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Local Governments and the Food System: Innovative Approaches to Public Health Law and Policy⁺

Lainie Rutkow,^{*} Jennifer L. Pomeranz^{**} & Sarah O. Rodman^{***}

I. INTRODUCTION

Law can serve as a powerful tool to protect and promote the health of populations.¹ In the United States, federal, state, and local actors frequently legislate, regulate, and litigate to further public health goals. Government may accomplish these objectives through a variety of means, such as raising the price of a harmful product, requiring an industry to change its practices to produce a safer product, and compelling disclosure of relevant information. For example, federal, state, and local governments impose cigarette taxes, which have been associated with decreased smoking, especially among young people.² Litigation against motor vehicle

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1. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 11 (2d ed. 2008) ("Public health has historically constrained the rights of individuals and businesses so as to protect community interests in health. Whether through the use of reporting requirements affecting privacy, mandatory testing or screening affecting autonomy, environmental standards affecting property, industrial regulation affecting economic freedom, or isolation and quarantine affecting liberty, public health has not shied from controlling individuals and businesses for the aggregate good.").

2. Christopher Carpenter & Philip J. Cook, *Cigarette Taxes and Youth Smoking: New Evidence from National, State, and Local Youth Risk Behavior Surveys*, 27 *J. HEALTH ECON.* 287, 297 (2008) ("Across our analyses of three distinct data sets, we find qualitatively similar estimates: an increase in the state cigarette tax reduces the probability a youth reports past 30 day smoking and frequent smoking."); Cindy Tworek et al., *State-Level Tobacco Control Policies and Youth Smoking Cessation Measures*, 97 *HEALTH POL'Y* 136, 141-42 (2010) ("Cigarette price had a positive association with three of the four cessation-related outcome measures studied among high school regular smokers, suggesting that increasing cigarette price is a successful tobacco control policy to encourage smoking cessation, particularly among youth who are often more price-sensitive."); see also Campaign for Tobacco-Free

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manufacturers played a critical role in the federal government's decision to require airbags in cars, which has saved tens of thousands of lives.³ And, in the mid-2000s, localities started to develop regulations that required some restaurants to post nutritional information about their foods, to help consumers make healthier eating decisions.⁴

As new challenges emerge and threaten the public's health, law can play a key role in response and mitigation. Numerous public health challenges are raised by the behaviors, practices, and products of the industries that comprise the food system.⁵ For example, the rise of obesity and chronic diseases associated with unhealthy diets has received growing attention throughout the 21st century.⁶ Approximately one-third of adults in the United States are classified as obese. This figure reflects a continual annual increase in obesity prevalence.⁷ While the food system includes industries associated with obesogenic food development and marketing, it also encompasses those associated with food production, such as pesticide manufacturers, factory farming operations, and food transporters.⁸ These industries may contribute

Kids, Local Government Cigarette Tax Rates & Fees (2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0304.pdf> (summarizing tax rates in the approximately 450 U.S. localities that impose cigarette taxes).

3. Nat'l Highway Traffic Safety Admin., Air Bag Safety, <http://www.safercar.gov/Air+Bags> (last visited Dec. 4, 2012) ("Frontal air bags have saved 25,782 lives between 1987 and 2008."); Stephen P. Teret, *Litigating for the Public's Health*, 76 AM. J. PUB. HEALTH 1027 (1986) (explaining role of litigation in promoting the presence of air bags in automobiles).

4. Pooja S. Tandon et al., *Nutrition Menu Labeling May Lead to Lower-Calorie Restaurant Meal Choices for Children*, 125 PEDIATRICS 244 (2010); Lainie Rutkow, Jon S. Vernick, James G. Hodge, Jr. & Stephen P. Teret, *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J. L. MED. & ETHICS 772 (2008).

5. E.g., Am. Pub. Health Ass'n, *Policy Statement: Toward a Healthy, Sustainable Food System* (2007), <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1361> (last visited Dec. 12, 2012) ("In the United States, obesity and diet-related chronic disease rates are escalating, while the public's health is further threatened by rising antibiotic resistance; chemicals and pathogens contaminating our food, air, soil and water; depletion of natural resources; and climate change. These threats have enormous human, social, and economic costs that are growing, cumulative, and unequally distributed. These issues are all related to food—what we eat and how it is produced. The US industrial food system provides plentiful, relatively inexpensive food, but much of it is unhealthy, and the system is not sustainable.").

6. Ruth W. Kimokoti & Barbara E. Millen, *Diet, the Global Obesity Epidemic, and Prevention*, 111 J. AM. DIETETIC ASS'N 1137 (2011).

7. Ctrs. Disease Control & Prevention, *Adult Obesity Facts* (2012), <http://www.cdc.gov/obesity/data/trends.html#County> (last visited Dec. 4, 2012).

8. Roni A. Neff et al., *Peak Oil, Food Systems, and Public Health*, 101 AM. J. PUB. HEALTH 1587, 1587 (2011) ("Food systems are systems—complex, and comprising all entities, processes, and relationships from soil and seed to table and waste."); H. Charles J. Godfray et al., *Food Security: The Challenge of Feeding 9 Billion People*, 327 SCI. 812 (2010).

