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History, Governmental Structure, and Politics: Defining the Scope of Local Board of Health Power

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HISTORY, GOVERNMENTAL STRUCTURE, AND POLITICS: DEFINING THE SCOPE OF LOCAL BOARD OF HEALTH POWER

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Local boards of health often issue regulations that have broad effects that surpass the borders of the city or county to which they apply. Promulgation of such rules by board of health members appointed by the executive branch implicates separation of powers concerns; because such regulations may so extensively burden a locality's citizens, it may be more appropriate for elected officials to adopt these regulations. Indeed, local businesses or other interested parties often bring suit challenging local board of health actions. Courts apply different analytical methodologies to review these challenges, which often leads to incongruent local health agency discretion for different boards in different states—or even between different local boards in the same state.

This Note suggests that the above concerns implicitly affect how courts assess local board of health action. Based on an examination of four local boards of health and their relationships with their local and state governments, this Note posits that there are three factors that courts and policymakers should examine when assessing the parameters of a local board of health's regulatory discretion: the locality's history, the locality's government structure, and the locality's politics. By taking into account these three factors before applying traditional doctrines of local agency review—including nondelegation, preemption, or Dillon's Rule—courts may be better positioned to decide which of these doctrines should apply. In conducting this analysis, this Note also furthers the understanding of the place local boards of health hold in the grander struggle between local and state governments.

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INTRODUCTION

Imagine a large city's local board of health passes a health regulation. The regulation requires all sugary drink packages to have a warning that indicates overconsumption of sugary drinks may lead to obesity and heart problems.[1] Health activists view this regulation as a positive step toward

1. This scenario reflects the New York City "Soda Ban" and antismoking regulations analyzed *infra* Part II. The Soda Ban is a misnomer created in the media and applied to the local board of health Sugary Drinks Portion Cap Rule that sought to limit the size of

creating a healthier population,[2] but local businesses and libertarians condemn it as being overly paternalistic.[3] The local businesses—backed by national trade organizations such as the American Beverage Association—bring suit against the local board of health, seeking to enjoin enforcement of the regulation. Meanwhile, in a neighboring state, a small town passes the same regulation, which is also challenged in court.

Both states' supreme courts eventually hear the challenges. Finding that the local board of health exceeded its powers, the large city's state supreme court strikes down the regulation. The supreme court in the small town's state, however, defers to the town's board of health and upholds the regulation. Are these results contradictory? Perhaps not.

The parameters of a local board of health's[4] regulatory powers are important for various separation of powers and policy reasons. First, states and local governments may disagree over which government should regulate a certain public health matter. In addition, a local board may promulgate a rule that has effects exceeding the locality's borders. The regulation may also burden citizens so extensively that a legislative body would more legitimately effectuate the regulation's goals. Moreover, political players may intentionally use local boards to subvert the local legislative process, presenting separation of powers concerns. And public health agencies often use innovative regulatory methods later replicated at the state or federal level.

Absent uniform judicial analysis of these agency actions, local boards of health will be granted disparate regulatory authority, further complicating the above separation of powers and policy issues. Thus, an examination of how courts inspect and analyze the scope of local health agency power can elucidate the role of local boards of health in the grander struggle between local and state governments. It can also provide guidance to courts and policymakers about how future local health agency action should be implemented and reviewed.

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beverages sold in certain food establishments. *See infra* notes 5, 208–11 and accompanying text. The example also mirrors a recent San Francisco ordinance that is currently being litigated in the Northern District of California under claims of First Amendment violations. *See* Cory L. Andrews, *San Francisco's Sweetened-Beverage Warning Mandate and Ad Ban Tread on First Amendment*, FORBES (Sept. 11, 2015), http://www.forbes.com/sites/wlf/2015/09/11/san-franciscos-sweetened-beverage-warning-mandate-and-ad-ban-tread-on-first-amendment/ [http://perma.cc/SH7N-5DCZ].

2. *See, e.g.*, Ryan Jaslow, *NYC Health Commissioner on Soda Ban: "We Are Just Making Healthy Choices Easier"*, CBS NEWS (Sept. 19, 2012), http://www.cbsnews.com/news/nyc-health-commissioner-on-soda-ban-we-are-just-making-healthy-choices-easier/ [http://perma.cc/4USD-WHC2].

3. *See, e.g.*, Bettina Elias Siegel, *Bloomberg Vs. Big Soda: Portion Size, Paternalism and Politics*, HUFFINGTON POST (June 1, 2012), http://www.huffingtonpost.com/bettina-elias-siegel/nyc-mike-bloomberg-soda-ban_b_1560967.html [http://perma.cc/6YJK-ZN8Z]. *See generally* Rachael Williams, *How Growing Legislation Geared Towards Restricting America's Expanding Waist Lines Is Restricting Consumer Choice*, 22 U. MIAMI BUS. L. REV. 145 (2014).

4. Unless otherwise specified, this Note uses the terms "health agency," "health department," and "board of health" interchangeably.

Through four cases studies, this Note evaluates the different analytical methods state courts have utilized to determine the parameters of local health agency power. What this Note does not do is assess the similarities and differences between health regulations—while the first case study concerns a sugary drink regulation, the other three studies feature smoking regulations.[5] Nor does this Note seek to examine the currentness of the regulations or statutes discussed.

To anchor these case studies, Part I describes different forms of local government and local health agencies, as well as how and from whom both entities are delegated power to act. It then explores the intricate relationship between states, their local governments, and local health agencies.

Part II examines how four localities—New York, New York; Toledo-Lucas County, Ohio; Tacoma-Pierce County, Washington; and Barnstable, Massachusetts—have been given narrow or broad regulatory latitude to promulgate public health regulations. Each case study in Part II.A proceeds in two parts: First, each study gives a brief overview of the locality's history, governmental structure, and local health agency. Second, it analyzes the methods each respective court employed to determine the boundaries of each board's delegated power. Part II.B compares and contrasts the different court's analytical methods and suggests that these decisions, though seemingly disparate, may be consistent.

Building on this analysis, Part III argues that courts implicitly base their reviews of different boards' health regulations on the history, governmental structure, and politics of the localities in question. In turn, these three factors affect whether arguments based on the following are persuasive: (1) state laws and potential preemption reflecting a Dillon's Rule-like analysis; (2) separation of powers and nondelegation issues; (3) prior regulatory history; (4) local charters; and (5) agency expertise. Part III concludes with a recommendation that in the future, policymakers and courts should examine the three underlying factors—history, governmental structure, and politics—in order to determine which health regulations a local board of health may properly promulgate.

I. THE ROLE OF LOCAL HEALTH AGENCIES IN THE GRANDER SCHEME OF LOCAL-STATE GOVERNMENT INTERACTION

Part I describes the role that local health agencies occupy in government. Part I.A explores the relationship between local and state governments.

5. For a discussion of these issues, see, for example, Rodger D. Citron & Paige Bartholomew, *The Soda Ban or the Portion Cap Rule? Litigation over the Size of Sugary Drink Containers As an Exercise in Framing*, 27 MUN. L. 29 (2013) (examining the city's framing of the Sugary Drinks Portion Cap Rule as a limitation versus the petitioner's framing of it as a ban); Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 856 (2000), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446261/pdf/10846500.pdf [http://perma.cc/T9SG-YZYB]; Hery (Michelle) Min, Note, *Large-Sized Soda Ban As an Alternative to Soda Tax*, 23 CORNELL J.L. & PUB. POL'Y 187 (2013).

Part I.B describes the nondelegation doctrine, how local health agencies are created, and the local health agencies' responsibilities. Finally, Part I.C examines the relationship between these three entities and concludes that both state and local governments may exert control over local health agencies.

A. Local Government Power

This section describes local governments and discusses their relationships with their state governments. Part I.A.1 examines the differences between municipal corporations (cities and towns) and quasi-corporations (counties). It also describes different types of local governmental structures. Part I.A.2 explains the home rule doctrine. Part I.A.3 combines these ideas to describe the relationship between local and state governments.

1. Creatures of the State: Varieties of Local Government

Local governments vary greatly. The term "local government" refers to a "unit of government that is closest to the people."[6] Each local government is either a municipal corporation or a quasi-corporation.[7] A municipal corporation is a city or other local political entity that is created by a charter from the state[8] and is voluntarily organized by local residents.[9] The municipal corporation administers local affairs by providing public services, exercising general police powers, and imposing taxes to raise revenue.[10] Today, state statutes prescribe substantive[11] and procedural requirements[12] for incorporation.

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6. SANDRA M. STEVENSON, UNDERSTANDING LOCAL GOVERNMENT 1 (2d ed. 2009). For a history of the development of municipal corporations, see 1 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 1:1–1:86 (3d ed. 2010).

7. *See* MCQUILLIN, *supra* note 6, § 1:21, at 22–23; STEVENSON, *supra* note 6, at 3; Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOK. L. REV. 321, 328–30 (1999) (drawing a distinction between voluntarily organized cities and villages and involuntarily created counties and towns).

8. *See Municipal Corporation*, BLACK'S LAW DICTIONARY (10th ed. 2014). A local government charter is a document, general statute, or body of laws that grants local municipalities the power to organize and function. *See* STEVENSON, *supra* note 6, at 26. In the colonial era, representatives of the Crown issued charters that granted limited powers to the colonial governments. *See* OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW § 5, at 19–20 (3d ed. 2009); *see also infra* notes 83–91 and accompanying text (describing charters).

9. This is usually done through a vote or petition. *See* REYNOLDS, *supra* note 8, § 6, at 22. In some instances, municipalities such as towns and cities predate the creation of states. *See* MCQUILLIN, *supra* note 6, §§ 1:10–1:13. After the American Revolution, the newly characterized states reaffirmed local government existence and power. *See infra* note 48.

10. *See* STEVENSON, *supra* note 6, at 3.

11. Substantive requirements may include, for example, a minimum population. *See* REYNOLDS, *supra* note 8, § 67, at 243–46.

12. Procedural requirements may describe the petitioning and approval process for incorporation. *See id.* § 68, at 246–49.

By contrast, states create quasi-corporations.[13] Quasi-corporations act as state administrative agents, existing to serve state needs and interests.[14] Because they are not created by residents (like municipal corporations), quasi-corporations are often described as "involuntary."[15] Quasi-corporations such as counties supervise various tasks such as discharging judicial functions, repairing roads, and maintaining official documents.[16]

Most states have a combination of cities, towns, and counties that can be organized in a variety of ways.[17] Town inhabitants control local governments by meeting and directly voting on issues, whereas in larger cities, citizens' representatives undertake these responsibilities.[18]

Towns are considered smaller versions of cities.[19] Counties, however, are fundamentally different from cities and towns because they are created by the state and not by the consent of the people who they govern.[20] Beginning in the mid-twentieth century, counties began to take on policy-making responsibilities—responsibilities that were traditionally seen as responsibilities belonging to municipalities.[21] Despite these differences, both municipal corporations and quasi-corporations are limited in some way by state law.[22]

In municipal corporations, local inhabitants choose to implement one of the types of government described by state statute.[23] These options may include the mayor-council form and the council-manager form, the two

13. *See id.* § 6, at 20–23.

