# NOTE

# LARGE-SIZED SODA BAN AS AN ALTERNATIVE TO SODA TAX

*Hery (Michelle) Min**

*This Note examines New York City's Sugary Drinks Portion Cap Rule (Soda Ban), which was originally set to become effective March 12, 2013. The New York County Supreme Court's decision in* New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene *suspended the Soda Ban on March 11, 2013. The First Department of the Appellate Division of New York State Supreme Court affirmed the suspension on July 30, 2013. However, the complex economic policy and constitutional issues arising from the proposed Soda Ban deserve as much attention as the ultimate result of the legal challenge to the ban. Both courts struck down the Soda Ban on the grounds that it violated the separation of powers doctrine. The lower court further held that the Soda Ban was arbitrary and capricious. This Note does not focus solely on the holdings of the two courts, but takes a broader approach in analyzing the issues involved in the Soda Ban.*

*By comparing and contrasting tobacco products with sugary beverages, this Note explains why the public seems to find the Soda Ban less appealing than tobacco regulations. Specifically, this Note addresses how the failed attempts of numerous states and cities to implement soda taxes demonstrate the complexity of policies geared toward curbing obesity; how fundamental values, such as health, fairness, efficiency, and autonomy factor into obesity policies; and the fact that legislatures and courts are struggling to determine the scope of public health law intervention. The Note explores how the Soda Ban, despite its judicial suspension, could represent a stepping-stone in combating the obesity epidemic.*



* J.D. Candidate, Cornell Law School, 2014; B.A., Yonsei University, 2010; General Editor, *Cornell Journal of Law and Public Policy*, Volume 23. I would like to thank Professor Robert A. Green for his helpful advice and guidance, and the *Journal*'s editorial staff for their invaluable feedback. Most importantly, I would like to thank my parents, Young Ok Kim and Yong Ho Min, for being with me every step of the way through law school and life.

## INTRODUCTION

In the opinion pages of the *New York Times*, Casey Neistat, a New York-based filmmaker wrote that "it is evident that some people just aren't responsible enough to feed themselves."[1] An overwhelming number of studies indicate that the U.S. obesity epidemic is a growing problem with serious implications.[2] For example, a study by the Obesity Task Force, an organization comprised of commissioners from eleven New York City agencies as well as representatives from the New York City mayor's office, notes that 58% of adults—or a total of 3,437,000 people—in New York City are overweight or obese.[3] The study concludes that obesity is "a leading cause of preventable death, second only to tobacco, and kills 5,800 New York City residents per year.[4] Currently, New York City's adult obesity rates not only exceed the national average,[5] but also force the City to spend $4 billion a year in obesity-

---

[1] Casey Neistat, *'Soda Ban Explained'*, N.Y. TIMES (Sept. 9, 2012), http://www.nytimes.com/2012/09/10/opinion/soda-ban-explained.html.

[2] Obesity is defined as having a body mass index (BMI) of thirty or higher, where the BMI is calculated using body weight and height. Eric Zuehlke, *For Women in the U.S., Obesity Links to Socioeconomic Status and Poor Diet*, POPULATION REFERENCE BUREAU (Apr. 2010), http://www.prb.org/Publications/Articles/2010/usobesity.aspx.

[3] *Reversing the Epidemic: The New York City Obesity Task Force Plan to Prevent and Control Obesity*, OBESITY TASK FORCE 4 (May 31, 2012), www.nyc.gov/html/om/pdf/2012/otf_report.pdf [hereinafter *Reversing the Epidemic*].

[4] *Id.*

[5] *Id.*

related medical costs.[6] In particular, New York State Comptroller Thomas P. DiNapoli estimated that in 2012, New York's Medicaid program, which is funded by federal, state and local taxes, spends more than $4.3 billion a year and private insurance and Medicare pay out $ 7.5 billion a year for obesity-related expenditures.[7] In 2004, recognizing the dire situation of health and cost burden of obesity, the Medicare program revised its coverage policy to classify obesity as a disease.[8] Furthermore, in 2006, Medicare began to cover bariatric surgery for the treatment of obesity.[9] The motive behind the state and federal governments' deep involvement in attempting to fund obesity-related medical costs may be due to the fact that obesity affects some ethnic group or socioeconomic group more than others. For example, a study found that non-Hispanic blacks have the highest age-adjusted rates of obesity (49.5%) compared with Mexican Americans (40.4%), all Hispanics (39.1%) and non-Hispanic whites (34.3%).[10] Also, the National Health and Nutrition Examination Survey found that obesity prevalence is similar at all income levels among men, but higher income women are less likely to be obese than low income women. Survey results also showed that while there is no significant trend between obesity and education among men, women with college degrees are less likely to be obese compared with less educated women.[11]

---

6 Neistat, *supra* note 1. The effects of obesity on health care costs exceed and the effects on the number of chronic conditions are larger than those of smoking or problem drinking. Roland Sturm, *The Effects of Obesity, Smoking, and Drinking on Medical Problems and Costs*, 21 *Health Affairs* 245, 246–48 (2002), *available at* http://content.healthaffairs.org/content/21/2/245.full.pdf ("In terms of absolute changes in costs for impatient and ambulatory care (which probably understate true absolute effects because of underrerporting), obesity is associated with an average increase of $395 per year, overweight with an increase of $125, current or ever smoking about $230, problem drinking with $150, and aging with $225.").

7 Press Release, News from the Office of New York State Comptroller, Report: Soaring Health Care Costs Highlight Need to Address Childhood Obesity (Oct. 24, 2012), http://www.osc.state.ny.us/press/releases/oct12/102412.htm.

8 *See* Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, N.Y. TIMES (Jun. 18, 2013), http://www.nytimes.com/2013/06/19/business/ama-recognizes-obesity-as-a-disease.html.

9 Memorandum from the Ctr. for Medicare & Medicaid Servs. on Coverage Decision for Bariatric Surgery for the Treatment of Morbid Obesity (Feb. 21, 2006), http://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=160&ver=32&NcaName=Bariatric+Surgery+for+the+Treatment+of+Morbid+Obesity+%281st+Recon%29&bc=BEAAAAAAEAgA.

10 Katherine M. Flegal et al., *Prevalence of Obesity and Trends in the Distribution of Body Mass Index Among US Adults, 1999-2000*, 307 J. AM. MED. ASSOC. 491, 493 (note Table 2-Prevalence of Obesity (BMI =30) and Overweight and Obesity Combined (BMI =25) for Adults Aged 20 Years and Older: NHANES 2009-2010).

11 Cynthia L. Ogden et al., *Obesity and Socioeconomic Status in Adults: United States, 2005-2008*. NCHS DATA BRIEF, NO. 50 (National Center for Health Statistics, MD) Dec. 2010, *available at* http://www.cdc.gov/nchs/data/databriefs/db50.pdf.

The fact that many New Yorkers have struggled to independently improve their eating habits suggests that government intervention may be helpful to both improve the health of New York City residents and reduce the City's medical costs.[12] As the results of the implementation of tobacco taxes and fast food regulations over the past decade demonstrate, government intervention can be used to shape individual behavior and industry norms to benefit the public interest.[13] Likewise, New York City's proposed ban on large sugary drinks may be used to curb obesity and obesity-related medical costs.

New York City's Sugary Drinks Portion Cap Rule, proposed by Mayor Michael Bloomberg in May 30, 2012, and approved by the New York City Board of Health in September 13, 2012, prohibits food-services establishments that are subject to the city's health department from selling sodas and other sugary drinks in containers larger than sixteen ounces.[14] It is important to note that although the proposed ban on large

---

12 Multiple factors determine a person's weight, such as genetics, metabolism, behavior, environment, culture, and socioeconomic influences. Todd J. Zywicki et al., *Obesity and Advertising Policy*, 12 GEO. MASON L. REV. 979, 979 (2004). The OECD (Organization for Economic Cooperation and Development) noted in a report published in September 23, 2010, "Obesity and the Economics of Prevention: Fit not Fat," that individual interventions have a relatively limited impact, that multiple interventions that can bring fundamental changes in social norms are necessary, and that governments need to intervene to make the social environment more conducive to healthier practices. Marion Nestle, *Americans Beat 33 Countries to Win OECD Obesity Prize*, FOOD POLITICS (Sep. 24, 2010), http://www.foodpolitics.com/2010/09/americans-beat-33-countries-to-win-oecd-obesity-prize. More importantly, The New England Journal of Medicine found in a study that "the genetic association with adiposity appeared to be more pronounced with greater intake of sugar-sweetened beverages." Qibin Qi et al., *Sugar-Sweetened Beverages and Genetic Risk of Obesity*, 367 NEW ENG. J. OF MED. 1387, 1387 (Oct. 11, 2012), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMoa1203039.

13 *See e.g.*, Amanda MacMillan, *NYC's Fat Ban Paying Off*, CNN (July 16, 2012), http://edition.cnn.com/2012/07/16/health/nyc-fat-ban-paying-off (reporting on a study by New York City health officials which found that the five year old ban on the use of trans fat-containing foods or using ingredients that contain 0.5 grams or more of trans fat per serving in the city's restaurants that was phased in between 2007 and 2008 had sharply reduced the consumption of the unhealthy fats among fast-food customers. The ban was estimated to have caused a drop of 2.5 to three grams in the average trans fat content of customers' meals, illustrating that "health regulations at the local level can have a measurable effect on public consumption."). A study found that strong local restaurant smoking regulations are associated with reduced environmental tobacco smoke exposure among youths. Siegel et al., *Effect of Local Restaurant Smoking Regulations on Environmental Tobacco Smoke Exposure Among Youths*, 94 AM. J. PUB. HEALTH 321, 325 (2004), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448250/pdf/0940321.pdf.

14 Vivian Yee, *Your Guide to New York's Soda Ban*, N.Y. TIMES (Mar. 11, 2013), http://cityroom.blogs.nytimes.com/2013/03/11/your-guide-to-new-yorks-soda-ban/ [hereinafter *Guide to New York Soda Ban*]; *see also* Michael M. Grynbaum, *Soda Makers Begin Their Push Against New York Ban,* N.Y. TIMES (July 1, 2012), http://www.nytimes.com/2012/07/02/nyregion/in-fight-against-nyc-soda-ban-industry-focuses-on-personal-choice.html?pagewanted=all [hereinafter *Soda Makers Push Against New York Ban*]; Jill Colvin, *New York Soda Ban Approved: Board of Health Oks Limiting Sale of Large-Sized, Sugary Drinks*, HUFFINGTON POST (Sep. 13, 2012), http://www.huffingtonpost.com/2012/09/13/new-york-approves-soda-ban-big-sugary-drinks_n_1880868.html.

sugary drinks is commonly referred to as a "Soda Ban," the ban would actually include many other types of sugary beverages such as fruit-flavored drinks, sports drinks, energy drinks, presweetened black coffee and teas, and hot chocolate.[15] Specifically, the Soda Ban defines "sugary drink" as:

> [A] carbonated or non-carbonated beverage that is non-alcoholic; is sweetened by the manufacture or establishment with sugar or another caloric sweetener; has greater than 25 calories per 8 fluid ounces of beverage; and does not contain more than 50 percent of milk or milk substitute by volume as an ingredient.[16]

The proposed ban further provides that self-service cups—cups or containers provided by a food service establishment and filled by the consumer—are also subject to the sixteen ounce limit.[17]

Although state legislatures have often introduced soda tax policies,[18] these policies, with the exception of small sales taxes on sugary beverages,[19] have either been repealed or have not been implemented, mainly due to fierce resistance by lobbyists.[20] Adam Smith stated in 1776 that "[s]ugar, rum, and tobacco are commodities which are nowhere necessaries of life, which are become objects of almost universal consumption, and which are therefore extremely proper subjects of taxation."[21] Over two centuries later, sugar is the anomaly of Smith's

---

15 *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12, slip op. 5505 at 9 (N.Y. App. Div. 1st Dep't, July 30, 2013). Note that the rule contains carve-outs for alcoholic beverages, milkshakes, fruit smoothies, mixed coffee drinks, mochas, lattes, and 100% fruit juices. *Id.* Thus, the term "soda," as used throughout this Note, includes all drinks affected by the New York Soda Ban.

16 R.C.N.Y. tit.24, § 81.53(a) (proposed). In sum, major exceptions to the Soda Ban include drinks with more than 50% milk (or milk substitute), beverages with less than twenty-five calories per eight ounces like diet sodas, and alcoholic beverages. *Guide to New York Soda Ban*, *supra* note 14.

17 R.C.N.Y. tit. 24, § 81.53(a), (c) (proposed).

18 Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 856 (2000) (note Table 2—Repealed Soft Drink and Snack Food Taxes), *available at* http://www.cspinet.org/reports/jacobson.pdf.

19 Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599, 1599 (2009), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMhpr0905723.

20 Paul Bedard, *Voters Say Don't Tax My Soda Pop*, U.S. NEWS (Nov. 12, 2010), http://www.usnews.com/news/washington-whispers/articles/2010/11/12/voters-say-dont-tax-my-soda-pop. For example, soft drink and snack food taxes have been repealed in a handful of states, including Maryland, Ohio, New York, and Washington. *See* Jacobson & Brownell, *supra* note 18, at 856.

21 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 889 (Edwin Cannan ed., 1937).

triumvirate, remaining largely untaxed while alcohol and tobacco are routinely taxed.[22]

While some argue that government regulation of diet is an overreach into people's lives,[23] government intervention in a market is warranted when market failures cause suboptimal consumption.[24] Market failure refers to problems in the decision-making process, and markets may fail in cases of information deficits, externalities, and lack of rationality.[25] Market failures are present in the soda industry due to consumers' time-inconsistent preferences, which provide short-term gratification but long-term harm; financial externalities caused by the fact that consumers do not bear the full costs of their consumption decisions; and consumers' ignorance of the negative effects that soda can have on their health, which causes them to make consumption decisions based on imperfect information.[26] Because various factors, such as the definition of regulated beverages, the type of regulation applied, and regulation content itself[27] will determine the legality of a soda ban and the ban's effect on soda consumption, only a sophisticated and well-tailored ban policy could accomplish its goals with minimal burden on beverage companies and consumers. While the Soda Ban may not be perfect, it is sophisticated enough to be considered legitimate and to accomplish its goal of inducing people make healthier choices.

Although New York's 2009 attempt to implement a statewide soda tax was abandoned, its spirit lives.[28] On September 19, 2012, the New York City Board of Health approved Mayor Michael Bloomberg's pro-

---

22 *See* J. Angelo DeSantis, *Formulating a Soda Tax Fit for Consumption: A Pragmatic Approach to Implementing the Failed New York Soda Tax*, 16 MICH. ST. J. MED. & L. 363, 370–71 (2012).

23 *See* Neil H. Buchanan, *Soft Drinks, Taxes, and Regulation: Why the Attacks on Mayor Bloomberg's Proposed Size Restrictions on Soda Servings Are Misplaced*, VERDICT.JUSTIA.COM (July 12, 2012), http://verdict.justia.com/2012/07/12/soft-drinks-taxes-and-regulation (noting that the strategy of the soda makers is to make the Soda Ban "a debate about freedom, not fatness," but arguing that "Bloomberg's approach is no more an attack on people's freedom than are traffic lights, or laws against lying to consumers," and "steering people away from harmful behavior in all these diverse ways is the very essence of good public policy.").

24 *See* John Cawley, *An Economic Framework for Understanding Physical Activity and Eating Behaviors*, 27 AM. J. PREV. MED. 117, 120 (2004).

25 *See id.*

26 Brownell et al., *supra* note 19, at 1601–02.

27 For consideration of such issues in the context of sugary-sweetened beverage taxes, see Leslie McGranahan & Diane Whitmore Schanzenbach, *Who Would Be Affected by Soda Taxes?*, CHI. FED LETTER (Fed. Reserve Bank of Chi., Chicago, Ill.) (Mar. 2011), *available at* http://www.chicagofed.org/digital_assets/publications/chicago_fed_letter/2011/cflmarch2011_284.pdf.

