

der too close. With strong empirical research, it should be possible to identify which marketing strategies place people at risk or undermine their health, as well as to quantify the magnitude of risk. This kind of knowledge should be applied in informing regulations that could govern the design and placement of foods in retail outlets to protect consumers.

We need to test new approaches to risk reduction that do not place additional cognitive demands on the population, such as limiting the types of foods

that can be displayed in prominent end-of-aisle locations and restricting foods associated with chronic diseases to locations that require a deliberate search to find. Harnessing marketing research to control obesity could help millions of people who desperately want to reduce their risks of chronic diseases.

Disclosure forms provided by the authors are available with the full text of this article at [NEJM.org](http://NEJM.org).

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DOI: 10.1056/NEJMp1209443

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## Portion Sizes and Beyond — Government's Legal Authority to Regulate Food-Industry Practices

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The importance of obesity as a public health problem has led to a number of proposed policy solutions, some of which — such as taxes on sugar-sweetened beverages — are highly controversial and have been opposed strongly by the food industry. One such measure is the proposal by the New York City Department of Health, supported by Mayor Michael Bloomberg, to prohibit sugar-sweetened beverages from being sold in containers larger than 16 oz by restaurants, movie theaters, and mobile food vendors (venues where the health department has jurisdiction).

This action and others that affect business practices of the food industry are likely to be challenged in the courts in cases that raise an important question. Does government have the legal authority to regulate the conduct of the food industry in this way? This question of authority applies to many policies that might be con-

sidered in the future — policies regarding, for example, the placement of items in supermarkets, children's access to certain foods, and the banning of harmful products (e.g., caffeinated alcohol drinks).

Whether government belongs in this arena is a political question. Whether government has the authority to be involved is a legal matter that should be considered carefully, given what is at stake for both public health and business interests.

States and their political subdivisions, such as cities, as distinct from the federal government, have the power to enact laws to protect the public health, safety, and welfare and may use this “police power” to regulate the sale of products that have public health effects.<sup>1</sup> Still, the question remains how broadly such power can be applied to the practices of food sellers.

City and state governments,

generally through health departments, have clear authority over matters concerning the short-term consequences of food intake. Mechanisms are in place for preventing or swiftly containing problems regarding food safety. Of more recent concern are the long-term consequences of food intake related to chronic health problems such as obesity, diabetes, heart disease, and cancer. Beginning with the ban on trans fats in restaurants in New York City and the requirement that chain restaurants post calorie counts for their menu items, cities and states have taken to considering the food environment as a chief way of protecting the long-term health of citizens.

Regulations that affect “ordinary commercial transactions” (such as the sale of a product) are presumed to be constitutional if they have a rational basis and if the government body enacting them has the appropriate knowl-

edge and experience to do so.<sup>2</sup> In the case of New York City's portion-size restrictions, for example, the health department is an expert public health body that reviewed relevant scientific evidence on the health hazards associated with consumption of sugar-sweetened beverages and the effect of portion sizes on consumption patterns. The proposed policy thus has a rational basis and is related to government's legitimate interests in protecting citizens' health and reducing the financial burden associated with poor nutrition.

Historically, industries subject to commercial regulations have challenged government in court by drawing on five different legal theories. First, industry may claim that an act by one level of government is preempted by laws from a higher level of government. The restaurant industry, for instance, sued New York City over its menu-labeling ordinance, arguing that the city could not act because federal food-labeling law preempted similar laws enacted by cities and states. The courts, however, ruled in favor of the city, and the menu-labeling ordinance was enacted. We are not aware of federal or state laws that would be preemptive in the case of portion-size restrictions or similar actions that might discourage the purchase of foods that contribute to disease.

A second type of challenge from industry is the claim that its First Amendment right to commercial speech has been violated. But this argument is not likely to prevail in cases of regulations of business practices that are distinct from speech. In the case of regulating portion sizes, no component of speech is being regulated.

A third potential argument is

that the ordinance violates the Dormant Commerce Clause (a legal doctrine inferred from the Constitution's Commerce Clause), which provides Congress with the power to regulate commerce among the states and denies states the power to unjustifiably discriminate against or burden interstate commerce. In order for industry to prevail on such a claim, a court would need to determine that government actions result in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."<sup>3</sup> Because portion-size restrictions or similar actions would apply to foods or beverages irrespective of whether they are produced within or outside a state, this portion of the test is satisfied. A court would next look at whether any incidental effect on commerce is "clearly excessive in relation to the putative local benefits."<sup>4</sup> The Supreme Court has found that "the inconvenience of having to conform to different packaging" was not excessive when there were local benefits to the regulation.<sup>4</sup> The Commerce Clause protects only the "interstate market" and not particular interstate businesses from regulations that affect or burden the current structure of the retail market<sup>4</sup> — and thus should be satisfied.

Fourth, the industry might allege that an ordinance violates the Equal Protection Clause because it distinguishes between one category of beverages and other products (e.g., sugar-sweetened beverages vs. food, for example) and between different types of businesses that sell them (e.g., restaurants vs. grocery stores). The courts have found that commercial regulations affecting the sale

of a product need only be rationally related to a legitimate government interest. To pass this test, the governing body need not "strike at all evils at the same time or in the same way."<sup>4</sup> For example, the Supreme Court upheld a state ban on plastic but not paperboard milk containers as a rational distinction for addressing environmental hazards. Laws do not violate the Constitution unless the "classification" is unreasonably conceived by the governing body.<sup>4</sup> Government actions, therefore, need not apply to all products or locations where products are sold.

A final possible challenge might be that the ordinance violates the substantive due-process rights of consumers by subjecting consumers to an arbitrary regulation. Substantive due process is customarily implicated when government deprives individuals of fundamental rights or liberty interests, neither of which would include the ability to engage in actions such as purchasing a large cup.<sup>5</sup> Public health actions based on sound scientific evidence and performed in domains in which government has a legitimate interest are likely to be deemed rational and not arbitrary.

A future concern is the possibility that industry will appeal to state politicians to pass laws forbidding their political subdivisions and local health departments from addressing these sorts of issues. In fact, when New York City and other cities began passing menu-labeling regulations, the state legislatures in Georgia and Utah passed laws that stifled the ability of cities and counties to act.

Governments are now considering a number of actions regarding business practices related to

food — for example, prohibiting the sale of sugar-sweetened beverages in municipal buildings by cities such as Boston, stopping the sales of sugar-sweetened beverages and low-nutrition snack foods by schools, taxing sugar-sweetened beverages, and imposing New York's portion-size initiative. Governments have the authority to act

in this arena, and though industry may launch legal challenges, there does not appear to be a sound basis for that opposition to prevail.

Disclosure forms provided by the authors are available with the full text of this article at NEJM.org.

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This article was published on September 21, 2012, at NEJM.org.

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DOI: 10.1056/NEJMp1208167

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