14. *See id.*

15. *See id.* at 21–22.

16. *See* MCQUILLIN, *supra* note 6, § 1:30, at 37; REYNOLDS, *supra* note 8, § 8, at 28.

17. *See* STEVENSON, *supra* note 6, at 1. State law may consolidate a city or town with the county that geographically encompasses it, either in a way that consolidates the two entities' powers or in a way that allows each to retain each other's functions. *See* MCQUILLIN, *supra* note 6, § 2:46, at 264–66.

18. *See* MCQUILLIN, *supra* note 6, § 1:33, at 43. New England towns are distinct from towns elsewhere in the nation because of their precolonial history as communities with a civil and religious center. *See id.* § 1:35, at 45–48. Though they are called "towns," they are actually quasi-corporations in which all of the inhabitants are members. *See id.* § 1:35, at 45. One case study this Note examines involves the town of Barnstable, Massachusetts. *See infra* Part II.A.4. Though Barnstable is a town in New England, it is not this type of New England town, but rather a "body politic and corporate"—in other words, it is a city (municipal corporation) with home rule powers. CHARTER OF THE TOWN OF BARNSTABLE, §§ 1-1 to 1-4 (2004), http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H]; *see also infra* notes 56–71 (describing home rule).

19. *See* MCQUILLIN, *supra* note 6, § 1:33, at 43.

20. *See id.* § 2:54, at 283–87.

21. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 8 (6th ed. 2004); REYNOLDS, *supra* note 8, § 8, at 28–29. Counties may be granted home rule, which perhaps explains why some have taken on more nontraditional county responsibilities. *See infra* notes 68–69. This shift may explain why some courts have held that a county is a municipal corporation. *See* MCQUILLIN, *supra* note 6, § 2:53, at 273–74.

22. *See* MCQUILLIN, *supra* note 6, § 1:21, at 23; *see also infra* Part I.A.2.

23. *See* REYNOLDS, *supra* note 8, § 18, at 61.

most widely used types of municipal governance.[24] In mayor-council governments, both the mayor and the local legislative body are generally elected by voters and share power.[25] Mayor-council governments may be further split into the weak-mayor system and the strong-mayor system.[26] In the former, a large city council has more power than the mayor: city department heads are usually chosen by the council or elected by voters, and the mayor has limited veto power over legislative action.[27] In the latter, the mayor is the city's chief administrative officer: he or she retains appointment and removal power over most city department heads and has significant veto power.[28] The council retains control over policy making.[29]

In council-manager governments, the city council performs legislative and policy-making functions but has no administrative function.[30] The council appoints and removes the city manager.[31] The city manager is the head administrative officer and has supervisory power over the heads of most city departments; generally, the city manager has appointment and removal power over these heads, but such power may be subject to council consent.[32] When control is given to a legislatively appointed city manager as opposed to an elected mayor, politics are theoretically excluded from the government's daily operation.[33]

Quasi-corporation governance is distinct from city and town administration. States often set up a board of commissioners to govern counties.[34] Counties may also have officers who share the responsibility of discharging state services in the locality; these officers include, among others, a clerk of courts, a treasurer, a prosecuting attorney, a sheriff, and a superintendent of schools.[35] Board members and officers are elected by the people or appointed by the board of commissioners.[36] The board is in charge of both policy making and its administrative functions.[37] Unlike

24. *See id.* § 19, at 62; *id.* § 21, at 66. A less common government form not applicable to any case study in this Note is the commission plan. For more information, see *id.* § 20, at 63–66.

25. *See id.* § 19, at 62–63.

26. *See id.*

27. *See id.* § 19, at 62.

28. *See id.* § 19, at 62–63; *see also* Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542 (2006) (advocating for strong municipal executives on the basis that they are more efficient and provide for accountability and transparency); *cf.* Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 554–60 (2001) (noting that states that eschew the unitary executive model of government have weaker governors who lack extensive power to lead and control the bureaucracy, leading to what some consider "bizarre or idiosyncratic" state administrative law procedures).

29. *See* REYNOLDS, *supra* note 8, § 19, at 62–63.

30. *See id.* § 21, at 66.

31. *See id.*

32. *See id.*

33. *See id.* at 66–67.

34. *See id.* § 23, at 69.

35. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 7–8; MCQUILLIN, *supra* note 6, § 1:29, at 35.

36. *See* REYNOLDS, *supra* note 8, § 23, at 69.

37. *See id.*

mayor-council and council-manager forms of government, board-of-commissioner governments tend not to concentrate significant power in one person.[38] Because there is no supervisory position, these governments are often considered weak.[39] This may lead to pressure to appoint or to elect a city manager-type leader.[40]

Nevertheless, local governments do not possess inherent sovereign authority.[41] Thus, both municipalities and quasi-corporations are often called "creatures of the state."[42] One scholar has described local governments as having two perspectives: a "bottom-up" perspective—which reflects the fact that local governments are both elected by and responsive to the people—and a "top-down" perspective—which reflects the idea that local governments derive their power and responsibilities from state constitutions, state laws, and state-granted charters.[43]

2. The Home Rule Doctrine: The Source of and Limit on Local Governmental Power

Because states experiment with different governmental and administrative structures, they are often referred to as "laboratories of government."[44] Population size and geographical makeup may help indicate which government structure best suits a particular locality.[45] These complex differences are reflected in the variation found within state constitutions and local charters, as well as within state and local laws.[46]

State governments have inherent, plenary powers.[47] They enable effective local self-government and intergovernmental cooperation by delegating to local governments certain rights, powers, privileges, and immunities.[48] Thus, state constitutions, state laws, or a combination thereof

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38. *See id.* § 23, at 70.

39. *See id.* § 23, at 69–70.

40. *See id.*; *see supra* notes 31–32 and accompanying text. Such pressure may or may not be acted upon: while Tacoma-Pierce County, Washington, has provided for a council-elected executive pursuant to its home rule power, *see infra* note 320 and accompanying text, Toledo-Lucas County, Ohio, has not, *see infra* notes 266–67 and accompanying text.

41. *See* STEVENSON, *supra* note 6, at 23; *see also* U.S. CONST. amend. X (indicating powers not delegated to the federal government are "reserved to the States").

42. *See, e.g.*, PETER J. GALIE & CHRISTOPHER BOPST, THE OXFORD COMMENTARIES ON THE STATE CONSTITUTIONS OF THE UNITED STATES: THE NEW YORK STATE CONSTITUTION 265 (2d ed. 2012); MCQUILLIN, *supra* note 6, § 3:2, at 305.

43. Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL'Y SYMP. 79, 79–82 (1996); *see also* BRIFFAULT & REYNOLDS, *supra* note 21, at 7–11; *infra* Part I.A.3.

44. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 13 (2006).

45. *See id.*

46. *See id.*

47. *See* GALIE & BOPST, *supra* note 42, at 265.

48. *See* STEVENSON, *supra* note 6, at 23. In some cases, a locality predates the creation of the states. *See* MCQUILLIN, *supra* note 6, §§ 1:10–1:13, 1:20. After the American

limit a local government's authority—if one of these documents does not explicitly delegate a power to the local government, a court will likely find it does not have the power.[49]

Influenced by popular philosophies from the Revolutionary era, states first drafted their constitutions to affirm their new statuses as states.[50] Fundamentally, drafters believed the people were best served by states that did little governing[51]: local governments could best govern because they were closer to the people, had the support of local citizens, and could best make decisions about the locality's structure and functions.[52]

State delegation of power to local government occurs through the home rule doctrine.[53] Developed as a reaction to judicial limitation on local power (a limitation captured in "Dillon's Rule"[54]), home rule authority serves the dual function of granting power to localities while also acting as a constraint on state control over those localities.[55] Home rule essentially gives local governments independence and control over local matters.[56]

"Dillon's Rule" traditionally limited local government power.[57] Dillon's Rule is a common law rule of statutory interpretation that dictates that local governments have the following powers: (1) those expressly granted to them, (2) those necessarily or incidentally implied through the expressly granted powers, and (3) those that are essential to the achievement of the

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Revolution, state legislatures granted municipal charters to those already established localities; thus, "legislative supremacy over the municipality was recognized whether so intended or not." MCQUILLIN, *supra* note 6, § 1:20, at 21.

49. *See* STEVENSON, *supra* note 6, at 23.

50. *See* William B. Munro, *An Ideal State Constitution*, 181 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 2 (1935), http://www.jstor.org/stable/1019357 (noting that some states simply adopted their colonial charters) [http://perma.cc/UE9W-BCUP]; *see also* SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY 294–99 (1999) (describing the initial adoption of state constitutions). For more on inaugural constitutions, see JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 9–10 (2006).

51. *See* Munro, *supra* note 50, at 2–3. *But see, e.g.*, THE FEDERALIST NO. 10 (James Madison) (arguing that a concentration of power at a higher level of government better avoids problems of factions).

52. *See* HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 1–2 (Dale Krane, Platon N. Rigos & Melvin B. Hill Jr. eds., 2001) [hereinafter HOME RULE IN AMERICA]. These related concepts were based in contemporary ideas that government overreach into the people's lives could be prevented by separation of powers, checks and balances, and a government close to the people. *See* GORDON, *supra* note 50, at 297–99; Munro, *supra* note 50, at 2.

53. *See, e.g.*, REYNOLDS, *supra* note 8, § 35, at 111–14.

54. *See infra* notes 57–64 and accompanying text.

55. *See* REYNOLDS, *supra* note 8, § 35, at 111–14. Reflecting the interconnectedness between local and state governments, the home rule grant was originally called *imperium in imperio*, or a government within a government. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 282.

56. *See* REYNOLDS, *supra* note 8, § 35, at 111–14.

57. The rule is named after Judge John Dillon, a local government law scholar and Iowa state court judge. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 266–67 (explaining that Judge Dillon articulated the rule in response to several mid-nineteenth century cases where local governments used public funds to financially assist railroads and other private enterprises). *See generally* 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (5th ed. 1911).