28 In 2009, New York State proposed $0.01 per ounce tax on soda and other sweet drinks. Anemona Hartocollis, *Failure of State Soda Tax Plan Reflects Power of an Antitax Message*, N.Y. TIMES (July 2, 2010), http://www.nytimes.com/2010/07/03/nyregion/03sodatax.html?pagewanted=2&_r=0.

posal to ban the sale of large sugary beverages, an unprecedented restriction in the United States.[29] The measure was planned to take effect starting March 2013.[30] However the plan was struck down by Judge Milton A. Tingling of the New York County Supreme Court in Manhattan on March 11, 2013.[31] Although the Bloomberg administration appealed in June,[32] the First Department of the Appellate Division of New York State Supreme Court in Manhattan upheld Judge Tingling's ruling on July 30, 2013.[33]

The Soda Ban prohibits New York City restaurants, movie theaters, food carts, sports stadiums, and other city-regulated food service establishments from serving sugary drinks in sizes larger than sixteen ounces.[34] However, unlike an absolute ban, Mayor Bloomberg's plan exempts many businesses and types of beverages. First, the Soda Ban does not apply to businesses that are not subject to inspection by the New York City Department of Health and Mental Hygiene (DOHMH) under the 2010 Memorandum of Understanding (MOU) between the DOHMH and New York State's Department of Agriculture and Marketing.[35] Such businesses include: supermarkets, convenience stores, grocery stores, corner markets, and gas stations.[36] The MOU provides that only food service establishments that generate "50 percent or more of its total annual dollar receipts from the sale of food for consumption on the prem-

---

29 Michael M. Grynbaum, *Health Panel Approves Restrictions on Sale of Large Sugary Drinks*, N.Y. TIMES (Sept. 13, 2012), http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html.

30 David B. Caruso & Jennifer Peltz, *NYC Bans Big, Sugary Drinks at Restaurants*, YAHOO! NEWS (Sept. 14, 2012), http://news.yahoo.com/nyc-bans-big-sugary-drinks-restaurants-210319871.html.

31 Michael M. Grynbaum, *Judge Blocks New York City's Limits on Big Sugary Drinks*, N.Y. TIMES (Mar. 11, 2013), http://www.nytimes.com/2013/03/12/nyregion/judge-invalidates-bloombergs-soda-ban.html?pagewanted=all&_r=0. The New York State Court of Appeals in New York's highest court. The Court of Appeals hears appeals from the Appellate Divisions of the Supreme Court, which hear appeals from the New York Supreme Courts, which are trial courts. *See Structure of the Courts,* NEW YORK STATE UNIFIED COURT SYSTEM, http://www.nycourts.gov/courts/structure.shtml (last updated Feb. 15, 2013).

32 Michael M. Grynbaum, *City Argues to Overturn Ruling that Prevented Limits on Sugary Drinks*, N. Y. TIMES (June 11, 2013), http://www.nytimes.com/2013/06/12/nyregion/bloomberg-presses-for-reversal-of-court-ban-on-sugary-drink-limits.html?_r=1&.

33 E. C. Gogolak, *Appeals Court Rules Against Bloomberg Beverage Restrictions*, N.Y. TIMES (July 30, 2013), http://www.nytimes.com/2013/07/31/nyregion/appeals-court-rules-against-bloomberg-beverage-rules.html?_r=0.

34 Michael M. Grynbaum, *New York Plans to Ban Sale of Big Sizes of Sugary Drinks*, N.Y. TIMES (May 30, 2012), http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugared-drinks.html?pagewanted=all [hereinafter *New York Plans to Ban Large Sodas*].

35 *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12,slip op. 5505 at 10 (N.Y. App. Div. 1st Dep't, July 30, 2013).

36 *Id.*

ises or ready-to-eat for off-premises consumption" are subject to inspection by a local Health Department.[37] Second, drinks such as alcohol, diet soda,[38] beverages that contain more than 50% milk, and those to which customers add sugar themselves are not subject to the Soda Ban.[39] Since sixteen fluid ounces is the size of a medium coffee and smaller than a common soda bottle,[40] New York City residents would probably notice the effects of the Soda Ban after its implementation. However, the restriction will not ban people from getting large quantities of sweetened beverages if they want to. Rather, the Soda Ban aims to educate the public by forcing people to make an informed choice of purchasing large and small soda drinks and consider the amount of sugar and the number of calories contained in the sugary beverages they consume on a daily basis. The Soda Ban's challengers argued and the New York County Supreme Court held that the Soda Ban was capricious and arbitrary on the grounds that the Soda Ban does not include all food establishments and all sugary drinks. However, because administrative agencies are given a high degree of judicial deference when exercising regulatory power in an area of particular expertise, a party that seeks to invalidate a regulation has "the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence."[41]

This Note's argument unfolds in three Parts. Part I examines the obesity crisis associated with sweetened sugary drinks and briefly discusses the background that led to New York City's attempted Soda Ban. Part II introduces some of the Soda Ban's constitutional implications and analyzes critics' concerns regarding the implementation of a soda tax or soda ban. Part III discusses the most salient points regarding tobacco taxes and food industry regulations and how they relate to the proposed Soda Ban. Part III.A addresses how the consumption of soda products differs from that of tobacco and food. Part III.B discusses the implications of tobacco taxes and food regulations for the Soda Ban. Part III.C discusses the differences between taxes and bans, argues that the government's direct regulation of the beverage industry is a sound policy, and explains why the government might prefer to ban soda in limited circumstances rather than tax it. Part III.D briefly explains the anticipated effects of the Soda Ban.

---

37 *Id.* at 6.

38 *Id.*

39 Caruso & Peltz, *supra* note 30.

40 *New York Plans to Ban Large Sodas, supra* note 34.

41 Consolation Nursing Homes, Inc. v. Comm'r New York State Dep't of Health, 85 N.Y.2d 326, 331–32 (1995).

## I. THE IMPETUS FOR NEW YORK CITY'S SODA BAN

### A. *Health Issues Related to Soda Drinks*

New York, like most other states, is experiencing an obesity crisis.[42] More than half of the adult New York City population (58%) and nearly 20% of New York City public school students (kindergarten through eighth grade) are now overweight or obese.[43] In 2006, obesity cost the nation $147 billion in direct medical costs—insurers in New York State alone spent $11.1 billion in obesity-related medical costs, including $2.7 billion spent by Medicare and $4 billion by Medicaid.[44] By 2012, obesity-related medical costs increased to $190 billion for the uninsured, with annual medical spending for each obese person totaling $3,271, compared to $512 for the non-obese.[45] Additional indirect costs include decreased productivity, increased insurance premiums, and increased disability costs.[46] Thus, in this context, food choices affect not only the individual who makes them, but also all taxpayers.

The fact that non-diet sodas contain large amounts of sugar and calories is uncontested: a regular twelve-ounce cola is 150 calories and contains ten teaspoons of sugar.[47] The American Heart Association has suggested that the maximum amount of sugar intake should be 150 calories per day (37.5 grams or nine teaspoons) for men and 100 calories per day (twenty-five grams of six teaspoons) for women,[48] meaning that

---

[42] *Reversing the Epidemic*, *supra* note 3, at 4.

[43] Brief for Appellant at 7, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12 (N.Y. App. Div. 1st Dep't, July 30, 2013).

[44] *Reversing the Epidemic*, *supra* note 3, at 5.

[45] Rick Ungar, *Obesity Now Costs Americans More in HealthCare Spending than Smoking*, FORBES (Apr. 3, 2012), http://www.forbes.com/sites/rickungar/2012/04/30/obesity-now-costs-americans-more-in-healthcare-costs-than-smoking/.

[46] J.G. Trogdon et al., *Indirect Costs of Obesity: A Review of the Current Literature*, 9 OBESITY REVS. 489, 489 (2008), *available at* http://web.ebscohost.com.proxy.library.cornell.edu/ehost/pdfviewer/pdfviewer?sid=3258b432-1533-4b72-96a9-a1085be771cb%40sessionmgr112&vid=2&hid=103.

[47] *How Sweet Is It?*, HARV. SCH. PUB. HEALTH, http://www.hsph.harvard.edu/nutritionsource/files/2012/10/how-sweet-is-it-color.pdf (last visited July 13, 2013); MICHAEL F. JACOBSON, CTR. FOR SCI. IN THE PUB. INTEREST, LIQUID CANDY: HOW SOFT DRINKS ARE HARMING AMERICANS' HEALTH 4 (2005), *available at* http://www.cspinet.org/new/pdf/liquid_candy_final_w_new_supplement.pdf. Diet sodas have also been associated with detrimental effects on health, such as higher risk of developing type 2 diabetes. *See* Amanda L. Chan, *Diet Soda Associated with Type 2 Diabetes Risk, Study Finds*, HUFFINGTON POST (Feb. 11, 2013, 4:58 PM), http://www.huffingtonpost.com/2013/02/11/diet-soda-diabetes-risk-type-2-artificially-sweetened-sugar_n_2663247.html. Furthermore, studies have shown that artificial sweeteners used in diet sodas make people hungrier, causing them to particularly crave sugars and carbohydrates. *See* Dominique Mosbergen, *Diet Soda Health Risks: Study Says Artificial Sweeteners May Cause Weight Gain, Deadly Diseases*, HUFFINGTON POST (July 11, 2013), http://www.huffingtonpost.com/2013/07/11/diet-soda-health-risks_n_3581842.html.

[48] Gianna Rose, *Recommended Daily Allowance of Sugar*, LIVESTRONG (Aug. 8, 2013), http://www.livestrong.com/article/363283-recommended-daily-allowance-of-sugar.

drinking a twelve-ounce cola alone could exceed the recommended daily sugar intake. While there have been heated debates as to whether soda consumption directly causes obesity,[49] many researchers have found evidence that soft drinks do, in fact, cause obesity.[50] Even if there was an absence of a direct causal link between drinking soda and obesity, another fact suggests that there is at least an indirect link between them. Unlike calories in solid food, calories consumed in the form of sugary drinks do not significantly decrease hunger. Thus, people who drink non-diet soda tend to consume more calories than people who do not consume calories in the form of sugary drinks.[51]

Being overweight or obese increases the risk of diabetes, heart disease, stroke, cancer, arthritis, asthma, depression and other diseases.[52] Moreover, overweight children and adolescents are more likely to become obese adults.[53] Obesity may weaken the stability and long-term growth of the economy[54] because people with obesity-related illnesses need to take a greater number of sick days and tend to retire earlier than their non-obese counterparts.[55] Also, since the public sector finances a

---

[49] *See* Michael L. Marlow & Alden F. Shiers, *Would Soda Taxes Really Yield Health Benefits?*, 33 REGULATION 34, 34–36 (2010), *available at* http://www.cato.org/pubs/regulation/regv33n3/regv33n3-4.pdf.

[50] *See* Caroline M. Apovian, *Sugar-Sweetened Soft Drinks, Obesity, and Type 2 Diabetes*, 292 J. AM. MED. ASS'N 978, 978–79 (2004) (includes Harvard School of Public Health study illustrating that soft drinks contribute to obesity in adults.); *see also* JACOBSON, *supra* note 47, at 10–11 (citing two studies: one study finding that obesity rates have risen in tandem with soft drink consumption and that heavy soda drinkers have higher caloric intakes; and another study finding that greater consumption of soft drinks by children between the ages of nine and fourteen is associated with small increases in body mass index (BMI) and that "consumption of sugar-added beverages may contribute to weight gain among adolescents."). Interestingly, another study found that studies that fail to find a relationship between the consumption of sugared beverages and negative health outcomes tend to be conducted by authors funded by the beverage industry. Richard A. Forshee et al., *Sugar-Sweetened Beverages and Body Mass Index in Children and Adolescents: A Meta-Analysis*, 87 AM. J. CLINICAL NUTRITION 1662,1666 (2008).

[51] *See* D. P. DiMeglio & R. D. Mattes, *Liquid Versus Solid Carbohydrate: Effects on Food Intake and Body Weight*, 24 INT'L. J. OBESITY 794, 798 (2000) (in a study where subjects added 450 calories per day to their diets from either soft drinks or jelly beans during two four-week periods, the subjects subconsciously compensated for the added calories by consuming roughly 540 fewer calories from other foods when they ate jelly beans, but not when they drank soft drinks).

[52] *Reversing the Epidemic*, *supra* note 3, at 4–5; U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 8–9 (2001), *available at* http://www.surgeongeneral.gov/library/calls/obesity/CalltoAction.pdf.pdf [hereinafter SURGEON GENERAL'S CALL TO ACTION].

[53] *Nutrition Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/healthyYouth/nutrition/facts.htm (last updated Feb. 19, 2013).

[54] *See* Kathryn Hinton, Note and Commentary, *Employer by Name, Insurer by Trade: Society's Obesity Epidemic and Its Effects on Employers' Healthcare Costs*, 12 CONN. INS. L.J. 137, 141–43 (2006).

[55] *See generally* Glenna Novack, Note, *Lawsuits in the Fast-Food Nation: Will Fast-Food Suits Succeed as Obesity Becomes an American Tradition?*, 52 WAYNE L. REV. 1307,

substantial part of obesity costs via Medicaid and Medicare, obesity heavily burdens federal and state budgets.[56] It has been noted that the absence of obesity would decrease the annual medical expenditures by 7–11%.[57] Given such findings, reducing the consumption of sugar-sweetened beverages may provide the best opportunity to reduce obesity and curb the resulting health problems and medical and social costs for both present and future generations.

Just as it is important to realize the link between soda consumption and the obesity epidemic, it must also be noted that the American obesity epidemic has many sources, including: lack of physical exercise;[58] poor diet and unhealthy dieting;[59] cultural upbringing;[60] health-care professionals' failure to counsel patients about obesity;[61] excessive food portions in restaurants;[62] junk food advertising on children's television

---

1307 (2006) (arguing that if obesity comes to be seen as an illness, the personal choice to eat fast food would not bar recovery for fast-food plaintiffs when the restaurants are seen as responsible for creating disease). In 2009 and 2010, more than one-third of U.S. adults—35.7% of U.S. adults, 41 million women and 37 million men—were obese. Cynthia L. Ogden et al., *Prevalence of Obesity in the United States, 2009-2010*, NCHS DATA BRIEF, NO. 83, 1, 3 (National Center for Health Statistics, MD) Jan. 2012, *available at* http://www.cdc.gov/nchs/data/databriefs/db82.pdf. For more statistics on overweight and obesity, see Overweight and Obesity Statistics, WEIGHT-CONTROL INFORMATION NETWORK, http://www.win.niddk.nih.gov/statistics (last modified Mar. 12, 2013).

[56] *Reversing the Epidemic*, *supra* note 3, at 5.

[57] *Id.*

[58] Thomas N. Robinson, *Reducing Children's Television Viewing to Prevent Obesity: A Randomized Control Trial*, 282 J. AM. MED. ASS'N 1561, 1561 (1999).

[59] *See* Mary K. Serdula et al., *Prevalence of Attempting Weight Loss and Strategies for Controlling Weight*, 282 J. AM. MED. ASS'N 1353, 1357–58 (1999) (finding that many dieters reduce their fat intake without reducing total calories or increasing their amount of exercise).

[60] For example, the American cultural models of abundance and innovation affect food choices at restaurants (e.g., certain American adages, for example "bigger is better," or "more is better," and the American capitalist value of "getting the most for your buck" may encourage people to consumer larger portions of food at restaurants). *See* Peter J. Brown & Sterling V. Krick, *Culture and Economy in the Etiology of Obesity: Diet, Television and the Illusions of Personal Choice* 6, 9, http://www.marial.emory.edu/pdfs/wp003-01obesity%20.pdf. Furthermore, the increase in the number of restaurants in the United States by 75% between 1977 and 1991, coupled with marketing-driven practice of "super-sizing" or value sizing have resulted in Americans getting an increased proportion of daily energy from food prepared outside the home. *Id.* at 8, 9. According to Nielsen ratings, U.S. children spend more time watching television than in any other activity except sleep, including time spent in school, resulting in reduced energy expenditure from displacement of physical activity, and increased food intake either during viewing or in response to food advertising. *Id.* at 11.

[61] *See* Deborah A. Galuska et al., *Are Health Care Professionals Advising Obese Patients to Lose Weight?*, 282 J. AM. MED. ASS'N 1576, 1576–78 (1999) (finding that less than half of obese adults have been advised to lose weight by their doctors); *see also* Christina C. Wee et al., *Physician Counseling About Exercise*, 282 J. AM. MED. ASS'N1583, 1583–88 (1999) (finding that doctors infrequently advise patients about exercise).

