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## Striking The Soda Ban: The Judicial Paralysis On The Department Of Health

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# STRIKING THE SODA BAN: THE JUDICIAL PARALYSIS ON THE DEPARTMENT OF HEALTH

ALANA SIVIN\*

I.	INTRODUCTION .....	247
II.	OBESITY AND THE PORTION-CAP .....	249
III.	THE DEPARTMENT OF HEALTH .....	252
IV.	STATEWIDE AND BOREALI .....	253
V.	THE NON-DELEGATION DOCTRINE.....	256
VI.	TYPICAL CONCERNS UNDERLYING DELEGATION AND WHY THEY DO NOT APPLY IN THIS CASE .....	258
VII.	ANALYSIS AND SUGGESTIONS.....	260
	A. <i>The July Decision</i> .....	260
	B. <i>Strengthening Agency Independence</i> .....	262
	C. <i>Increasing Public Education</i> .....	262
VIII.	CONCLUSION .....	263

## I. INTRODUCTION

Media coverage surrounding the New York City Department of Health’s recent portion-cap on sugary beverages sold in food service establishments tends to focus on public opinions regarding the role of government.<sup>1</sup> Within this dialogue, there are two camps. On one hand lies the opposition; these individuals criticize the Department of Health as a “nanny state” involving itself with individual consumption choices.<sup>2</sup> On the other side lay the supporters who recognize the

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\* Alana Sivin received her J.D. from Brooklyn Law School and her B.A. in political science from Columbia University. She currently practices criminal law as a staff attorney at New York County Defender Services in Manhattan, New York. She extends a special thanks to Professor Melissa Mortazavi, Michael Reese, and Kim Richman for their help and guidance in the writing process.

<sup>1</sup> See Alexandra Sifferlin, *From the NYC Soda Ban Hearing: The Best Arguments For and Against*, TIME HEALTHLAND (July 25, 2012), <http://healthland.time.com/2012/07/25/from-the-nyc-soda-ban-hearing-the-best-arguments-for-and-against/>. The portion-cap would prevent food service establishments (FSEs) from selling sugary drinks in containers larger than 16 oz. See N.Y. COMP. CODES R. & REGS. tit. 24 § 81.53 (2012).

<sup>2</sup> See Karen Harned, *The Michael Bloomberg Nanny State in New York: A Cautionary Tale*, FORBES (May 10, 2013), <http://www.forbes.com/sites/realspin/2013/05/10/the-michael-bloomberg-nanny-state-in-new-york-a-cautionary-tale/>; Katrina Trinko, *Soda Ban? What About Personal Choice?*, USA TODAY (Mar. 10, 2013),

gravity of the obesity epidemic and applaud government efforts to ameliorate its effects.<sup>3</sup>

Regardless of public debate, the judiciary bears a single task: to determine whether or not the regulations are lawful. In its decision to strike the portion-cap, the New York Court of Appeals, affirming the decision of the Appellate Division, First Department,<sup>4</sup> failed to meet that task in *New York Statewide Coalition of Hispanic Chambers of Commerce v. The New York City Department of Health and Mental Hygiene*.<sup>5</sup> Instead, it made its own subjective determination that these regulations were too political to be promulgated by an administrative agency.<sup>6</sup>

However, we cannot entirely blame the court - it simply relied on bad precedent set by *Boreali v. Axelrod*.<sup>7</sup> In that case, the New York Court of Appeals, relying on antiquated notions of non-delegation arising from the New Deal era, struck down the Public Health Council's regulations restricting smoking in public areas, finding that the Council acted "outside of its proper sphere of authority."<sup>8</sup>

This article stands for the position that the *Boreali* decision improperly relied on an outdated view of agency delegation and strayed from both state and federal precedents allowing broad delegations of legislative power to the Department of Health. The decision created a precedent whereby the judiciary may supplant agency expertise with its subjective politics, as evidenced in *Statewide*. Accordingly, the New York Court of Appeals failed to return authority to the Department of Health when it upheld the Appellate Division's ruling and relied on *Boreali*.

Part II of this article discusses obesity and the proposed portion-cap at issue in *Statewide*, summarizing arguments both in favor of and against its enactment. Part III summarizes the *Statewide* and *Boreali* decisions, emphasizing their faulty reliance on the non-delegation doctrine. Part IV discusses the history of the New York City Department of Health, highlighting its eminence as an entity designated with broad legislative authority to govern all matters relating to public health, both from the plain language of the city charter and its history as a physician-led agency. Part V and VI lay out the evolution of the non-delegation doctrine in the U.S.

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<http://www.usatoday.com/story/opinion/2013/03/10/soda-ban-what-about-personal-choice-column/1977091/>.

<sup>3</sup> See Nadia Arumugam, *Why Soda Ban Will Work in Fight Against Obesity; Food Regulations Have Proven Record*, FORBES (Sept. 14, 2012), <http://www.forbes.com/sites/nadiaarumugam/2012/09/14/why-soda-ban-will-work-in-fight-against-obesity-food-regulations-have-a-proven-record/>; Richard Buery, *Keeping the Oversized Soda Fight in Perspective*, THE HUFFINGTON POST (Oct. 23, 2013), [http://www.huffingtonpost.com/richard-buery/new-york-soda-ban\\_b\\_3750419.html](http://www.huffingtonpost.com/richard-buery/new-york-soda-ban_b_3750419.html).

<sup>4</sup> See *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. The N.Y.C. Dep't of Health and Mental Hygiene*, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013); *aff'd* (N.Y. July 2014) [hereinafter *Statewide*].

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 213 This effort to strike "the proper balance among health concerns, costs and privacy interests . . . is a uniquely legislative function." *Boreali v. Axelrod*, 71 N.Y.2d 1,14 (N.Y. 1987).

<sup>7</sup> See *Boreali*, 71 N.Y.2d 1.

<sup>8</sup> *Id.* at 12 (citing *Picone v. Comm'r of Licenses*, 149 N.E. 336 (N.Y. 1980)).

Supreme Court and various state courts, illustrating the error in *Boreali's* and *Statewide's* reliance on the doctrine. Part VII discusses suggestions for the Court of Appeals, the Mayor, and the Department of Health in implementing future public health regulations in New York City.