"objects and purposes of the corporation."[58] Further, if any doubt exists concerning whether a locality has a power, the court must deny that power.[59] The rule is not consistently applied[60] and is not always named when applied.[61] Still, courts today use Dillon's Rule to limit local government action in areas where the court thinks a matter is better left to the states or to the private sector.[62]

From its initial articulation in the mid-nineteenth century, scholars and judges have consistently attacked Dillon's Rule. Acting on this criticism, local governments have endeavored to diminish the limiting effects of Dillon's Rule.[63] To give local governments more authority over their local affairs, states have enacted constitutional and statutory home rule provisions to grant localities general, broad powers to act even absent specific state authorization.[64] Whether constitutionally or statutorily granted, the state constitution is the starting point—it either contains self-executing language, or it directs the legislature to pass a law to define the scope of home rule power.[65] In both cases, courts play a significant role in interpreting the parameters of the home rule power.[66] Ultimately, however, the municipality's charter is considered the main source of home rule power.[67]

Certain states also provide for county home rule: if a county decides to implement home rule, they may adopt a county home rule charter that dictates how to resolve local county matters.[68] Thus, these counties are more autonomous than a traditional county that is a "mere instrumentality of the state" subject to complete state legislative control.[69]

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58. *See* LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 165 (2d ed. 2008); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2285 (2003); Randall E. Kromm, Note, *Town Initiative and State Preemption in the Environmental Arena: A Massachusetts Case Study*, 22 HARV. ENVTL. L. REV. 241, 255–56 (1998).

59. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 267.

60. *See* GOSTIN, *supra* note 58, at 165 (discussing the modern judicial split over whether to interpret strictly or broadly the state delegation of powers to local government).

61. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 268 ("[A] narrow reading of state-granted local powers and the desire to limit the power to change legal rules to the state are hallmarks of the Dillon's Rule approach to state-local relations.").

62. *See* GOSTIN, *supra* note 58, at 165; Hermer, *supra* note 7, at 329–30.

63. *See* Hermer, *supra* note 7, at 329–30.

64. *See id.*; *see also* 1–21 CHESTER JAMES ANTIEAU, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.01 (Sandra M. Stevenson ed., 2d. ed. 2014), Lexis Advance.

65. *See* REYNOLDS, *supra* note 8, § 35, at 111–14.

66. *See* ANTIEAU, *supra* note 64, § 21.01. Constitutional home rule exists when a self-executing state constitutional provision directly grants home rule to localities. *See* REYNOLDS, *supra* note 8, § 35, at 112–13. Statutory home rule exists when the state constitution authorizes the state legislature to create home rule laws; this non-self-executing constitutional grant must be effectuated by legislative action. *See id.*

67. *See* REYNOLDS, *supra* note 8, § 35, at 113–14.

68. *See* MCQUILLIN, *supra* note 6, §§ 1:26, 1:31; *see also infra* note 266 and accompanying text (describing Toledo-Lucas County's failure to adopt a home rule charter); *infra* notes 319–22 and accompanying text (describing Tacoma-Pierce County's exercise of county home rule powers).

69. *See* MCQUILLIN, *supra* note 6, § 1:26, at 31.

By shifting the balance of state-local authority through the implementation of home rule provisions, states hope to counteract the limiting effects of Dillon's Rule.[70] Still, some states continue to have a Dillon's Rule-like approach to local government and, specifically, toward local public health agency action.[71]

3. The Separation of Powers Doctrine: The Struggle for Power Between State and Local Governments

The foregoing discussion of Dillon's Rule and the home rule doctrine reflects the difficulty courts face in determining which level of government is responsible for certain tasks.[72] The separation of powers doctrine designates different responsibilities to different authorities, both horizontally—between the legislative, executive, and judicial branches—and vertically—between federal, state, and local governments.[73] Based on the idea that the federal government's power may be limited through a checks and balances system, the doctrine seeks to preserve the people's freedom and prevent tyranny.[74] Though no explicit constitutional separation of powers provision exists, the doctrine is implicit in the document's text, structure, and organization.[75]

Similarly, states generally have an unstated separation of powers doctrine[76] based implicitly in the federal Constitution.[77] For example, certain clauses refer explicitly to a state's "Executive" and "Legislat[ive]" bodies.[78] Furthermore, the doctrine's implicit acceptance is reflected in state constitutional division of inherent state power among the legislative, executive, and judicial branches.[79]

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70. *See* ANTIEAU, *supra* note 64, § 21.01.

71. *See id.* § 24.03; BRIFFAULT & REYNOLDS, *supra* note 21, at 272 (calling Dillon's Rule a "Residual Rule" still used today due to continued uncertainty regarding the scope of local power); Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859, 1867–70 (2013).

72. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 14, 266.

73. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 2–4, at 132–36 (3d ed. 2000); *see also* BRIFFAULT & REYNOLDS, *supra* note 21, at 14–46 (citing canonical separation of powers documents, such as *The Federalist Papers* and Alexis de Tocqueville's *Democracy in America*).

74. *See* TRIBE, *supra* note 73, §§ 1–3, at 6–7. *See generally* GORDON, *supra* note 50 (exploring the doctrine's historical development, as well as its variations and global applications); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (2d ed. 1998) (tracing the doctrine's history and development).

75. *See* TRIBE, *supra* note 73, §§ 2–3, at 127. For instance, the Constitution allocates certain powers and responsibilities to each branch of the government, which indicates that the branches are separate. *See id.*; *see also* U.S. CONST. arts. I–III.

76. *See, e.g.*, State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1085 (Ohio 1999) ("The principle of separation of powers is embedded in the constitutional framework of our state government."); Boreali v. Axelrod, 517 N.E.2d 1350, 1355–58 (N.Y. 1987).

77. *See* TRIBE, *supra* note 73, §§ 2–4, at 133–36.

78. U.S. CONST. art. IV, § 4.

79. *See* THOMAS C. MARKS, JR. & JOHN F. COOPER, STATE CONSTITUTIONAL LAW: IN A NUTSHELL 189 (2d ed. 2003); *see also* cases cited *supra* note 76.

Moreover, separation of powers may be implicit at the local level. The doctrine applies to "localities that have distinct legislative and executive branches."[80] Some local government charter provisions also mandate separation of powers.[81] Some states courts, however, have found that there is no local separation of powers doctrine.[82]

The separation of powers doctrine is reflected in the three sources of power for local governments: the state constitution, state legislation, and local charters. First, the state constitution delegates home rule power to municipal corporations and sometimes to quasi-corporations.[83] If the home rule grant is not self-executing, state legislation grants the locality power to self-govern.[84] Finally, voters approve the municipal or county charter, which identifies the corporation's powers, places limitations on local power, and provides a local government framework.[85]

The main source of home rule power is the charter.[86] Adoption of a charter may establish the local government or it may be adopted post facto.[87] To address changing circumstances, state constitutions and statutes often grant local governments authority to adopt or amend old charters, which makes local governments more efficient and useful to their citizens.[88]

Local charter provisions have the force and effect of laws; accordingly, courts interpret them as statutes.[89] As charters are specifically written to apply to a particular locality, the charter usually takes precedence if it conflicts with a law generally applicable to all state localities.[90] When a charter is silent on a specific matter, a generally applicable law can supplement the charter provided the law does not violate the local government's home rule authority.[91]

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80. Elizabeth Fine & James Caras, *Twenty-Five Years of the Council-Mayor Governance of New York City: A History of the Council's Powers, the Separation of Powers, and Issues for Future Resolution*, 58 N.Y.L. SCH. L. REV. 119, 126 (2007).

81. *See, e.g.*, CHARTER OF THE TOWN OF BARNSTABLE, §§ 1–3 (2004), http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H].

82. *See, e.g.*, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 550–61 (N.Y. 2014) (Read, J., dissenting) (implicating that the separation of powers doctrine need not apply at the city level); *see also* Jordan v. Smith, 669 So. 2d 752, 756 (Miss. 1996) (finding that because there is no natural law of separation of powers, the doctrine only applies at the local level if the state constitution explicitly provides for it); City Council of Reading v. Eppihimer, 835 A.2d 883 (Pa. Commw. Ct. 2003) (finding no local separation of powers because the state constitution did not explicitly provide for it); Moreau v. Flanders, 15 A.3d 565, 579 (R.I. 2011) ("After considering the arguments raised by the parties, we hold that the separation of powers doctrine is a concept foreign to municipal governance.").

83. *See* GOSTIN, *supra* note 58, at 164.

84. *See id.*

85. *See id.*; STEVENSON, *supra* note 6, at 26; *see also supra* notes 23–40 and accompanying text (describing common local government frameworks).

86. *See* REYNOLDS, *supra* note 8, § 35, at 113–14.

87. *See* STEVENSON, *supra* note 6, at 26; *see also supra* note 48.

88. *See* STEVENSON, *supra* note 6, at 26.

89. *See id.*

90. *See id.*

91. *See id.*

Yet "as a matter of black-letter principles, the states enjoy complete hegemony over their local governments."[92] The U.S. Supreme Court stated in *Hunter v. City of Pittsburgh*,[93] "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising [state-delegated] powers."[94] States may define the nature of local power, modify or withdraw all powers, repeal a local charter, or abolish a municipal corporation—all without the local citizens' consent.[95] Still, local autonomy requires first that local people control their governments and, second, that local governments have authority to make policy decisions regarding local interests.[96]

Regardless of whether they are constitutional or legislative, home rule provisions limit state government interference with powers statutorily delegated to local governments.[97] For example, home rule provisions may affirm the local governments' rights to appoint or elect their own officers or may require state governments to obtain local government consent before taking certain actions.[98] Thus, the home rule doctrine does not only act as a source of power but also as a limitation on state legislative control.[99]

Still, local governments may only act in areas of local concern and not in areas of state concern.[100] Courts have acknowledged that there is "considerable overlap" between the two categories.[101] Though no clear test exists to distinguish between areas of local and state concern, courts consider the impact of the legislation when drawing the line.[102] If the result only affects the local government, the area is likely a local concern and within the power of the local government to regulate.[103] If, however, the result has extraterritorial effect, the matter may be deemed a state concern, thereby precluding the local government from legislating in that area.[104]

92. BRIFFAULT & REYNOLDS, *supra* note 21, at 235.
93. 207 U.S. 161 (1907).
94. *Id.* at 178–79.
95. *See id.*
96. *See* Briffault, *supra* note 43, at 82. Briffault identifies a third component of local autonomy—that local governments must also have the fiscal resources to carry out the functions they have been made responsible for—that is not discussed in this Note. *Id.*
97. *See* REYNOLDS, *supra* note 8, § 35, at 111–14; *see also* STEVENSON, *supra* note 6, at 10.
98. *See* STEVENSON, *supra* note 6, at 10; *see also* BRIFFAULT & REYNOLDS, *supra* note 21, at 238–66 (examining other limits on state control over local government power).
99. *See* ANTIEAU, *supra* note 64, § 21.02.
100. *See* STEVENSON, *supra* note 6, at 25.
101. ANTIEAU, *supra* note 64, § 21.05; *see also* Adler v. Deegan, 167 N.E. 705, 713 (N.Y. 1929) (Cardozo, J., concurring) (noting that "[a] zone, however, exists where state and city concerns overlap and intermingle"). Local concerns include how land is used and developed; choice of government style; how and what local offices, boards, or commissions are created; and how local government and agency employees are compensated. *See* STEVENSON, *supra* note 6, at 27.
102. *See* ANTIEAU, *supra* note 64, § 21.05.
103. *See id.*
104. *See id.*

Public health is one contentious area where the line between state and local control is unclear.[105]

State preemption arises when both the local and state governments have authority to act on a specific issue.[106] States may expressly or implicitly preempt local action.[107] To determine if a local regulation is preempted, courts consider (1) whether the regulation is in direct conflict with a state law and (2) whether the subject regulated concerns an area where the state has power to supersede local regulation.[108] Thus, the court may consider whether the state has restrained local authority.[109] Preemption is often based in the state's home rule provision, a provision that usually prohibits home rule action that is inconsistent with state law.[110]

B. Local Public Health Agency Power

This section introduces public health agencies and their role in government. Part I.B.1 explores administrative law principles that apply to local health agencies. Part I.B.2 surveys the makeup and responsibilities of local health agencies.

