Viewpoint

Stigmatized products: how conflicting laws can influence decisions to proceed

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How conflicting laws can influence strategic decisions

Should a firm introduce a contemplated new product? Should a firm merge with an organization that offers products that it does not now market? One factor to be considered in such decisions is whether the products under consideration face now or may soon face conflicting laws – literally laws that tell companies that a product cannot be marketed – and other laws tell them that it can be.

The analysis presented here does not look at simply geographic inconsistency, where alcohol, for example, can be sold in a given US county but not another. The focus of this paper is *conflicting* laws: categories of products sold in jurisdictions in which they are legal in an individual state within the USA, but banned federally or banned in localities within a state whose legislature has prohibited precisely such bans. Such a focus proceeds from the expectation that where local laws differ within a state, some probability exists that the state will step in to legislatively override those local laws – while localities continue to enforce them. If so, an increasing number of firms who now face simply jurisdictional inconsistency may soon face the greater problem of operating in an environment where they simply cannot conform to laws that conflict.

That issue may escalate, to the extent that the US Congress follows the example of the state legislatures that are preempting local laws. In such situations, Congress could preempt statewide bans, declaring them illegal but individual states could continue to enforce them. Permitted or forbidden levels of vehicle emissions provide a likely example, with 2019 seeing the conflict between stricter emissions rules in 14 states within the USA and weaker rules in the remainder.

A broadening issue

The basic point offered here is that conflicting laws that do or do not ban some products, particularly those stigmatized by some segments of society, are a concept worthy of exploration – and certainly a warning to those making strategic decisions. The paper provides a background in product-related laws that are inconsistent across US jurisdictions, then identifies examples of the many stigmatized products that because of their unpopularity among at least some segments of society, face non-uniform legal environments. Those product examples are analyzed in two dimensions:

1. Type of stigma (moral concerns, public safety concerns from product use and environmental concerns – or a combination of these three types).
2. The level of government within the USA at which the ban occurs.

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The paper’s conclusions suggest managerial responses, based on the belief that conflicting laws will likely apply to more goods and services in the future. This expectation leads to two foreseeable possibilities. One possibility in the USA involves Congress or regulatory agencies overriding state laws with the goal of federal uniformity, either a nationwide ban or nationwide relaxing of restrictive state rules, as in the case of emission standards for vehicles. The other possibility involves the US federal government first encouraging states to chart their own course in controversial areas, but then considering federal preemption of their contrasting legal solutions. Either approach may become relevant in any other country, of course.

Evidence exists already that in the USA as local or state norms evolve – and differ – additional marketers may find those differences expressed as laws. Companies seeking to store and transport coal already find that practice banned in Oakland, CA, and municipal leaders in the cities of Spokane and Seattle in Washington state proposed bans on the transportation of oil and coal through the city limits, citing concerns about health and environmental safety. Lawmakers in the state of California have introduced bills aimed at reducing consumption of sugar-sweetened soda, and local bans may well await retailers of such drinks, as well as those selling vaping (electronic smoking) products. Flavored vaping cartridges have already been banned in Washington state, with several other US states expected to follow suit.

Stigmatized products and inconsistent laws regarding them

Researchers use the phrase “stigmatized products” to refer to goods and services toward which significant segments of consumers hold negative attitudes and beliefs, meaning that their purchase and consumption can create various negative emotions for the purchaser and/or user. Previous studies dealing with stigmatized products have included those with a focus on a range of product categories, from genetically modified food (Ellen and Bone, 2008) to strip clubs (Rich, 2003).

As a practical matter, stigmatized products can be uniformly banned or uniformly restricted, as in limited to adults only. In the 1960s, many US states passed legislation to restrict the sale of cigarettes to minors in response to a report released by the nation’s Surgeon General that documented the physical effects of tobacco use. Other products banned to protect public health include haggis, red food dyes such as those used to make red M&M’s, and energy drinks, banned by some local governments from consumption by student athletes during school hours and athletic events.

Beyond bans based on moral or health-safety concerns, a more recent development has seen lawmakers at various governmental levels in the USA banning products seen as detrimental to the natural environment, for example, those perceived to be overloading landfills, contaminating water, etc. Although some environment-driven product bans occurred in the 1950s (i.e. dichlorodiphenyltrichloroethane), most such bans began in the late 1980s. Examples include Nebraska’s state-wide ban of disposable diapers, and the

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ban of Styrofoam food containers in Minneapolis, MN, Freeport, ME, Suffolk County, NY and Hamden, CT.

