government sets a preemptive threshold while enabling states to enforce not only the minimum national law but also, if they see fit, their own stricter standards.

When a statute contains both a preemption clause and a savings clause, a court must reconcile the two in order to determine the extent of express preemption. The first part of *Geier*, mentioned above, offers a recent illustration of this analysis. The petitioner, Geier, was injured in a car crash, and in her subsequent lawsuit she alleged that the manufacturer, American Honda, was liable under District of Columbia tort law for failing to include airbags in the design of the car. In response, American Honda argued in part that the National Traffic and Motor Vehicle Safety Act of 1966 expressly preempted Geier’s state-law tort claim because the Department of Transportation had issued a regulatory standard giving manufacturers a choice whether to include airbags or an alternative safety mechanism. Furthermore, the Act included a clause prohibiting states from establishing motor vehicle safety standards different from those promulgated under the Act. At the same time, however, the Act also contained a savings clause providing that compliance with a federal safety law would not exempt a person from liability under common law. In reconciling these two provisions, the Court looked to the underlying public policies at issue and reasoned that the preemption clause reflected “a [Congressional] desire to subject the industry to a single, uniform set of federal safety standards”, while the savings clause sacrificed some of that uniformity in the interest of preserving a means for state courts to enforce the safety standards and for victims to seek

common-law compensation when the standards were violated.⁴⁰ In other words, although the preemption clause, viewed alone, would have prevented the tort action, the savings clause showed a Congressional intent not to bar common-law liability, in accordance with the well-established principle that a statute must be interpreted in such a way as to give force to all provisions.⁴¹

4. Categories of federal preemption: Implied preemption

Where a statute does not contain an express preemption clause, a court must infer a basis for preemption, either by looking for an inherent conflict with state law, by considering the objectives and purposes behind the federal statute, or examining whether Congress intended to exert exclusive domination over the entire regulatory field.

As the name suggests, implied preemption involves one or more inductive steps to infer a Congressional intent to preempt state and local law. The first subtopic here, conflict preemption, involves the most direct logical step: where state or local law conflicts with a federal regulatory scheme, courts will infer a Congressional intent to preempt, with a nod to the presumption against preemption.

i. Conflict preemption

After the Court's straightforward balancing of the preemption and savings clauses, the analysis in *Geier* reaches into the far thornier region of implied conflict preemption. Having concluded that the savings clause rescued Geier's lawsuit from the automatic oblivion ordained by the preemption clause, the Court turned its attention to whether the savings clause suggested a further Congressional intent to prevent any application of *implied* preemption theory. The Court did not uncover anything to suggest that the savings clause could protect a tort action that implicitly conflicted with the federal

regulatory regime. Finding an implied conflict between Geier's tort claim against American Honda and the more lenient federal safety standard that gave manufacturers a choice between using airbags or alternative safety measures, the Court held that the federal statute did indeed preempt Geier's lawsuit. The Court gave, and the Court hath taken away.

As *Geier* illustrates, implied conflict preemption involves a two-step process. First, a court will look to the relevant objectives and policies behind federal and state law. This step is fact-intensive and may involve a consideration of the legislative record or the history of a regulatory field. Then, a court will consider whether state law conflicts with the federal legislative regime. The court will find a conflict if it decides that a private party could not possibly comply with both federal and state law,⁴² or if a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴³ (Legal scholars and courts sometime assign this latter test to its own category—"obstacle preemption"—even though it is fundamentally a type of implied conflict preemption, since it involves at least an attenuated conflict between state or local law on the one hand, and the objectives of a federal regulatory regime on the other.)