1. The Nondelegation Doctrine: A Limit on Legislative Delegation of Power to Agencies

When examining an agency's regulatory efforts, administrative law is necessarily implicated.[111] Administrative law addresses three main issues: the leadership, appointment process, and general design of administrative agencies; the extent of and limits on administrative agency power; and how to remedy unlawful agency actions.[112] An agency may act only to the extent it has been legislatively delegated such authority.[113]

An overview of federal administrative principles that have been translated to state and local governments provides useful context. The Constitution vests all federal legislative power in the U.S. Congress, which gives Congress supreme legislative authority.[114] Due to time and expertise constraints, however, Congress may statutorily delegate some of its

105. *See* GOSTIN, *supra* note 58, at 164–65. For example, the "general exercise of police powers to protect the health, welfare, and safety and morality of citizens" arguably belongs to both state and local governments. *See* STEVENSON, *supra* note 6, at 53–54.

106. *See* STEVENSON, *supra* note 6, at 28.

107. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 347.

108. *See id.* at 361.

109. *See* Kromm, *supra* note 58, at 252.

110. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 347.

111. *See* Eleanor D. Kinney, *Administrative Law and the Public's Health*, 30 J.L. MED. & ETHICS 212, 213 (2002).

112. *See id.* at 213–15. Interestingly, the due process requirements for adjudicative hearings, judicial review of agency action, and other aspects of administrative law have developed in the context of public health. *Id.* at 215.

113. *See* GOSTIN, *supra* note 58, at 165–71; *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) ("[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.").

114. *See* U.S. CONST. art. I, § 1; *see also* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 9 (3d ed. 2014).

constitutionally vested power to agencies.[115] To delegate legislative power, Congress first identifies a social, economic, or scientific problem.[116] Then, it establishes a general solution with an intelligible principle.[117] Finally, it statutorily delegates to an expert agency the responsibility to fill in the solution's specific details and to implement the solution.[118] Guided by the "intelligible principle," the agency performs this function.[119] This process reflects the nondelegation doctrine,[120] i.e., the idea that "the Constitution limits Congress's ability to confer power on administrative agencies."[121]

A delegation statute may confer executive, legislative, or judicial powers on an agency, or it may confer a combination of the three.[122] In the agency context, these powers are more specifically called enforcement, rulemaking, and adjudicative powers.[123] The government's executive branch often has significant control over agencies, which includes the power to appoint agency members.[124] Agency administration has advantages over traditional governance: specialization, expertise, and flexible decision making.[125] Agency officials are often appointed, which potentially implicates separation of powers concerns.[126]

The nondelegation doctrine is a "logical extension" of the separation of powers doctrine.[127] To prevent encroachment on the legislative branch's exclusive power to legislate, agencies must be given a precise mandate (otherwise labeled an "intelligible principle") within which to work.[128] Thus, the intelligible principle guides agency action, and the absence of an intelligible principle violates the nondelegation doctrine.

Because overly detailed statutes may become unwieldy, internally inconsistent, and difficult to administer, statutes must often delegate broad authority to agencies.[129] Expansive agency power must be balanced against the fact that voters usually cannot hold agency officials accountable for

115. *See* AMAN & MAYTON, *supra* note 114, at 9–10.
116. *See id.* at 9–14.
117. *See id.*
118. *See id.*
119. *See id.* In fact, Congress may *only* delegate powers if it provides an intelligible principle. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).
120. *See* AMAN & MAYTON, *supra* note 114, at 14–23 (describing the federal nondelegation doctrine's development in the United States).
121. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS: IN A NUTSHELL 12–13 (5th ed. 2006).
122. *See* Kinney, *supra* note 111, at 216.
123. *See* GOSTIN, *supra* note 58, at 166.
124. *See* AMAN & MAYTON, *supra* note 114, at 492–512 (describing the President's control over federal agencies).
125. *See* GOSTIN, *supra* note 58, at 166.
126. *See id.* at 163.
127. *See* Benjamin M. McGovern, Note, *Reexamining the Massachusetts Nondelegation Doctrine: Is the "Areas of Critical Environmental Concern" Program an Unconstitutional Delegation of Legislative Authority?*, 31 B.C. ENVTL. AFF. L. REV. 103, 108 (2004). Like the separation of powers doctrine, the Constitution does not explicitly mandate nondelegation. *See id.*; *see also supra* notes 72–110 and accompanying text.
128. *See* GOSTIN, *supra* note 58, at 165–66.
129. *See* AMAN & MAYTON, *supra* note 114, at 9; GOSTIN, *supra* note 58, at 165–66.

their actions.[130] Accordingly, courts review agency action to determine if they are functioning within their statutory guidelines.[131] Courts have used the nondelegation principle in a variety of ways: to overturn a statute that passed nondelegable matters to an agency, to reform or amend a statute, and against an agency that claims they have power to do something that was not within their delegated authority.[132]

Historically, state supreme courts have used the nondelegation doctrine to strike down broad delegations, whereas the Supreme Court has almost always found broad delegations constitutional.[133] Structural differences between the federal, state, and local administrative agency frameworks may explain this variance. For instance, state agencies may not be as intricate or refined as the "massive federal bureaucracy," which may lead state judges to mistrust states agencies.[134] Moreover, states may delegate regulatory responsibility to boards composed of members from the regulated industry, which makes regulation susceptible to control by private individuals or businesses.[135] Additionally, state governments' propensity toward factionalism and inefficiency may manifest itself in problems in agency decision making, accountability, and independence.[136] At the local government level, these issues may be multiplied.[137]

In response, state legislatures and courts may develop a more stringent state administrative procedure. This may include stricter application of the nondelegation principle at the state level than at the federal. This arguably counterbalances diminished executive and legislative control over the agencies.[138] Many states also require that statutes contain very detailed standards to shield against the grant of overbroad regulatory discretion.[139]

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130. *See* GOSTIN, *supra* note 58, at 165–71. Agencies, however, are accountable to elected branches of government. *See* AMAN & MAYTON, *supra* note 114, at 494.

131. *See* AMAN & MAYTON, *supra* note 114, at 9–10; Kinney, *supra* note 111, at 217–18.

132. *See* AMAN & MAYTON, *supra* note 114, at 14.

133. *See* GELLHORN & LEVIN, *supra* note 121, at 28; Gary J. Greco, Survey, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 578 (1994).

134. *See* Greco, *supra* note 133, at 578 & n.56.

135. *See* GELLHORN & LEVIN, *supra* note 121, at 29.

136. *See* Rossi, *supra* note 28, at 560–62. State administrative procedure may also include a "rules review process" that is often dictated by the state administrative procedure act. It may also include a "central panel," which is an independent agency housed by administrative law judges that adjudicate regulatory matters. *See id.* at 562–69.

137. *See generally* Nestor M. Davidson, *The Administrative City-State: Administrative Law in Local Governance* (Oct. 9, 2015) (unpublished manuscript) (on file with author) (providing a framework for local administrative law). Professor Davidson notes that in reviewing local agency actions, courts should consider the varied nature of local government structure and "resist false parallels between the local and federal levels." *Id.* at 31. Regarding accountability, for instance, "localism can cut in multiple ways": based on the specifics of the regulated area, risk of agency capture may be higher or lower than at the federal level. *Id.* at 38.

138. *See* Rossi, *supra* note 28, at 560.

139. *See* GELLHORN & LEVIN, *supra* note 121, at 28–29; Greco, *supra* note 133, at 578–600 (dividing the fifty states into three groups based on whether they require strict, loose, or "adequate" procedural safeguards).

