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Paul A. Diller

LOCAL TOBACCO REGULATION AND ITS EFFECT
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OBESITY PREVENTION POLICIES AT THE LOCAL LEVEL: TOBACCO'S LESSONS

Paul A. Diller

For at least a decade, commentators have speculated that obesity is the next tobacco, a public health scourge that might nonetheless offer a gold mine to ambitious plaintiffs' lawyers.¹ Successful lawsuits, as in the tobacco context, might spur the food industry to reform its practices so as to help reduce the alarmingly high national obesity rate. The obesity narrative, however, has not played out according to the same script as tobacco. Relatively quick action by many state legislatures immunized the food industry to tort lawsuits seeking obesity-related damages,² and the scant judicial opinions on the issue have skeptically assessed plaintiffs' claims against the industry.³ While a litigation-based strategy to combat obesity has largely floundered, legislative and administrative efforts have shown tentative progress. It is in the legislative and administrative arenas that the campaign against tobacco use has the most to teach obesity prevention strategists. In particular, local efforts to regulate the food industry are capable of significantly influencing the legislative and administrative processes at higher levels of government.⁴ Even where local action is ultimately preempted or invalidated by courts on other grounds, local action can nonetheless influence state and national policy in the long term by placing certain issues on the agendas of policymakers at higher levels of government.

LOCAL TOBACCO REGULATION AND ITS EFFECT

Since the public health effects of tobacco became better understood and widely known in the 1960s, government regulators have taken important steps to rein in tobacco use, particularly among minors.⁵ While some key policies emanated from

1. See, e.g., Roger Parloff, *Is Fat the Next Tobacco? For Big Food, the Supersizing of America is Becoming a Big Headache*, FORTUNE, Feb. 2003, at 50; Emily Heller, *Fat Suit; Mac Headed Down Tobacco Road?*, NAT'L L.J., Dec. 9, 2002.

2. See TRUST FOR AMERICA'S HEALTH, F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE 65 (2012), available at <http://healthyamericans.org/assets/files/TFAH2012FasInFatFnlRv.pdf> (noting that 25 states have passed laws prohibiting claims for obesity-related harms from being brought against food vendors).

3. See, e.g., *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 517-19 (S.D.N.Y. 2003) (dismissing claims by teenagers for obesity-related harms allegedly caused by eating McDonald's food frequently).

4. I focus on local governments because they are at the forefront of obesity prevention strategy. See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure* 91 WASH. U. L. REV. (forthcoming 2014) (manuscript at 17-24). Insofar as states have regulated beyond the federal floor in an attempt to combat obesity, their action can influence the federal legislative and regulatory processes in the same way that local action can influence state and federal processes.

5. See e.g., Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 87, 87 (1970) (codified as amended at 15 U.S.C.A. §§ 1331-40 (West 2010 & Supp. 2012)) (banning tobacco companies from radio and television advertising and strengthening the cigarette package warning label requirement); see also Patrick Kabat, Note, "Till Naught But Ash Is Left to See": *Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 128, 133 (2009).

the national government, many others emerged from the local level, such as bans on outdoor advertising, smokefree workplace laws, and limitations on cigarette vending machine locations.⁶ Along the way, tobacco companies challenged many of these policies in court as impliedly preempted or otherwise unconstitutional, and often sought—and sometimes obtained—express preemption of such ordinances by state legislatures.⁷ Despite tobacco industry opposition, however, local efforts to curtail tobacco use have still diffused laterally to other cities, and some prominent local efforts have migrated up to the state and national levels. For instance, although local ordinances banning outdoor tobacco advertising were ultimately deemed preempted by the United States Supreme Court,⁸ they effectively became the law of the land after the attorneys general of 46 states entered into a master settlement agreement with the major tobacco companies that prohibited such advertising.⁹ Similarly, some significant restrictions on the place and manner of tobacco sales, while initially pursued at the local level and frequently challenged by the tobacco industry,¹⁰ have now become national policy by Food and Drug Administration rule.¹¹ In many states, a number of localities first adopted smokefree workplace regulations before the state legislature eventually addressed the issue.¹² Even if not initially successful, therefore, persistent local effort to regulate the tobacco industry has often paid dividends by diffusing horizontally, vertically, or both.

