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Constitutionality of New York City's Health Regulations

By: Richard Lyons

Abstract

The rapid rise in obesity has become a significant public health concern. As a growing number of adults and children suffer from this disease, health care professionals, as well as government bodies, have begun to intervene. Obesity leads to unsustainable increases in health care, and as a result, many states have attempted to pass regulations to control the epidemic. This article surveys the dominant factors that have been linked to obesity, as well as the potential health effects. The second part of the paper focuses on government intervention in New York City, which has played a prominent role in leading the nation in passing regulations as a proposed solution to slow the progression of this epidemic. Lastly in the third part, there have been a number of proposed federal constitutional challenges to the regulations imposed by New York City's government. This section will outline out the arguments using previous jurisprudence on both sides and offer a predictive approach on how a court is likely to adjudicate these matters.

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Introduction

It is estimated that 95 million adults are overweight or obese in the United States.¹

Studies conducted by the Center for Disease Control and Prevention (CDC) indicate that over 36% of adults over the age of 20 are classified as obese.² More alarming is the fact that 17.1% of juveniles are classified as obese.³ The Center for Disease Control and Prevention defines obesity as an adult who has a body mass index (BMI) of 30 or higher.⁴ The standard example is a person who is 5 feet, 9 inches tall and weighing 203 pounds is classified as obese.⁵ As a leading public health concern within the United States that is showing no sign of decline, government agencies have pushed for intervention

There are considerable health risks associated with obesity, including heart disease, type 2 diabetes, hypertension, certain cancers, and increased risk of stroke.⁶ Obesity not only affects individuals, it also creates a shifting cost to the rest of society. The CDC estimates that medical costs resulting from obesity exceeded 147 billion dollars.⁷ Further, there are both direct and indirect costs associated with obesity. The direct costs are those such as medical expenses, including preventative, diagnostic, and treatment services.⁸ In addition, there are numerous indirect costs, which stem from the decreased productivity and restricted activities of those who are classified as obese.⁹

Studies indicate there various factors which have been linked to the prevalence of obesity. For instance, obesity has been directly correlated with race. Studies indicate Mexican-

¹ DiPiro JT, Talbert RL, Yee GC, Matzke GR, Wells BG, Posey LM, eds. *Pharmacotherapy: A Pathophysiologic Approach*. 6th ed. New York, NY: McGraw-Hill; 2005:761.

² US Department of Health and Human Services (US DHHS), Centers for Disease Control and Prevention, National Center for Health Statistics.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

American women and African-American women had the highest prevalence of obesity: 48.1 and 49.1 percent, respectively.¹⁰ Furthermore, socioeconomic status is classified as the most prevalent factor in obesity. As a result of the relatively low cost and easily available fast food in the inner cities, consumption of high fat and sugar meals among the poor and working poor has skyrocketed. Studies show that 54.1 % of women with income below the poverty line suffer from obesity.¹¹ It is commonly believed that packaged foods are more affordable than fresh natural ingredients, and this misconception has contributed to the obesity epidemic in the United States.

Traditional government functions include protecting the public health and promoting public safety.¹² As a result, many state and local jurisdictions have adopted regulations and laws to increase exercise and decrease consumption of potentially harmful products. On October 11th 2012, the New Jersey Legislature passed Act 3441, which allows tax deductions for individuals who bike to work.¹³ The legislation notes that this method is an ideal solution to the need for moderate physical activity.¹⁴ Currently, there are considerable amounts of similar legislation being proposed and placed into law all across the United States. The most prominent area, and the first city, to establish multiple regulations designed to promote public health in light of the obesity epidemic is New York City.¹⁵

Overview of Trans Fat Regulation

On December 5, 2006, the Board of Health approved amendment § 81.08 to Article 81 of the New York City Health Code to phase out artificial trans fat in all New York City restaurants and other food service establishments.¹⁶ The phase out of artificial trans fat in restaurant foods

¹⁰ DiPiro *Pharmacotherapy: A Pathophysiologic Approach*. 6th ed. New York, NY: McGraw-Hill; 2005:761.

¹¹ DiPiro *Pharmacotherapy: A Pathophysiologic Approach*. 6th ed. New York, NY: McGraw-Hill; 2005:761. At 2226

¹² ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 317 (2001)-

¹³ N.J.S. 3441, 2012.

¹⁴ *Id.*

¹⁵ *The Regulation to Phase Out Artificial Trans Fat In New York Food Service Establishments* . Seen on:10/25/2012

<http://www.nyc.gov/html/doh/downloads/pdf/cardio/cardio-transfat-bro.pdf>

¹⁶ *Id.*

took effect in two stages.¹⁷ By July 1, 2007, New York City food service establishments were prohibited from using oils, shortening, and margarine containing artificial trans fat for frying or as a spread which would contain 0.5 grams or more of trans fat per serving.¹⁸ Moreover, by July 1, 2008, all foods must have less than 0.5 grams of trans fat per serving if they have any artificial trans fat.¹⁹ Packaged foods served in the manufacturer's original, sealed packaging are exempt from these regulations.²⁰

In passing Amendment § 81.08, the legislation offered a considerable amount of findings, which directly related promulgation of the trans fat ban. Food service establishments are an important source of daily food intake for New York City residents. It is estimated that one third of daily caloric intake of the city's residents comes from foods purchased in restaurants.²¹ Therefore, assuring healthy dining options is an essential public health priority. Section 81.08 was initiated to address the growing concerns surrounding the health of New York City residents by restricting trans fat in foods served in restaurants, which represents a dangerous, and preventable, health risk to restaurant goers.²² The goal of the regulation is that through the restriction of foods containing artificial trans fats from being served at food service establishments, there will be a reduction in New Yorkers' exposure to food items that are heavily associated with increased heart disease risk.²³

From a public health standpoint, it was determined that New York City required

¹⁷ Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.08) to Article 81 of the New York City Health Code (2006), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf>

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *The Regulation to Phase Out Artificial Trans Fat In New York Food Service Establishments*

²¹ Guthrie JF. et al. Role of Food Prepared Away from Home in the American Diet, 1977-78 Versus 1994-96: Changes and Consequences. *Society for Nutrition Education* 2002; 34:140-150.

²² Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.08)

²³ *Id.*

intervention. Heart disease is classified as New York City's leading cause of death.²⁴ In 2004 alone, over 23,000 New York City residents died from heart disease.²⁵ More alarming is that nearly one-third of these individuals died before the age of 75.²⁶ Medical experts have directly correlated increased trans fat intake with the risk of heart disease. With an estimated one third of dietary trans fat coming from foods purchased in restaurants, New York City health official became increasingly concerned with the prevalence of trans fat oil in restaurant foods.²⁷ Trans fat essentially increases the risk of heart disease by elevating a person's "bad" cholesterol, while at the same time, lowering "good" cholesterol.²⁸ Due to trans fats negative effect on "good cholesterol", it has a more destructive impact than saturated fat. The 2005 Dietary Guidelines for Americans, issued by the United States Department of Agriculture, recommends that dietary intake of trans fat be "as low as possible."²⁹ Similarly, the American Heart Association guidelines from 2006 recommend that trans fat intake be kept below 1% of total energy intake.³⁰

It is estimated by New York City health officials that approximately 80% of dietary artificial trans fat is found in industrially produced, partially hydrated oils, which is used for frying, baking, and is prevalent in many processed foods.³¹ The Institute of Medicine firmly stated that there is no safe level of artificial trans fat consumption.³² In contrast, other dietary fats, when consumed in moderation, are a natural part of a healthy diet.³³ The Institute of

²⁴ *Id.*

²⁵ *Id.*

²⁶ NYC DOHMH, Office of Vital Statistics. NYC Vital Statistics 2004, Accessed on EpiQuery. 2006.

²⁷ Guthrie JF. et al. Role of Food Prepared Away from Home in the American Diet, 1977-78 Versus 1994-96: Changes and Consequences. *Society for Nutrition Education* 2002; 34:140-150.

²⁸ Ascherio A. Katan MB. Zock PL. Stampfer MJ. Willett WC. Trans fatty acids and coronary heart disease. *New England Journal of Medicine*. 1999; 340:1994-1998

²⁹ Dietary Guidelines Advisory Committee. King J, et al. Dietary Guidelines for Americans 2012. October 31 2012. <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/ExecutiveSummary.pdf>

³⁰ American Heart Association Nutrition Committee. Lichtenstein, A. et al. Diet and lifestyle recommendations revision 2006: a scientific statement from the American Heart Association Nutrition Committee. *Circulation*. 2006 July 4;114(1)e27.

³¹ http://www.fda.gov/fdac/features/2003/503_fats.html

³² US Food and Drug Administration. Trans Fatty Acids in Nutrition Labeling, Nutrient content Claims, and Health Claims (68 Fed. Reg. 41443 (July 11, 2003)) accessed on November 21 at <http://www.cfsan.fda.gov/~lrd/fr03711a.html>

³³ *Id.*

Medicine states that artificially produced trans fat offers no known health benefit.³⁴ Because healthy, inexpensive alternatives exist for the most common source of trans fat, New York City health officials have determined that the use of artificial trans fats pose an unnecessary health threat to the public.³⁵

Overview of Menu Label Regulation

In continuing with its goal of reducing obesity, New York City passed Amendment § 81.50 to Article 81 of the New York City Health Code. Section 81.50 requires that on July 1st 2007, food service establishments in New York City, which sell food items with standardized portions and contents, must display publicly available information about the calorie content of these items on menus and menu boards.³⁶ The aims of the amendment are an effort to inform consumers about their nutritional choices at the time of purchase.³⁷ Through the passage of section 81.50, New York City's Board of Health has made considerable findings in support of this amendment.

New York City's Board of Health is well aware that obesity is an epidemic. Amendment 81.05, in its legislative findings, offers that, according to measured height and weight data from the National Health and Nutrition Examination Survey (NHANES), the obesity rate among U.S. adults more than doubled over the past three decades from 14.5% in 1971-1974 to 32.2% in 2003-2004.³⁸ In New York City, more than half of adults are overweight, while one in six are obese.³⁹ Obesity begins at an early age with nearly 21% of New York City kindergarten children

³⁴ *Id.*

³⁵ Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.08

³⁶ Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.50) to Article 81 of the New York City Health Code 2 (2006), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf>

³⁷ *Id.*

³⁸ Flegal KM, Carroll MD, Ogden CL, Johnson CL. Prevalence and trends in obesity among U.S. adults, 1999-2000. *JAMA* 2002; 288:1723- 1727.

³⁹ "One in 6 New York City Adults is Obese." *NYC Vital Signs*. NYCDOHMH. 2003. 2(7).

suffering from obesity.⁴⁰ Because it is well established that individuals who are overweight are at increased risk for diabetes, heart disease, stroke, high blood pressure, arthritis, and cancer, the Board declared obesity a substantial public health concern.

The Board's primary concern is "away from home' food consumption."⁴¹ It is estimated that New York City's residents consume approximately one third of daily caloric intake from foods purchased and prepared outside of the home, and this proportion is increasing.⁴² Studies show that Americans as a whole are increasingly consuming meals outside of the home. In 1970, Americans spent on average 26% of money allocated for meals on foods prepared outside their homes, including restaurants, fast food chains, delicatessens, and food stands.⁴³ Comparatively, by 2006 Americans spent almost half, roughly 48%, of their money allocated for meals on food made outside the home.⁴⁴ As a result, New York City officials have determined that the need for informed choice is required now more than ever.