Although the reasons for banning a stigmatized product vary, a few themes recur. A product is likely to be banned when:

- there is strong scientific evidence that its use leads to public harm and this harm outweighs any potential benefits of its use;
- public opinion calls for strict regulation or prohibition of the product (i.e. marijuana);
- a ban protects a vulnerable population, such as children or;
- use of the product is associated with involuntary risks to the general public (i.e. secondhand smoke or vicious dogs); and/or
- its use harms the natural environment, according to Hodge and Scanlon (2014).

These same authors have found that geography, demographics and differing cultural values can influence the laws that a particular county and/or state will adopt, and their reasoning may be applied to national governments beyond the USA as well.

Within the USA, local, state and federal governments ban or regulate products under different legal authorities. At the federal level, the US Congress can enforce product bans by using their power to tax and spend; in the 1980s, for example, that body voted to withhold highway repair tax dollars from states that did not raise the legal drinking age. Individual state governments can use "police powers," a reference to the power granted under the Tenth Amendment to the US Constitution that allows states and/or local government to ban particular products or regulate those products in specific settings even if doing so interferes with interstate commerce (Hodge and Scanlon, 2014). Recently, the use of police powers was instrumental in banning the use of tobacco in public places and for increasing legal consequences for using drugs or alcohol in school zones.

As of 2019, the list of products whose marketing is affected by inconsistent laws is far longer than can be detailed here. Therefore, we offer an unsystematic sampling of such products to categorize them on the basis for stigmatizing them and in the USA, the level of government creating the ban. In Figure 1, the products include:

Figure 1 Examples of goods or services banned at each governmental level

	Basis for Ban		
Level of Ban	Public Health/Safety	Environmental	Moral
Local	Fireworks Specific dog breeds	Plastic bags Coal/oil transport	Alcohol
State	Assault Weapons Gun Silencers	High Emission Vehicles	Marijuana Controversial women's health services
Federal			Marijuana

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- Marijuana (laws vary by state and local municipalities, but legalization conflicts with federal law);
- Alcoholic drinks (production and/or consumption laws vary by county and/or state);
- Vehicles and equipment are seen as polluting (laws vary by state);
- Providers of contraceptives and abortions (laws vary by state);
- Various types of firearms (i.e. assault weapons and/or gun silencers) (laws vary by state); and
- Fireworks (laws vary by city/county) (Figure 1).

Inconsistencies have recently led to two kinds of actual conflicts in the legal environment facing marketers. One is a federal ban by the US Government being disregarded by individual states within the USA, as is the case with marijuana. The other is a local ban overridden by the state but still in force locally. In either case, the basic issue is defiance by a jurisdiction of the larger jurisdiction within which it operates, leaving for marketers the problem that by conforming to one law they are quite possibly violating at least the spirit of another.

The third source of conflict is coming into focus, however. The *New York Times* reports concerning laws on vehicle emissions that:

> [. . .] nervous automakers are devising a strategy to handle their worst-case situation: a divided American auto market, with some states following President Trump's weakened rules while others stick with tougher ones (Davenport, 2019, B1).

Thus, the third category of conflict does not state disregarding a federal ban, but some states – not all – disregarding a federal mandate that opposes the stricter rules – and instead requiring that strict rules be followed.

A range of examples

For an extreme case of how conflicting laws affect strategic choices, the marijuana industry and product category certainly come to mind. This product is stigmatized by some on moral grounds and by some – often the same individuals – as potentially dangerous. Therefore, marijuana offers the clearest example of how conflicting legal environments add to costs and to consumer risk.

It should be noted, however, that inconsistent law also affects the marketing of a range of offerings. These include but are not limited to pit bull terriers, single-use plastic shopping bags, alcohol, firearms, coal, high-emissions vehicles and equipment, and such controversial women's health services as contraceptives and abortions. While currently, only the first two from that list face laws in the USA that directly conflict, the possibility that others will encounter conflicting laws in the future justifies examining the consequences of one area in which they now do so: marijuana.

The most drastic conflict of laws: marijuana

At the federal level, the US Government considers marijuana to be outlawed as a Schedule I drug with a high potential for abuse and no accepted medical use, grouping it with heroin, lysergic acid diethylamide and methamphetamines. However, the use of marijuana for medical purposes in the USA is legal as of 2019 in 33 individual states and the District of Columbia, with recreational marijuana also legal in 10 states.

State-by-state legalization in the USA has followed voter belief that prohibition of the product is ineffective, unnecessary and intrudes into the lives of adults – or some combination of those views (Geiger-Oneto and Simkins, 2018). According to one analysis, more than half of the US population now resides in states where sellers and buyers are engaging in activities that while legal in their respective states are in direct violation of federal law (Huddleston, 2016a) – and produced a reported $10.4bn in revenue in 2018 (CNBC, 2018).

