This paper discusses the relationship between obesity, law, and public health preparedness as well as the relevant roles of public health practitioners, policymakers, and lawyers. Each group believes they have a unique role in this relationship although there can be overlap and/or lack of clarity as to what that role may be.

The role of the lawyer in the public policy process is to identify relevant legal issues, to analyze them and give advice on the risks of taking a given action, and to communicate legal advice in a clear manner. Simply put, the lawyer's role is to dive deep into the law surrounding the topic at hand and to offer advice regarding the permissible limits of policymakers' options and the associated risks.

In contrast, policymakers work with an infinite set of choices that have no clear and defined base of underlying, common reference points. Debates about issues can be discussed at length as multiple and very different perspectives are brought to bear. Instead of seeking in-depth understanding of the parameters set by the law, the policymaker explores a broad range of possible options and weighs them against a number of standards. Legal considerations are surely one of the most important; but the issue of practical feasibility is also critically important: can a policy under consideration garner and maintain support from the stakeholders who are critical to its adoption and implementation?

The challenge of the National Summit on Legal Preparedness for Obesity Prevention and Control is to marry these two perspectives — that of the policymaker and that of legal counsel — in order to reduce obesity while paying homage to the principles underlying our system of laws and gaining support from the public.

The best way to tackle this challenge is to be guided by principles and fundamentals.

Our constitutional system of government has one feature of particular importance to the role of the federal government: enumerated powers. This principle speaks to the core element of public health legal preparedness, i.e., laws and legal authorities.

The doctrine of enumerated powers is clearly manifested in the Constitution and holds that the federal government has only the authorities that are granted to it by the people in the Constitution. In the language of the Tenth Amendment, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

This guideline is uniquely important for federal government officials and their legal counsel. Lawyers in private practice do not ask what the legal authority is for their clients’ action. Rather, they often seek to identify the extent to which a government agency has authority to require their client to take a certain action, that is, to regulate their client. In contrast, a lawyer who advises a federal agency has to start with a clear understanding of the legal authority that agency has and of the constitutional and other limits on that authority.

Here lies the genius of the constitutional founders. While Congress, over the years, has legislated broadly in many areas of public health, the fact remains that

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every action the federal government takes must be based on constitutionally articulated authority.

A corollary first principle is that of federalism. Many federal government actions — including many of those aimed at protecting the public’s health — must be taken in concert with state and local governments. Federal policymakers often find it frustrating when they bump up against these limitations, yet policymaking gains in quality and feasibility when state, local, and federal agencies collaborate, each acting in its constitutionally defined realm. This interplay was the framers’ intent.

The Constitution does not enumerate specific powers for the federal government in the domain of health. Of course the federal government is extremely active in health and plays a prominent role in public health, including the prevention and control of obesity. This role rests on two constitutional authorities: the commerce clause (Article I, Section 8 [3]), which empowers Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;” and the spending clause (Article I, Section 8 [1]) which authorizes Congress to “lay and collect taxes…and provide for the common Defense and general Welfare of the United States.” Within that authority, Congress has assigned specific powers to HHS by statute and appropriates funds to implement them. HHS’ main statutory authorities for public health stem from the Public Health Service Act, a law first enacted in 1912 with a very limited scope. At that time, the act contained only two sections that occupied one half of one printed page. Today, its many subsequent amendments make it a two-inch-thick document.

With respect to legal authority for obesity prevention and control, HHS has — mostly within the Public Health Service Act — broad powers to monitor and report on trends in obesity and its health consequences, to conduct research on the causes of obesity, to educate the public and professionals, and to explore and support effective interventions. Many parts of HHS rely on these authorities to conduct obesity prevention initiatives. The National Institutes of Health conducts extensive research on the causes of and potential treatments for obesity. The Food and Drug Administration regulates food safety and nutritional claims. The Medicaid program provides obesity-related health services for low-income children and mothers. HHS’ many projects to prevent obesity include the Surgeon General’s “Healthy Youth for a Healthy Future” initiative, CDC’s School Health Index, the “Together Raising Awareness for Indian Life” initiative led by the Indian Health Service, and the Head Start Playground Initiative led by the Administration for Children and Families.

Many other federal agencies also play significant roles in addressing obesity. The Department of Agriculture influences production of the Nation’s food supply and also enhances nutrition through the School Lunch Program, the Food Stamp Program, and the Special Supplemental Nutrition Program for Women, Infants and Children (the WIC program). The Department of Education provides guidance to schools for student physical activity and nutrition. And the Department of Transportation importantly shapes the environment for physical activity through funding for highways, alternative modes of transit, and the Safe Routes to Schools program. As with HHS, these activities are conducted within the guiding principle of enumerated powers and as generally authorized by Congress under the spending power and commerce clauses.

A constant challenge policymakers face is deciding on the level of government that is best suited to take action addressing a specified problem. The division between the enumerated powers of the federal government and the powers of the states results in the U.S. system of federalism. State governments mirror the organization of the federal government with their own legislative, executive, and judicial branches, including administrative agencies that substantially parallel their federal counterparts. Many of these — for example, states’ health and human services agencies — receive federal funds conditioned, in a variety of ways, on the states’ compliance with given program and policy requirements.

