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# Throwing the Red Flag: Why the NFL Should Challenge the Ruling on the Field That Player Decertification Lowers the Antitrust Shield

Alexandra Hayes

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# HOW GROWING LEGISLATION GEARED TOWARDS RESTRICTING AMERICA'S EXPANDING WAIST LINES IS RESTRICTING CONSUMER CHOICE

RACHAEL WILLIAMS

## I. INTRODUCTION

This note serves as a commentary on the evolution of government involvement in traditionally private consumer choice decisions in the government's efforts to battle the obesity epidemic. For adults, obesity is defined as having a body mass index (BMI) of 30 or higher.<sup>1</sup> Currently more than 33% of adults and 17% of children are considered obese.<sup>2</sup> Heightened regulations on food services implemented by city, state, and federal governments in order to combat obesity are creating an increasingly complex regulatory environment, potentially harming business, commerce, and consumer choice.

In this commentary, Part II will discuss how the government has historically addressed the dietary health of its citizens and how past regulations have formed the legal basis for more restrictive government food regulations today. Part III will focus on one of the most modern and controversial pieces of proposed health legislation, the New York City soda ban, and analyze the constitutional arguments for and against the ban that will impact future government action across the country. Part IV will discuss additional legal, economic, and social consequences of food regulations restricting citizens' dietary choices at the federal, state, and local levels. Finally, Part V concludes by addressing the potential impact the New York City soda ban decision will have on the future regulatory environment in combatting the obesity epidemic.

## II. NOTEWORTHY BACKGROUND CASES AND LEGISLATION

### A. *The Pelman Case*

*Pelman v. McDonald's Corp.* is best known as the catalyst for McDonald's removing "Supersize" meals from its menu in order to prevent against future lawsuits.<sup>3</sup> *Pelman* was a landmark case because it

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<sup>1</sup> See, Defining Overweight and Obesity, cdc (Apr. 27, 2012), <http://www.cdc.gov/obesity/adult/defining.html>.

<sup>2</sup> See, Morgan Korn, *Has the "War on Obesity" Gone Too Far?*, CNBC (Nov. 13, 2012, 4:45PM), [http://www.cnbc.com/id/49810996/Has\\_the\\_039War\\_on\\_Obesity039\\_Gone\\_Too\\_Far](http://www.cnbc.com/id/49810996/Has_the_039War_on_Obesity039_Gone_Too_Far).

<sup>3</sup> See, Jacob Mattis, *Pelman v. McDonald's and the Fast Food Craze: Sending a Court to do a Man's Job*,

took on issues of “personal responsibility, consumer knowledge, public health, and the role of society in regulating the fast-food industry.”<sup>4</sup> The case was filed in 2003 and was the first lawsuit in which consumers challenged the healthfulness of fast food companies’ products and its effect on consumer health.<sup>5</sup>

The plaintiffs in *Pelman* were two young girls whose parents asserted on their behalf that the girls’ obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and other problems were directly correlated to their intake of McDonald’s fast food.<sup>6</sup> The plaintiffs’ legal arguments were largely rooted in state law, but certain legal theories could be widely applied across state lines in future similar lawsuits. The plaintiffs filed five counts against McDonald’s, with Counts I and II based on New York Consumer Fraud Protection statutory provisions and Counts III, IV, and V founded on common law tort liability doctrine. Generally, the parents claimed that their minor children sustained injuries in the form of health problems as a result of McDonald’s deceiving the public regarding the healthiness of its products.<sup>7</sup>

Count I alleged McDonald’s violated New York’s Consumer Fraud Protection statutory provisions<sup>8</sup> by “misrepresenting—affirmatively and by omission—how healthy (or unhealthy) its products are.”<sup>9</sup> The plaintiffs pointed to McDonald’s ads and statements as evidence of this misrepresentation.<sup>10</sup> Count II, also citing consumer fraud provisions, asserted “that McDonald’s directed its marketing at children, falsely promoting its food as nutritious and failing to disclose the food’s adverse health effects.”<sup>11</sup> Count III stated that McDonald’s was negligent “in selling food products that are high in cholesterol, fat, salt and sugar when studies show that such foods cause obesity and detrimental health

UNIVERSITY OF HOUSTON LAW CENTER (March 22, 2004), <http://www.law.uh.edu/healthlaw/perspectives/Obesity/040322Pelman.html>.

<sup>4</sup> *Id.*; see also, *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 518 (S.D.N.Y. 2003).

<sup>5</sup> See generally, *Pelman* 237 F. Supp. 2d 512.

<sup>6</sup> See, Forrest Lee Andrews, Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry, 15 ALB. L.J. SCI. & TECH. 153, 174 (2004).

<sup>7</sup> See, *Pelman*, 237 F. Supp. 2d at 520.

<sup>8</sup> See, Jonathan Benloulou, *Pelman v. McDonald’s: An In-depth Case Study of Fast Food - Obesity Lawsuit*, Digital Access to Scholarship at Harvard, page 9, (April 2005), available at <http://dash.harvard.edu/bitstream/handle/1/8852143/Benloulou05.pdf?sequence=1>.

<sup>9</sup> *Id.*; see also, Consumer Protection Act, N.Y. Bus. Corp. Law §§ 349-50 (LexisAdvance 2014); N.Y. City Admin. Codes, Ch. 5, §20-700 et seq. (2014).

<sup>10</sup> See, Benloulou, *supra* note 8.

<sup>11</sup> *Id.* at 10.

effects.”<sup>12</sup> Count IV, also grounded in tort law theory, alleged that “McDonald’s failed to warn the consumers of McDonalds’ products [that] a diet high in fat, salt, sugar and cholesterol could lead to obesity and health problems.”<sup>13</sup> Lastly, Count V claimed that McDonald’s “negligently, recklessly, carelessly, and/or intentionally” distributed and marketed “food products that were physically and psychologically addictive.”<sup>14</sup>

In response to the plaintiffs’ complaint, McDonald’s refuted their claims under the following theories: (1) Count I fails because the plaintiffs did not “plead with sufficient specificity” and McDonald’s “acts or practices ‘cannot be deceptive if the consuming public is already aware of the ‘concealed’ characteristics’”<sup>15</sup>; (2) Count II fails because its ads directed towards children were mere “product puffery” that could not reasonably mislead minor consumers<sup>16</sup>; and (3) Counts III, IV, and V fail because McDonald’s owes no duty towards the plaintiffs and there exists no “proximate causal link between [McDonald’s] act and the plaintiff’s injury.”<sup>17</sup> McDonald’s also stated that the “claims are pre-empted by federal law” under the Federal Nutritional Labeling and Education Act<sup>18</sup> because McDonald’s satisfied the federal requirements for disclosing the nutritional value of its products.

Ultimately, the court found for McDonald’s due to the plaintiffs’ lack of specificity regarding the frequency that the girls consumed McDonald’s and the plaintiffs’ failure to demonstrate that “a McDiet is a substantial factor [in the girls’ health problems and weight gain] despite other variables.”<sup>19</sup> However, the *Pelman* decision is important because it established that “the federal courts do not consider obesity lawsuits to be as frivolous” as the fast food industry and consumers may have believed.<sup>20</sup> It paved the way for future legislation restricting otherwise lawful food products on the basis of protecting consumers from making unhealthy diet

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<sup>12</sup> *NY Dismisses First Fast Food Lawsuit*, The Law, Science, and Public Health Law Cite, [http://biotech.law.lsu.edu/cases/food/Pelman\\_v\\_McDonalds\\_SDNY\\_brief.htm](http://biotech.law.lsu.edu/cases/food/Pelman_v_McDonalds_SDNY_brief.htm) [hereinafter *NY Dismisses*].

<sup>13</sup> *Id.*

<sup>14</sup> *See*, Benloulou, *supra* note 8, at 13.

<sup>15</sup> *See*, *NY Dismisses*, *supra* note 12.

<sup>16</sup> *See*, Benloulou, *supra* note 8 at 10.

<sup>17</sup> *Id.* at 12.

<sup>18</sup> *See*, *NY Dismisses*, *supra* note 12 at 175; *see also*, Federal Nutritional Labeling and Education Act, 21 U.S.C. § 343(q).

<sup>19</sup> *See*, Andrews, *supra* note 6, at 175.

<sup>20</sup> *Id.*

decisions. From the *Pelman*<sup>21</sup> court's language, it was clear that courts could potentially hold restaurants responsible for the long-term weight and health problems of their consumers, so long as future plaintiffs could prove the link between eating at a certain establishment and their health problems. Eventually, *Pelman* served as the legal basis for courts and government bodies to further restrict the fast food industry's products and marketing.