The legislative intent behind the state or local law is irrelevant; a state or municipality may neither intentionally nor accidentally frustrate the operation of a federal law. For example, in *Perez v. Campbell*,⁴⁴ an Arizona law required that uninsured motorists who were delinquent in paying accident judgments had to demonstrate financial responsibility before the state would reissue their licenses. Arizona made no exception for motorists whose debts had been discharged in federal bankruptcy, although the purpose behind the state law was to deter irresponsible driving rather than to frustrate

federal law. Nevertheless, the Supreme Court found that the Arizona statute was an obstacle to the operation of the U.S. bankruptcy laws, and accordingly the statute was preempted.

ii. Field preemption

In some cases, a court will infer a conflict less from the specific provisions or objectives of a federal statute than from a general Congressional intent to bar all state regulation from an entire field. Congressional intent to preempt a regulatory field can be inferred in several ways. A court may preempt state law if it considers the federal regulatory regime “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”⁴⁵ Likewise, field preemption is proper where the federal interest in regulating the given field is “so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”⁴⁶ A court may also preempt state law where “the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.”⁴⁷ If the field has traditionally been regulated by states, however, the court will begin its analysis with a stronger presumption against preemption.⁴⁸

As an example of field preemption, the Food and Drug Administration takes the position that Congress, in passing the Food, Drug and Cosmetic Act, intended to establish a federal regulatory scheme with exclusive control over the legal importation of drugs into the United States. By implication, any state attempt to create different or supplemental rules—e.g., by licensing Canadian pharmacies to sell less expensive prescription drugs by mail-order—would be preempted.⁴⁹

5. *Preemption in practice*

Other than the last category of field preemption, examples of federal preemption, whether express or implied, generally take one of two forms—floor preemption and ceiling preemption.⁵⁰ In the context of food and public health, floor preemption would tend to advance the cause of stricter regulation, and the FMNV regulations discussed in subpart 1 above present a clear example. If the FMNV standards are tightened, federal preemption would clearly promote the cause of better nutrition, provided that the standards remain a floor—i.e., if amendments to the standards do not remove the savings clause that allows state agencies and school food authorities to impose additional restrictions on food sales. Such is the essence of cooperative federalism, and in this context nutrition advocates might find preemption arguments strategically beneficial.

By contrast, ceiling preemption would tend to frustrate efforts to raise community standards and improve nutrition. The tobacco industry has long understood the power of ceiling preemption, and the doctrine has played a central role in their efforts at both the federal and state levels to counter the trend towards stricter local controls.⁵¹ Indeed, two of the most important Supreme Court cases on preemption law in the past fifteen years—*Cipollone v. Liggett Group*⁵² and *Lorillard Tobacco Co. v. Reilly*⁵³—involved attempts by the tobacco industry to have stricter state laws preempted.

Nutrition advocates must therefore be vigilant against efforts to include express ceiling preemption clauses in new federal laws that would restrict higher state standards. Even where Congressional bills or draft regulations do not contain express adverse preemption clauses, nutrition advocates must evaluate proposed rules and legislation in light of implied preemption and decide whether to insist on a savings clause, turning a potential threat of ceiling preemption into a beneficial floor preemption.

Part II. State preemption of local ordinances

Just as state laws may face preemption from Congress, local ordinances may be subject to preemption at *both* the federal and state level. The degree to which a state legislature can preempt the actions of cities, towns and counties depends on the nature of municipal authority under the constitution and general laws of the state. Although it is beyond the scope of this paper to analyze the law of preemption in all fifty states, certain broad concepts are useful. In this regard, there are two broad categories: “Dillon’s Rule” states and “home rule” states.

Under Dillon’s Rule, named after the Iowa state chief justice who first enunciated the principle in the nineteenth century,⁵⁴ municipalities have no powers beyond those granted by the state legislature. The classic statement of the Rule describes three categories of municipal power: (1) powers the state legislature grants expressly to the municipality; (2) powers necessarily or fairly implied by these express grants; and (3) powers essential to the declared objects and purposes of the municipal corporation. Where there is any reasonable doubt that a power has been conferred, however, the Rule presumes that a municipality does *not* have the power in question.⁵⁵ Therefore, the scope of the delegated authority to the city, town or county will directly determine whether a local ordinance can withstand challenge in a Dillon’s Rule jurisdiction.

In contrast, the doctrine of home rule, which became increasingly popular over the course of the twentieth century in response to the perceived injustice and inefficiencies of Dillon’s Rule, emphasizes considerable local control over municipal matters, with a limited right of interference by state legislatures. Consequently,

municipalities may have far more discretion to promote nutrition measures aggressively, and preemption analysis becomes more difficult.