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to other pressing public health concerns, such as the rise of environmental pollutants and antimicrobial resistance among animals used for food.⁹ Scholars have identified novel uses of the law to address these challenges and create a healthier and more sustainable food system.¹⁰

Local governments are often viewed as policy innovators,¹¹ so it is particularly important to understand their challenges and successes in regulating food system industries. As previously mentioned, local governments pioneered the use of menu labeling (i.e., posting nutritional information in restaurants), a measure ultimately codified into the federal Patient Protection and Affordable Care Act.¹² In some instances, however, federal and state laws thwart local governments' efforts to regulate the food system due to preemption.¹³

This article provides a brief overview of the legal infrastructure within which local governments operate. It then considers efforts by stakeholders within the food system to challenge local governmental regulation through litigation. Next, it examines how speech rights protected by the First Amendment may curb local governments' efforts to regulate food system industries. It then analyzes the impact of preemption on regulatory action by local governments. The article concludes with a discussion of how local governments can promote innovative public health law and policy responses to redress potentially harmful actions by food system industries.

9. E.g., David C. Love et al., *Dose Imprecision and Resistance: Free-Choice Medicated Feeds in Industrial Food Animal Production in the United States*, 119 *ENVTL. HEALTH PERSP.* 279 (2011).

10. Samantha Graff, Dale Kunkel & Seth E. Mermin, *Government Can Regulate Food Advertising to Children Because Cognitive Research Shows That It Is Inherently Misleading*, 31 *HEALTH AFF.* 392 (2012); Frank J. van Rijnsoever, Harro van Lente & Hans C. M. van Trijp, *Systemic Policies Towards a Healthier and More Responsible Food System*, 65 *J. EPIDEMIOLOGY & COMMUNITY HEALTH* 737 (2011); Jennifer L. Pomeranz et al., *Innovative Legal Approaches to Address Obesity*, 87 *MILBANK Q.* 185 (2009); Michelle M. Mello, David M. Studdert & Troyen A. Brennan, *Obesity—the New Frontier of Public Health Law*, 354 *NEW ENG. J. MED.* 2601 (2006).

11. E.g., Scott Burris, *Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility*, 53 *ST. LOUIS U. L.J.* 1089 (2009); Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 *TEMP. POL. & CIV. RTS. L. REV.* 371 (2008); *INNOVATION AND ENTREPRENEURSHIP IN STATE AND LOCAL GOVERNMENT* (Michael Harris & Rhonda Kinney eds., 2004); cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

12. 21 U.S.C. § 343(q) (2012).

13. E.g., Mark Pertschuk et al., *Assessing the Impact of Federal and State Preemption in Public Health: A Framework for Decision Makers*, 19 *J. PUB. HEALTH MGMT. & PRAC.* 213 (2012); Rutkow et al., *supra* note 4.

II. LOCAL GOVERNMENTS AS PUBLIC HEALTH POLICY-MAKERS

Under U.S. law, local governments exist by a specific grant of authority from state constitutions or statutes.¹⁴ In many states, local authority includes broad power to address local issues, also known as home rule.¹⁵ Localities can thus govern themselves as long as they comply with state and federal laws. For example, Rhode Island's constitution states,

It is the intention of this article to grant and confirm to the people of every city and town in this state the right of self government in all local matters. . . . Every city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly.¹⁶

In some states, however, local governments do not enjoy broad home rule authority; instead their powers are determined by a legal construct known as Dillon's Rule, which holds that localities have limited authority and must receive permission from the state to act in certain areas.¹⁷ For example, North Carolina's constitution states,

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.¹⁸

14. *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.").

15. See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 *DENV. U. L. REV.* 1337, 1338 (2009) ("While home rule is the creation of legislatures acting within constitutional conventions or through other mechanisms, the contours and content of home rule have been developed by the courts through adjudication. . . . The result of these efforts has been a highly developed, and still developing, case law, one that involves drawing lines between what is properly the domain of state government and those powers which may be exercised by municipalities free of state preemption.").

16. R.I. CONST. art. XIII, § 2; see IND. CODE § 36-1-3-2 (2012) ("The policy of the state is to grant units all the powers that they need for the effective operation of government as to local affairs.").

17. Elijah Swiney, *John Forrest Dillon Goes to School: Dillon's Rule in Tennessee Ten Years After Southern Constructors*, 79 *TENN. L. REV.* 103, 106 (2011) ("Dillon's Rule encompasses not only a rule for interpreting statutes but also a more substantive view of the nature of local power in the American constitutional system.").

18. N.C. CONST. art. VII, § 1; Frayda S. Bluestein, *Do North Carolina Local Governments*

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In addition, a state's delegation of authority may differ among cities, counties, and other municipalities within the state;¹⁹ some of these states employ either home rule or Dillon's Rule for different localities within their jurisdiction, a distinction often based on the size of the populace. As these examples suggest, local authority varies across the 50 states. Therefore, while many localities have broad powers to enact innovative policies relative to the food system, some have much narrower authority to do so. Experts have identified diverse areas in which localities may be in the best position to act to regulate food system industries, such as by using their authority over zoning, food safety, food procurement, and labeling.²⁰

III. LEGAL CHALLENGES TO LOCAL GOVERNMENTS' REGULATORY ACTIONS

Through litigation, individuals or entities (e.g., businesses) who claim to have been wronged can attempt to halt purportedly harmful behaviors or obtain compensation for damages. When local governments act—through their legislative or executive powers—to regulate food system industries, they face the possibility of this type of legal challenge; for example, a business that believes its rights have been illegally restricted by legislation may bring a lawsuit to overturn the law. Even if industry-initiated lawsuits are not successful, they may significantly delay implementation of local regulation and may serve as a model for similar lawsuits against other localities.²¹ In recent years, food system industries have primarily focused on two types of claims in actual or threatened lawsuits against local governments: 1) claims related to speech protected by the U.S. Constitution's First Amendment and 2) claims related to preemption (i.e., the ability of a higher level of government to limit or foreclose action by a lower level of government).²²

In 2007, the New York State Restaurant Association ("NYSRA") challenged a New York City Department of Health regulation using both types of claims.²³ In late 2006, the Department of Health adopted and

Need Home Rule?, 84 N.C. L. REV. 1983 (2006).

19. HARVARD LAW SCH. FOOD LAW & POL'Y CLINIC, GOOD LAWS, GOOD FOOD: PUTTING LOCAL FOOD POLICY TO WORK FOR OUR COMMUNITIES 9 (2012), http://www.law.harvard.edu/academics/clinical/lsc/documents/FINAL_LOCAL_TOOLKIT2.pdf ("Further, states such as Arizona, Missouri, and Delaware require a minimum population size before a municipality can create a Home Rule Charter.").

20. *Id.* at 12–13 (Table I-1: Role of Various Levels of Government in Food Policy).

21. See *infra* note 30.

22. See *infra* Parts IV and V.

23. *New York State Rest. Ass'n v. New York City Bd. of Health*, 08 Civ. 1000, 2008 WL 1752455, at *1 (S.D.N.Y. Apr. 16, 2008).

subsequently amended an innovative regulation requiring large chain restaurants to post calorie information on menus and menu boards (i.e., menu labeling).²⁴ The regulation's goal was to "help guide informed and healthier food choices, an important step in addressing the obesity epidemic that now affects millions of New York City residents."²⁵ Restaurant owners expressed concerns about the costs of implementation, including expenditures to update menus and menu boards and to test food items to determine their calorie content.²⁶ The NYSRA argued that the ordinance was preempted by the federal Nutrition Labeling and Education Act ("NLEA"), which regulates claims and information on food packaging. The NYSRA also claimed that the regulation violated restaurants' First Amendment speech rights by impermissibly compelling them "to convey the government's message regarding the importance of calories, a message with which they may disagree."²⁷

A New York district court concluded that New York City's menu-labeling regulation was not preempted by the NLEA, nor did it violate restaurants' First Amendment rights because it compelled them to disclose purely factual information and was reasonably related to the city's interest in addressing obesity by providing consumers accurate nutrition information.²⁸ In 2009, a federal appellate court upheld this decision.²⁹ While this litigation was pending, the California Restaurant Association filed similar suits against San Francisco and Santa Clara County over menu-labeling ordinances.³⁰ Although ultimately unsuccessful, the NYSRA's lawsuit is emblematic of how businesses within the food system may challenge local governments'

24. *Id.*

25. Press Release, New York City Dep't Health & Mental Hygiene, Board of Health Votes to Require Chain Restaurants to Display Calorie Information in New York City (Jan. 22, 2008), <http://www.nyc.gov/html/doh/html/pr2008/pr008-08.shtml>.

26. Press Release, Nat'l Restaurant Ass'n, Trans Fat, Menu Labeling Comments Presented by New York State Restaurant Association at Hearing before New York City Department of Health and Mental Hygiene (Oct. 30, 2006), <http://dev.restaurant.org/pressroom/print/index.cfm?ID=1332> ("Finally, the proposal does not take into account the cost to restaurants to comply with the proposed regulations on menu and menu board labeling. And the cost could certainly pose a disincentive to providing nutrition information for those operators that do not currently offer nutrition information and are not covered by this proposal. The proposal also imposes real costs for restaurateurs for extensive laboratory testing of each menu item — and each time a new item is added or modified.").

27. New York State Restaurant Ass'n, 2008 WL 1752455, at *1.

28. *Id.* at *12–*13.

29. New York State Restaurant Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

30. PUB. HEALTH LAW CTR., MENU LABELING LEGISLATION: OPTIONS FOR REQUIRING THE DISCLOSURE OF NUTRITIONAL INFORMATION IN RESTAURANTS 9 (2009), available at <http://publichealthlawcenter.org/sites/default/files/resources/phlc-policy-menu-labeling.pdf>.

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regulatory actions and stimulate parallel legal responses in other localities.³¹

IV. PROTECTIONS FOR SPEECH AND THEIR IMPLICATIONS FOR LOCAL REGULATION

Speech protections established by the First Amendment may impede local governments' development of innovative regulatory approaches for the food system. The freedom of speech clause in the First Amendment protects against government interference with the right to expression.³² Judicial interpretation of this guarantee has resulted in the bestowal of extensive speech rights to corporations, and these rights have important implications for communications between food system industries and the public.

At its core, the First Amendment protects the "free exchange of ideas,"³³ which traditionally takes the form of political and religious speech.³⁴ This core speech is strictly protected against government restriction; government regulations in this context thus rarely survive judicial scrutiny.³⁵ A second

31. Interestingly, while businesses within the food system can initiate lawsuits to address perceived wrongs by localities, nearly half of the U.S. states have passed industry-backed legislation to prevent food and beverage manufacturers from being subject to certain types of litigation. In other words, while businesses within the food system can serve as plaintiffs in litigation, twenty-four states have limited the context in which some of these businesses can be defendants in a lawsuit. TRUST FOR AMERICA'S HEALTH, SUPPLEMENT TO "F AS IN FAT: HOW OBESITY POLICIES ARE FAILING IN AMERICA" (2007). The laws that immunize these businesses from certain lawsuits, known as "cheeseburger bills" or "commonsense consumption laws," gained traction in the mid-2000s. This type of legislation was initially enacted in response to litigation brought in New York against a fast food restaurant by two teenagers who claimed the restaurant's food caused them to develop health problems such as obesity and diabetes. Mello et al., *supra* note 10. The plaintiffs argued that the restaurant had violated New York's consumer protection laws, through advertisements that falsely suggested its food was "nutritionally beneficial and part of a healthy lifestyle if consumed daily" and failure to properly disclose that, due to food processing, some of its food was "substantially less healthy than represented." *Pelman v. McDonald's Corp.*, 396 F. Supp. 2d 439, 442 (S.D.N.Y. 2005). As an immediate response, industry organizations, including the National Restaurant Association and its state affiliates, began to work directly with legislators throughout the country to introduce legislation that would immunize food and beverage manufacturers from facing these types of lawsuits. Melanie Warner, *The Food Industry Empire Strikes Back*, N.Y. TIMES, July 7, 2005.

32. U.S. CONST. amend I.

33. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002).

34. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

35. In 2010, the U.S. Supreme Court expanded the political speech rights of corporations, making them more similar to the rights of actual persons to participate in political speech. The groundbreaking case of *Citizens United v. Federal Election Commission* made it possible for corporations to spend unlimited money on advertising to support or oppose candidates during elections. 558 U.S. 310 (2010). For example, businesses can now fund political commercials to encourage the election of candidates who support the deregulation of products or oppose

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category of speech, “commercial speech,” is generally defined as “speech that proposes a commercial transaction,”³⁶ and is a fairly recent construction by the U.S. Supreme Court.³⁷ The majority of commercial speech cases involve industry challenges to restrictions on advertisements for products and services. The Supreme Court has said that commercial speech restrictions garner “intermediate” judicial scrutiny, meaning any restriction must directly advance a substantial government interest.³⁸ The Court has not upheld a commercial speech restriction since 1995,³⁹ and recent cases indicate increased protection for commercial speech than in the past.⁴⁰

Businesses value their right to communicate with the public to effectively market their products. When government seeks to shield children or the general public from communications that involve products with the potential to cause public health harms, the impacted industry will sometimes challenge the law on First Amendment grounds. For example, in the pivotal case *Lorillard v. Reilly*,⁴¹ the tobacco industry challenged a Massachusetts law that sought to restrict tobacco advertising on billboards within 1,000 feet of child-oriented places (e.g., schools), among other requirements. Importantly, tobacco is a product that children cannot legally purchase, whereas children can legally purchase any food product.⁴² The Supreme Court struck down the advertising restrictions as violating the First Amendment rights of tobacco companies to communicate with adults and the corresponding rights of adults to receive such information.⁴³ There has not been similar litigation in the context of food advertisements or similar products that children can legally purchase. However, the Supreme Court has explained that it is skeptical when government seeks to “keep people in the dark for what the government believes to be their own good.”⁴⁴

the increase in minimum wage standards, in direct opposition to public health interests. Lainie Rutkow, Jon S. Vernick & Stephen P. Teret, *The Potential Health Effects of Citizens United*, 362 *NEW ENG. J. MED.* 1356 (2010).

36. *Bd. of Trustees of the State U. of New York v. Fox*, 492 U.S. 469, 482 (1989).

37. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

38. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

39. *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

40. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); see also Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court’s Threat to Overhaul the Commercial Speech Doctrine*, 45 *LOY. L.A. L. REV.* 389 (2012).

41. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

42. Cf. James G. Hodge, Jr. et al., *New Frontiers in Obesity Control: Innovative Public Health Legal Interventions*, ___ *DUKE F. L. & SOC. CHANGE* ___ (forthcoming 2013).

43. *Lorillard*, 533 U.S. 525.

44. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995).

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The food industry markets food products consistent with its perceived First Amendment rights, arguing that efforts to restrict this speech, including government-sponsored voluntary recommendations, violate the First Amendment.⁴⁵ Therefore, if a local government attempted to restrict food marketing to children within its jurisdiction, for example, the industry would likely argue that the law violates its right to advertise to children. Several decades ago, the Supreme Court found that government's interest in protecting children is substantial and sometimes trumps industries' First Amendment rights,⁴⁶ but recent cases in the core speech context throw this precedent into question.⁴⁷ Given the evolving precedent in this area, local governments that seek to regulate the advertising or promotion of food products must craft the ordinance to ensure that it can withstand First Amendment challenges.⁴⁸

Notably, the First Amendment does permit government to require industries that put products into the commercial marketplace to disclose necessary factual information about those products. These requirements are subject to a much less demanding test than laws that restrict speech.⁴⁹ Specifically, factual commercial disclosure requirements need only be reasonably related to a valid government interest.⁵⁰ The ability of government to require factual disclosures in the commercial context is the underpinning of familiar regulations such as the menu labeling regulations discussed above and the NLEA, which requires the disclosure of an ingredient list and nutrition facts panel on packaged foods and beverages.⁵¹ Factual disclosure requirements are a valid government tool to protect and inform consumers consistent with the First Amendment.⁵²

45. Letter from James H. Davidson, Executive Director, Alliance for Am. Advertising, to Donald S. Clark, Secretary, Federal Trade Commission, Interagency Working Group on Food Marketed to Children: General Comments and Proposed Marketing Definitions: FTC Project No. P094513 (July 14, 2011), available at http://www.aaaa.org/advocacy/gov/news/Documents/071511_comments_food.pdf.

46. *Ginsberg v. New York*, 390 U.S. 629 (1968).

47. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729 (2011); *FCC v. Fox Television Stations Inc.*, 131 S. Ct. 3065 (2011).

48. ChangeLab Solutions, *Healthier Toy Giveaway Meals: A Legal Q&A* (2012), <http://changelabsolutions.org/publications/healthier-toy-giveaway-meals-legal-qa> ("In order to maintain the regulatory focus on business practices, it is important that toy giveaway laws be drafted to govern the practice of giving away the toy itself rather than governing advertising for the toys or meals.").

49. *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985).

50. *Milavetz v. United States*, 130 S. Ct. 1324 (2010).

51. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified in part at 21 U.S.C. §§ 343(i), (q) and (r)).

52. Cf. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

V. THE EFFECT OF PREEMPTION ON LOCAL REGULATION

State lawmakers can quash local policy innovation through a legal tool known as preemption. Preemption occurs when a higher level of government prevents a lower level of government from acting in a certain area.⁵³ Industries have pressured state-level legislators to halt these local efforts by arguing that it is difficult to comply with a “patchwork” of varied laws among different localities in the same state.⁵⁴ Preemption has implications for regulation of the broader food system, including for example the use of pesticides, which can potentially contaminate water, soil, and food, and lead to direct exposures. Supported by lobbying from the U.S. chemical and other impacted industries, forty-one states have passed laws that prevent localities from implementing their own rules to restrict the use of pesticides on private property.⁵⁵ Although some state legislators, such as those in California and Connecticut, have attempted to repeal their pesticide preemption laws and allow localities to implement stricter pesticide policies, these efforts have not been successful to date.⁵⁶

While preemption may limit local innovation, at least one city has successfully employed a novel legal theory to argue that state preemption unconstitutionally violates local authority. In early 2011, the Cleveland City

(finding that Vermont failed to offer a valid government interest for requiring disclosure of rbGH on milk products). This case serves as a reminder to government entities that disclosure requirements must be based on government interests accepted by the courts. Commonly upheld objectives include preventing deception and providing accurate information about products and services to protect and inform consumers. See also *United States v. United Foods*, 533 U.S. 405 (2001) (holding that the government cannot require an industry to subsidize viewpoints contrary to its own). This case provides a nice distinction between compelled disclosure of facts, which is permitted under the First Amendment, and coerced commercial speech about subjective topics, which is not consistent with the Constitution. Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: the Case of Menu Label Laws*, 12 *J. HEALTH CARE L. & POL’Y* 159 (2009).

53. Pertschuk et al., *supra* note 13; Rutkow et al., *supra* note 4.

54. E.g., Stephanie Strom, *Local Laws Fighting Fat Under Siege*, *N.Y. TIMES*, July 1, 2011, at B1, available at http://www.nytimes.com/2011/07/01/business/01obese.html?pagewanted=all&_r=0 (“Public health advocates worry that the new laws will stall a movement among cities and counties that are putting in place a wide range of policies and tools aimed at stemming the rising tide of obesity among their residents. . . . Towns and cities . . . often serve as laboratories where new policies can be tested and tweaked, to develop public support that then unfolds across states and even nationally.”).

55. BEYOND PESTICIDES, STATE PREEMPTION LAWS (May 2010), <http://www.beyondpesticides.org/lawn/factsheets/Preemption%20Factsheet.pdf>; Golf Course Superintendents Ass’n Am., *State Preemption of Local Pesticide Ordinances* (Jan. 30, 2012), <http://www.gcsaa.org/Community/Government-Relations/Pesticide-Laws-and-Regulations.aspx#preemption> (last visited Dec. 12, 2012).

56. E.g., A.B. 977, 2008 Leg., Reg. Sess. (Cal. 2008); S.B. 244, 2011 Leg., Reg. Sess. (Conn. 2011).

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Council banned the use of trans fats by local restaurants.⁵⁷ A few months later, the Ohio Restaurant Association worked with Ohio legislators to draft a bill with sweeping preemptive provisions that prohibited localities from regulating restaurants' displays of nutritional information, advertising practices, use of ingredients, and provision of toys with children's meals.⁵⁸ The preemption provisions, which became law through an amendment to the state's budget bill, simultaneously prevented localities from enacting many types of obesity prevention measures and fostered a self-regulatory environment for the food industry.⁵⁹ With local regulatory action preempted, the food industry in Ohio had an amplified ability to behave in ways that might increase profits while harming the public's health (e.g., through use of cheap, unhealthful ingredients such as trans fats).

To contest this extensive preemption and nullification of its trans fat ban, the city of Cleveland initiated litigation, arguing that the state legislature's budget bill amendment was unconstitutional and that the local trans fat ban was "a proper exercise of [Cleveland's] home rule authority."⁶⁰ According to Cleveland's motion for summary judgment, the Ohio Constitution states: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws."⁶¹ Relying on this broad grant of authority, in the early 20th century,

57. CLEVELAND, OHIO, CODE § 241.42(a) (2011) ("No foods containing industrially-produced trans fat, as defined in this section, shall be stored, distributed, held for service, used in preparation of any menu item or served in any food shop . . . except food that is being served directly to patrons in a manufacturer's original sealed package.").

58. Ohio Restaurant Ass'n, *ORA Amendment Would Preempt Local Governments from Regulating Restaurants* (2011), http://www.ohiorestaurant.org/aws/ORA/pt/sd/news_article/44483/_PARENT/layout_details>true.

59. H.B. 153, § 3717.53(3)(C), 129th Gen. Assemb., Reg. Sess. (Ohio 2011), available at http://www.legislature.state.oh.us/BillText129/129_HB_153_EN_N.html ("No political subdivision shall do any of the following: (1) Enact, adopt, or continue in effect local legislation relating to the provision or nonprovision of food nutrition information or consumer incentive items at food service operations; (2) Condition a license, a permit, or regulatory approval on the provision or nonprovision of food nutrition information or consumer incentive items at food service operations; (3) Ban, prohibit, or otherwise restrict food at food service operations based on the food nutrition information or on the provision or nonprovision of consumer incentive items; (4) Condition a license, a permit, or regulatory approval for a food service operation on the existence or nonexistence of food-based health disparities; (5) Where food service operations are permitted to operate, ban, prohibit, or otherwise restrict a food service operation based on the existence or nonexistence of food-based health disparities as recognized by the department of health, the national institute of health, or the centers for disease control.").

60. Plaintiff's Motion for Summary Judgment at 34, *City of Cleveland v. State of Ohio*, Case No. CV 12 772529 (2012).

61. OHIO CONST. art. XVIII, § 03.

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the city adopted a charter that states, “the City of Cleveland . . . may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the City The city shall have all powers that now are, or hereafter may be granted to municipalities by the Constitution or laws of Ohio”⁶² In 1931, Cleveland amended its charter to explicitly state that the city could enforce laws concerning public health.⁶³

The city argued that its 2011 trans fats ban was consistent with its charter because it addressed “a threat to the public health.”⁶⁴ Because the Ohio Constitution clearly gives municipalities the authority to develop their own regulations to protect the public’s health in accordance with their police powers, the city argued, the Ohio legislature had unconstitutionally preempted Cleveland’s trans fat ban with its budget bill amendment. The State of Ohio argued in its motion for summary judgment that while its amended budget bill would preempt the Cleveland trans fat ban, this was not an unconstitutional action. According to the State of Ohio, the amendment, *inter alia*, “clarif[ies] what Ohio law has established for decades: that sole, exclusive, rulemaking authority over Ohio’s restaurants and retail food establishments in the areas of food nutrition labeling and food safety resides with the Ohio Department of Health and the Ohio Department of Agriculture.”⁶⁵

In June 2012, an Ohio state judge ruled that Ohio’s state-level preemption provisions were an unconstitutional effort to prevent Cleveland from using its home rule powers.⁶⁶ Advocates have noted the importance of the decision, as it has the potential to “further the national conversation about the responsibility of local governments to address public health crises in their communities. . . . It’s about putting the conduct of municipal affairs in the hands of those who know the needs and conditions of their communities.”⁶⁷ Although the decision is limited to Ohio and is being appealed by the state—making its future uncertain—it highlights a possible avenue for local

62. CLEVELAND, OHIO, CHARTER § 1 (2012).

63. *Id.* § 114.

64. Plaintiff’s Motion for Summary Judgment at 6, *City of Cleveland v. State of Ohio*, Case No. CV 12 772529 (2012).

65. Defendant’s Motion for Summary Judgment at 1, *City of Cleveland v. State of Ohio*, Case No. CV 12 772529 (2012).

66. Cuyahoga County Clerk of Courts Website, http://cpdocket.cp.cuyahoga-county.us/p_Search.aspx (last visited Dec. 8, 2012) (search by case number 772529); see Joe Palazzolo, Judge Gets Behind Cleveland’s Trans Fat Ban, *WALL ST. J.* (June 13, 2012, 11:12 AM), <http://blogs.wsj.com/law/2012/06/13/judge-gets-behind-clevelands-trans-fat-ban/>.

67. Stephanie Strom, Judge Rules Restaurant Law Stifles Ohio Cities, *N.Y. TIMES*, June 13, 2012, at B4, available at http://www.nytimes.com/2012/06/13/business/judge-rules-restaurant-law-unfair-to-ohio-cities.html?_r=0 (quoting Samantha Graff, Research Director, ChangeLab Solutions).

governments with home rule authority to defend a public health ordinance from state-level preemption.

VI. OPPORTUNITIES FOR REGULATORY INNOVATION BY LOCAL GOVERNMENTS

When localities regulate food system industries, they must consider a variety of factors that determine the legality of their actions. These include limitations imposed by the First Amendment and the possibility of federal or state-level preemption.⁶⁸ However, localities can introduce new and innovative regulatory approaches to the broader policy community and influence regional, state, and even national laws.⁶⁹ Localities should, however, carefully fashion their ordinances and regulations to withstand potential legal challenges.

A. Using Police Powers to Protect the Public's Health

Because some states grant localities broad home rule authority and accompanying police powers to protect the health and safety of their residents, localities like the city of Cleveland have been able to defend ordinances and regulations facing state-level preemption.⁷⁰ A related example arose from an ordinance passed by the Board of County Commissioners in Linn County, Missouri, to regulate concentrated animal feeding operations ("CAFOs"). In 1997, the County Commissioners passed a health-related ordinance that imposed requirements on CAFO owners to avoid contamination of soil, water, and air.⁷¹ Jeremy and Janice Borron sought to establish a CAFO in Linn County, and they brought a lawsuit arguing that the county ordinance was preempted by a Missouri state law that regulated the zoning of CAFOs.⁷²

A Missouri appellate court found in favor of Linn County, concluding that state law did not preempt the ordinance. First, the court noted that the

68. See *supra* Parts III & IV.

69. See *infra* Part VI.B.

70. Palazzolo, *supra* note 66.

71. *Borron v. Farrenkopf*, 5 S.W.3d 618, 620 (Mo.App. 1999). The ordinance stated that it was enacted in accordance with the following provision of Missouri state law: "The county commissions and the county health center boards of the several counties may make and promulgate orders, ordinances, rules or regulations, respectively as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county, but any orders, ordinances, rules or regulations shall not be in conflict with any rules or regulations authorized and made by the department of health and senior services in accordance with this chapter or by the department of social services." MO. REV. STAT. § 192.300 (2012).

72. MO. REV. STAT. § 64.620.

ordinance had a clear connection to health, as it regulated “structures and lagoons of [the Borron’s] hog facility, including distance requirements of animal waste from streams, water supply and buildings occupied by people.”⁷³ Second, the court found that Linn County’s ordinance was a health rather than a zoning ordinance. Thus, it was not preempted because state law allowed localities to impose additional health-related requirements on CAFOs.⁷⁴ Importantly, state courts vary in their interpretations of this type of argument. For example, in 2004 the Iowa Supreme Court concluded that, although a county argued that its CAFO ordinance was passed to address public health concerns, state law that regulated CAFOs preempted the ordinance.⁷⁵ Such state-specific variation underscores the need for localities to consult lawyers familiar with their state’s jurisprudence regarding local authority to protect the public’s health.

B. Filling Regulatory Gaps

Even when federal or state laws preempt localities from acting, opportunities may exist to use innovative policy approaches to fill remaining gaps. One example of this type of opportunity has arisen from federal menu-labeling legislation. With the passage of the Patient Protection and Affordable Care Act (“ACA”) in 2010, the U.S. Congress required restaurants with twenty or more locations to provide calorie information about their foods on menus and menu boards.⁷⁶ Menus must include an anchor statement, such as “an average person should consume 2,000 calories each day.”⁷⁷ Additional nutrition information must be made available if a customer requests it. Restaurants that are not covered by the ACA’s menu-labeling provisions (i.e., those with fewer than twenty locations) can choose to opt in and comply with the ACA requirements. States and localities cannot impose different nutrition labeling requirements on restaurants that are covered by the ACA or those that opt in.⁷⁸

Despite this federal preemption, substantial room remains for localities to

73. Borron, 5 S.W.3d at 622.

74. William C. Ellis, *Pig in a Poke: Missouri Draws Tenuous Line Between Public Health and Zoning Ordinances in Allowing County Regulation of Concentrated Animal Feeding Operations*, 8 MO. ENVTL. L. & POL’Y REV. 29, 34–35 (2001) (“The Borron Court implied that the test for whether an ordinance is related to zoning or health is whether the purpose of the ordinance is to regulate for health concerns rather than for a uniform development of real estate.”).

75. *Worth County Friends of Agric. v. Worth County*, 688 N.W.2d 257 (Iowa 2004).

76. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 4205 (2010) (to be codified at 21 U.S.C. § 343(q)(5)).

77. *Id.*

78. *Id.* § 4205(c).

develop innovative approaches to help consumers receive nutritional information about foods they consume outside of the home. For example, localities may introduce menu-labeling regulations for restaurants that have fewer than twenty locations. They can enact ordinances or regulations that require these restaurants to post calories as well as additional nutrition information (e.g., information about sodium, trans fat, sugar, cholesterol). Localities could require display of this information on menus and menu boards in ways that would help consumers better understand the information (e.g., listing items on a menu from lowest calorie content to highest calorie content).⁷⁹ Because the ACA does not impose menu-labeling requirements on non-restaurant establishments, such as movie theaters and bowling alleys,⁸⁰ localities might also consider introducing menu labeling regulations for these entities. If localities do pioneer these types of regulatory approaches for menu labeling, they can work with researchers to conduct evaluations that analyze whether the regulations are associated with healthier eating decisions among consumers.⁸¹ These findings can then serve as an evidence base for other localities considering similar regulations.

C. Introducing Novel Regulatory Approaches

Menu labeling has also become a quintessential example of how local innovation can influence national policy. Initially, in the mid-2000s, a handful of localities including New York City and King County, Washington introduced menu-labeling regulations.⁸² Over the course of approximately five years, the concept of providing consumers with nutrition information while dining out garnered attention from policy-makers at the national level.

79. See Peggy J. Liu, Christina A. Roberto, Linda J. Liu & Kelly D. Brownell, A Test of Different Menu Labeling Presentations, 59 *APPETITE* 770, 775 (2012) (“[T]he findings from this study suggest that presenting menu items with calorie information ordered from low to high values might be more likely to lead consumers to make healthier choices than presenting the information in no particular order.”).

80. U.S. Food & Drug Admin., Questions and Answers on the New Menu and Vending Machines Nutrition Labeling Requirements (last updated Nov. 16, 2012), <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm248731.htm>.

81. E.g., Brian Elbel, Rogan Kersh, Victoria L. Brescoll & L. Beth Dixon, Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City, 28 *HEALTH AFF. W1110* (2009); Tamara Dumanovsky, Christina Y. Huang, Mary T. Bassett & Lynn D. Silver, Consumer Awareness of Fast-Food Calorie Information in New York City After Implementation of a Menu Labeling Regulation, 100 *AM. J. PUB. HEALTH* 2520 (2010); Pooja S. Tandon et al., The Impact of Menu Labeling on Fast-Food Purchases for Children and Parents, 41 *AM. J. PREVENTIVE MED.* 434 (2011).

82. Rutkow et al., *supra* note 4; Press Release, King County Board of Health, Menu Labeling, Trans Fat Ban Approved by the Board of Health (July 19, 2007), available at <http://www.kingcounty.gov/healthservices/health/news/2007/07071901.aspx>.

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It is now codified into federal law.⁸³ While this national adoption of innovative local regulations may not routinely occur, it nicely illustrates the diffusion of a regulatory approach that originated at the local level.

Localities have repeatedly crafted new regulatory approaches to promote public health goals such as healthier eating. For example, in 2010, California's Santa Clara County became the first locality in the country to enact legislation that restricted restaurants' ability to link toys or other "incentive items" (e.g., trading cards) to food purchases.⁸⁴ Specifically, restaurants in the county are prohibited from providing toys with meals that contain excessive calories, sodium, fat, or sugars.⁸⁵ Violators face fines and penalties. Santa Clara County introduced this innovative idea "to improve the health of children and adolescents in the county by setting healthy nutritional standards for children's meals accompanied by toys or other incentive items."⁸⁶ One preliminary evaluation found that the ordinance was associated with restaurants' promotion of healthier foods, but restaurants did not increase the total number of healthier items they offered.⁸⁷ Even if this did not turn out to be the most successful measure, it spurred a national discussion about the healthfulness of restaurant meals marketed to children using incentive items.

San Francisco passed a similar ordinance in 2010,⁸⁸ and other jurisdictions have contemplated adopting such measures,⁸⁹ or variations on the idea.⁹⁰ For these ordinances to withstand legal challenges, particularly those that argue they violate the First Amendment by restricting commercial speech, they must be prudently drafted. For example, experts in public health law recommend that toy ordinances mention "the practice of giving away the toy

83. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 4205 (2010) (to be codified at 21 U.S.C. § 343(q)(5)).

84. SANTA CLARA COUNTY, CAL., CODE §§ A18-350 to A18-356 (2010), available at <http://library.municode.com/index.aspx?clientId=13790>.

85. The ordinance provides definitions of what constitutes "excessive" calories, sodium, fats, and sugars. *Id.* § A18-351.

86. *Id.* § A18-350.

87. Jennifer J. Otten et al., Food Marketing to Children Through Toys: Response of Restaurants to the First U.S. Toy Ordinance, 42 AM. J. PREVENTIVE MED. 56 (2012). But see Rachel Gordon & John Wildermuth, Burger King Joins McDonald's in Charging for Kids' Meal Toys, S.F. CHRON., Dec. 1, 2011 (noting that McDonald's and Burger King circumvented the San Francisco toy ordinance by charging a small fee, e.g., 10 cents, to have a toy included with a meal).

88. S.F., CAL., HEALTH CODE, art. 8, §§ 471.1–471.9 (2010).

89. E.g., Margery A. Beck, Neb. Bill Would Ban Toys in Fast-Food Kids' Meals, ASSOCIATED PRESS, Feb. 1, 2011.

90. The New Haven Food Policy Council worked with a Clinic at Yale Law School to develop a healthy default ordinance for New Haven, which did not ultimately pass.

itself rather than governing advertising for the toys or meals.”⁹¹ Thus, a locality should not frame its ordinance as one pertaining to speech; rather, the focus should remain on promoting healthier eating, particularly for children. These strategic considerations are important, as industry is likely to view localities’ new regulatory approaches with suspicion.⁹²

VII. CONCLUSION

Law can serve as a powerful tool to develop a healthful eating environment and to design policies to promote sustainability within the food system. The use of novel legal approaches on multiple fronts (i.e., legislation, regulation, and litigation) will be critical as policy-makers seek to identify strategies to accomplish these goals. Given their traditional role as policy innovators due to their typically broad regulatory powers, local governments are uniquely positioned to design and implement new legal strategies. They can rely upon their police powers to regulate for public health purposes, fill regulatory gaps, and introduce novel policy approaches to challenges within the food system. Evaluations of these strategies can then inform policy-making at the state and federal levels, as well as the actions of other localities.

Despite significant regulatory authority, localities face constraints imposed by the First Amendment and preemption by state or federal laws. Localities can address these issues in several ways. To avoid possible First Amendment challenges, they can consult with lawyers regarding the language and scope of a proposed ordinance or regulation. In addition, they can monitor and respond to preemption bills introduced in their state. This can be accomplished by tracking active bills through their state legislature’s website, meeting with legislators or their staff, or testifying at relevant hearings about the potential public health harms of preemptive legislation. By anticipating and addressing these types of barriers, local governments can develop and ultimately implement innovative legal strategies intended to mitigate public health harms and establish a stronger regulatory environment

91. ChangeLab Solutions, Healthier Toy Giveaway Meals: A Legal Q&A, <http://changelabsolutions.org/publications/healthier-toy-giveaway-meals-legal-qa> (last visited Dec. 9, 2012); CHANGE LAB SOLUTIONS, MODEL ORDINANCE FOR TOY GIVEAWAYS AT RESTAURANTS (Sep. 2012), available at <http://changelabsolutions.org/publications/healthier-toy-giveaway-meals>.

92. E.g., Rachel Gordon, S.F. Proposal: Healthier Kids Meals or No Toys, S.F. CHRON., Aug. 11, 2010, available at <http://www.sfgate.com/restaurants/article/S-F-proposal-Healthier-kids-meals-or-no-toys-3256451.php> (“The San Francisco Board of Supervisors seems to have an insatiable appetite for punishing the restaurant industry . . .,” said Daniel Conway, director of public affairs for the California Restaurant Association. “Toy bans are only proven to disappoint kids, frustrate parents and generate headlines for ambitious politicians.”).

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for the food system.

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