6. See Diller, *supra* note 4 (manuscript at 8-17).

7. See e.g., *Penn Adver. of Balt., Inc. v. Mayor & City Council of Balt.*, 63 F.3d 1318, 1323-25 (4th Cir. 1995) (challenging Baltimore's ordinance prohibiting cigarette billboard advertising as preempted under federal law and as a violation of the First Amendment); *Allied Vending, Inc. v. City of Bowie*, 631 A.2d 77, 80-81 (Md. 1993) (challenging local ordinances restricting cigarette vending machine locations as preempted by state law); see also Kabat, *supra* note 5, at 138-40 (reviewing states that preempted local authority to regulate indoor smoking).

8. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001) (holding that Massachusetts regulation prohibiting outdoor tobacco advertising was preempted by Federal Cigarette Labeling and Advertising Act ("FCLAA")). Although *Lorillard* invalidated a state restriction, its holding applied perforce to local ordinances as well. But see Michael Clisham, *Commercial Speech, Federal Preemption, and Tobacco Signage: Obstacles to Eliminating Outdoor Tobacco Advertising*, 36 URB. LAW. 713, 739 (2004) (arguing that *Lorillard* could be distinguished if local ordinance was aimed at discouraging youth access to tobacco, rather than at smoking and health generally).

9. See *Tobacco Master Settlement Agreement*, NAT'L ASS'N ATT'YS GEN. 10, 22-23 (1998), <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf> (agreeing to "discontinue Outdoor Advertising and Transit Advertisements advertising Tobacco Products within the Settling States").

10. See, e.g., *Allied Vending*, 631 A.2d at 78-81 (describing local restrictions on vending machines).

11. See, e.g., 21 C.F.R. § 1140.16(c) (2013) (prohibiting sales of cigarettes and smokeless tobacco products by vending machine, with limited exceptions). The Family Smoking Prevention and Tobacco Control Act of 2009 ("TCA"), Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 15, and 21 U.S.C.), expressly authorized the FDA to regulate tobacco products, and the FDA has used this authority to promulgate a number of rules that aim to restrict smoking, some of which borrow from local action. See C. STEPHEN REDHEAD & TODD GARVEY, CONG. RES. SERV., *FDA FINAL RULE RESTRICTING THE SALE AND DISTRIBUTION OF CIGARETTES AND SMOKELESS TOBACCO* (2010), available at <http://www.nacsonline.com/NACS/Government/Tobacco/Documents/CRSReport.pdf>.

12. See Diller, *supra* note 4, (manuscript at 11-13). In some states, the statewide smoking ban was enacted via voter initiative. See Kabat, *supra* note 5, at 147 (discussing passage of statewide smoking bans by plebiscite in Arizona, Nebraska, Ohio, and Washington).

EMERGING LOCAL OBESITY REGULATION

In the obesity context, a slate of local regulation is emerging that includes: trans fats prohibitions; requirements that restaurant menu labels list calories and other nutritional information; bans on toy giveaways with meals of low nutritional quality; portion caps on sugar-sweetened beverages; and the proposed ineligibility of soda purchase with food stamps.¹³ As in the tobacco context, food and soda industry groups have challenged some of these policies in the courts as preempted or otherwise illegal,¹⁴ or have succeeded in obtaining legislative preemption by higher levels of government.¹⁵ In other instances, however, local policies have weathered industry opposition in the legal and political spheres and have eventually migrated to higher levels of government. For instance, New York City was the first jurisdiction to ban trans fats, followed by a number of other cities and counties.¹⁶ In 2008, California became the first (and still only) state to follow suit.¹⁷ New York City was also the first jurisdiction to adopt an ordinance requiring chain restaurants to indicate the calorie counts of their products prominently on a menu board.¹⁸ After diffusing to a number of other local jurisdictions, and being adopted by a handful of states,¹⁹ a version of menu labeling is set to become national policy under regulations authorized by the Affordable Care Act of 2010.²⁰ While the row for soft drink-specific regulation may be tougher to hoe,²¹ persistent local action is

13. See Diller, *supra* note 4, (manuscript at 17-24); see also Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS (SUPPLEMENT) 89, 91-92 (2011) (listing various local obesity prevention policies).