## II. OBESITY AND THE PORTION-CAP

The Center for Disease Control has formally recognized obesity as a public health crisis affecting 34.9% of American adults and 17% of children between the ages of two and nineteen.<sup>9</sup> The Surgeon General has associated obesity with health problems such as heart disease, type 2 diabetes, stroke, certain types of cancer, and osteoarthritis.<sup>10</sup> In addition, obesity affects minority populations more strongly than other groups.<sup>11</sup> Studies from the Center for Disease Control indicate that obesity disproportionately affects minority populations, with 47.8% of non-Hispanic black Americans suffering from obesity, followed by 42.5% of Hispanic Americans.<sup>12</sup>

Given the gravity of the problem, it should come as no surprise that state and local governments have begun implementing aggressive food and health-related initiatives toward combating the epidemic. New York City, in particular, has been a leader in this area. For example, over the last five years alone, the New York City Department of Health, through its policy-making arm, the Board of Health, became the first local agency in the United States to ban the use of artificial trans fats in restaurant foods<sup>13</sup> and to require franchise restaurants to post calorie counts on menu boards.<sup>14</sup>

New York City's initiatives have not gone unnoticed. Its caloric content amendment was not only implemented by California, Maine, New Jersey, and Vermont, but was also integrated into the federal Affordable Care Act.<sup>15</sup> Furthermore, in the fall of 2014 the FDA announced its intent to regulate e-cigarettes

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<sup>9</sup> See *Overweight and Obesity, Data and Statistics, Facts*, CTR. FOR DISEASE CONTROL & PREVENTION (Sept. 3, 2014), <http://www.cdc.gov/obesity/data/facts.html>.

<sup>10</sup> See Kathleen Sebelius, *Statement on National Childhood Obesity Awareness Month*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Aug. 31, 2012) (discussing the public health hazards of obesity), <http://wayback.archive-it.org/3926/20150121155321/http://www.hhs.gov/news/press/2012pres/08/20120831a.html> (last visited Feb. 3, 2015).

<sup>11</sup> See *Overweight and Obesity, Data and Statistics, Facts, Adult Obesity Facts*, CTR. FOR DISEASE CONTROL AND PREVENTION (Sept. 3, 2014), <http://www.cdc.gov/obesity/data/adult.html>.

<sup>12</sup> See *id.*

<sup>13</sup> See N.Y. COMP. CODES R. & REGS. tit. 24 § 81.08 (2012).

<sup>14</sup> See Nat'l Conference of State Legislatures, *Trans Fat and Menu Labeling Legislation*, NCSL.ORG (Jan. 2013) <http://www.ncsl.org/issues-research/health/trans-fat-and-menu-labeling-legislation.aspx>.

<sup>15</sup> See *id.*; see also Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859, 1866–67 (2013).

after the enactment of an amendment to the New York City Smoke-Free Air Act prohibiting electronic cigarettes in bars, restaurants, offices, parks, and benches.<sup>16</sup>

Thus, when the Board of Health amended the N.Y. Health Code to include a portion-cap on sugary beverages larger than sixteen ounces (in response to studies indicating a strong link between sugary beverage consumption and obesity),<sup>17</sup> the future of public health seemed promising not only in New York City, but also nationwide. Under the amendment to section 81.53 of the N.Y. Health Code, food service establishments would not be able to “sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces.”<sup>18</sup>

The rule defines a “sugary drink” as:

a carbonated or non-carbonated beverage that: (A) is non-alcoholic; (B) is sweetened by the manufacturer or establishment with sugar or another caloric sweetener; (C) has greater than 25 calories per 8 fluid ounces of beverage; and (D) does not contain more than 50 percent of milk or milk substitute by volume as an ingredient.<sup>19</sup>

Failure to comply with these regulations results in a fine of no more than \$200 for each violation.<sup>20</sup>

In defending the portion-cap, Public Health Commissioner Thomas called it a “reasoned and reasonable response to the crisis.”<sup>21</sup> Sugary drinks, he continued, “can bring on obesity and diabetes, and drinking just one sugary drink per day increases a person’s risk. . . .”<sup>22</sup> In his statement supporting the cap, former Mayor Bloomberg pinpointed obesity as “the only major public health issue we face.”<sup>23</sup> The National

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<sup>16</sup> Dan Goldberg, *E-cig Ban Takes Effect, Soda Ban Receives Support*, CAPITAL NEW YORK (Apr. 29, 2014), <http://www.capitalnewyork.com/article/city-hall/2014/04/8544439/capital-health-care-e-cig-ban-takes-effect-soda-ban-receives-suppo>.

<sup>17</sup> See generally Gail Woodward-Lopez et al., *To What Extent Have Sweetened Beverages Contributed to the Obesity Epidemic?* 14 PUB.HEALTH NUTRITION 499 (2010). See also *The Nutrition Source, Sugary Drinks*, HARVARD SCH. PUB. HEALTH, <http://www.hsph.harvard.edu/nutritionsource/healthy-drinks/sugary-drinks/> (last visited Jan. 25, 2015) (summarizing Harvard University study showing that women who increased their intake of sugary drinks over a four year period had significantly higher increases in weight than those who reduced their sugary drink intake).

<sup>18</sup> N.Y. COMP. CODES R. & REGS. tit. 24 § 81.53(b) (2012).

<sup>19</sup> *Id.* at § 81.53(a)(1).

<sup>20</sup> *Id.* at § 81.53(d).

<sup>21</sup> Rob Waters, *NYC Health Commissioner: Limiting Soda is the Right Way to Protect the Health of New Yorkers*, FORBES (June 11, 2013), <http://www.forbes.com/sites/robwaters/2013/06/11/nyc-health-commissioner-limiting-soda-size-is-the-right-way-to-protect-the-health-of-new-yorkers/>.

<sup>22</sup> *Id.*

<sup>23</sup> Jill Colvin, *Bloomberg Celebrates Court Decision on Soda Ban*, OBSERVER.COM (Oct. 17, 2013), <http://observer.com/2013/10/bloomberg-celebrates-court-decision-on-soda-cup-regulations/#axzz31eQXjuhA>.