New York officials primarily rely on the contrast between products that are for sale in grocery stores, to products consumed in food service establishments. Currently it is federally mandated that products for sale in a supermarkets, grocery stores, and convenience stores display adequate nutritional labels.⁴⁵ This allows for consumers to make informed decisions based on specific criteria such as caloric information and fat content. However, in contrast, consumers lack essential information to make healthy choices when eating in restaurants.⁴⁶ The Board of Health determined that if caloric information was provided at the time of food selection, New

⁴⁰ "Obesity in Early Childhood: More than 40% of Head Start Children in NYC are Overweight or Obese." *NYC Vital Signs*. NYCDOHMH. 2006. 5(2).

⁴¹ Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.50)

⁴² *Id.*

⁴³ Guthrie JF. et al. Role of Food Prepared Away from Home in the American Diet, 1977-78 Versus 1994-96: Changes and Consequences. *Society for Nutrition Education* 2002; 34:140-150.

⁴⁴ *Id.*

⁴⁵ US Department of Health and Human Services (US DHHS), Centers for Disease Control and Prevention, National Center for Health Statistics. *Healthy People 2000 Final Review*. 2001.

⁴⁶ *Id.*

Yorkers would not only be allowed to make more informed choices, but are likely to choose a healthier option.⁴⁷ Accordingly, Article 81 of the New York City Health Code was amended to require that information on calorie content of menu items be available to patrons of food service establishments at the time of ordering when such information is otherwise made publicly available by or on behalf of the food service establishment.⁴⁸

Overview of Soda Ban

On March 16th 2013 New York City will officially place a ban on the sale of sugary drinks.⁴⁹ Also known as Amendment § 81.53 to Article 81 of the New York City Health Code, the ban was established as another proposed intervention to the ever-growing problem of obesity. It has been reported that more than half of New York City adults, estimated at fifty eight percent, are now overweight or obese.⁵⁰ In comparison 35.9% of adults nation-wide suffer from obesity, and 33.3% who are classified as overweight.⁵¹ Not only is the average New Yorker overweight at a higher rate than the national average, it is estimated that more than 20% of the City's public school children (K-8) are obese.⁵² Comparatively, the Center for Disease Control and Prevention report that 18% of all children from ages 6 to 11 suffer from obesity.⁵³

The New York City legislature provided significant findings in support of the sugary drink ban. Today it is estimated that Americans consume 200-300 more calories daily than 30 years ago.⁵⁴ The precipitating cause is being attributed to increased consumption of sugary drinks.⁵⁵

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Legal challenges to New York Sugary drink ban may fail.* Inside Counsel. June 5, 2012. Seen at: <http://www.insidecounsel.com/2012/06/05/legal-challenges-to-new-york-sugary-drink-ban-may?page=2>

⁵⁰ New York City Department of Health and Mental Hygiene. Community Health Survey 2010.

⁵¹ *Id.*

⁵² Centers for Disease Control and Prevention. Obesity in K-8 students – New York City, 2006-07 to 2010-11 school years. *Morbidity and Mortality Weekly Report* 2011; 60(49): 1673-78.

⁵³ *Id.*

⁵⁴ Olshansky SJ, Passaro DJ, Hershov RC, Layden J, Carnes BA, Brody J, Hayflick L, Butler RN, Allison DB, Ludwig DS. A potential decline in life expectancy in the United States in the 21st century. *New England Journal of Medicine* 2005; 352(11): 1138-45.

⁵⁵ *Id.*

Studies indicate that a 20-ounce sugary drink can contain the equivalent of 16 packets of sugar.⁵⁶ These drinks have been associated with long-term weight gain among both adults and children.⁵⁷ Major concerns have surfaced surrounding the health of today's youth. Scientists predict, with every additional sugary beverage a child drinks daily, a child's odds of becoming obese increase by 60%.⁵⁸ With this, major concerns, such as juvenile diabetes, are more prominent today than ever.

Food service establishments are an important source of daily food intake for New York City residents. It is estimated that one third of daily caloric intake of the city's residents comes from foods purchased in restaurants.⁵⁹ The consumption of sugary drinks among New York City residents has created concern from a public health perspective. It is estimated that more than 30% of adult New Yorkers report drinking one or more sugary drink per day.⁶⁰ While these rates raise concern, the rates are considerably higher in, low-income communities and among youths. For example, residents in low-income neighborhoods report drinking 4 or more sugary drinks daily.⁶¹ Comparatively, youth are consuming sugary drinks in even larger quantities. In 2009, 44% of NYC children aged 6 to 12 years consumed more than 1 sugary drink per day.⁶² Similarly, 26% of public high school students consumed 2 or more sugary drinks per day in the last week.⁶³

Fast food chains have adopted a clear strategy that is best characterized as “more bang for

⁵⁶ Guthrie JF, Morton JF. Food sources of added sweeteners in the diets of Americans. *Journal of the American Dietetic Association* 2000; 100:43-51.

⁵⁷ Malik VS, Schulze MB, Hu FB. Intake of sugar-sweetened beverages and weight gain: A systematic review. *American Journal of Clinical Nutrition* 2006; 84:274-88.

⁵⁸ Ludwig DS, Peterson KE, Gortmaker SL. Relation between consumption of sugar-sweetened drinks and childhood obesity: A prospective, observational analysis. *Lancet* 2001; 357:505-8.