[62] *See* Samara Joy Nielsen & Barry M. Popkin, *Patterns and Trends in Food Portion Sizes, 1977-1998*, 289 J. AM. MED. ASS'N 450, 450–53 (2003) (finding that food portion sizes have increased markedly in recent decades). For example, Cheesecake Factory's Bistro Shrimp Pasta dish is 3,120 calories, which is 320 to 520 more calories than the amount advised

programs;[63] the increasing number of meals eaten outside the home;[64] and genetic predisposition.[65] Certainly the consumption of sugary drinks is not the sole cause of the problem. However, since these causes are closely correlated with each other, controlling one factor may ultimately influence other factors and promote overall health. For example, drinking soda amplifies a person's risk of obesity beyond baseline hereditary projections.[66] Thus, controlling the consumption of soda drinks may be an important step to bring fundamental and long-lasting improved public health outcomes.

---

for a moderately active male aged nineteen to thirty to consume in a day. Matt Peckham, *Cheesecake Factory's 3,000-Calorie Bistro Shrimp Pasta Tops List of 'Xtreme' Gut-Busters*, TIME (Jan. 17, 2013), http://newsfeed.time.com/2013/01/17/cheesecake-factorys-3000-calorie-bistro-shrimp-pasta-tops-list-of-xtreme-gut-busters/.

63 *See* Dale Kunkel et al., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN 5, 12 (2004), *available at* http://www.apa.org/pi/families/resources/advertising-children.pdf.; *see also CSPI Hits Marketing Junk Food to Kids*, CTR. FOR SCI. IN THE PUB. INTEREST (Nov. 10, 2003), http://www.cspinet.org/new/200311101.html; *but see* Zywicki et al., *supra* note 12, at 979 ("[T]he available evidence to support any proffered link between food advertising and obesity is quite limited and often contrary to the thesis.").

64 Americans spend half of their food budget and consume a third of their calories outside the home, with fast food constituting 50% of all restaurant sales. Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1171 (2004). Americans spend $110 billion annually in the country's 160,000 fast-food restaurants, and get 37% of their daily calories from eating a fast-food meal. Fast Food Statistics, PEW RESEARCH CENTER, http://www.statisticbrain.com/fast-food-statistics.

65 *See* Joseph P. McMenamin & Andrea D. Tiglio, *Not the Next Tobacco: Defense to Obesity Claims*, 61 FOOD & DRUG L. J. 445, 453–86 (2006) (presenting a comprehensive explanation of the causes of obesity); *see also* SURGEON GENERAL'S CALL TO ACTION, *supra* note 52, at 1 ("Overweight and obesity are caused by many factors. For each individual, body weight is determined by a combination of genetic, metabolic, behavioral, environmental, cultural, and socioeconomic influences."); *see generally* Zywicki et al., *supra* note 12, at 980–90 (presenting numerous hypotheses regarding the causes of increased rates of obesity among Americans). The genetic association with obesity is more pronounced with greater intake of sugar-sweetened beverages. *See* Qibin Qi et al., *Sugar-Sweetened Beverages and Genetic Risk of Obesity*, 367 NEW ENG. J. OF MED. 1387, 1387 (Oct. 11, 2012), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMoa1203039. A study found that active people with a genetic predisposition to obesity did not have higher or lower BMIs than those of people without the obesity gene. *See Genes Are Not Destiny*, HARV. SCH. PUB. HEALTH, http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/genes-and-obesity (last visited Oct. 17, 2013). Furthermore, even a study that found that gaining weight from a high-fat diet is primarily determined by genetics admitted that "whether you choose to eat a high-fat diet in the first place is largely environmental." Kathleen Miles, *'Fat Genes' Determine Obesity UCLA Study Says, In Addition to Diet and Exercise*, HUFFINGTON POST (Jan. 10, 2013), http://www.huffingtonpost.com/2013/01/10/fat-genes-obesity-ucla-study-diet-exercise_n_2450108.html.

66 Marilynn Marchione, *Soda, Other Sugary Drinks More Firmly Tied to Obesity In New Studies*, HUFFINGTON POST (Sept. 21, 2012), http://www.huffingtonpost.com/2012/09/21/obesity-soda-sugary-drinks_n_1904732.html.

### B. *Early Governmental Efforts to Curb Soda Consumption*

New York City's attempt to ban large sized sodas from being sold by certain retailers is not the first type of regulatory measure to try to limit soda consumption. Many states and localities enacted soda taxes from the 1960s to the 1980s, mostly in the range of $0.01 to $0.02 per bottle (approximately 1–3%), but repealed them in the 1990s.[67] As one might expect, lobbying by the beverage and bottling industries was the most common reason for repealing these soda taxes.[68] The lobbying power of soda companies cannot be overlooked, since most of them, including PepsiCo, Coca-Cola, and Dr. Pepper Snapple Group are multinational companies listed in the Fortune 500.[69] This pattern was apparent in the failure of New York Governor David A. Paterson's proposed tax on sugary drinks. Kevin Finnegan, the political director of 1199 Service Employees International Union (a local union of the Service Employees International Union, set up to organize pharmacists in New York City), explained that "money" was the reason for the defeat. Estimates of money spent by the Alliance for a Healthier New York ranged from $2.5 million to $5 million, whereas the American Beverage Association spent $9.4 million to oppose New York's soda tax.[70]

While the differences between banning and taxing soda drinks will be discussed in detail in Part III, at this point, it is worth discussing the process of implementing either a soda ban or a soda tax policy in New York City. In the case of a ban, the proposal can be approved by the Board of Health, whose members are appointed by New York City's mayor.[71] In contrast, for New York City to impose taxes or change its existing tax structure, it must first seek permission from the New York State Legislature.[72] This is where lobbying comes into play. Thus, because of such limited tax authority, implementation of tax-based policies have proven to be infeasible in many cases, including New York State's failure to tax soda drinks in 2009.

---

67 Brownell et al., *supra* note 19, 1602 (taxes can be levied at the wholesale or retail level, and fixed by volume of product or as a percentage of sales price).

68 *Id.*

69 *Fortune 500*, FORTUNE (May 21, 2012), http://money.cnn.com/magazines/fortune/fortune500/2012/full_list. In some cases, there is an explicit quid pro quo involving the industry. For example, in response to Coca-Cola's offer to build a bottling plant in Louisiana, the state passed a law in 1993 repealing its soft drink tax contingent on a bottling company contracting to build a bottling plant in the state worth $50 million or more. As Coca-Cola signed such a contract in 1997, the tax was abolished. *See* Jacobson & Brownell, *supra* note 18, at 855–56.

70 Anemona Hartocollis, *Failure of State Soda Tax Plan Reflects Power of an Antitax Message*, N.Y. TIMES (July 2, 2010), http://www.nytimes.com/2010/07/03/nyregion/03sodatax.html?pagewanted=2&_r=0.

71 *Soda Makers Push Against New York Ban*, *supra* note 14.

72 Erin Adele Scharff, Note, *Taxes as Regulatory Tools: An Argument for Expanding New York City's Taxing Authority*, 86 N.Y.U. L. REV. 1556, 1556 (2011).

## II. THE REACTION TO THE SODA BAN

### A. *Constitutional Implications of the Soda Ban*

#### 1. Separation of Powers

The promulgation of New York City's Soda Ban garnered public criticism from people who view the ban as paternalistic.[73] The lawsuit filed by the American soft drink industry and other businesses to overturn the Soda Ban questioned the authority of the New York City Board of Health to enact such policy.[74] The lawsuit also raised constitutional concerns. The main issues in *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene* were: (1) whether the New York City Board of Health violated the separation of powers doctrine by promulgating the Soda Ban; and (2) whether the Soda Ban was arbitrary and capricious.[75] Both the trial and appellate courts that heard the case held that the Soda Ban was unconstitutional based on state law because it violated separation of powers principles. The New York County Supreme Court further held that the ban was arbitrary and capricious, and thus contrary to law.[76] In reaching their separation of powers conclusion, the two courts applied the four-prong test of *Boreali v. Axelrod*, the seminal New York State separation of powers case.[77] In *Boreali*, the New York Court of Appeals held that the Public Health Council (PHC) overstepped the bounds of its authority in instituting regulations banning indoor smoking in certain establishments.[78] The four factors the *Boreali* court looked at in making its determination were:

---

[73] Bettina Elias Siegel, *Bloomberg vs. Big Soda: Portion Size, Paternalism and Politics*, HUFFINGTON POST (June 1, 2012), http://www.huffingtonpost.com/bettina-elias-siegel/nyc-mike-bloomberg-soda-ban_b_1560967.html.

[74] Michael M. Grynbaum, *Soda Industry Sues to Stop a Sales Ban on Big Drinks*, N.Y. TIMES (Oct. 12, 2012), http://www.nytimes.com/2012/10/13/nyregion/soda-industry-sues-to-stop-bloombergs-sales-limits.html?_r=0.

[75] N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N. Y. City Dept. of Health & Mental Hygiene, No. 653584-12, slip op. 30609(U) at 2, 31 (N.Y. Sup. Ct., Mar. 11, 2013).

[76] *Id.* at 31, 34. However, note that the Appellate Division held that the fourth factor of the *Boreali* test was violated, in contrast to the lower court. *Id.* at 31–32; N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12, slip op. 5505, at 28-31 (N.Y. App. Div. 1st Dep't, July 30, 2013). Furthermore, the Appellate Division did not reach the issue of whether the Soda Ban was arbitrary and capricious, reasoning that the Ban's failure to meet the *Boreali* test ended the inquiry. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12, slip op. 5505 at 31 (N.Y. App. Div. 1st Dep't, July 30, 2013).

[77] 71 N.Y.2d 1 (1987).

[78] *Id.* at 6. The four "coalescing circumstances" that were present in *Boreali* were: (1) the PHC had carved out numerous exemptions based solely upon economic and social considerations; (2) the PHC "wrote on a clean slate, creating its own comprehensive set of rules without the benefit of legislative guidance"; (3) the State Legislature had previously adopted legislation relating to smoking in public places, and thereafter considered (but never adopted)

(1) whether the challenged regulation was based upon concerns not related to the stated purpose of the regulation (e.g. economic and social concerns); (2) whether the regulation was created on a clean slate, thereby creating its own comprehensive set of results without legislative guidance; (3) whether the regulation addressed a matter the legislature had previously discussed, debated or tried to address (presence of this factor is construed as being indicative of the legislature's inability to agree on "the goals and methods that should govern in resolving" the issue); and (4) whether the regulation required the exercise of expertise or technical competence on behalf of the body passing the legislation.[79] The four *Boreali* factors function to frame judicial analysis of whether regulatory action exceeds the authority of an administrative body by supplanting the constitutionally-allocated exclusive legislative authority of the State Legislature.

In utilizing the four-factor *Boreali* test to determine the constitutionality of the Soda Ban, the New York County and appellate courts first determined that the act of the New York City Health Board was within the scope of *Boreali* review and that a sufficient number of *Boreali* test factors were present (i.e., the Supreme Court of New York County found that the ban violated three factors and the Appellate Division of the Supreme Court of New York found that the ban violated four factors).[80] The Appellate Division held that the Board's decision to exempt certain establishments and drinks "reflects a balance between health concerns, an individual consumers choice of diet, and business financial interest" and thus involves "difficult social problems," which must be resolved by a legislature.[81] The Appellate Division also held that the Soda Ban violated the second *Boreali* factor—whether the agency exceeded its authority by going outside the limits of interstitial rulemaking (the process of filling in the details of a broad legislative mandate).[82] The court reasoned that neither the New York State Legislature nor the New York City Council had established a statute defining a policy with respect to excessive soda consumption, and that the New York City Charter's grant

---

40 bills that addressed the same subject area; and (4) no special expertise in the field of health was necessary to develop the regulations. *Id.* at 11–14.

79 *Id.* at 12–14.

80 N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12,slip op. 5505 at 17–31 (N.Y. App. Div. 1st Dep't, July 30, 2013); N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N. Y. City Dept. of Health & Mental Hygiene, No. 653584-2012, slip op. 30609(U) at 15,19, 31-32 (N.Y. Sup. Ct., Mar. 11, 2013).

81 N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12,slip op. 5505 at 21–23 (N.Y. App. Div. 1st Dep't, July 30, 2013).

82 *Id.* at 23.

of broad authority to the Board of Health is not unlimited.[83] Although the court acknowledged that the New York Legislature intended to provide the Board with the discretion to engage in interstitial rulemaking regarding matters inherently harmful to the health of City residents, stating that because overconsumption of soda, not mere soda consumption, is what poses a health hazard, the court found that the Soda Ban violated the second *Boreali* factor.[84] In finding that the Soda Ban violated the third factor, the court noted that the Soda Ban employs different means of targeting the sale of certain sugary beverages than those previously employed by legislative bodies. Nevertheless, the court reasoned, because the legislature had not agreed on "the goals and methods that should govern in resolving" the issue addressed by the Soda Ban, the agency improperly attempted to come up with its own solution.[85] Finally, the court held that the Board violated the fourth factor because it did not exercise any special expertise or technical competence in developing the Soda Ban.[86] The court based this conclusion on the fact that the deleterious effect of excessive soda consumption is well known to non-experts and the Board had enacted the rule without substantively modifying the draft version of the rule proposed by the Office of the Mayor.[87]

---

[83] *Id.* at 24–25.

[84] *Id.* at 25–27. Although moderate soda consumption may not be a health hazard, it must be noted that obesity has been officially recognized as a disease by the American Medical Association. *See* Pollack, *supra* note 8.

[85] *Boreali v. Axelrod*, 71 N.Y.2d 1, 8 (1987); *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, slip op. 5505 at 27–29.

[86] *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, slip op. 5505 at 28, 30–31.

[87] *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, slip op. 5505 at 30–31. However, the lower court held that the ban did not violate the fourth *Boreali* factor because the mere fact that the Board enacted the version of the regulation proposed by the Office of the Mayor without significant modification did not necessarily indicate that the Board had not employed its technical expertise to evaluate the regulation. *Id.* Board membership does indeed require technical expertise. Of the ten Board of Health members not serving as chairperson, five must be doctors of medicine, and non-physician members must hold at least a masters in "environmental, biological, veterinary, physical or behavioral health or science, or rehabilitative science or in a related field." NYC Charter§ 553(a) (2001). Furthermore, all ten Board members must have at least ten years of pertinent experience. *Id.* As the Board noted in its brief for the appeal:

> The current members of the Board represent a broad range of health and medical disciplines, including: a former chairperson of the Department of Community Health Sciences at the Tulane University School of Public Health and Tropical Medicine; the president and CEO of Maimonides Medical Center in Brooklyn; an Associate Professor of Pediatrics and Community and Preventive Medicine at Mt. Sinai School of Medicine; a Professor and Chair at the Department of Epidemiology at Columbia University Mailman School of Public Health; a Professor and Director of the Urban Public Health Program at Hunter College; and a Senior Advisor at Nexera Consulting and former Administrator of the Health Care Financing Administration, the federal agency responsible for Medicare, Medicaid, and related programs.

As to the question of arbitrary and capricious standard, through Article 78 of the New York Civil Practice Law and Rules, a party may challenge determinations or rulings of administrative agencies, public bodies or officers. Such an Article 78 challenge submits agency action to a two prong test.[88] The two-step process examines first whether the action is reasonable and second, whether the action is arbitrary and capricious.[89] Finding all four *Boreali* factors to be present in the Board's action to promulgate the Soda Ban, the Appellate Division did not reach the second prong.[90] For its part, the New York County Supreme Court did conduct the two-prong analysis, reaching the second prong of the test after concluding that the Board's stated premise of enacting the Soda Ban to address the rising obesity rate in the New York City was reasonable. In its second prong analysis, the court held that the rule's exemptions of various food establishments and beverages were arbitrary and capricious, and undermined the stated purpose of the rule.[91]

Although the two courts' rulings put the Soda Ban on hold, Mayor Bloomberg appealed to New York State's highest court—the Court of Appeals—which announced on October 17, 2013, that it will hear the appeal.[92] The fate of the appeal, however, will depend on the administration of Bloomberg's successor as mayor, as the Court of Appeals will not hear the case until 2014, after Mayor Bloomberg is out of office. The outcome of the appeal will be the ultimate decision regarding the Soda Ban proposed by Bloomberg, but even if the Court of Appeals affirms the suspension, a soda ban may yet go into effect with some modifications to the rule and its implementation. The decision of the Appellate Division noted:

> [N]othing in this decision is intended to circumscribe DOHMH's legitimate power. Nor is this decision intended to express an opinion on the wisdom of the soda consumption restrictions . . . . [H]ealth authorities may

---

Brief for Petitioner, 46, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12 (N.Y. Sup. Ct. Mar. 11, 2013).