Alliance for Hispanic Health, along with various other interest organizations, also pointed to studies demonstrating the strong link between the consumption of sweetened beverages and obesity.<sup>24</sup> One study notes “sweetened beverages account for at least one-fifth of the weight gained between 1977 and 2007 in the US population.”<sup>25</sup> It also noted that underserved populations disproportionately consume these beverages and that the portion-cap would “ease an unfair burden on the poor of being the helpless victims of an industry where profits triumph [over] good health.”<sup>26</sup>

Despite its justifications, the portion-cap faced significant backlash in the media and in the political sphere. Some criticized the Mayor for infringing on individuals’ personal choice of beverage, while others voiced concern that it unfairly favored certain businesses over others.<sup>27</sup> Some commentators expressed a fear that the cap would prove ineffective and “poison the water for better solutions.”<sup>28</sup> The Chamber of Commerce argued that the Board failed to properly evaluate the costs and benefits of the ban and account for the “hundreds of thousands to millions of dollars” that businesses presumably would suffer as a result of its enactment.<sup>29</sup>

However, the portion-cap is an appropriate and cost-efficient solution to New York City’s obesity crisis. A report conducted by Professor Shi-Ling Hsu indicates that whereas the cost of sugary drink regulation could reach a maximum of \$500 million, the benefits of such regulations could range from \$3.2 billion to \$13.2 billion.<sup>30</sup> According to the study, “the most known adverse health outcomes stem from the contribution that sugary drinks have in making people obese.”<sup>31</sup> Accordingly, the sale of sugary drinks “imposes further [treatment] costs . . . [including costs for] . . . type 2 diabetes, coronary heart disease, and a variety of cancers.”<sup>32</sup> In conducting his cost-benefit analysis, Hsu takes two approaches. First,

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<sup>24</sup> Brief for the National Alliance for Hispanic Health, et. al. as Amici Curiae at 11–12, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce, v. The N.Y.C. Dep’t Of Health and Mental Hygiene*, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013) (APL 2013-00291).

<sup>25</sup> Gail Woodward-Lopez et al., *To What Extent Have Sweetened Beverages Contributed to the Obesity Epidemic?* 14 PUB. HEALTH NUTRITION 499, 499 (2010).

<sup>26</sup> *Id.* See also *supra* note 24 (citing Comment of Pastor Brian L. Carter, President, Borough of Brooklyn Ecumenical Advisory Group at p. 27).

<sup>27</sup> See e.g., Harned, *supra* note 2; Trinko, *supra* note 2.

<sup>28</sup> Brian Wansink & David Just, *How Bloomberg’s Soft Drink Ban Will Backfire on NYC Public Health*, THE ATLANTIC.COM (June 14, 2012), <http://www.theatlantic.com/health/archive/2012/06/how-bloombergs-soft-drink-ban-will-backfire-on-nyc-public-health/258501/>.

<sup>29</sup> Notice of Motion for Leave to File Brief for the Chamber of Commerce of the United States of America, National Black Chamber of Commerce, et. al as Amici Curiae, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. The N.Y.C. Dep’t Of Health and Mental Hygiene*, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013) (No. 653584/2012).

<sup>30</sup> Shi-Ling Hsu, *A Cost-Benefit Analysis of Sugary Drink Regulation in New York City*, FSU COLLEGE OF LAW, PUBLIC LAW RESEARCH PAPER NO. 661 1 (Feb. 14, 2014), SSRN: <http://ssrn.com/abstract=2390854> or <http://dx.doi.org/10.2139/ssrn.2390854>.

<sup>31</sup> *Id.* at 7.

<sup>32</sup> *Id.*

he focuses on the monetary costs stemming from obesity – namely, type 2 diabetes and coronary heart disease.<sup>33</sup> Second, he focuses on productivity costs specifically attributable to obesity.<sup>34</sup> By synthesizing studies from the American Medical Association,<sup>35</sup> The National Center for Health Statistics,<sup>36</sup> and the Center for Disease Control,<sup>37</sup> Hsu approximates the total cost of type 2 diabetes attributable to sugary drink consumption in New York City at \$3.6 billion,<sup>38</sup> the total cost of coronary heart disease in New York City attributable to sugary drink consumption at \$9.6 billion,<sup>39</sup> and the total productivity costs of obesity in New York City at \$412 million.<sup>40</sup> The study concludes by determining that the benefits of the portion-cap, estimated modestly, yield a 14:1 benefit-cost ratio.<sup>41</sup>

Furthermore, although opposing city council members argued that the cap would open the floodgates and give the Board of Health limitless authority to enact “even more intrusive policies,”<sup>42</sup> comprehensive expert studies indicate that decreasing portion sizes is *the most tailored solution* to address the problem of obesity. A recent study by public health scholars Marion Nestle and Lisa R. Young indicates that the sharp increase in obesity in recent years is largely due to excess calorie consumption,<sup>43</sup> indicating “a need for greater attention to food portion size as a factor in energy intake and weight management.”<sup>44</sup> Therefore, the portion-cap proves to be a statistically supported and reasonable decision that demonstrates the Department of Health’s understanding of the particular intricacies surrounding obesity in New York City.

### III. THE DEPARTMENT OF HEALTH

The New York City Charter provides:

Except as otherwise provided by law, the department shall have jurisdiction to regulate *all matters affecting health* in the city of New York and to perform all those functions and operations performed by the

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

<sup>34</sup> *Id.* at 10.

<sup>35</sup> *Id.* at 12.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 16.

<sup>38</sup> *Id.* at 15.

<sup>39</sup> *Id.* at 19.

<sup>40</sup> *Id.* at 21.

<sup>41</sup> *Id.* at 24.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> Lisa R. Young & Marion Nestle, *The Contribution of Expanding Portion Sizes to the Obesity Epidemic*, 92 AM. J. PUB. HEALTH, 246 (2002).