⁵⁹ Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.53) to Article 81 of the New York City Health Code (2012), available at <http://www.nyc.gov/html/doh/downloads/pdf/notice/2012/amend-food-establishments.pdf>

⁶⁰ New York City Department of Health and Mental Hygiene. Community Health Survey 2010.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

your buck.” Recent trends indicate that increased portion sizes have had a direct effect on the prevalence of obesity in our nation.⁶⁴ Moreover, as portion sizes increased in fast food chains, so have the bottling and portion sizes of soft drinks. For instance, the original Coca-Cola bottle size was 6.5 fluid ounces; whereas today the standard is 12-16 fluid oz.⁶⁵ Fountain drinks are also a growing concern. The soda sizes at McDonald’s have increased a staggering 457% since 1955, from 7 fluid ounces to 32 fluid ounces.⁶⁶

While fast food chains do contribute to the growing health problems, they are not the sole cause. Some restaurants in New York City offer individual drink sizes up to 64 fluid ounces. It has been estimated that a sugary drink this size contains 780 calories and 54 teaspoons of sugar, and no nutrients.⁶⁷ Logically, larger portions lead to increased consumption and calorie intake.⁶⁸ It has been shown that when individuals are given larger portions, they unknowingly consume more while at the same time do not experience an increased sense of fullness. In one study in particular, people who consumed soup from self-refilling bowls ate 73% more than those who had to manually refill, without perceiving that they felt fuller or had eaten more.⁶⁹ New York health officials feel the same holds true with beverages. They conclude that when served more fluid ounces of a beverage, people will inevitably drink more without decreasing the amount of food they eat or experiencing a difference in “fullness” or thirst.⁷⁰

Amendment § 81.53 was ultimately proposed to address the obesity epidemic among New York Cities residents. By limiting the maximum size of sugary beverages sold in food service

⁶⁴ Young LR, Nestle M. The contribution of expanding portion sizes to the US obesity epidemic. *American Journal of Public Health* 2002; 92(2):246-49.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Retrieved on November 22, 2012 from: <http://nutrition.mcdonalds.com/getnutrition/nutritionfacts.pdf>.

⁶⁸ Wansink B, Painter JE, North J. Bottomless bowls: Why visual cues of portion size may influence intake. *Obesity Research* 2005; 13(1): 93-100.

⁶⁹ Wansink B et al. (2005)

⁷⁰ *Id.*

establishments, the goal is to reduce the adverse effects of overconsumption.⁷¹ Section 81.53 includes a ban on all sugar sweetened drinks over sixteen ounces sold or provided in restaurants, fast food chains, movie theaters, sports stadiums, and food carts.⁷² The ban is designed to reach all types of sugary drinks, including beverages such as coffee, energy drinks, and pre-sweetened iced teas. However, diet sodas, fruit juices, dairy-based milkshakes, and alcoholic beverages would not be affected.⁷³ Moreover, the amendment sets a maximum size for self-service cups at not more than 16 fluid ounces. Failure to comply with the regulation carries a punishment of no more than two hundred dollars for each violation as described in the proposed rule.⁷⁴

Constitutional Challenges to Trans Fat Regulation

Currently, there have been no constitutional challenges to New York City's ban on trans fat; however, legal scholars have hypothesized the potential challenges to the regulation. The main theories are: 1. The trans fat ban is preempted by federal law; 2. The amendment violates the Dormant Commerce Clause because of its burden on interstate commerce; and 3. The restriction of trans fats violates the Takings Clause of the Fifth Amendment.

A. Preemption Challenge

Preemption is the ability of Federal laws and regulation to prevent or prohibit the actions of a lower level government.⁷⁵ In the United State Constitution, the Supremacy Clause explicitly states that Federal law is the “supreme law of the land.”⁷⁶ Expanding on the text, the Supreme Court has interpreted the Supremacy Clause to unequivocally grant Congress and federal

⁷¹ Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.53)

⁷² *Legal challenges to New York Sugary drink ban may fail*. Inside Counsel. June 5, 2012. Seen at: <http://www.insidecounsel.com/2012/06/05/legal-challenges-to-new-york-sugary-drink-ban-may?page=2>

⁷³ *Id.*

⁷⁴ Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.08)

⁷⁵ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 317 (2001)

⁷⁶ U.S. CONST. ART. VI.

agencies the power to preempt local laws on the same subject.⁷⁷ Conversely, the Court has declared that traditional state functions are those, which deal with public health, safety, and welfare.⁷⁸ These state functions have been classified as being within the police powers of a state.⁷⁹ Legal scholars suggest the core of the preemption challenge would stem from the Food, Drug and Cosmetic Act of 1938.⁸⁰ Under the Food Drug and Cosmetic act, trans fats are generally recognized as safe, with the only requirement being fat content disclosed on the nutritional label.⁸¹ Theoretically, a challenger could posit that, because the Food, Drug and Cosmetic Act of 1938 expressly states that the only requirement for trans fats is labeling disclosure, any further regulation would be an overreach of a state's power. State and local governments are free to set and enforce more rigorous standards than those delineated by the federal government.⁸² Federal laws are essentially viewed as a floor, meaning they set the minimum requirements to which a state must adhere. However, a state is free to raise the ceiling as high as they would like, as long as it does not substantially frustrate the purpose of federal law. In analyzing the trans fat ban, it is unlikely that a court would determine the New York City regulation frustrates the purpose of the Food, Drug and Cosmetic Act of 1938. The Act was established as a response to the deceptive practices in the late 1920's-1930's, which contributed to the great depression.⁸³ The Act's hopes were that by ensuring consumers were not defrauded or misinformed; the government could regain public trust in business.⁸⁴ It is likely that a court would determine that the purpose of the New York City regulation only expands on the foundations of the FDCA. By banning trans fat in food service establishments, consumers are

⁷⁷ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 317 (2001)

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Food Drug and Cosmetic Act, P. L. 75-717, 52 Stat. 1040 (1938).