Home rule arises most commonly from express provisions in state constitutions and less commonly from statutes; a dwindling number of states still do not recognize home rule at all. The practical effect of home rule varies enormously from state to state. At one extreme, some states even recognize a limited right of municipalities to *supersede* state law;⁵⁶ at the other extreme, courts may use Dillon's Rule as the lens through which to interpret a grant of home rule authority, despite the inherent contradiction in doing so.⁵⁷ Moreover, in states where a home rule provision is not self-executing, municipalities must enact a special charter before home rule applies. As a result, home rule might apply only to certain municipalities in a state, with Dillon's Rule being applicable everywhere else.

In a home rule jurisdiction, the preemption doctrine acts as a limit on the otherwise expansive powers of the municipality. As with judicial interpretations of home rule, the specific criteria and tests for preemption vary widely from state to state, although conflict is again the common analytical thread, as at the federal level. For example, California follows an expansive principle of Home Rule, and the state constitution provides that “[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”⁵⁸ In determining whether a municipal ordinance conflicts with a state law, a California court will examine whether the ordinance contradicts or duplicates the state law, or attempts to regulate a field that the state legislature has expressly manifested an intent to occupy alone,⁵⁹ categories similar to those of federal preemption. Likewise, the

New York constitution provides that local governments have, in general, the power to enact local laws not inconsistent with the state constitution or general laws.⁶⁰ In determining preemption, a New York court will use a test broadly similar to the one used in California, with some different nuances.⁶¹

Accordingly, nutrition advocates working at the local level must be cognizant of the possibility that their hard-won efforts may be voided by state legislatures even if the municipality enjoys significant home rule authority. As with federal preemption, however, advocates can turn preemption at the state level to their advantage by seeking the passage of preemptive pro-nutrition laws with statewide effect.

Part III. Other constitutional obstacles for state and local laws

In addition to preemption issues, advocates must take into account possible substantive challenges to local ordinances and state statutes under the federal constitution.⁶² This Part will discuss the three most relevant issues concerning nutrition legislation—the extent to which states are able to pass laws affecting interstate commerce, limitations on the ability of states to impair contracts, and constitutional restrictions on land takings without compensation.

The Dormant Commerce Clause

As discussed in Part I above, the Commerce Clause of the federal constitution gives Congress the power to regulate interstate commerce. Once Congress has legislated on a matter involving interstate commerce, a court should apply field preemption to conflicting state laws. If Congress has not yet legislated on the matter, however, an entirely different analysis applies. Since the early nineteenth century,⁶³ the Supreme Court has inferred from the Commerce Clause a corollary limitation on the power of

states to regulate interstate commerce. This doctrine, known as the “Dormant Commerce Clause”, has significant implications for state efforts to use restrictive laws to promote better nutrition. In its modern jurisprudence, the Court applies different levels of scrutiny depending on whether the state law discriminates against out-of-state commerce.

Where a state law blatantly discriminates against outsiders—for example, by allowing in-state wineries to mail wine directly to state residents but prohibiting wine shipments from outside the state⁶⁴—a court will presume that the law is unconstitutional.⁶⁵ In defending itself, the state may contest this presumption by arguing that a compelling regulatory interest motivated the discriminatory law, and that the state had no other way to advance that interest. This argument is difficult to make, however, and to date only one state has successfully done so: Maine, which fought to uphold its ban on the import of live bait fish by arguing that there was no other way to prevent non-native pests in the bait from contaminating local fisheries.⁶⁶

The same standard applies in situations where state legislators have crafted a law so that it has a discriminatory effect while appearing on its face not to discriminate. In addition to finding a facially discriminatory Michigan law unconstitutional, the Supreme Court in *Granholm v. Heald* struck down a New York law that set theoretically neutral direct-shipping requirements for wineries. Unlike the Michigan statute, the New York law did not discriminate against out-of-state wineries outright—they could ship to New York residents if they established themselves as New York wineries, but the cost of complying in this manner was so onerous and impractical that the law effectively blocked direct shipments of wine from outside the state, to the benefit of in-state wineries.⁶⁷ In

both circumstances, the crucial element was protectionism against out-of-state economic interests, which violated the fundamental purpose of the Commerce Clause.