<sup>44</sup> *Id.*

city that relate to the health of the people of the city, including but not limited to the mental health, mental retardation, alcoholism and substance abuse-related needs of the people of the city.<sup>45</sup>

The Health Code also grants the Department the specific authority to “regulate . . . food . . . and ensure that such businesses and activities are conducted in a manner consistent with the public interest.”<sup>46</sup> Prior to the 1987 *Boreali* decision, New York courts interpreted this type of legislative delegation broadly. In *People ex rel. Knoblauch v. Warden of Jail of Fourth Dist. Magistrate’s Court*,<sup>47</sup> for example, the Appellate Division, Second Department regarded the Board (the Department of Health’s policy-making arm) as “a statutory body [whose] powers are very broad – well nigh plenary.”<sup>48</sup> Similarly, the New York State Court of Appeals in *Grossman v. Baumgartner*<sup>49</sup> found delegation permissible to the extent that legislation did not preempt state laws on the same matter.<sup>50</sup> Five years prior to *Boreali*, one court described the Board of Health as “the sole legislative authority in the field of health regulation in the City of New York.”<sup>51</sup>

This broad reading of the Board’s ability to regulate all matters concerning public health in New York City is in line with the legislative history of the Board. The New York City Charter was revised in the mid-1900s to create a Board of Health composed of physicians, police commissioners, and other experts, as opposed to the previously city-run agency.<sup>52</sup> The change came as a result of critics calling for “an independent city health department that would not be controlled by the corrupt Tammany machine.”<sup>53</sup>

#### IV. STATEWIDE AND *BOREALI*

Despite clear precedent and legislative intent to delegate broad authority to the Department of Health, the *Statewide* court, relying on *Boreali*, struck the portion-cap as an unconstitutional exercise of power. While the court recognized the permissibility of delegations of power to administrative agencies,<sup>54</sup> it found that such

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<sup>45</sup> NEW YORK CITY, N.Y., CHARTER § 556 (2004), available at [http://www.nyc.gov/html/records/pdf/section%201133\\_citycharter.pdf](http://www.nyc.gov/html/records/pdf/section%201133_citycharter.pdf) (emphasis added).

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

<sup>47</sup> See *People ex rel. Knoblauch v. Warden*, 216 N.Y. 154, 162 (1915).

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

<sup>49</sup> *Grossman v Baumgartner*, 17 N.Y.2d 345, 351 (N.Y. 1966).

<sup>50</sup> *Id.*

<sup>51</sup> *Schulman v. N.Y.C. Health & Hosps. Corp.*, 38 N.Y.2d 234, 237 (N.Y. 1975).

<sup>52</sup> See THE N.Y. CITY DEP’T OF MENTAL HEALTH & HYGIENE, PROTECTING PUBLIC HEALTH IN NEW YORK CITY: 200 YEARS OF LEADERSHIP 12 (2005), available at <http://www.nyc.gov/html/doh/downloads/pdf/bicentennial/historical-booklet.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> See *Statewide*, *supra* note 4, at 207 (finding that the Board of Health possessed “no inherent legislative power [to make] . . . broad-based public policy determinations.”).



delegations should be interpreted narrowly.<sup>55</sup> Relying on language in *Boreali v. Axelrod*, the court determined that the Board “invalid[ly] exercise[d] . . . legislative power.”<sup>56</sup>

In *Boreali*, the plaintiff challenged the Public Health Council’s (the predecessor to the Department of Health) regulations governing smoking in public areas. In striking down the regulations, the court delivered a paralyzing four-factor test that precluded health agencies from using expertise and removal from the political structure to implement sound regulations in the interest of public health. First, the court determined that the Council improperly developed a scheme “based. . . upon economic and social concerns”<sup>57</sup> other than health by carving out exemptions for bars and convention centers.<sup>58</sup> Second, the court found that the Council wrote “on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.”<sup>59</sup> Third, the court found that the regulations concerned “an area in which the legislature had repeatedly tried – and failed – to reach agreement in the face of substantial debate and vigorous lobbying by a variety of interested factions.”<sup>60</sup> The court pointed to “the significance of legislative inaction as evidence that the legislature [had] so far been unable to reach agreement on the goals and methods that should govern” in this area.<sup>61</sup> Finally, the court found that the agency “overstepped its bounds because the development of the regulations did not require expertise in the field of health.”<sup>62</sup> The court found that all factors “when viewed in combination, paint[ed] a portrait of an agency that has improperly assumed for itself . . . the elected legislature’s role.”<sup>63</sup>

The holding in *Boreali* changed the landscape of New York administrative law. Under the new framework, the courts can now deny city agencies the authority to promulgate overly “political” regulations. However, because no objective standard exists to determine whether promulgations are indeed political,<sup>64</sup> New York case law regarding delegation is inconsistent and more likely to be driven by the politics of the judiciary than by legal criteria. The decision in *Statewide* serves as a clear example.

Using *Boreali*’s four-factor analysis, the court in *Statewide* similarly found the portion-cap unconstitutional. Addressing the first prong of the analysis, the

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<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *Boreali v. Axelrod*, 71 N.Y.2d 1, 11 (N.Y. 1987).

<sup>58</sup> *Id.* at 12.

<sup>59</sup> *See Statewide*, *supra* note 4, at 207 (citing *Boreali*, 71 N.Y.2d 1, at 12).

<sup>60</sup> *Id.*

<sup>61</sup> *Boreali*, 71 N.Y.2d 1, at 14.

<sup>62</sup> *Statewide*, *supra* note 4, at 207 (citing *Boreali*, 71 N.Y.2d 1, at 14).

<sup>63</sup> *Id.*

<sup>64</sup> *See* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 343 (1987).

*Statewide* court determined that the Department of Health's exemption of certain businesses, including grocery markets and 711 stores that had signed agreements with the state's Department of Agriculture, demonstrated that "the Board . . . took into account its own non-health policy considerations."<sup>65</sup> Under the second factor, the court found that the legislature failed to enumerate the regulation of obesity-causing products as an "inherently harmful [matter] affecting the health of the City,"<sup>66</sup> and that the ban, therefore, did not fall within "the kind of interstitial rule making intended by the legislature and engaged in by the Board of Health in the past."<sup>67</sup> Under the third factor, the court found that because the City and State legislatures had attempted (and failed) to enact various similar pieces of legislation reducing sugary beverage consumption – warning labels, food stamp restrictions, and taxes – the Board of Health circumvented the will of the legislature by "[pursuing] the same end, and thus address[ing] the same policy areas as the proposals rejected by the State and City legislatures."<sup>68</sup> Finally, the court found "that the Board of Health's technical competence was [not] necessary to flesh out details of the legislative policies embodied in the [portion-cap]."<sup>69</sup>