⁸² CHERMERINSKY

⁸³ Food Drug and Cosmetic Act, P. L. 75-717, 52 Stat. 1040 (1938).

⁸⁴ *Id.*

further protected from ingesting potential harmful oils, which are used in a considerable amount of products and product preparation.

B. Challenge under the Dormant Commerce Clause

The Dormant Commerce clause is a concept that has been judicially created by the Supreme Court through decades of jurisprudence. The Dormant Commerce Clause gets its powers directly from the enumerated powers granted within the Commerce Clause, which is included in Article 1 section 8 of the United States Constitution.⁸⁵ The Commerce clause grants the federal government the power to regulate trade between states.⁸⁶ In expanding on the enumerated language, the Supreme Court's development of the Dormant Commerce Clause has allowed Congress to regulate (1) the channels of interstate commerce; (2) the instrumentalities used in interstate commerce; (3) and those things which would substantially affect interstate commerce.⁸⁷

With the broadening of the Commerce Clause, when applying the Dormant Commerce Clause, the Court has adopted a systematic approach in analyzing the constitutionality of state and local laws. The first step in the analysis requires there to be a state action.⁸⁸ It is clear that a court would determine there has been a state action on the part of New York City. Because this is a piece of legislation, proposed by the government, enacted and enforced by government agencies, the court will unquestionably determine there has been a state action. Once the Court determines there is a state action, the next question is whether the state or local legislation is facially discriminatory.⁸⁹ A piece of legislation is facially discriminatory when, in the express text of the law, its purpose clearly discriminates against out-of-staters, either by burdening out-

⁸⁵ CHEMERINSKY

⁸⁶ *Id.* 310

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 317 (2001)

of-staters or unfairly advantaging in-staters.”⁹⁰ This step is arguably the most crucial element of a court’s analysis. Facially discriminatory laws are subject to a virtually per se rule of invalidity.⁹¹ The Court has firmly declared that it applies the “strictest scrutiny” in facially discriminatory cases.⁹² In order for a state or local government to survive strict scrutiny, the discriminatory law will only be upheld if it is proven by the government that the law is necessary to achieve a compelling government purpose, and the means to achieving that end are narrowly tailored.⁹³ State laws may also violate the dormant Commerce Clause with statutes that are facially neutral. Here, the court does not decide whether the actual text of the legislation discriminates, but rather if its purpose was discriminatory or is discriminatory in its effect.⁹⁴ In looking at the discriminatory purpose or effect the Supreme Court has developed a balancing test.⁹⁵ In *Pike*, the Supreme Court determined that when a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld, unless the burden imposed on commerce is clearly excessive in relation to the local benefits.⁹⁶ In other words, if the burden from a state law exceeds the benefits from that law, the law will be struck down. This balancing test provides the courts with a great deal of discretion in their analysis of nondiscriminatory dormant Commerce Clause cases.⁹⁷ Unlike facially discriminatory laws, the courts generally uphold nondiscriminatory laws.⁹⁸

Challengers to the trans fat ban would ultimately contend that the court should analyze the law under strict scrutiny; however, there is nothing in the text of Amendment § 81.08, which

⁹⁰ *Id.* at 318

⁹¹ *Id.*

⁹² *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Chemerinsky, *supra* note 95, at 299-300

⁹⁷ *Id.*

⁹⁸ *Id.* at 301

appears to discriminate against out-of-staters while favoring in-state residents. The regulation prohibits all food containing artificial trans fat from being served in all restaurants within city limits, regardless of their geographic origin.⁹⁹ Therefore, because the law is not facially discriminatory, the court is unlikely to apply strict-scrutiny. It is less clear whether the trans fat ban would survive a contention that even though the regulation is not facially discriminatory, it has either a discriminatory effect or purpose. A challenger's likely argument would be that the trans fat regulation is discriminatory in its effect. It could be argued that banning trans fats could discriminate against the mass production used by many chain restaurants. Because the foundations of a chain restaurant are consistency, a ban of trans fat in New York City could potentially yield a change in their product. For example, McDonald prides itself that a french fry or a Big Mac in Massachusetts tastes the same as a Big Mac or french fries in London. Because chains such as McDonalds prepares and cooks the majority of food items using trans fats, they could contend that a Big Mac or french fry in New York City wouldn't taste the same as a Big Mac or french fry across the Hudson river in New Jersey. Moreover, it could be asserted that the use of trans fats is more economically viable for mass production. In requiring the use of other oils, not only would it increase the costs of preparation and products in general, but a company who mass produces would have to specially prepare foods just for New York City, which would result in a substantial burden for outside companies. This argument is likely to be a challenger's best argument. By showing that an outside corporation would have to produce special products just to ship into New York City, a flourishing market for consumerism, one can claim this legislation has a discriminatory effect. Further, a challenger would contest that companies that produce goods directly in New York City are being unfairly advantaged, because their production could simply be riden of trans fat all together and still produce a uniform product.

⁹⁹ Bd. of Health, N.Y. City Dep't of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.08)

The court would likely analyze this contention by applying the Pike balancing test. The standard for the Pike test analyzes whether a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld, unless the burden imposed on commerce is clearly excessive in relation to the local benefits.¹⁰⁰ It seems unlikely that a court would interpret the effect of the New York City regulation as being clearly excessive in the face of the ever-growing epidemic of obesity. New York City officials could contend that since the regulation was passed as a response to a serious public health concern, the local benefits are overwhelming. A court is likely to determine that the legislative intent is to slow down the rise in overweight and obese individuals, and that this intent is a very compelling state interest. Further the court is likely to determine that the effects on interstate commerce are merely incidental. There is no evidence from the legislative findings, and nothing expressly stated in the regulation itself that is evidence of any type of discrimination. It is evident that anytime a state or local ordinance is passed that restricts anything in a commercial setting, there will be a corporation somewhere in the United States, or outside the country, that will experience some form of burden. Because the burdens are merely incidental and the potential benefits from the regulation are overwhelming positive, a court is likely to reject this contention.