These states must, however, consider the difficulties presented by detailed delegation statutes.[140]

Finally, agencies adopt rules,[141] whereas legislatures enact statutes. A statute is any "law passed by a legislative body,"[142] which includes laws that grant power to health agencies and local governments. Informed both by their own expertise and by private sector participation, agencies promulgate rules to add detail to these legislative mandates.[143] A rule is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[144]

2. Responsibilities and Forms of Public Health Agencies

The first public health agencies developed in response to the scientific understanding that filth causes infectious disease; accordingly, early public health agencies oversaw sanitation, sewage, and control of infectious disease—three fundamentally local concerns.[145] Today, local public health agencies have broader jurisdiction: among other things, they regulate air, water, and noise pollution; animal control; smoking in public places; and cleanliness of food and beverage production sites.[146] Relying on other sciences (including epidemiology, toxicology, and environmental science),[147] public health agencies collect and analyze data, monitor and control disease, and create and enforce public health regulations.[148] Still, they do not have inherent power to carry out these tasks: in accordance with the nondelegation principle, state and local governments must confer upon local health agencies the power to do so.[149]

Local health agencies vary in structure. Centralized agencies are operated directly by a state's department of health, and decentralized agencies are managed by a local government; some local public health agencies are a mixture of these two models.[150] Some states have an intermediate administrative entity between the state-level health agency and local public health agency, which is often called a district health department.[151]

Most local public health agencies have a board of health that has "policymaking or advisory functions" that include issuing health regulations.[152] Many states require that board members of local public

140. *See supra* note 129 and accompanying text.
141. These may also be called regulations.
142. *See Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).
143. *See* AMAN & MAYTON, *supra* note 114, at 20.
144. Administrative Procedure Act, 5 U.S.C. § 551(4) (2012).
145. *See* Kinney, *supra* note 111, at 213.
146. *See* GOSTIN, *supra* note 58, at 164.
147. *See* Kinney, *supra* note 111, at 212.
148. *See* GOSTIN, *supra* note 58, at 164; Kinney, *supra* note 111, at 218–20.
149. *See supra* Part I.B.1.
150. *See* GOSTIN, *supra* note 58, at 164.
151. *See id.*
152. *See id.*; Kinney, *supra* note 111, at 218–20.

health agencies be appointed; some states, however, allow board members to be popularly elected or allow an already elected legislative body to serve as the board of health.[153] Law often mandates that board members possess certain work experience or educational credentials demonstrating their expertise in the field.[154]

Most public regulation is geared toward curbing risks to health and safety.[155] Due to limited resources, health agencies focus their regulatory attention on what they deem the most serious risks.[156] Different factions or interest groups, however, may not always agree with agency decisions to regulate. For example, an antismoking advocacy group may approve of "no smoking in restaurants" regulations, while restaurant owners may believe that such regulations will diminish their profits.[157] And because public health agencies are on the "front lines in formulating a response" to such highly controversial problems, public health matters necessarily implicate politics.[158] Moreover, because voters may not hold agencies accountable despite these issues, judicial review of a public health agency is fundamentally important.[159]

C. The Interaction Between Local Health Agencies, Local Government, and State Government

In recent decades, local governments have attempted to employ innovative methods to address modern health problems such as tobacco use and obesity.[160] Though such innovation cannot initially be utilized at the federal level in every instance,[161] the import of local innovation is clear: a locality's innovative methods may be emulated by other cities and counties

153. *See* Diller, *supra* note 71, at 1877.
154. *See id.*; *see, e.g.*, *infra* note 207.
155. *See* Kinney, *supra* note 111, at 218–20.
156. *See id.*
157. *See id.* at 219.
158. *See* GOSTIN, *supra* note 58, at 165; Kinney, *supra* note 111, at 212.
159. *See* GOSTIN, *supra* note 58, at 165–71.
160. *See* Diller, *supra* note 71, at 1862; Kinney, *supra* note 111, at 212 (describing other modern public health concerns, such as health issues stemming from terrorist acts like the post-9/11 anthrax scare, chronic diseases caused by obesity, and risks to health and safety in the environment and workplace).
161. *See* David B. Caruso, *Bloomberg Trans Fat Ban in NYC Set Example for FDA*, HUFFINGTON POST (Nov. 8, 2013), http://www.huffingtonpost.com/2013/11/08/bloomberg-trans-fat_n_4239264.html (quoting former New York City Health Commissioner, Thomas Farley, as saying, "People used to look to the federal government, [but] [i]t's much tougher to do it at the federal level") [http://perma.cc/H878-Q8LQ]; *see also* Jason C. Czarnezki, *New York City Rules! Regulatory Models for Environmental and Public Health*, 66 HASTINGS L.J. 1621, 1660 (2015) (noting that New York City can "act as a norms leads . . . in other urban centers and national politics" as evidenced by "the popularity of smoking bans and the requirement for food menu labeling"); *"Fat Taxing" Our Way to a Healthier World*, 38 SUFFOLK TRANSNAT'L L. REV. 387 (2015) (exploring how an international "fat tax" regime may combat the obesity epidemic); Adam Nagourney, *Berkeley Officials Outspend but Optimistic in Battle over Soda Tax*, N.Y. TIMES (Oct. 7, 2004), http://www.nytimes.com/2014/10/08/us/berkeley-officials-outspent-but-optimistic-in-battle-over-soda-tax.html?_r=0 [http://perma.cc/V8TZ-6F3C].

or, after sufficient local trial, by the state and federal governments.[162] Local legislative bodies may apply these innovations and pass them as ordinances; other times, local health agencies may undertake such innovation by adopting rules.[163]

Nevertheless, local health agencies may be prevented from regulating innovatively because of controversy over whether certain public health issues are indeed local.[164] Police power to protect the public safety, health, morals, and general welfare is delegated from the state to local governments.[165] Though localities may argue otherwise, public health is almost always considered a state concern because circumstances in one locality may affect another.[166]

Because states have inherent police power, state legislatures enact public health statutes to create both state and local health agencies.[167] These statutes define the public health agencies' organization, mission, and functions.[168] The statutes may also delegate power to a local government to

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162. *See supra* note 44 and accompanying text. For example, New York City's Sugary Drinks Portion Cap Rule compelled some cities to consider implementing their own similar rules. *See* Leon Stafford, *Soda Wars: Cities Seek Restrictions, Taxes to Curb Obesity*, ATLANTA J.-CONST. (Nov. 12, 2012, 6:32 AM), http://www.ajc.com/news/news/local/soda-wars-cities-seek-restrictions-taxes-to-curb-o/nS4b2/#__federated=1 (noting that Washington, D.C., and Cambridge, Massachusetts, considered implementing similar rules) [http://perma.cc/S736-7X52]. Other cities have passed legislation showing their disapproval of the Sugary Drinks Portion Cap Rule. *See, e.g.*, Cheryl K. Chumley, *Mississippi Passes Anti-Bloomberg Bill Banning Bans on Soda Sales*, WASH. TIMES (Mar. 21, 2013), http://www.washingtontimes.com/news/2013/mar/21/mississippi-passes-anti-bloomberg-bill-banning-ban/ (describing a bill, nicknamed after New York City Mayor Bloomberg, prohibiting local governments from banning supersized sugary beverages) [http://perma.cc/LTG8-RUPB]. Mexico has since implemented a successful soda tax, *see* Willy Blackmore, *Mexico's Soda Tax Is Working*, TAKEPART (Oct. 10, 2014), http://www.takepart.com/article/2014/10/10/mexican-soda-sales-down [http://perma.cc/EE2N-FQPS], which some commentators initially compared to the New York City soda ban, *see* Jeff Stier, *With Its Soda Tax, Mexico Repeats the Mistakes of Mayor Bloomberg*, FORBES (Oct. 10, 2013, 8:00 AM), http://www.forbes.com/sites/realspin/2013/10/10/with-its-soda-tax-mexico-repeats-the-mistakes-of-mayor-bloomberg/ [http://perma.cc/DH8Y-H8YK].

163. *See* Diller, *supra* note 71, at 1866–67; *see also infra* notes 208–11 and accompanying text (describing the New York City Sugary Drinks Portion Cap Rule).

164. *See* GOSTIN, *supra* note 58, at 164–65; Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1113–14 (2007) (discussing how state preemption of local ordinances inhibits local policy innovation and consequently has a negative effect on state and national political processes); *see also supra* notes 100–05 and accompanying text (describing the difficulty of determining whether a particular matter is local or state).

165. *See* REYNOLDS, *supra* note 8, § 39, at 125–28; *see also, e.g.*, Adler v. Deegan, 167 N.E. 705, 709 (N.Y. 1929) (finding that home rule authority did not permit New York City to legislate regarding the "hygienic conditions of a community" because that is within the state's police power to regulate).

166. *See* REYNOLDS, *supra* note 8, § 39, at 126.

167. *See* C. Arden Miller et al., *Statutory Authorizations for the Work of Local Health Departments*, 67 AM. J. PUB. HEALTH 940, 941 (1977); *see also* GOSTIN, *supra* note 58, at 161. Though some public health concerns are local, concerns such as controlling an epidemic may surpass the boundaries of the locality and render it a state concern. *See* Kinney, *supra* note 111, at 213–15. Furthermore, with the advent of Medicaid and other federal programs that require state administration, state agencies have taken on more public health responsibilities. *See id.* at 216.

168. *See* GOSTIN, *supra* note 58, at 161.

act in the area of public health.[169] Often, local charters further address which powers and limits apply to local health agencies.[170]

Depending on whether local health agencies are centralized or decentralized,[171] state law, local law, or a combination of both may apply.[172] Though state public health agencies serve the state, local public health agencies serve a political subdivision of the state—that is, a city or county.[173] Thus, both localities and the local public health agencies that serve them "are subsidiary and largely subordinate to the state."[174] Courts interpret relevant constitutional, statutory, and charter provisions to determine if local governments and local agencies are acting within their delegated powers.[175]

Whether local agencies are subject to state or local control may affect how their powers are interpreted. If cities and towns are considered state agencies[176] but the local charter defines the local public health agency's powers, a local health agency may be considered the agency of an agency, or an "agent[] 'twice removed' from state control."[177] If, however, the local public health agency is considered a creation of state law independent of the local government with which it is associated, the agency is ranked equally to the local government it "serves": the city and the local health agency are both state agencies.[178]

In the first case, the local health agency is the locality's "sub-agent[]": the local health agency serves another agency—the locality.[179] The local legislature who has written the charter that defines the agency's functions thus controls the local health agency.[180] Further, the agency's powers should not exceed the local legislature's powers.[181] By contrast, if the health agency is a state creation, its powers are defined by state law; in

169. *See, e.g.*, N.Y. PUB. HEALTH LAW § 300 (McKinney 2012).

170. *See, e.g.*, CHARTER OF THE TOWN OF BARNSTABLE, § 10-7(k)(3) (2004), http://www.townofbarnstable.us/TownClerk/TownCode.pdf (indicating that the town council appoints the board of health) [http://perma.cc/EC5R-LQ4H].

171. *See supra* note 150 and accompanying text.

172. *See* GOSTIN, *supra* note 58, at 164.

173. *See id.*

174. *Id.*

175. *See supra* Part I.A.2.

176. *See supra* notes 93–95 and accompanying text.

177. Diller, *supra* note 71, at 1867.

178. *See id.* at 1867. Ohio, Washington, and Massachusetts follow this model. *See infra* Part II.A.2–4. It is harder to identify which model New York follows. *See infra* Part II.A.1. New York City, for instance, is exempted from many of the state law provisions that govern local board of health action. *See id.* Instead, the New York City Charter defines those powers. *See id.* Nevertheless, the NYC Board argued that both they and the city had legislative powers, which indicates that at least the NYC BOH adhered to the second model. *See infra* notes 215–20 and accompanying text. For an interesting exploration of how *local* judges fit into this landscape, see generally Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013).

179. *See* Diller, *supra* note 71, at 1868.

180. *See id.*

181. *See id.*

theory, the agency's powers may exceed the locality's.[182] Thus, a comprehensive assessment of a local health agency's powers necessarily requires a court to determine which level of government a local health agency pertains to.[183] To make this determination, a court may evaluate the state constitution, state statutes, local charters, or a combination thereof to determine who controls the public health agency.[184] Though many state courts faced with this issue have looked primarily or exclusively to state law,[185] in some instances they also look to local charters.[186]

In this interplay, both state and local governments endeavor to assert control over each other. States may seek to limit city or county discretion in a variety of ways: they may (1) decline to grant certain authority to local governments, (2) withhold resources from local governments, or (3) statutorily preempt certain local regulations.[187] Localities, however, may contend that they have implied power to act; alternatively, localities may claim home rule authority over public health because it is a local concern.[188] In response, a court may apply Dillon's Rule to the actions of a local public health agency.[189] The next part of this Note explores some ways that this conflict has unfolded in the highest courts of different states.

II. METHODS TO ASSESS THE REGULATORY POWER OF LOCAL BOARDS OF HEALTH

This part examines four state supreme court decisions that have analyzed the scope of local health agency power.[190] Part II.A evaluates how these state supreme courts upheld or invalidated regulations promulgated by local boards of health. Part II.B compares and contrasts the methods the courts considered in reaching their decisions.

A. Four Case Studies: From Narrow Construction of "Broad Powers" to Extreme Deference

Each case study proceeds in two sections: First, each section describes the locality's governmental structure and local health agency, including from whom it derives power. Second, each section analyzes the state supreme court's decision reviewing the local board of health's rulemaking.

182. *See id.* In Michigan, for example, health agencies may adopt rules that the local governments do not have the statutory authority to adopt. *See id.* at 1870–71. Similarly, courts in West Virginia have held that the state legislature has delegated to local boards a "broad delegation of power." *See id.* at 1872. Accordingly, local boards in Michigan and West Virginia have more aggressively regulated indoor smoking than their respective local legislative bodies. *See id.* at 1871–72.

183. *See* GOSTIN, *supra* note 58, at 164.

184. *See id.*

185. *See* Diller, *supra* note 71, at 1868; *see also infra* Part II.A.2–3.

186. *See infra* Part II.A.1, II.A.4.

187. *See* GOSTIN, *supra* note 58, at 165.

188. *See id.*

189. *See id.*; Diller, *supra* note 71, at 1870.

190. In order to see if there are any geographical trends in how the courts decided the cases, this Note looks at cases from New York, Massachusetts, Ohio, and Washington. No such trends were found among these four cases.

Part II.A.1 describes a New York case that focused on whether the New York City Board of Health ("NYC BOH" or "the NYC Board") had the power to issue a particular rule. Part II.A.2 and II.A.3, respectively, examine state court decisions from Lucas County, Ohio, and Toledo County, Washington. Both decisions focus on whether the actions of a county public health agency conflicted with the higher state power, which presumes the county agencies have the regulatory power to promulgate these regulations. Finally, Part II.A.4 describes a Massachusetts case where the court considered both issues of whether a Massachusetts board of health ("Barnstable BOH" or "the Barnstable Board") had power to issue a rule and whether such a rule conflicted with state power.

Taken together, these decisions demonstrate two overarching inquiries courts make when evaluating the scope of a local health agency's regulatory powers: First, does the board have the legal authority to promulgate the rule? Second, does the board's exercise of power conflict with a higher governmental power? Analysis of these two issues provides insight into how a board exercises its powers within the grander scheme of the state-local governmental interplay.

1. New York City: Drawing a Line Between Rules and Laws

In *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health & Mental Hygiene*,[191] the New York Court of Appeals invalidated the Sugary Drinks Portion Cap Rule which regulated the size of beverages sold in food service establishments.[192] The court examined whether the NYC BOH exceeded the scope of its regulatory authority and determined that the NYC Board had engaged in illegal lawmaking: by choosing between competing policy goals without any legislative guidance, the NYC BOH infringed on the city council's legislative jurisdiction.[193] Unlike courts in Ohio,[194] Washington,[195] and Massachusetts,[196] the court here did not focus on whether the NYC BOH's exercise of power conflicted with state law, but rather on whether the NYC Board had the authority to adopt the regulation.

New York City was founded in 1624.[197] Cities in New York State are municipal corporations voluntarily organized by local inhabitants; cities' powers are defined by the state constitution, the Statute of Local

191. 16 N.E.3d 538 (N.Y. 2014).

192. *Id.* at 541. The Sugary Drinks Portion Cap Rule is informally known as Bloomberg's Soda Ban.

193. *Id.*

194. *See infra* Part II.A.2.

195. *See infra* Part II.A.3.

196. *See infra* Part II.A.4.

197. *See* Sam Roberts, *New York's Birth Date: Don't Go by City's Seal*, N.Y. TIMES (July 14, 2008), http://www.nytimes.com/2008/07/14/nyregion/14seal.html?pagewanted=all&_r=0 [http://perma.cc/4T27-WKUE]. Some controversy exists as to the year the city was founded because it was first settled in 1624, but formally chartered in 1653. *Id.*

Governments and the Municipal Home Rule Law, and city charters.[198] Home rule was first adopted in 1894; the New York Constitution was later amended both to grant the power of self-government to cities and to limit the state's power to intrude on matters of local concern.[199] The first New York City Charter applying to all five boroughs was enacted by state law in 1897 and has been amended more than one hundred times by state or local law.[200] Though New York localities appear to have considerable control over local affairs, the New York Court of Appeals has consistently protected the state legislature's power to enact laws restricting local power, often finding state concerns in "seemingly local matters."[201] New York City has adopted a mayor-city council form of government.[202]

The New York Public Health Law indicates that preexisting local boards and departments of health shall continue to exist in counties, cities, villages, and towns.[203] The Public Health Law does not apply to New York City unless specially provided.[204] The commissioner of health and mental hygiene, who is appointed by the mayor, heads the New York City Department of Health and Mental Hygiene[205] (DOHMH). The commissioner is the chairperson of the board of health.[206] The mayor appoints ten more board members for six-year terms, and each must meet minimum educational and professional requirements.[207]

On September 13, 2012, the NYC BOH adopted the Sugary Drinks Portion Cap Rule[208] ("the Rule"). In relevant part, the Rule provided that if a container were capable of holding more than sixteen ounces, a food service establishment could not "sell, offer, or provide" a "sugary drink" in that container, nor "sell, offer, or provide" the empty container to be used at a self-service station.[209] A sugary drink is defined as a nonalcoholic

198. *See* N.Y. CONST. art. IX; N.Y. MUN. HOME RULE LAW § 10 (McKinney 1994); Nassau County v. Lincer, 3 N.Y.S.2d 327, 333 (Nassau Cty. Ct. 1938) (reversed on other grounds) (describing cities created by charter as corporations and distinguishing them from state-created civil divisions).

199. *See* Briffault, *supra* note 43, at 86–87; Hermer, *supra* note 7, at 328–31.

200. *See* Fine & Caras, *supra* note 80, at 122–23.

201. *See* Jeffrey M. Stonecash, *New York*, *in* HOME RULE IN AMERICA, *supra* note 52, 303.

202. *See* NEW YORK CITY CHARTER, §§ 1, 21, http://codes.lp.findlaw.com/nycode/NYC [http://perma.cc/8HV4-P32B].

203. *See* N.Y. PUB. HEALTH LAW § 300 (McKinney 2012).

204. *See id.* § 312; *see also* NEW YORK STATE PUBLIC HEALTH LEGAL MANUAL: A GUIDE FOR JUDGES, ATTORNEYS AND PUBLIC HEALTH PROFESSIONALS 1 (Michael Colodner ed., 2011) [hereinafter NEW YORK STATE PUBLIC HEALTH LEGAL MANUAL], http://www.nycourts.gov/whatsnew/pdf/PublicHealthLegalManual.pdf (directing readers to the New York City Health Code, the New York City Charter, and the New York City Administrative Code instead of the state public health law) [http://perma.cc/65MB-549W].

205. *See* NEW YORK CITY CHARTER, § 551(a), http://codes.lp.findlaw.com/nycode/NYC [http://perma.cc/8HV4-P32B].

206. *See id.* § 553(a).

207. *See id.* § 553(a)–(b).

208. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 541 (N.Y. 2014). This Note does not seek to examine the differences and similarities between beverage regulation—including soda taxation—and smoking regulations, which are discussed *infra* Part II.A.2–4.

209. *Id.*

sweetened drink containing a specific amount of calories, sugar or other sweetener, and milk or milk substitute.[210] Certain establishments subject to regulation by the New York State Department of Agriculture and Markets were exempted from the Rule.[211]

Six not-for-profit and labor organizations (some national, some statewide) sued then-Commissioner Dr. Thomas Farley, the NYC BOH, and the DOHMH.[212] Plaintiffs moved for an order to enjoin and permanently restrain defendants from implementing or enforcing the Rule and further moved to declare the Rule invalid.[213] They argued that the NYC Board had exceeded its regulatory authority in promulgating the rule.[214]

The NYC BOH argued that because it was created by the state legislature—a contention subject to debate[215]—it had inherent legislative

210. *Id.*

211. *Id.* at 541–42.

212. *Id.* at 542. Control over New York City's public health has changed multiple times between the city and the state. *See* N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, PROTECTING PUBLIC HEALTH IN NEW YORK CITY: 200 YEARS OF LEADERSHIP 12–16 (2005), http://www.nyc.gov/html/doh/downloads/pdf/bicentennial/historical-booklet.pdf [http://perma.cc/Q5DJ-BAMA]; *see also infra* note 215 (describing the development of the NYC BOH). In 2002, voters approved the merger between the Department of Health and the Department of Mental Health, Mental Retardation and Alcoholism Services, resulting in the current Department of Health and Mental Hygiene. *See* N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, *supra*, at 63–64. Dr. Thomas Farley was the Commissioner of the New York City DOHMH and the chair of the NYC BOH when the Sugary Drinks Portion Cap Rule was adopted. *See* Susan Heavey, *Thomas Farley, NYC Health Commissioner, Defends Bloomberg's Big Soda Ban*, HUFFINGTON POST (Aug. 7, 2012, 5:12 AM), http://www.huffingtonpost.com/2012/06/07/thomas-farley-nyc-health-_n_1579700.html [http://perma.cc/YD9M-WTTN]. The executive branch appoints the eleven-member board. *See* NEW YORK CITY CHARTER, §§ 551, 553 http://codes.lp.findlaw.com/nycode/NYC [http://perma.cc/8HV4-P32B]. For purposes of this Note, these three parties will be referred to as "the NYC BOH" or "the NYC Board."

213. *See N.Y. Statewide Coal.*, 16 N.E.3d at 542.

214. *See id.* Plaintiffs also argued that the Rule itself was arbitrary and capricious. *See id.* Like the Appellate Division, however, the Court of Appeals did not reach this issue. *See id.* at 542, 549.

215. In 1793, state doctors established New York State's first health agency in response to a yellow fever outbreak. *See* N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 212, at 4 (describing how leading doctors in New York organized a committee with authority to inspect ships entering state ports); *see also N.Y. Statewide Coal.*, 16 N.E.3d at 551–53 (Read, J., dissenting) (describing the state statutes). In 1805, the NYC Common Council established the NYC BOH to gain more direct oversight over yellow fever prevention. *See* N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 212, at 4; *see also N.Y. Statewide Coal.*, 16 N.E.3d at 551 (Read, J., dissenting) (noting that the term "board of health" appeared in state statutes for the first time in 1811). Ultimately, modern-day control over the city's public health lies with the city. *See* N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 212, at 63–68. Although the majority opinion in *N.Y. Statewide Coal.* did not delve deeply into the NYC Board's historical roots, Judge Read's dissent examined the historical development of the NYC Board to support her position that the NYC Board was correct in asserting it was a state creature. *N.Y. Statewide Coal.*, 16 N.E.3d at 551–57 (Read, J., dissenting). In Judge Read's view, the only issue was whether the NYC Board had properly acted within the parameters of its state-delegated powers. *See id.* at 551–54. Though the majority agreed with the dissent's historical analysis of the NYC Board's authority, its statutory analysis focused primarily on the New York City Charter. *See infra* notes 229–34 and accompanying text. Though a state creation, the NYC BOH is seemingly

powers "separate and apart" from the city council. It therefore argued that it had legislative authority to adopt the Rule.[216] In support of this contention, the NYC Board pointed to language in the New York City Charter,[217] the history of the NYC Board,[218] and other public health areas where the NYC Board had previously promulgated rules.[219] The NYC Board effectively argued that it had legislative—not regulatory—authority to adopt the Rule.[220]

The court considered, in two parts, the overarching issue of whether the NYC Board had the power to promulgate the Rule: First, it considered whether the NYC Board had legislative authority. Finding it did not, the court then applied the test articulated in *Boreali v. Axelrod*,[221] a standard used to determine when an agency has crossed the line between rulemaking and lawmaking.[222] By employing this analysis, the court ostensibly can determine if an agency has exceeded its regulatory powers.[223]

As to the first issue, the court determined that the only New York City body with legislative power is the city council.[224] In support of this

unique in that many provisions of the New York Public Health Law do not apply to the city. *See* N.Y. PUB. HEALTH LAW § 312 (McKinney 2011); NEW YORK STATE PUBLIC HEALTH LEGAL MANUAL, *supra* note 204, at 1 (directing readers to the New York City Health Code, the New York City Charter, or the New York City Administrative Code based on the circumstances).

216. *N.Y. Statewide Coal.*, 16 N.E.3d at 543.

217. *See id.* at 544; *see also* NEW YORK CITY CHARTER, §§ 556, 558(b)–(c), http://codes.lp.findlaw.com/nycode/NYC [http://perma.cc/8HV4-P32B].

218. *N.Y. Statewide Coal.*, 16 N.E.3d at 544–45.

219. *See id.*

220. *See id.*

221. 517 N.E.2d 1350 (N.Y. 1987). Notably, the *Boreali* case examined a smoking regulation promulgated by the New York Public Health Council, a *state* agency. *Id.* at 1353.

222. *See N.Y. Statewide Coal.*, 16 N.E.3d at 545–49.

223. *See id.* at 549.

224. *See id.* at 543–44. In the modern administrative state, it is unlikely that any court would find that a board of health would have "legislative" powers: though agencies are delegated legislative powers, they have these powers only to the extent that they are filling in the blanks left by the statute that delegates them that power. *See id.* at 554 (Read, J., dissenting) ("While it may sound odd in the context of modern-day administrative law to call an agency's authority 'legislative,' the Board's authority is quite clearly at least 'nearly legislative.'"); *see also supra* Part I.B.1; *cf.* Mistretta v. United States, 488 U.S. 361, 372 (1989) (holding that a delegation of legislative authority must contain some "intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform").

finding, the court cited the city charter,[225] the state constitution,[226] and the New York State Home Rule Statute.[227]

The court examined two phrases in the city charter to affirm that the charter did not empower the NYC Board to create law: (1) "to adopt local laws," and (2) "all matters and subjects."[228] First, the charter indicated that only the city council could "adopt local laws."[229] The charter restricted the NYC Board's rulemaking powers to add to, alter, and repeal provisions of the health code, as well as publish additional health code provisions.[230] The court determined that the authority to publish a health code reflected a regulatory mandate, not legislative power.[231] Second, the charter was amended in 1979 to add the seemingly broad phrase "all matters and subjects"[232] to the health code provision.[233] Legislative history indicated that the purpose of the amendment was not to give the NYC Board plenary power to regulate *all* matters, but rather to preclude the NYC Board from regulating areas unrelated to health.[234]

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225. *N.Y. Statewide Coal.*, 16 N.E.3d at 543 (noting that the New York City Charter provides for distinct legislative and executive branches of city government); *see also* NEW YORK CITY CHARTER, § 21, http://codes.lp.findlaw.com/nycode/NYC (stating that the city council is "the legislative body of the city . . . vested with the legislative power of the city") [http://perma.cc/8HV4-P32B]; *accord* Under 21, Catholic Home Bur. for Dependent Children v. City of New York, 482 N.E.2d 1, 4–5 (N.Y. 1985).

226. *See N.Y. Statewide Coal.*, 16 N.E.3d at 544 ("[E]very local government . . . shall have a legislative body elective by the people thereof." (quoting N.Y. CONST. art. IX, § 1(a))).

227. *See id.* at 544 (citing N.Y. MUN. HOME RULE LAW § 2(7) (McKinney 1994)). The dissent maintained that the home rule amendment and the home rule law preserved an existing board's power and laws, indicating that the institution of home rule in New York did not eradicate the NYC Board's lawmaking powers. *See id.* at 555 (Read, J., dissenting) (citing N.Y. MUN. HOME RULE LAW §§ 50(3), 56(1)).

228. *N.Y. Statewide Coal.*, 16 N.E.3d at 544; *see also* NEW YORK CITY CHARTER, §§ 28(a), 558(c), http://codes.lp.findlaw.com/nycode/NYC [http://perma.cc/8HV4-P32B].

229. *See N.Y. Statewide Coal.*, 16 N.E.3d at 544; *see also* NEW YORK CITY CHARTER, § 28(a), http://codes.lp.findlaw.com/nycode/NYC ("The council in addition to all enumerated powers shall have power to adopt local laws which it deems appropriate . . . .") [http://perma.cc/8HV4-P32B].

230. *N.Y. Statewide Coal.*, 16 N.E.3d at 544; *see also* NEW YORK CITY CHARTER, § 558(b), http://codes.lp.findlaw.com/nycode/NYC [http://perma.cc/8HV4-P32B]. The Sugary Drinks Portion Cap Rule was adopted as an amendment to an article of the health code. *See N.Y. Statewide Coal.*, 16 N.E.3d at 541.

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

232. NEW YORK CITY CHARTER, § 558(c), http://codes.lp.findlaw.com/nycode/NYC ("The board of health may embrace in the health code all matters and subjects to which the power and authority of the department extends.") [http://perma.cc/8HV4-P32B].

233. *See N.Y. Statewide Coal.*, 16 N.E.3d at 544–45. This reflected a Dillon's Rule-like analysis.

234. *See id.* at 544 (citing a report by the city's committee on health that indicated that the amendment addressed concerns that the NYC Board was passing overly broad regulations that invaded the city council's legislative territory); *cf.* Diller, *supra* note 71, at 1870 (describing the Supreme Court of Washington's similar analysis as a "Dillon's Rule-like approach to the agency's power"). *Compare infra* notes 282–92 and accompanying text (describing how the Ohio Supreme Court accepted the argument that broad statutory language could be limited by other provisions of the Ohio Revised Code), *with infra* notes 385–88 and accompanying text (describing how the Supreme Judicial Court of

The court further explained why the NYC Board was incorrect in arguing that its powers were legislative and not regulatory. The court was troubled that the NYC BOH did not address what would happen if the NYC Board passed a "health law" that conflicted with a city council law.[235] This provided additional support to the argument that the NYC Board could only enact "rules with the force of law"—an action distinct from and less powerful than passing a "legislative law."[236] The court continued that the NYC Board's emphasis on two cases that had made "passing references" to the NYC Board's "legislative authority" was misplaced.[237] Ultimately, the court concluded it was clear that the NYC Board had no legislative authority, but "only a regulatory mandate."[238] Thus, the court implicitly found that the NYC BOH was an agency twice removed.[239]

The second part of the court's analysis focused on whether the "difficult-to-define line" between legislative policymaking and administrative rulemaking had been crossed; namely, the court examined whether the nondelegation doctrine had been violated.[240] To determine this, the court applied *Boreali*, New York courts' "go-to" case[241] to assess whether an agency has exceeded its delegated powers.[242] There, the court identified four "coalescing circumstances" that a court should analyze to determine if an administrative rule has "run[] afoul of the constitutional separation of powers doctrine": (1) whether the regulation considers factors not related to the stated purpose of the regulation; (2) whether the regulation was created on a "clean slate" without the benefit of legislative guidance; (3)

Massachusetts rejected the argument that a broad statutory delegation of powers could be limited by other statutory language).

235. *N.Y. Statewide Coal.*, 16 N.E.3d at 545.

236. *Id.* Though similar to a preemption analysis, this action is distinct: this type of same-level-of-government conflict reflects the *Boreali* separation of powers analysis conducted later in the opinion. *See* Boreali v. Axelrod, 517 N.E.2d 1350, 1357 (1987) (noting that when "a perceived conflict between legislative policy and administrative action at the same level of government is at issue," the preemption doctrine does not apply).

237. *N.Y. Statewide Coal.*, 16 N.E.3d at 545. By contrast, the dissent found these cases to be very persuasive, noting "[i]t is impossible to wish away the large body of caselaw [sic] in which we have repeatedly described the source of the Board's delegated authority" to be the New York State Legislature. *See id.* at 554 (Read, J., dissenting). The dissent implied that both NYC and the NYC BOH are state agencies. *See supra* notes 176–86 and accompanying text.

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

239. *See supra* notes 176–86 and accompanying text.

240. *N.Y. Statewide Coal.*, 16 N.E.3d at 545–46.