14. See e.g., *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 117-18 (2d Cir. 2009) (rejecting industry challenge to New York City's menu labeling rule that was brought on federal preemption and First Amendment "compelled speech" grounds).

15. See e.g., TENN. CODE ANN. § 68-14-303(3) (2012) (preempting non-elected bodies of local governments from requiring nutritional information on menus); Nashville & Davidson County, Tenn., *Proposed Regulations of the Metropolitan Board of Health Governing Menu Labeling in Covered Food Service Establishments* (Feb. 6, 2009), available at <http://www.tennessean.com/assets/doc/DN12800326.DOC> (attempting to require restaurants with more than fifteen franchises to post calorie information on menu boards).

16. See NEW YORK CITY, N.Y., HEALTH CODE § 81.08 (2012) (banning the use of "artificial trans fat" in food preparation); PUB. HEALTH LAW CTR., TRANS FATS BANS: POLICY OPTIONS FOR ELIMINATING THE USE OF ARTIFICIAL TRANS FATS IN RESTAURANTS 7 (2008), available at <http://publichealthlawcenter.org/sites/default/files/resources/phlc-policy-trans-fat.pdf> (listing cities and counties that adopted a trans fat ban).

17. See Act of July 25, 2008, ch. 207, § 1, 2008 Cal. Stat. 1007-08 (codified at CAL. HEALTH & SAFETY CODE § 114377 (West 2012)).

18. See Notice of Adoption of an Amendment (§ 81.50) to Article 81 of the New York City Health Code (adopted Dec. 5, 2006), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf> (codified at NEW YORK CITY, N.Y. HEALTH CODE § 81.50 (2012)).

19. See TRUST FOR AMERICA'S HEALTH, *supra* note 2, at 65.

20. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 573, 573-76 (2010) (codified at 21 U.S.C. § 343(q)(5)) (authorizing the FDA to issue implementing regulations).

21. For instance, a number of proposed soft drink taxes have been defeated in the political sphere. See Lisa Baertlein, *Soda Tax Ballot Measures Fizzle in California*, REUTERS, Nov. 7, 2012, <http://www.reuters.com/article/2012/11/07/usa-campaign-california-sodatax-idUSL1E8M6ATV20121107> (describing defeat of local soda tax ballot measures in El Monte and Richmond, California, in 2012); Anemona Hartocollis, *Failure of State Soda Tax Plan Reflects Power of an Antitax Message*, N.Y. TIMES, July 3, 2010, at A14 (describing defeat of proposed soda tax in New

likely to keep the issue on the state and national agendas.

To be sure, it is by no means inevitable that local action to combat obesity will ultimately diffuse to other jurisdictions and percolate up to higher levels of government. On this point the tobacco example is also illuminating. But for a brief and (from the perspective of public health advocates) serendipitous moment in 2009 when one political party controlled both houses of Congress—including a filibuster-proof majority in the Senate—and the presidency, the bill to give the FDA the authority to regulate tobacco may never have become law.²² Without such a law, some significant tobacco controls first adopted at the local level might never have become federal policy. Thus, advocates of increased regulation of the food industry to combat obesity should be patient, aware that many policies pursued at the local level might never become state or national policy. On the other hand, the record of tobacco regulation—and the now emerging record of food regulation to reduce obesity—shows that diffusion and percolation are at least possible, and that cities and counties are often the leaders in adopting the most innovative policies.

Thus, the best way to keep the issue of obesity prevention on the state and national legislative agenda is to keep pushing for more, and ever more innovative, regulation at the local level. In some instances, like New York City asking the federal government to permit a pilot program denying SNAP benefits for soft drink purchase, officials at higher levels will be compelled to respond, which may bring more national attention to the issue and increase the pressure on higher-level officials to confront the underlying problem even when they disagree with the proposed local solution. In other instances where local laws need no higher-level approval to go into effect, the food industry itself may prefer a more stringent, yet uniform, system of regulation enacted by a higher level of government to a patchwork of regulations at the local level, and thus decide to support a more uniform standard rather than fight local regulations tooth and nail.²³ To some extent, this is how the process unfolded in certain states with respect to smokefree workplace legislation, and at the national level with respect to menu labeling requirements.