C. Violation of 5th Amendment, as a “Taking”

The last potential challenge to New York City’s ban of trans fats is that the economic impact of the ban on restaurants could constitute a “taking”. The Takings Clause is enumerated under the Fifth Amendment and states, “no private property shall be taken for public use, without just compensation.”¹⁰¹ Over the years, the Supreme Court has refined the Takings Clause into

¹⁰⁰ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁰¹ U.S. CONST., AMEND V; U.S. CONST., AMEND. XIV, § 1.

two categories, a physical taking, and a regulatory taking.¹⁰² A physical taking occurs through avenues such as eminent domain, which is the actual taking of land to advance a government purpose. In contrast, a regulatory taking occurs when the government regulates private property for a public purpose.¹⁰³ Furthermore, a regulatory taking can occur when a government action, such as a law or regulation, interferes with an owner's use of private property. The Supreme Court has fashioned a test to examine whether a taking has violated the United States Constitution. The test, also known as the Penn Central balancing test, determines whether the government action in question regulates the property to such a degree that it denies an owner of all economically viable use of the property.¹⁰⁴ Essentially the Court will balance whether the economic impact of the regulation on the business owner outweighs the governments need to protect the public through the regulation.

It seems likely that the New York City trans fat ban would survive a challenge brought under the Takings Clause. A court would likely determine that the regulation does not deprive restaurant owners of all economically viable use of their property, rather just a potential loss of value in their property. Requiring restaurants and fast food chains to use an alternative to trans fat merely requires the food service establishments to use a different type of oil in their preparation. The cost of fat free oils are relatively low, but have a slight increase in comparison to the more cost effective trans fat. However, simple economic losses through increased costs and decreased profits are insufficient to establish a taking. Moreover, the court is likely to weigh the benefits of public health against the costs imposed on the food service establishments. One important element in this distinction is that the trans fat ban is all encompassing. The ban applies to all food service establishments evenly. Therefore, all food service industries are required to

¹⁰²Chemerinsky, at 315

¹⁰³ *Id.*

¹⁰⁴ Penn Central Transportation Co. v. City of New York, 439 U.S. 104, 125 (1978).

bear the same burden, the same costs, and the same potential economic loss. This even-handedness merely solidifies a courts likely determination that the public health benefits far exceed a potential economic burden.

Constitutional Challenges to Menu Label Regulation

On January 22, 2008 New York City adopted § 81.50 to Amendment 81, which required all food service establishments to disclose the caloric contents on their menus.¹⁰⁵ Major challenges to the New York City regulation have been brought under the First Amendment as violating freedom of speech.¹⁰⁶ In order for a menu label law to be considered legal, the Court must consider each step of the First Amendment analysis. First, menus and menu boards much be considered a form of commercial speech.¹⁰⁷ Second, the menu label laws must be a form of commercial disclosure, a requirement mandating the disclosure of factual information, and lastly, the menu label laws must pass a reasonable basis test.¹⁰⁸

A. First Amendment

The First Amendment explicitly states the “Congress shall make no law abridging the freedom of speech.”¹⁰⁹ While it is generally thought that freedom of speech applies only to individual rights, the United States Supreme Court has interpreted the First Amendment as encompassing a protection of commercial speech.¹¹⁰ In the landmark case of Virginia State Board of Pharmacy, the Supreme Court expanded the general interpretation of the First Amendment and held that the First Amendment protects speech that “does no more than propose

¹⁰⁵ Bd. of Health, N.Y. City Dep’t of Health & Mental Hygiene, Notice of Adoption of an Amendment (§81.50) to Article 81 of the New York City Health Code 2 (2006), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf>

¹⁰⁶ N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 352 (S.D.N.Y. 2007).

¹⁰⁷ *Id.* at 363

¹⁰⁸ Riley v. Nat’l Fed’n of the Blind, Inc., 487 U.S. 781, 797 (1988).

¹⁰⁹ Bd. of Health, N.Y. City Dep’t of Health & Mental Hygiene,

¹¹⁰ Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

a commercial transaction.”¹¹¹ As a result, the Supreme Court’s interpretation expanded the application of the First Amendment to commercial transactions. It is very likely that a court would find that menus are a form of commercial speech. Menus primary function is to propose to consumers a commercial transaction. A court however could potentially distinguish menus and menu boards as falling outside the spectrum of commercial speech because menus are not generally viewed as advertisement. However, for the purpose of analysis it is reasonable to conclude that menus could be classified as a form of commercial speech.

Historically, First Amendment analyses have been generally broken into two sub-categories, traditional speech and commercial speech.¹¹² Traditional speech is based on the principals that individuals in general have the right to speak or refrain from speaking.¹¹³ While the application of traditional speech does not align itself with challenges to the New York City regulation, an application of compelled commercial disclosure is the foundation of challenger’s argument. These cases generally involve deceptive speech in commercial settings.¹¹⁴ In such cases as *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, the United State Supreme Court explained that “advertising by professionals possesses special risks of deception, because the public lacks sophistication.”¹¹⁵ The right to be free from compelled speech is a somewhat murky area of jurisprudence. In *Virginia Pharmacy*, the Court explained that it may be appropriate to require a commercial message to appear in such a form, or include additional information, warnings, or disclaimers as are necessary to prevent it from being deceptive.¹¹⁶ Commercial disclosure requirements however are a routine part of the regulatory

¹¹¹ *Riley v. Nat’l Fed’n of the Blind, Inc.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)

¹¹⁶ *Id.*

scheme in the United States. In 1966, Congress enacted the Fair Packaging and Labeling Act.