88 CPLR 7803; N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N. Y. City Dept. of Health & Mental Hygiene, No. 653584-2012, slip op. 30609(U) at 33 (N.Y. Sup. Ct., Mar. 11, 2013).

89 *See, e.g.*, Consolidation Nursing Homes, Inc. v. Comm'r New York State Dept. of Health, 85 N.Y.2d 326, 331 (1995); Bates v Toia, 45 N.Y.2d 460, 464 (1978); Bernstein v Toia, 43 NY2d 437, 448 (1977); Ostrer v Schenck, 41 N.Y.2d 782, 786 (1977).

90 N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N. Y. City Dept. of Health & Mental Hygiene, No. 653584-2012, slip op. 30609(U) at 33–34 (N.Y. Sup. Ct., Mar. 11, 2013).

91 *Id.* at 34.

92 Michael M. Grynbaum, *New York Soda Ban to Go Before State's Top Court*, N.Y. TIMES (Oct. 17, 2013), http://www.nytimes.com/2013/10/18/nyregion/new-york-soda-ban-to-go-before-states-top-court.html.

> make rules and regulations for the protection of the public health and have great latitude and discretion in performing their duty to safeguard the public health.[93]

Contrary to the holdings of the two New York courts, this Note concludes that consideration of the four *Boreali* factors should not invalidate New York City's Soda Ban for the following reasons. First, the exceptions to the Soda Ban are not a result of balancing the economic and social concerns against health concerns as were the exceptions to the regulations at issue in *Boreali*. The challenged regulation in *Boreali* excluded venues with seating "capacities of less than 50, conventions, trade shows, bars, private homes, private automobiles, private social functions, hotel and motel rooms and retail tobacco stores," and more importantly, a wavier could be obtained from the Commission upon a showing of "financial hardship."[94] In contrast, which food establishments were to be exempt from the Soda Ban was not defined in the challenged Ban itself, but rather based on an MOU previously signed in 2010 between the New York City Department of Health and Mental Hygiene and the New York State's Department of Agriculture and Marketing, and there were no exceptions based on "financial hardship". Furthermore, unlike the exceptions to the regulations at issue in *Boreali*, this MOU was not created particularly for the Soda Ban, and the MOU's criterion that only food service establishments that generate fifty percent or more of their total annual dollar receipts from the sale of food for ready-to-eat consumption (either on or off-premises) are subject to inspection by a local Health Department is distinct from exempting places with capacities of less than fifty, as the latter is an exception based on economically adverse effects on small businesses, whereas the former is not. Also, the drinks designated exempt from the Ban were determined solely on health concerns rather than on any other economic or social concerns. While the scientific basis of the Soda Ban exceptions, like the exceptions at issue in *Boreali*, may not reach the level of the regulation upheld by the New York Court of Appeals in *Chiropractic Ass'n of N.Y., Inc.v v. Hilleboe*,[95] that by itself does not mean that the Soda Ban exceptions are analogous

---

[93] *Id.* at 31–32.

[94] *Boreali v. Axelrod*, 71 N.Y.2d 1, 7 (1987).

[95] Chiropractic Ass'n of N.Y., Inc. v. Hilleboe, 12 N.Y.2d 109 (1962) (upholding a challenged regulation that limited the use of x-rays by chiropractors who were not licensed to practice medicine); *Boreali v. Axelrod*, 71 N.Y.2d at 12–13 (distinguishing the exceptions in *Boreali* for bars, convention centers, small restaurants, and the like, and the waivers based on financial hardship, which allegedly lacked considerations of public health, from the regulations challenged in *Chiropractic Assn.* limiting the use of x-rays and fluoroscopic equipment by people not licensed to practice medicine, stating that the latter regulations were "promulgated in direct furtherance of the health-related goal of avoiding unnecessary exposure to harmful radiation").

with the *Boreali* exceptions. The scientific basis for the venues that are exempt from the Soda Ban is more analogous to the regulation upheld by *Hilleboe* than the regulation struck down by *Boreali*, and the exemptions from the Soda Ban are not based on financial hardships as they were in *Boreali*.

Second, while the Appellate Division's ruling on the Soda Ban relies on *Boreali*'s interpretation of the New York Public Health Law § 225(5)(a) to analogously interpret New York City Charter §§ 556 and 558[96] to reason that the agency had created a regulation on a legislative clean slate, other binding precedent has endorsed a more flexible approach. As the New York Court of Appeals had previously noted on New York Public Health Law § 225,

> [n]ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel the Legislature to prescribe detailed rules. Although an enactment entitled a health law or regulation must be such in fact as well as in name, and must not attempt in the name of the police power to effect a purpose having no adequate connection with the common good, the Sanitary Code in general presents a situation where flexibility and the adaptation of the legislative policy to infinitely variable conditions constitute the essence of the program.[97]

Thus, the courts considering the Soda Ban could easily have taken a broader approach in interpreting New York City Charter §§ 556 and 558. The Soda Ban reflected a regulatory response to a health problem that should have been assessed within the context of such necessary regulatory flexibility.

---

[96] N.Y. PUB. HEALTH LAW § 225(5)(a) (McKinney 2011), *available at* http://www.health.ny.gov/regulations/public_health_law/section/225 ("The sanitary code may: (a) deal with any matters affecting the security of life or health or the preservation and improvement of public health in the state of New York, and with any matters as to which the jurisdiction is conferred upon the public health council"); N.Y. City Charter § 556 ("Except as otherwise provided by law, the department shall have jurisdiction to regulate all matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city, including but not limited to the mental health, mental retardation, alcoholism and substance abuse-related needs of the people of the city."); N.Y. City Charter§ 558(b), *available at* http://codes.lp.findlaw.com/nycode/NYC/22/558 ("The board of health from time to time may add to and alter, amend or repeal any part of the health code, and may therein publish additional provisions for security of life and health in the city and confer additional power on the department not inconsistent with the constitution, law of this state or this charter, and may provide for the enforcement of the health code of any order made by the commissioner or the board of health, by such fines, penalties, forfeitures and imprisonment as may be prescribed there in or therein or otherwise by law.").

[97] Chiropractic Ass'n of N.Y., Inc., 12 N.Y.2d at 120.

Third, while the New York City Council and the State Legislature considered three soda-related resolutions (taxing soda drinks, requiring warning labels, and prohibiting the use of food stamps to purchase such drinks) but failed to implement any of them, "the Court of Appeals, in *Boreali*, could not have intended to invalidate a regulation merely because the Legislature had, at some point, considered the same subject matter."[98]

Lastly, the Soda Ban not only addresses subject matter highly appropriate to the expertise of the Board of Health, but required the Board's expertise in public health to determine that sugary drinks were a significant driver of the obesity epidemic, as well as the link between portion size and consumption. As required by the City Charter, all of the members of the Board at the time of the promulgation of the Soda Ban had ten years of experience in fields of medical or scientific expertise—Board members included a former chairperson of the Department of Community Health Sciences at the Tulane University School of Public Health and Tropical Medicine, the president and CEO of Maimonides Medical Center in Brooklyn, a Professor and Chair at the Department of Epidemiology at Columbia University Mailman School of Public Health, and a Senior Advisor at Nexera Consulting and former Administrator of the Health Care Financing Administration, the federal agency responsible for Medicare, Medicaid, and related programs.[99] Although the members of the Board did not modify the Mayor's proposed version of the Ban, the fact that they reviewed and analyzed the scientific arguments made by the New York City Department of Health and Mental Hygiene and those opposing the Ban is sufficient to show that their specialized skills were involved.

### 2. Substantive Due Process

While the Soda Ban's paternalism might conceivably trigger substantive due process concerns, no such argument was raised in the Soda Ban challenge lawsuit. As I explain below, it is highly unlikely that such and argument would be successful because the Soda Ban promotes various compelling governmental interests and is narrowly tailored.

---

[98] Festa v. Leshen, 145 A.D.2d 49, 51, 63 (1989) (holding that the New York State Division of Housing and Community Renewal's (DHCR) amendments to the Rent Stabilization Code was a proper exercise of the DHCR's statutory authority. In analyzing the second *Boreali* factor, the court held that although the Code's succession regulations were not specifically addressed by the Legislature or the City Council, they were "entirely consistent with the legislative intent underlying the Rent Stabilization Law.").

[99] Brief for Petitioner, 46, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12 (N.Y. Sup. Ct. Mar. 11, 2013).

The Soda Ban raises the issue of the legitimacy of the government's authority to regulate what people should eat.[100] The Fourteenth Amendment of the United States Constitution forbids states from depriving any individual of "life, liberty, or property, without due process of law."[101] In determining whether a law violates substantive due process under the Fourteenth Amendment, a reviewing court must first determine whether the liberty interest at issue is a fundamental right.[102] In *Washington v. Glucksberg*, the Supreme Court held that the right to physician-assisted suicide is not a fundamental liberty interest, and thus was not protected by the Due Process Clause.[103] In reaching its decision, the Court derived a two part test for whether a fundamental right exists for the purposes of substantive due process analysis. First, the Due Process Clause protects fundamental rights that are "deeply rooted in history and tradition" and "implicit in the concept of ordered liberty."[104] Second, the fundamental right must be carefully described.[105] If a fundamental right is deprived by a law or regulation, a court must apply strict scrutiny in assessing the law's validity. Subject to strict scrutiny, a law is upheld only if it is "justified by a compelling governmental interest," is "necessary . . . to the accomplishment of [that] legitimate purpose,"[106] and "the means chosen to accomplish the State's asserted purpose [is] specifically and narrowly framed to accomplish that purpose."[107] Under strict scrutiny review, the government has the burden of proof to demonstrate that the law at issue is necessary to achieve the asserted compelling interest.[108] The Supreme Court has never explicitly stated what constitutes a "compelling" government interest, but has acknowledged that a state or municipality may interfere with citizens' fundamental rights if such

---

100 This Note does not discuss the dormant Commerce Clause and First Amendment issues, since, unlike other blanket ban policies, New York City's Soda Ban is highly unlikely to unduly burden interstate commerce or freedom absent justification by substantial local governmental interests. Furthermore, banning large soda drinks regulates companies' business conduct, as opposed to their speech. As the Supreme Court noted in *Sorrell v. IMS Health*, the First Amendment does not preclude regulations governing conduct or commerce that merely inflict incidental burdens on speech. *See* 131 S. Ct. 2653, 2664–65 (citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 62 (2006)).

101 U.S. CONST. amend. XIV, § 1.

102 *See* Roe v. Wade, 410 U.S. 113, 155 (1973) (holding that a mother's right to get an abortion in limited circumstances is a fundamental right derived from the penumbra of constitutional concern for personal autonomy).

103 Wash. V. Glucksberg, 521 U.S. 702, 705–06 (1997).

104 *Id.* at 720-21.

105 *Id.* at 721.

106 Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (internal quotation marks omitted).

107 Wygant v. Jacobson Board of Education, 476 U.S. 267, 280 (1986).

108 Miller v. Johnson, 515 U.S. 900, 919–21 (1995); Rich. v. Croson, 488 U.S. 469 (1989).

interferences are necessary to protect their "health, safety, and general welfare."[109]

On the other hand, if a court deems that the government's asserted interest is not a fundamental right, it applies a more flexible standard—rational basis review. Under rational basis review, "a legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose."[110] Also, the party challenging the legality of the law holds the burden of proof.[111] Thus, as long as a court believes that the government sought to achieve a legitimate purpose through reasonable means, it will uphold the law at issue as constitutional.[112] Applying *Glucksberg*'s standard for identifying fundamental rights for the purpose of substantive due process analysis, an asserted right to purchase a sixteen-ounce or a larger soda drink at places regulated by the New York Health Board would probably not be considered a fundamental right. Such a right is almost certainly too frivolous and novel as to be considered a fundamental right. Such a right might be treated analogously to cases of an asserted right to smoke. There is "no current court decision holding that smoking falls within a state constitution's fundamental right to privacy," and several courts in fact have "specifically ruled that smoking does not fall under a federal and/or state constitutional right to privacy—even where smoking in private is concerned."[113]

The Supreme Court has traditionally held that state or municipal laws enacted to ensure the health, safety, and general welfare of its constituents do not violate the Fourteenth Amendment.[114] Aiming to promote public health by reducing obesity, the Soda Ban advances two compelling interests. First, the Soda Ban will protect people's health and well-being by making unhealthy, sugary beverages less enticing.[115] As the government has a compelling interest to protect public health, it could reasonably follow that such an interest extends to preventing people from becoming obese—especially considering that obesity has been officially recognized as a disease by the American Medical Associa-

---

109 *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (determining that the compulsory education law was not justified by a compelling interest because it was not necessary to protect the health and welfare of children).

110 R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 183 (1980); *see e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955).

111 Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973).

112 Washington v. Glucksberg, 521 U.S. 702, 728–32 (1997).

113 Samantha K. Graff, *There is No Constitutional Right to Smoke: 2008*, http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008_0.pdf (citing cases from Oklahoma, Florida and Ohio).

114 *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that the private sphere of family life is not immune from governmental regulation in the furtherance of public interest).

115 *Reversing the Epidemic*, *supra* note 3, at 14.

tion.[116] Furthermore, although a court has never formally determined that preventing obesity constitutes a compelling government interest, a comparison can be made with the Supreme Court's view that the government has the right to regulate people's use of tobacco products.[117] In light of continually increasing rates of obesity and other diet-related illnesses and the way that beverage manufacturers encourage consumption of unhealthy beverages through aggressive advertising, the government's involvement in promoting healthy food choices is both pressing and necessary.[118]

Second, New York City has an interest in efficiently managing funds related to treating diet-related illnesses and promoting general public health. The City can do this by raising funds for health programs and curbing the rising healthcare expenses incurred by diet-related illnesses that impose economic burdens on taxpayers. As the Supreme Court decided in *West Coast Hotel v. Parrish*, the government has a compelling interest in regulating matters that have economically adverse impacts on its citizens.[119] Obesity is a substantial concern for states and municipalities because its economic costs are recurrent and ongoing. With $168 billion spent annually on obesity-related illnesses—over 16% of the nation's healthcare expenses—the direct and indirect effects of obesity are financially burdensome and widespread. While there may be no bright line as to at what point obesity becomes a compelling interest, considering the enormous number of obese people and the amount of money being spent to ameliorate the obesity epidemic, obesity is something that deserves our significant interest.

In addition to advancing compelling government interests, the Soda Ban is narrowly tailored and would survive strict scrutiny. The Soda Ban would be implemented on a local level and apply only to New York City. Since the size of the obese population is different among cities even within a single state, local restrictions should be considered narrowly tailored. Also, the Soda Ban would only restrict the sale of certain sugary drinks sold in containers over sixteen ounces. Thus, sugary drinks sold in containers that are less than or equal to sixteen ounces,

---

116 *See* Pollack, *supra* note 8.

117 For example, the Supreme Court rejected a tobacco industry challenge to the Family Smoking Prevention & Tobacco Control Act, a 2009 federal law that required graphic warning labels on cigarettes and restricted marketing of tobacco. *See* Disc. Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509, 518 (6th Cir. 2011), *cert. denied*, Am. Snuff Co. v . U.S., 133 S. Ct. 1996 (2013).

118 *See* discussion *supra* Parts I.A and I.B. (detailing why diet-related regulations, like the Soda Ban, may be needed).

119 *See* 300 U.S. 379, 399 (1937) (allowing Washington State to enact a law regulating minimum wage on the grounds that it advances a compelling state interest by not only preventing the unlawful exploitation of workers, but also protecting taxpayers from bearing the burden of paying the workers' lost wages).

drinks that are not sugary, or drinks to which people add sugar themselves will be exempt from the Soda Ban.[120] Since regulations do not limit vendors in how much sugar they can provide to consumers on the side, consumers still have the choice of adding as much as sugar as they want to drinks that are not pre-sweetened. This aspect once again illustrates that the proposed Soda Ban would not unduly infringe on people's freedom. Furthermore, since the Soda Ban specifically lists the places where the regulation will be imposed, people would still be able to purchase sugary drinks that are over sixteen ounces at various places, such as convenient stores and supermarkets,[121] which are not regulated by the New York City Health Department.[122] As previously mentioned, these various establishments would be exempt from the Soda Ban because of the 2010 Memorandum of Understanding (MOU) between the New York City Department of Health and Mental Hygiene (DOHMH) and New York State's Department of Agriculture and Marketing. Consequently, the Soda Ban would not be overly burdensome and would arguably provide the least restrictive way to help people select reasonably-sized sugary drinks. While a more comprehensive Soda Ban may go farther toward accomplishing its public health goals, the fact that some places are exempt from the Soda Ban would probably not undermine the purpose or the proposed effect of the ban. Since New York City's Soda Ban is necessary to accomplish the legitimate purpose of a "compelling governmental interest," and the means is "narrowly framed to accomplish that purpose," it would likely survive strict scrutiny. Specifically, the government has compelling interest to solve the problem of the all-time high obesity rates and the medical costs resulting from the obesity epidemic, and these rates and costs can be reduced by encouraging people to reduce their daily caloric consumption, which in large part is influenced by soda consumption. Thus, the Ban would also pass the lower burden of proof threshold required by rational basis review, which requires legislative action to have a "rational relationship to a legitimate purpose," and would not be ruled to violate the Fourteenth Amendment's Due Process Clause.