The mere fact that a state regulation disadvantages some out-of-state actors over others does not necessarily implicate the Dormant Commerce Clause, however. The Supreme Court upheld a Maryland law that prohibited petroleum refiners and producers from owning retail stations within the state, and prevented them from offering temporary supply discounts to some independent stations but not others. The Court reasoned that although the burden of the provisions fell exclusively on out-of-state dealers (Maryland had no producers or refiners), the law did not discriminate against out-of-state commerce *per se*; some out-of-state companies would face a disadvantage, while others would step in to fill the commercial gap.⁶⁸

Moreover, the Supreme Court recently clarified that in certain instances a state may favor its own public enterprises at the expense of private companies in interstate commerce. In *United Haulers Assoc. Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, a private solid waste hauler alleged that New York counties and their waste management authority violated the Dormant Commerce Clause by requiring all trash loads to be processed at a publicly owned facility, which prevented business from going to less expensive out-of-state processors. In deciding for the counties, the court argued that laws favoring public entities required a fundamentally different analysis—in this case, the court found the ordinance was motivated not by economic protectionism but by a legitimate desire to protect the general welfare by enforcing waste disposal policies through mandatory use of a public processing plant. Significantly, the court also noted that the New York ordinance treated all waste management companies alike—it did not

discriminate specifically against private out-of-state companies for the benefit of its own citizens—and that waste disposal was typically and traditionally a function of local government.⁶⁹

Where a state law does not discriminate on its face or in its effects but still burdens interstate commerce, a court will balance the state's interest against the effect on commerce. Whether the court upholds the law depends on the significance of the burden on interstate commerce, the nature of the state's regulatory interest in the matter, and the possibility of achieving the same end with less burdensome means.⁷⁰

There is, however, a broad exception to everything above: in the absence of preemptive Congressional action, a state may burden interstate commerce and even freely discriminate against out-of-state companies if the state is buying and selling in the marketplace rather than regulating it. In this situation, the underlying motivations behind the Commerce Clause do not apply.⁷¹ For example, a South Dakota policy required a state-owned cement plant to supply in-state customers first in times of shortages, and this policy put out-of-state purchasers at a significant disadvantage by reducing their supplies. Nevertheless, the Supreme Court upheld this policy because South Dakota was acting as a commercial participant in the market—the owner of the concrete plant—and not as a regulator.⁷² This exception is not unlimited, however. Any state action such as a law, regulation or contract that imposes a substantial regulatory effect beyond the specific market in which the state is doing business will render the market-participant exception unavailable.⁷³

In the context of nutrition, a Dormant Commerce Clause challenge might arise, for example, over a state law requiring school districts to give preference to local food

suppliers who are able to offer fresher produce. In such a case, the state would need to demonstrate that it had a compelling interest in passing the legislation, and that no other, non-discriminatory option was possible. Depending on the facts at hand, however, the state could probably make a viable argument that it was acting as a market purchaser, not as a regulator.

The Contract Clause

State and local efforts to promote better nutrition might also face challenge under the Contract Clause from Article I of the federal constitution, which prohibits states from passing laws that nullify existing contractual obligations.⁷⁴ This provision may be relevant, for example, in a campaign to terminate marketing or vending arrangements between school districts and junk-food manufacturers. Although nutrition advocates should be wary of overestimating the potential impact of the Contract Clause, a basic understanding of this area of constitutional law is nonetheless important in avoiding pitfalls that could be exploited by opponents of nutrition reform.