POTENTIAL JUDICIAL OBSTACLES

Where reasonably possible, as in the tobacco context, the food industry may

York legislature in 2010). Moreover, a state trial judge has enjoined enforcement of New York City's portion cap on sugar-sweetened beverages in response to an industry lawsuit. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, No. 653584-2012 (N.Y. Gen. Term Mar. 11, 2013) (enjoining enforcement of NEW YORK CITY, N.Y., HEALTH CODE § 81.53 (2013), for violating state constitutional separation-of-powers doctrine). New York City's appeal of the decision is pending at the time of this Essay's publication. *See* Etan J. Yeshua, *Appeal in NYC Sugary Drinks Case Set for June*, FDA L. BLOG (Mar. 20, 2013, 10:29 PM), http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2013/03/appeal-in-nyc-sugary-drinks-case-set-for-june-decision-by-judge-tingling-cites-loopholes-and-questio.html.

22. *See supra* note 11 (discussing Family Smoking Prevention and Tobacco Control Act ("TCA")); *see also* Mariano-Florentino Cuéllar, *Earmarking Earmarking*, 49 HARV. J. ON LEGIS. 249, 265 (2012) (describing legislative history of the TCA).

23. *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 29-30 (2007).

turn to the courts to defeat local regulatory efforts on legal grounds other than preemption, such as the First Amendment or the Fifth Amendment's Takings Clause.²⁴ When industry succeeds in getting courts to invalidate regulatory efforts on constitutional grounds, the results appear much stickier because a constitutional amendment is needed to overturn the decision directly. In the preemption context, by contrast, if the legislature disagrees with a judicial finding of implied preemption, it may "overrule" the decision by merely passing a statute.²⁵ Nonetheless, even when courts invalidate legislation on non-preemption constitutional grounds, persistent local action can still change the national discourse. By passing newsworthy, but perhaps constitutionally dubious (at least under prevailing doctrine) legislation, proponents of obesity prevention may keep the issue at the forefront of the national consciousness even if such legislation has little direct effect.²⁶ This is not an endorsement of blatantly unconstitutional local action, but rather a recognition that political actors, including those at the local level, can influence constitutional doctrine through the regulations they enact or promulgate, as well as in other ways.²⁷ Constitutional doctrine is not static; a regulation forbidden as "unconstitutional" by the courts at one point in time may eventually be permitted. Thus, should judicial constitutional interpretation obstruct local efforts to combat obesity, persistent and nimble local action may offer the best hope for ultimately overcoming such an obstacle.

CONCLUSION

In sum, unlike in the tobacco context, proponents of obesity prevention policies will need to pursue reform largely in the legislative and administrative arenas since the courthouse doors have mostly closed to tort lawsuits. But as tobacco demonstrates, in the legislative and administrative arenas, it is okay to start small. Isolated local regulatory policy may someday spread far and wide. Seemingly disheartening setbacks in the courts, at the ballot box, or in state legislatures and Congress need not spell permanent doom. Given the nation's short

24. See, e.g., *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 117 (2d Cir. 2009) (raising First Amendment challenge to New York City menu labeling regulation).

25. Given the partisan gridlock in Congress and the now-routine use of the filibuster in the Senate, "overruling" a court's interpretation of a federal statute is more difficult than it used to be. See generally Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. (forthcoming 2013) (on file with author).

26. See Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. (forthcoming 2013) (manuscript at 8-13) (on file with author) (discussing similar dynamic in the context of issues like abortion, the Affordable Care Act, and medical marijuana).

27. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748-49 (2005) (citing examples of cities allowing gay marriage and school boards authorizing the teaching of creationism). My point here is not that cities ought to "enforce" constitutional rights, a subject much debated among scholars of local government law, see, e.g., Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1 (2012), but rather that cities, like Congress, can take action that aims to confront or chip away at contrary constitutional doctrine (so long as they possess relatively strong home-rule authority). Cf. Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 286-87 (2008) ("Congress may also use its lawmaking power to challenge judicial constitutional interpretations by enacting statutes consistent with Congress' constitutional views but arguably inconsistent with then-current Supreme Court doctrine.").

attention span in the political realm, and the difficulty of getting any issue on the agenda of state and national policymakers, persistent and scattered local action likely offers the best hope for moving forward a regulatory strategy to combat obesity.