Notes

THE PROBLEMS OF POURING-RIGHTS CONTRACTS

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INTRODUCTION

Commercial activities abound in public schools. These activities range from direct advertisements to product sales, from instructional materials to market research.[1] This Note examines one type of commercial activity: soft-drink sales through pouring-rights contracts in public schools. Pouring-rights contracts refer to "large payments from soft-drink companies to [schools or] school districts in return for the right to sell that company's products—and only those products."[2] The legal response to these contracts is a tattered patchwork of local, state, and federal regulations.[3]

This Note argues that pouring-rights contracts cause several problems, and that these problems demand a legal solution. Principally, they harm students by encouraging the frequent consumption of soft drinks, which increases obesity. These contracts also undermine the integrity of public education by using compulsory education laws to expose children to unhealthy soft drinks, they dilute the curriculum by discouraging soft-drink consumption in nutrition classes while encouraging soft-drink consumption the rest of the day,

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1. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, PUBLIC EDUCATION: COMMERCIAL ACTIVITIES IN SCHOOLS 3 (2000) (using this taxonomy to identify and describe the laws and policies that governed commercial activities in public schools between November 1999 and August 2000).

2. MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 197 (2002).

3. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 10–13 (outlining various local, state, and federal regulations that govern the sale of soft drinks in public schools).

and they disproportionately affect poor communities that need funding from these contracts to provide basic educational services.

To solve these problems, and to mend the patchwork of regulation, this Note suggests a three-part solution: (1) federal action to remove the local incentive to sign pouring-rights contracts and to establish uniform standards; (2) fundamental changes in the current laws to restrict the sale of soft drinks in schools beyond current prohibitions; and (3) comprehensive action to address the underlying problem of the sale of soft drinks. Combining these elements, Part III suggests federal legislation that requires the U.S. Department of Agriculture (USDA) to eliminate current regulations and replace them with regulations that ban the sale of soft drinks and pouring-rights contracts in public schools. Before Part III advances this solution, Part I of this Note describes the milieu and details the problems of pouring-rights contracts, and Part II outlines the legal authority over these contracts.

I. MILIEU AND PROBLEMS

A. Milieu of Pouring-Rights Contracts

Commercial activities in public schools are not new. Schools used corporate-sponsored materials as early as 1890 when "a paint company developed a handout on primary and secondary colors for schools to distribute in their art classes."[4] In another example, the Coca-Cola Company sent booklets of its history and products to elementary schools in the 1970s, despite its then-stated policy that it would not advertise directly to children under twelve.[5] At present, commercial activities are ubiquitous.[6] Thus, while commercial activities in public schools are not new, "[w]hat is new today is the popularity of these practices and the wide range of businesses involved."[7]

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4. *Id.* at 5–6.

5. SHEILA HARTY, HUCKSTERS IN THE CLASSROOM: A REVIEW OF INDUSTRY PROPAGANDA IN SCHOOLS 38 (1979).

6. *See* Jason Vaughn, *Big Business and the Blackboard: A Winning Combination for the Classroom?*, J.L. & EDUC., Apr. 1997, at 35, 37 ("Nearly every school sports field is adorned with the advertisements of team sponsors, most school newspapers and yearbooks actively solicit for advertisements from the local community, and advertisements for high school rings and school apparel have been tolerated for years.").

7. Jeff I. Richards et al., *The Growing Commercialization of Schools: Issues and Practices*, 557 ANNALS AM. ACAD. POL. & SOC. SCI. 148, 149 (1998).

Three factors explain the recent popularity and increasing breadth of commercial activities in public schools. First, schools face severe budget shortfalls.[8] These shortfalls force schools to accept commercial activities to meet essential educational needs.[9] Second, children influence a large amount of money; for example, in 1999, children aged six through nineteen influenced $485 billion in spending.[10] These numbers are too big for companies to resist. Third, schools provide a unique commercial opportunity. Companies view schools, which confine children and restrict advertising, as one of few places where their activities can transcend the din of commercial advertising.[11] Moreover, companies can target children in schools more effectively than with more diffuse methods, such as television.[12] Thus, declining school budgets and significant youth spending combine with corporate strategy to explain the increase in commercial activities in public schools.

The best-known example of a commercial activity in public schools is Channel One.[13] Channel One "provides schools with more than $50,000 worth of televisions, video cassette recorders, and satellite dishes under the stipulation that the contracting school broadcast the twelve minute Channel One news program to its

8. *See, e.g.*, David Pierson, *Pressure Builds for Burbank School Board*, L.A. TIMES, May 1, 2002, at B4.

9. *See* Anand Vaishnav, *Budget Cuts May Affect Classrooms*, BOSTON GLOBE, Mar. 3, 2002, at B9 ("[W]ith shrinking state revenues, schools now have to make due [sic] with less—and make tough choices as proposed budget cuts loom.").

10. NESTLE, *supra* note 2, at 176; *see also* Joe L. Kincheloe, *McDonald's, Power, and Children: Ronald McDonald (aka Ray Kroc) Does It All for You*, *in* KINDERCULTURE: THE CORPORATE CONSTRUCTION OF CHILDHOOD 249, 255 (Shirley R. Steinberg & Joe L. Kincheloe eds., 1997) (noting that children influence $82 billion in food and drink purchases per year).

11. *See* Alex Molnar, *Colonizing Our Future: The Commercial Transformation of America's Schools*, Education Policy Studies Laboratory, *at* http://www.asu.edu/educ/epsl/CERU/Documents/cace-00-01.htm (Mar. 2000) (on file with the *Duke Law Journal*) ("Apart from places of worship, schools are perhaps the most uncluttered ad environment in our society.").

12. *Id*.

13. Channel One is important to a discussion of pouring-rights contracts because judicial opinions on the legality of Channel One articulate the courts' acceptance of commercial activities in public schools. For a discussion of these opinions, see *infra* notes 116–126 and accompanying text.

students ninety-five percent of school days."[14] Two of the twelve minutes must consist of advertisements.[15]

The topic of this Note—soft-drink sales through pouring-rights contracts—is another example of a commercial activity. The sale of soft drinks in public schools has been around for decades.[16] Pouring-rights contracts have also been around for decades, often used to finance sports stadiums.[17] However, pouring-rights contracts in public schools are a relatively recent innovation. They began in the early 1990s when soft-drink companies signed exclusive deals with universities.[18] After universities, soft-drink companies targeted elementary, middle, and high schools.[19] Consequently, in less than ten years, soft drink "contracts granting exclusive sales and advertising rights appear to be replacing informal arrangements between vendors and school officials" as the means by which public schools sell soft drinks.[20] In other words, soft-drink sales through pouring-rights contracts are relatively recent, but their prevalence and impact is growing rapidly.

Those factors that explain the growth in commercial activities also explain the growth of pouring-rights contracts—namely, shrinking school budgets, rising youth spending, and a corporate strategy that targets children at school. Two additional factors help explain the growth of pouring-rights contracts in schools. First, soft drinks, with a low-unit cost and a need for constant replacement,

14. Christina Lee Dasinger, *Students for Sale: The Regulation of Televised Commercial Advertising in Public Schools*, 20 LAW & PSYCHOL. REV. 197, 197 (1996).

15. Cynthia Newsome, Note, *Pay Attention: A Survey and Analysis of the Legal Battle over the Integration of Forced Television Advertising into the Public School Curriculum*, 24 RUTGERS L.J. 281, 292 (1992).

16. *See* NESTLE, *supra* note 2, at 207 ("By the late 1960s, coin-operated vending machines selling soft drinks and snacks were already well established in schools.").

17. *See* Ralph C. Anzivino, *Reorganization of the Professional Sports Franchise*, 12 MARQ. SPORTS L. REV. 9, 58 (2001) ("Pouring rights are negotiated locally and each team receives the revenue from such a contract right."); Matthew J. Parlow, *Publicly Financed Sports Facilities: Are They Economically Justifiable? A Case Study of the Los Angeles Staples Center*, 10 U. MIAMI. BUS. L. REV. 483, 504 (2002) ("Teams or local governments derive revenue from concessions in one of three ways: charging royalties based on sales, charging a fixed fee not based on sales, or a combination of the two.").

18. *See, e.g.*, *Rutgers Sells Vending Rights to Coca-Cola*, N.Y. TIMES, Sept. 1, 1994, at B9.

19. *See* NESTLE, *supra* note 2, at 202 ("Pouring-rights contracts emerged as a particularly effective marketing strategy.").

20. U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 18.

require a marketing strategy called intensive distribution.[21] Intensive distribution attempts to saturate the market, "enabling the consumer to purchase soft-drink beverages with a minimum of effort."[22] Thus, intensive distribution of soft drinks aimed at children must include schools, where children spend a substantial amount of their time. Second, soft-drink companies thrive on consumer brand loyalty.[23] Thus, soft-drink companies that attempt to build brand loyalty as young as possible must target schools.

Pouring-rights contracts represent the fastest growing area of product sales in schools.[24] According to the most recent study,[25] nearly one-third of public school districts have a pouring-rights contract with a soft-drink company.[26] These contracts vary widely, ranging from a single school with a one-year contract to a consortium of districts with a ten-year contract.[27]

B. Educational Problems

Pouring-rights contracts endanger education in three ways. First, they undermine the integrity of compulsory education laws.[28] The purpose of these laws is "to produce citizens who can think critically

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21. RONALD D. MICHMAN & EDWARD M. MAZZE, THE FOOD INDUSTRY WARS: MARKETING TRIUMPHS AND BLUNDERS 236 (1998).

22. *Id*.

23. Julie Johnson Bradford, *Pop or Hops?*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 6, 2002, at WUP18 ("The soft drink industry knows if they capture consumers when they are kids, they stand a good chance of keeping them when they are older.").

24. U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 16.

25. U.S. DEP'T OF AGRIC., THE SCHOOL MEALS INITIATIVE IMPLEMENTATION STUDY: THIRD YEAR REPORT xiii–xiv (2002) (sampling 2,325 school districts, which created a "nationally representative sample of public school food authorities (SFAs) participating in the [National School Lunch Program]").

26. *Id.* at xxii; *see also* U.S. DEP'T OF AGRIC., CHILDREN'S DIETS IN THE MID-1990S: DIETARY INTAKE AND ITS RELATIONSHIP WITH SCHOOL MEAL PARTICIPATION 159 (2001) ("Most schools offer children the option of purchasing a la carte items outside the regular school meal.").

27. U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 16. Although these contracts are widespread, the sale of soft drinks in public schools accounts for just over one percent of Coca-Cola's North American business. Betsy McKay, *Coke Finds Its Exclusive School Contracts Aren't So Easily Given Up*, WALL ST. J., June 26, 2001, at B1.

28. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-802 (West 2002) (requiring "[e]very child between the ages of six and sixteen years" to attend school); N.J. STAT. ANN. § 18A:38-25 (West 1999) (stating that "[e]very parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend" public or private schools).

and participate in democracy."[29] Pouring-rights contracts thwart this purpose by using compulsory education law to force children to be exposed to soft drinks.[30] In other words, soft-drink companies take advantage of compulsory education laws that were meant to produce critical citizens by transforming public schools from institutions of learning into commercial environments. Some commentators couch this criticism as violating the schools' *in loco parentis* responsibility[31] or violating the students' liberty interest.[32] Indeed, these are some of the theories advanced by critics of pouring-rights contracts as potential grounds for litigation.[33]

Second, pouring-rights contracts dilute the effect of a school's curriculum. Specifically, the sale of soft drinks in schools contravenes the lessons of nutrition classes by promoting a healthy diet in class and then permitting children to consume unhealthy soft drinks when they are not in class.[34] This contravention is particularly dangerous because students perceive soft drinks sold in school as endorsed by the school.[35] In other words, pouring-rights contracts create a conflict between theory and practice. In theory, children are told to limit their consumption of soft drinks. But in practice, schools encourage

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29. MICHAEL F. JACOBSON & LAURIE ANN MAZUR, MARKETING MADNESS: A SURVIVAL GUIDE FOR A CONSUMER SOCIETY 37 (1995); *see also* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("There is no doubt as to the power of a State, having a high responsibility for *education* of its citizens, to impose reasonable regulations for the control and duration of basic education." (emphasis added)).

30. *Cf.* JACOBSON & MAZUR, *supra* note 29, at 36 ("[C]ompulsory attendance confers on educators an obligation to protect the welfare of their students and the integrity of the learning environment."); *see also* DERON BOYLES, AMERICAN EDUCATION AND CORPORATIONS: THE FREE MARKET GOES TO SCHOOL xiv–xv (1998) (arguing that commercial influences in schools "limit and reduce the capacities of students and teachers to be critical citizens").

31. *See* Newsome, *supra* note 15, at 289 ("Some opponents argue that this compromise [with commercial influences] represents a breach of the schools' special duty to protect children from danger while they are forced to be away from home.").

32. *See id.* (arguing that forcing children to become targets of commercial activities "is an unjustified intrusion into student liberty interests").

33. *See infra* notes 127–128 and accompanying text.

34. U.S. DEP'T OF AGRIC., FOODS SOLD IN COMPETITION WITH USDA SCHOOL MEAL PROGRAMS: A REPORT TO CONGRESS, *at* http://www.fns.usda.gov/cnd/Lunch/CompetitiveFoods/report_congress.htm (Jan. 12, 2001) (on file with the *Duke Law Journal*).

35. Linda Mae Carlstone, *A Lesson in Simple Arithmetic*, ADVERTISING AGE, Jan. 2, 1995, at 22 (reporting that marketers deliberately try to advertise in schools because there is an "implied endorsement from a trusted institution"); Richard Salit & Celeste Tarricone, *Soda Wars: Coke, Pepsi Pay Big for Sole Rights to Sell Soft Drinks in Schools*, PROVIDENCE J.-BULL., Mar. 14, 1999, at 1A ("School buildings lend credibility to soda machines and their products, and that's why soft drink companies are so eager to get their products inside them . . . .").

students to drink soft drinks because schools need the money that they derive from pouring-rights contracts.

Third, pouring-rights contracts can disproportionately affect poor communities. It is unclear whether companies target schools in poorer communities.[36] Nonetheless, districts most in need of funding are the first to succumb to the bargaining power of soft drink companies.[37]

C. Health Problems

Soft drinks are made from carbonated water, sugar, and flavors.[38] An average twelve-ounce soft drink "contains 40 grams of added sugar—and provides about 160 calories—but little else of nutritional value."[39] Soft-drink consumption contributes to many health problems, including obesity, osteoporosis, tooth decay, heart disease, kidney stones, and addiction.[40] This Note focuses on the contribution of soft drinks to obesity-related health problems.

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36. *Compare* U.S. DEP'T OF AGRIC., *supra* note 25, at xxii ("The share of districts under contract was . . . more prevalent among low-poverty districts than among high-poverty districts (35.0% versus 20.5%)."), *with* Newsome, *supra* note 15, at 312 ("The pattern of approval for Channel One demonstrates that local school boards, especially in poorer districts, are vulnerable to the lure of Channel One's free equipment."), *and* Michael Morgan, *Channel One in the Public Schools: Widening the Gaps*, at http://www.umass.edu/communication/resources/special_reports/channel_one/ch_one_report.shtml (Oct. 2003):

> [S]chools with the greatest concentration of low-income students are more than twice as likely (37.7% vs. 16.6%) as the schools with the wealthiest students to have Channel One. The data show a very strong and monotonic pattern: as community income levels drop, the proportion of schools receiving Channel One steadily rises . . . .

37. *See* Lisa Greene, *Bush Takes Aim at "Obesity Epidemic"*, ST. PETERSBURG TIMES, Oct. 16, 2003, at 1B ("Faced with state budget cuts, some school districts have embarked on exclusive contracts with soft drink companies that pay millions in exchange for putting drinks machines in schools."); Susan H. Thompson, *Bubble Trouble*, TAMPA TRIB., March 16, 2004, at 1 ("Amid sharp budget cuts for education, [some] school districts are relying on the quarters, nickels and dimes from students who buy soft drinks at school."); Joel Turner, *PTA Leaders Urge Schools to Curb Candy Sales*, ROANOKE TIMES & WORLD NEWS, April 15, 2003, at B3 ("Superintendent Wayne Harris said schools need the money from soft-drink sales to help pay for educational programs because of the state's budget crisis and the school district's financial crunch.").

38. Marion Nestle, *Soft Drink "Pouring Rights": Marketing Empty Calories*, PUB. HEALTH REP., July–Aug. 2000, at 308, 309 (noting that "diet sodas substitute artificial sweeteners for the sugar but are not currently consumed by children to any great extent").

39. *Id.*

40. *See generally* Michael F. Jacobson, *Liquid Candy: How Soft Drinks are Harming Americans' Health*, *at* http://www.cspinet.org/sodapop/liquid_candy.htm (last visited Dec. 30, 2002) (on file with the *Duke Law Journal*) (surveying the correlation between the consumption of soft drinks and various health problems). Several commentators have examined various

To appreciate the severity of obesity-related health problems, one must first understand the obesity crisis among America's youth.[41] The Surgeon General issued a "Call to Action" in 1999 when he reported that "61 percent of U.S. adults were overweight or obese, and 13 percent of children and adolescents were overweight."[42] These numbers were not always this large: "Today there are nearly twice as many overweight children and almost three times as many overweight adolescents as there were in 1980."[43]

Researchers estimate that 300,000 deaths per year in the United States are associated with obesity.[44] The relationship between obesity and death is multifarious: obesity "substantially raises [a person's] risk of morbidity from hypertension, dyslipidemia, type 2 diabetes, coronary heart disease, stroke, gallbladder disease, osteoarthritis, sleep apnea and respiratory problems, and endometrial, breast, prostate, and colon cancers."[45] There are also significant economic costs associated with obesity. The total cost attributable to obesity in 1995 was $99.2 billion;[46] in 2000, total costs rose to $117 billion.[47]

Soft-drink consumption contributes substantially to obesity-related health problems,[48] in large part because soft drinks are the

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health problems associated with the consumption of soft drinks. *See, e.g.*, Curtis R. Ellison et al., *Current Caffeine Intake of Young Children: Amount and Sources*, 95 J. AM. DIETETIC ASS'N 802 (1995) (dangers of increased caffeine consumption); Amid I. Ismail et al., *The Cariogenicity of Soft Drinks in the United States*, 109 J. AM. DENTAL ASS'N 241 (1984) (tooth decay); Grace Wyshak & Rose E. Frisch, *Carbonated Beverages, Dietary Calcium, the Dietary Calcium/Phosphorus Ratio, and Bone Fractures in Girls and Boys*, 15 J. ADOLESCENT HEALTH 210 (1994) (bone fractures).

41. The Surgeon General and most researchers use the Body Mass Index (BMI) to define overweight and obesity. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 4 (2001). BMI is a measure of weight in relation to height. *Id.* An adult with a BMI of 30 kg/m^2 or greater is considered obese while an adult with a BMI between 25 kg/m^2 and 29.9 kg/m^2 is considered overweight. *Id.* This Note uses the term "obese" to refer to both groups.

42. *Id.* at xiii.

43. *Id.*

44. David B. Allison et al., *Annual Deaths Attributable to Obesity in the United States*, 282 JAMA 1530, 1530 (1999).

45. NAT'L INST. OF HEALTH, CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS: THE EVIDENCE REPORT xi (1998); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 41, at 9 (citing a laundry list of health problems associated with obesity).

46. NAT'L INST. OF HEALTH, *supra* note 45, at 9.

47. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 41, at 10.

48. *See generally* Jacobson, *supra* note 40 (discussing the health consequences of consuming large quantities of carbonated soft drinks).

number one source of added sugars in children's diets.[49] Most adolescents (65 percent of girls and 74 percent of boys) consume soft drinks daily.[50] As a result, the average thirteen- to eighteen-year-old receives about 9 percent of his or her daily calories from soft drinks.[51] Moreover, "overweight youths tended to consume a greater proportion of [calories] from beverages than did their nonoverweight counterparts."[52] This means that while soft drinks contribute to obesity in children generally, they specifically harm those already susceptible to obesity. One study, which found that the "[c]onsumption of sugar-sweetened drinks is associated with obesity in children,"[53] concluded that the "ratio of becoming obese among children increased 1.6 times for each additional can or glass of sugar-sweetened drink that they consumed every day."[54] In sum, while there are many factors that contribute to obesity—lack of exercise, high caloric intake, genetics, etc.—soft drinks are a significant factor.

In addition to the simple fact that pouring-rights contracts make soft drinks available in schools, these contracts increase the unhealthy consumption of soft drinks in two additional ways. First, they compel schools to push soft drinks on children because these contracts often have quotas that require schools to sell a certain amount of soft drinks to get the promised financial rewards.[55] For example, one Maryland school entered into a contract that contained the following clause: "[I]f the Board of Education actively enforces the policy in which vending machines are turned off during the school day, the

49. U.S. DEP'T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 32 (2000).

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

51. Jacobson, *supra* note 40.

52. Richard P. Troiano et al., *Energy and Fat Intakes of Children and Adolescents in the United States: Data from the National Health and Nutrition Examination Surveys*, 72 AM. J. CLINICAL NUTRITION 1343S, 1351S (Supp. 2000).

53. Ludwig et al., *supra* note 50, at 505.

54. *Id.* at 507.

55. Jill L. Kramer-Atwood et al., *Fostering Healthy Food Consumption in Schools: Focusing on the Challenges of Competitive Foods*, 102 J. AM. DIETETIC ASS'N 1228, 1229 (2002) ("Because consumption quotas often need to be met to receive some of the awards offered by bottlers or vendors to schools, students may be urged by school personnel to buy those products."); *see also* U.S. DEP'T OF AGRIC., *supra* note 25, at VII-9 ("Of those districts that were under contract to a soft drink company in [school year] 1999/00, over one-third reported that their contract applied to products sold in the cafeteria."); NESTLE, *supra* note 2, at 205 ("But because the contracts provide additional benefits for consumption levels that surpass quotas, school administrators are placed in the position of pushing soft drinks to faculty, staff, and students.").

of education."[63] The state board and the department of education then delegate most of the administration of education programs to local school districts, which are governed by local boards of education.[64] These local "boards have broad discretion in the management of school affairs."[65]

Local authorities also dominate decisions about commercial activities.[66] Because different local officials have different preferences, local control results in different levels of commercial activities across districts.[67] To illustrate, nineteen states had laws governing commercial activities in schools in 2000, but in fourteen states those statutes and regulations were not comprehensive and addressed only certain types of activities.[68]

While states are principally responsible for education, the federal government is involved in many aspects of education,[69] particularly nutrition control. The principal means of federal nutrition control are the National School Lunch Act[70] and the School Breakfast Program under the Child Nutrition Act[71] (collectively the school meals programs or programs). The USDA administers these school meals

63. Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, 14 HARV. J.L. & PUB. POL'Y 447, 447 (1991); *see also* WILLIAM D. VALENTE, LAW IN THE SCHOOLS 10 (4th ed. 1998) ("Most states employ a three-tier system of state-level, regional (intermediate), and local administration. A minority of states employ a two-echelon (state-local) administrative structure, whereas Hawaii has a single statewide administration.").

64. Faber, *supra* note 63, at 447.

65. Bd. of Educ. v. Pico, 457 U.S. 853, 863 (1982); *see also* Lisa M. Spenny, Comment, *Commercialism in New York Public Schools: State Versus Local Control*, 5 ALB. L.J. SCI. & TECH. 339, 343 (1996) (arguing that "local school boards, because of their unique proximity to and relation with the community, possess the necessary authority to make" decisions that affect local communities).

66. U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 14.

67. *Id*.

68. *Id.* at 3–4.

69. *See* H.C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 6 (2d ed. 1985) (noting that federal laws regulate "programs in such areas as adult education, vocational and technical education, multicultural education, special education, science education, foreign language education, and others"); *see also* Faber, *supra* note 63, at 453:

> [T]he federal government has always had some involvement in and influence upon the educational affairs of the nation. The federal government's early participation in education ranged from land grants and distribution of surplus funds for the establishment of common schools to special purpose grants for the establishment of land grant colleges in the 1800s.

70. 42 U.S.C. §§ 1751–1769 (2000).

71. 42 U.S.C. §§ 1771–1791 (2000).

programs,[72] but participation is voluntary.[73] In one recent year, 4.2 billion lunches and 1 billion breakfasts were served through the programs.[74] The programs feed a daily average of 27 million children at lunch and 7.3 million at breakfast.[75] In addition to the federal school meals program, the federal government is also involved with the summer food service programs,[76] the child and adult care food program,[77] the special milk program,[78] and the special supplemental nutrition program for women, infants, and children.[79] The USDA requires its meals under the school meals programs to "meet minimum nutritional requirements prescribed by the Secretary."[80]

Despite this federal role in nutrition control, states and local districts maintain substantial control over nutrition decisions. To begin, schools are not required to meet federal nutrition guidelines if they choose not to participate in the federal meals programs.[81] Even if schools do participate in the programs, the USDA must operate through state agencies, and these agencies have substantial discretion to act without express federal authorization.[82] Finally, although federal regulations set the floor for nutrition standards, states are free

72. 42 U.S.C. § 1752 (2000) (enabling the Secretary of the USDA to carry out the provisions of the federal meals programs); *see also* BONNIE B. TAYLOR, EDUCATION AND THE LAW: A DICTIONARY 218 (1996) (noting that the "[s]chool meals programs are administered by the U.S. Department of Agriculture (USDA) through its Food and Consumer Service").

73. Richmond Welfare Rights Org. v. Snodgrass, 525 F.2d 197, 205 (9th Cir. 1975); Torres v. Butz, 397 F. Supp. 1015, 1021 (N.D. Ill. 1975).

74. U.S. DEP'T OF AGRIC., *supra* note 25, at III-7, III-10.

75. U.S. DEP'T OF AGRIC., *supra* note 26, at xv.

76. 42 U.S.C. § 1761 (2000).

77. *Id.* § 1766.

78. 42 U.S.C. § 1772 (2000).

79. *Id.* § 1786.

80. 42 U.S.C. § 1758(a)(1)(A); *see also* 42 U.S.C. § 1773(e)(1)(A) ("Breakfasts served by schools participating in the school breakfast program under this section shall consist of a combination of foods and shall meet the minimum nutritional requirements prescribed by the Secretary on the basis of tested nutritional research.").

81. *See* Shaw v. Governing Bd., 310 F. Supp. 1282, 1286 (E.D. Cal. 1970) ("Since the federal school lunch program is purely voluntary, a school district which feels it cannot afford to meet the requirement of providing free lunches is free to drop out. So long as it chooses to participate, however, the district must comply fully with the terms of the Act.").

82. *See* Rogers v. Brockette, 588 F.2d 1057, 1072 (5th Cir. 1979) (holding that states have substantial discretion over decisions regarding federal meal programs because "Congress would not have assigned them to the states if it distrusted the states, wanted to insulate local school boards from the states' mandates, or thought that local boards' decisions were singularly likely to further the policies of the program").

to regulate further.[83] In sum, while the federal government has an active role in nutrition control, the states maintain substantial responsibility.

B. Federal Control over the Sale of Soft Drinks in Public Schools

Current federal control over the sale of soft drinks in public schools is the result "of nearly annual tinkering with the rules that govern the school lunch and school breakfast programs."[84] The first effort to restrict the sales of soft drinks was a 1970 amendment to the Child Nutrition Act.[85] During the 1970s, Congress vacillated between giving the Secretary of the USDA the authority to restrict soft drinks sales, and then removing that authority.[86] One such attempt to give the Secretary the authority to restrict the sale of soft drinks and other competitive, unapproved foods was voided by *National Soft Drink Ass'n v. Block*,[87] which is discussed in detail in Part II.D.[88]

After *Block*, there was not much congressional effort to restrict the sale of soft drinks in public schools until Congress amended the School Lunch Act in 1994.[89] But these amendments did not empower the Secretary; rather, they left the decision about whether to restrict the sale of soft drinks to state and local authorities.[90] After these amendments, soft-drink sales and pouring-rights contracts have proliferated.[91] Thus, the federal government has tried to address the

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83. *See* Competitive Food Services, 7 C.F.R. § 210.11(b) (2003) ("State 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 Program.").

84. NESTLE, *supra* note 2, at 207.

85. Act of May 14, 1970, Pub. L. No. 91-248, sec. 8, § 10, 84 Stat. 207, 212–13 (codified at 42 U.S.C. § 1779 (2000)).

86. *See* Nat'l Soft Drink Ass'n v. Block, 721 F.2d 1348, 1350–51 (D.C. Cir. 1983) (describing the different congressional legislation and administrative regulations that were enacted during the 1970s).

87. *Id*.

88. *See infra* notes 109–115 and accompanying text.

89. These amendments appeared in sections 101–125 of the Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, 108 Stat. 4699, 4700–34, (codified in scattered sections of 42 U.S.C. §§ 1751–1769 (2000)).

90. *See* NESTLE, *supra* note 2, at 211 (noting that although "a Senate committee suggested that the USDA should . . . develop 'model language' to restrict sales of soft drinks and other such foods in *elementary* schools before the end of the last lunch period," the 1994 legislation "left the decision about whether to adopt that language to the discretion of state and local school authorities").

91. Salit & Tarricone, *supra* note 35.

sale of soft drinks in schools, but it no longer adheres to its previously strong position of allowing the Secretary to restrict sales.

At present, current regulations only require state agencies and schools to "prohibit the sale of foods of minimal nutritional value"[92]—which includes soft drinks[93]—during federal school meal periods.[94] These regulations define foods of minimal nutritional value as "food which provides less than five percent of the Reference Daily Intakes (RDI) for each of eight specified nutrients per serving."[95] These regulations do not address the sale of soft drinks outside of the cafeteria or during non-meal periods.[96] Thus, current regulations only restrict the sale of soft drinks *in* the cafeteria *during* the lunch period. Despite recent attempts to expand the scope of federal regulations,[97] current law permits the sale of soft drinks, and thus permits pouring-rights contracts. As a result, the current onus of regulation falls on states and localities to restrict the sale of soft drinks in public schools.

C. State and Local Control over the Sale of Soft Drinks in Public Schools

State and local control over the sale of soft drinks in public schools create a patchwork of regulations in which there is considerable variation both between states and between localities in the same state. For example, West Virginia and North Carolina have statutes that specifically permit the sale of soft drinks.[98] California, on

92. 7 C.F.R. § 210.11(b).

93. *Id.* § 210 app. B (naming "soda water," defined as a "class of beverages made by absorbing carbon dioxide in potable water," as one of the prohibited categories). The regulations also include hard candies, water ices, and chewing gum. *Id.*

94. *See supra* note 92 and accompanying text.

95. 7 C.F.R. § 210.11(a)(2). The eight nutrients are protein, vitamin A, vitamin C, niacin, riboflavin, thiamine, calcium, and iron.

96. *See* Nestle, *supra* note 38, at 308 ("Although the US Department of Agriculture (USDA) requires federally subsidized school meal programs to meet established nutritional standards and dietary guidelines . . . [such standards do] not apply to foods sold outside of school cafeterias in snack bars, school stores, or vending machines.").

97. *See, e.g.*, Neil Buckley & Victoria Griffith, *The Scary Fat End of the Wedge*, FIN. TIMES (London), July 12, 2002, at 11 ("Senators Bill Frist and Jeff Bingaman plan to introduce [an] 'obesity bill' [that will authorize] . . . federal agencies to spend more money educating the public on the dangers of excess weight.").

98. *See* W. VA. CODE § 18-2-6a (2003) ("In order to generate funding for necessary programs and supplies, county boards may permit the sale of soft drinks in county high schools except during breakfast and lunch periods."); N.C. GEN. STAT. § 115C-264 (2002) ("Each school may, with the approval of the local board of education, sell soft drinks to students so long as soft

the other hand, requires that a certain percentage of food sold throughout the day come from a "nutritional list" that excludes soft drinks.[99]

At the local level, some cities have rejected pouring-rights contracts. For example, the Los Angeles Unified School District prohibited the sale of soft drinks in its schools.[100] Similarly, the Oakland Unified School District adopted the following policy: "[V]ending machines accessible to students shall not disperse sodas, drinks that contain caffeine or a high concentration of sugar . . . during school hours."[101] Conversely, school districts in San Diego,[102] Evansville,[103] and suburban Chicago[104] all recently approved pouring-rights contracts. In sum, there is piecemeal resistance, but most jurisdictions eagerly sign these contracts.

Responding to concerns from parents and schools in 2001,[105] the Coca-Cola Company announced that it "supports adoption of non-exclusive agreements with schools [and] will continue to return revenue from beverage sales to support educational programs,

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drinks are not sold (i) during the lunch period, (ii) at elementary schools, or (iii) contrary to the requirements of the National School Lunch Program.").

99. CAL. EDUC. CODE § 38,085 (West 2002).

100. Kim Severson, *L.A. Schools to Stop Soda Sales*, S.F. CHRON., Aug. 28, 2002, at A1 ("Los Angeles school district officials expelled soda pop from campus Tuesday night in a unanimous vote that . . . means that no carbonated drinks can be sold during school hours beginning in January 2004.").

101. CTR. FOR FOOD & JUSTICE, OCCIDENTAL COLL., CHALLENGING THE SODA COMPANIES: THE LOS ANGELES UNIFIED SCHOOL DISTRICT SODA BAN, *at* http://departments.oxy.edu/uepi/cfj/resources/SodaBan.htm (Sept. 2002) (on file with the *Duke Law Journal*).

102. *See* Logan Jenkins, *San Dieguito's Sweet Pact with Pepsi Shows Lack of Regard for Student Bodies*, SAN DIEGO UNION-TRIB., Aug. 29, 2002, at NC-2 (reporting that the school board stood to make more than $800,000 over five years as a result of its agreement with the Pepsi Bottling Group).

103. *See* Patricia Swanson, *School Board Reluctantly OKs Contract with Coke*, EVANSVILLE COURIER & PRESS, Aug. 12, 2003, at A7 ("The Evansville-Vanderburgh School Board, unanimously but also reluctantly, has approved an exclusive soft drink contract with the Coca-Cola Bottling Co. The $700,000 annual contract will help fund extracurricular activities in the schools.").

104. *See* Laura Zahn Pohl, *Middle Schools Get Beverage Deal*, CHI. TRIB., Dec. 12, 2002, at DN-3 (reporting that the deal between the district's middle schools and the Coca-Cola Bottling Company could "return up to $275,000 to the schools' coffers during the five-year deal").

105. *See* Marc Kaufman, *Coca-Cola Tries to Cap Exclusive School Deals*, WASH. POST, Mar. 14, 2001, at A2 (stating that the Coca-Cola Company was "responding both to health concerns about soda consumption and to criticism over the commercialization of schools").

without requiring exclusivity."[106] Despite this pledge, Coke's bottlers continue to sign pouring-rights contracts with schools.[107] PepsiCo Inc. has never made a similar statement and permits its bottlers to bid for pouring-rights contracts.[108] Therefore, states and localities as a whole have not filled the regulatory void left by federal inaction; rather, they have been unable to stop the proliferation of pouring-rights contracts.

D. Judicial Attempts to Restrict the Sale of Soft Drinks

No court has specifically addressed pouring-rights contracts in schools. However, a number of decisions display the courts' willingness to permit the sale of soft drinks in public schools and their unwillingness to prohibit commercial activities in public schools.

In *National Soft Drink Ass'n v. Block*,[109] the D.C. Circuit prevented the USDA from prohibiting the sale of soft drinks in public schools. The Secretary of the USDA issued rules in 1980 that restricted the sale of soft drinks and other competitive, unapproved foods until "after the last lunch period."[110] Organizations representing producers and sellers of soft drinks challenged the rules as exceeding the Secretary's statutory jurisdiction.[111] The trial court held that the Secretary was duly authorized to issue these rules.[112] It reasoned that "[t]he clear purpose of the [federal meals program] would be frustrated if foods identified as non-nutritious could be sold fifteen minutes before lunch or in vending machines located down a corridor from the cafeteria."[113]

The court of appeals reversed, holding that "the Secretary exceeded his rule making authority when he promulgated the time

106. Press Release, The Coca-Cola Company, Coca-Cola Announces New Education Advisory Council; Major Changes in Its Public/Private Education Partnerships with the Nation's Schools, *at* http://www2.coca-cola.com/presscenter/pc_include/nr_03142001_education_advisory_council_ include.html (Mar. 14, 2001) (on file with the *Duke Law Journal*) ("Working with schools to comply with all federal, state, and local guidelines, the Coca-Cola bottlers will unconditionally honor the wishes of all schools that seek to limit the sale of beverages at certain points of the school day, or at certain locations on school campuses.").

107. McKay, *supra* note 27, at B1.

108. *Id*.

109. 721 F.2d 1348 (D.C. Cir. 1983).

110. 7 C.F.R. § 210.15(b) (1981).

111. *Block*, 721 F.2d at 1351.

112. *Id.* at 1351.

113. *Id*. (quoting district court opinion).

and place regulations barring the sale of competitive foods throughout the school and until after the end of the last service of the day."[114] In so holding, the court relied on the section of the statute that limited the authority of the Secretary "to the sale of competitive foods in 'food service facilities or areas during the service of food' under the school nutritional program."[115] As a result of *Block*, and unless Congress removes this limitation, the Secretary can prevent only the sale of soft drinks *in* the cafeteria *during* the lunch periods of schools that participate in federal meal programs.

State v. Whittle Communications[116] and *Dawson v. East Side Union High School District*[117] are two principal cases that address the legality of commercial activities in public schools. While these decisions do not address soft-drink sales or pouring-rights contracts, they show the hesitance of the judiciary to curb commercial activities in schools. In *Whittle*, the North Carolina Supreme Court considered whether the North Carolina State Board of Education had the authority to prohibit schools from contracting for Channel One television services.[118] The court rejected the plaintiff's argument that forcing students to watch commercial television was against public policy and therefore void under the North Carolina Constitution.[119] Instead, in the words of one commentator, the court "relied on the fact that the program was not mandatory."[120] The court stressed that it should defer to the legislature.[121] Thus, *Whittle* "represents a triumph for local autonomy in public education" by rejecting the argument

114. *Id.* at 1353. Judge Wilkey dissented and wrote that he would "leave it to the legislature to decide whether it prefers the position of this court or that of the Secretary and the District Court." *Id.* at 1355.

115. *Id.* at 1352–53 (quoting 42 U.S.C. § 1779).

116. 402 S.E.2d 556 (N.C. 1991).

117. 34 Cal. Rptr. 2d 108 (Cal. Ct. App. 1994).

118. *Whittle*, 402 S.E.2d at 559 (examining "whether the trial court erred in determining . . . that it lacked subject matter jurisdiction over the complaint [and] whether the trial court erred in failing to find that Whittle's contract is contrary to public policy and the North Carolina Constitution and therefore void"). This Note will not discuss the court's principal ruling, which was "that the State Board of Education did not have the authority to enact the temporary rule concerning the Whittle contracts because these contracts involve the selection and procurement of supplementary materials, an area which the General Assembly has specifically placed under the . . . supervision of the local school boards." *Id.* at 557.

119. *Id.* at 564–65 (rejecting the plaintiff's argument that Article IX, section 2(1) of the North Carolina Constitution and its requirement for a "general and uniform system of free public schools" makes commercial advertising void as against public policy).

120. Dasinger, *supra* note 14, at 200–01.

121. *Whittle*, 402 S.E.2d at 564.

that commercial activity in public schools is void as against public policy.[122]

A California court of appeals in *Dawson* also held that commercial activities "are not illegal as a matter of law."[123] In that case, California's Superintendent of Public Instruction resisted a contract with Channel One, considering "'the crux of the issue [to be] the illegal and unethical use of schools' unique access to an extremely valuable commercial audience which [Channel One] wants to monopolize.'"[124] Nevertheless, the Board of Trustees approved the contract, prompting a suit by the Superintendent.[125] Upholding the contract, the court reasoned that the legislature must set educational policy because the "assessment of 'core [educational] values' is beyond the scope of our judicial function."[126]

Although no court has had the opportunity to review pouring-rights contracts, some opponents of those contracts have recently indicated their intent to sue. For example, one group has threatened that Seattle School Board "members could be held individually liable for health problems suffered by students if the district violates its 'fiduciary duty' to protect students' health."[127] This litigation resembles the "new group of class action tort cases [that] allege that children who are frequent patrons of . . . fast-food restaurants have become obese and, as a result, have developed serious health problems . . . ."[128]

Although it is too early to evaluate these new cases, established case law suggests that any attempt to prohibit pouring-rights contracts or the sale of soft drinks in public schools must pursue legislative

122. Michele L. Harrington, State v. Whittle Communications*: Allowing Local Boards to Turn on "Channel One"*, 70 N.C. L. REV. 1929, 1945–46 (1992).

123. Dawson v. East Side Union High Sch. Dist., 34 Cal. Rptr. 2d 108, 121 (Cal. Ct. App. 1994). However, the court limited its holding by cautioning that "a showing of more intrusive commercial content, or of less effective editorial content, might warrant a conclusion that it would be an abuse of discretion for a school district to enter into such a contract." *Id.* at 120.

124. *Id.* at 113.

125. *Id.* at 113–14.

126. *Id.* at 128.

127. Keith Ervin, *School Board Is Warned Against Coke Contract*, SEATTLE TIMES, July 2, 2003, at B1; *see also* Neil Buckley, *Obesity Campaign on Drinks in Schools*, FIN. TIMES (London), June 23, 2003, at 10 ("School authorities that sign exclusive contracts to sell soft drinks such as Coca-Cola and Pepsi in vending machines could become the next big target of the growing legal movement against the US obesity epidemic.").

128. John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 110 (2003).

solutions. Specifically, *Block*, *Whittle*, and *Dawson* stress that courts should not usurp the educational policy of the legislature.[129] The *Whittle* court stated that "[w]hether the public policy established by [education statutes] is wise or unwise is for determination by the General Assembly."[130] Commentators echo this judicial discretion. For example, after addressing Channel One litigation in New York, one commentator stated that the "proper forum for the Channel One debate is not in courtrooms, but at local school board meetings and elections."[131] In sum, as of now, the proper means for solving the problems of pouring-rights contracts is not litigation, but legislation.

III. SOLUTION

This Part advances a solution to the problems of pouring-rights contracts, beginning with a survey of other proposals. Based on these proposals and on the previous two Parts, this Part outlines the elements that any solution to pouring-rights contracts must contain. This Part concludes by using these elements to propose new legislation.

A. Myriad Proposals

Commentators respond to criticisms levied against pouring-rights contracts with myriad proposals. The first and simplest proposal is to do nothing.[132] Indeed, this Note's thesis that pouring-rights contracts are harmful to students and to education is controversial, especially to local school boards and soft-drink companies. School boards, and many taxpayers,[133] could argue that these contracts provide a vital

129. *See also* Richmond Welfare Rights Org. v. Snodgrass, 525 F.2d 197, 205 (9th Cir. 1975) ("The individual defendants herein, not the courts, were elected and empowered to make precisely such decisions. If defendants ultimately and lawfully adopt what may be perceived as an inhumanly callous position, the matter is one for correction by the voters of the district, not for us.").

130. State v. Whittle Communications, 402 S.E.2d 556, 564 (N.C. 1991) (citing Martin v. Hous. Auth., 175 S.E.2d 665, 672 (N.C. 1970)).

131. Spenny, *supra* note 65, at 367.

132. *See, e.g.*, Nestle, *supra* note 38, at 312 (illustrating how soft-drink companies and school officials justify the contracts as "breaking no new ground and argue that soft drink vending machines already exist in schools, soft drinks already pervade American culture, children are not forced to drink them, and contracts can be written with safeguards that protect students' rights to drink other kinds of soda").

133. *See A Lucrative Soda Contract*, GREENVILLE NEWS, Aug. 3, 2002, at 14A ("Some may question the educational and nutritional value of promoting soft drinks at schools, but most taxpayers likely will welcome a funding stream that may offset some tax revenues.").

source of funding.[134] Soft-drink companies also argue that "publicly supported schools should not dictate what students eat when parents and children want something else."[135] A similar proposal is to let states and localities decide for themselves what to do.[136] This proposal of federal abstention and state experimentation is the current course of action.[137] And as noted in Part II.C, this course has permitted the growth of pouring-rights contracts.

A slightly more proactive proposal is to keep pouring-rights contracts, but to provide students with healthy alternatives to soft drinks.[138] For example, the National Institutes of Health proposes that schools should give students "food options that are low in fat, calories, and added sugars, such as fruits, vegetables, whole grains, and low-fat or nonfat dairy foods."[139] This proposal often includes nutrition education as a way to encourage students to choose these healthier alternatives.[140]

A proposal that focuses on cost as a disincentive to buying soft drinks is to keep pouring-rights contracts, but to tax the sale of soft drinks.[141] Some commentators analogize a tax on soft drinks to a tax

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134. *See* Nakamura, *supra* note 56 ("The students may be junk food junkies, but the schools are hooked, too, increasingly dependent on the revenue that soda and candy machines bring in each year."); Susan Lynn Roberts, Note, *School Food: Does the Future Call for New Food Policy or Can the Old Still Hold True?*, 7 DRAKE J. AGRIC. L. 587, 608 (2002) ("Given the dollars to be made . . . it can be understood why many school administrators find it convenient to avoid the health and ethical implications of 'pouring rights' contracts.").

135. Nestle, *supra* note 38, at 309.

136. *See supra* notes 98–108 and accompanying text (noting that states and localities have taken considerably different approaches regarding the regulation of soft drinks in public schools).

137. *See supra* notes 84–108 and accompanying text.

138. *See* Carole Sugarman, *Stock School Vending Machines with Cereal Bars, No Soda, Say Dietitians*, FOOD CHEMICAL NEWS, Sep. 16, 2002, at 29 (suggesting that "[c]arrying healthier items in vending machines and making them less expensive than their sugary, higher-fat, higher-calorie counterparts are just a few options. . . .").

139. Office of the Surgeon General, *Overweight and Obesity: A Vision for the Future*, *at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_vision.htm (last modified Nov. 20, 2003) (on file with the *Duke Law Journal*).

140. *See id.* (advising schools to help "students develop the knowledge, attitudes, skills, and behaviors to adopt, maintain, and enjoy healthy eating habits and a physically active lifestyle"); *see also* Kramer-Atwood et al., *supra* note 55, at 1233 ("Local school policies should respond to community needs and priorities and integrate the school nutrition programs with education.").

141. *See* Jim Ritter, *Teens Take off the Fat Bite by Bite*, CHI. SUN-TIMES, June 23, 2002, at 14 ("Obesity in children has become so serious that some health advocates suggest that federal and local governments start taxing sugar-rich soft drinks and restricting snack foods in schools . . . ."); *see also* Consumers Union, *Captive Kids: A Report on Commercial Pressures on Kids at Schools*, *at* http://www.consumersunion.org/other/captivekids/recommendations.htm

on cigarettes,[142] arguing that the revenue from these taxes should be reinvested into obesity-prevention programs.[143]

Another proposal calls for Congress to reinstate the authority that the Secretary of the USDA had in 1980 to restrict the sale of soft drinks. The American Federation of Teachers, for example, "supports federal efforts to re-establish the authority of the Secretary of Agriculture to regulate the sale of all foods throughout the entire school until the end of the school day."[144] Another commentator argues that "Congress should create a single food safety agency that has sufficient authority to protect public health."[145]

The most comprehensive proposal is to prohibit pouring-rights contracts by changing the federal laws that permit them.[146] The USDA, for example, wants to "[s]trengthen the statutory language to ensure that all foods sold or served anywhere in the school during the school day meet nutrition standards."[147] The Surgeon General is one of many who propose that schools should "[a]dopt policies ensuring that all foods and beverages available on school campuses and at school events contribute toward eating patterns that are consistent with the Dietary Guidelines for Americans."[148]

(last visited Dec. 30, 2002) (on file with the *Duke Law Journal*) (stating that Congress should "[e]liminate tax benefits for corporate contributions to schools that carry a commercial message").

142. *See, e.g.*, Ritter, *supra* note 141.

143. *See* Lori Lohmeyer, *Los Angeles School District Votes to Ban Soda Sales on 677 Campuses*, NATION'S RESTAURANT NEWS, Sept. 9, 2002, at 16 ("The controversial bill, written by Sen. Deborah Ortiz, D-Sacramento, initially sought to raise as much as $300 million a year in taxes on all soda sales in the state to combat childhood obesity and fund incentives for schools to halt soft-drink sales.").

144. American Federation of Teachers, *Resolution on Regulating the Sale of Competitive Foods in Schools*, *at* http://www.aft.org/about/resolutions/2000/compfoods.html (July 2000) (on file with the *Duke Law Journal*); *see also* NESTLE, *supra* note 2, at 368 (suggesting that Congress reconsider legislation to improve the "agency's ability to regulate food and supplement supply").

145. ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 264 (2001).

146. *See* American Dietetic Association, *Position of the American Dietetic Association: Competitive Foods in Schools*, 91 J. AM. DIETETIC ASS'N 1123, 1124 (1991) (advocating for the complete prohibition of soft drinks and other competitive foods of minimal nutritional value).

147. U.S. DEP'T OF AGRIC., *supra* note 34.

148. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 41, at 20.

B. Necessary Elements to Any Solution

Considering the proposals outlined above and the failure of current legal authority outlined in Part II, there are at least three necessary elements to any solution to the problems caused by pouring-rights contracts.

First, any solution must come from the federal level. Local control does not adequately address the proliferation of these contracts and their associated problems. After *Block*, states could have adopted new laws to regulate soft drinks, yet *no* state prohibits the sale of soft drinks. While some cities and communities have taken action against pouring-rights contracts, most schools and local boards rarely have the resources to resist these lucrative contracts. Indeed, schools are often "the staunchest opponents" to restricting these contracts because limiting the sale of soft drinks removes a source of school funding.[149] Moreover, the specifics of each pouring-rights contract may prevent local action because "the agreements between schools and soda companies sometimes deter principals from following state policy, especially since how much schools make is often tied to how much they sell."[150] Local control also fails because it creates a patchwork in which wealthy school districts can afford to resist these contracts, while poorer districts cannot.[151]

Second, any solution must move beyond the current federal law. Current federal regulations fail because they address *only* the sale of soft drinks in the cafeteria during the lunch period. Moreover, soft drinks compete with healthier beverages, such as juice or milk.[152] Thus, keeping current rules that merely restrict the time or place of soft-drink sales ignores the underlying problem that the frequent

149. Greg Winter, *States Try to Limit Sales of Junk Food in School Buildings*, N.Y. TIMES, Sept. 9, 2001, at A1; *see also* Salit & Tarricone, *supra* note 35 (noting one principal's suggestion that because soft-drink companies already do business in schools, the schools should be able to receive something in return).

150. Winter, *supra* note 149.

151. *See supra* note 36–37 and accompanying text; *see also* Newsome, *supra* note 31, at 313 ("[E]conomic disparity does not justify differential treatment of student privacy interests."). The Supreme Court rejected this argument when it held that classifications based on wealth are an "inappropriate case in which to subject state action to strict judicial scrutiny." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1972). However, the Court's rationale does not mitigate the policy and pragmatic force of my argument because the Court limited its discussion to whether wealth classifications fit within its strict scrutiny jurisprudence, *see id.* at 38–39, not whether these classifications were harmful as a policy matter.

152. *See supra* notes 57–60 and accompanying text.

consumption of soft drinks is unhealthy.[153] Similarly, current regulations deter litigation against school districts that approve pouring-rights contracts.[154]

Third, any solution must address squarely the sale of soft drinks rather than pursuing merely a piecemeal approach. Piecemeal solutions—such as healthier alternatives in vending machines or taxes on the sale of soft drinks—fail because they permit students to continue to buy soft drinks and because they do not address the problems caused by pouring-rights contracts.[155] Taxes fail specifically because they do not remove a school's incentive to encourage the sale of soft drinks and thus increase the revenue that it receives from soft-drink companies.

In sum, any solution to the problems of pouring-rights contracts must include the following elements: (1) federal action to remove the local incentive to sign pouring-rights contracts and to establish uniform standards for poor and wealthy districts; (2) fundamental changes in the current laws to restrict the sale of soft drinks beyond merely during lunch in the cafeteria; and (3) comprehensive action to address the underlying problems of the sale of soft drinks and the proliferation of pouring-rights contracts.

C. Proposed Legislation

Applying the three elements from the previous Section, this Note proposes federal legislation that eliminates current regulations that permit the sale of soft drinks in public schools. In place of these regulations, the legislation would ban pouring-rights contracts and the sale of soft drinks in public schools.[156] This legislation would ban the

153. *See supra* notes 48–54 and accompanying text.

154. *See supra* notes 127–131 and accompanying text.

155. *See* Nakamura, *supra* note 56 ("[The principal of one high school] says that years ago he tried an experiment. He filled one machine with more healthy drinks, such as V-8 juice. Virtually no one bought the product, he said.").

156. This Note does not address questions of federalism nor the specifics of federal action because the purpose of this Note is to justify action against pouring-rights contracts and to outline a solution, not to delve into the specifics of implementation. However, federalism is unlikely to be a problem because the USDA already has the authority to regulate the sale of soft drinks under 42 U.S.C. §§ 1751–1765 (2000); merely enhancing this power to ban rather than to regulate does not materially change the nature of federal action. Similarly, this Note does not address the specifics of how to finance my solution. However, financing is unlikely to be a problem because current estimates only place the value of vending machine sales, of which the sale of soft drinks are only a part, at $750 million, Severson, *supra* note 100. Moreover, one commentator argued that because soft drinks increase obesity, "students become heavier[,] . . .

sale of soft drinks because of the health problems of soft-drink consumption. Moreover, by banning the sale of soft drinks, this legislation would also prohibit pouring-rights contracts because of their unique educational problems and because they contribute to the health problems associated with soft-drink consumption.

To adopt this proposal, Congress should enact legislation that expressly requires the USDA to ban the sale of soft drinks in public schools. The USDA should implement this law because it is responsible for nutrition control and because it supports it.[157] The legislation and accompanying regulations that ban the sale of soft drinks should be drafted scrupulously because soft-drink companies have a history of trying to evade the law by "donating sodas to schools for free distribution during school meal periods,"[158] and by developing sweetened fruit drinks that "contain just enough juice (5%) to circumvent definition as a food of minimal nutritional value."[159]

Such legislation would have several limitations, such as addressing only one cause of obesity and addressing only the sale of soft drinks and not the other "junk foods" sold through school vending machines. Yet, these limitations do not mitigate the need for a solution. While frequent soft-drink consumption in schools has always been unhealthy, the problem is becoming worse with the proliferation of pouring-rights contracts. The current trend portends more sales and larger bottles; this trend is worsened by pouring-rights contracts.[160] Moreover, the longer that schools sell soft drinks, the more dependent schools will become on money that pouring-rights contracts provide. That is, as governments see that schools are adequately funded by corporations, they will perceive less of a need for government funding of education.[161] Thus, although this solution is limited, it specifically addresses a serious and immediate problem.[162]

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their health deteriorates, [and] more serious ailments like diabetes can arise, leading to higher health care costs over time." Winter, *supra* note 149.

157. *See supra* note 147 and accompanying text.

158. Nestle, *supra* note 38, at 315.

159. *Id*. One possible way in which the USDA could implement this rule is to ban the sale of both soft drinks and beverages that are nutritionally similar to soft drinks or fail to meet higher nutritional standards.

160. *See supra* notes 55–60 and accompanying text.

161. *See* J. Sheehan, *Why I Said No to Coca-Cola*, AM. SCH. BOARD J., Oct. 1999, *at* http://www.asbj.com/199910/1099coverstory.html (on file with the *Duke Law Journal*) (reporting that a principal of a high school stated that he rejected a pouring-rights contract because "[i]t sends the message to our voters and legislators that we can let them off the hook—

CONCLUSION

The Surgeon General recently issued a "Call to Action" to address the "epidemic proportions" of obesity.[163] Against this backdrop, pouring-rights contracts—and the problems associated with these contracts—are proliferating. These contracts now control the sale of soft drinks in nearly one of every three school districts.[164] Unfortunately, the federal government's current regulations only permit it to restrict the sale of soft drinks in a school cafeteria during the lunch period. Local school boards and state legislatures have attempted to fill the void created by federal inaction with a patchwork of proposals. This patchwork leaves many students unprotected from the problems caused by pouring-rights contracts and soft-drink consumption. To address this problem, the federal government should mend the tattered patchwork by enacting legislation to ban pouring-rights contracts and the sale of soft drinks in public schools.

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that advertising and sales of consumer products can fill the gap when it comes to supporting education").

162. Although beyond the scope of this Note, nothing that this Note proposes eschews future legislation to remove candy, chips, or other "junk foods" from public schools. Indeed, many of the arguments that this Note makes against soft drinks can be made against other "junk foods" that are sold in public schools.

163. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 41, at xiii.

164. *See supra* note 26 and accompanying text.