Frequently, decision makers at both the federal and the state levels make coordinated contributions. One example is the financial incentives that several states have begun giving to encourage food stamp and WIC recipients to purchase vegetables and fruit. In contrast, the safe routes to schools movement is a grassroots initiative which began in the 1980s and 1990s and was supplemented by the federal Department of Transportation receiving Congressional approval to provide financial and technical assistance to state programs in 2005.

Justice Louis Brandeis noted one of the most important benefits of our federal system in his famous dissent in the Supreme Court’s 1932 New State Ice Co. v. Liebmann ruling when he wrote, “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.”

We are an innovative country, and federalism, as Brandeis noted, can stimulate such innovation. Justice Brandeis’ observation should be an important precept...
for any exploration of alternative approaches to dealing with the obesity epidemic.

The doctrine of individual rights is another fundamental principle to keep in mind in developing strategies to address obesity as a health problem with societal implications. Elected officials, as well as public health professionals and advocates, frequently encounter the tension between individual rights and society’s well-being. Smokers assert rights to smoke while non-smokers point to scientific evidence that there is no risk-free level of secondhand smoke exposure to assert their right to live, work, and play in smoke-free environments. Motorcycle riders advocate for repeal of mandatory helmet laws while research shows that repeal correlates with fatal or debilitating head injuries. Restaurant operators have opposed mandatory publication of calorie content on menu boards as an infringement on their right to manage commercial speech.

This tension, in some sense, is likely always to be with us since there clearly is some degree of inherent conflict between many choices the community makes and the choice each individual might prefer for himself. When, in 1905, a Massachusetts resident refused to submit to mandatory smallpox vaccination, the Supreme Court ruled against the individual and specifically rejected the argument that mandatory vaccination violated the due process and equal protection clauses of the Fourteenth Amendment, supporting the state’s use of its police powers to defend the community at large. The Court said, in part, that “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”

However, regarding the present obesity epidemic, we have to ask whether there really is any similar legal and ethical basis for imposing, as some have advocated, public health interventions on the individual.

Whatever legal tools are used to help prevent and control obesity, they must be limited to those that afford individuals due process with respect to life, liberty, and property. While this restriction may not seem relevant on its face, it is both important and relevant. In this regard, three principles regarding the role of governments, at all levels, may especially help guide formulation of any action agenda:

- First, preventing obesity requires decisions about personal behavior that by definition can only be made by the individual. These are inherently personal decisions about what to eat and how much exercise and physical activity to engage in. It is inconceivable that elected officials in this country would attempt to enact laws compelling Americans to eat only certain types and amounts of food or to engage in specified types and levels of physical activity. The fundamental, constitutional principal of individual rights prevails, yet the action options should be framed to achieve population-level health outcomes while creating policy and environmental supports that encourage individual-level behavior change.

- Second, a corollary is that open, competitive markets are a collective expression of individuals’ private choices. When government regulates what is offered in the market, it indirectly regulates citizens’ range of choice. Further, regulation prevents private businesses from introducing new products and services into the marketplace that could fulfill the desire many Americans express for healthier food and more opportunities to engage in physical activity. Shaping actionable options must include a search for opportunities to stimulate the functioning of competitive market forces.

- Third, obesity is not like smoking. We cannot simply tell people not to eat. As Florida, California, and other states have shown, many smokers are responsive to sustained public education campaigns that urge them to quit. “Don’t smoke” is a relatively simple message to convey. Educational campaigns, in the case of obesity, have to encourage healthy eating. Everyone has to eat and, further, nutritional needs vary from person to person depending on a host of factors. This highlights the need to consider action options that will improve our understanding of the impact of law-based interventions and of their synergy with educational and other strategies.

These three principles — the primacy of personal choice, competitive markets’ importance to that personal choice and private-sector innovation, as well as the challenges in formulating effective, science-based interventions — point policymakers toward the use of subtle and graduated legal tools rather than rely on legal fiat or court orders. They point in the direction of shaping persuasive, nuanced educational campaigns together with legal approaches that build on initiatives proven in the laboratory of states.

An example to look at is the success Arkansas has had with the legislation it adopted in 2003 that required body mass index (BMI) testing in schools. Arkansas has monitored implementation of the legislation since enactment and has acted quickly to adjust its approach through education programs and through subsequent legislation; the state was able to
do this by fine-tuning the original approach based on feedback from parents, educators, and public health professionals. This approach is more complex, and demands more patience and flexibility than one that relies simplistically on the imposition of essentially coercive laws, which simply demand change in personal behavior. Such change may not be realistic. On the other hand, the history of thought about obesity gives us further reason to take a systematic and science-based approach to obesity prevention. The ancient Greeks were among the first to write about the association between obesity and well-being. In De Priscina Medicina, circa 400 B.C., Hippocrates wrote, “It is very injurious to health to take in more food than the constitution will bear, when, at the same time one uses no exercise to carry off this excess.... For as ailment [food] fills, and exercise empties the body, the result of an exact equipoise between them must be to leave the body in the same state they found it, that is, in perfect health.” Selecting the legal, policy, and other tools best suited to attaining this “exact equipoise” for the individual and for society is the practical challenge faced at the Summit.

The trends in obesity are troubling and pose threats to the health and well-being of Americans. Without question, we should explore, identify, and adopt grounded, empirically validated, law-based strategies to address these threats along with complementary, educational approaches.

References
1. U.S. Const. amend X.