### *B. Arguments Against Soda Taxes and the Soda Ban*

Like the failed 2009 New York State soda tax, the City Soda Ban was unwelcome to some members of the public.[123] For example, a Quin-

---

120 *See* discussion *supra* Introduction (explaining the scope of the Soda Ban).

121 *Id.*

122 *Guide to New York Soda Ban*, *supra* note 14.

123 Michael M. Grynbaum & Marjorie Connelly, *Most New Yorkers Oppose Bloomberg's Soda Ban: 60% in City Oppose Bloomberg's Soda Ban, Poll Finds*, N.Y. TIMES (Aug. 22, 2012), http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html.

nipiac University poll released in March 2013 found that 51% of New Yorkers surveyed opposed the Soda Ban.[124] A Harris Interactive/Health Day poll released in April 2013 showed that respondents were "opposed to government taxes on sugary drinks and candy by a more than 2-to-1 margin."[125] Although those polls may illustrate *some* people's reluctance to increase regulation of sugary products the results likely do not accurately reflect the opinion of the general public. For example, a poll labeling a soda tax as an "obesity" or "fat" tax received 31% support,[126] whereas a poll labeling it as a "soft drink" tax rendered 52% support.[127] While the variance in wording of the polls relating to the Soda Ban is not as complicated as that of taxing, and thus may not tap into the same issues of stigma or discomfort, it is worth noting that public support varies significantly depending on how poll questions are phrased.[128] The difference in poll responses may be due to the nuances of the terms that are used—the term "fat tax" seems to imply that the tax serves to punish those who are overweight, whereas "soft drink tax" seems more comparable to the taxes applied to alcohol and cigarettes. Thus, people may have reacted more emotionally to the former phrasing simply because the tax seemed to be a personal attack on the overweight. However, even if the public opinion is accurately reflected in the poll results, public opinion is fickle and can change over time. Thus, a poll result showing strong opposition or strong support for a Soda Ban today does not necessarily mean that public opinion will not change in the future. Thus, these polls should be given minimal weight and the government should principally rely on objective data, such as obesity-related illness rates and the associated medical costs. Furthermore, a former Supreme Court Justice, Justice Marshall mentioned in *Furman v. Georgia*, that public polls should only be given weight when the poll reflects people's opinion "in light of all information presently available."[129] Notwithstanding the accuracy of public opinion polls, addressing the possible arguments against the Soda Ban is the first step to grasping the core of the policy.

---

124 John Mariani, *New York City Voters Divided on Sugary Soda Ban, Survey Says*, POST-STANDARD (Mar. 1, 2013), http://www.syracuse.com/news/index.ssf/2013/03/new_york_city_voters_divided_on_sugary_soda_ban_survey_says.html.

125 Amy Norton, *Most American Oppose Soda, Candy Taxes*, MYFOXNY.COM (Apr. 25, 2013), http://www.myfoxny.com/story/22075714/most-americans-oppose-soda-candy-taxes.

126 QUINNIPIAC UNIVERSITY POLLING INST., PUBLIC OPINION POLL CONDUCTED DECEMBER 2008, http://www.quinnipiac.edu/institutes-and-centers/polling-institute/search-releases/search-results/release-detail?ReleaseID=1245&What=&strArea=;&strTime=28 (accessed Sept. 18, 2013).

127 *Soft Drink Taxes: A Policy Brief*, RUDD CTR. FOR FOOD POLICY & OBESITY, RUDD REPORT 4 (Fall 2009), http://eatbettermovemore.org/SA/enact/neighborhood/documents/community.foodmarketing.tools.phlp.rudd_softdrink_tax.pdf.

128 *Id.*

129 Furman v. Georgia, 408 U.S. 238, 362 (1972).

There are at least three policy arguments against the Soda Ban: First, that the ban, similar to a tax, might regressively target low- and middle-income families;[130] second, that the ban restricts individuals' freedom of choice; and finally, that the ban arbitrarily subjects some businesses to the tax while exempting others.

The first argument contends that a soda tax may disproportionately affect low-income people, because sugar-sweetened beverages represent a larger share of spending for the poor than for the overall population.[131] But because the poor may be exposed to higher risk of diet-related disease, these groups may stand to reap the greatest health benefits from such a tax. According to scholars at the Oxford University Department of Public Health looking at health-related food taxes around the world, "progressive health gains are expected because poor people consume less healthy food and have a higher incidence of most diet-related disease, notably cardiovascular disease."[132] Because poor people are more sensitive to price changes, their diet could improve the most as consequence of a soda tax.[133] An analogous benign effect for the poor would likely result from the Soda Ban. Moreover, unlike taxing, which causes people to pay more for a product, because banning does not involve extra payment but rather simply makes certain products unavailable, a soda ban will not have a regressive impact.

Regarding the freedom of choice argument, this Part limits its discussion to non-constitutional issues as Part II, *infra* of this Note discusses the constitutional implications of the Soda Ban. Some soda tax opponents claim that, because there are roughly 40,000 food products in a typical U.S. supermarket, the argument that consumers drink too much soda as a result of inadequate access to healthier food and beverage is meritless.[134] However, most places, including movie theaters, sports stadiums, and vending machines, provide a very limited range of drinks, most of which are sugary. Furthermore, this argument is also undercut by the fact that 23.5 million people in the United States live in "food

---

130 *Soda Makers Push Against New York Ban*, *supra* note 14.

131 McGranahan & Schanzenbach, *supra* note 27 (noting that the average consumption of sugar-sweetened beverages, as a share of total spending, falls as educational and wealth attainment increases).

132 Denis Campbell, *'Fat tax' on Unhealthy Food Must Raise Prices by 20% to Have Effect, Says Study*, GUARDIAN (May 15, 2012), http://www.guardian.co.uk/society/2012/may/16/fat-tax-unhealthy-food-effect.

133 *See* Mytton OT et. al., *Taxing Unhealthy Food and Drinks to Improve Health*, 344 BRITISH MED. J., 30, 31 (2012) *available at* http://www.bmj.com/highwire/filestream/584815/field_highwire_articlepdf/0/bmj.e2931. .

134 Michael L. Marlow & Alden F. Shiers, *Would Soda Taxes Really Yield Health Benefits?*, 33 REGULATION 34, 35 (2010), *available at* http://www.cato.org/pubs/regulation/regv33n3/regv33n3-4.pdf.

deserts"—low-income communities with low-access to fresh, healthy, and affordable food.[135]

In the lawsuit against the New York City Board of Health challenging the Soda Ban, the trial court held that the ban was arbitrary and capricious because not all soda vendors are subject to the rule.[136] However, the fact that the ban is allegedly "underinclusive" is not a proper basis for invalidation.[137] As the Board argued on appeal, "patterns 'of human behavior indicate that consumers overwhelmingly gravitate towards the default option' and that with the adoption of the ban consumer's 'intent upon consuming more than 16 ounces would have to make conscious decisions to do so.'"[138] Because people can still choose to buy large soda drinks from supermarkets and restaurants, those who, for example, want to buy larger sodas to save money, share with family members, or drink the same soda all day[139] can still get the same product for the same price, unaffected by the ban. Although the Soda Ban would inconvenience some people who want to buy large sodas from certain regulated businesses, the inconvenience is offset by the importance of protecting public health. Furthermore, while consuming solid food also involves caloric intake, curbing soda consumption is a more effective mechanism for reducing caloric intake than curbing food consumption.[140]

---

135 *Food Deserts*, USDA, http://apps.ams.usda.gov/fooddeserts/foodDeserts.aspx (last visited Oct. 21, 2013).

136 N. Y. Statewide Coal. of Hispanic Chambers of Commerce v. N. Y. City Dept. of Health & Mental Hygiene, No. 653584-12, slip op. 30609(U) at 34 (N.Y. Sup. Ct. Mar. 11, 2013).

137 *See* New York State Health Facilitates Ass'n v. Axelrod, 77 N.Y.2d 340, 344, 350 (1991) (upholding the validity of the Public Health Council's adoption of Medicaid Patient Access Regulations, which required new applicant facilities seeking nursing home approval to agree that the home admit a reasonable percentage of Medicaid patients, but not for existing facilities); *see also* New York State Restaurant Ass'n v. New York City Board of Health, 556 F.3d 114, 133 n.22 (2d Cir. 2009) (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court* in rejecting New York State Restaurant Association's challenge to disclosure requirements that affected only ten percent of New York City restaurants, based on the reasoning that just because legislation is "under-inclusive," it is not necessarily invalid for that reason alone, as "governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied." 471 U.S. 626, 651 n.14 (1985).).

138 Brief for Appellant at 46, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene, No. 653584-12 (N.Y. Sup. Ct. Mar. 11, 2013).

139 Brian Wansink & David Just, *How Bloomberg's Soft Drink Ban Will Backfire on NYC Public Health*, ATLANTIC (June 14, 2012), http://www.theatlantic.com/health/archive/2012/06/how-bloombergs-soft-drink-ban-will-backfire-on-nyc-public-health/258501.

140 *See* Gail Woodward-Lopez et al., *To What Extent Have Sweetened Beverages Contributed to the Obesity Epidemic?*, 14 PUB. HEALTH NUTRITION 499, 502 (2010). The director of the New Balance Foundation Obesity Prevention Center at Boston Children's Hospital, who led a study published in the New England Journal of Medicine noted that "I know of no other category of food whose elimination can produce weight loss in such a short period of time," concluding that "[t]he most effective single target for an intervention aimed at reducing obes-

## III. THE DIFFERENCE BETWEEN BANNING AND TAXING: SOME IMPLICATIONS FROM TOBACCO TAXES AND FOOD INDUSTRY REGULATIONS

### A. *What Is So Special About Soda?*

Understanding the uniqueness of soda products and their consumption patterns will allow us to understand why sodas must be treated differently than other types of products subject to sin taxes like tobacco. Some of the differences between soda and tobacco or fast food favor restrictions on soda.

First, there may be a stronger case for a soda ban than for a tobacco or food ban because, while there may be no available free substitutes for tobacco or food, there is a low- to no-cost alternative for soda drinks that is readily available: water. While some people may not enjoy drinking regular water or lack access to water of good quality,[141] limiting the purchase of a product with a low- to no-cost substitute is definitely different from limiting purchase of a product with no such alternative. Furthermore, when people reduce their soda consumption, a majority of them turn to water as a substitute.[142] A recent *Wall Street Journal* online poll indicated that 13% of the people either drink juice-based drinks or energy drinks as an alternative to soda, possibly indicating that some people are unaware that various sugary drinks other than soda can be harmful to their health.[143]

Second, while fatty foods and sodas can both cause obesity, only liquid calories such as those found in sugary beverages generally fail to make us full.[144] Later decreased consumption offsets 64% of food energy but only 9% of liquid energy.[145] This suggests that curbing soda consumption, rather than food consumption, might be more effective in shaping a healthy diet and that therefore policies regulating sodas should be implemented.

---

ity is sugary beverages." Sharon Begley, *Can It! Soda Studies Cite Stronger Link to Obesity*, REUTERS (Sep. 21, 2012), http://www.reuters.com/article/2012/09/21/us-obesity-soda-idUSBRE88K1782012092 1.

141 *See* Charles Duhigg, *Millions in U.S. Drink Dirty Water, Records Show*, N.Y. TIMES (Dec. 7, 2009), http://www.nytimes.com/2009/12/08/business/energy-environment/08water.html?pagewnated=all&_r=0.

142 *If You've Slowed Your Soda Consumption, What Are You Drinking Instead?*, WALL ST. J., http://online.wsj.com/community/groups/question-day-229/topics/if-youve-slowed-your-soda (last visited Mar. 15, 2013) (an online poll regarding what people drink as an alternative to soda).

143 *Id.*

144 *See* DeSantis, *supra* note 22, at 371.

145 Woodward-Lopez et al., *supra* note 140, at 502.

Third, unlike food, which is a necessity, it is widely thought that cigarettes are harmful when consumed in any quantity.[146] The same is true for sodas, including diet sodas.[147] People who do not consume soda are generally healthier than those who regularly consume soda.[148] Thus a ban on sale of large soda drinks in some places would cause inconvenience at most, rather than any sort of risk of nourishment deprivation.

At the same time, however, there is an interesting explanation for why a sin tax has not worked for sodas when it has worked for other products, such as tobacco. While there is no doubt that the lack of a successful soda tax is at least partially attributable to the enormous lobbying power of the American Beverage Association, there is an even more fundamental reason: soda taxes have been unpopular.[149]

At first glance, it seems difficult to understand why taxing soda would not be appealing to the public, since it serves the same purpose as the sin tax on cigarettes: to generate revenue and deter behavior that has negative societal consequences.[150] Such taxes and fines, by aiming to discourage certain activities, communicate that smokers and speeders are doing something that is detrimental to society and deserve to be penalized.[151] Similarly, imposing a per-ounce soda tax would send the same message.[152]

However, whereas only 19.3% of Americans aged eighteen and older currently smoke,[153] 51% of Americans drink soda every day.[154] The average American consumes 44.7 gallons of carbonated soft drinks a year,[155] and "[s]odas account for 28% of all beverages—water and milk included—consumed in the United States."[156] In other words, the widespread nature of soda consumption may be the ultimate reason that many

---

146 *See* Richard A. Daynard et al., *Private Enforcement: Litigation as a Tool to Prevent Obesity*, 25 J. PUB. HEALTH POL'Y 408, 408 (2004).

147 *See supra* Part I.A; Tanya Zuckerbrot, *The Truth About Diet Drinks*, FOX NEWS (Oct. 8, 2012), http://magazine.foxnews.com/food-wellness/truth-about-diet-drinks.

148 *See generally*, HARV. SCH. PUB. HEALTH, *Sugary Drinks and Obesity Fact Sheet*, http://www.hsph.harvard.edu/nutritionsource/sugary-drinks-fact-sheet (last visited Oct. 27, 2013).

149 DeSantis, *supra* note 22, at 369.

150 *See* Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 778 (1994) (explaining that all fines, penalties, and taxes generate revenue and deter behavior).

151 DeSantis, *supra* note 22, at 365.

152 *Id.* at 369.

153 Brian King, et al., *Vital Signs: Current Cigarette Smoking Among Adults Aged = 18 Years—United States, 2005–2010*, 60 MORBIDITY & MORTALITY WKLY. REP. 1207, 1208 (2011), *available at* http://www.cdc.gov/mmwr/pdf/wk/mm6035.pdf.

154 Lisa Nicita, *Tempest in a Coffeepot*, ARIZ. REPUBLIC, Mar. 8, 2008, at E1.

155 Mark Bittman, *Bad Food? Tax It*, N.Y. TIMES (July 24, 2011), http://www.nytimes.com/2011/07/24/opinion/sunday/24bittman.html. By comparison, Americans consume 20.8 gallons of beer, 20.4 gallons of milk, 28.3 gallons of bottled water, and 18.5 gallons of coffee. Natalie Zmuda, *Bottom's Up! A Look at America's Drinking Habits*, ADVERTISING AGE (June 27, 2011), http://adage.com/article/news/consumers-drink-soft-drinks-water-beer/228422.