Courts give great deference to the traditional power of the states to legislate for the general welfare, and the Supreme Court has indicated that the Contract Clause is not to be interpreted verbatim, for doing so would deprive the states of the power to protect the public interest.⁷⁵ Accordingly, in testing the constitutionality of a state law that restricts or nullifies existing contracts, a court will first examine the seriousness of the impairment. A minimal effect on contracts⁷⁶ or a substantial limitation solely on *future* contracts⁷⁷ will not warrant further judicial attention. If the court finds that the state law substantially alters obligations under *existing* contracts, however, it will balance the Contract Clause against the state's traditional police power and consider whether the state

had a significant and legitimate purpose in passing the law.⁷⁸ Even in this analysis a court will give the state substantial latitude. An attempt to remedy a “broad and general social or economic problem” will count as legitimate.⁷⁹ Moreover, the “significant and legitimate purpose” need not involve an emergency or a temporary situation,⁸⁰ and a court will give strong consideration to whether the contractual parties already operate in a regulated industry.⁸¹ Once a court finds a significant and legitimate purpose, it will then examine whether the law is an appropriate means to realize this end.⁸² Unless the state itself is a party to the contract, however, a court will defer to the state’s own assessment of whether the law is necessary and reasonable in this regard.⁸³

A court will give the state much less deference if the law attempts to alter public contracts to which the state is a party⁸⁴—although contracts themselves are creatures of state law, a state generally cannot relieve itself of its own contractual obligations by legislative fiat.⁸⁵ Of course, in such situations the state could still seek to terminate a contract by invoking any rights it may have in that regard as a contractual party.

The Takings Clause

The Fifth Amendment of the U.S. Constitution prohibits the federal government from taking property for public use without paying just compensation, which applies to state and municipal governments as well by operation of the Fourteenth Amendment.⁸⁶ The Takings Clause is relevant to our discussion because it concerns not only direct expropriations, but also regulatory restrictions on property use, such as zoning ordinances,⁸⁷ which are a powerful tool for local communities seeking to limit access to unhealthy foods.⁸⁸

The question of whether a certain land-use regulation constitutes a taking depends heavily on the facts at hand. The following situations are more likely to trigger the compensation requirement:

- Where government requires an owner to suffer a permanent physical invasion of property;⁸⁹
- Where regulations completely deprive an owner of all economically beneficial use of property;⁹⁰ and
- Where the government extracts a property concession from a private citizen in return for granting an unrelated benefit.⁹¹

Beyond these categories, a court will consider a number of other factors, primarily the harshness of the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action.⁹² Under this very last prong, a court will lean heavily against a finding of a Fifth-Amendment taking where the complaint arises from regulations "adjusting the benefits and burdens of economic life to promote the common good."⁹³

Before undertaking initiatives to achieve nutrition goals through creative use of zoning regulations, advocates must determine whether their plan would involve a constitutional taking under the above criteria, as the requirement to provide just compensation may render a zoning change economically infeasible.

Conclusion

The American federal system presents many challenges and opportunities for nutrition advocates working at state and local levels, from substantive constitutional pitfalls and the threat of ceiling preemption, to the possibility of using floor preemption

to raise nutritional standards. By collaborating with legal counsel and taking into account federal and state laws relevant to proposed reforms, advocates can develop effective strategies for ensuring against constitutional challenges, countering efforts to preempt stricter new standards, and using the federal system to fight obesity and improve child nutrition.

¹ See generally Marice Ashe et al., *Local Venues for Change: Legal Strategies for Healthy Environments*, *Journal of Law, Medicine & Ethics* (Spring 2007) 35: 138–147 (discussing local legal strategies for achieving nutrition reform).

² See *id.* at 139-40.

³ See *id.* at 141-43.

⁴ See, e.g., Eric Gorovitz, James Mosher & Mark Pertschuk, *Preemption or Prevention?: Lessons From Efforts to Control Firearms, Alcohol, and Tobacco*, *Journal of Public Health Policy* 19(1): 36, 37 (1998) (discussing how the influence of the tobacco and alcohol industries, pervasive at the federal and even the state levels, wanes considerably at the local level for a variety of reasons, including the expense of placing lobbyists in every community and resistance from local lawmakers to outsiders).

⁵ See *id.*

⁶ “New York Bans Most Trans Fats in Restaurants,” *New York Times*, December 6, 2006.

