

necessarily volunteer to comply — state and local menu-labeling regulations remain important.⁵

State and local governments now have a substantial opportunity to craft innovative menu-labeling regulations that build on the current evidence base. For example, a city or town could pass a menu-labeling ordinance requiring restaurants to list their food options starting with their lowest-calorie items. Such a rearrangement may help consumers to select more healthful and lower-calorie foods. Localities might also require restaurants to post calorie information in the form of physical-activity equivalents along with or instead of absolute calories. State and local governments that are hesitant to pass menu-labeling legislation might begin by encouraging voluntary participation in these and other innovative alternatives.

Despite the regulatory opportunity provided by the ACA, state and local governments must remain mindful of the broader legal environment as they draft menu-labeling regulations. A handful

of states (e.g., Georgia and Utah) have enacted laws that prohibit localities from imposing such regulations; such laws may be passed for a variety of reasons, including as a response to local menu-labeling initiatives. The restaurant industry has argued that such preemptive laws protect restaurants from facing the costs of compliance with a patchwork of potentially inconsistent local regulations. As they anticipate such concerns, localities should be mindful of the costs associated with menu labeling and — to encourage participation in innovative programs — perhaps provide financial support or technical assistance for restaurants' calculating of nutritional content and reprinting of menus and menu boards. State and local governments should also consider the scope of the First Amendment, which protects commercial speech and may limit the language that can be mandated in menu-labeling regulations.

Pilot studies will be needed to test novel approaches, but the emerging evidence base indicates

that innovative calorie labeling on menus has the potential to be more effective than the status quo. Local governments should take advantage of this opportunity. The success of menu labeling will depend greatly on its implementation, ideally at the federal, state, and local levels.

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Limiting “Sugary Drinks” to Reduce Obesity — Who Decides?

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When a judge struck down the New York City Board of Health's partial ban on selling “sugary drinks” in containers of more than 16 fluid ounces, the reaction was swift. The Portion Cap Rule was widely viewed as a signature accomplishment of Mayor Michael Bloomberg's third term as the “public health mayor,” and he vowed to appeal, saying, “I've got to defend my children, and yours, and do what's

right to save lives. Obesity kills.”¹ But the question before the judge was not about the health risks posed by obesity or even the relationship between obesity and access to large cups of sugary drinks; it was whether the city's Board of Health (part of the New York City Department of Health and Mental Hygiene) had the legal authority to restrict the serving size of such drinks.

Written in the mayor's office,

the Portion Cap Rule was adopted by the board on an 8-to-0 vote with one abstention in September 2012 and was almost immediately challenged in court. Judge Milton A. Tingling heard the case and wrote a 36-page opinion striking down the rule.² There was no dispute that obesity is a serious problem; the only issue considered by the judge was whether the board has the power to adopt the rule. The substance of the

rule is that "A food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces." A "sugary drink" is defined as a nonalcoholic drink that is "sweetened by the manufacturer or establishment with sugar or another caloric sweetener; has greater than 25 calories per 8 fluid ounces of beverage; and does not contain more than 50 percent of milk . . . by volume."

Legislatures make policy, and administrative agencies carry out the policy made by the legislature. The New York City Board of Health is an administrative agency, which can do only what it is authorized to do by legislation. The threshold question was whether the board exceeded its authority "and impermissibly trespassed on legislative jurisdiction."² The judge relied heavily on a 1987 case involving a successful challenge to the state Public Health Council's anti-indoor-smoking rules.³ In that case, the Court of Appeals (the highest court in New York State) examined "the difficult-to-define line between administrative rule-making and legislative policy-making." Four "coalescing circumstances" persuaded the Court of Appeals that the state administrative agency had crossed the line in that case. The 1987 rules prohibited smoking in a "wide variety of indoor areas that are open to the public" but expressly excluded many venues, including restaurants with fewer than 50 seats, conventions, trade shows, bars, and hotel rooms. The Court of Appeals determined that those rules were based more on economic and social concerns than on public health matters, were

written on a "clean slate" rather than simply filling in regulatory gaps left to the agency by the legislature, involved a matter on which the legislature had repeatedly tried and failed to reach agreement, and were developed without the exercise of any special public health expertise.³