156 Helena Oliviero, *A Rush in a Can*, ATLANTA J. CONST., Oct. 16, 2006, at C1.

people oppose soda taxes[157] and, therefore, some policy other than taxing soda would be more likely to be approved by the general public. Also, the fact that it took longer for the public to understand the negative effects of soda consumption than those of smoking could have played a part in public's opposition of soda taxes.[158]

Second, despite people's growing awareness of obesity, many people consume fast food and drink soda. Compared to tobacco, which is heavily addictive, food products are generally not considered to be inherently addictive.[159] Furthermore, multiple factors other than eating and drinking habits, such as exercise and genetic makeup, influence a person's weight.[160] Since this is the biggest flaw in the soda obesity argument, people who are against the Soda Ban make this argument most frequently.[161]

Third, unlike the food and tobacco industries, where ethical violations negatively impacting consumer health have damaged public opinion and served as a basis for lawsuits,[162] the soda industry has been free

---

157 *See* DeSantis, *supra* note 22, at 365.

158 In 2005, the Center for the Science in the Public Interest proposed the idea of putting warning labels on sodas. *See* Michael J. O'Flaherty, *Beware: Warning Labels on Soft Drinks*, 20 WASHINGTON LEGAL FOUNDATION 1 (Nov. 4, 2005), http://www.wlf.org/upload/110405LBOFlaherty.pdf. It formally petitioned the Food and Drug Administration to require "cigarette-style warnings" on non-diet soda labels that contain more than 1.1 grams of high fructose corn syrup or other caloric sweetener per fluid ounce. *Id.* Examples of proposed warnings were "The U.S. Government recommends that you drink less (non-diet) soda to help prevent weight gain, tooth decay, and other health problems."; "To help protect your waistline and your teeth, consider drinking diet sodas or water."; "Drinking soft drinks instead of milk or calcium-fortified beverages may increase your risk of brittle bones (osteoporosis)."; "Drinking too many (non-diet) soft drinks could cause diabetes [or heart disease, high blood pressure, osteoarthritis, cancer] by increasing your weight." *Id.* at 1–2. In California, drinks that contain a certain amount of carcinogens are required to have a cancer warning label, and when the state added ammonia sulfite to its list of known carcinogens, PepsiCo and Coca-Cola modified its caramel coloring in their sodas to avoid the cancer warning label requirement. *See* Mikaele Conley, *Coke, Pepsi Skirt Cancer Warning Label*, ABC NEWS (Mar. 9, 2012), http://abcnews.go.com/blogs/health/2012/03/09/coke-pepsi-skirt-cancer-warning-label/.

159 *See* Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned from Tobacco for Obesity Litigation*, 15 ANNALS HEALTH L. 61, 94 (2006). This statement is not without caveat. Even if consuming a moderate amount of fast food and sodas may not lead to obesity, it may still adversely affect people (e.g., visceral fat). *See* Jane Riley, *Watch Out for Fructose*, THE GARDEN ISLAND (Sept. 29, 2013, 12:15 AM), http://thegardenisland.com/lifestyles/health-med-fit/watch-out-for-fructose/article_f1672d26-28d2-11e3-a432-0019bb2963f4.html.

160 Courtney, *supra* note 159, at 94.

161 *See. e.g.*, Press Release, American Beverage Association, American Beverage Association Statement on Children and Sugar-Sweetened Beverages Study (Aug. 5, 2013), http://www.ameribev.org/files/news/aba-statement-on-pediatrics-study.pdf; *Failure of the New York City Soda Ban to Curb Sugary Beverage Consumption-Lindsey Rorden*, CHALLENGING DOGMA (May 5, 2013), http://challengingdogma-spring2013.blogspot.com/2013/05/failure-of-new-york-city-soda-ban-to.html.

162 *See* Joshua Logan Pennel, Note, *Big Food's Trip Down Tobacco Road: What Tobacco's Past Indicate About Foods' Future*, 27 BUFF. PUB. INT. L.J. 101, 112–13 (2009).

from such outright violations. For example, tobacco companies concealed the addictive and harmful nature of cigarettes by conducting research under close management of their legal counsels, thus allowing unfavorable findings to be inadmissible in court due to attorney-client privilege.[163] Also, major fast food industry brands such as McDonald's and Burger King suffered from deteriorating public perception for failing to report certain facts (e.g., McDonald's failed to report the use of beef fat in the cooking of its fries) and for lying on their nutritional labels by stating that their foods contained less fat than they actually did.[164] In contrast, the beverage industry has been relatively free of such accusations of ethical violations related to consumer health. This could be due to many reasons, but it could be contributed mostly to the continuing success of beverage companies in creating new products that both spur sales and appear responsive to consumers' health-consciousness. Numerous beverage companies have introduced a diet or light version of their original drinks and have also introduced various sizes.[165] These tactics do not explicitly violate any health-related ethical rules, but ultimately achieve the same goal pursued by both the tobacco and fast food industries: increasing sales by disingenuously presenting their product as healthy. According to Harvard School of Public Health, although artificial sweeteners can make a person lose weight in the short term (because artificial sweeteners deliver zero carbohydrates, fat, and protein), they can't directly influence calorie intake or blood sugar.[166] Thus these sweeteners can disrupt the body's ability to gauge how many calories are being taken in and may promote weight gain in the long term.[167]

Lastly, while "[c]igarette . . . consumption by minors, as a result of targeted advertisements, is illegal, and clearly affronts parental authority and autonomy,"[168] sodas are legal for people of all ages. According to a

---

163 *See* Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 499–500 (1999).

164 Pennel, *supra* note 162, at 113.

165 *See e.g.*, Philip H. Dougherty, *Advertising; Diet Coke Prepares Its Debut*, N.Y. TIMES (July 9, 1982), http://www.nytimes.com/1982/07/09/business/advertising-diet-coke-prepares-its-debut.html; Andrew Martin, *Did McDonald's Give In to Temptation?* N.Y. TIMES (July, 22, 2007), http://www.nytimes.com/2007/07/22/business/yourmoney/22feed.html (illustrating that large soda sizes have been the subject of growing concern for a long time).

166 HARV. SCH. PUB. HEALTH, *Artificial Sweeteners*, http://www.hsph.harvard.edu/nutritionsource/healthy-drinks/artificial-sweeteners/ (last visited Oct. 27, 2013)

167 *Id.*; *see also* Nicholas Bakalar, *Risks; Diet Soft Drinks Linked to Heart Disease*, N.Y. TIMES (FEB. 27, 2012), http://www.nytimes.com/2012/02/28/health/research/diet-soft-drinks-linked-to-risk-of-heart-disease.html?_r=0 (study published in the Journal of General Internal Medicine found that daily consumption of diet soda was associated with an increased risk for stroke, heart attack, and death).

168 Lee J. Munger, Comment, *Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements Targeting Children in Light of the American Overweight and Obesity Epidemic*, 3 CONN. PUB. INT. L.J. 456, 478 (2004) (footnote omitted).

poll conducted by the National Health and Nutrition Examination Survey, from 2005 to 2008, approximately one-half of the population aged 2 and older consumed sugar drink every day.[169] This finding was reinforced by a Gallup poll in 2012, which revealed that forty eight percent of surveyed American drink soda on a daily basis, and that the average daily intake among them was 2.6 glasses per day.[170] On the other hand, a study done by the Centers for Disease Control and Prevention's Office on Smoking and Health—using data from the 2011 National Health Interview Survey (NHIS)—found that nineteen percent of all adults (aged 18 years or older) in the U.S. smoke cigarettes.[171] This again factors in to the larger target consumer group for sodas, and the likelihood that a soda ban may face relatively greater opposition.

The differences between tobacco and food and soda explain why the public might be more sympathetic towards defendants in potential soda-related cases than those in food and tobacco lawsuits. People's sympathy towards soda companies may be indicated by New Yorkers' opinions on Mayor Bloomberg's proposed Soda Ban: 60% opposed it.[172] However, the history of the tobacco industry and the food industry, both of which became the target of countless lawsuits despite strong initial public support,[173] may hint that the soda industry could take a similar path.

---

169 Cynthia L. Ogden et al., *Consumption of Sugar Drinks in the United States, 2005-2008*, NCHS DATA BRIEF, NO. 71, 2 (National Center for Health Statistics, MD) Aug. 2011, *available at* http://www.cdc.gov/nchs/data/databriefs/db71.pdf.

170 Lydia Saad, *Nearly Half of Americans Drink Soda Daily*, GALLUP (July 23, 2013), http://www.gallup.com/poll/156116/nearly-half-americans-drink-soda-daily.aspx.

171 Israel Agaku, *Current Cigarette Smoking Among Adults—United States, 2011*, 61 MORBIDITY & MORTALITY WKLY. REP. 889, 889-94(2012), *available at* http://www.cdc.gov/mmwr/pdf/wk/mm6144.pdf.

172 *New Yorkers' Opinions on Sugary Drinks*, N.Y. TIMES, Aug. 22, 2012, http://www.nytimes.com/interactive/2012/08/22/nyregion/new-yorkers-opinions-on-sugary-drinks.html?ref=nyregion.

173 Pennel, *supra* note 162, at 103–107. During the 1950s, tobacco's popularity reached its height; despite scientific evidence linking smoking and lung cancer, there were relatively few lawsuits against the tobacco companies. *Id.* at 103. Moreover, the tobacco industry successfully defended itself against the few lawsuits that came its way. *Id.* In the 1960s and early 1970s, Congress enacted the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act, Pub. L. No. 91-222, 84 Stat. 87 (1970), which required that cigarettes be labeled as harmful and restricted the marketing of cigarettes. *Id.* at 103–04. By the 1970s, cigarette use by the general population had decreased, and the public opinion had started to shift. *Id.* at 104. In the 1980s and 1990s, new data was discovered and new legislation was introduced (e.g. outlawing smoking within the workplace passed in San Francisco), and the tobacco industry could no longer rely on its previous tactics (e.g., concealing ethical violations and the addictive and harmful nature of cigarettes). *Id.* at 104, 112–13.

### B. *What the Tobacco and Fast Food Industries' Pasts Could Indicate About the Soda Industry's Future*

Understanding the history of the fast food and tobacco industries allows for a comparison of where the soda industry currently stands and where it may be headed. The three industries are comparable on four issues.

First, since people voluntarily use these industries' products, all three industries could defend against lawsuits by arguing contributory negligence or assumption of risk by consumers.[174] Contributory negligence arises when the plaintiff's failure to exercise care is one of the causes of the harm.[175] Assumption of risk is a defense in cases involving risks that are known or that a reasonable person would know.[176] However, such defenses would probably fail if the manufacturers intentionally concealed the risks associated with their products.[177] Furthermore, the defense of assumption of risk would probably not succeed in obesity litigation involving children considered too young to understand and "appreciate the nature of the risks associated with eating fast food or junk foods," or if the food industry failed to inform consumers of risks associated with eating these foods.[178] Similarly, a contributory fault defense may be unavailable if the food industry acted recklessly or intentionally in causing consumers harm.[179] In the tobacco cases, although plaintiffs voluntary used the products, juries nonetheless imposed liability.[180]

Second, all three industries target (or in the case of tobacco, have historically targeted) vulnerable groups, especially children, in their advertising campaigns.[181]

Third, all three industries have an overwhelming amount of lobbying power. For example, the lobbying power of tobacco industry groups in Washington is demonstrated by the tobacco industry's successful efforts to exclude its products from the jurisdiction of the Consumer Products Safety Commission (CPSC) and from the Environmental Protection

---

174 Alyse Meislik, Note, *Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 ARIZ. L. REV. 781, 803 (2004); *cf.* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 531–33, 540–42 (S.D.N.Y. 2003) (dismissing plaintiffs' claims that McDonald's food is inherently dangerous and that McDonald's failed to warn consumers of the food's unhealthiness on the grounds that it is a well-known fact that fast food is usually unhealthy).

175 *See* DAN B. DOBBS, THE LAW OF TORTS § 199 (2000).

176 *See generally* RESTATEMENT (SECOND) OF TORTS § 496A (1965).

177 Meislik, *supra* note 174, at 803.

178 *Id.*

179 *Id.*

180 *See* John A. Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L. J. 103, 113 (2003).

181 Meislik, *supra* note 174, at 804–05.

Agency's (EPA) jurisdiction under the Toxic Substances Control Act.[182] The result of these exclusions is that the CPSC lacks the authority to issue and enforce mandatory standards, ban, recall, or conduct research on the potential hazards associated with tobacco products[183] and that the EPA cannot write and enforce environmental and health regulations of tobacco products.[184] Further, in *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court held that the Food and Drug Administration (FDA) could not classify tobacco as a pharmaceutical, and thus could not regulate its production.[185] The lobbying power of the food industry is illustrated by the House's approval of the Personal Responsibility in Food Consumption Act, which aimed to prevent frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcohol beverage products.[186]

Fourth, the health and economic costs of tobacco and fast food served as catalysts for change in tobacco and fast food policy.[187] Similarly, the rising costs related to obesity, which are predicted to continue to rise in the coming decade, may compel similar soda industry policy reform.[188]

The similarities between sodas, smoking, and fast food hint that the regulatory history of tobacco and food may be portentous for regulatory efforts such as the Soda Ban. Also, the uniqueness of soda, as described in Part III.A, explains why taxing soda has not gained popularity among the general public. However, government regulations can be used to shape individual and public behavior. For example, many extensive studies show that "[s]ignificant increases in tobacco taxes are a highly effective tobacco control strategy and lead to significant improvements

---

182 Richard A. Daynard, *Regulating Tobacco: The Need for a Public Health Judicial Decision-Making Canon*, 30 J.L. MED. & ETHICS 281, 282 (2002); *see generally* 15 U.S.C. § 2052(a)(1)(B) (2006) ("The term 'consumer product' . . . does not include . . . tobacco and tobacco products . . . ."); 15 U.S.C. § 1261(f)(2) (2006) ("The term 'hazardous substance' shall not apply to . . . tobacco and tobacco products . . . .").

183 *See Who We Are—What We Do for You*, U.S. CONSUMER PRODUCT SAFETY COMM'N, http://www.cpsc.gov/en/Safety-Education/Safety-Guides/General-Information/Who-We-Are—-What-We-Do-for-You/ (last visited Aug. 20, 2013).

184 *See Our Mission and What We Do*, EPA, http://www2.epa.gov/aboutepa/our-mission-and-what-we-do (last updated June 3, 2013).

185 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125-26, 139-40 (1999).

186 H.R. REP. No.108–432, at 1 (2004).

187 *See, e.g.*, Michelle M. Mello et al., *The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity*, 22 HEALTH AFFAIRS 207, 212–14 (2003), *available at* http://content.healthaffairs.org/content/22/6/207.full.html; *The Political Economy of Tobacco Taxation*, WHO, http://www.who.int/tobacco/publications/en_tfi_tob_tax_chapter4.pdf.

188 *See* Munger, *supra* note 168, at 459 (discussing how the medical costs of obesity in the United States now exceed the medical costs of smoking).

in public health."[189] A study evaluating the effect of state tax increases on cigarettes sales from 1955 to 1988 found that: (1) cigarette tax increases were associated with an average decline in cigarette consumption of three cigarette packs per capita (about 2.4%); and (2) larger tax increases were associated with larger declines in consumption.[190] Over the past fifty years, regulatory policies like tobacco advertisement bans, package warnings, and cigarette taxes have decreased the prevalence of smoking by almost 34% in the United States.[191] Just as cigarette taxation was successful in curbing the consumption of cigarettes, an excise tax on sugary drinks could be effective in discouraging consumption. Following the same logic, the ban of large soda drinks in New York City-regulated establishments, would probably prove effective in decreasing the consumption of soda.

In the 1960s and 70s, suits against tobacco manufacturers and anti-obesity campaigns against junk food manufactures faced strong opposition from those who believed that people should be able to freely make personal choices on what to do or what to eat, even if they suffer from lung cancer or become overweight due to such choices.[192] However, after two decades of unsuccessful breach of warranty, product liability, and negligence lawsuits against tobacco manufacturers,[193] some state courts started applying the market share principle. The market share principle is a judicially-created exception to basic tort principles that relieves plaintiffs of the requirement of identifying a single tortfeasor and shifts the burden to the defendant, who must prove that the plaintiff's injury was not caused by its product.[194] Defendants failing to meet their burden are responsible for the proportion of the damages judgment represented

---

189 Frank J. Chaloupka et al., *Tobacco Taxes as a Tobacco Control Strategy*, 21 TOBACCO CONTROL 172, 172 (2012), *available at* http://tobaccocontrol.bmj.com/content/21/2/172.full.pdf+html.