A figurative seesaw of expected enforcement faces the marijuana marketers and consumers affected by mismatched laws, principally because of complexities that flow from the unique "nationally-illegal" status of the product. These include state border issues, lack of federal product quality regulation, inability to protect brand names and the financial complexities associated with illegal businesses – of which increase costs. For example, it is difficult for owners of marijuana related businesses (MRBs) to find any banks to allow them to:

- open a checking or savings account;
- have a debit and/or credit card;
- get loans;
- transfer money;
- make electronic payments; and/or
- deposit proceeds from an industry that is federally illegal, even if their business is fully legal in their given state (Huddleston, 2016b).

The banking industry's apprehension typically stemming from a fear of losing insurance offered by the US Government, means that MRBs become cash-only businesses, a difficulty for customers and a serious security expense for marketers. Cash only businesses are hard to track, and with each paper dollar that comes in, the likelihood that the money is handled properly decreases (Bryant and Grissler, 2014). Also, the cash-only consequence of conflicting laws can discourage innovation that might benefit both marketers and consumers. Weed (2016) describes two retired women from Denver, CO, who started an enterprise to turn recycled plastic milk jugs into odor-free, child-resistant marijuana containers – but found that their first payment, from a Denver cannabis dispensary, was "$54,000 entirely in small bills and reeking of marijuana." Worried that their bank would not take the deposit, they put the money in a clothes dryer with some Febreze sheets to remove the smell.

As noted earlier, however, a conflict between national and state laws is only one aspect of conflicting laws affecting the marketing of stigmatized goods or services. Therefore, it appears useful to offer a framework describing the conflicting legal environment facing two products stigmatized for, respectively, the danger they are seen to pose to individuals and

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the danger they are seen to pose to the environment. Pit bull terriers and plastic shopping bags are both banned in some local areas, and the conflict arises when the local bans run counter to legislation by states that have passed laws saying they cannot be banned in local areas.

Banning dog breeds. While more than 400 dog breeds are registered across the globe, a handful of breeds have been deemed dangerous because of their propensity to bite and cause severe bodily harm. As a result:

- several insurance companies have refused to provide homeowners' insurance to owners of these breeds; and
- several local municipalities have enacted breed-specific legislation banning such dog breeds – specifically targeting pit bulls, Rottweilers and other breeds associated with dog fighting.

There are several categories of breed-specific legislation. The most common, a "breed ban," specifically prohibits the breeding and future ownership of certain dog breeds (usually pit bulls), but allows existing dogs to remain with their owners, as long as they are neutered or spayed. The goal of this type of legislation is to significantly lower the number of pit bulls within a community.

Another type of breed-specific legislation is "automatic labeling," which uniformly declares a certain breed as being dangerous or vicious, thereby triggering stricter regulations for owners of those breeds. Such regulations can involve mandatory liability insurance of $100,000, mandatory sterilization, fencing requirements and other measures. As an alternative, some city councils have passed ordinances that only require existing dogs to be spayed or neutered if their breed has been declared dangerous but does not prevent future ownership of these dogs. As of 2018, residents of more than 900 cities, 38 counties and 292 military bases within the USA lived in areas with breed-specific legislation. This legislation, while existing nowhere in the US statewide, occurs in local areas within 38 different states (Dogsbite.org, 2018).

Those local areas enforce their bans within seven US states that to some extent prohibit municipalities from banning dog breeds, plus an additional 14 states that prohibit "municipal declaration of dangerous, potentially dangerous or vicious dog based solely by breed" (Wisch, 2018). In other words, in 21 states, local breed-specific laws conflict with legislation at the state level that preempts precisely such breed-specific laws. Examples include the states of Rhode Island, CO and Pennsylvania.

The consequences of these conflicting laws differ from those associated with marijuana but are hardly desirable. Where inconsistencies occur, they have driven the market for dangerous dog breeds underground. Breeders of pit bulls have been forced to either cease operations, reducing the supply of these dogs or enter the black market. For some consumers, the resulting scarcity of pit bulls and other banned dog breeds has caused those breeds to become status symbols, and illegal ownership of these banned animals has been linked to other criminal activities such as drug trafficking, gangs and dog fighting (Rayner, 2010). Also, in a recent underground investigation, black market pit bull breeders were found to be working with licensed veterinarians to create documentation misrepresenting the dogs' breed (Winter, 2016), leading to the likelihood that some consumers unknowingly purchase banned dogs and others deliberately circumvent legal guidelines for muzzles and higher levels of insurance.

In summary, because these breeds are illegal only in some areas, they continue to be bred. Then, as consumers, where they are illegal, may want such a dog, the supply/demand geographic mismatch basically "breeds" illegal activity.