Judge Tingling found the indoor-smoking decision to be a controlling precedent in the Portion Cap Rule case. He examined the "coalescing circumstances" to determine whether New York City's board had exceeded its administrative authority. Tingling found first that, like the indoor-smoking rule, the regulation was "laden with exceptions based on economic and political concerns," which are outside the Board of Health's purview. Next, he concluded that the powers granted to the health department by the New York City Charter (from its origin in 1730 through more than a dozen amendments to date) did not grant the board "the authority to limit or ban a legal item under the guise of 'controlling chronic disease.'"² Third, the judge found that that city's legislature, the New York City Council, had not passed any laws addressing the subject matter. The judge's bottom line is that the health department violated the separation-of-powers doctrine by exceeding its authority as an administrative agency and acting like a legislature. Accepting the city's arguments would, the judge concluded, "create an administrative Leviathan" that would give the Board of Health "authority to define, create, mandate and enforce [rules] limited only by its own imagination."²

The judge also adopted a separate basis for striking down the

Portion Cap Rule, determining that it was arbitrary and capricious because it does not apply to "all food establishments in the City, it excludes other beverages that have significantly higher concentrations of sugar sweeteners . . . on suspect grounds," and it has many loopholes — for instance, it imposes no limitations on refills, which defeats its purpose.²

The rule and the opinion raise several issues. First, the city's health department has taken other actions without direct authorization by the city council that could now be challenged. For example, in 2005, the Board of Health required laboratories to report to the department the names, dates of birth, addresses, physicians, and blood-sugar levels of people with type 2 diabetes — without patient consent.⁴

Second, the judge's conclusion that the legislative branch is the proper branch to make public health policy is correct. Both the New York City Council and the New York State legislature have the authority to regulate the sale of soda in large containers and to grant this authority to the city or state health department. Should either legislative body do so, it is much less likely that a court would overturn the Portion Cap Rule as arbitrary and capricious. On the other hand, the rule has been widely ridiculed, which makes its enactment by elected officials highly unlikely. Jon Stewart probably expressed a widespread public sentiment when he joked that he loved the rule because "it combines the draconian government overreach people love with the probable lack of results they expect."

Third, there are reasonable alternatives to the Portion Cap

Rule, such as higher taxes on all sales of sodas. Higher prices often discourage consumption, as has been the case with cigarettes. Such taxes tend to be regressive, however, with disproportionate effects on lower-income people, who in this case could not afford to buy fancy bottled water or juice drinks. That may be one reason why some New York communities oppose such taxes.

Some alternatives, however, are not reasonable — in particular, the current proposals to shame people who are overweight.⁵ Such shaming amounts to treating a health risk, whose development may be involuntary, as a moral failure. Any public policy entailing overt discrimination based on physical appearance is simply wrong. People who are obese know it; making them feel worse about themselves encourages bul-

lying, another public health problem, and helps no one.

Perhaps the most important lesson is old news: economics often drives health policy. New York City's efforts to reduce obesity grew with its desire to control its health care costs for its residents, a disproportionate share of whom are obese or have diabetes. Meanwhile, large corporations continue to use their influence and money to derail public health measures that could reduce their profits. Although the general public shares the goals of public health, many people remain skeptical of government's choice of means for achieving those goals. Agencies that overstep their bounds or adopt rules that are intrusive or just plain silly invite backlash, which can make effective public health regulation impossible. They make fools

of themselves and heroes of the opponents of public health.

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Half Empty or Half Full? New York's Soda Rule in Historical Perspective

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Despite New York City Mayor Michael Bloomberg's plans to appeal it, the March 11 decision by Justice Milton A. Tingling of the New York State Supreme Court striking down the city's partial ban on sugar-sweetened drinks larger than 16 fluid ounces might easily be seen as a cup half empty. The ruling represents a major setback for a controversial and ambitious proposal, which was approved by the New York City Board of Health on September 13, 2012, and was immediately challenged in court by a group of small businesses

along with the National Restaurant Association and the American Beverage Association. But many people remain torn over whether the giant-soda ban is an important measure for combating obesity or a gross intrusion on personal liberty — and so whether such a public health regulation should itself be seen as a glass half empty or a glass half full.

From the glass-half-empty perspective, the policy is a drop in the bucket of what would be required to solve the obesity problem. Setting limits on just a single behavior, in the face of all

the other unhealthy choices we must avoid (fried foods, excessive portions, carbohydrates galore), can hardly be expected to turn the obesity tide. Moreover, because the ban contains all kinds of loopholes — it doesn't set limits on refills, for instance, and it excludes ("on suspect grounds") "other beverages that have significantly higher concentrations of sugar sweeteners and/or calories" — the charge that it is "arbitrary and capricious" may strike opponents as more descriptive than acerbic.¹

But from the glass-half-full