190 *See generally*, Dan E. Peterson, *The Effect of State Cigarette Tax Increases on Cigarette Sales, 1955 to 1988*, 82 AM. J. PUBLIC HEALTH 94, 94-96 (1992). A study by the Congressional Budget Office estimated that implementing a fifty cents per pack tax on cigarettes would lead to 1.4 million fewer smokers, with gains concentrated among younger Americans. Also, a 2012 study in the journal *Tobacco Control* found that the implementation of tobacco taxes decreases the intensity of smoking, especially among the most intense smokers. *See* Sarah Kliff, How *Obama's Tobacco Tax Would Drive Down Smoking Rates*, WASHINGTON POST (Apr. 11, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/11/how-obamas-tobacco-tax-would-drive-down-smoking-rates.

191 Prabhat Jha & Frank J. Chaloupka, *The Economics of Global Tobacco Control*, 321 BMJ 358, 358–361 (2000).

192 Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L. 839, 846 (2005); *see* Spain v. Brown &Williamson Tobacco Corp., 872 So. 2d 101, 120 (Ala. 2003) (Johnstone, J., dissenting); Courtney, *supra* note 159, at 104.

193 *See* Leila B. Boulton, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 35 CATH. U.L. REV. 643, 644 n.4 (1987).

194 Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 693 (Ohio 1987).

by their share of the market.[195] The market share principle allows for joint and several liability, pitting liable tobacco companies against each other in contribution actions.[196] Further momentum gained against the tobacco industry as some states outlawed smoking in certain public places.[197] The tobacco industry's entrance into the Tobacco Master Settlement Agreement ("MSA") with the attorneys general of forty-six states, as well as those of the District of Columbia, Puerto Rico, and the Virgin Islands,[198] and numerous smaller manufacturers (collectively known as "Participating Manufacturers),[199] which cost Big Tobacco billions of dollars and set strict marketing and advertising standards,[200] was another major example of the dramatic shift in the legal fortunes of companies manufacturing and advertising tobacco.[201] In essence, the agreement was presented by the state attorneys general to make a deal with the tobacco companies[202]: the states, in exchange for agreement of the companies to make specified payments to the settling states (exceeding $200 billion through 2025) and to abide by extensive restrictions on the advertising, promotion and marketing of cigarettes, settled their Medicaid lawsuits against the tobacco industry and released the companies from claims by the states "generally related to the use, sale distribution, manufacture, development, advertising, marketing or health effects of, the exposure to, or research statements, or warnings regarding, Tobacco Products."[203]

---

195 Sindell v. Abbott Laboratories, 607 P.2d 924, 925 (Cal. 1980), cert. denied, 449 U.S. 912, 937 (1980); "Market share" is defined as the percentage of the total sales in a given market that is controlled by a given firm. BLACK'S LAW DICTIONARY 971 (6th ed. 1990).

196 Scott Richardson, Comment, *Attorney General's Warning: Legislation May Now be Hazardous to Tobacco Companies' Health*, 28 AKRON L. REV. 291, 292–93 (1995).

197 *See generally* Gene Borio, *The Twentieth Century, 1950-1999—The Battle is Joined*, *in* TOBACCO TIMELINE, TOBACCO.ORG (2007), http://www.tobacco.org/resources/history/Tobacco_History20-2.html (discussing how seminal legislation, judicial opinions, and even scientific studies can show how tobacco changed from a commonly accepted commodity to a highly regulated drug).

198 *Master Settlement Agreement*, National Association of Attorneys General (1998). http://web.archive.org/web/20080625084126/http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf.

199 *MSA Settlement Proposals: Why Sign the MSA?*, National Association of Attorneys General, http://www.naag.org/backpages/naag/tobacco/msa/msa_settlementeproposal.

200 *See* Shital A. Patel, *The Tobacco Litigation Merry-Go-Round: Did the MSA Make it Stop?*, 8 DEPAUL J. HEALTH CAREeL. 615, 634–35 (2005).

201 *See* Robin Miller, *Validity, Construction, Application, and Effect of Master Settlement Agreement (MSA) Between Tobacco Companies and Various States, and State Statutes Implementing Agreement; Use and Distribution of MSA Proceeds*, 25 A.L.R.6th 435 (2007).

202 *See* Richard A. Daynard et al., *The Multistate Master Settlement Agreement and the Future of State and Local Tobacco Control: an Analysis of Selected Topics and Provisions of Multistate Master Settlement Agreement of November 23, 1998*, The Tobacco Control Resource Center, Inc., at Northeastern University School of Law (Mar. 24, 1999), http://www.tobacco.neu.edu/tobacco_control/resources/msa/.

203 *Id.*

As for food, as people started to look past personal responsibility and focused on the cultural, corporate, socioeconomic, and environmental causes of obesity,[204] the fast food industry became more amenable to settlements in lawsuits. In an example of a more aggressive regulatory targeting of the industry as a cause of obesity, the Board of Supervisors of San Francisco, California, passed an ordinance requiring that Happy Meals and other fast food meals that include toys and are marketed to children meet new nutritional standards, or be removed from menus starting in December 2011.[205] The new standard required that food and beverages contain fewer than 600 calories, and that less than 35% of total calories come from fat.[206] Demonstrating the industry's increased amenability to settlement, McDonald's chose to settle one fat content lawsuit in 2005 for $8.5 million.[207] In that case, McDonald's was accused of failing to keep its promise to reduce its use of trans fat.[208] The settlement not only cost McDonald's millions of dollars, but also required McDonald's to give public notice that the oil it used contained trans fat.[209] A similar lawsuit brought by the Center for Science in the Public Interest against Burger King, the Center claimed that the company knowingly put their customers' health at risk by using trans fat.[210] As a result of this suit, Burger King eventually pledged to phase out trans fat by November 2008.[211]

Similar to what has happened in the tobacco industry and food industry, a shift in public attitude towards the soda industry may give political support to actions by judges and politicians aiming to curb soda drink consumption. Although a majority of the New York City population does not currently appear to support the Soda Ban, as with the tobacco industry in the 1980s and the food industry in early 2000s, public opinion may shift as further research reveals the health effects of sugary drinks and resulting societal costs.

---

204 Courtney, *supra* note 159, at 69.

205 Michael Martinez, *San Francisco Overrides Mayoral Veto, Bans Happy Meals with Toys*, CNN (Nov. 24, 2010), http://www.cnn.com/2010/US/11/23/california.happy.meals.ban/index.html.

206 *Id.*

207 *McDonald's Settles Fat Lawsuit for $8.5 Million*, INS. J. (Feb. 15, 2005), http://www.insurancejournal.com/news/national/2005/02/15/51451.htm.

208 *Id.* Trans fat are considered to be the worst type of fat because it not only raises the "bad" cholesterol (low-density lipoprotein) like other fats, but also lowers the "good" cholesterol (high-density lipoprotein). *See The Truth About Fats: Bad and Good*, HARVARD MEDICAL SCHOOL FAMILY HEALTH GUIDE, http://www.health.harvard.edu/fhg/updates/Truth-about-fats.shtml (last updated Nov. 2007).

209 *McDonald's Settles Fat Lawsuit for $8.5 Million*, INS. J. (Feb. 15, 2005), http://www.insurancejournal.com/news/national/2005/02/15/51451.htm.

210 *Burger King Hit with Trans Fat Lawsuit*, CTR. FOR SCI. IN THE PUB. INTEREST (May 16, 2007), http://www.cspinet.org/new/200705161.html.

211 *Id.*

In sum, there seems to be a common pattern, as shown by the experiences of the tobacco and fast food industries, in successful implementation of regulatory policies targeting widely-consumed products with known adverse health effects. Once scientific evidence of tobacco-related harm and fast-food-related harm was established, the responsibility of the government to inform consumers of the related health consequences arose. Gradually thereafter, targeted regulation successfully changed marketing practices and consumer behavior. Today there is ample scientific evidence of soda-related harm, and therefore, the government has the responsibility to inform the public of such harm. Thus, some sort of regulatory intervention like the Soda Ban could be an effectively targeted regulatory mechanism for reducing obesity or improving public health.

### *C. Taxing and Banning Sugary Beverages*

As of 2009, thirty-three states had sales taxes on soft drinks, but the taxes are too small to affect consumption; in many cases, consumers did not know the taxes existed.[212] In addition, the revenues generated by these taxes were not used to fund nutrition programs.[213] Experts have stated that "fat taxes" would have to increase the price of unhealthy food and drinks by as much as 20% to cut consumption by a sufficient margin to reduce obesity and other obesity-related diseases.[214] However, as previously mentioned, plans for taxing soda drinks in New York City have failed due to both the beverage industry's lobbying power and New York City's limited authority to implement tax policies. Although a literal reading of the New York State Constitution suggests that the State's preemptive authority is limited when it seeks to restrict the activities of a particular jurisdiction,[215] New York courts have interpreted this restriction so narrowly that, in practice, almost any legislation passed by New York City can be preempted by state legislative action.[216] Because im-

---

212 Brownell et al., *supra* note 19, at 1599.

213 *Id.* For example, the majority of the revenue from soda sales taxes that were enacted from mid- to late 1900s were mostly used to fund general funds. *See* Jacobson & Brownell, *supra* note 18, at 855–56.

214 Denis Campbell, *'Fat Tax' on Unhealthy Food Must Raise Prices by 20% to Have Effect, Says Study*, GUARDIAN (May 15, 2012), http://www.guardian.co.uk/society/2012/may/16/fat-tax-unhealthy-food-effect.

215 The New York State Constitution places limits on "special legislation." Such "special legislation" can be passed only at the request of the local government under a home rule message or in emergency situations. N.Y. CONST. art. IX, § 2(b)(2).

216 In practice, however, these restrictions on special legislation are limited by the judiciary's willingness to defer to legislative judgments as to what constitutes an issue of statewide concern and, therefore qualifies as general, rather than special, legislation. *See, e.g.*, Patrolmen's Benevolent Ass'n v. City of New York, 767 N.E.2d 116 (N.Y. 2001) (holding that the safety of New York City residents was a statewide issue, and therefore, the New York Legislature had authority to pass laws affecting New York City's contact with its police union, limit-

plementing a partial ban on soda does not rely on New York City's limited authority to implement tax policies, nor is it as vulnerable to lobbying as a soda tax, New York City may have relatively more success implementing a soda ban.

While enforcing an outright product ban would restrict all soda retailers, New York City seeks to impose regulations merely restricting the sale of sixteen-ounce sugary drinks in establishments regulated by the city's health department.[217] In addition, the soda restriction could be considered as a type of retailing limit: a sales location limit.[218] Retailing restrictions such as age limits, time-of-day limits, and product display limits are widespread for many products.[219] For example, retailing limits, like a requirement that candy be placed above a certain height (e.g., higher than a child's eye level) or behind the counter, have proven effective in discouraging impulsive purchases.[220] In a similar fashion, the Soda Ban would also seek to reduce impulsive purchases of large sodas. State and local governments may legitimately impose conditions on sales to limit a product's detrimental effect on public health. For example, California has been successful in prohibiting tobacco retailers from selling single cigarettes and requiring them to abide by a minimum pack size.[221] Given these many examples of laws and regulations legitimately limiting product access in response to health concerns, the Soda Ban's restrictions appear reasonable.[222]

### *D. Aftermath of the Soda Ban*

The soda drink industry consists of a series of stakeholders along the supply chain, beginning with the beverage company and ending with

---

ing the City's bargaining power and preempting the City's own mediation laws for negotiating with public employee unions).

217 Erin Durkin, *Judge Halts Bloomberg's Large Soda Ban Before It's Set to Go into Effect*, DAILY NEWS (Mar. 11, 2013), http://www.nydailynews.com/new-york/bloomberg-soda-ban-national-article-1.1285235.

218 *See, e.g.*, CAL. BUS. & PROF. CODE 22960, 22962 (West 2005) (prohibiting access to cigarettes without the assistance of a clerk). An example of a sales location limit would be requiring that candy or other products to be restricted to certain locations in retail outlet. *See* Randolph Kline, *Beyond Advertising Controls: Influencing Junk-Food Marketing and Consumption with Policy Innovations Developed in Tobacco Control*, 39 LOY. L.A. L. REV. 603, 616 (2006).

219 *See, e.g.*, Thomas R. Frieden, *Forward* to U.S. DEP'T OF HEALTH AND HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL, at i (2012), *available at* http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.

220 Rebecca E. Lee et al., *The Relation Between Community Bans of Self-Service Tobacco Displays and Store Environment and Between Tobacco Accessibility and Merchant Incentives*, 91 AM. J. PUB. HEALTH 2019, 2019, 2021(2001).

221 *See, e.g.*, CAL. PENAL CODE 308.2 (West 2005) (prohibiting single cigarette sales); CAL PENAL CODE 308.3 (West Supp. 2005) (requiring a minimum pack size).

222 *See* Kline, *supra* note 218, at 617–18.

the retailer. Many industries, including bottling companies, restaurants, theatres, and vending machine businesses' interests are closely aligned with the soda industry, and thus, are potentially affected by increased regulatory control of the soda industry.

In predicting how consumers will behave if the Soda Ban is implemented, one must consider the relevant background of how large-sized beverages were introduced. Starbucks introduced its Trenta size for its iced beverages in 2011 in at least fourteen states, adding to the already existing Short, Tall, Grande, and Venti sizes.[223] A Trenta-sized drink (916 milliliters) is larger than the average capacity of the adult human stomach of 900 milliliters.[224] Assuming that Starbucks, like any corporation, exists to maximize its profits, the intention of introducing the Trenta size may well have been to create a demand for a super-sized drink, or at least to implicitly encourage people to drink more coffee—"[t]he problem is, whether you want so much food or not, the more you're served, the more you eat."[225] While rise in portion size may be partially attributable to consumers' desire to maximize value,[226] the fact that beverage and fast-food companies do not fulfill consumers' demand by offering lower prices on smaller instead of bigger portions[227] illustrates that their motive is skewed toward maximizing profits rather than fulfilling the needs of customers. As critical realists state, "manufactures

---

[223] Alexandra Corbett, *Thirsty? Starbucks Supersizes to the Trenta*, NORWALK (Jan. 18, 2011), http://norwalk.dailyvoice.com/news/thirsty-starbucks-supersizes-trenta.

[224] Andrew Barr, *Graphic: How Big, Exactly, is Starbucks' New 'Trenta' size?*, NAT'L POST (Jan. 17, 2011), http://news.nationalpost.com/2011/01/17/graphic-how-big-exactly-is-starbucks-new-trenta-size/.

[225] A study by the Penn State University's College of Health and Human Development found that when people were served with varying size of food portions, most of them did not notice the difference, and everyone, "men or women, dieters or non-dieters, people who were overweight or not, people who habitually clean their plates or not," responded to the increased size by eating more. John Mckenzie, *Food Portion Sizes Have Grown – A Lot*, ABC NEWS (Jan. 21, 2003), http://abcnews.go.com/WNT/story?id=129685&page=1. Another interesting result of that same study was that people reported similar ratings of hunger and fullness after each meal despite the intake differences. *Id.* Another effect of continuous exposure to larger food portion sizes is "portion distortion," where people perceive larger potions sizes as an appropriate amount to consumer at a single occasion. *See* Ruth E. Litchfield & Mary Beth Penisten, *Nutrition Education Delivered at The State Fair: Are Your Portions in Proportion?* 36 J. NUTR. EDUC. BEHAV. 275, 275 (2004), *available at* http://www.sciencedirect.com/science/article/pii/S1499404606603928; Jaime Schwartz & Carol Byrd-Bredbenner, *Portion Distortion: Typical Portion Sizes Selected by Young Adults,* 106 J. AM DIET ASSOC. 1412, 1412 (2006), *available at* http://www.sciencedirect.com/science/article/pii/S0002822306013836.