⁷ See, e.g., “Ban gives Philadelphia a healthy lead in trans-fat fight”, *Philadelphia Inquirer*, February 9, 2007 at A01; “L.A. County to study trans fat ban”, Associated Press, January 11, 2007.

⁸ To date, the only example of an obesity lawsuit is the New York saga of *Pelman v. McDonald’s Corp.*, which has survived three motions to dismiss and, as of April 2007, still appears to be moving forward. See 396 F.3d 508 (2d Cir. 2005).

⁹ See Gorovitz, Mosher & Pertschuk, *supra* n. 4, at 39-41.

¹⁰ See, e.g., *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995) (finding that the Federal Cigarette Labeling and Advertising Act (FCLAA) did not preempt a local ordinance banning cigarette advertising on billboards in designated zones) and *Lindsey v. Tacoma-Pierce County Health Dep’t*, 8 F.Supp. 2d 1213 (W.D. Wa. 1997) (citing *Penn Advertising* and finding no preemption of a local county ordinance limiting outdoor tobacco advertising); but see *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994) (finding that the FCLAA preempted a New York City ordinance regulating tobacco advertisements on taxicabs).

¹¹ See generally Heather Macdonald, Stella Aguinaga & Stanton A. Glantz, *The Defeat of Philip Morris’ “California Uniform Tobacco Control Act”*, 87 *Am. J. Public Health* 1989 (Dec. 1997).

¹² Personal Responsibility in Food Consumption Act, H.R. 554 (2005), S. 908 (2006).

¹³ H.R. 4167, 109th Cong., 2d Sess. (2006). Although the House of Representatives passed the bill in early 2006, the U.S. Senate failed to take action before the end of the Congressional term in January 2007, and accordingly the bill lapsed and never became law.

¹⁴ See Stephen Gardbaum, *The Nature of Preemption*, 79 *Cornell L. Rev.* 767, 787-808 (1994). Gardbaum describes three distinct periods of Supreme Court jurisprudence on preemption. According to him, from 1789 to 1912 the Court strictly construed the doctrine against the federal government and struck down state law only when it conflicted with substantive provisions of federal law. From 1912 to 1933, the Court went to the opposite extreme and found that federal law automatically preempted entire regulatory fields. Gardbaum describes the Court’s preemption jurisprudence from 1933 to the present as a mixture of previous interpretations.

¹⁵ See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding, in a heavily fractured opinion, that where Congress included an express preemption clause in a statute, matters beyond the reach of the clause were not preempted, and there was no need to perform an implied preemption analysis); *Freightliner*

Corp. v. Myrick, 514 U.S. 280, 289 (1995) (“At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption.”); *Geier v. American Honda Motor Corp.*, 529 U.S. 861 (2000) (conducting implied preemption analysis despite the presence of an express preemption clause).

¹⁶ Gardbaum, *supra* n.12, at 787 (“[There is] fundamental confusion in thinking . . . about the underlying nature of preemption.”)

¹⁷ For sake of brevity, the remainder of Part I will refer only to the preemption of state law; the discussion applies equally to local ordinances, however.

¹⁸ Although this paper will usually refer to the preemptive force of federal law, regulations issued by federal agencies pursuant to Congressional legislation generally carry the same force, provided that the agency has not acted arbitrarily or exceeded the scope of its regulatory authorization. Accordingly, the discussion of the preemptive effect federal law applies equally to the Code of Federal Regulations.

¹⁹ *See, e.g., United States v. Lopez*, 514 U.S. 549, 567 (1995) (referring to the “general power police . . . retained by the States”).

²⁰ *See id.* at 566 (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”)

²¹ U.S. Const. art. I, § 8, cl. 3.

²² *See Lopez*, 514 U.S. at 559-60.

²³ *See Lopez*, 514 U.S. at 558.

²⁴ *See generally* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 *Virg. L. Rev.* 249, 266-88 (2005) (describing how the Commerce Clause was the result of a pressing need for a national government to impose uniformity in commerce among the thirteen original states).