The *Statewide* and *Boreali* decisions fall outside the trend of New York courts to uphold similarly broad legislative promulgations and to recognize the Board as "the sole legislative authority in the field of health regulation in the City of New York."<sup>70</sup> Even after *Boreali*, New York courts have recognized the Board of Health's legislative authority without subjecting it to a four-factor analysis. For example, in *New York State Rest. Assn. v. New York City Dep't of Health & Mental Hygiene*, the New York Supreme Court found that because the charter provided that "the Department shall have jurisdiction to regulate all matters affecting health in the City of New York" and to "enforce all provisions of law applicable in the area under the jurisdiction of the Department," the Board had the statutory authority to promulgate inspection procedures.<sup>71</sup> Furthermore, In *Glass v. City of New York*,<sup>72</sup> the court upheld the Board of Health's amendment to the health code prohibiting individuals from owning ferrets, finding that the Board's possession of broad authority to regulate the keeping of animals was "not only reasonable and proper within the overall municipal government structure; it [was] necessary for the protection of the health and safety of the public."<sup>73</sup>

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<sup>65</sup> *Statewide*, *supra* note 4, at 210.

<sup>66</sup> *Id.* at 211.

<sup>67</sup> *Id.* at 212.

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

<sup>69</sup> *Id.* at 213.

<sup>70</sup> *Schulman v. N.Y.C. Health & Hosps. Corp.*, 38 N.Y.2d 234 (N.Y. 1975).

<sup>71</sup> *New York State Rest. Ass'n v. N.Y.C. Dept. of Health & Mental Hygiene*, 2004 NY Slip Op 51290(U), 2004 WL 2423561 (N.Y. Sup. Ct. Oct. 27, 2004).

<sup>72</sup> *See Glass v. City of New York*, No.121839/99, 2002 WL 1461895 (N.Y. Sup. Ct. June 14, 2002).

<sup>73</sup> *Id.* at 2.

Therefore, the *Boreali* decision set unclear precedent resulting in its inconsistent and subjective application. Recognizing this error, the dissent properly criticized the majority for arbitrarily resurrecting New Deal era principles prohibiting the legislature from delegating decision-making power to administrative agencies.<sup>74</sup>

#### V. THE NON-DELEGATION DOCTRINE

In striking the Public Health Council's anti-smoking regulations, the *Boreali* court relied heavily on Supreme Court articulations of the non-delegation doctrine,<sup>75</sup> which represents a judicial theory that disfavors delegation of legislative authority to administrative agencies as an unconstitutional separation of powers violation.<sup>76</sup> However, although Supreme Court decisions frequently point to the non-delegation doctrine when making "categorical statements"<sup>77</sup> criticizing delegations of authority,<sup>78</sup> on only three occasions has the Court invalidated regulations based on non-delegation reasoning during the New Deal era.<sup>79</sup> Accordingly, various legal scholars in the field of administrative law recognize that non-delegation is more of an "empty formalism" than actual doctrine.<sup>80</sup> Scholar Louis Jaffe, for example, has attributed the few New Deal cases finding impermissible delegations of authority as "sports," understandable merely in terms of the politics of the Justices of the Supreme Court in 1935, rather than in terms of legal doctrine.<sup>81</sup> Furthermore, the

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<sup>74</sup> See *Boreali*, 71 N.Y.2d 1, 19–20 (N.Y. 1987) (Bellacosa, dissenting).

<sup>75</sup> See *id.* at 10 (citing *Buttfield v. Stranahan*, 192 U.S. 470 (1904)); *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

<sup>76</sup> See JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM CASES AND MATERIALS* 72 (2009).

<sup>77</sup> ERNEST GELLHORN & RONALD M. LEVEN, *ADMINISTRATIVE LAW AND PROCESS* 12 (2006); see also MASHAW, MERRILL & SHANE, *supra* note 76.

<sup>78</sup> See, e.g., *Buttfield v. Stranahan*, 192 U.S. 470 (1904) (upholding the board of tea inspectors the authority to place standards on the sale of tea); see also *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (validating a broad statute enabling the Secretary of Agriculture to issue regulations and criminal penalties regarding the preservation of national forests while finding that delegation is only appropriate to "fill up the details."); see also *Field*, 143 U.S. 649 ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.").

<sup>79</sup> These decisions include *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down a statute giving power to prohibit interstate shipments of contraband oil, as it gave no guidance as to circumstances, and the code, in any event, had never been published); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating regulations under the Live Poultry Act because of unclear legislative policy objectives and a lack of procedural standards); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (finding that the mandating statute improperly gave legislative power to representatives of the regulated industry).

<sup>80</sup> LOUIS, L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 51–52 (1965); see also GELLHORN & LEVEN, *supra* note 77, at 13.

<sup>81</sup> See MASHAW, MERRILL & SHANE, *supra* note 76, at 74 (citing JAFFE, *supra* note 80, at 51–52).

most recent articulation of the non-delegation doctrine only finds that delegation is improper when legislation fails to indicate an “intelligible principle” to guide agency action.<sup>82</sup>

While the states have historically been more prone to develop varied non-delegation doctrines,<sup>83</sup> more recent state decisions indicate that courts are beginning to move away from non-delegation principles.<sup>84</sup> Many of the states that do

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<sup>82</sup> See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

In the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’

*Id.*; see also *Lichter v. United States*, 334 U.S. 742, 785–86 (1948) (upholding delegation of authority to determine excessive profits); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105–06 (1946) (upholding delegation to SEC to prevent unfair or inequitable distribution of voting power among security holders); *Yakus v. United States*, 321 U.S. 414, 426–27 (1944) (upholding delegation to price administrator to fix commodity prices that would be fair and equitable); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding delegation to FCC to regulate broadcast licensing as public interest, convenience, or necessity require). Federal (and state) courts do, however, still express concern where legislative authority is given to private industries. See *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 668 (D.C. Cir. 2013) (striking Section 207 of the Rail Investment and Improvement Act of 2008 which “empowered Amtrak and the Federal Railroad Administration (FRA) to jointly develop performance measures to enhance enforcement of the statutory priority Amtrak’s passenger rail service has over other trains.”). While the court in *American Railroads* utilized the nondelegation doctrine, it also noted that nondelegation has little practical application outside of this context because “no statute can be entirely precise,” meaning “some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it.” *Id.* (citing *Mistretta v. United States*, 488 U.S. 361, 415 (1989)).

<sup>83</sup> See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1220 (1999). Professor Rossi groups these approaches into three categories—weak, strong, and moderate nondelegation states. *Id.* States adopting a strong nondelegation approach require delegating statutes to possess strict standards and safeguards. *Id.* Weak nondelegation states, on the other hand, adopt the Supreme Court approach and recognize virtually any procedural safeguards as sufficient. *Id.* Moderate delegation states fall between the two, and require only loose standards and safeguards. *Id.*

<sup>84</sup> See *Roe v. Replogle*, 408 S.W.3d 759, 763–66 (Mo. 2013) (relying on a Supreme Court analysis when upholding a delegation to require sex-offender registration); *S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 745 (Fla. 2013) (noting that “it is not this Court’s function to substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute.” (citing *State v. Rife*, 789 So.2d 288, 292 (Fla. 2001))); *City of San Antonio v. Salvaggio*, 419 S.W.3d 605, 610 (Tex. App. 2013), *review denied* (Apr. 25, 2014) (finding that hearing examiner did not act as a policy maker under the nondelegation doctrine); *TECO Mech. Contractor, Inc. v. Com.*, 366 S.W.3d 386 (Ky. 2012), *as corrected* (June 27, 2012) (finding that sufficient safeguards prevented state cabinet from abusing any legislative or judicial authority granted to it under prevailing wage law, and thus law did not violate state constitution’s non-delegation doctrine.); *Thomas v. Henry*, 260 P.3d 1251 (Okla. 2011) (statutory provisions requiring verification of immigration status through “query to Law

implement the non-delegation doctrine only do so when agency capture becomes a concern, as in *Carter v. Carter Coal Co.*,<sup>85</sup> or when the legislation lacks appropriate safeguards.<sup>86</sup> One explanation for courts' hesitancy to use the non-delegation doctrine lies in the difficulty of its implementation. The task of developing consistent standards has proven impossible, both at the state and federal level.<sup>87</sup> Harvard Law Professor Richard B. Stewart highlights Justice Rehnquist's utilization of the doctrine to further illustrate this point. Stewart notes that Rehnquist, in *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, voted to strike an OSHA provision setting standards to eliminate toxic occupational health risks "to the extent feasible," but voted a year later to uphold a delegation to the FCC to regulate pursuant to the "public interest" in *FCC v. WNCN Listeners Guild*.<sup>88</sup> Such inconsistency in application, he argues, can only be explained by subjective political motivations.<sup>89</sup>

#### VI. TYPICAL CONCERNS UNDERLYING DELEGATION AND WHY THEY DO NOT APPLY IN THIS CASE

While we cannot know for certain why *Boreali* diverged from New York's previous non-delegation view and why *Statewide* chose to follow that view, a variety of concerns could have come into play. Professor Rossi notes that several differences between the states and federal governments account for stronger adherence to non-

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Enforcement Support Center of the United States Department of Homeland Security" and to notify Department of Homeland Security if immigration status could not be verified were not impermissible delegations of authority to federal government); *Conner v. N. C. Council of State* 716 S.E. 2d 836 (N.C. 2011) (finding that "strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers.); *McNeil v. Charlevoix County*, 772 N.W.2d 18 (Mich. 2009) (upholding the local health department's rule restricting smoking in public places despite plaintiff's assertion that nothing in the enabling statute authorized the health department to enforce such restrictions).

<sup>85</sup> See *Krielow v. La. Dep't of Agric. & Forestry*, 125 So. 3d 384, 395–96 (La. 2013) (finding that "[t]he Rice Statutes . . . violate the non-delegation doctrine by giving a private group the power to decide whether the law governing the refunds will change."); *City of Hous. v. BCCA Appeal Grp., Inc.*, 01-11-00332-CV, 2013 WL 4680224 (Tex. App. Aug. 29, 2013) (noting that the non-delegation doctrine "should be used sparingly" and only when delegation is made to a private organization (citing *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 475 (Tex.1997))). Note also that the Pennsylvania constitution specifically precludes delegations to special commissions and private organizations other than the police and fire department. See *Lancaster Cnty. v. Pa. Labor Rels. Bd.*, 35 A.3d 83, 88 (Pa. Commw. Ct. 2012).

<sup>86</sup> See *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (holding that the delegation was impermissible to the extent that it suspended and terminated rulemaking by precluding notice publication and other compliance with the state administrative procedure act).

<sup>87</sup> See Stewart, *supra* note 64, at 342.

<sup>88</sup> See *id.* at 325.

<sup>89</sup> See *id.* at 342–43.

delegation doctrines.<sup>90</sup> First, differences in institutional design might justifiably call for a divergence in approach. For example, local governments might become more subject to agency capture due to the geographic proximity to special-interest groups (such as farming corporations) or because of short legislative sessions.<sup>91</sup> Furthermore, many state courts might adopt a strong non-delegation approach to supplant its state's weak Administrative Procedure Act.<sup>92</sup> Second, adherence to the non-delegation doctrine can be explained by a "Common American Heritage" approach, where the courts will generally adhere to Supreme Court reasoning, but will stray from such reasoning on occasions where the Supreme Court "has gotten it wrong."<sup>93</sup>

Finally, and less justifiably, Rossi notes that several states root their reliance on non-delegation principles in anti-federalist views, masking them as textual arguments.<sup>94</sup> When assessed objectively, he finds that this arguments fails "as an interpretive method in the separation of powers context because it does not explain differences . . . between systems with similar separation of powers clauses in their constitutions."<sup>95</sup> Under this view, the *Boreali* and *Statewide* decisions more likely stem from anti-federalist or political notions, similar to the handful of New Deal cases that struck down otherwise lawful delegations of authority. As an example, the *Boreali* court frequently cites to the New York City Charter, most likely to signal that it possesses certain unique qualities that call for non-delegation.<sup>96</sup> In analyzing that Charter, however, *Boreali* relies heavily on *Supreme Court* case law arising out of the New Deal era, undermining the assumption that its *own* constitution uniquely calls for non-delegation.<sup>97</sup> Furthermore, the *Boreali* and *Statewide* decisions cannot be explained by Rossi's other justifiable rationales.

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<sup>90</sup> See e.g., Rossi, *supra* note 83.

<sup>91</sup> *Id.* at 1224–25.

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

<sup>93</sup> See *id.* at 1240; see also James A. Gardner, *What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1044–54 (1993) (arguing that state constitutions are not the embodiment of independent political values, but instead are safeguards that reinforce national political values where the federal government has failed to do so).

<sup>94</sup> See Rossi, *supra* note 83, at 1172–73. While Rossi's observation that anti-federalist views are often masked by textual or Common American Heritage arguments from over a decade prior, a search of the few non-delegation driven decisions arising within the past five years indicates that this trend has not changed. See, e.g., *Hobbs v. Jones*, 412 S.W.3d 844, 847 (Ark. 2012) (citing to the Arkansas state constitution in its determination that general guidelines allowing the Arkansas Department of Corrections to conduct lethal injections were too broad and constituted an unlawful delegation of legislative authority to the state executive agency).

<sup>95</sup> Rossi, *supra* note 83, at 1220.

<sup>96</sup> See generally *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987).

<sup>97</sup> *Id.* at 1355.

First, the institutional design of the city's government closely parallels that of the federal government;<sup>98</sup> accordingly, sufficient safeguards are in place to account for failures in agency action. Furthermore, agency capture seems unlikely given the composition of the Board and the nature of the regulated industries. Unlike those state decisions concerned with industry influence,<sup>99</sup> the Board, in accordance with its role as an unbiased, expert agency, made decisions that were strongly disfavored by the regulated industries. City Council members, on the other hand, have more opportunities than Board members to become conflicted as paid representatives.<sup>100</sup>

Accordingly, by relying heavily on the *Boreali* precedent, the *Statewide* court also was able to "bury in doctrinal subterfuge the micropolitical factors that influence[d] [its] doctrinal [approach]." <sup>101</sup> Whereas the New York state courts have upheld regulations on calorie listing, personal pet ownership, and the promulgation of inspection requirements, it arbitrarily struck down the regulations at issue in *Boreali* and *Statewide* based on reasoning that can only be explained by subjective political views.

## VII. ANALYSIS AND SUGGESTIONS

### A. *The July Decision*

The New York Court of Appeals' decision not only failed to improve the health of thousands of New Yorkers, but also upheld an improper implementation of a judicial doctrine that paralyzes agencies by precluding them from carrying out their important roles as expert rule-makers. The current approach not only proves unworkable in practice, but also opens the door for the judiciary to supplant agency and legislative action with its own power.<sup>102</sup> Under this framework, neither legislators nor agency experts have decision-making power; instead, an unelected judiciary has granted itself the authority to determine the merits of legislative

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<sup>98</sup> See N.Y. C.P.L.R. § 7803 (McKinney 2013) (supplemental commentary) ("Similar language may be found in § 9(e) of the Federal Administrative Procedure Act, 5 U.S.C.A. § 1009(e), § 207(f) of the proposed Administrative Code, and § 12(7)(e) of the Model State Administrative Procedure Act."); see also Frederick Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, DUKE L.J. 388, 389 (1977) ("Other states, such as New York and Iowa, adhere more closely to the federal model. . .").

<sup>99</sup> See e.g., *Krielow v. La.*, 125 So. 3d 384, 395–96 (La. 2013); *City of Hous. v. BCCA Appeal Group, Inc.*, No. 01-11-00332-CV., 2013 WL 4680224 (Tex. Civ. App. 2013); *Texas Boll Weevil Eradication Found. Inc. v. Lewellen*, 952 S.W.2d 454, 475 (Tex. 1997).

<sup>100</sup> For example, Council member Christine Quinn received \$9,750 dollars of funding from interested parties, including sixteen high-ranking Coca-Cola employees. See Michael M. Grynbaum, *Quinn, Cool to Soda Ban, Gets Donations From Coke*, (January 25, 2013), N.Y. Times, (Jan. 25, 2013), <http://www.nytimes.com/2013/01/26/nyregion/coke-executives-give-christine-quinns-campaign-9750.html>. Similarly, Council members Letitia James, Melissa Mark-Viverto, and Daniel R. Garodnick all received substantial campaign contributions from PepsiCo. *Id.*

<sup>101</sup> Rossi, *supra* note 83, at 1172–73.

<sup>102</sup> See *supra* Part I.

decisions.<sup>103</sup> The decision in *Boreali*, and New York's reliance upon it in *Statewide*, not only misapplies federal and state case law but also allows for courts to make arbitrary judgment call[s] of [their] own,"<sup>104</sup> and creates a standard by which the courts can pick and choose when to use *Boreali*'s precedent to exercise its discretion in striking down regulations.

Rather than adhere to an unpredictable and outdated doctrine, the Court of Appeals should have instead analyzed whether the Board's process in promulgating regulations was thorough and accounted for abuses of power. The state Administrative Procedure Act serves as an appropriate starting point for this purpose. Under its provisions, agency regulations are granted deference absent a finding that they are "arbitrary and capricious."<sup>105</sup> While the petitioners in *Statewide* claimed that the cap failed to meet this standard,<sup>106</sup> the court did not address the question because it had already determined that the Board lacked legislative authority.<sup>107</sup> In any event, the portion-cap was not arbitrary and capricious because, as discussed in Part II,<sup>108</sup> statistical analyses indicate that reducing portion sizes might be the most necessary step that governments can take to reduce obesity. Furthermore, although the lower court found the rule arbitrary due to "loopholes" excluding certain restaurant businesses and beverages,<sup>109</sup> New York case law (as noted in the City's brief) recognizes that such administrative regulations are still valid, even when they only address "part of a perceived concern."<sup>110</sup> Therefore, the portion-cap under this test would likely pass constitutional muster, especially since an "administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise."<sup>111</sup>

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<sup>103</sup> See *supra* Part IV.

<sup>104</sup> See generally *Boreali v. Axelrod*, 517 N.E.2d 1350, 1359 (Bellacosa, dissenting).

<sup>105</sup> N.Y. C.P.L.R. § 7803 (McKinney 2003); see also *Matter of Consolation Nursing Homes, Inc. v. Comm'r New York State Dep't of Health*, 85 N.Y.2d 326, 331 (N.Y. 1995) ("The standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious.").

<sup>106</sup> See *Statewide*, *supra* note 4, at 213.

<sup>107</sup> *Id.*

<sup>108</sup> See *supra* Part II.

<sup>109</sup> See *Statewide*, *supra* note 4, at 213.

<sup>110</sup> Brief for the National Association of County and City Health Officials, et. al. as Amici Curiae at 19, *New York Statewide Coal. of Hispanic Chambers of Commerce v. The New York City Dep't. of Health and Mental Hygiene*, 16 N.E.3d 538 (N.Y. 2014), 2014 WL 2995965 (citing *New York State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 350 (1991); *New York State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 n.22 (2d Cir. 2009)).

<sup>111</sup> *Consolation Nursing Home, Inc. v. Comm'r of New York State Dep't of Health*, 85 N.Y.2d 326, 331 (N.Y. 1995).



### B. Strengthening Agency Independence

Moving forward, New York City would benefit from strengthening the Board's independence of the Mayor's office. Mayor De Blasio's recent election affords his office a ripe opportunity to encourage such structural changes.<sup>112</sup> While the current Board of Health has maintained independence from City Council, it remains closely intertwined with the Mayor. Currently, DeBlasio has the power to appoint and dismiss members of the Board of Health.<sup>113</sup> While these members have little to lose from dismissal (they are unpaid volunteers), the appointment process may lead the courts and the public to question whether their intentions are apolitical.<sup>114</sup> Accordingly, while the power of appointment should rest in the Mayor, giving City Council the opportunity to object when it can present clear evidence indicating that Board members do not meet the qualifications set forth in the City Charter may serve to advance a more independently structured Board. Furthermore, the City Council should be able to nominate Board members for Mayoral consideration.

The fact that the portion cap was largely written by the former Mayor's office and was immediately enacted by the Board of Health is indicative of the concerns surrounding the Board's significant relationship and seeming reliance on the Mayor's office.<sup>115</sup> As noted by the *Statewide* court, not unreasonably, this practice further undermines the contention that the Board of Health acts based on specialized expertise.<sup>116</sup> Accordingly, the Board of Health may benefit from developing a set of standards to follow when considering regulations proposed by outside branches.

### C. Increasing Public Education

In an administrative state where the non-delegation doctrine runs strong, the best approach to passing groundbreaking rules governing public health is to win public support. For example, in its amicus brief, City Council members argue that the trans-fat ban only passed constitutional muster because the City Council chose to endorse it.<sup>117</sup> While no case law supports the notion that a legislative branch's endorsement of an agency rule signals the agency's lack of legislative power, the council members' argument points to the importance of gaining public support. Before

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<sup>112</sup> See generally *De Blasio Announces Major Reform of City's 'Outdate' Corporate Tax Structure*, THE FORUM (Jan. 15, 2015), <http://theforumnewsgroup.com/2015/01/15/de-blasio-announces-major-reform-of-citys-outdated-corporate-tax-structure/> (discussing the new expansive structural tax reforms Mayor De Blasio plans on making in 2015).

<sup>113</sup> New York City, N.Y., Charter § 551 (2004), available at [http://www.nyc.gov/html/records/pdf/section%201133\\_citycharter.pdf](http://www.nyc.gov/html/records/pdf/section%201133_citycharter.pdf).

<sup>114</sup> See Diller, *supra* note 15, at 1897–99 (2013) (discussing ways in which the portion cap strays from the Wilsonian ideal of agency rulemaking).

<sup>115</sup> See *Statewide*, *supra* note 4, at 213.

<sup>116</sup> See *id.* at 212–13; see also Diller, *supra* note 15, at 1897.

<sup>117</sup> Brief for Petitioners at 212–13, *New York Statewide Coal. of Hispanic Chambers of Commerce v. The New York City Dep't. Of Health and Mental Hygiene*, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013) (arguing that City Council's approval of the trans-fat ban "actually emphasizes the limits of the Board's authority – the Board cannot enact rules on its own establishing).

enacting the trans-fat ban, various local businesses were convinced to begin switching to alternatives.<sup>118</sup> As restaurants began using replacement products, the notion of banning trans-fat appeared more realistic and feasible for both local businesses and presumably the City Council.<sup>119</sup> Accordingly, the Board of Health may find its regulation better received and less open to judicial scrutiny if it wins the support of the public prior to its enactment. This could involve, for example, incentivizing businesses to voluntarily replace sugary beverages (for example, with diet versions) and increasing public education campaigns bringing attention to the harms associated with their consumption.<sup>120</sup>

### VIII. CONCLUSION

The portion cap was a promising regulation that had the potential not only to improve the health of New Yorkers, but also of the nation. Unfortunately, the court's current non-delegation approach stifled the Board's endeavors. Furthermore, the Court of Appeals failed to seize its unique opportunity to act as a model for public health and correct archaic precedent that paralyzes agencies from carrying out their intended functions. As a result, the Board of Health must now explore alternative options for enacting regulations seeking to improve public health, such as increasing public awareness and agency independence.

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<sup>118</sup> David B. Caruso, *Bloomberg Trans Fat Ban in NYC Set Model for FDA* (Nov. 8, 2013), available at [http://www.huffingtonpost.com/2013/11/08/bloomberg-trans-fat\\_n\\_4239264.html](http://www.huffingtonpost.com/2013/11/08/bloomberg-trans-fat_n_4239264.html).

<sup>119</sup> *Id.* The article states:

[B]y the time New York's phased-in ban took full effect in 2008, relatively little enforcement had to be done. The market had already adjusted. It helped that partially hydrogenated vegetable oil, originally marketed in the early 1900s as a cheap substitute for butter and lard, is tasteless. It was hard to find diners who noticed any difference after New York's changes took effect.

*Id.*

<sup>120</sup> Paul A. Simon et. al., *Declines in Sugar-Sweetened Beverage Consumption Among Children in Los Angeles County, 2007 and 2011*, 10 *Preventing Chronic Disease* (2013) available at [http://www.cdc.gov/pcd/issues/2013/13\\_0049.htm](http://www.cdc.gov/pcd/issues/2013/13_0049.htm) (showing evidence that reduced sugary soda beverages among Latino communities suggests that community education programs may be effective).