### B. *San Francisco v. McDonald's Happy Meal Toys*

Prior to the pending New York City soda ban attempting to ban large sizes of sugary drinks for all consumers, discussed in Part III, arguments for similar bans relied on the inability of children in particular to choose healthy foods in the face of marketing ploys from companies selling unhealthy products geared towards children.

In 2010, consumer advocacy group, Center for Science in the Public Interest, and mother, Monet Parham, filed suit against McDonald's to stop the business from selling toys in Happy Meals and prohibit McDonald's from marketing its Happy Meals to children in the State of California.<sup>22</sup> The plaintiffs originally filed suit in the Superior Court of California in the county of San Francisco.<sup>23</sup> McDonald's fought to remove the case to federal court because federal courts are "generally viewed by corporate defendants as friendlier than state court."<sup>24</sup> However, the district court judge sent the case back to state court because, "McDonald's had not met the standard to defend the case in federal court."<sup>25</sup>

Similarly to the *Pelman* case in New York, the plaintiffs argued that McDonald's marketing of Happy Meals violated California's consumer protection laws and sought declaratory and injunctive relief to prevent McDonald's from engaging in marketing practices directed towards children. The plaintiffs alleged that McDonald's "engage[d] in the unfair, unlawful, deceptive, and fraudulent practice of promoting and advertising McDonald's Happy Meal products to very young California children, using the inducement of various toys."<sup>26</sup> The plaintiffs further supported

<sup>21</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 538 (S.D.N.Y. 2003).

<sup>22</sup> *UPDATE 2-McDonald's loses bid to move Happy Meal lawsuit-judge*, REUTERS, (July 20, 2011, 3:08PM), <http://www.reuters.com/article/2011/07/20/mcdonalds-lawsuit-idUSN1E76J0XM20110720>.

<sup>23</sup> See, *Parham v. McDonald's Amended Class Action Complaint* 2011 WL 162213 (Cal. Superior) (Trial Pleading).

<sup>24</sup> See, *UPDATE 2*, supra note 22.

<sup>25</sup> *Id.*; see also, *Parham*, CGC-10-506178.

<sup>26</sup> See, *Parham*, supra note 23.

their arguments with long-established federal law that “advertising that is not understood to be advertising is misleading to consumers . . . and the public is entitled to know when and by whom it is being persuaded.”<sup>27</sup> McDonald’s subsequently filed a motion to dismiss the lawsuit for failure to state a claim upon which relief could be granted. On April 4, 2012, Superior Court Judge Richard Kramer dismissed the suit.<sup>28</sup>

Following dismissal, on November 2, 2010 the San Francisco Board of Supervisors enacted an ordinance banning companies within the city limits from putting toys in kids meals unless the meals met certain nutritional requirements:<sup>29</sup> the meals must not exceed a predetermined amount of fat, sodium, and calories, and must also include a serving of fruit or vegetables.<sup>30</sup> According to the Board’s website, ordinances are defined as “legislation which amend municipals codes and make laws.”<sup>31</sup> Therefore, the toy ban has the same effect as law within the city. The San Francisco Board of Supervisors, elected by district, voted eight to five to implement the ordinance.

### C. *The Federal Nutritional Labeling and Education Act & Patient Protection and Affordable Health Care Act*

The 1990 Federal Nutritional Labeling and Education Act (NELA) amended the Food, Drug, and Cosmetic Act (FD&CA) by establishing more detailed requirements for nutrition labeling and information on food products.<sup>32</sup> Because NELA is a federal law, it “preempts state food labeling laws . . . [and] prohibits states from establishing or enforcing labeling requirements that are different from federal law.”<sup>33</sup> In addition, NELA further supersedes state nutrition law by “prohibit[ing], subject to exception, a state from establishing or enforcing any requirement for a food that is subject of a standard of identity or a labeling requirement that is not identical to the federal act.”<sup>34</sup> While NELA insures food companies

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<sup>27</sup> *Id.*

<sup>28</sup> Complaint, *Monet Parham v. McDonalds Corp., et al.*, 2012 WL 1129911 (Cal. Superior 2012).

<sup>29</sup> See, Sharon Bernstein, *San Francisco bans Happy Meals*, L.A. TIMES, Nov. 2, 2010, available at <http://articles.latimes.com/2010/nov/02/business/la-fi-happy-meals-20101103>.

<sup>30</sup> See, *San Francisco Bans the Happy Meal*, HUFFINGTON POST Nov. 2, 2010, [http://www.huffingtonpost.com/2010/11/02/san-francisco-happy-meal-ban-mcdonalds\\_n\\_777939.html](http://www.huffingtonpost.com/2010/11/02/san-francisco-happy-meal-ban-mcdonalds_n_777939.html).

<sup>31</sup> Legislation Passed, City and County of San Francisco Board of Supervisors, available at <http://www.sfbos.org/index.aspx?page=2285>.

<sup>32</sup> See, Daniel Duffy, *INGREDIENT LABELING LAWS*, OLR RESEARCH REPORT, June 5, 2008, available at <http://www.cga.ct.gov/2008/rpt/2008-R-0334.htm>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

must place Federal Drug Administration (FDA) approved nutrition labels on their products, current federal legislation has upped the standard for companies to provide nutritional information to consumers through Section 4205 of the Patient Protection and Affordable Health Care Act (Health Care Act).

On March 23, 2010, President Obama signed into law the Health Care Act.<sup>35</sup> Following legal challenges, the Supreme Court ruled the Health Care Act constitutional on June 28, 2012.<sup>36</sup> Section 4205 of the Health Care Act goes beyond the Federal Nutritional Labeling and Education Act by extensively regulating the location and manner in which nutritional information must be presented on food establishments' properties, whereas previously the FDA only required nutrition labels on food products. The federal government implemented Section 4205 of the Health Care Act in the effort to combat rising obesity rates in the United States.

Section 4205 is momentous because it enables the government to dictate to private businesses on private property certain nutritional information requirements that must be displayed on menu boards and menus.<sup>37</sup> Specifically, Section 4205 gives the federal government the power to dictate the required type size, color, and location of calorie content and nutrition information on menu boards<sup>38</sup> of "pizzeria, grocery, or convenience store[s] with more than 20 locations."<sup>39</sup> The Federal Drug Administration (FDA) is responsible for proposing specific regulations arising under Section 4205. The FDA proposed regulations in April 2012 and will begin enforcing the new regulations after it allows enough time for Citizens to submit comments and suggestions.<sup>40</sup> However, certain companies, such as McDonald's, have already taken the initiative to post calorie content on its menu boards before the FDA

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<sup>35</sup> Sheryl Gay Stolberg and Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish, Money and Policy*, N.Y. TIMES, March 23, 2010, available at [http://www.nytimes.com/2010/03/24/health/policy/24health.html?\\_r=0](http://www.nytimes.com/2010/03/24/health/policy/24health.html?_r=0).

<sup>36</sup> Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES, June 28, 2012, available at <http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all>.

<sup>37</sup> *Proposed FDA Regulations to Require "Chain Restaurants" to Post Nutrition Information*, JONES DAY, Sept. 26, 2012, available at [http://www.jonesday.com/proposed\\_fda\\_regulations/](http://www.jonesday.com/proposed_fda_regulations/).

<sup>38</sup> FDA U.S., *New Menu and Vending Machines Labeling Requirements*, June 28 2012, [www.fda.gov/food/labelingnutrition/ucm217762.htm](http://www.fda.gov/food/labelingnutrition/ucm217762.htm) [hereinafter *Labeling Requirements*].

<sup>39</sup> *Nanny State: Obamacare Now Regulating Pizza*, MINORITY REPORT, Nov. 19, 2012, <http://www.theminorityreportblog.com/2012/11/19/nanny-state-obamacare-now-regulating-pizza/>.