²⁵ *See United States v. Morrison*, 529 U.S. 598 (2000) and *Lopez*, 514 U.S. 549 (overturning the federal Violence Against Women Act as exceeding Congress’s power under the Commerce Clause)

²⁶ *See Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Congress’s authority under the Commerce Clause to prohibit intrastate sales of cannabis).

²⁷ U.S. Const. art. I, § 8, cl. 1.

²⁸ *See, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that although Congress lacked the constitutional power to set a national minimum drinking age, it could withhold a portion of federal highway funds from states that allowed people under the age of twenty-one to purchase alcoholic beverages). Ultimately, however, there are limits to this spending power. A spending provision cannot be so coercive that it compels state action. *See id.* at 211. The plain language of the federal spending statute must be aimed at the general welfare. *See id.* at 207. The condition must be unambiguous, and the condition must be reasonably related to the purpose of the funding. *See id.* Finally, the condition must not violate other provisions of the Constitution by, for example, impermissibly restricting speech protected by the First Amendment. *See id.* at 208, citing *Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁹ In addition, the Constitution includes a general enabling provision—the “Necessary and Proper Clause”—that the Court has traditionally used to infer Congressional powers not expressly mentioned in the constitution. U.S. Const. art. I, § 8, cl. 18; *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that the federal government could establish the Bank of the United States as a means to realizing its other, express constitutional powers).

³⁰ *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

³¹ *Jones v. Rath Packing Co.* at 525, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

³² 331 U.S. 218 (1947).

³³ *Id.* at 230.

³⁴ 529 U.S. 861 (2000).

³⁵ *See Jones v. Rath Packing Co.*, *supra* at 525, quoting in part *Florida Lime* at 142 (“[W]hen Congress has ‘unmistakably . . . ordained,’ . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall.”).

³⁶ U.S. Const. art. VI, cl. 2.

³⁷ *See* Edward J. Larson, *Building a Nation from Thirteen States: The Constitutional Convention and Preemption*, 33 *Pepperdine L. Rev.* 7 (2005).

³⁸ H.R. 4167, *supra* note 11.

³⁹ 7 C.F.R. § 210.11(b).