Another example: single-use plastic shopping bags. Moving to the third stigmatized category facing conflicting laws in the USA, those stigmatized based on their potential for environmental damage, the category of single-use plastic shopping bags provides a useful example. As of 2019, they were banned statewide in California, and also in New York with a start date of March in 2020. They are banned in some counties in Hawaii, and at the municipal level, they are banned in Boston, Chicago, Los Angeles, San Francisco and Seattle, along with many smaller cities (National Conference of State Legislatures (NCSL), 2019).

Whether actual or threatened, these city bans have prompted actions by some US state legislatures to preempt the bans, prohibiting their enforcement. For example, in 2016, state lawmakers in Arizona passed House Bill 2131, which specifically prohibits local governments from passing legislation restricting the use of plastic bags, after the city of Tempe passed such a ban.

Also, in 2016, city officials in Minneapolis, MN passed legislation to prohibit retailers from supplying customers with plastic bags and to allow a fee of $0.05 per bag for paper bags used at local stores and businesses. However, the governor of Minnesota signed a bill forbidding the regulation of plastic bags by local governments one day before the city council's bill was to take effect. Despite this action, city council members stated an intention to move forward with the ban after reviewing their ordinance to determine, which sections, if any, would be preempted at the state level.

As of 2019, US state legislatures had passed preemptive legislation, forbidding bans, in the following states: Arizona, ID, MS and Missouri (National Conference of State Legislatures (NCSL), 2019). Should any city in one of these states decide to ban such bags or restrict their use, retailers will find themselves in violation of either state or local law. Furthermore, as additional US cities consider bans, additional state legislatures may consider preemptive laws, leading to the same conflict situation.

High-emission vehicles. It can be argued that a significant proportion of marketers and consumers can avoid issues with marijuana, certain dog breeds and single-use plastic bags. However, the same cannot be said for vehicles marketed in the USA, and a scenario in which vehicle emissions standards are rolled back at the federal level, but a subset of states maintain them, appears likely.

An estimated one-third of the US auto market lives in the 14 states expected to maintain the standard requiring automakers to manufacture vehicles that average 54.5 miles per gallon by 2025 (Davenport, 2019). The manufacturers could set out to meet the 54.5-mile standard but thereby sell fewer sports utility vehicle (SUVs) than the market desires. Alternatively,

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they could sell different cars in these states – more electric vehicles, fewer SUV's – but the US Congress could also pass a law forcing national uniformity at a level of more relaxed standards. At that point, if states enforce their standards, differing from a national prohibition of just such standards, the scenario of conflicting laws affects a major industry and a large number of consumers.

Alternatives for strategic decision-making

Once the issue of conflicting laws is seen as ranging from medical marijuana to vehicles seen as polluting, it should be clear that one-size-fits-all responses to such conflicts are unlikely. More likely is the spread of the problem to include such items as super-sized soft drinks and any material that adds to the volume of local landfills.

Such considerations raise the question of whether at the federal level the US Congress may respond with preemption to statewide environmental bans – which those states may nevertheless continue to enforce. The willingness of states to defy US federal law justifies interest in whether standards for vehicle emissions may become another example, presumably with the most significant economic consequences.

Overall, then, conflicting laws create difficulties for marketers and costs for consumers. The question is what to do about it, both in the short-term if an organization already markets a product facing conflicting regulations and in the long run if more products will be subject to conflicting regulations.

As with any area of strategic decision-making, the first step here is diagnosis. Is a product or its packaging or how it is manufactured or how it is transported likely to evoke the disapproval of groups with enough influence to lead to a ban someplace? If so, a company already has a problem – which may become a worse problem if a higher jurisdiction bans the ban.

If this diagnostic step leads to any possible concern, the next question is whether an organization already markets this product, is considering doing so or is considering a merger or acquisition that will put such a product in their portfolio. Any product likely to face conflicting laws should be launched or acquired with the associated legal costs built into projections of profitability.

Another question is the likelihood of stigmatizing leading to bans. Marketing research may helpfully assess the extent of stigmatizing but cannot assess its intensity. Here another cost factor may come into play: lobbying if a ban is proposed, then lobbying at a higher jurisdictional level if the additional threat of conflicting laws appears relevant.

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A tactic worth considering is mobilizing consumer sentiment. Organizations that market stigmatized products appear to have a vital interest in awakening consumers to the costs associated with contradictory laws and this fact suggests the merits of increasing such awareness, including awareness of the trade-offs involved. As costs increase for marketers, they are paid by buyers. Consequently, consumers/voters have a legitimate interest in protecting and promoting the uniformity of regulation that companies presumably favor – whether for products as ordinary as plastic bags or as specialized as marijuana – and eliminating the need to put cash in the dryer with Febreeze.

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