[226] *See* Ingrid HM Steenhuis & Willemijn M Vermeer, *Portion Size: Review and Framework for Interventions*, 6 INT'L J. BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 58, 59 (2006), *available at* http://www.ijbnpa.org/content/pdf/1479-5868-6-58.pdf

[227] *See* O'Dougherty M, *Nutrition Labeling and Value Size Pricing at Fast-Food Restaurants: A Consumer Perspective*, 20 AM. J. HEALTH PROMOT. 247 (2006) (study showing that 62% of participants supported a law requiring nutrition labels on restaurant menus, and 34% supporting a law requiring restaurants to offer lower prices on smaller instead of bigger portions).

constantly adapt to exploit consumers' cognitive tendencies and manipulate the commercial environment in which consumers are making purchasing decisions, both conscious and unconscious."[228] Furthermore, it has been suggested that if people are offered larger portions of food, they eat significantly more without realizing it.[229] Conversely, perhaps caloric intake can be reduced over time by reducing portion size and the size of the dish in which food is served.[230]

Another relevant point is how sensitive people are to marginal prices. In economic terms, the point where marginal cost and marginal benefit meet is the optimal activity level.[231] However, because the difference in marginal price for consumers decreases as the size of the soda increases, a person would likely buy a larger soda even if it only provides a small marginal benefit.[232] While consideration of value for money

---

228 Jon D. Hanson & Douglas A. Kysar, *The Joint Failure of Economic Theory and Legal Regulation, in* SMOKING: RISK, PERCEPTION, & POLICY 229, 258–61 (2001) ("[T]he market is . . . more powerful than the government at manipulating consumer perceptions and preferences."). Critical realism takes the position that there is an objective reality and the objects of scientific study will thus always exist in the same manner regardless of knowledge gained about them. Paul Taylor et al., *Tobacco Smoking and Incarceration Expanding the 'Last Poor Smoker' Thesis*, INTERNET J. CRIMINOLOGY 4 (2012), http://www.internetjournalofcriminology.com/Taylor_Ogden_Corteen_Tobacco_Smoking%20_and_Incaraceration_IJC_Dec_2012.pdf. Critical realists generally think that because the process of an investigation is ultimately the product of social relations, investigations have limitations. *Id.* at 4. In the view of critical realists, "current work, theory or 'evidence' is always open to criticism and change and the difference between a theory and its relation to real events[e] arises due to the attempt to explain an underlying structure which is not necessarily observable (albeit still real)." *Id.* at 4.

229 *See* Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1696–97 (2004); *see also* MARION NESTLE, WHAT TO EAT 504, 506 (2006) (describing "portion distortion" and powerful but unconscious "eat me" effect of large portions).

230 *See generally* BRIAN WANSINK, MINDLESS EATING: WHY WE EAT MORE THAN WE THINK (2006). Stated more technically, "unfamiliar optimization is impossible within the cognitive bounds of rationality, when decision time is scarce." Reinhard Selten, *What is Bounded Rationality?*, *in* BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX 13, 69–70 (G. Gigerenzer & R. Selten eds., 2002). The serving size bias affects caloric consumption even if the consumers have been educated about it. Wanksink concludes:

> No one is immune to serving-size norms—not even "intelligent, informed" people who have been lectured on the subject ad nauseum. In the end, setting the table with the wrong dinner plates or serving bowls—the big ones—sets the stage for overeating. And there are heavyweight consequences . . .

BRIAN WANSINK, MINDLESS EATING 69, 70 (2006).

231 *See* C.R. Thomas & S.C. Maurice, *Marginal Analysis for Optimal Decisions*, MCGRAWHILL, http://answers.mheducation.com/business/economics/business-economics/marginal-analysis-optimal-decisions (last visited Oct. 18, 2013).

232 *See* Willemijn M. Vermeer et al., *Portion Size: A Qualitative Study of Consumers' Attitudes Toward Point-of-Purchase Interventions Aimed at Portion Size*, 25 HEALTH EDUC. RES. 109, 113 (2009), *available at* http://her.oxfordjournals.org/content/25/1/109.full.pdf+html. For examples of non-proportional pricing of soda drinks see *From Wallet to Waistline*, NATIONAL ALLIANCE FOR NUTRITION AND ACTIVITY 8–10 tbl.2 (June 2012), http://www.cspinet.org/w2w.pdf (e.g., in 2002, McDonald's sold a small sixteen ounce Coca-Cola for $1.04, medium twenty-one ounce for $1.20, large thirty-two ounce for $1.44, and super size forty-two

strongly guides consumers toward buying larger portions,[233] a study found that when confronted with proportional pricing, overweight fast food restaurant visitors were less likely to choose large soft drink sizes.[234] If consumers know that the increase in the marginal price of drinks decreases as the size of the drink increases, they may buy larger drinks than they actually need or want. In other words, consumers, in the absence of the marginal price curve, may not consume the largest drinks available. Thus, if the Soda Ban is implemented, people will no longer be motivated by incremental gains along the marginal curve.

Furthermore, since children develop eating habits and brand loyalties before becoming overweight,[235] reduced soda consumption resulting from the implementation of the Soda Ban could help shape a healthier diet for children and for the general population in the long-term. One difference between adults and children is that, whereas adults are relatively more aware that their consumption choices are shaped by marketing tactics, children are subconsciously heavily influenced by food industry advertising.[236] The Soda Ban could thus be particularly helpful in reducing the exposure of children to unhealthy beverages, and promoting more healthful consumption habits for long-term benefit.

---

ounce for 1.64). In calculating the marginal cost, the marginal benefit must be discounted because there is a time delay between the time at which people decide they want to consume and the time when they actually do consume. For example, a person who discounts all times in the future at a rate higher than the pure time discount rate, but trades off consumption in future states at the time discount rate will want to begin the diet tomorrow. This is because the long-term benefits justify the lost utility tomorrow, but not today, as the immediate gratification from food is high. If that person is hungry and a vending machine filled with cookies is ten feet away, that person might eat mid-afternoon cookies even if he is on a diet since the diet can always start tomorrow. The same person, however, might not be willing to walk ten minutes to and from the store to get cookies since the bene?ts of eating these cookies are too far away. "Many behavioral change programs—like those involved with smoking and drinking cessation as well as weight loss—encourage keeping the offending items as far away as possible. Raising time costs is believed to reduce consumption." David M. Cutler et al., *Why Have Americans Become More Obese?* 17 J. ECON. PERSPECTIVE 93, 113-14 (2003), *available at* http://faculty.chicagobooth.edu/jesse.shapiro/research/obesity.pdf.

233 Vermeer et al., *supra* note 232, at 110.

234 However, the study concluded with a caveat that among the general public, proportional pricing did not reduce consumers' size choices. *See* Willemijn M. Vermeer et al., *Value for Money or Making The Healthy Choice: The Impact of Proportional Pricing on Consumers' Portion Size Choices*, 20 EUR. J. PUBLIC HEALTH 65, 65 (2009), *available at* http://eurpub.oxfordjournals.org/content/20/1/65.full.pdf?html.

235 *See generally* Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 1 INT'L J. BEHAVIORAL NUTRITION & PHYSICAL ACTIVITY 3 (2004), http://www.ncbi.nlm.nih.gov.proxy.library.cornell.edu/pmc/articles/PMC416565/pdf/1479-5868-1-3.pdf.

236 *See* Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 79 (2006) (revealing that children do not understand that marketing techniques are commercially motivated).

The impact of the Soda Ban on big beverage companies would not be as bad as an outright ban of all types of sugary beverages in all places, but it would definitely bring some change.[237] When the tobacco industry faced fundamental changes due to restrictions on tobacco and smoking in the United States, it diversified company holdings, expanded the industry into developing nations, and pioneered alternative tobacco products. The beverage industry has embraced the latter two practices, and some beverage companies have diversified company holdings.[238] The change in beverage companies' net profits resulting from the Soda Ban would depend on profit offsets, which would partially depend on whether their alternative products or marketing strategies were successful enough to cover the lost sales caused by the soda ban. While the lost revenue from the Ban for beverage sellers may vary in the short- and long-terms, it is unlikely to exceed the direct cost-saving of $4.7 million—New York Department of Health's estimate of obesity-related costs saved by the Ban[239]—and the other indirect costs resulting from obesity. Furthermore, as with the implementation of Starbucks' mandatory calorie counts, the Ban may not result in significant change in beverage calories purchased, as sugary beverages of more than sixteen ounces will still be available to consumers.[240]

## CONCLUSION

New York City's Soda Ban evokes concerns of paternalism. The public was mostly concerned with whether the Ban infringed on freedom of choice, and the New York County Supreme Court and the First De-

---

237 For example, because only the businesses that are regulated by New York City are subject to the Ban, the Soda Ban leaves out large companies like 7-Eleven and other grocery stores. Some worried that the Ban may selectively harm small businesses. *See, e.g.*, Jason Kessler, CNN, *Groups: NYC Soda Unfair to Small, Minority-Owned Businesses* (Jan. 25, 2013), http://www.cnn.com/2013/01/23/health/new-york-large-drinks/index.html; Paul Frumkin, *Restaurant Industry Leaders Oppose New York Soda Ban* (June 1, 2012), http://nrn.com/latest-headlines/restaurant-industry-leaders-oppose-proposed-new-york-soda-ban.

238 Most of the major beverage companies have diversified company holdings. For example, Coca-Cola Company, which mainly produces syrup concentrate, holds numerous subsidiary beverage brands. Its notable subsidiary holdings include a major bottler in North America, Coca Cola Refreshments, and its foreign subsidiaries. *See Subsidiaries of The Coca-Cola Company as of October 2, 2011*, http://www.sec.gov/Archives/edgar/data/829224/000119312511317175/d232803dex21.htm. Starbucks and Kraft also have diversified company holdings. *See Subsidiaries of Starbucks Corporation*, http://pdf.secdatabase.com/2646/000119312511317175.pdf; *Kraft Foods Group, Inc. List of Subsidiaries*, http://www.sec.gov/Archives/edgar/data/1545158/000119312513118824/d463856dex211.htm.

239 *See* Zachary Stieber, *The Cost of Complying with NYC's Soda Ban*, THE EPOCH TIMES (Feb. 21, 2013), http://www.theepochtimes.com/n2/united-states/the-cost-of-complying-with-nyc-s-soda-ban-350678.html.

240 *See* Anna Cooperberg, *Fast-Food Outlets Prepare to Lose Over Big Soda Ban*, MIDTOWN GAZETTE (Oct. 4, 2012), http://themidtowngazette.com/2012/10/fast-food-outlets-prepare-to-lose-over-big-soda-ban.

partment of the Appellate Division of New York State Supreme Court relied on separation of powers principles and the arbitrary and capricious standard to hold the Ban legally invalid. While the legal debate on the Soda Ban has raised various constitutional issues, this Note has further considered the economic and social aspects of the Ban.

Sodas have not only been scientifically linked to obesity, which has been linked to numerous fatal diseases, and has also recently been categorized as a disease by the American Association. Beyond the harm to individuals, medical expenses related to obesity have become an excessive burden on the government and taxpayers. So far, beverage companies have not accepted much responsibility for the damage caused by their products, nor have they taken the threat of federal regulation seriously. Therefore, a critical need exists to regulate the devastating juggernaut that is the soda industry.

Unfortunately, this need has yet to be met. Unlike the tobacco industry and fast food industry, the beverage industry is perceived to be relatively free of ethical violations that affect health, and a greater number of people consume sodas compared to cigarettes or fast food. Perhaps due to the uniquely widespread nature of soda consumption, the anti-soda movement has not yet garnered significant support, influence, or exposure. Having learned from past experience that the beverage industry enjoys influence over lawmakers, New York City has tried to prevent obesity by implementing a local ban of large-sized sodas in certain retail outlets.

The New York City's Board of Health's efforts, however, have been crushed, but with little persuasive justification. While the First Department of the Appellate Division of New York State Supreme Court has held that all four factors of the *Boreali* were present in the Soda Ban, this Note disagrees. First, the promulgation of the Soda Ban was based solely on healthy concerns, not as a result of balancing of social and economic factors, and therefore the Soda Ban must be distinguished from the regulation challenged in *Boreali*. Second, while the authority of the Board is not without limits, the language of the New York City Charter indicates that the Board is permitted to engage in interstitial rulemaking regulations regarding matters inherently harmful to the health of City residents—an obesity epidemic should surely be the qualify as such a matter. Third, because the Soda Ban is different from other resolutions and bills proposed by City Council and State legislature, the Board did come up with its own answer to an unresolved issue. Lastly, as the Soda Ban was proposed to curb one of the factors affecting the obesity epidemic, it is difficult to see how the expertise of the Health Board would not have been utilized in making the decision to implement such regulation. Furthermore, the mere presence of various exceptions to a regula-

tion does not itself make the regulation arbitrary and capricious. The reasoning behind exceptions must be considered, and for the Soda Ban, the grounds for exceptions were legitimate.

While the New York State courts' decisions suspending the Ban were a disappointing setback, the Soda Ban still has hope given that the New York Court of Appeals agreed to hear the appeal. Further, even if the Court of Appeals does not reverse the lower court's decision, a first-time failure to implement one type of soda ban does not in any way indicate that all types of soda bans or soda regulation will be rejected. There are several potential solutions for the problems identified by the courts that suspended the Soda Ban. First, the Board could attempt to coordinate with the Department of Agriculture to implement a citywide regulation, and provide further scientific basis for its sixteen-ounce size limit. Alternatively, instead of banning sodas larger than sixteen-ounces, the Board could attempt to develop a pricing regulation that resembles a proportional pricing of sodas.

Moreover, once a soda ban is crafted to survive a *Boreali* analysis through the simple mechanisms outlined above, it should not be vulnerable to other constitutional challenges. As argued by Professor Michael Dorf of Cornell Law School, a similar type of ban would be upheld under the federal Constitution.[241] Because the Soda Ban, if implemented, might well achieve sufficient benefits to offset any inconveniences imposed on customers and any losses imposed on vendors, New York City should not abandon its goal of implementing a soda regulation. In this way the Soda Ban could be similar to New York State's Clean Indoor Air Act of 2003 in terms of eventual impact and reception. The 2003 Clean Indoor Air Act—New York's statewide ban on smoking in bars and restaurants—was a legislative attempt to protect second-hand smokers. Like the Soda Ban, the Clean Indoor Air Act was enacted with an ultimate focus on public health. While the Act prohibits indoor smoking in various venues—places of employment, bars, restaurants, public transportation, schools, general hospitals—it is not without exceptions: the Act exempts places like private homes, hotel, retail tobacco businesses, and up to 25% of outdoor seating areas in restaurant without roof or

---

241 Mike Dorf, *A Federal Constitutional Right to Soda? Fat Chance*, DORF ON LAW (Mar. 14, 2012), http://www.dorfonlaw.org/2013/03/a-federal-constitutional-right-to-soda.html (concluding, prior to the disposition of the Appellate Division on the Soda Ban, that "even if the NY ruling is affirmed on appeal, the federal Constitution would allow a similar sugary-drink ban in a jurisdiction that permits it under state law."); *see also* Susan Saulny, *Rejecting Constitutional Claims, Judge Upholds Smoking Bans*, N.Y. TIMES (Apr. 9, 2004) http://www.nytimes.com/2004/04/09/nyregion/rejecting-constitutional-claims-judge-upholds-smoking-bans.html (reporting on federal court in Manhattan upholding the constitutionality of New York City's Smoke Free Air Act and New York State's Clean Indoor Air Act).

ceiling.[242] In 2003, when the law was first enacted, 76% of non-smoking adults supported the law, whereas only 28% of smokers were in favor.[243] In 2009, however, 87% of non-smokers supported the law, and support among smokers had doubled, increasing to 58%.[244] Perhaps the public's strong view against the Soda Ban before its enactment would similarly subside following implementation, upon recognition of the health benefits of the measure.[245]

---

242 DEPARTMENT OF HEALTH, *A Guide to The New York State Clean Indoor Air Act*, http://www.health.ny.gov/publications/3402 (last updated May 2011).

243 DEPARTMENT OF HEALTH, NEW YORK STATE'S CLEAN INDOOR AIR ACT: TEN YEARS LATER AND GOING STRONG (July 2013), http://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume6/ciaa_2013_10_year_report.pdf.

244 *Id.*

245 *See* Andrea Elliott, *Bars and Restaurants Thrive Amid Smoking Ban, Study Says*, N.Y. TIMES (Mar. 29, 2004), http://www.nytimes.com/2004/03/29/nyregion/bars-and-restaurants-thrive-amid-smoking-ban-study-says.html; Don Cazentre, *Ten Years Later, New York's Smoking Ban Barely Raises a Puff of Discontent*, SYRACUSE.COM (Aug. 6, 2013), http://www.syracuse.com/news/index.ssf/2013/08/ten_year_later_new_yorks_smoking_ban_raises_barely_a_puff_of_discontent.html (illustrating that in the long run, many bar and restaurant owners have hardly noticed any economic effects of the Clean Indoor Air Act. Although, according to a Syracuse bar owner, "[i]t probably took a little nibble (lost business) in the first few years, . . . in the long term I don't think it made much difference." Also, according to another proprietor, although the "transition was tough," "[i]n the end, when the dust settled, it's been a good thing, obviously. People smoke less when they have to get up and go inside.").