The Act states:

Informed consumers are essential to the fair and efficient functioning of a free market economy. Packaging and their labels should enable consumers to obtain accurate information as to the quantity of the contents and should facilitate value comparisons. Therefore, it is hereby declared to be the policy of Congress to assist consumers and manufactures in reaching these goals in the marketing of consumer goods.¹¹⁷

As a result of the Courts interpretation, legislative intervention requiring commercial disclosures has been extended to First Amendment protections. Opponents of the menu label laws are likely to attack this analysis based on the contention that menu label laws require a food service establishment to voice a point of view with which they disagree, or that they do not want to disclose. A court is likely to reject this contention because the menu label laws require a factual disclosure of caloric information. While a challenger may not agree with displaying the information, a food service establishment would not be able to contend the caloric information is inaccurate. New York City's menu label law merely compels the disclosure of factual and uncontroversial commercial information.

The third and final step in analyzing compelled commercial speech is application of a rational basis review. A Courts analysis under rational basis simply asks whether the piece of legislation is rationally related to a reasonable state interest.¹¹⁸ The application of this test has historically been fatal to the party challenging the legislature. It is clear that New York City has a substantial interest in the promotion of public health. Further, as a result of the increased number of overweight and obese population in New York City, informed consumption is a reasonable means to achieving their goal. The legislature and public health department have discovered considerable findings, which directly correlate an increased consumption by New York City

¹¹⁷ Fair Packaging and Labeling Act, Pub. L. No. 89-755, 80 Stat. 1296 (1966).

¹¹⁸ United States v. Lopez, 514 U.S. 549, 558-59 (1995)

residents at food service establishments, with a rise in obesity. This correlation triggered a substantial need for government intervention. A challenger's best contention to combat the rational basis test is whether targeting calories is reasonably related to the state's interest. Experts consider calorie consumption to be the single most important indicator for weight loss and gain.¹¹⁹ It would clearly be unreasonable to compel food service establishments to disclose every line of nutritional information as is required on packaged food. Therefore it is fair to say that a court would conclude that the menu label laws have a rational relationship to the government's interest in the promotion of public health.

Constitutional Challenges to Soda Ban

Since the passage of the Amendment § 81.53 ("Soda ban") by New York City, no challenges have been brought forward.¹²⁰ The ban does not take into effect until March 16th 2013; however, many legal scholars predict a considerable amount of federal constitutional challenges will be brought forward.¹²¹ Ironically, legal scholars predict that these challenges would be brought not from individual citizens who feel their rights have been violated, but rather by major companies like Coca-Cola Co, PepsiCo Inc., and Dr. Pepper Snapple Group Inc.¹²² Legal scholars predict corporations will likely rely on two federal constitutional challenges. First, the soda ban has a substantial effect on interstate commerce, thus violating the Dormant Commerce Clause. Second, by regulating the size of only sugary drinks, as opposed to all drinks, the soda ban violate a company's equal protection rights.

A. Dormant Commerce Clause

The modern Dormant Commerce Clause approach has abandoned the rigid, bright-line

¹¹⁹ N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 352 (S.D.N.Y. 2007).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Reuters online, *Potential Challenges to NYC Soda Ban*.

tests of the past in favor of a more flexible approach.¹²³ Generally stated, “State regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate state end, and (b) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation.”¹²⁴ Therefore, the first step in the analysis of whether the dormant commerce clause is applicable requires a state action. It is clear when looking at the soda ban, as with the challenges to the trans fat ban, there is a clear state action. The legislation enacted, passed, and enforced the regulation; therefore, a court would easily determine that there is a state action. After the court determines there is a state action, the next question is whether the state or local legislation is facially discriminatory.¹²⁵ Facially discriminatory has been classified as when a state law in the explicit text of the law unfairly discriminates against out-of-staters.¹²⁶ This step is arguably the most important element of a courts analysis. Facially discriminatory laws are subject to a virtually per se rule of invalidity.¹²⁷ The Court has firmly declared that it will employ the “strictest scrutiny” in facially discriminatory cases.¹²⁸ In order for a state or local government to survive strict scrutiny, the government bears the burden of proof that the law is necessary to achieve a compelling government purpose; and the means to achieving that end are narrowly tailored.¹²⁹ In applying the soda ban, there is nothing in the text that would trigger strict scrutiny. The text of the soda ban even-handedly applies within and outside New York City. Therefore, it is reasonable to conclude that a court would not apply strict scrutiny.

State laws can also violate the Dormant Commerce Clause that are facially neutral with

¹²³ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 317 (2001)

¹²⁴ U.S. CONST. ART I, § 8, cl. 3.

¹²⁵ CHERMERINSKY, CONSTITUTIONAL LAW (2001).

¹²⁶ *Id.* at 318.

¹²⁷ *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

¹²⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹²⁹ *Id.*

respect to out-of-staters, but have a discriminatory effect or a discriminatory purpose.¹³⁰ In looking at the discriminatory effect or purpose the Courts have developed a balancing test.¹³¹ In *Pike*, the Supreme Court determined that where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld, unless the burden imposed on commerce is clearly excessive in relation to the local benefits.¹³² Unlike facially discriminatory laws, the courts generally uphold nondiscriminatory laws.¹³³

Challengers to the soda ban are likely to have the best chance of success contending that the soda ban is discriminatory in effect. Major companies like Coca Cola and Pepsi could contend that, when manufacturing their product, the New York City ban in excess of 16 ounces discriminates against the industry standard bottling of 20 ounces. As a result of New York City's expansive market, manufacturers would have to bottle their products in accordance with the 16-ounce regulation, to be permitted to ship within the city limits. A court could potentially determine that this contention is very persuasive. One possible contrast is that these major corporations are not limited to shipping any of their products within New York City to grocery or convenience stores. It is unclear on exactly how a court would interpret a contention like this. New York City is very well known for having a substantial number of delicatessens, fast food chains, pizza places, and street carts. In almost all of these places, there is the availability of the industry standard 20-ounce soda. By requiring a major company to manufacture bottles specifically for New York City food service establishments, could be viewed as an excessive burden. Therefore, there are potential considerations for the court to weigh. In applying these burdens to the *Pike* test, a court must determine if the regulation even-handedly effectuates a

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² CHEMERINSKY, CONSTITUTIONAL LAW (2001). at 327

¹³³ *Id.*

legitimate local public interest, and if that interest outweighs the burdens placed on interstate commerce.¹³⁴ A court's analysis of the regulation would most likely reveal that all manufacturers are being treated equally. One would conclude that there are no New York City manufacturers who would gain any material benefit from the regulation. Rather they too would have to specially produce bottles for the New York City market, which would be different from those shipped outside of the city. In these respects, the court is likely to conclude the regulation is even-handed in its effect. It is less clear, however, that a court would outweigh the local public interest over the burdens placed on interstate commerce. New York City is the largest city in the United States. By restricting the free flow of outside products into New York City, a court could very well determine that the public interest does not outweigh the burden. New York City will undoubtedly proffer that the rise in obesity is a substantial public health concern, and that state and local governments are explicitly granted the power to promote public health and welfare. However, historically the United State Supreme Court has been hesitant to allow regulations that would restrict the free flow of interstate commerce, where there could be a possible aggregate effect. A court could very well conclude that if New York City restricted the size of sugary drinks, and every major city followed, manufacturers could suffer such severe economic burdens that they would be forced to close. In the event a court concludes that soda ban does violate the Dormant Commerce Clause due to the 16-ounce restrictions, it is likely that the ban could be amended to increase the maximum from 16-ounce to 20-ounces to conform with industry standards. This possible settlement, would likely eliminate any corporations from challenging the constitutionality of the soda ban.

B. Equal Protection

The Equal Protection Clause finds its roots in both the 14th amendment and 5th

¹³⁴ Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Amendment of the U.S. Constitution. When faced with a state denying equal protection of the law to a citizen the application of the 14th Amendment Equal Protection Clause is appropriate. The Equal Protection Clause prohibits states from denying any person within its jurisdiction the equal protection of the laws.¹³⁵ In other words, state laws must treat all individuals the same. The equal protection clause does not have to provide "equality" among individuals or classes, rather only requires equal application of the laws.¹³⁶ In determining whether a violation has occurred, the Supreme Court has applied different tests depending on the type of classification and its effect on fundamental rights.¹³⁷ Generally, the Court will defer to the states and trust that the law is per se valid. The least stringent test that the Court will apply is a rational basis test. The test, simply stated, is whether there is a rational basis for the state purpose. The Court, however, applies more stringent analyses in cases with "suspect classes".¹³⁸ If the law or regulation denies equal protection to a suspect classification, the Court will apply strict scrutiny.¹³⁹ Suspect-classifications occur when there is denials of equal protect based on race, color, and religion.¹⁴⁰ Moreover, a violation of a fundamental right, such as a law that restricts speech, will also trigger the Courts analysis under strict scrutiny.¹⁴¹ In order for a law or regulation to survive strict scrutiny the government must prove that there is a compelling purpose for the government interest in passing the law or regulation, and the means to achieving the end is narrowly tailored.¹⁴²

The foundation of a challenger's contention is that by requiring only food service

¹³⁵ U.S. CONST., AMEND XIV, § 1.

¹³⁶ Cornell University Law School, Legal Information Institute, *Equal Protection Overview*, at http://www.law.cornell.edu/wex/equal_protection (last visited November 24th 2012)

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 613 (2001).

¹⁴² *Id.* at 615

establishments to be subject to the soda ban, while leaving grocery stores and convenience stores exempt, violates equal protection of the law. It is unlikely that the court will determine the soda ban targets suspect classes by any means. There are no restrictions to fundamental rights, and the regulation does not discriminate against any single class of person. Therefore, applying strict scrutiny would not be prudent. A court will likely analyze the regulation using a rational basis standard. As previously mentioned, rational basis is almost always fatal to the challenging party because courts generally defer to legislatures, without questioning their basis for enacting laws. However, the challenging party could make a strong argument that there is no reasonable relationship between restricting only food service establishments and leaving people the choice to buy the same product from a grocery store. This contention, while compelling, is likely to be thrown out by the court. The means to achieving an end do not have to be narrowly tailored in the application of a rational basis standard. The only thing required is the government must present some reasonable reason for the adoption of the soda ban. It is clear that the government would offer evidence of the obesity epidemic and the potential health hazards linked with overly sugary drinks. It is fair to conclude that the court would deem this reason to be reasonable, thus upholding the constitutionality of the regulation as being in line with the 14th Amendment.

Conclusion

With New York City, a prominent government at the forefront of public health intervention, it is likely than many jurisdictions throughout the United States will adopt similar regulations, laws and ordinances to combat the ever rising epidemic of obesity. While many challenges will likely result from these regulations, the growing concerns from a public health standpoint are insurmountable. It is clear that government intervention, as illustrated in New York City, is not only a proper exercise of governmental rights, but would be determined by a

court to be a constitutional response to a growing health concern. Regardless of the law, regulation or ordinance, particular individuals, groups, organizations will feel as though their rights are being restricted. However, when faced with substantial interests, such as public health, safety and welfare, the government should and will be granted a considerable amount of deference in their response.