<sup>40</sup> See, *Labeling Requirements*, *supra* note 38.

begins enforcing the regulations, although these menu boards will likely need to be altered after the FDA sets specific standards.<sup>41</sup>

Section 4205 is significant because it demonstrates that the federal government will begin taking a more active role in establishing regulations aimed towards battling the obesity epidemic, and new regulation is sure to go beyond local and state bans on “unhealthy” products. Perhaps most importantly, because federal law preempts state law and city ordinances, Section 4205 will preempt state and city regulations that already regulate menu-labeling requirements because “[s]tates and their subdivisions are now precluded from establishing ‘any requirement for nutrition labeling of food that is not identical to the [federal] requirement[.]’”<sup>42</sup> The country is moving towards increased local, state, and federal regulation of the nutritional value of food products and is placing new importance on measuring the impact, if any, new regulations will have on consumer diets. However, if calorie posting does not impact the healthiness of consumer choices and slow the rise in obesity, the federal government will likely increase pressure on businesses by implementing restrictions on the volume of products sold and prohibiting persuasive marketing<sup>43</sup> of “unhealthy” food products to particular target segments, such as children.

The Health Care Act and NELA have further implications in lawsuits against the food industry based on consumer health issues and corporate marketing ploys, because the Acts raise federalism issues. For example, it is unclear whether consumers filing future suits citing obesity problems from food products, similar to *Pelman*, will be successful as long as the companies abide by federal laws. While the federal government’s approach so far has been to require increased transparency of food nutritional content, localities have implemented blanket bans on items restricting private consumer choice and impeding certain marketing tactics of otherwise lawful products. If food establishments are in compliance with the new detailed federal requirements on nutrition information availability for the customer at the time of purchase, can consumers still claim that they did not have enough information regarding the healthfulness of the food they were consuming, or the corporations deceived them into unhealthy eating practices through marketing?

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<sup>41</sup> See, Marion Nestle, *McDonald's will post calorie info on menus. Won't it have to anyway?*, FOOD POLITICS, Sept. 13, 2012, <http://www.foodpolitics.com/tag/calorie-labeling/>; see also, Proposed FDA, *supra* note 37.

<sup>42</sup> Proposed FDA, *supra* note 37.

<sup>43</sup> Stephanie Rosenbloom, *Calorie Data to Be Posted at Most Chains*, N.Y. TIMES, March 23, 2010, available at [http://www.nytimes.com/2010/03/24/business/24menu.html?\\_r=0](http://www.nytimes.com/2010/03/24/business/24menu.html?_r=0).



*D. Current Federal USDA Regulations in Schools*

While certain cities are restricting the volume of portions sold and governing how companies market their food products within the city limits, the federal government is directly focusing on children through federally funded school food programs. In an effort to combat childhood obesity, the United States Department of Agriculture (USDA), along with First Lady Michelle Obama and Agricultural Secretary Tom Vilsak, announced on November 21, 2012 that the USDA established new nutritional requirements for school lunches funded with federal dollars.<sup>44</sup> The new meal requirements, expected to cost \$3.2 billion over the next five years,<sup>45</sup> are part of the Healthy, Hunger-Free Kids Act that President Obama signed into law on December 13, 2010.<sup>46</sup> The new revisions impose per meal calorie limits for the first time in the federal school lunch program's history<sup>47</sup> and are the first major modifications of the program in nearly fifteen years.<sup>48</sup> The regulations mandate that schools serve younger students meals containing no more than 650 calories and limit high school students to 850 calories per serving.<sup>49</sup>

However, opponents of the new regulations, such as Representatives Steve King (R-Iowa) and Tim Huelskamp (R-Kansas), have "introduced a bill that would repeal the age-aligned calorie maximums imposed by [the] new USDA school lunch guidelines."<sup>50</sup> Rep. King explained that while "[t]he goal of the school lunch program was — and is — to ensure students receive enough nutrition to be healthy and to learn,"<sup>51</sup> the new guidelines wrongly put every child on a diet when not all children need to

<sup>44</sup> United States Department of Agriculture Food and Nutrition Service, *USDA Unveils Historic Improvements to Meals Served in America's Schools*, Jan 25, 2012, <http://www.fns.usda.gov/cga/pressreleases/2012/0023.htm>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Students, staff struggle with new school lunch regulations*, REDWOOD FALLS GAZETTE, Nov. 22, 2012, <http://www.redwoodfallgazette.com/article/20121122/NEWS/121129943/1001/NEWS>.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*; see also, *New School Lunch Guidelines Take Effect This Fall*, FOOD MANUFACTURING (Aug. 21, 2012), <http://www.foodmanufacturing.com/news/2012/08/new-school-lunch-guidelines-take-effect-fall> (last visited Mar. 24, 2014).

<sup>50</sup> See, *School Lunch Calorie Maximums Protested By Students As House Republicans Introduce Bill To Repeal USDA Rules*, HUFFINGTON POST EDUCATION (Sept. 18, 2012), [http://www.huffingtonpost.com/2012/09/18/house-republicans-introdu\\_n\\_1893936.html](http://www.huffingtonpost.com/2012/09/18/house-republicans-introdu_n_1893936.html) (Students protest against calorie restrictions by bringing food from home).

<sup>51</sup> *Id.*

be on a diet.<sup>52</sup> Also, strict calorie restrictions are not appropriate for every student because under the USDA regulations, portions must be the same “whether served to a six foot, 200-pound athlete or a 120-pound professional student.” Although fruits and vegetables are unlimited, students cannot ask for second servings of any other food group.<sup>53</sup>

The new USDA mandates have unintended economic consequences for schools, manufacturers, and food distributors providing school lunches. The schools risk losing federal funding if they fail to meet even the smallest of goals, as schools must “serve each student one cup of potato a week — whether the student wants it or not” and guarantee “each lunch include half a cup of fruits and vegetables per day for elementary students, three quarters cup for students in grades six through eight, and a full cup for high-school students.”<sup>54</sup> These stringent regulations result in unnecessary “increased expense and waste.”<sup>55</sup> In order to combat waste problems from students throwing mandatory healthy food away and bypass the restrictive mandates without losing federal funding, some schools are serving an “a-la-carte” section in which students pay directly out of pocket, and the food servings are not subject to the same regulations.<sup>56</sup>

The USDA regulations have a profound economic impact on food manufacturers and distributors. For example, the new National School Lunch Program regulations will have a negative impact on companies that had already been providing schools with nutritional lunches. These companies are finding the mandates extremely difficult to meet and discovering the inflexible nutritional requirements can have the exact opposite effect on the quality of food. For example, Choicelunch is a private service that allows schools and parents to choose a lunch made with fresh ingredients and have the lunch delivered directly to the school. Choicelunch’s founder, Justin Gagnon, stated that the new USDA regulations “simply do not support programs that offer choices. Menu planning when you’re using fresh, real ingredients is hard enough.” He explains how in practice “it is nearly impossible to actually execute on a solid menu with real choices and still nail every single one of [the federal

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<sup>52</sup> *Id.*

<sup>53</sup> *Students, staff struggle, supra* note 47.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

government's] requirements."<sup>57</sup>

Chocelunch's founder also details ways in which other companies will cut corners in order to steady rising costs incurred as a result of the new regulations. He explains that in order to "hit the increased calorie requirements for the older [student] grades without increasing the maximums of grain and proteins commensurately," companies will turn to fat, even though "the impact of adding a 9-calorie gram of fat is over double that of a 4-calorie gram of protein or carb." He says, "What the maximums are really going to do is force the manufacturers to add more additives and fillers, ala Taco Bell and its 35% beef lawsuit."<sup>58</sup> Subsequently, the students are "stuck with whatever menu configuration the school can get to check off all the boxes with the regulations," resulting in those districts following the National School Lunch Program wondering "why they can't get better participation from their paid students."<sup>59</sup> Essentially, the USDA regulations are too difficult for the schools and the students to follow, and participation is declining while food waste is increasing.

If students are not buying school lunches because they do not like what is being served to them, the school districts will end up bearing the expense.<sup>60</sup> For example, in some districts "as many as half the students stopped buying [school] meals . . . creat[ing] tens of thousands of dollars in deficits."<sup>61</sup> Some school districts could no longer afford to waste money on food that students would not purchase or eat and have opted out of the school lunch program. However, schools in poverty stricken areas cannot afford to opt out of federal subsidies because for many students school lunch is their only meal of the day.<sup>62</sup> For schools in areas with high poverty levels, hitting lofty nutritional requirements is far less important than being able to afford to serve children food at all—yet low-income

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<sup>57</sup> Dana Woldow, *New USDA School Lunch Rules Limit Even Healthy Choices*, BEYOND CHRON (Aug. 7, 2012), <http://www.beyondchron.org/news/index.php?itemId=10381#more>.

<sup>58</sup> Sophia Johnson, *Chocelunch founder explains new USDA school lunch rules*, CHOICELUNCH (Aug. 13, 2012), <http://www.chocelunch.com/klds-nutrition/justins-interview-on-the-new-usda-school-lunch-rules>.

<sup>59</sup> *Id.*; see also, *School Lunch Calorie Maximums Protested By Students As House Republicans Introduce Bill To Repeal USDA Rules*, HUFFINGTON POST EDUCATION, Sept. 18, 2012, [http://www.huffingtonpost.com/2012/09/18/house-republicans-introdu\\_n\\_1893936.html](http://www.huffingtonpost.com/2012/09/18/house-republicans-introdu_n_1893936.html).

<sup>60</sup> See, *Some School Districts Opt Out Of National School Lunch Program*, FOX PHILLY, (Feb. 18, 2013), <http://www.myfoxphilly.com/story/21235211/some-school-districts-opting-out-of-national-school-lunch-program>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

neighborhood schools must find a way to reach nutritional goals or risk losing funding.

It is likely only a matter of time before the USDA publishes a “national menu”<sup>63</sup> or forces schools to ban students from bringing in lunch from home in order for the school to receive federal funding. Some schools have already banned students from bringing food from home,<sup>64</sup> and it is not a stretch to think the federal government could require the same. After all, excluding the food stamp program, which costs the government \$27 billion, the federal school lunch program is the most expensive federal food program, costing \$9.8 billion dollars when totaling school lunch, breakfast, and food commodities programs.<sup>65</sup>

Originally, the federal government created programs providing meals to schools in order to feed hungry school children from struggling families.<sup>66</sup> The school lunch program, while previously accused by critics of helping spread obesity, “is now being called on to cure obesity.”<sup>67</sup> Using federal school lunch programs to help eradicate obesity in children is ironic “given that the original goal of child nutrition programs was to ensure that poor children received enough to eat”<sup>68</sup> Considering that students’ “preference for foods that are bound to make them fatter is [likely] established outside the school system,”<sup>69</sup> schools have an uphill battle ahead of them as they continue to share the blame with fast food companies for contributing to unhealthy children.

### III. THE NEW YORK CITY SODA BAN

#### A. Facts And Procedural History

On September 13, 2012, in an effort to “reduce runaway obesity rates,”<sup>70</sup> Mayor Bloomberg of New York City with the New York City

<sup>63</sup> See, Dana Woldow, *Choicelunch founder explains new USDA school lunch rules*, BEYOND CHRON (Aug. 13, 2012), [http://www.beyondchron.org/articles/Choicelunch\\_founder\\_explains\\_new\\_USDA\\_school\\_lunch\\_rules\\_10397.html](http://www.beyondchron.org/articles/Choicelunch_founder_explains_new_USDA_school_lunch_rules_10397.html).

<sup>64</sup> See, Ethan A. Huff, *Public school bans students from bringing lunches from home, forces them to eat cafeteria food*, NATURAL NEWS (April 12, 2012), [http://www.naturalnews.com/032047\\_public\\_schools\\_cafeteria\\_food.html](http://www.naturalnews.com/032047_public_schools_cafeteria_food.html).

<sup>65</sup> Ron Haskins, *The School Lunch Lobby*, EDUCATION NEXT, Summer 2005, Vol. 5, No. 3, <http://educationnext.org/the-school-lunch-lobby/>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Michael N. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES,

Board of Health passed a new regulation banning the sale of large sodas and other drinks full of sugar in “restaurants, fast-food chains, theaters, delis and office cafeterias.”<sup>71</sup> Specifically, the drinks may no longer be sold in containers larger than sixteen ounces.<sup>72</sup> The American Beverage Association (ABA) pushed back by running ads telling consumers to “make their own choices” concerning their diet, as the ABA stands to “lose millions of dollars in revenue” if the law is upheld.<sup>73</sup> On October 12, 2012, the soda industry, represented by the American Beverage Association and others, sued the New York City Department of Health and Hygiene in the Supreme Court of New York, seeking the judge to block the ban from going into effect.<sup>74</sup> Opponents of the ban were particularly angered because “the vote by the Board of Health was the only regulatory approval needed to make the ban binding in the city,”<sup>75</sup> as the Mayor did not put the proposal before the elected New York City Council for vote.

The regulation, deemed the “soda ban,” was set to take effect on March 12, 2013.<sup>76</sup> However, on March 11, 2013, one day before the ban would have gone into effect, Judge Milton Tingling ruled in favor of the ABA, invalidating the law as “fraught with arbitrary and capricious consequences.”<sup>77</sup> Judge Tingling held that the law not only violated the separation of powers doctrine but also “eviscerated” it, as Mayor Bloomberg failed to bring the law before City Council and held the issue for vote before the city’s Board of Health, whose members the Mayor appointed himself.<sup>78</sup> On July 30, 2013, the mid-level state appeals court

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(Sept. 13, 2012), available at <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>.

<sup>71</sup> James Joyner, *Bloomberg Big Soda Ban Dumber Than We Thought*, OUTSIDE THE BELTWAY (Feb. 25, 2013), <http://www.outsidethebeltway.com/bloomberg-big-soda-ban-dumber-than-we-thought/>.

<sup>72</sup> haffajee, *Soda Industry Sues to Block NYC Ban on Sugar-Sweetened Beverage Sales*, HARVARD LAW PETRIE-FLOM CENTER (Oct. 15, 2012), <http://blogs.law.harvard.edu/billofhealth/2012/10/15/soda-industry-sues-to-block-nyc-ban-on-soda-sales/>.

<sup>73</sup> Michael M. Grynbaum, *60% in City Oppose Bloomberg’s Soda Ban, Poll Finds*, N.Y. TIMES, Aug. 22, 2012, available at [http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html?\\_r=1&](http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html?_r=1&).

<sup>74</sup> Harvard Law Blog, *supra* note 72.

<sup>75</sup> See, Michael M. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, available at <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>.

<sup>76</sup> *Id.*

<sup>77</sup> See Michael Howard Saul, *Judge Cans Soda Ban*, N.Y. TIMES, March 11, 2013, available at, <http://online.wsj.com/news/articles/SB10001424127887323826704578354543929974394>

<sup>78</sup> *Id.*

affirmed Judge Tingling's ruling, reiterating that that ban violated the separation of powers doctrine.<sup>79</sup> The appeals court stated that the ban's inconsistencies go "beyond health concerns, in that it manipulates choices to try to change consumer norms"<sup>80</sup> and loopholes would have exempted grocery stores and convenience stores, rendering the ban arbitrary under a rational basis review. The highest court of New York, the Court of Appeals, will hear the city's appeal later in 2014.<sup>81</sup>

The ABA's specific causes of action are the following: (1) The New York City Charter "does not delegate the necessary enumerated powers to the DOH [Department of Health] to implement such a ban"; (2) Even if the Charter does delegate to the DOH the power to enact the ban, "such delegation [by the legislative branch to the executive branch] is unconstitutional as in violation of the separation-of-powers doctrine (i.e., the legislature cannot cede its fundamental policy-making responsibility to an administrative agency)"; and (3) The ban fails under a "rational basis review given it's arbitrary features that are unrelated to [its] stated purpose (e.g., cutoff at 16 oz size, exclusion of alcohol, and application to certain food establishments but not grocery or conveniences stores)."<sup>82</sup>

### B. Future Implications

The significance of Mayor Bloomberg's pending soda ban reaches far beyond the City of New York, as the ban has received widespread publicity in the news media. The ban has increased concern among consumers and the food industry that city mayors and health boards will follow New York's lead by imposing burdensome legislation in efforts to combat obesity. As previously discussed, cities such as San Francisco have already taken steps to control consumer diet choices and restrict business marketing practices through city boards. Certain proponents of holding the fast food industry accountable for consumer health problems, such as Forrest Lee Andrews in his commentary entitled "Small Bites: Obesity

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<sup>79</sup> Julia Marsh, *Appeals court upholds ruling slapping down Mayor Bloomberg's soda ban*, July 30, 2013, N.Y. POST, available at <http://nypost.com/2013/07/30/appeals-court-upholds-ruling-slapping-down-mayor-bloombergs-soda-ban/>.

<sup>80</sup> *Id.*

<sup>81</sup> Daniel Wiessner, *New York court to hear Bloomberg's appeal to restore soda ban*, REUTERS, Oct. 17, 2013, <http://www.reuters.com/article/2013/10/17/us-nycsodaban-appeal-idUSBRE99G0T620131017>.

<sup>82</sup> See, Michael M. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, available at <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>; see also, Notice of Verified Petition, N.Y. Statewide Coal. Of Hispanic Chambers of Commerce v. N.Y. Dep't of Health and Hygiene, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013).

Lawsuit Prepare to Take on the Fast Food Industry,” assert that “lawsuits which place the responsibility of products safety in the hands of the industry that creates these products are a sign that our government is responsive to the masses.”<sup>83</sup> However, in most cases a limited city board is hardly representative of the will of the masses. For example, the New York Times conducted a poll on the New York City soda ban, where “[s]ix in 10 residents said the mayor’s soda plan was a bad idea, compared with 36 percent who called it a good idea” and “[a] majority in every borough was opposed.”<sup>84</sup>

Following New York City’s large public outcry over the ban and the ongoing contentious litigation, “[p]ublic health experts around the nation – and the restaurant and soft-drink industry – will be watching closely to see whether the new restrictions will make a difference and lead to changes in the way New Yorkers eat and drink.”<sup>85</sup> Particularly, if the ban is eventually implemented and fails to curb obesity, one major fear is that the government will impose taxes on unhealthy foods as a means of compelling people to make healthier choices. Although not a tax, bans like the soda ban can still have a substantial negative impact on the local economy because, according to the spokesperson for the New York State Restaurant Association, bans “discourage new business and hurt [New York City’s] reputation as the dining capital of the world.”<sup>86</sup> Excessive regulations place increased economic burdens on businesses and create greater complexity, “making it harder for businesses to function.”<sup>87</sup>

While the ABA in the New York soda ban lawsuit cites specifically to New York law, the ban also raises general constitutional law principles under which state restrictions on consumer choices may be analyzed. In Part II, this commentary dealt with arguments based in consumer protection laws, tort common law, and preemptive federal laws restricting the sale of lawful food products. Now, this commentary will explore constitutional law arguments against excessive consumer restrictions in detail below.

<sup>83</sup> See, Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153 (2004).

<sup>84</sup> See, Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg’s Soda Ban, Poll Finds*, N.Y. TIMES, Aug. 22, 2012, available at <http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html>.

<sup>85</sup> See, *New York City’s Sugar Drink Limits: What’s Next?* CBSNEWS.COM, Sept. 14, 2012, [http://www.cbsnews.com/8301-504763\\_162-57513268-10391704/new-york-citys-sugary-drink-limits-whats-next/](http://www.cbsnews.com/8301-504763_162-57513268-10391704/new-york-citys-sugary-drink-limits-whats-next/).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

### C. Constitutional Arguments

#### i. The Commerce Clause

An important potential argument against the soda ban and similar regulations that can be applied across state lines is that the ban is unconstitutional under the Commerce Clause.<sup>88</sup> Under Article 1, Section 8 of the Constitution, Congress has the right “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>89</sup> City governments cannot “pass laws that . . . impose [excessive] burdens on the free flow of commerce between states . . . Only Congress can impose burdens on commerce.”<sup>90</sup> Opponents of Mayor Bloomberg argue that the ban violates the Commerce Clause because the volume restrictions on the soda containers “would require manufacturers to make different size servings and distribution methods,”<sup>91</sup> resulting in undue burdens on the free flow of commerce between the states.

However, raising the Commerce Clause could fail “because states clearly have the ability to regulate what [its citizens] consume . . . That [is] why states can be dry and not allow alcohol. [States] can have different drug laws and different speed limits.”<sup>92</sup> The soda ban has also been equated to city laws banning cigarette smoking in public places,<sup>93</sup> requiring chain restaurants to post calorie counts on their menus, and requiring restaurants to display their health grade in plain view for consumers.<sup>94</sup> All three of the aforementioned laws survived legal challenges and are generally accepted by the public as within the scope of municipalities’ legal power, although Mayor Bloomberg and the New York Board of Health did previously “[loose] a legal battle over [requiring] graphic signs designed to show the health effects of smoking”

<sup>88</sup> Victoria Bekiempis, *Is Mayor Michael Bloomberg’s Supersized Soda Ban Unconstitutional?*, VILLAGE VOICE BLOGS (June 14, 2012, 4:29 PM), [http://blogs.villagevoice.com/runninscared/2012/06/mayor\\_michael\\_bloomberg\\_supersize\\_soda\\_ban.php](http://blogs.villagevoice.com/runninscared/2012/06/mayor_michael_bloomberg_supersize_soda_ban.php).

<sup>89</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>90</sup> Bekiempis, *supra* note 88.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Paul Samakow, *Soda ban sense and nonsense*, WASH. TIMES, Sept. 15, 2012, <http://communities.washingtontimes.com/neighborhood/leading-edge-legal-advice-everyday-matters/2012/sep/15/soda-ban-sense-and-nonsense/>; *see also*, *The NYC Ban From a Legal Perspective*, RES IPSA BLOGGER (June 8, 2012), <http://resipsablogger.wordpress.com/2012/06/08/the-nyc-soda-ban-from-a-legal-perspective/>.

<sup>94</sup> *See*, *The NYC Ban From a Legal Perspective*, RES IPSA BLOGGER (June 8, 2012), <http://resipsablogger.wordpress.com/2012/06/08/the-nyc-soda-ban-from-a-legal-perspective/>.



to be displayed in all tobacco retailers.<sup>95</sup>

While “[t]he Supreme Court has interpreted the [Commerce] clause to mean that states cannot take actions that harm interstate commerce,” proponents of the ban believe the ban does not hinder interstate commerce.<sup>96</sup> However, “interstate commerce is defined as the free exchange of commodities among citizens of different states across state lines,” and “soda industry representatives could argue that the soda ban unduly harms producers that ship soda syrup and cups from other states into New York.”<sup>97</sup>

## ii. Equal Protection and Substantive Due Process

The second viable legal claim against regulations such as New York City’s soda ban is a Fourteenth Amendment Equal Protection<sup>98</sup> and substantive due process claim.<sup>99</sup> The Fourteenth Amendment of the Constitution prohibits state governments from “depriving any individual of ‘life, liberty, or property, without due process of law.’”<sup>100</sup> Under a Fourteenth Amendment claim asserting that the government has imposed excessive restrictions on the sale of consumer goods under the guise of public health, the court will use a rational basis test. In order to succeed on a rational basis standard, the plaintiffs would need to prove that “the legislation has no reasonable connection to a legitimate and constitutionally sound objective.”<sup>101</sup> The burden of proof is on the plaintiffs because under a rational basis review, the burden lies on the parties challenging the legality of the legislation.<sup>102</sup> Courts have long

<sup>95</sup> David Howard King & Nina Goldman, *Beverage Industry Fight Against Soda Ban Just Beginning*, GOTHAM GAZETTE, July 24, 2012, available at <http://www.gothamgazette.com/index.php/topics/health-1420-soda-ban-war>; see also Mayor Bloomberg, Deputy Mayor Gibbs And Health Commissioner Farley Celebrate Local, National And Global Impact Of Smoke-free Air Act On 10th Anniversary, The Official Website of the City of New York, March 27, 2013, <http://www1.nyc.gov/office-of-the-mayor/news/114-13/mayor-bloomberg-deputy-mayor-gibbs-health-commissioner-farley-celebrate-local-national-and>.

<sup>96</sup> Samakow, *supra* note 93.

<sup>97</sup> See, Res Ipsa Blogger, *supra* note 94.

<sup>98</sup> Katie Booth, *Are There Any Good Legal Arguments to Overturn the NYC “Soda Ban”?*, HARVARD LAW BLOGS (Sept. 19, 2012), <http://blogs.law.harvard.edu/billofhealth/2012/09/19/are-there-any-good-legal-arguments-to-overturn-the-nyc-soda-ban/>.

<sup>99</sup> See, Alexis M. Etow, *No Toy For You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?*, 61 AM. U. L. REV. 1503 (2012).

<sup>100</sup> *Id.* at 1519.

<sup>101</sup> Res Ipsa Blogger, *supra* note 94.

<sup>102</sup> Etow, *supra* note 99, at 1520.

established that “protecting the public health is a legitimate interest,”<sup>103</sup> and proponents of the ban would only be required to “cite a rational reason for the ban”<sup>104</sup> and would not need to “prove that the ban would lower consumption of soft drinks and consequently reduce obesity among New Yorkers.”<sup>105</sup>

Although rational basis review is a low standard for the government to meet, bans that target only certain types of establishments may not survive under this review because of the very minimal impact such “underinclusive”<sup>106</sup> regulations have on public health. For example, the New York soda ban prohibits the sale of extra large soft drinks in certain businesses while allowing the sale of large drinks in arguably more convenient establishments such as convenience stores and supermarkets. Specifically, “[o]nly establishments that receive inspection grades from the health department, including movie theaters and stadium concession stands” are subject to the ban, while supermarkets, vending machines, newsstands, and “convenience stores, including 7-Eleven and its king-size Big Gulp drinks” are exempt.<sup>107</sup> Therefore, opponents of the ban contend that because the ban does not apply to arguably the biggest offenders of selling super size drinks, it will have no effect on soda consumption and fails to have a reasonable connection to the ban’s objective in curbing obesity.<sup>108</sup>

#### IV. ANALYSIS OF UNDERLYING THEMES IN FOOD REGULATION

##### A. *Demonizing The Food Industry*

New regulations further restricting the sale of lawful products and limiting consumer freedom of choice in the name of public health are often justified using the case of the tobacco industry. Historically, the success of one government battle waged against a targeted industry (e.g. tobacco) serves as justification for increasing regulation on newly targeted

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<sup>103</sup> Res Ipsa Blogger, *supra* note 94.

<sup>104</sup> Booth, *supra* note 98.

<sup>105</sup> Res Ipsa Blogger, *supra* note 94.

<sup>106</sup> Booth, *supra* note 98.

<sup>107</sup> See, Michael N. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, available at <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>.

<sup>108</sup> Res Ipsa Blogger, *supra* note 94.

industries.<sup>109</sup> Even today, the bans, taxes, and limitations on tobacco have a large effect on current food regulations because “[f]or years, public health advocates have openly — and selectively — tried to demonize soda companies in language that compares them to cigarette companies.”<sup>110</sup> Local prohibitions and federal regulations restricting businesses’ marketing and sale of alleged “unhealthy” foods must be closely evaluated, as overhauling the food industry has become the government’s most recent public health project.

For example, referring to “how people eventually embraced smoking bans,” New York City’s Health Commissioner stated, “If we can do that for . . . tobacco, we can certainly do that for obesity as well.”<sup>111</sup> The Mayor of Philadelphia, in agreement with the Commissioner, said, “The [food] industry needs to at least acknowledge that they are part of the problem.”<sup>112</sup> It has become increasingly apparent that businesses in the food industry selling unhealthy food and sugary drinks are being compared to tobacco companies selling cigarettes.<sup>113</sup> Using the war on tobacco strategy in the fight against obesity is troublesome because it creates the perception that no industry is safe from being targeted as the latest “health hazard” by the government and other public officials:

Public health officials are consciously comparing their strategy of rules, regulations, and taxes on soda to those used against tobacco addiction; New York City’s [Board] vote today is one result. Papers and essays linking anti-tobacco strategies to obesity are all too common, yet few provide evidence that these strategies will work against a different target.<sup>114</sup>

However, the food and beverage industry, by providing what people want to eat in the sizes consumers find most convenient, should not be attacked as in the case of the tobacco companies. Unlike practicing cigarettes in moderation, most would agree that consumers might occasionally indulge in fast foods and soft drinks without serious health repercussions.

<sup>109</sup> David Gratzer, *Why Bloomberg’s War on Soda Will Fail*, HUFFINGTON POST, Sept. 13, 2012, available at [http://www.huffingtonpost.com/david-gratzer/new-york-soda-ban\\_b\\_1880846.html](http://www.huffingtonpost.com/david-gratzer/new-york-soda-ban_b_1880846.html).

<sup>110</sup> *Id.*

<sup>111</sup> Susan Heavey, *New York City officials defend “super-size” drink ban*, REUTERS, June 7, 2012, <http://www.reuters.com/article/2012/06/08/us-usa-sugarban-IdUSBRE85703O20120608>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Gratzer, *supra* note 109; see also, Carolyn L. Engelhard et al., *REDUCING OBESITY: POLICY STRATEGIES FROM THE TOBACCO WARS*, STAN DORN URBAN INSTITUTE, July 2009, [http://www.urban.org/UploadedPDF/411926\\_reducing\\_obesity.pdf](http://www.urban.org/UploadedPDF/411926_reducing_obesity.pdf).

Further linking the war on obesity with the war on tobacco, the author of a scholarly article titled “Reducing Obesity: Policy Strategies From the Tobacco Wars” outlines specific strategies unique to the war on tobacco that should be employed to combat obesity. It is frightening that the author proposes the following strategies and laws for restricting business in the name of reducing obesity: “imposing excise or sales taxes on fattening food of little nutritional value,” “banning advertising and limiting the marketing of fattening food,” “limiting the sale of fattening food at schools, workplaces, and supermarket checkout counters,” and “identify[ing] the foods that may not be advertised to children and adolescents.”<sup>115</sup> Because obesity is now considered a disease, it is preferable to target food industries as the root of the problem because criticizing the obese person for personal choices would be seen as insensitive.<sup>116</sup> The path to sin taxes ultimately begins with the government and public “demonizing an industry,” as seen in the case of tobacco, by accusing the industry of “seeking profits by peddling poison” and “lur[ing] children into destructive habits.”<sup>117</sup>

*B. Food Bans: Paving the Way for Future Taxes*

The government generally has four legal options in limiting intake of certain foods:

- (1) “controlling the conditions of sale through direct restrictions or limits (especially aimed at youth); (2) raising prices through ‘sin taxes’; (3) government litigation against producers of unhealthy substances with damage awards earmarked for health care or healthy alternatives; and (4) regulating marketing and advertising.”<sup>118</sup>

While the soda ban is not a sin tax, the ban in practice costs consumers and businesses more money by forcing consumers to purchase additional smaller size containers and requiring businesses to purchase new legal size cups and modify marketing and distribution plans. If state and federal

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<sup>115</sup> See, Carolyn L. Engelhard et al., *REDUCING OBESITY: POLICY STRATEGIES FROM THE TOBACCO WARS*, Stan Dorn Urban Institute, July 2009, 4-5, [http://www.urban.org/UploadedPDF/411926\\_reducing\\_obesity.pdf](http://www.urban.org/UploadedPDF/411926_reducing_obesity.pdf).

<sup>116</sup> Rohan Kersh and James Monroe, *The Politics of Obesity: Seven Steps to Government Action*, *Health Affairs*, <http://content.healthaffairs.org/content/21/6/142.full>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

governments continue to ban certain portion sizes of “unhealthy” food products and intervene in companies’ marketing of “unhealthy” foods, a sin tax does not seem too far away.

Sin taxes are already being discussed as a more effective way of curbing obesity. The reality behind taxing a product because one group has demonized it is that “[e]very sin tax makes sense to someone. In theory, we could craft millions of tiny little taxes to compensate for every ‘market failure’ we manage to uncover. But that’s impractical, so instead we pick and choose a few sin taxes that we find especially appealing.”<sup>119</sup> Currently, many people working to fight obesity in the public health sector “have long argued that a tax on sugar-sweetened beverages would be one of the most effective measures the government could take to reduce calorie intake in the public.”<sup>120</sup>

Yet advocates of sin taxes on certain food items should consider what occurred in Denmark. Denmark previously implemented a tax on certain fatty foods such as butter, cream, and cheese, and it was abolished because “authorities said the tax had inflated food prices and put Danish jobs at risk.”<sup>121</sup> The Danish tax ministry stated, “The fat tax and the extension of the chocolate tax, the so-called sugar tax, has been criticized for increasing prices for consumers, increasing companies’ administrative costs and putting Danish jobs at risk.”<sup>122</sup> According to the Danish Food Workers Union, the tax “led to a loss of 1,300 retail and manufacturing jobs” in Denmark.<sup>123</sup>

Denmark’s tax was “the world’s first so-called ‘fat tax,’”<sup>124</sup> although France, Hungary, Israel, and other countries have considered or are in the process of considering taxes on fat or sugar.<sup>125</sup> France is discussing implementing a “Nutella Tax” because “[French] lawmakers argue that

<sup>119</sup> Joseph J. Thorndike, *Tax.com*, Nov. 5, 2012, <http://www.tax.com/taxcom/taxblog.nsf/Permalink/JTHE-8ZRNAS?OpenDocument>.

<sup>120</sup> Joe Satran, *Soda Taxes Shot Down By Voters In Two California Towns*, THE HUFFINGTON POST, Nov. 8, 2012, [http://www.huffingtonpost.com/2012/11/07/soda-taxes\\_n\\_2088170.html](http://www.huffingtonpost.com/2012/11/07/soda-taxes_n_2088170.html).

<sup>121</sup> *Denmark to abolish tax on high-fat foods*, BB NEWS EUROPE, Nov. 10, 2012, <http://bbc.co.uk/news/world-europe-20280863>.

<sup>122</sup> Olga Khazan, *What the world can learn from Denmark's failed fat tax*, WASH. POST WORLD VIEWS, Nov. 11, 2012, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/11/what-the-world-can-learn-from-denmarks-failed-fat-tax/>.

<sup>123</sup> *Id.*

<sup>124</sup> Denmark, *supra* note 121.

<sup>125</sup> Khazan, *supra* note 122.

palm oil, which is high in saturated fats, poses a threat to public health.”<sup>126</sup> However, when a country levies a small tax out of public health concerns for its citizens, the tax has unanticipated economic consequences in other countries. For example, the “Nutella Tax” would not only impact French citizens, but “the levy would quadruple — to 400 euros from 100 euros — (to \$509 from \$127) the import tax on Malaysian palm oil,”<sup>127</sup> crushing Malaysia’s palm oil industry.

One of the most important consequences of raising taxes, even temporarily, to solve a problem is “how long-term policy can be affected by the short-term state of the economy.”<sup>128</sup> For example, although Denmark repealed the fat tax, the very fact that it was implemented in the first place had lasting effects. The fat tax generated “an estimated 170 million (\$216 million) in 2012 in new revenue” for the government.<sup>129</sup> Therefore, when Denmark citizens voted to repeal the tax the government felt it was within its power to “slightly raise income taxes and reduce personal tax deductions to offset the lost revenue.”<sup>130</sup> Now, because the tax was once implemented, the people of Denmark are paying a higher income tax and the price of items such as butter, oil, sausage, cheese and cream increased 9%.<sup>131</sup> Denmark demonstrates that sin taxes have long-term repercussions and lasting effects on the future economy that cannot always be predicted.

In California, voters in two midsized cities voted against a proposed “fat tax” that would have been levied citywide on soda sales.<sup>132</sup> However, the news media blamed soda companies’ lobbying strategies and accused the companies of purposefully deceiving the constituents because “[t]he taxes would have been applied as a complicated tax on businesses instead of being levied directly on consumers at the point of sale.”<sup>133</sup> Typically when a business is taxed, the expense is passed down to consumers

<sup>126</sup> ‘Nutella Tax’ Could Raise Price Of Chocolate-Hazelnut Spread In France, HUFFINGTON POST, Nov. 12, 2012, available at [http://www.huffingtonpost.com/2012/11/12/nutella-tax-france\\_n\\_2117272.html](http://www.huffingtonpost.com/2012/11/12/nutella-tax-france_n_2117272.html).

<sup>127</sup> Scott Johnson, *Bittersweet Chocolate News in Europe*, INTERNATIONAL HERALD TRIBUNE, Nov. 14, 2012, available at <http://rendezvous.blogs.nytimes.com/2012/11/14/bittersweet-chocolate-news-in-europe/>.

<sup>128</sup> Stephen J. Dubner, *Fans of a “Fat Tax” Will Be Saddened by the News From Denmark*, FREAKONOMICS.COM, Nov. 13, 2012, <http://www.freakonomics.com/2012/11/13/fans-of-a-fat-tax-will-be-saddened-by-the-news-from-denmark/>.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Joe Satran, *Soda Taxes Shot Down By Voters In Two California Towns*, THE HUFFINGTON POST, Nov. 8, 2012, available at [http://www.huffingtonpost.com/2012/11/07/soda-taxes\\_n\\_2088170.html](http://www.huffingtonpost.com/2012/11/07/soda-taxes_n_2088170.html).

<sup>133</sup> *Id.*

through increases in the price of its products. The business will not simply absorb the cost typically because margins, particularly in the food industry, are already razor thin. Accordingly, “[t]he effect of any tax depends on the responses of both the consumer and producer. The burden of the tax will typically fall on the side of the market less-sensitive to price changes. In most cases, both parties will invariably absorb some portion of the tax.”<sup>134</sup> Although the soda ban is not an outright tax, it would pass the cost down to consumers in the form of a price increase in the product. The increase in price is necessary to accommodate the additional expenses the company generates in order to bring itself in compliance with the new standard.

If the New York Court of Appeals determines the New York City soda ban to be valid, consumers will be forced to pay more for smaller containers than for large containers. For example, consumers “would have to buy six 12-ounce cans at an average cost of \$7.50 to get an equivalent amount of a \$3 2-liter bottle.”<sup>135</sup> Also, businesses such as bowling alleys and nightclubs will no longer be able to serve soda or mixers in large pitches and cafes, creating unnecessary inconvenience and hurting sales.<sup>136</sup> Movie theatres will also take an economic hit, with certain independent theaters grossing “\$20,000 to \$30,000 less per year in beverage sales.”<sup>137</sup> Many local chains are waiting for the New York Court of Appeals decision in the pending lawsuit before implementing changes in soda sales, because the requirements are “very, very expensive from the printing, to the glassware to the server tips, everything [is] a trickle down when you make a decision like that.”<sup>138</sup> The environmental consequences of the ban have yet to be fully understood as well: consumers will buy more small containers to total one large container, creating waste from additional packaging and increased recycling and disposal costs.

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<sup>134</sup> Brian Bass, *Effects of Taxes in Price Elasticity*, HOUSTON CHRONICLE, available at <http://smallbusiness.chron.com/effects-taxes-price-elasticity-22323.html>.

<sup>135</sup> Jessica Chasmar, *N.Y. Mayor Bloomberg bans 2-liter sodas with pizza delivery: report*, WASH. TIMES, Feb. 24, 2013, available at <http://www.washingtontimes.com/news/2013/feb/24/report-ny-mayor-bloomberg-bans-2-liter-sodas-pizza/#ixzz2Mged1mTB>.

<sup>136</sup> *Id.*

<sup>137</sup> Sandra Bookman, *Soda ban set to take effect on March 12*, ABCNEWS, March 4, 2013, [http://abclocal.go.com/wabc/story?section=news/local/new\\_york&id=9015439](http://abclocal.go.com/wabc/story?section=news/local/new_york&id=9015439).

<sup>138</sup> *Id.*

C. *Conflicting Government Health Initiatives and Federal Farmer Subsidies*

Ironically, “[t]he federal government has financed a multi-million dollar ad campaign in New York City and elsewhere attacking sugary soft drinks. But legislation passed [in June] continues subsidizing sugar producers, and allows food stamp recipients to buy soda and other supposedly unhealthy foods with taxpayer money.”<sup>139</sup> The excerpt below further describes the disparity between federal subsidies to farmers and government campaigns warning against the very products it is financially supporting. According to a report in the New York Times:

The U.S. Senate approved the 2012 “farm bill” last week with a few minor cuts to agriculture subsidies. But the sugar industry managed to preserve tariffs on the importation of sugar and domestic quotas that keep prices artificially high [in] an effort to maintain American sugar farmers’ profit margins. But while the federal government supports the production of sugar and the consumption of sugary foods, it has also spent tens of millions of dollars marked for economic recovery programs to attack the soda industry and discourage consumers from buying their products. In New York City, which [banned] soft drinks larger than 16 oz., the federal government has financed 87% of a \$2.8 million ad campaign linking soda to obesity.<sup>140</sup>

While local, state, and federal governments are spending millions in efforts to get consumers to reduce their consumption of unhealthy products such as soda, government health efforts are in direct conflict with federal subsidies being given to the very farmers whose livelihoods depend on soda consumption.

Interestingly, “the federal government subsidizes sugar farmers to the tune of \$2 billion per year”<sup>141</sup> and subsidizes corn that is later “made into high-fructose corn syrup.”<sup>142</sup> Not to mention, “the three primary sources of fat in the typical American diet are red meat, plant oils, and dairy products. Producers of all three are subsidized or otherwise aided by

<sup>139</sup> Lachlan Markay, *Uncle Sam Simultaneously Attacks and Subsidizes Soda Consumption*, THE FOUNDRY, (July 2, 2012), <http://blog.heritage.org/2012/07/02/federal-government-attacks-and-subsidizes-soda-consumption/>.

<sup>140</sup> *Id.*

<sup>141</sup> See, Betsy McKay, *What Role Should Government Play in Combatting Obesity*, N.Y. TIMES, Sept. 18, 2012, available at <http://online.wsj.com/article/SB10000872396390444812704577609482961870876.html> (quoting Michael D. Tanner).

<sup>142</sup> *Id.*



federal, state, and local authorities.”<sup>143</sup> Yet the government targets junk food and soda companies because these very industries have not historically received subsidies. Government bodies and public health officials also do not want to receive the public backlash of hurting demand for American farmers’ products, such as in the instance of California’s “Meatless Mondays” where senators and the National Cattleman’s Beef Association alike “called the move a ‘slap in the face’ to people who work hard everyday to raise livestock for human consumption.”<sup>144</sup>

Finally, “[w]hen it comes to food, people don’t behave like we expect.”<sup>145</sup> Consumers do not tend to respond directly to taxes on products that have easily available alternatives. For example, Dr. Wansick’s of Cornell University “From Coke to Coors” study demonstrated that in Utica, New York, citizens bought less soda and more Coors beer in response to a six-month tax on soft drinks.<sup>146</sup>

#### D. Freedom of Choice v. Public Good

In the frenzy to combat obesity, certain commentators are rushing to blame targeted food industries with statements such as the following: “The soda manufacturers can try to change the subject to a distorted view of what counts as freedom of choice, but the public should not be fooled. This is about disease and death, and about reining in the companies that profit from pretending otherwise.”<sup>147</sup> This opinion accuses soda companies from profiting from a product that the companies are aware is causing death among consumers and compares soda to a product as dangerous as tobacco or even alcohol. The author’s inflammatory language actually accuses soda companies of manipulating the public to purchase their products that will surely result in disease and death. However, the author fails to provide examples of soda companies encouraging consumers to obtain 100% of their nutrition from sodas. Just as milk or orange juice, consuming too much of any one food or beverage

<sup>143</sup> See, Rohan Kersh and James Monroe, *The Politics of Obesity: Seven Steps to Government Action*, *Health Affairs*, <http://content.healthaffairs.org/content/21/6/142.full>.

<sup>144</sup> See, James Johnson, *USDA Calls For “Meatless Monday” And Receives Backlash From Meat Producers*, *THE INQUISITOR*, July 26, 2012, available at <http://www.inquisitr.com/285625/usda-calls-for-meatless-monday-and-receives-backlash-from-meat-producers/>.

<sup>145</sup> McKay, *supra* note 140 (quoting Dr. Wansick).

<sup>146</sup> *Id.*

<sup>147</sup> See, Neil H. Buchanon, *Soft Drinks, Taxes, and Regulation: Why the Attacks on Mayor Bloomberg’s Proposed Size Restrictions on Soda Servings Are Misplaced*, *JUSTIA.COM*, July 12, 2012, <http://verdict.justia.com/2012/07/12/soft-drinks-taxes-and-regulation>.

can have harmful consequences. However, it would be politically incorrect to attack the companies that obtain their products from dairy or orange groves farmers, although the author is essentially waging a war on the sugarcane farmers whose livelihoods depend on soda companies.

Another author who wrote the legal article, “Why New York’s (and Other Jurisdictions’) Food Regulations Do Not Violate Freedom of Choice: The False Notion That Our Tastes Are of Our Own Making,” claims the government has the right to limit consumer choices of lawful products.<sup>148</sup> The author explains, “Currently, we are being manipulated into eating unhealthy foods. Thus, governmental efforts to change our eating habits are not a violation of our freedom, but rather an important way to push back against all of the ways in which people are manipulated and harmed by industrial food production.”<sup>149</sup> Essentially, the author asserts that it is irrelevant if the government limits what consumers eat because corporations already limit people’s choices.<sup>150</sup> He continues, “A person who objects to the government telling him what to do in this area of his life is, in essence, saying: ‘Don’t let Big Brother tell me what to eat. I do what the Pillsbury Dough Boy tells me.’”<sup>151</sup>

However, the author’s assertions do not truly encompass the current food industry environment. In fact, because of business and corporate competition, a consumer has access to thousands of different types of products suited to individual preference, and a single company such as Pillsbury does not have an enormous influence over a person’s power of choice. Consumers are empowered to make healthy decisions because competition offers choices, not because the government limits consumer choice to counteract the perceived inability of its citizens to exercise self-control and individual restraint.

In the case of obesity, public health entities, including the government, are largely in conflict with consumers because they value “the health and safety of populations rather than the health of individual patients,” “prevention of injury and disease rather than treatment and care,” “and relationships between the government and the community

<sup>148</sup> See, Neil H. Buchanan, *Why New York’s (and Other Jurisdictions’) Food Regulations Do Not Violate Freedom of Choice: The False Notion That Our Tastes Are of Our Own Making*, JUSTIA.COM, May 20, 2010, <http://writ.news.findlaw.com/buchanan/20100520.html>.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

rather than the physician and the patient.”<sup>152</sup> Therefore, the government is inclined to implement regulations combatting obesity that it believes will do the greatest good for the most people, rather than preserving consumer freedom of choice or protecting against “potential infringement on companies’ commercial” rights.”<sup>153</sup>

For example, “the rationale for [the] public health approach to obesity lies partly in the argument that efforts to reduce obesity rates are hobbled by a collective action problem.”<sup>154</sup> This collective action problem occurs because “individuals acting in their own self-interest will not effectively address the problem [of obesity], because they do not internalize some of the major costs and benefits of action or nonaction.”<sup>155</sup> Some believe obesity is not a personal problem but rather the government’s responsibility to correct, because obesity indirectly impacts the public system through increased costs in healthcare.<sup>156</sup> However, illnesses that occur as a result of poor eating habits “only increase insurance costs to the degree that [the government] prohibit[s] insurers from charging actuarially appropriate premiums.”<sup>157</sup> Ultimately, the government is so pervasive that it somehow touches every aspect of citizens’ everyday lives, and “[t]o suggest that the mere existence of some societal cost grants government the power to regulate [citizens’] decisions is to open the door to government intervention pretty wide.”<sup>158</sup> The collective action argument could likely be used as justification in nearly every instance of increased government involvement in previously private decisions.

## VI. CONCLUSION

From the local to federal level, government legislation geared towards curbing the obesity epidemic by seeking to limit consumer choice is becoming increasingly pervasive, despite the minimal impact regulations

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<sup>152</sup> Lauren B. Jacques, *The Federal Government’s Role in Combating Obesity: A Matter of Personal Responsibility or Public Health?*, THE HEALTH LAW AND PUBLIC POLICY FORUM, at 5.

<sup>153</sup> Etow, *supra* note 99 at 1503.

<sup>154</sup> Lauren B. Jacques, *The Federal Government’s Role in Combating Obesity: A Matter of Personal Responsibility or Public Health?*, THE HEALTH LAW AND PUBLIC POLICY FORUM, at 6.

<sup>155</sup> *Id.*

<sup>156</sup> Etow, *supra* note 99 at 1531.

<sup>157</sup> See, Betsy McKay, *What Role Should Government Play in Combatting Obesity*, N.Y. TIMES, Sept. 18, 2012, available at <http://online.wsj.com/article/SB10000872396390444812704577609482961870876.html> (quoting Michael D. Tanner).

<sup>158</sup> *Id.*

will have on public health. In the pending decision on the validity of the New York soda ban, the New York Court of Appeals will likely find the ban to be arbitrary. The ban will have little to no impact in combatting the obesity problem as it “applies to restaurants, fast-food chains, theaters, delis and office cafeterias”<sup>159</sup> but exempts convenience stores, supermarkets, and even 7-11 Big Gulps, the very products the ban intended to prohibit. However, the Court of Appeals decision will have a major impact on whether other city boards across the nation will implement similar laws under the pretense of bearing a rational relation to public health objectives in lowering obesity rates.

In addition, the regulatory environment in food regulation is growing increasingly complex, as local and federal health initiatives raise questions under state consumer protection laws, common law tort liability doctrine, and constitutional law. If consumers continue to allow the government to determine which industries to target next, there is no telling the degree of intrusion and detriment to business that will result. America’s perception of consumer responsibility must first begin to change before consumers begin taking their health back into their own hands and out of the courtroom. Ultimately, consumers may begin taking control of their health by first taking control of their government.

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<sup>159</sup> James Joyner, *Bloomberg Big Soda Ban Dumber Than We Thought*, OUTSIDE THE BELTWAY (Feb. 25, 2013), <http://www.outsidethebeltway.com/bloomberg-big-soda-ban-dumber-than-we-thought/>.