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- ⁴⁰ *Geier*, 529 U.S. at 870-71.
- ⁴¹ *See id.* at 867-68.
- ⁴² *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).
- ⁴³ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
- ⁴⁴ 402 U.S. 637 (1971).
- ⁴⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ *See English v. General Electric Co.*, 496 U.S. 72, 79 (1990).
- ⁴⁹ *See* U.S. Food & Drug Administration Letter to Patrick C. Lynch, Attorney General of Rhode Island (January 28, 2005), <http://www.fda.gov/oc/opacom/hottopics/importdrugs/lynch012805.html>; *see also* “R.I. mulls prescription drugs from Canada”, CNN.com (January 14, 2004), <http://www.cnn.com/2004/HEALTH/01/14/canada.drugs.ap/index.html>.
- ⁵⁰ *See* Electronic Privacy Information Center, “Privacy Preemption Watch”, available at <http://www.epic.org/privacy/preemption/>.
- ⁵¹ *See generally* Advocacy Institute, “Preemption of State and Local Tobacco Control Policies”, available at <http://www.advocacy.org/publications/mtc/preemption.htm>, citing C. Everett Koop, David Kessler & George Lundberg, “Reinventing American Tobacco Policy: Sounding the Medical Community’s Voice” (editorial), *J. American Med. Assoc.* 279:7 (Feb. 18, 1998) (describing the preemption strategies of the tobacco industry). *See also* Stanton A. Glantz and Edith D. Balbach *Tobacco War: Inside the California Battles* (Univ. Cal. Press 2000), available at <http://ark.cdlib.org/ark:/13030/ft167nb0vq/> (reviewing in detail efforts by the tobacco industry to preempt local ordinances in California).
- ⁵² 505 U.S. 504 (1992).
- ⁵³ 533 U.S. 525 (2001).
- ⁵⁴ John Forrest Dillon elucidated the principle in his 1872 treatise *Municipal Corporations*, and in *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), the U.S. Supreme Court espoused his view of the relation between municipalities and states.
- ⁵⁵ *See Clark v. City of Des Moines*, 19 Iowa 199 (1865).
- ⁵⁶ *See, e.g., U.S. West Communications Inc. v. City of Longmont*, 948 P.2d 509, 515 (Colo. 1997) (stating that in matters of local concern, a local home rule ordinance will supersede a conflicting state law).
- ⁵⁷ Brookings Institution Center on Urban and Metropolitan Policy, “Is Home Rule the Answer? Clarifying the Influence of Dillon’s Rule on Growth Management” (January 2003) at 13. (The report is available online at <http://www.brookings.edu/es/urban/publications/dillonsrule.pdf>).
- ⁵⁸ Cal. Const. art. XI, § 7.
- ⁵⁹ *See Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897-98 (1993).
- ⁶⁰ NY Const. art. IX, §2(c).
- ⁶¹ *See DJL Restaurant Corp. v City of New York*, 96 N.Y.2d 91, 95 (2001) (stating that preemption occurs either where a local law directly conflicts with a state law or whether a local government legislates in a field where the state has assumed full regulatory responsibility).
- ⁶² Of course, local ordinances and state laws can face challenges under state constitutions as well.
- ⁶³ *See Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).
- ⁶⁴ *See Granholm v. Heald*, 544 U.S. 460 (2005) (striking down a Michigan law that allowed licensed in-state wineries to ship directly to Michigan customers but prohibited out-of-state wineries from doing so, even if they were licensed).
- ⁶⁵ *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).
- ⁶⁶ *See Maine v. Taylor*, 477 U.S. 131,138 (1986).
- ⁶⁷ *See Granholm v. Heald*, 544 U.S. 460.
- ⁶⁸ *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 123, 125-30 (1978).
- ⁶⁹ *See United Haulers Assoc. Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 2007 WL 1237912 (S.Ct. 2007).
- ⁷⁰ *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
- ⁷¹ *See College Savings Bank v. Florida Prepaid Postsecondary Ed. Exp. Bd.*, 527 U.S. 666, 685 (1999) (“The “market participant” exception to judicially created dormant Commerce Clause restrictions makes sense because the evil addressed by those restrictions—the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure

of state resources) to favor their own citizens . . . is entirely absent where the States are buying and selling in the market.”)

⁷² See *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

⁷³ See *South-Central Timber Development Inc. v. Wunnicke*, 467 U.S. 82, 97-98 (1984).

⁷⁴ U.S. Const. art. I, § 10, cl. 1.

⁷⁵ See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 239 (1978).

⁷⁶ See *id.* at 245.

⁷⁷ See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, (1827)

⁷⁸ *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983).

⁷⁹ *Id.* at 412-13. Compare *Spannaus*, 438 U.S. 234, where the Court struck down a Minnesota law that forced private companies who had 100 or more employees and offered a pension plan under section 401 of the Internal Revenue Code to pay a special charge if they terminated the plan or closed a Minnesota office. The Court reasoned that the law, which applied to an extremely limited class (and possibly only to a single company), had far too narrow a scope and imposed a completely unexpected, gross liability in an area that the state had never before sought to regulate. As such, there was no plausible basis for concluding that the law addressed a broad societal interest.

⁸⁰ *Id.* at 412, citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, n. 19 (1977).

⁸¹ *Id.* at 411, quoting *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) (“One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.”)

⁸² *Id.* at 412-13.

⁸³ See *United States Trust Co.*, 431 U.S. at 22-23.

⁸⁴ *Kansas Power & Light Co.*, 459 U.S. at 413, citing *United States Trust Co. v. New Jersey*, 431 U.S. at 26.

⁸⁵ See *United States Trust Co.*, 431 U.S. at 25 n.23, quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878) (“The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons.”).

⁸⁶ See *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

⁸⁷ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁸⁸ See generally Marice Ashe et al., *supra* note 1.

⁸⁹ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁹⁰ See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁹¹ See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁹² See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁹³ *Id.*