OBESITY REGULATION UNDER HOME RULE: AN ARGUMENT THAT REGULATION BY LOCAL GOVERNMENTS IS SUPERIOR TO ADMINISTRATIVE AGENCIES

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INTRODUCTION

On September 13, 2012, the New York City Board of Health (Board of Health) voted to adopt the "Sugary Drinks Portion Cap Rule," otherwise known as the "Portion Cap Rule."[1] The Portion Cap Rule was designed to limit sugary drinks by capping portions that food service establishments could sell at a maximum of sixteen fluid ounces.[2] A controversial regulation, the Portion Cap Rule was criticized for imposing a perceived "nanny state,"[3] for its inconsistent and uneven application, and for its general ineffectiveness stemming from a number of loopholes through which consumers could bypass the rule.[4] The New York State Court of Appeals ultimately declared the Portion Cap Rule invalid, and enjoined its implementation.[5]

Despite the Portion Cap Rule's brief existence, it brought a new policy question to the forefront: How should the government attempt to regulate the obesity epidemic and the sale and consumption of obesogenic products?[6] In many respects, the arguments for and against such a policy are similar to the debates regarding regulations on

1 N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.53 (repealed 2014); N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 541 (N.Y. 2014); *see also generally* Nathan Sadeghi-Nejad, *NYC's Soda Ban Is a Good Idea, but a Tax Would Be Better*, FORBES (Sept. 13, 2012, 5:10 PM), http://www.forbes.com/sites/natesadeghi/2012/09/13/nycs-soda-ban-is-a-good-idea-but-a-tax-would-be-better.

2 *Statewide Coal.*, 16 N.E.3d at 541.

3 Karen Harned, *The Michael Bloomberg Nanny State in New York: A Cautionary Tale*, FORBES (May 10, 2013, 8:00 AM), http://www.forbes.com/sites/realspin/2013/05/10/the-michael-bloomberg-nanny-state-in-new-york-a-cautionary-tale.

4 Mark Koba, *NYC Sugary Drink Ban: No More Big Gulps?*, CNBC (Mar. 11, 2013, 3:26 PM), http://www.cnbc.com/id/100532785 (noting that consumers can always purchase more than one drink at regulated stores or can always receive free refills if they so choose).

5 *See Statewide Coal.*, 16 N.E.3d at 541.

6 Obesogenic means "causing obesity," *Obesogenic*, COLLINS ENGLISH DICTIONARY (complete and unabr. digital ed. 2012), or "pertaining to or tending to cause obesity." *Obesogenic*, DICTIONARY.COM, http://dictionary.reference.com/browse/obesogenic (last visited Nov. 28, 2014).

cigarettes[7] and alcohol.[8] Large soda companies lobby and react in much the same manner as large cigarette companies.[9] The similarities between the two industries are further compounded when it is shown that soda—much like tobacco—has little nutritional value vis-à-vis its negative impacts.[10]

Obesity[11] in the United States has had disastrous effects on both public health and the economy.[12] As of 2011, thirty-six states had obesity rates of twenty-five percent or greater, and twelve of those had obesity rates of thirty percent or higher.[13] By 2030, it is predicted that thirteen states could have adult obesity rates above sixty percent, and a total of thirty-nine states could have obesity rates above fifty percent.[14] The current obesity epidemic has resulted in harsh health consequences,

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7 Mark Bittman, *Soda: A Sin We Sip Instead of Smoke?*, N.Y. TIMES (Feb. 13, 2010), http://www.nytimes.com/2010/02/14/weekinreview/14bittman.html?_r=0.

8 Deborah A. Cohen & Lila Rabinovich, *Addressing the Proximal Causes of Obesity: The Relevance of Alcohol Control Policies*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/pcd/issues/2012/11_0274.htm (last updated July 12, 2012).

9 The food industry has taken many half-measures, such as deflecting the debate on obesity off to the side by promoting exercise, while denying the effects of bad diets. *See* Anahad O'Connor, *Coca-Cola Funds Scientists Who Shift Blame for Obesity Away from Bad Diets*, N.Y. TIMES: WELL BLOG (Aug. 9, 2015, 5:25 PM), http://well.blogs.nytimes.com/2015/08/09/coca-cola-funds-scientists-who-shift-blame-for-obesity-away-from-bad-diets/?_r=0. These overtures can be likened to efforts taken by the tobacco industry, which extolled the virtues of its charitable contributions and smoking prevention programs for kids. *See* Carrie Gann, *Experts See Parallels Between Food and Tobacco Industries, but Comparison Is Complicated*, ABC NEWS (June 20, 2012), http://abcnews.go.com/Health/soda-food-industries-marketing-cues-tobacco-study/story?id=16606512; *see also Tobacco Companies Challenge New York City Cigarette Prices*, ABC7NY (Jan. 31, 2014, 3:59 AM), http://7online.com/archive/9414427; Editorial, *Coke Tries to Sugarcoat the Truth on Calories*, N.Y. TIMES (Aug. 14, 2015), http://www.nytimes.com/2015/08/14/opinion/coke-tries-to-sugarcoat-the-truth-on-calories.html (listing the great variety of methods the sugary beverage industry has tried to deflect the adverse health effects of their products).

10 Sadeghi-Nejad, *supra* note 1.

11 Obesity is defined as "a condition that is characterized by excessive accumulation and storage of fat in the body and that in an adult is typically indicated by a body mass index of 30 or greater." *Obesity*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/medical/obesity (last visited Feb. 7, 2015). Body mass index, or BMI, is defined as "a measure of body fat that is the ratio of the weight of the body in kilograms to the square of its height in meters." *Body Mass Index*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/medical/body%20mass%20index (last visited Feb. 7, 2015).

12 *See An Epidemic of Obesity: U.S. Obesity Trends*, HARV. T.H. CHAN SCH. PUB. HEALTH, http://www.hsph.harvard.edu/nutritionsource/an-epidemic-of-obesity (last visited Dec. 30, 2014).

13 *Adult Obesity Rate in New York Could Reach 50.9 Percent by 2030, According to New Study*, TR. FOR AMERICA'S HEALTH (Sept. 18, 2012), http://tfah.org/reports/obesity2012/?stateid=NY.

14 *Id.* Even more pressing, nationally, it is "estimated that 67.6 million Americans over the age of 25 were obese as of 2012, and an additional 65.2 million were overweight." Karen Kaplan, *Obese Americans Now Outnumber Those Who Are Merely Overweight, Study Says*, L.A. TIMES (June 22, 2015, 2:53 PM), http://www.latimes.com/science/la-sci-sn-more-americans-obese-than-overweight-20150620-story.html.

leading to a towering prevalence of cardiovascular diseases,[15] type 2 diabetes, hypertension, arthritis, cancer, and strokes.[16] This translates directly into increased societal costs, as the estimated "medical cost[s] of adult obesity" are $147–$210 billion each year in government funding,[17] and as adult obesity causes lower worker productivity and higher absenteeism.[18]

Given the detrimental health and economic effects of obesity, the question for federal, state, and local governments becomes one of implementation: How may obesity be legally regulated in a politically feasible manner? The questions of legality and politics cannot be partitioned into a question of just legality. In many instances, even if a form of regulation could be legally implemented, the political process to implement that regulation would never allow such regulation to come into existence.[19] These questions become especially relevant in light of the invalidation of the Portion Cap Rule, which was not enacted by any elected legislature, but promulgated by an administrative agency.[20]

Administrative agencies, however, are not the only authorities that can promulgate regulations on obesity. Given the Portion Cap Rule's failure, they may not be the best option either. Another viable option

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15 These cardiovascular diseases include "high blood pressure, high cholesterol, and high blood sugar." *See U.S. Obesity Trends*, *supra* note 12.

16 *See Adult Obesity Rate in New York*, *supra* note 13. Importantly, "more than 25 million Americans have type 2 diabetes, 27 million have chronic heart disease, 68 million have hypertension and 50 million have arthritis. In addition, 795,000 Americans suffer a stroke each year." *Id.* (predicting increases in associated medical costs by 2030).

17 *Id.*; *The Healthcare Costs of Obesity*, ST. OBESITY, http://stateofobesity.org/healthcare-costs-obesity (last visited Jan. 14, 2016); *see also* ALEX BRILL, MATRIX GLOB. ADVISORS, THE LONG-TERM RETURNS OF OBESITY PREVENTION POLICIES (2013), http://campaigntoendobesity.org/documents/FinalLong-TermReturnsofObesityPreventionPolicies.pdf (noting that $210 billion figure is "21 percent of total national health care spending").

18 *See Adult Obesity Rate in New York*, *supra* note 13; *see also* John Cawley et al., *Occupation-Specific Absenteeism Costs Associated with Obesity and Morbid Obesity*, 49 J. OCCUPATIONAL & ENVTL. MED. 1317, 1321 ("For men and women combined, these [obesity-related absenteeism] costs total $4.3 billion in 2004 dollars . . . .").

19 Indeed, even if politics did not outright defeat a measure for control, in many instances, lobbying skews the scale such that only half-measures are taken by the government—if any measures are taken at all. At times, the opposition is so strong that even when the public is shown the clear health (or financial) benefits of a regulation, they can balk in the face of advertisements that are "calculated to make the blood boil." Consequently, if the public balks, politicians will balk, too. *See* Anemona Hartocollis, *Failure of State Soda Tax Plan Reflects Power of an Antitax Message*, N.Y. TIMES (July 2, 2010), http://www.nytimes.com/2010/07/03/nyregion/03sodatax.html?pagewanted=all; Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012, 9:03 AM), http://www.reuters.com/article/2012/04/27/us-usa-foodlobby-idUSBRE83Q0ED20120427.

20 In fact, it was the New York City Department of Health and Mental Hygiene that directed the City's Board of Health, at the direction of Mayor Michael Bloomberg, to instigate and adopt the Portion Cap Rule. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 541 (N.Y. 2014). The New York City Council, the City's local legislative body, played no part in the Portion Cap Rule at all. *See id.*

rests with "local governments," or a "local government's legislative body,"[21] and all the authority that "home rule"[22] laws grant to them.[23] Under home rule, local governments can act within whatever authoritative boundaries the state legislature or constitution grants.[24] This autonomy is broad, and local governments often have freedom to innovate in policy arenas that the federal and state governments may be reluctant to entertain.[25]

With that, this Note argues that pragmatic approaches to obesity regulation could be better taken by local governments' legislative bodies, with their relative freedom of authority under home rule, than by administrative agencies, which are limited by the bounds of the legislative enactments that created them. Often, the most successful ventures into controlling the spread of obesity have not arisen from large-scale regulatory schemes drafted by Congress or state legislatures, but from modest ordinances by local governments.[26] These local governments can make great strides toward bypassing the political hurdles because of their partisan concentrations, smaller jurisdictional scales, and streamlined legislative processes.[27] Combined with their innovative proclivities,[28] local governments have a phenomenal ability to implement regulations on obesity.

Part I of this Note presents the case against promulgating obesity regulation via administrative agencies, using the history, policy, and failed implementation of the Portion Cap Rule in *New York Statewide*

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21 For this Note's purposes, the term "local government" will always refer to "a local government's legislative body"—the body through which the local government enacts ordinances under home rule laws. A "local government" or a "municipal government" will also be assumed to include entities such as cities, counties, and the like. *See Local Government*, BLACK'S LAW DICTIONARY (10th ed. 2014). Thus, the definition of "local government" includes the legislative bodies of cities, counties, and the like. That said, it is worth noting that when speaking colloquially of "local governments," most will think of the term "city"—the political entity most associated with the term "local government." Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 347 (1990).

22 "Home rule" is defined as a "state legislative [or constitutional] provision . . . allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms." *Home Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

23 *See* Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89, 89 (2011) ("Recognizing the enormous influence a community's food environment has on the quality and quantity of what people eat, cities and counties have sought to encourage food retail establishments to promote healthier options through regulations and incentives.").

24 *See* discussion *infra* Part III.

25 *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1129 (2007).

26 *See* Paul A. Diller, Essay, *Obesity Prevention Policies at the Local Level: Tobacco's Lessons*, 65 ME. L. REV. 459, 462 (2013) (noting in particular the success of local bans on trans fats and on requirements to post calorie counts on menus).

27 Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1283 (2014).

28 *See* discussion *infra* Part II.A.

Coalition of Hispanic Chambers of Commerce v. New York City Department of Health & Mental Hygiene[29] as a case study for that purpose. Part II makes the case for obesity-related local government regulation, addressing policy arguments for and against such regulation. Part III explains home rule's black letter law, giving an overview of its scope, limitation, and typical grant of authority. Part IV explores the viability of different forms of obesity regulation under home rule laws, such as taxes, subsidies, restraints on business practices, and zoning ordinances, with a focus on tobacco-related regulatory laws as pre-existing, paradigmatic examples. Part V concludes by proposing that local governments should use the full force of their authority under home rule to combat the threat that obesity poses.

I. THE CASE AGAINST ADMINISTRATIVE AGENCY REGULATION

In lieu of congressional and state legislative inaction, the two governmental entities left to regulate obesity are administrative agencies and local governments. Before delving into why local governments are a superior vehicle for obesity regulation under home rule, it is necessary to undertake an in-depth analysis of regulation by administrative agencies, and to analyze why such regulation is inferior to action by local governments. To accomplish this, this Note will perform a case study of the Portion Cap Rule—an agency regulation enacted without a legislative directive[30]—which will illustrate the weaknesses of an agency's regulation that attempts to innovate and regulate in a new forum.

A. *The Portion Cap Rule's Invalid Promulgation by the New York City Board of Health*

In early 2012, Mayor Michael R. Bloomberg announced that he intended to "restrict sales of sugary soft drinks to no more than 16 ounces a cup."[31] Thereafter, the New York City Department of Health and Mental Hygiene (Department of Health) proposed that the Board of

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29 N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014).

30 *See* discussion *infra* Part I.A.

31 Henry Goldman & Duane Stanford, *NYC Mayor Bloomberg Seeks Ban on Super-Size Soft Drinks*, BLOOMBERG (May 31, 2012, 2:56 PM), http://www.bloomberg.com/news/2012-05-31/nyc-mayor-bloomberg-seeks-ban-on-super-size-soft-drinks.html (noting that the rule applied to "city restaurants, movie theaters, stadiums and arenas").

Health[32] restrict the size of sugary beverages that may be sold.[33] The Department argued that more than half of New York City's adults were overweight,[34] that sugary beverages comprised the largest source of additional sugar intake,[35] and that sugary beverages were a direct cause of weight gain.[36] Many argued that the rule would be ineffective, since traditional supermarkets and grocery stores were not regulated by the rule, and consumers could simply choose to buy more than one beverage at regulated stores anyway.[37] Others declared the rule to be paternalistic—that the government was becoming a "nanny state" to consumers who otherwise had sufficient intellect to make their own decisions.[38] In the end, a majority of New York City's citizens were against the rule as well.[39]

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32 For the purposes of this Note, the Department of Health and the Board of Health are only analyzed in their capacity as administrative agencies as it pertains to their independent authority to regulate, and not in their capacity as arms of a local government. *See Statewide Coal.*, 16 N.E.3d at 543–45 (noting that the Board of Health—the entity that adopted the Portion Cap Rule—is an administrative agency). While both agencies are normally considered arms of New York City's local government, *see id.* at 541–45, two assumptions are important for the purposes of this Note: First, this Note only uses the term "local government" to refer to a local government's legislative body, and neither the Department of Health nor the Board of Health are local governments under that definition. *See id.* at 543 (noting that "[t]he City Council is the sole legislative branch" for the city); *see also* discussion *supra* note 21. Second, any administrative agency that is engaging in independent policy-making and is acting outside the authority of its enacting statute, regardless of whether the agency is at the federal, state, or local level, is likely to see any rule it develops fail for the same reasons as the Portion Cap Rule was struck down in *Statewide Coalition*. *See* discussion *infra* Part I.B and accompanying notes (noting that the Portion Cap Rule was invalidated because the Board of Health acted independently of its enacting statute, which constituted ineffective lawmaking instead of permissive rulemaking).

33 Michael M. Grynbaum, *Strong Words from Both Sides at Soda Ban Hearing*, N.Y. TIMES (July 24, 2012), http://www.nytimes.com/2012/07/25/nyregion/at-hearing-on-soda-ban-strong-words-both-sides.html.

34 "More than half of New York City adults (58%) are now overweight or obese and more than 20% of the City's public school children (K–8) are obese." Notice of Public Hearing, N.Y.C. Dep't of Health & Mental Hygiene, Bd. of Health, *Opportunity To Comment on the Proposed Amendment of Article 81* (June 19, 2012) (footnote omitted), http://www.nyc.gov/html/doh/downloads/pdf/notice/2012/amend-food-establishments.pdf.

35 *Id.* (stating that "[s]ugary drinks . . . compris[e] nearly 43% of added sugar intake," and "[a] 20 ounce sugary drink can contain the equivalent of 16 packets of sugar").

36 *Id.*

37 *See* Koba, *supra* note 4; Sadeghi-Nejad, *supra* note 1.

38 *See* Harned, *supra* note 3; *see also* Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg's Soda Ban, Poll Finds*, N.Y. TIMES (Aug. 22, 2012), http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html?_r=0. These arguments were no doubt fueled by heavy lobbying from the soda industry. *See* Michael M. Grynbaum, *Soda Makers Begin Their Push Against New York Ban*, N.Y. TIMES (July 1, 2012), http://www.nytimes.com/2012/07/02/nyregion/in-fight-against-nyc-soda-ban-industry-focuses-on-personal-choice.html?pagewanted=all (noting that the soda industry argued that the ban was against individual autonomy).

39 Grynbaum & Connelly, *supra* note 38 (noting that about 60% of the population was against the Portion Cap Rule).

Nevertheless, to curtail the obesogenic effects that sugary beverages had on the public, the Board of Health approved the ban on large sugary beverages.[40] Before the Portion Cap Rule was slated to take effect, however, a New York State Supreme Court (New York's trial-level court) barred the Board of Health from implementing the Portion Cap Rule, and otherwise declared the rule invalid.[41]

In *Statewide Coalition*, the New York Court of Appeals (the state's highest court) also rejected the Board of Health's arguments that the Portion Cap Rule was valid.[42] First, the court determined that the Board of Health's role was "regulation, not legislation."[43] The court recited that under the New York City Charter, the sole legislative branch of the city's government is the City Council,[44] a local governmental body that is elected by the people.[45] The Charter empowers the City Council to adopt local laws for public welfare, while simultaneously restricting the Board of Health's rulemaking to the publication of a health code.[46] The Board of Health's constrained authority represents a discrete regulatory power, not an all-encompassing legislative power.[47] This was found to be true in light of section 558(c) of the Charter, which confines the Board of Health's power to "all matters and subjects" within the authority of the Department of Health,[48] so as to prevent the Board's regulatory power from encroaching upon the City Council's legislative power.[49]

Once the Board of Health's role was determined to be regulation and not legislation, the Portion Cap Rule became subject to an inquiry under the *Boreali v. Axelrod* test.[50] The fundamental purpose of the

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

41 N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *22 (N.Y. Sup. Ct. Mar. 11, 2013) (invalidating the rule based on the fact that it was both arbitrary and capricious, and that the rule violated the *Boreali* test, which tests when an agency engages in impermissible lawmaking as opposed to permissible rule-making). The Department of Health appealed to the Appellate Division, which upheld the invalidation. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 212 (App. Div. 2013). The case was finally appealed again to the New York Court of Appeals. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014).

42 16 N.E.3d at 541.

43 *Id.* at 543–45.

44 *Id.* at 543–44.

45 N.Y. CONST. art. IX, § 1(a).

46 *Statewide Coal.*, 16 N.E.3d at 544.

47 *Id.* at 544–45.

48 *Id.*

49 *Id.*

50 Boreali v. Axelrod, 517 N.E.2d 1350 (N.Y. 1987).

Boreali test is to determine whether the adopting agency has engaged in policy-making that is reserved solely for the legislative branch.[51] The four *Boreali* factors are whether the agency: (1) made inroads into policy-making, (2) made the rule without a parent statute, (3) acted where the legislature has tried and failed to act, and (4) did not rely on technical expertise to create the rule.[52] Given the complexity of defining the line between simple administrative rule-making and legislative policy-making, the factors are applied fluidly, and not discretely.[53]

The first factor of the *Boreali* test was most prominent. The Board of Health had to choose not only between whether to ban sugary beverages or to just limit their portions, but also had to choose how far they desired to influence a citizen's decision-making.[54] The Board of Health had to decide whether to go full-force with a ban, or to take a more cautious approach.[55] The court found that the complexity involved in crafting such a regulation went beyond simple rule-making, and drifted into policy-making by virtue of the requisite "value judgments concerning personal autonomy and economics."[56]

The second and third *Boreali* factors[57] were also dispositive. The Board had no policy foundation from the legislature upon which to craft the rule, thus meeting the second factor.[58] For the third factor, the court deferred to the Appellate Division's analysis,[59] which concluded that because the City Council and State Assembly had both attempted and failed to control sugary beverages, the Board violated the third factor by trying to "fill the vacuum and impose a solution of its own."[60] The Court

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51 *Statewide Coal.*, 16 N.E.3d at 546 (noting that the *Boreali* test is also meant to determine whether the challenged regulation has attempted to resolve difficult social problems).

52 *Boreali*, 517 N.E.2d at 1355–56.

53 The factors are to "'paint a portrait of an agency that has improperly assumed for itself the open-ended discretion to choose ends' that is the 'prerogative[] of [a] legislature.'" *Statewide Coal.*, 16 N.E.3d at 546 (alteration in original) (quoting *Boreali*, 517 N.E.2d at 1355, 1359).

54 *Id.* at 546–48 (noting that the Board of Health was not merely making a cut-and-dry determination).

55 This approach consisted of a choice between warnings on drinks or vending machines, and the ban itself. *Id.* at 547.

56 *Id.* at 548.

57 *Boreali*, 517 N.E.2d at 1356.

58 The Board could not point to any parent legislation concerning sugary beverages. *Statewide Coal.*, 16 N.E.3d at 548 ("In short, this is not a case in which 'the basic policy decisions underlying the [challenged] regulations have been made and articulated by the Legislature.'" (alteration in original) (quoting Bourquin v. Cuomo, 652 N.E.2d 171, 173 (N.Y. 1995))).

59 *Id.* at 548.

60 N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 211–12 (App. Div. 2013) (quoting *Boreali*, 517 N.E.2d at 1356); Kara Marcello, Note, *The New York City Sugar-Sweetened Beverage Portion Cap Rule: Lawfully Regulating Public Enemy Number One in the Obesity Epidemic*, 46 CONN. L. REV. 807 (2013) (discussing the Appellate Division's decision and defending the legality of the Portion

of Appeals concluded that these factors amounted to policy-making on the part of the Board of Health. Thus, the court concluded that the Board of Health exceeded the scope of its regulatory authority, and declared the Portion Cap Rule invalid in its entirety.[61]

The dissenting opinion harshly criticized the majority's opinion, making two points explicit: First, the majority had turned away from years of rhetoric that implied that the Board of Health's authority was actually legislative in nature, and not merely administrative.[62] Second, the majority took an inappropriate approach to their *Boreali* analysis.[63] According to the dissent, the majority seemingly reduced the *Boreali* test to just a question of the chosen policy ends, a method that foregoes any analysis of the costs and benefits of the alternatives that the agency examined.[64]

Whereas the dissent relied on the proposition that the Board of Health's authority to make rules was "nearly legislative," if not outright legislative,[65] the majority believed the Board's authority was not legislative at all, but merely administrative.[66] With that understanding, the Portion Cap Rule failed for the simple reason that the Board of Health was an administrative agency engaged in rulemaking within an area of the law where the State Assembly and City Council had not yet legislated, and had been unable to legislate due to political pressures.[67]

Cap Rule). The third factor's outcome may have been different if neither the City Council nor the State Assembly had made prior attempts at controlling, taxing, or otherwise containing sugary beverages. The Appellate Division noted that legislative inaction is not enough, a distinction that was significant in the Court of Appeal's determination of the third factor in *Boreali*. *Statewide Coal.*, 970 N.Y.S.2d at 211–12.

61 *Statewide Coal.*, 16 N.E.3d at 549.

62 *Id.* at 553–56 (Read, J., dissenting). Indeed, there are prior opinions acknowledging that the Board of Health does have legislative authority in the area of health in New York City. *See* Schulman v. N.Y.C. Health & Hosps. Corp., 342 N.E.2d 501, 502 n.1 (N.Y. 1975) ("[T]he Board of Health has been recognized by the Legislature as the sole legislative authority in the field of health regulation in the City of New York." (citing Grossman v. Baumgartner, 218 N.E.2d 259, 262 (N.Y. 1966))). The dissent equated this long history to mean that the Board's authority was "nearly legislative." *Statewide Coal.*, 16 N.E.3d at 554 (Read, J., dissenting).

63 *Statewide Coal.*, 16 N.E.3d at 558–60 (Read, J., dissenting).

64 *Id.*; *see also* Recent Case, New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014), 128 HARV. L. REV. 1508, 1514 (2015) (noting that the Court reduced the *Boreali* factors into "one inquiry . . . [of] the regulation's significance"). The Court of Appeals reinforced this view in a later case, where the court went through the motions of the *Boreali* analysis, finding that the questioned regulation was proper rulemaking, yet still commenting on the "difficult social problems" portion of *Statewide Coalition*. *See* Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, 36 N.E.3d 632, 638–40 (N.Y. 2015).

65 *Statewide Coal.*, 16 N.E.3d at 554 (Read, J., dissenting).

66 *Id.* at 543–45 (majority opinion).

67 *Id.* at 546–49.

B. *Administrative Agency Regulation After the Invalidation of the Portion Cap Rule*

For years, the Court of Appeals had stated that the Board of Health had authority equivalent to the legislature in matters regarding the Health code.[68] Yet in *Statewide Coalition*, the court turned that rhetoric on its head by stating that the Board of Health's authority was directly inferior to both the State Assembly and the City Council.[69] This may be a consequence of New York's harsh judicial outlook on legislative delegation to administrative agencies,[70] or perhaps the court rectifying years of linguistic laziness in which it unintentionally implied that the Board of Health had legislative authority instead of its mere and actual administrative authority.[71] Another likely option is that the majority engaged in clandestine judicial activism—invalidating a rule that was drastically unpopular with the public, and which the court itself did not believe was a good regulation.[72]

Interestingly, the court did not discuss whether the Portion Cap Rule was "rational" or whether it was "arbitrary or capricious"—even though an administrative regulation can only be upheld if it has a

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68 *See, e.g.*, Schulman v. N.Y.C. Health & Hosps. Corp., 342 N.E.2d 501, 502 n.1 (N.Y. 1975) (noting in a passing footnote that the Board of Health has legislative authority in the field of health); Grossman v. Baumgartner, 218 N.E.2d 259, 263 (N.Y. 1966) (referring at times to the board's "legislative authority" in adopting regulations); *In re* Bakers Mut. Ins. Co. of N.Y., 92 N.E.2d 49, 52 (N.Y. 1950) ("The [Health] Code of the City of New York is to have within that city the force and effect of State law . . . ."); People v. Blanchard, 42 N.E.2d 7, 8 (N.Y. 1942) ("[T]he [Health] Code is to be taken to be a body of administrative provisions sanctioned by a time-honored exception to the principle that there is to be no transfer to the authority of the Legislature.").

69 *Statewide Coal.*, 16 N.E.3d at 543–45.

70 *See id.* at 556 (Read, J., dissenting) (citing David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1387 n.32 (2011), and Gary J. Greco, Survey, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 581 (1994)).

71 The Court of Appeals went to great lengths to demonstrate that the cases cited by the Board of Health, *see* cases cited *supra* note 68, did not stand for the proposition that the board had legislative authority, but instead that it only had administrative authority. *Statewide Coal.*, 16 N.E.3d at 545 (noting that the board only had the ability to institute regulations in those cases because of pre-existing statutes which stated the board could do as much).

72 *Statewide Coal.*, 16 N.E.3d at 561 (Read, J., dissenting) (implying that the majority "step[ped] into the middle of a debate over public health policy" in order "to strike down an *unpopular* regulation" (emphasis in original)); *see also* Grynbaum & Connelly, *supra* note 38 (discussing the clear unpopularity of the ban among the public). The rule's unpopularity was palpable, which probably factored into the trial court's hostility to the rule's haphazard application. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *20 (N.Y. Sup. Ct. Mar. 11, 2013) ("The Rule is nevertheless fraught with arbitrary and capricious consequences. . . . [It] leads to . . . uneven enforcement even within a particular City block, much less the City as a whole. Furthermore, . . . the loopholes in this Rule effectively defeat the stated purpose of the Rule.").

rational basis.[73] This may have been a more operative theory of law on which to invalidate the rule, if the premise was that the rule was unpopular.[74] The trial court followed this logic, in addition to its analysis of the *Boreali* factors, by also invalidating the Portion Cap Rule as "arbitrary and capricious."[75] In the end, the Court of Appeals did not review whether the rule was arbitrary because the Appellate Division did not decide that issue.[76]

Regardless, following *Statewide Coalition*, it is clear that the power of administrative agencies is limited by the scope of the power of the legislatures that created them, and by the courts that enforce such limits. Furthermore, legislatures can enforce these limits passively, as evidenced by the fact that neither the State Assembly nor the City Council took action against the Portion Cap Rule.[77] This is precisely the problem with administrative action in new regulatory areas: without a legislative law endorsing action on obesogenic factors, an administrative agency cannot act.[78] If the agency does act, it is very likely that the rule will be struck down because the legislature did not empower the agency to act.[79]

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73 *See* N.Y. State Ass'n of Ctys. v. Axelrod, 577 N.E.2d 16, 20–21 (N.Y. 1991) ("[A]n administrative regulation will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious. . . . [Rules] are scrutinized for genuine reasonableness and rationality in the specific context." (citations omitted)). Federal agencies are subject to a similar review, which is governed by the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (2012) ("The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (A) *arbitrary*, *capricious*, an abuse of discretion, or otherwise not in accordance with law . . . ." (emphasis added)); *see also* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) ("[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute.").

74 If a rule is unpopular, as the Portion Cap Rule undoubtedly was, then an adopting agency will surely receive a palpable amount of unfavorable testimony and comments, which will emphasize the deficiencies of the rule. *See* Grynbaum, *supra* note 33. In that case, even in affording the adopting agency with every degree of judicial deference, *see Axelrod*, 577 N.E.2d at 23 (Hancock, J., dissenting), it would be difficult for an administrative agency to justify the regulation, especially if the regulation's application is haphazard or seemingly follows no intelligible principle related to the agency's corresponding evidence. *See id.* at 21–22 (majority opinion).

75 The trial court noted that the rule was haphazard, with a tangible number of loopholes which, if exploited, would cause the rule to be ineffectual. *Statewide Coal.*, 2013 WL 1343607, at *19–20.

76 *Statewide Coal.*, 16 N.E.3d at 542. That said, the court possibly blended the process behind its analysis of whether a regulation is "arbitrary and capricious" into its *Boreali* analysis. *See id.* at 546–48.

77 Indeed, it was instead a coalition of interested entities that took action against the Portion Cap Rule. *Id.* at 542.

78 *See id.* at 546–49.

79 *Id.*

This concept holds true against administrative agencies at all governmental levels: federal, state, and local.[80] If an agency engages in unilateral policy-making that is inconsistent with its parent statute,[81] or acts in an arbitrary and capricious manner,[82] then the agency's rule will be struck down. This infirmity precludes innovation on the part of an administrative agency, and prevents it from unilaterally acting to combat a "new" threat, such as obesity. This limitation on administrative agencies makes action by local governments far more attractive, as local governments have the necessary autonomy to unilaterally act and innovate under home rule laws.

II. THE CASE FOR LOCAL GOVERNMENT REGULATION

Before delving into the black letter law of home rule and the viability of various obesity-related regulatory schemes developed by local governments, it is prudent to give a brief overview of the arguments for and against delegating functional control of this nature to local governmental entities. This overview will provide a useful backdrop for the analytical comparison of regulation by local governments against broad state or federal regulatory schemes. More importantly, these arguments will later factor into the types of regulation that local governments can implement, and what scope such regulation should take.

A. *Arguments for Local Government Regulation of Obesity*

There are two main arguments for local government regulation of obesity, both of which can be associated with the movement towards innovative and greater controls of obesity over the long-term: (1) local governments can serve as legal laboratories, and (2) other local governments can copy successful regulations. In many ways, these arguments intertwine, and they present a powerful combined argument

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80 *See* Katherine Pratt, *Lessons from the Demise of the Sugary Drink Portion Cap Rule*, 5 WAKE FOREST J.L. & POL'Y 39 (2015) (describing constraints on agency regulation, using the Portion Cap Rule as an example).

81 At the federal level, administrative agencies will get what is known as "Chevron deference" for their regulations, so long as the agency acts pursuant to a parent statute that is ambiguous, and the agency's interpretation of that statute is reasonable. *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863 (2013) (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

82 *See* discussion *supra* note 73 and accompanying text.

for local regulation as a means for driving innovative controls of obesity.[83]

Local experimentation, or "cities as laboratories," allows for local governments to champion the path towards greater innovation in areas where federal and state legislation may be held back by powerful and politically affluent interest groups,[84] including the tobacco[85] and the food and beverage industries.[86] Local governments have proven successful in enacting regulations in a number of areas where the state and federal levels originally floundered, including living wage mandates,[87] smoking bans,[88] preliminary inroads into controls on obesogenic factors,[89] and a number of other areas.[90]

The concept that smaller governmental subdivisions may serve as laboratories for novel ideas and legal experiments without creating risk for other subdivisions or for the larger governmental entity is not a foreign or anachronistic idea. It was discussed as far back as 1932 by

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83 *See* Diller, *Intrastate Preemption*, *supra* note 25, at 1129 ("[C]ities [may] experiment with new and interesting policies that, for whatever reason, the state and federal governments may be unprepared or politically unable to adopt. If . . . th[o]se policies 'work,' they may percolate both out (to other cities) and up (to other levels of government—whether state or federal).").

84 *Id.* at 1127–29.

85 In 2013, the tobacco industry spent nearly twenty-seven million dollars on lobbying (and over twenty-two million dollars in 2014). *Tobacco*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/lobby/indusclient.php?id=a02&year=2013 (last visited Dec. 27, 2015).

86 In 2013, the food and beverage industry spent more than thirty million dollars on lobbying (and over thirty-two million dollars in 2014). *Food & Beverage*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/lobby/indusclient.php? id=N01&year=2013 (last visited Dec. 27, 2015). Of the 2013 amount, Coca-Cola Co., PepsiCo Inc., and the American Beverage Association contributed a combined total of nearly eleven million dollars. *Id.*

87 Darin M. Dalmat, Note, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 99 (2005) (noting that over 120 local governments had enacted living wage mandates).

88 In particular, New York City is a modern pioneer in this area. Janos Marton, *Today in NYC History: In 2003, Mayor Bloomberg's Smoking Bans Kicks in*, UNTAPPED CITIES (Mar. 31, 2015, 1:00 PM), http://untappedcities.com/2015/03/31/today-in-nyc-history-in-2003-mayor-bloombergs-smoking-bans-kicks-in (discussing when New York City's ban on smoking in public places came into effect and the cascading wave of comparable laws that were promulgated subsequent to that law); *New York City Bans Sale of Cigarettes to Under 21s*, TELEGRAPH (London) (Oct. 30, 2013, 10:48 PM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10416354/New-York-City-bans-sale-of-cigarettes-to-under-21s.html; *see also* Smoke-Free Air Act, N.Y.C., N.Y., ADMINISTRATIVE CODE tit. 17, § 17-503 (2002) (prohibiting smoking in public places, including bars and restaurants); *id.* § 17-706 (2013) (banning the sale of tobacco products to anyone under twenty-one years old).

89 This includes both bans on trans fats, *see* N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.08 (2006) (banning the use of trans fats in most instances), and mandated posting of calorie amounts. *See* N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.50 (2008) (requiring food service establishments in New York City with fifteen or more outlets nationally to post calorie amounts of each item listed on the menu).

90 Diller, *Intrastate Preemption*, *supra* note 25, at 1117–18 (noting additional policy advances in workers' rights, global warming reduction, public financing campaigns, affordable housing, universal health care, environmental protection, and gay rights).

Justice Brandeis in the context of federalism (with the states being the subdivisions and the federal government being the larger entity), and reiterated again more recently by Justice O'Connor.[91] It is not a great leap of imagination to analogize the federal-to-state paradigm with the state-to-local paradigm. Indeed, commentators have already done so in the context of local experimentation, likening local governments to states, and states to the federal government.[92]

When these regulations are successful in one local jurisdiction, other jurisdictions of a "like mind" may copy such regulation.[93] This proliferation of interest in a particular field at the lower, territorial levels of government may consequently rise to the state and federal levels.[94] By the time the higher level legislatures are ready to act, local regulation has typically become so widespread within larger jurisdictions that the higher level legislatures must act, for better or for worse.[95] Even if state or federal legislatures restrain or otherwise preempt a local ordinance,[96] however, that does not indicate failure or the end of local innovation in an area of law. Being "mere creatures of the state,"[97] local governments

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91 *See* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) ("One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

92 *See, e.g.*, Diller, *Intrastate Preemption*, *supra* note 25, at 1127–32 ("City experimentation is an essential component of what, in the federalism context, Rick Hills has described as 'political entrepreneurship.'" (quoting Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21 (2007))); *see also* Briffault, *supra* note 21, at 454 ("Many matters are, in fact, inappropriate for uniform state-wide treatment and are better suited to local decisions that reflect particular local beliefs and local needs. Many areas of public action benefit from the opportunities for experimentation that the decentralization of law-making and regulatory authority provides.").

93 Diller, *Intrastate Preemption*, *supra* note 25, at 1129.

94 *Id.* ("Once a city or a number of cities have put an issue on the nation's policy agenda . . . Congress or state legislatures may feel more compelled to address it.").

95 As Professor Diller argued:

> Once a city or a number of cities have put an issue on the nation's policy agenda, however, Congress or state legislatures may feel more compelled to address it. Cities, therefore, can serve as a "destabilizing" force in state and national policy debates, disrupting the state legislative and Congressional stasis on policy matters of significance. Even if Congress and/or the statehouses continue to avoid an issue, other cities may decide to take action after assessing the first city's experiment.

Diller, *Intrastate Preemption*, *supra* note 25, at 1129 (footnotes omitted).

96 This can be the case in states with highly partisan demographics. Where local governments in urban areas adopt modern regulations, the state's legislature may combat such regulations through brutal preemption laws, which are usually at the behest of adversely affected special interests. *See* Shaila Dewan, *States are Blocking Local Regulations, Often at Industry's Behest*, N.Y. TIMES (Feb. 23, 2015), http://www.nytimes.com/2015/02/24/us/govern-yourselves-state-lawmakers-tell-cities-but-not-too-much.html?emc=eta1&_r=0.

97 *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062–67 (1980) (discussing the general powerlessness of cities).

are accustomed to enacting tenacious and innovative ordinances to continue to address their jurisdiction's needs, such that in time, perhaps even the highest echelons of government must relent to the popular opinion of local citizens.[98]

The following real-world example serves to illustrate this profound political effect. In 2008, New York City passed a regulation which mandated that chain food service establishments of fifteen or more outlets post the calorie count of all items listed on their menus.[99] The regulation survived claims in the Second Circuit that it was federally preempted and that it violated the First Amendment right to commercial speech.[100] Around the same time, a number of other counties,[101] cities,[102] and states[103] adopted the regulatory strategy of posting calorie counts on menus. With legislation for that same strategy pending in a number of other states, the regulatory scheme was finally adopted into federal law with the passage of the Patient Protection and Affordable Care Act.[104] This process began with New York City's innovative experimentation with a new regulatory scheme. The scheme was then successfully duplicated in many local jurisdictions, and at multiple levels of state government, which finally prompted the federal government to adopt the scheme as well.[105]

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98 Diller, *Intrastate Preemption*, *supra* note 25, at 1129 (noting that cities can operate "as a 'destabilizing' force in . . . policy debates" where there would otherwise be stability at the state and federal levels).

99 *See* N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.50 (2008).

100 N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 117–18 (2d Cir. 2009).

101 *See, e.g.*, WESTCHESTER COUNTY, N.Y., ADMINISTRATIVE CODE ch. 533, § 533.03 (2010); ULSTER COUNTY, N.Y., ADMINISTRATIVE CODE ch. 205, art. I, § 205-2 (2009).

102 *See, e.g.*, PHILA., PA., HEALTH CODE tit. 6, § 6-308 (2008); S.F., CAL., HEALTH CODE art. 8, § 468.3 (2008) (suspended). The San Francisco ordinance was suspended in 2009 after California enacted a state-wide menu labeling law, which preempted the city's ordinance. *See* S. 1420, 2007–08 Leg., Reg. Sess. (Cal. 2008); *see also* Rajiv Bhatia, Presentation for the San Francisco Health Commission: Regulatory Updates for Environmental Health (June 19, 2012), https://www.sfdph.org/dph/files/hc/HCCommPublHlth/Agendas/2012/June%2019/env%20health%20regulatory%20updates.pdf.

103 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 114094 (West 2007). An updated section 114094, which was enacted in 2011, S. 20, 2011–12 Leg., Reg. Sess. (Cal. 2011), repealed and replaced the original section 114094, which was enacted in 2008, S. 1420, 2007–08 Leg., Reg. Sess. (Cal. 2008), in order to harmonize California law with the federal Patient Protection and Affordable Care Act.

104 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573–76 (2010) (codified at 21 U.S.C. § 343(q)(5)(H) (2012)).

105 Another very recent example is the New York City trans fat ban, N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.08 (2006), which has expanded to the federal level. Mary Clare Jalonick, *FDA Tells Food Industry to Phase Out Artificial Trans Fats*, ASSOCIATED PRESS (June 17, 2015, 2:57 AM), http://bigstory.ap.org/article/e6f526746cb74f1fb7058c0929b47110/obama-administration-cracking-down-trans-fats; *see also* CAL. HEALTH & SAFETY CODE § 114377 (West 2007) (banning trans fat after New York City enacted its ban).

B. *Arguments Against Local Government Regulation of Obesity*

In contrast to the benefits of innovation that local regulation brings, there are two criticisms that are particularly relevant to obesity regulation that need to be addressed. The first constitutes a straightforward question: Will obesity regulation at the local level even work? Some argue it will not, because, among other reasons, avoiding compliance with such regulation would simply require one to cross the border from a regulated jurisdiction into an unregulated jurisdiction.[106]

However, the innovation argument for local regulation already presupposes such an outcome. If the "legislative marketplace" of jurisdictions determines that a type of regulation "works," then it is likely that the regulatory scheme will diffuse by being adopted within many other local jurisdictions.[107] If it expands to the federal level, the border-crossing argument becomes moot, as the regulation would be uniform throughout the entire country. Conversely, if that same "legislative marketplace" determines that the regulation is faulty, and a local jurisdiction's residents begin to "vote with their feet" by purchasing products in unregulated jurisdictions, then the regulating jurisdiction will be forced to reassess its position.[108] Regardless, the regulating jurisdiction can always amend its ordinance to incorporate more palatable and less controversial restrictions, which in turn could attract residents to return, and perhaps even cause the updated ordinance to diffuse to other amenable jurisdictions.

Another prominent counterargument is that obesity regulation is overly paternalistic.[109] Paternalism can be roughly defined as the government's "interference with a person's freedom of action out of a desire to protect that person's welfare, interests, or values."[110] In terms

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106 *See* Rachel E. Morse, Note, *Resisting the Path of Least Resistance: Why the Texas "Pole Tax" and the New Class of Modern Sin Taxes Are Bad Policy*, 29 B.C. THIRD WORLD L.J. 189, 211 (2009) ("In 1998, California increased its cigarette tax by fifty cents a pack, marking the tax revenue for early childhood development programs. Rather than pay the tax, California residents who lived near the border with Nevada—a state with significantly lower cigarette tax—merely went across state lines to buy cigarettes, leaving sales in California way down. In January 1999, a Reno newspaper 'reported that Nevada retailers along the border [had] seen cigarette sales boom.'" (alteration in original) (footnotes omitted) (quoting D. Dowd Muska, Sin Tax Error, Nev. J., May 1999)); *see also* Michel Kelly-Gagnon, *Why Flaherty's Sin Tax on Cigarettes Won't Work*, HUFFINGTON POST: THE BLOG (Apr. 16, 2014, 5:59 AM), http://www.huffingtonpost.ca/michel-kellygagnon/flaherty-tobacco_b_4782056.html (noting that when taxes raise too high, consumers turn to "the black market or cross-border shopping").

107 *See* Diller, *Intrastate Preemption*, *supra* note 25, at 1129.

108 *See* Morse, *supra* note 106, at 211.

109 *See* Robert Creighton, Commentary, *Fat Taxes: The Newest Manifestation of the Age-Old Excise Tax*, 31 J. LEGAL MED. 123, 123, 130–32 (2010); *see also* Harned, *supra* note 3.

110 Jendi B. Reiter, Essay, *Citizens or Sinners?—The Economic and Political Inequity of "Sin Taxes" on Tobacco and Alcohol Products*, 29 COLUM. J.L. & SOC. PROBS. 443, 452 (1996).

of obesity, this could take the form of direct bans,[111] or a more indirect approach designed to make the exercise of certain options more difficult or unpleasant.[112] As such, one major criticism of paternalism is that it unreasonably restrains personal liberty, with the added cost of inefficiency.[113] Paternalism does not allow for individuals to change their behavior of their own volition,[114] it is undemocratic because it eliminates the choice of following the "morally wrong" behavior,[115] and it is unlikely to fix the underlying problem because people become demoralized and inefficient when their freedom of choice is withheld.[116]

Autonomy arguments are strong in our American culture, but they are not decisive. First, obesity regulations can be viewed as creating a system of incentives, rather than as a system that limits freedom.[117] Indeed, regulations can be subliminal, by advocating for the consumer to make what society believes is the "better" choice, without expressly forcing the consumer to make such a choice.[118] The final decision to consume, or not to consume, resides comfortably within the liberty of the individual.[119] Second, there are many types of obesity-related regulations where, even if the regulation expressly uses the notorious term "ban," such regulation does not operate as a per se ban, but instead operates as a less infringing incentive or disincentive.[120] It is thus

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111 This is best articulated by New York City's ban on trans fat, which directly takes the choice of ingesting trans fat away from the consumer. *See* N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.08 (2006).

112 A mandate to post calorie counts could arguably fall under this banner, as they are designed to inform people of what they are eating, and that knowledge is meant to be a disincentive for people making those high caloric choices. *See* N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.50 (2006).

113 Morse, *supra* note 106, at 204.

114 *See id.* ("When a government imposes on its citizens choices that they would not make for themselves in the name of their own welfare, their priorities are unlikely to change to align with their new behavior.").

115 Reiter, *supra* note 110, at 444.

116 *See id.* at 453–54 ("[R]egardless of whether the subjective suffering of those stigmatized should constrain paternalistic policy choices, benefit to the community is probably insufficient to justify moralistic lifestyle regulation, for a community divided by blame lacks the cohesion and compassion necessary to solve social problems."). Perhaps more importantly, it is argued that this demoralizing cost will only introduce additional problems. *Id.* at 454 ("[A] culture which openly censures unhealthy physical lifestyles and indulgence in bodily pleasures may foster intrusiveness and class bias . . . .").

117 *See* discussion *infra* Part IV.

118 *See* Jonathan Cummings, Comment, *Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages*, 34 SEATTLE U. L. REV. 273, 293–94 (2010) (discussing sin-taxes, which minimally affect individual autonomy). Cigarette and alcohol taxes are defining examples of such regulations. *See* discussion *infra* Part IV.A.

119 *Id.* ("[T]he final choice whether to consume or not still remains unabridged.").

120 For example, the Portion Cap Rule—while using the term "ban" for all sugary drinks over sixteen fluid ounces as its premise—could have easily been sidestepped if a consumer purchased more than one smaller drink. Koba, *supra* note 4. Thus, while the Portion Cap Rule did "ban" one path to consuming larger portions, it still enabled a consumer to obtain that

unpersuasive to consider paternalism (if using that term as a pejorative) as a great barrier to obesity regulation by local governments, given how little such regulation may actually infringe upon an individual's autonomy.[121]

III. THE HOME RULE DOCTRINE

A. *The History, Implementation, and Limitations of Home Rule*

The home rule doctrine works to provide a measure of autonomy to local governments.[122] Generally speaking, local governments do not have inherent sovereign power, but are instead allocated authority by their sovereign state governments.[123] Originally, this authority was manifested through the common law doctrine for local governments known as Dillon's Rule—articulated by Justice Dillon in his opinion for the Iowa Supreme Court in *Merriam v. Moody's Executors*.[124] Dillon's Rule,[125] however, was a decisively restrictive rule,[126] impotent in today's

same larger portion, but only through the inconvenience—and perhaps the dissuasion—of purchasing multiple smaller-sized portions. *See id.*

121 There are many other forms of regulation that can be quite benign and that do not directly require a consumer to do anything, nor directly prohibit the consumer from doing anything, such as a variety of zoning ordinances that local governments enact to control the geographic areas within which businesses may operate. *See* discussion *infra* Part IV.D.

122 *See Home Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

123 Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised *rests in the absolute discretion of the state*." (emphasis added)).

124 25 Iowa 163 (1868). The legacy of this rule was further cemented in history through Justice Dillon's thorough treatment of the rule in his treatise on municipal corporations. *See generally* JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872). This treatise was later cited by the Supreme Court of the United States, and the Court adopted Dillon's theory of state power over municipal corporations in full, thus making it the common law of the land. *See* Merrill v. Town of Monticello, 138 U.S. 673, 681–82 (1891).

125 Under the rule, local governments may only exercise three powers: (1) those granted expressly; (2) those necessarily implied or necessarily incident to the powers expressly granted; and (3) those absolutely essential to the declared purposes of the local government, which are not merely convenient, but are indispensable. *Merriam*, 25 Iowa at 170. If there is any fair, reasonable, or substantial doubt as to the existence of the local government's power, it is resolved against the local government by the courts, and the power is denied. *Id.*

126 Under the rule, a state legislature typically was required to expressly grant authority to a local government via statute in order for the local government to be able to permissibly enact an ordinance. Dalmat, *supra* note 87, at 102. If a grant of authority existed, the courts construed the grant narrowly under the presumption that local governments lacked any authority to act beyond the statute. *Id.* at 102–03. This prevented local governments from regulating in areas beyond those that states specifically permitted. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2286 (2003) ("Cities' attempts to impose new public burdens, grant public

modern age of vast regulation.[127] The rule has instead given way to home rule laws.[128]

A state typically grants home rule authority through one of two models: the "imperio in imperium" regime,[129] or the "legislative home rule" regime.[130] The imperio regime sets down two basic ground rules when it comes to local authority: First, only those powers which are purely steeped in "local affairs" are allocated to a local government.[131] Second, ordinances which regulate purely local affairs should be granted immunity from state preemption.[132] This state constitutional grant is meant to be broad, and it essentially protects against narrow judicial holdings.[133] Legislative home rule endows local governments with all of the powers that a state legislature has not prohibited the local government from exercising.[134] This endowment accomplishes two goals: First, local governments have as much authority as a state legislature can constitutionally grant to them.[135] Second, if the scope of home rule in a particular state is to be limited at all, it can only be limited through legislative action, not through unilateral judicial opinions.[136] Thus, a court's role is reduced to a simple determination of

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subsidies to certain favored private actors, or regulate private freedom in ways not already sanctioned fell outside the 'usual range' of local affairs. To be lawful, such novel local action would require the clear imprimatur of the state legislature." (footnote omitted)).

127 Dalmat, *supra* note 87, at 103 (describing Dillon's Rule as a restraint to livable wage laws).

128 *See* Michael A. Woods, Comment, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L.J. 515, 521 (2003) ("The modern trend has been toward a broad grant of authority to municipalities and other local government bodies . . . .").

129 "Imperio in imperium" means "government within a government." Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1339 n.13 (2009) (quoting City of St. Louis v. W. Union Tel. Co., 149 U.S. 465, 467–68 (1893)) (translating the phrase and indicating the case believed to have coined it); *see also* Dalmat, *supra* note 87, at 104 ("In California [(a typical example of an imperio power)], home rule cities can 'make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.'" (quoting CAL. CONST. art. XI, § 5(a))).

130 Dalmat, *supra* note 87, at 105–07 ("This model . . . gets the name 'legislative' because local governments in this model have regulatory powers nearly as broad as the state legislature."); *see also generally* Barron, *supra* note 126 (outlining the history and implementation of home rule).

131 Baker & Rodriguez, *supra* note 129, at 1340–41.

132 *Id.* at 1340–43.

133 Dalmat, *supra* note 87, at 104.

134 Baker & Rodriguez, *supra* note 129, at 1338–39.

135 Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1276 (2009); *see also* City of New Orleans v. Bd. of Comm'rs, 640 So. 2d 237, 243 (La. 1994) (under the legislative home rule power, "all delegable legislative powers would be granted to the local government, subject to the legislature's power to deny local government's exercise of authority by state statute").

136 Reynolds, *supra* note 135, at 1276.

whether there has been preemption by the state, and if not, then an ordinance is valid.[137] In modern times, roughly half the states follow the "imperio in imperium" regime, and the other half follow the legislative home rule regime.[138]

Judicial inquiry into the legal validity of a local ordinance is remarkably similar for both imperio regimes and legislative regimes, generally involving a two-step process.[139] The first step involves an evaluation of the scope of a state's home rule law, and an evaluation of whether a questioned ordinance falls within that scope of delegated authority.[140] The second step evaluates whether an ordinance has "nevertheless been preempted by state law."[141] Preemption, or a legislatively implied intent to preempt, gives home rule its contours,[142] and it is very rare that an ordinance survives if a court finds that it has been preempted by state law.[143]

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137 *Id.* at 1276–77. However, there are some courts within states that are under legislative regimes which state that, even if there is no express preemption by the state, if the state legislature obviously implied preemption, then the local ordinance is still invalidated. *See* Casuse v. City of Gallup, 746 P.2d 1103, 1105 (N.M. 1987) (concluding that the state legislature sufficiently expressed an intent to preempt local legislation).

138 There are comprehensive—yet cursory—lists of the ever-changing home rule laws of the fifty states. Baker & Rodriguez, *supra* note 129, app. at 1374; Dalmat, *supra* note 87, app. at 138–39. Observant readers will note minor differences between the two lists in the descriptions of home rule regimes attributed to certain states. *Compare* Baker & Rodriguez, *supra* note 129, app. at 1374 (designating Idaho as an imperio regime), *with* Dalmat, *supra* note 87, app. at 139 (designating Idaho as a legislative regime). These differences are due to the difficulty in defining imperio regimes, legislative regimes, and all of the nuances that each state creates within their home rule laws. *See* Diller, *Intrastate Preemption*, *supra* note 25, at 1127 n.65; s*ee also* Dalmat, *supra* note 87, at 102 n.45 ("These classifications are merely ideal models or types of home rule powers. Any particular state may devolve a range of powers somewhere between these models.").

139 Reynolds, *supra* note 135, at 1276–77.

140 *Id.* at 1276. In imperio regimes, this evaluation distinguishes whether an ordinance can be classified as pertaining to purely local affairs, or as infringing upon statewide affairs. *Id.* Legislative regimes have a more limited role for the judiciary, confining the evaluation to whether a state legislature could delegate the power in question to a local government in the first place. *Id.*

141 *Id.*

142 *See, e.g.*, City of Northglenn v. Ibarra, 62 P.3d 151, 155 (Co. 2003) (en banc) (determining that the ordinance in question concerned statewide affairs and was therefore preempted); Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989) ("The preemption doctrine represents a fundamental limitation on home rule powers."). Preemption is not fused into the concept of scope within the home rule analysis in all states, but even when preemption is not fused, it is always a significant factor, whether in the background of the home rule analysis or in its forefront. *See* Goodell v. Humboldt Cty., 575 N.W.2d 486, 491–93 (Iowa 1998) (discussing Iowa's two-step process: first an inquiry into scope under home rule, followed by an inquiry into preemption).

143 Survival only appears possible through the immunity granted to local ordinances under the imperio regime in circumstances where they govern purely local matters. *See* Barron, *supra* note 126, at 2290 (noting that such immunity is intended for specifically local concerns). An immunity's breadth in different imperio regimes, however, falls across a spectrum. *See, e.g.*, City & Cty. of Denver v. State, 788 P.2d 764, 767 (Colo. 1990) (en banc) ("In matters of local

There are two main forms of preemption: express preemption and implied preemption. Express preemption occurs when a state specifically prohibits the local government from acting within a certain area, either constitutionally or legislatively.[144] In contrast with express preemption's simple prohibition, implied preemption occurs when a legislature demonstrates an implicit desire to preempt a local government from legislating in a field of law.[145]

A state legislature may imply intent to preempt in two typical scenarios: First, legislative intent to regulate an entire field of law may be implied from both the nature of the subject matter at hand, and from the purpose or the scope of a state's legislative scheme.[146] Alternatively, a local ordinance may also be considered inconsistent with state law, and thus invalid, if an ordinance is found to either prohibit conduct that state law allows or if it imposes restrictions beyond those employed by

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concern, both home rule cities and the state may legislate. However, when a home rule ordinance or charter provision and a state statute conflict with respect to a local matter, the home rule provision supersedes the conflicting state provision." (citation omitted)); *cf.* City of La Grande v. Pub. Employes Ret. Bd., 576 P.2d 1204, 1215 (Or. 1978) (indicating that a state's general law will prevail over a contrary local law if the state law was "addressed primarily to substantive social, economic, or other regulatory objectives of the state," unless it proved to be "irreconcilable with the local community's freedom to choose its own political form").

144 *Goodell*, 575 N.W.2d at 492; *see also* Nat'l Ass'n of Tobacco Outlets v. City of N.Y., 27 F. Supp. 3d 415, 427 (S.D.N.Y. 2014). Typically, when a court finds that a state constitution or legislature expressly preempts a local ordinance, an ordinance is conclusively precluded unless a preempting statute is found to be unconstitutional, or a local ordinance has immunity. *See* Dalmat, *supra* note 87, at 107. Some jurisdictions, however, suggest that even express preemption may not be so concrete. *See* James R. Wolf & Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, FLA. B.J., June 2009, at 92 ("While express preemption may not be implied or inferred, whether that express preemption is broad enough to encompass the proposed action may be open to interpretation." (citing Hillsborough Cty. v. Fla. Rest. Ass'n, 603 So. 2d 587, 590 (Fla. Dist. Ct. App. 1992))).

145 *See* Modern Cigarette, Inc. v. Town of Orange, 774 A.2d 969, 977–78 (Conn. 2001) ("[I]n determining whether a local ordinance is preempted by a state statute, we must consider whether the legislature has demonstrated an intent to occupy the entire field of regulation on the matter . . . ."); *Goodell*, 575 N.W.2d at 493 ("Implied preemption may also occur when the legislature has 'cover[ed] a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.'" (alteration in original) (quoting City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983))).

146 Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 922 (N.Y. 1989). At the federal level, this type of preemption is commonly known as "field preemption." *See* Diller, *Intrastate Preemption*, *supra* note 25, at 1141. Local ordinances found to be inconsistent with such a legislative scheme are rendered invalid, and state law reigns supreme. *See Goodell*, 575 N.W.2d at 493; *cf.* Sch. Comm. of York v. Town of York, 626 A.2d 935, 940–41 (Me. 1993) (a local government's "home rule power should not be restricted unless the [local government's] legislation 'prevents the efficient accomplishment of a defined state purpose'" (quoting JOINT STANDING COMM. ON LOCAL & CTY. GOV'T, REPORT ON THE REVISION OF TITLE 30, J. Comm. 112, 2d Reg. Sess., at 11 (Me. 1986), http://lldc.mainelegislature.org/Open/Rpts/kf5300_z99m25_1986.pdf)). However, not every jurisdiction follows the theory of "field preemption." Instead, some jurisdictions mandate that if a legislature wishes to preempt a field of law, it must expressly state as much. *See* Municipality of Anchorage v. Repasky, 34 P.3d 302, 311 (Alaska 2001).

state law.[147] Essentially, a court's examination can be boiled down to a question of whether a local ordinance is inconsistent with a state's legislative intent, after examining the scope and purpose of a state's statute.[148] A local government will need to be mindful of such constraining statutes that are inconsistent with their own innovation, since preemption provides the largest overt barrier to regulation at the local level.

B. *Categories of Authority Granted Under Home Rule Laws*

Within home rule's defined boundaries, there are typical grants of authority that may be delegated to a local government. These grants of authority come in four basic categories: structural, functional, personnel, and fiscal.[149] Structural authority grants a local government the ability to choose its form of governance and charter, as well as how to revise that charter.[150] Functional authority grants a local government the power to enact ordinances and to regulate within specific boundaries set by the state.[151] Personnel authority grants the power to choose employment policies, including wages and work conditions.[152] Fiscal authority grants the ability to generate and spend revenue, including imposing taxes and borrowing funds.[153]

While the broadest discretionary powers are typically allocated to structural and personnel authority, the narrowest are almost always allocated to fiscal powers.[154] A weak fiscal authority is a common trait among both imperio and legislative home rule regimes.[155] Of the few states that do grant a broader array of fiscal authority, such as Illinois, Iowa, and Tennessee, local governments need legislative approval before

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147 Vatore v. Comm'r of Consumer Affairs, 634 N.E.2d 958, 958 (N.Y. 1994); *see also Goodell*, 575 N.W.2d at 493. At the federal level, this is also known as "conflict preemption." *See* Diller, *Intrastate Preemption*, *supra* note 25, at 1141.

148 *See Goodell*, 575 N.W.2d at 493 (acknowledging both forms of preemption as a check on inconsistency). Even at the federal level, the types of implied preemption begin to "blur" in practice, as opposed to their concrete forms in theory. Diller, *Intrastate Preemption*, *supra* note 25, at 1141 (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990)).

149 *Local Government Authority*, NAT'L LEAGUE CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority (last visited Dec. 29, 2015).

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*; *see also* Erin Adele Scharff, Note, *Taxes as Regulatory Tools: An Argument for Expanding New York City's Taxing Authority*, 86 N.Y.U. L. REV. 1556, 1572 (2011).

155 Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL'Y SYMP. 79, 101–02 (1996) (noting that giving local governments the power to act without the ability to generate funds is a "cruel trick").

their revenue generating ordinances may be enacted into law.[156] There are also states, such as New York, which have a lesser form of fiscal authority.[157] Such states mandate that their legislatures maintain a veto power over fiscal ordinances proposed by local governments where that veto power is not already waived by express statutory language.[158] The breadth of these categories, or their corresponding limitations, will be useful in evaluating the types of obesity regulations a local government can rely on, regardless of the theoretical effectiveness of such regulation; if a certain type of regulation can never be enacted by a local government in the first place, it will hardly be effective at controlling obesity.

IV. FORMS AND IMPLEMENTATION OF OBESITY REGULATION UNDER HOME RULE

The forms of obesity regulation available to local governments can be roughly divided into four categories: taxes, subsidies, controls on business practices, and zoning laws.[159] Each of these categories provide different strategies for obesity regulation, and each of these categories have different viabilities and consequences under home rule. This Part delves into all four categories by defining the strengths and drawbacks of each, and seeks to identify generally viable regulatory schemes that local governments may employ within their jurisdictions to combat obesity.

A. *Taxes*

Perhaps the path of least resistance,[160] the most direct way of regulating obesity at the local level is to enact excise taxes[161] directly on

156 Clayton P. Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241, 1245–46 (2009) (noting that these constitutional grants are subject to narrow judicial interpretations, further reducing a local jurisdiction's fiscal authority).

157 *See* Scharff, *supra* note 154, at 1572 (noting that local governments in New York have "limited fiscal authority").

158 *Id.* at 1573–77 (suggesting that this veto power restrains a local government's fiscal authority regardless of its actual use, since a local government will be dissuaded from knowingly implementing a proposal that will likely be denied by the legislature, which is akin to the threat of a filibuster at the federal level).

159 These four regulatory categories are not "official" categories, but are instead general categories of certain groups of strategies that are available to combat obesity, which are presented in this manner so that various strategies may be discussed coherently and comprehensively.

160 For a discussion on why taxes are the path of least resistance, see Morse, *supra* note 106, at 201–03 (noting that taxes, specifically sin taxes, "are generally the easiest kinds of taxes to

food and beverages that are determined to contribute to obesity.[162] Historically used to generate revenue,[163] excise taxes can also be used to increase the price of unhealthy products so that the cost begins to outweigh the "benefits" for consumers.[164] The hope is that consumers will be influenced to purchase less of the unhealthy products, and will instead purchase the untaxed healthier alternatives.[165]

Called Pigovian Taxes, or more commonly "Sin Taxes,"[166] these taxes are meant to dissuade the consumer from engaging in behavior that society finds morally bankrupt, or otherwise unhealthy for the individual.[167] The tax is employed to correct a market force error, which the market cannot correct on its own due to any number of externalities.[168] Familiar examples of such taxes are those imposed on tobacco[169] and alcohol products.[170] While there are certain objections based on the potential negative effects of such taxes,[171] the general

impose," because most voters will not be affected by the them, the revenue from those taxes can be tied to a program related to the item or activity being taxed, and the item or activity to be taxed is disfavored by a majority of voters).

161 An excise tax is "imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." *Excise*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Scharff, *supra* note 154, at 1565 (noting that excise taxes may act as "behavioral controls" through pricing).

162 Scharff, *supra* note 154, at 1588.

163 *See* Morse, *supra* note 106, at 196–98.

164 Scharff, *supra* note 154, at 1565.

165 *Id.* ("Excise taxes can force people to reconsider certain decisions or behaviors that are undesirable to society.").

166 Pigovian Taxes were named after English economist Arthur Pigou, "who first developed the idea of imposing a tax equal to the magnitude of the harm caused by the externality," or uncompensated costs in the market imposed on others. *Id.* at 1564 (noting that pollution and congestion are typical examples of such externalities).

167 *Id.* at 1565–66. Moreover, it has been found that the lower the cost of "unhealthy" foods, such as pizza and sugary beverages, the higher that obesity rates become. *See* Rogan Kersh & Brian Elbel, *Public Policy & Obesity: Overview and Update*, 5 WAKE FOREST J.L. & POL'Y 105, 111 (2015).

168 *See* Cummings, *supra* note 118, at 286–90 (noting that one external cost of sales of sugary beverages is an increase in healthcare costs due to rising obesity rates). For purposes of this Note, market force errors are the increased healthcare costs and lower worker productivity and absenteeism associated with obesity. *See supra* notes 12–18 and accompanying text.

169 *See, e.g.*, N.Y. TAX LAW § 471 (McKinney 2014) (imposing a $4.35 tax on the sale of cigarette packs in New York State); N.Y.C., N.Y., TAX CODE tit. 19, § 4-02 (2014) (imposing a $1.50 tax on the sale of cigarette packs in New York City). These amounts are combined for a total tax of $5.85 per cigarette pack in New York City. *Cigarette and Tobacco Products Tax*, N.Y. ST. DEP'T TAX'N & FIN., http://www.tax.ny.gov/bus/cig/cigidx.htm (last updated Aug. 7, 2015).

170 *See, e.g.*, N.Y. TAX LAW § 424 (McKinney 2014) (imposing excise taxes on a variety of alcoholic beverages in New York State); N.Y.C., N.Y., TAX CODE tit. 19, § 25-02 (2014) (imposing excise taxes on a variety of alcoholic beverages in New York City).

171 *See* Morse, *supra* note 106, at 208–16 (discussing the potential harms caused by sin taxes, with a focus on the disproportionate burdens on the poor and small businesses, and the increased administrative costs); Reiter, *supra* note 110 (discussing the potential general inequity of sin taxes, with a focus on paternalistic and fairness objections).

consensus is that these taxes are effective at reducing undesirable or unhealthy behaviors,[172] especially tobacco use.[173]

Sin taxes can be applied to obesity regulation in a straightforward manner. For example, one proposed policy is an excise tax of 1% per ounce of each sugary beverage purchased.[174] This rate of taxation would increase the average price of the typical twenty-ounce sugary beverage by 20%,[175] which is more than enough for some consumers to be deterred from purchasing the obesogenic drink.[176] Additionally, the revenue from these taxes can be earmarked and used for other weight reduction programs, such as health education or subsidies for healthier alternatives.[177] Thus, this tax would perform a dual regulatory role: it would both dissuade consumers from always making the obesogenic choice, and would provide local governments with the revenue they need to fund other programs.[178]

Despite the benefits and ease of implementing excise taxes, they are unlikely to be a viable tool for local governments. As previously discussed, the fiscal authority of local governments, or their ability to take revenue-raising actions such as increasing taxes, is almost always weak and insufficiently broad under home rule laws.[179] Jurisdictions that do have the authority to raise taxes are also usually subject to state legislative review,[180] which may make local experimentation difficult if state legislatures do not agree with an excise tax.[181]

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172 *See generally* Scharff, *supra* note 154 (arguing that taxes can be beneficial regulatory tools, despite opponents' reservations); *see also* Cummings, *supra* note 118, at 281–86 (describing the behavioral benefits of excise taxes).

173 Christopher Carpenter & Philip J. Cook, *Cigarette Taxes and Youth Smoking: New Evidence from National, State, and Local Youth Risk Behavior Surveys*, 27 J. HEALTH ECON. 287, 295 (2008) (noting an effective reduction in the rate of smoking by high school students).

174 Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599, 1602 (2009).

175 *Id.* at 1602. If the twenty-ounce sugary beverage cost two dollars pre-tax, it would thus cost $2.40 post-tax.

176 *See* Cummings, *supra* note 118, at 280; *see also* Brownell et al., *supra* note 174, at 1602 (noting that as taxes increase, the effects of price elasticity, or the "consumption shifts produced by price," become more drastic).

177 Brownell et al., *supra* note 174, at 1603 (noting potential programs such as "childhood nutrition programs, obesity-prevention programs, or health care for the uninsured"); *see also* discussion *infra* Part IV.B (discussing subsidies as a form of obesity regulation).

178 David Leonhardt, *Sodas a Tempting Tax Target*, N.Y. TIMES (May 19, 2009), http://www.nytimes.com/2009/05/20/business/economy/20leonhardt.html ("Tobacco taxes have become the shining example.").

179 *See* discussion *supra* Part III.B.

180 These jurisdictions include states such as Iowa, Illinois, and Tennessee. *See* discussion *supra* Part III.B.

181 A state legislature may very well disagree, or may be persuaded to disagree, given the soda industry's penchant for aggressive lobbying if talk of an excise tax on their products arises. *See* Alex Lazar, *Food & Beverage*, CTR. FOR RESPONSIVE POL., http://www.opensecrets.org/lobby/background.php?id=N01&year=2013 (last updated Sept. 2015).

Attempts at experimentation by local governments, however, may still be valuable in the long term, and may still lead to increased regulation of this sort overall.[182] It has been argued that regulation on obesity via excises is a worthwhile venture.[183] Furthermore, excise taxes on sugary beverages—regardless of the justification—are not an unheard of notion, and have been enacted for purely revenue raising purposes at the state level in at least one state.[184] A number of states also forego exempting sugary beverages from sales taxes, an exemption which typically *does exist* for regular, nutritional food and beverages.[185] Without an exemption from the sales tax, sugary beverages are subject to the tax and effectively penalized, whereas healthy foods are not. While an excise tax may not currently be a practical option for many local governments, there are still some that can employ this tactic, which means that it is still viable to at least some extent.[186]

B. *Subsidies*

In contrast with raising taxes, local governments can generally spend the funds that they receive, from either the state or from the few revenue raising tools that they possess, however they wish.[187] This spending power is simple to apply to obesity regulation. Generally,

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182 *See* Diller, *Intrastate Preemption*, *supra* note 25, at 1129 (noting that local governments acting, or attempting to experiment, may still have a moving effect on a state legislature that otherwise wishes to maintain the status quo).

183 *See generally* Scharff, *supra* note 154 (arguing for greater fiscal authority for New York City, and quantifying the benefits associated with such authority).

184 *See, e.g.*, W. VA. CODE § 11-19-2 (2015) (earmarking revenue from an excise tax on the sale of bottled sugary drinks for the creation of a medical school).

185 *See* Brownell et al., *supra* note 174, at 1599 (noting thirty-three states with sales taxes on non-exempt sugary drinks, with a mean rate of 5.2%, which other food and beverages are exempt).

186 This is especially true given the public's receptiveness to these types of excise taxes on obesogenic products. *See id.* at 1603–04 ("Support for food taxes rose from 33% in 2001 to 41% in 2003 and then to 54% in 2004. A 2008 poll of New York State residents showed that 52% of respondents support a soda tax; 72% support such a tax if the revenue is used to support programs for the prevention of obesity in children and adults." (footnote omitted)).

187 *See* Scharff, *supra* note 154, at 1575 (noting that cities in New York State have the same spending capacity as the state legislature). However, spending is limited to the funds that local jurisdictions actually receive, as state legislatures and constitutions typically place severe debt-limit caps on local governments. *Id.*; *see also* Briffault, *supra* note 155, at 91–95 (discussing debt limit caps for local governments in New York State); Gillette, *supra* note 156, at 1255–56 ("Virtually every state constitution imposes limits on the amount of debt that its political subdivisions can issue in order to fund capital projects, whether those subdivisions are granted home rule authority or not."). This can prevent local governments from financing large-scale projects with excessive debt. *Id.* at 1256.

healthy alternatives to obesogenic products are more expensive.[188] This can force the poor, who are also the most afflicted by obesity, to purchase inexpensive, unhealthy options.[189] A straightforward, natural response to this issue is to introduce subsidies for healthier options,[190] and level the decisional field, at least in terms of cost comparison. Typically, although not always, the funds for such subsidies come from an excise tax on the disfavored product.[191]

Similar ideas have been employed at the state level with tobacco products. For example, in July 2005, Minnesota enacted a law that imposed an excise tax called the "Health Impact Fee" on the sale of cigarettes.[192] Simultaneously, the proceeds from that law were earmarked towards subsidizing the state's increasing healthcare costs.[193] Minnesota's Supreme Court held that this was a perfectly acceptable means of regulating, and theoretically of reducing tobacco use.[194] Similar ordinances could be enacted at the local level, placing taxes on obesogenic foods and beverages, where the revenue from those taxes would be earmarked for a separate fund and used for public healthcare, health education, or subsidizing healthy alternatives.

The greatest barrier to entry, however, is again weak local fiscal authority. If a local government intends to implement a spending program, then it will need the funds to foster such spending. As home

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188 Mayuree Rao et al., *Do Healthier Foods and Diet Patterns Cost More than Less Healthy Options?: A Systematic Review and Meta-Analysis*, BRIT. MED. J. OPEN, Dec. 2013, at 15, http://bmjopen.bmj.com/content/3/12/e004277.full.pdf+html (noting that a healthier diet costs five hundred and fifty dollars more per person per year).

189 *Id.* Many studies have found that obesity rates tend to rise as "healthier" foods, such as vegetables and fruits, become more expensive. Kersh & Elbel, *supra* note 167, at 111.

190 It is beyond the scope of this Note to precisely define the term "healthier option," since it can be defined in a variety of ways. *See* Mayuree Rao et al., *supra* note 188, at 2 (noting the variety of ways that "healthy vs. unhealthy" may be defined and compared).

191 That said, such earmarking certainly raises public support for the corresponding excise tax. *See* Brownell et al., *supra* note 174, 1603–04. For obesity regulation, this method could work by taking the revenue generated from an excise on sugary beverages, and using the revenue to subsidize healthier alternatives.

192 Act of July 14, 2005, ch. 4, art. 4, § 2, 2005 Minn. 1st Spec. Sess. Law Serv. 2454, 2541–42 (West) (codified at MINN. STAT. § 256.9658 (repealed 2013)). While the statute was later repealed, the $0.75 excise tax that it included was not eliminated, as that tax was folded into the new tax rate on cigarettes, which became $2.83 per pack of twenty, up from the original $0.48 per pack (not including the repealed $0.75 Health Impact Fee). *See* MINN. STAT. § 297F.05 (2014).

193 Act of July 14, 2005, ch. 4, art. 4, § 1, 2005 Minn. Sess. Law Serv. 2454, 2541 (West) (codified at MINN. STAT. § 16A.725 (repealed 2013)). The repeal directed that the revenue raised from the cigarette excises would go directly to the state's general fund, as opposed to making a pit stop in the Health Impact Fund. *See* Nan Madden, *Senate Tax Priorities Start to Come into View*, MINN. BUDGET PROJECT (Apr. 12, 2013), http://minnesotabudgetbites.org/2013/04/12/senate-tax-priorities-start-to-come-into-view/#.VEK7h8mTJNs.

194 State *ex rel.* Humphrey v. Philip Morris USA, Inc., 713 N.W.2d 350, 353 (Minn. 2006). This was true even after a prior settlement agreement in a tobacco lawsuit between Minnesota and a number of major tobacco companies. *Id.*

rule typically does not grant the ability to raise revenue, a necessary requisite for subsidizing healthier alternatives is crippled: funding. Without funding, the spending option's viability is constrained under home rule laws.[195] While some local governments do not have such a restraint on their ability to raise revenue, such jurisdictions are few and far between.[196] Therefore, unless revenue-raising authority is increased in more jurisdictions, subsidies will also be less viable under home rule laws.

C. *Controls on Business Practices*

Given the fiscal limitations under home rule laws, perhaps a local government's greatest form of regulatory control should not be seen as stemming from incentives or disincentives based on funding, but rather based on restraints on business practices.[197] A local government can adopt restraints on business practices through reliance on other forms of authority, such as functional authority,[198] without the need to rely on its weak fiscal authority.[199] This control of business practices still allows a local government to influence consumer choices by constraining the retailer-medium through which consumers make their choices.[200]

Once again, regulations related to tobacco products provide sterling examples of ordinances employing this type of control.

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195 An acute example of this is spending on education. Typically, the amount of funding spent on education directly correlates with the fiscal tax base of the local jurisdiction. Briffault, *supra* note 21, at 422–23 ("Wealthy communities generally spend much more per capita on their schools, but can still tax their residents at much lower rates than poorer communities, which typically tax at high rates but can still manage only relatively low levels of school spending."). This leads directly to the idea that without proper funding, or without an adequate way to raise revenue, spending by local governments is severely hampered, or is otherwise uneven and indirectly preferential. *Id.*

196 *See* discussion *supra* Part III.B.

197 Restraints on business practices are an exceedingly common tool that local governments use for tobacco products. *See* Diller, *Intrastate Preemption*, *supra* note 27, at 1231–34 (noting that cities have regulated the age at which one can purchase cigarettes, the locations where tobacco companies are prohibited from advertising, have restricted pharmacies from selling tobacco, and have generally banned certain flavored tobacco products).

198 Functional authority is the form of home rule which allows a local government to actually adopt regulatory ordinances within their jurisdiction, perhaps making it a local government's greatest tool. *See* discussion *supra* Part III.B.

199 For the regulatory tools discussed in this Section, this Note assumes that administrative or enforcement costs can simply be rolled into existing facets of a local government's infrastructure, and excludes any analysis of the relevant implications on fiscal authority, such as the need to raise revenue or spend funds, and instead maintains focus on these strategies as pure regulatory tools.

200 *See* Diller & Graff, *supra* note 23, at 89 (noting that food retail establishments have an enormous influence on a consumer's nutritional habits).

Ordinances in Providence[201] and then New York City[202] mandated that cigarette retailers cannot employ business practices that reduce the price per cigarette carton beneath a certain minimum price, which is set by the local government.[203] This is effectively accomplished by prohibiting retailers from providing so-called "buy two cartons, get one free" sales,[204] and by prohibiting retailers from accepting coupons which reduce the price of cigarettes.[205]

The reasoning behind this type of regulation is straightforward. For example, New York City sets the minimum price for cigarettes at $10.50 per carton.[206] However, if consumers purchase three cartons of cigarettes, thus triggering the retailer's "buy two cartons, get one free" sale, consumers are effectively paying beneath the set minimum price that the local government has mandated.[207]

Coupons also reduce the retail price of cigarettes below the set minimum. By prohibiting the use of coupons, a local government forces consumers to pay at least the mandated minimum price.[208] As a result, this prevents retailers from counteracting the dissuading effect that high cigarette prices have on consumers.[209]

Both ordinances were challenged in federal courts,[210] on grounds that they violated the Constitution's First Amendment right to freedom

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201 PROVIDENCE, R.I., CODE OF ORDINANCES, ch. 14, art. XV, § 14-303 (2012).

202 N.Y.C., N.Y., ADMINISTRATIVE CODE tit. 17, ch. 7, § 17-176.1 (2014). The fact that Providence enacted its ordinance before New York City is a notable twist given that it is typically New York City that pioneers break-through ordinances. *See supra* note 88.

203 ADMINISTRATIVE § 17-176.1(d) (setting New York City's minimum price at $10.50). The Providence ordinance does not expressly state a price minimum, but instead restricts the price at which cigarettes may be sold to the retailer's "listed or non-discounted price." CODE OF ORDINANCES §§ 14-300, -303.

204 *Id.* § 14-303(4).

205 *Id.* § 14-303(2). New York City's ordinance is not materially different from the Providence ordinance. *See* ADMINISTRATIVE § 17-176.1(b), (c).

206 *Id.* § 17-176.1(d).

207 Consumers would be paying $21 for three cartons in a "buy two cartons, get one free" sale regime, instead of the $31.50 consumers would normally pay. For the mathematically inclined, that is a cost savings of $3.50 per carton of cigarettes, after taxes. That method of price reduction would completely defeat New York City's excise tax, *see* N.Y.C., N.Y., TAX CODE tit. 19, § 4-02 (2014), and would wipe out almost two-thirds of New York State's excise tax. *See* N.Y. TAX LAW § 471(1) (McKinney 2014).

208 Providence's statute, which does not have a price minimum, accomplishes the same effect by mandating that cigarettes must be sold for the retailer's listed or non-discounted price. CODE OF ORDINANCES §§ 14-300, -303.

209 This also prevents retailers from inappropriately telling consumers that they are "getting a deal," and prevents such "getting a deal" mentality outright. *See* Nat'l Ass'n of Tobacco Outlets v. City of N.Y., 27 F. Supp. 3d 415, 421–22 (S.D.N.Y. 2014).

210 The Providence ordinance went on to be decided by the First Circuit Court of Appeals. Nat'l Ass'n of Tobacco Outlets v. City of Providence, 731 F.3d 71 (1st Cir. 2013). The Southern District of New York subsequently relied on the First Circuit's opinion in order to uphold New York City's substantively similar ordinance. *Nat'l Ass'n of Tobacco Outlets*, 27 F. Supp. 3d at 421, 423.

of speech,[211] and that they were also directly preempted by the Federal Cigarette Advertising and Labeling Act.[212] However, the ordinances were upheld on both grounds.[213] The First Circuit relied on *44 Liquormart v. Rhode Island*[214] for the First Amendment argument, and determined that Providence's ordinance did not violate the Constitution because it only regulated the pricing of lawful transactions, and not the retailer's ability to actually display or advertise the pricing of cigarettes.[215] The preemption argument also failed because the court determined that the ordinance was content-neutral,[216] and because the ordinance regulated the "manner" of pricing.[217] The District Court for the Southern District of New York also followed these determinations when upholding a similar New York City ordinance.[218]

At least in terms of constitutionality, the precedent set by these two ordinances suggests that regulating the price of certain food and beverage products, or the business practices of certain food service establishments, may indeed be a permissible way to regulate obesity. To continue the soda example, a local government could adopt an ordinance that is similar in effect to the ones mentioned above. Such an ordinance could prohibit regulated entities from accepting coupons, or could prevent the use of discounted sales regimes, such as the "buy two get one free" sale, which would otherwise reduce the price of soda below

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211 The plaintiffs asserted that the prohibitions unconstitutionally restrained their ability to display pricing information about lawful transactions, which is protected commercial speech under the First Amendment. *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 75; *Nat'l Ass'n of Tobacco Outlets*, 27 F. Supp. 3d at 417; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–64 (1976) (ruling that pricing information is protected speech).

212 *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 75 (citing 15 U.S.C. § 1334(b) (2012)); *Nat'l Ass'n of Tobacco Outlets*, 27 F. Supp. 3d at 417, 424 (citing § 1334(b)).

213 *Id.* at 85; *Nat'l Ass'n of Tobacco Outlets*, 27 F. Supp. 3d at 423, 426.

214 517 U.S. 484 (1996).

215 *Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 77–78. The court further determined that "'the provision only precludes licensed tobacco retailers from *offering* what the Ordinance explicitly forbids them to do,' and that offers to engage in banned activity may be 'freely regulated by the government.'" *Id.* at 78 (quoting Nat'l Ass'n of Tobacco Outlets v. City of Providence, C.A. No. 12-96-ML, 2012 WL 6128707 (D.R.I. Dec. 10, 2012)). The court relied upon the idea that "[t]he government may ban . . . commercial speech related to illegal activity." *Id.* (alterations in original) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980)).

216 *Id.* at 81 ("Here, . . . the Price Ordinance merely regulates certain types of price discounting and offers to engage in such price discounting. It does not regulate "content" relating to health claims or warnings.").

217 *Id.* ("[There is] no material difference between price regulations generally and the regulation of multi-pack discounts and coupons. Price regulations, including regulations of price offers, are regulations concerning the 'manner' of promotion, and are not preempted."). Preemption exceptions also exist under section 1334 for ordinances that only regulate the time or place at which cigarettes can be purchased. *Id.* at 79–80 (citing § 1334(c)).

218 *Nat'l Ass'n of Tobacco Outlets*, 27 F. Supp. 3d at 423–24, 426–27.

a mandated minimum price or below the normal retail price of soda. The ordinance could perhaps even prevent regulated entities from providing "free refills," as that would also reduce the price of soda below the minimum.[219] These types of restrictions would likely not be objectionable, at least not beyond the standard public discontent towards price hikes, as soda is already seen as having limited nutritional value.[220]

The preceding constitutional analysis did not, however, take into account potential preemption concerns at the state level. In both *National Association of Tobacco Outlets* cases, state preemption claims were a prevalent portion of the petitioners' argument.[221] With any regulation of business practices related to food and beverage products, a local government will have to be especially mindful of state statutes that regulate retail food establishments. States typically base such statutes on the guidelines provided by the Food and Drug Administration's model retail food code, which applies to both restaurants and grocery stores.[222]

Nevertheless, preemption arguments are unlikely to be successful because the retail food statutes and the proposed regulations on business practices regulate in different contexts.[223] Whereas state retail food codes are typically focused on ensuring minimum food safety standards,[224] the local ordinances proposed here aim to create disincentives for consuming obesogenic or otherwise unhealthy foods.[225] These two regulatory "fields" do not come into conflict, so preemption at the state level is avoided.[226]

In addition to the regulation on business practices discussed above, there are other creative ways that a local government may regulate business practices related to obesogenic food and beverage products. For example, local governments have enacted ordinances setting

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219 An interesting note is that the Portion Cap Rule did not prohibit free refills of sugary beverages, one of the rule's primary criticisms. N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.53 (2009). This loophole could have been created through negligence on the part of the Board of Health, or more likely, because the Board of Health had limited authority as an administrative agency to act to the same extent that a local government's legislature could act. *See* discussion *supra* Part I.B.

220 *See* Bd. of Health, *supra* note 34. The nutritional value, or lack thereof, of soda aside, there are many who already consider soda the next tobacco, with the soda industry perhaps ready to take the same path into a myriad of health regulations and taxes, much like the tobacco industry before it. *See* Bittman, *supra* note 7.

221 *See Nat'l Ass'n of Tobacco Outlets*, 731 F.3d at 83–85; *Nat'l Ass'n of Tobacco Outlets*, 27 F. Supp. 3d at 425–33.

222 Diller & Graff, *supra* note 23, at 92.

223 *Id.*

224 *Id.*

225 *Id.* (noting that a similar idea may be applied to regulations that instead "promote access to healthful food").

226 Indeed, it is "[o]nly when the 'field' regulated by a state food code is defined extremely broadly is a field preemption argument likely to prevail." *Id.*

nutrition standards for children's meals that include toys,[227] prohibiting mobile food vendors from selling anything other than fresh fruits and vegetables within designated nutritionally destitute areas,[228] and banning the use of trans fats within food service establishments.[229] Ordinances which require chain food service establishments to post the calorie counts of menu items also fall into this wide category.[230] Given the myriad of ways that a local government's legislature can creatively regulate business practices related to obesogenic products under the grant of functional authority, controls on business are likely to be a local government's best regulator tool in its toolbox.

D. *Zoning Regulations*

Another major tool that local governments can use to regulate obesity is the ability to set zoning restrictions, which enables a local government to determine where a business or a particular type of transaction may or may not occur.[231] While zoning laws can arguably be considered as part of the regulating business practices category,[232] the ability to determine where a business may practice or perform the sale of a certain type of good is a powerful enough authority to warrant consideration within its own separate category. The two general strategies for regulating obesity through zoning include reducing the concentration of obesogenic-related businesses or business practices, and increasing the availability of property for use by healthy alternatives in areas where the public has limited access to healthy foods.

For the first strategy, the two main formats that local governments may make use of are exclusionary zoning and inverse zoning. Exclusionary zoning is the process through which a local government excludes a particular type of business from a district.[233] Two examples of exclusionary zoning are Detroit's ban on fast food restaurants within 500 feet of schools,[234] and Concord, Massachusetts's law directly

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227 SANTA CLARA COUNTY, CAL., HEALTH & WELFARE CODE div. A18, ch. XXII, § A18-352 (2010); *see also* S.F., CAL., HEALTH CODE art. 8, § 471.4 (2011).

228 N.Y.C., N.Y., ADMIN. CODE tit. 17, §§ 17-306(s), -307(b)(4) (2014) (noting that carts which sell only fruits and vegetables full-time are called "Green Carts").

229 *See* N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.08 (2006); *supra* text accompanying notes 89, 111; *see also* PHILA, PA., HEALTH CODE tit. 6, § 6-307 (2007).

230 *See* HEALTH & MENTAL HYG. CODE § 81.50.

231 Zoning is defined as the "division of a region . . . into separate districts with different regulations within the districts for land use, building size, and the like." *Zoning*, BLACK'S LAW DICTIONARY (10th ed. 2014).

232 *See supra* Part IV.C.

233 *Exclusionary Zoning*, BLACK'S LAW DICTIONARY (10th ed. 2014).

234 *See* DETROIT, MICH., CITY CODE ch. 61, §§ 61-12-91, -228 (2011).

banning all drive-in or fast food restaurants.[235] Both of these ordinances act to completely exclude fast food restaurants from designated zones, and in Detroit, the ordinance acts to prevent access—or at least readily available access—to fast food restaurants to a certain target group: children.[236] The rationale underlying the ordinances is that if a business cannot operate within an area that is near the consumer, then the consumer consequently will have more difficulty purchasing that business's goods.

Alternatively, inverse zoning operates to disperse particular types of business uses of property.[237] One example would be the zoning regime imposed in Westwood Village, California, which restricts the density of fast food restaurants to one restaurant every 400 feet along a particular street.[238] Density may also be restrained by forcing fast food restaurants to share buildings with a non-fast food establishment or business.[239] Much like exclusionary zoning, inverse zoning acts to make it more difficult for consumers to have readily available access to fast food restaurants, in the hopes that consumers will choose healthier options instead. This type of zoning is vitally important in so-called "food deserts,"[240] where there is a plethora of obesogenic restaurants, but a paucity of healthy and inexpensive alternatives.[241] If the number of fast food restaurants is restrained, then it will be easier for healthier

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235 CONCORD, MASS., ZONING BYLAW § 4.7.1 (2014).

236 *See* CITY CODE § 61-12-91. Concord's ordinance wipes out the option for the entire city. *See* ZONING BYLAW § 4.7.1.

237 *Inverse Zoning*, BLACK'S LAW DICTIONARY (10th ed. 2014).

238 Westwood Village, Cal., Ordinance 164,305, § 5(B)(4) (Dec. 14, 1988).

239 An example of a density restriction such as this was imposed by the city of Bainbridge Island:

> Any formula take-out food restaurant may not exceed 4,000 square feet and must be in a building that is shared with at least one other business that is not a formula take-out food restaurant. Only one formula take-out food restaurant is permitted per parcel, lot or tract on which all or a portion of a building is located. No drive-through facilities are allowed.

BAINBRIDGE ISLAND, WASH., MUN. CODE tit. 18, ch. 18.09, § 18.09.030(D)(2)(a) (2015). The ordinance also combines multiple types of density control. Not only is a fast food restaurant (called a formula restaurant) tied to a non-fast food restaurant, but there may not be more than one fast food restaurant per "parcel, lot or tract on which all or a portion of a building is located." *Id.*

240 "Food deserts" are "areas that lack full-service supermarkets and restaurants and are saturated with fast-food restaurants and liquor stores." Diller & Graff, *supra* note 23, at 89.

241 There is an argument to be made that locations where there is easy access to an overwhelmingly large array of unhealthy options or sub-par supermarkets should instead be designated by the term "food swamp." Geoffery Mullings, *The Food Desert You Know Nothing About*, BLINKER (July 3, 2013), http://theblinker.com/mainpage/2013/07/03/the-food-desert-you-know-nothing-about (noting that food swamps affect primarily poor, minority communities within urban areas).

alternatives to take root and to generate business from consumers within the regulated area.

These exclusionary and inverse zoning ordinances are likely to be most effective if used in conjunction with the second zoning strategy: increasing access to healthier alternatives.[242] One form of this strategy often used is incentive zoning, which relaxes zoning restrictions in certain areas so long as developers "provide certain public benefits" in those areas.[243] One prime example is a zoning regulation in Fresno, California, which allows designated "farmer's markets"[244] to be built in residential areas where commercial activity is otherwise prohibited.[245] Similarly, New York City grants incentives for the development of full-service grocery stores by reducing zoning requirements or exempting such developers altogether.[246] These ordinances are designed to increase access to healthier options in areas that do not have access to full-service grocery stores, particularly in poor residential communities.[247] When used in conjunction with exclusionary and inverse zoning, these ordinances incentivize the development of businesses that offer healthier alternatives while simultaneously restraining or eliminating the growth of obesogenic businesses.

Perhaps the most appealing characteristics of zoning ordinances is their ease of implementation and the typically large amount of zoning authority delegated to local governments by states.[248] Generally, state legislatures rarely preempt a field in the area of zoning regulation, leaving local governments free to zone as they see fit.[249] Furthermore, local governments are given a vast amount of authority to zone, so long as the purpose is for protecting the public's general health, safety, and

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242 This may be especially true considering the relative prevalence of the "food swamp" phenomenon. *See id.*

243 *Incentive Zoning*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that this is also known as "bonus zoning").

244 At least seventy-five percent of the products sold at such farmer's markets must be agricultural products, while the remaining twenty-five percent may be processed foods such as "dried fruit, cheese, or bread." FRESNO, CAL., MUN. CODE ch. 12, § 12-105(F)(4.5) (2008).

245 *See id.* §§ 12-211, -211.3(E).

246 N.Y.C., N.Y., Zoning Resolution, art. VI, ch. 3, §§ 63-01 to -60 (Oct. 9, 2013).

247 *Id.* § 63-00 ("[The] general goals include, among others, the following purposes: (a) encourage a healthy lifestyle by facilitating the development of FRESH food stores that sell a healthy selection of food products; (b) provide greater incentives for FRESH food stores to locate in neighborhoods underserved by such establishments; (c) encourage FRESH food stores to locate in locations that are easily accessible to nearby residents; and (d) strengthen the economic base of the City, conserve the value of land and buildings, and protect the City's tax revenues.").

248 Allyson C. Spacht, Note, *The Zoning Diet: Using Restrictive Zoning to Shrink American Waistlines*, 85 NOTRE DAME L. REV. 391, 402 (2009) ("Traditionally, almost all of the police power [(in the context of zoning)] was delegated to local governments."). Recently, a few states have taken back some zoning authority from local governments in certain areas of land use. *Id.*

249 *See* Diller & Graff, *supra* note 23, at 90.

welfare.[250] It is simple to relate zoning regulation of fast food establishments back to those general guidelines of promoting public health and welfare, and as such, local zoning in this field should almost always survive constitutional scrutiny.[251] Given that preemption is unlikely to be a real threat to local governments when enacting obesity-related regulations within this field,[252] zoning laws are a potent tool with which local governments can combat obesity.

V. PROPOSAL: LOCAL GOVERNMENTS SHOULD ACT UNDER HOME RULE

Local governments should use the full force of their authority under home rule to combat the threat that obesity poses. As shown, local governments have experimented with a range of ordinances to identify effective strategies for obesity-related regulation.[253] In that sense, local governments have succeeded in acting as legal laboratories for obesity-related regulation where states have failed, and have thus fulfilled one primary rationale of federalism.[254] These cities and counties have developed an array of ordinances to mitigate the obesity epidemic—but more innovation and experimentation can be achieved.

Utilizing the authority granted to them by home rule, local governments have made great strides in decreasing the availability of obesogenic products by regulating business practices[255] and enacting zoning ordinances,[256] and it is highly unlikely that a local government's authority to regulate in these fields can be seriously limited.[257] Both of these tools provide local governments with the power to target specific obesogenic-related businesses or business practices and to control how those obesogenic products are handled. This gives local governments wide latitude in obesity-related regulation. However, it also opens the door to a prominent counterargument and perhaps the greatest

250 *See* Spacht, *supra* note 248, at 401–02 ("Public land use controls, such as zoning, are exercises of states' police power. Under the police power, states [(and the local governments they have delegated powers to)] have the authority to enact laws to promote the health, safety, morals, and public welfare of the community." (footnote omitted)).

251 *See id.* at 408–14 (outlining the constitutionality of zoning laws as applied to fast food restaurants, and arguing that they should almost assuredly survive any constitutional attack).

252 *Id.*

253 *See generally* discussion *supra* Part IV.

254 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

255 *See* sources cited *supra* notes 227–30.

256 *See* discussion *supra* Part IV.D.

257 This can certainly be inferred from the courts' preferable treatment of city ordinances that restrict business practices related to unhealthy products. *See, e.g.*, Nat'l Ass'n of Tobacco Outlets v. City of Providence, 731 F.3d 71 (1st Cir. 2013). The same can be said for the treatment of zoning ordinances. *See* Spacht, *supra* note 248, at 408–14 (noting that zoning ordinances, as applied to fast food restaurants, should survive any constitutional attack).

weakness for these tools. Because these tools directly control the availability of obesogenic products, they have an obvious, paternalistic feel.[258] If leveraged inappropriately or haphazardly,[259] local governments will not have the support of the public making it more difficult to enact such regulations. This limitation mandates that local governments use these tools in studied and precise ways to reduce obesity or reduce the availability of obesogenic products, without wasting political capital on haphazard attempts.

Taxes and subsidies present another facet of home rule control, with simplified implementation and enforcement in comparison to zoning laws and regulation on business practices. These tools enable local governments to influence consumers through pricing, and then to use any revenue generated to either reduce the price of healthier alternatives or to fund educational programs. However, local governments will have great difficulty in taxing and spending in this manner, as their fiscal authority remains hampered in many states by existing home rule laws.

As such, states should grant increased fiscal authority to local governments, at least in the preliminary context of regulation, if not for the express purpose of raising revenue. If states are wary of their local governments, such fiscal authority can be modeled off of New York's home rule, within which the state's legislature always maintains a veto power over any particular local tax.[260] This will enable local governments to experiment with tax-based regulation, and will also give local governments a tool with which to generate sufficient funds to experiment with their spending powers. Increased fiscal authority in a large number of local jurisdictions, alongside these local governments' existing authority, will help develop an expansive network of regulatory laboratories all across the country, each acting with the express purpose of regulating a palpable threat to American health and productivity.

If this proposal is taken to its fullest extent, one can visualize obesity-related regulation, such as New York City's Portion Cap Rule, as envisioned and implemented under home rule laws, instead of as unsuccessfully implemented under administrative agency authority. For example, local governments could set a minimum price tag on the sale of sugary beverages.[261] This would prevent businesses from discounting the price of sugary beverages within a local government's entire jurisdiction,[262] and would also prevent the "free refills" dilemma that the

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258 *See* discussion *supra* Part II.B.

259 For example, when regulations contain a large number of loopholes, as existed within New York City's Portion Cap Rule. *See* Koba, *supra* note 4.

260 *See* discussion *supra* Part III.B.

261 *See* discussion *supra* Part IV.C.

262 Perhaps this would avoid some pitfalls that led to criticism of the Portion Cap Rule—that

original Portion Cap Rule failed to resolve.[263] Alternatively, local governments could ban the sale of certain sugary beverages outright,[264] or perhaps could limit the direct ban to meals that included children's toys.[265]

Exclusionary zoning may also be used. Local governments could mandate that business entities that sell sugary beverages—regardless of the entities' main form of revenue—be classified as "sugary beverage sellers."[266] Once that classification is established, local governments could zone in such a way as to exclude designated "sugary beverage sellers" from conducting business within 1,000 feet of a school.[267] To avoid such a designation, it is conceivable that businesses at risk of being designated "sugary beverage sellers" in such newly zoned locations would simply stop selling sugary beverages in order to maintain their business operations.

Finally, even considering their weak fiscal authority, some local governments still have the power to enact ordinances through taxes and subsidies.[268] For these local governments, sugary beverages could be taxed in the same manner as tobacco products, with the size of the tax either equal to a specific dollar amount that is preset by the local government,[269] or calculated through an equation based on a percentage related to the number of fluid ounces sold in a container.[270] Conversely, local governments may also subsidize designated healthier alternatives,

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it was not uniformly in effect within New York City, and that it only applied to regulated entities. *See* Koba, *supra* note 4. Indeed, to get around the rule, consumers could have simply shopped at any common retailer, which are not regulated by the Board of Health. *Id.*

263 *Id.*; *see also* N.Y.C., N.Y., HEALTH & MENTAL HYG. CODE tit. 24, § 81.53 (2009) (containing no language at all that banned free refills).

264 Any total ban is unlikely to be popular with consumers, and would be an unfortunate first step for local governments to take when enacting obesity-related regulation. *See* Grynbaum, *supra* note 38.

265 This would be similar to Santa Clara County's ordinance, which regulates the nutritional value of children's meals that come with a toy. SANTA CLARA COUNTY, CAL., HEALTH & WELFARE CODE div. A18, ch. XXII, § A18–352 (2010). Instead of just regulating the nutritional value of such meals, the local government could also ban the sale of sugary drinks with such meals.

266 For example, an entity's main form of revenue could be fast food sales, hardware sales, convenience store sales, etc. All of these businesses would fall under the umbrella of "sugary beverage sellers," if such businesses sold any designated sugary beverages.

267 This is similar to pre-existing ordinances, which ban the operation of fast food restaurants within a certain distance from schools. *See* DETROIT, MICH., MUN. CODE §§ 61-12-91, -228 (2011). This type of exclusionary zoning could be expanded to the entire jurisdiction of a local government as well, if desired. *See* CONCORD, MASS., ZONING BYLAW § 4.7.1 (2014).

268 *See* discussion *supra* Part III.B.

269 This is similar to New York City's tax of $1.50 per cigarette carton. N.Y.C., N.Y., TAX CODE tit. 19, § 4-02 (2014); *see also* W. VA. CODE § 11-19-2 (2015) (imposing a state tax on the sale of bottled soft drinks).

270 For example, sugary beverages could be taxed at a rate of 1% per fluid ounce. *See* Brownell et al., *supra* note 174, at 1602; *see also supra* notes 175–78 and accompanying text.

or craft spending programs designed to educate the public on health awareness. Funding for these subsidies can come from pre-existing revenue streams, or from new taxes. Indeed, in many respects, the synergy gained between the revenue raised through regulatory taxes, and the subsequent spending of that revenue on associated regulatory subsidies and other spending programs, enables taxes and subsidies to be a very powerful combination.[271]

CONCLUSION

Obesity remains a threat to Americans throughout the entire country. Given the increased attention from the media and greater public awareness, governments at all levels will soon feel pressure to address obesity's threat, if only to quell the clamor for answers from the public.[272] Local governments and their legislatures have heard the call to action. Local governments have already enacted a variety of ordinances to combat obesity, using their vast functional authority and zoning authority. As obesity rates can be affected by many factors, local governments should continue to innovate and experiment with new types of ordinances and strategies. They should use the full force of their home rule authority, and where that authority is limited, such as with their fiscal authority, they should attempt to use it to its limit in order to experiment with new tools to combat the serious problem of obesity. If many local governments join this innovation wave, each with a high degree of authority, then it is only a matter of time before future ordinances emulate the success of New York City's mandate for calorie counts on menus, and solutions for obesity are adopted nationally for all Americans.

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271 *See* discussion *supra* Part IV.B.

272 *Public Agrees on Obesity's Impact, Not Government's Role*, PEW RES. CTR. (Nov. 12, 2013), http://www.people-press.org/2013/11/12/public-agrees-on-obesitys-impact-not-governments-role ("Most Americans (69%) see obesity as a very serious health problem.").