241. *See id.* at 545 ("Because a doctrine of separation of powers [is] delineated in the City Charter . . . *Boreali* provides the appropriate framework.").

242. *Id.* The dissenting opinion in *N.Y. Statewide Coal.*, for example, took issue with *Boreali*'s application to the instant case, explaining that *Boreali* relied on the New York State Constitution and did not apply to questions of local government power. *Id.* at 558 (Read, J., dissenting). It maintained that *Boreali* could not apply if the NYC Board did not derive its power from the state. *Id.*; *accord* Min, *supra* note 5, at 204–06 (arguing *Boreali* should not apply in the Soda Ban context); *see also supra* note 238. Indeed, *Boreali* examined a smoking ban promulgated by the Public Health Council, a *state* agency. *See* Boreali v. Axelrod, 517 N.E.2d 1350, 1353 (N.Y. 1987).

whether there was legislative inaction; and (4) whether the regulation involved technical expertise.[243]

Yet instead of strictly applying the *Boreali* coalescing circumstances,[244] the court emphasized *Boreali*'s underlying policy that the people's elected representatives should legislate difficult social problems.[245] Through examination of the first three *Boreali* factors,[246] the court explained why each factor indicated that the NYC Board had engaged in policymaking that should be left to the elected representatives.[247] First, in adopting an indirect method of regulating soda consumption as a way to combat obesity, the NYC Board had improperly made a policy decision based on "complex value judgments" properly left to elected officials.[248] Second, neither the city council nor the state legislature had legislated in the area of sugary-beverage consumption.[249] Accordingly, the Rule did not merely fill in the details of a legislative statute or ordinance, but effectively made law.[250] Finally, the city and the state legislatures' inaction in this area indicated the NYC Board was making a new policy decision.[251] Therefore, regardless of "which arm of government first proposed or drafted" the Rule and regardless of "whether the [NYC] Board exercised its considerable professional expertise or merely rubber-stamped a rule drafted outside the agency," the *Boreali* analysis rendered the Rule invalid.[252]

2. Toledo-Lucas County: Granting Only "Specific" Broad Powers

In *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health*,[253] the Ohio Supreme Court declared that local boards of health do not have authority to prohibit smoking in all public places.[254] The court examined whether the Board of Health of Toledo-Lucas County Regional Health District ("TLC BOH" or "the TLC Board") had power to prohibit smoking in all public

243. *Boreali*, 517 N.E.2d at 1355–58.

244. The dissent criticized the majority's "flexible approach" to the coalescing circumstances. *N.Y. Statewide Coal.*, 16 N.E.3d at 558–561 (Read, J., dissenting).

245. *Id.* at 545–49 (majority opinion). The NYC BOH is appointed. *See supra* notes 205–07 and accompanying text.

246. It did not assess the fourth factor. *See id.* at 548–49 ("[T]he *Boreali* factors do not constitute rigid conditions.").

247. *Id.* at 545–49. By contrast, the intermediary appellate and trial courts had specifically analyzed all four factors by focusing more on the actual test than its underlying policy. *See In re* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 110 A.D.3d 1 (N.Y. App. Div. 2013); N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 N.Y. Misc. LEXIS 1216 (N.Y. Sup. Ct. Mar. 11, 2013).

248. *N.Y. Statewide Coal.*, 16 N.E.3d at 547–48.

249. *See id.* at 548.

250. *See id.*

251. *See id.*

252. *Id.* at 549.

253. 773 N.E.2d 536 (Ohio 2002). For another analysis of this case, see Kenneth J. Heisele, *Cases Involving the Interpretation of State and Federal Statutes*, 29 OHIO N. UNIV. L. REV. 728, 740–48 (2003).

254. *See id.* at 547.

places based on the authority delegated to it in Ohio Revised Code § 3709.21.[255] It concluded that although Ohio state law delegated broad authority to the TLC BOH to regulate some specific public health matters, state law did not delegate to the TLC Board unlimited power to promulgate regulations concerning all public health matters.[256] Thus, the court considered the same question raised in the Sugary Drinks Portion Cap Rule context[257]: Did the TLC Board have the power to promulgate this rule? Instead of focusing its inquiry on whether the TLC Board had the authority to adopt the regulation pursuant to local law,[258] the court considered whether the TLC Board's powers conflicted with higher state law—similar to analyses conducted by the Washington[259] and Massachusetts[260] courts, discussed below.

In 1788, Toledo-Lucas County was established as an administrative arm of the Ohio Territory government.[261] The city of Toledo is within Lucas County, Ohio.[262] Unlike townships and cities that are separate corporate bodies with the ability to exercise police powers, counties are considered extensions of the state that simply implement state law and state policy.[263] Counties, however, do encompass townships and cities.[264]

In 1933, a state constitutional amendment allowed counties the option to gain home rule powers if the county voters ratified a home rule charter. The amendment gave counties the freedom to self-govern and limited the state legislature's involvement in the county's affairs.[265] Lucas County, however, has not ratified a home rule charter.[266] Accordingly, the county is administered by nine officers who are elected to four-year terms to the board of county commissioners.[267] Lucas County, unlike a municipality that has adopted a home rule charter, is thus a "creature of the state" subject to state control.[268] Ohio is divided into general health districts.[269] Each

255. *See id.* at 541–47; *see also* OHIO REV. CODE ANN. § 3709.21 (West 2011) ("The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances.").

256. *See D.A.B.E.*, 773 N.E.2d at 547.

257. *See supra* Part II.A.1.

258. *See supra* Part II.A.1.

259. *See infra* Part II.A.3.

260. *See infra* Part II.A.4.

261. *See About Us*, LUCAS COUNTY, http://co.lucas.oh.us/index.aspx?NID=7 (last visited Oct. 21, 2015) [http://perma.cc/V9TK-5WHY]; *see also* BALDWIN'S OHIO PRACTICE, LOCAL GOVERNMENT LAW—COUNTY § 1:1 (Thomson Reuters 2010) [hereinafter BALDWIN'S OHIO PRACTICE].

262. *See D.A.B.E.*, 773 N.E.2d at 539.

263. *See* BALDWIN'S OHIO PRACTICE, *supra* note 261, § 1:1.

264. *See* Jack L. Dustin, *Ohio*, *in* HOME RULE IN AMERICA, *supra* note 52, 330–31.

265. *See* OHIO CONST. art. X, §§ 1–4; Dustin, *supra* note 264, at 333; Stephen Cianca, *Home Rule in Ohio Counties: Legal and Constitutional Perspectives*, 19 U. DAYTON L. REV. 533, 533 n.1 (1994).

266. *See* BALDWIN'S OHIO PRACTICE, *supra* note 261, § 1:2; Cianca, *supra* note 265, at 535 n.13.

267. *See* OHIO CONST. art. X, § 1; BALDWIN'S OHIO PRACTICE, *supra* note 261, § 1:2.

268. *See* Cianca, *supra* note 265, at 536.

269. *See* OHIO REV. CODE ANN. § 3709.01 (West 2013).

health district, including the Toledo-Lucas County Regional Health District, has a board of health, which consists of appointed members.[270]

On May 24, 2001, the TLC BOH adopted the Lucas County Regional Health District Clean Indoor Air Regulation ("the Regulation"), a rule prohibiting smoking in all public areas.[271] The TLC Board cited § 3709.21 of the Ohio Revised Code as the source of its power to pass the Regulation.[272]

Twenty-seven trade associations and small businesses sued the TLC Board, seeking an injunction barring enforcement of the Regulation.[273] They raised several state law claims and one federal law claim, contending that the Regulation's promulgation was beyond the TLC Board's legislative authority under the applicable provisions of the Ohio Revised Code and that the Regulation was an illegal legislative act.[274] The TLC Board removed the action to federal court, which certified four Ohio state law questions to the Ohio Supreme Court.[275]

Of these four, the Ohio Supreme Court focused on one question: "Does the *Ohio Revised Code* authorize or delegate to a local board of health of a general health district the authority to prohibit smoking in all public places as defined by the Regulation at issue herein?"[276] The TLC BOH contended

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270. *See id.* § 3709.02; D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 773 N.E.2d 536, 539 (Ohio 2002). For purposes of this Note, both the regional health district and its board will be referred to as "the TLC Board" or "the TLC BOH."

271. *See D.A.B.E.*, 773 N.E.2d at 539. "Public area" was defined as all enclosed, indoor areas where the general public is invited or normally permitted. *See id.* The Regulation further proscribed smoking within twenty feet of entrances and of open windows at these public areas and mandated criminal penalties for violators and for owners of public places who did not enforce the Regulation. *See id.*

272. *See id.* In relevant part, Ohio Revised Code § 3709.21 provides,

> The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. . . . All orders and regulations . . . shall be adopted, recorded, and certified as are ordinances of municipal corporations and the record thereof shall be given in all courts the same effect as is given such ordinances.

OHIO REV. CODE ANN. § 3709.21 (West 2011).

273. *See D.A.B.E.*, 773 N.E.2d at 539. The small businesses included several bars, restaurants, a bowling alley, and a cigar lounge. *See id.*

274. *See id.*

275. *See id.* at 540.

276. *See id.* Because the court answered this first question in the negative, it declined to answer the remaining certified questions. The other three questions asked what would happen if a board of health had authority to promulgate the smoking regulation, but their regulation conflicted with one or more of the following: the Ohio Constitution, state statute, and/or a local legislative ordinance. *See id.* at 540, 547. The state statute provided for "nonsmoking areas in places of public assembly," but delegated authority to designate the nonsmoking sections to the local fire authority, the director of administrative services of a state agency, or the person controlling the place of public assembly. *Id.* at 540; OHIO REV. CODE ANN. § 3791.031. The Toledo Municipal Code, chapter 1779, regulated smoking within the city and permitted smoking to some extent in businesses like the ones owned by plaintiffs. *See D.A.B.E.*, 773 N.E.2d at 540; *cf. infra* notes 337–40 and accompanying text (describing how Washington did reach this question of whether the state smoking statute preempted the local board's regulation); *supra* notes 228–34 and accompanying text (describing how New York City and Massachusetts examined the issue of health regulations

that § 3709.21 vested it with a broad and independent authority to adopt any regulation necessary to protect the public health.[277] It further argued that any regulation adopted pursuant to § 3709.21 that was (1) "necessary to protect the public health" and (2) "reasonable, nondiscriminatory, and consistent" with the Ohio constitution was valid.[278] By contrast, the local businesses argued that § 3709.21 was simply an enabling statute that conferred rulemaking powers on the boards of health; it did not grant local boards plenary authority to regulate any and all public health concerns.[279]

Similar to New York Court of Appeals's analysis, the court here addressed two overarching issues[280]: First, the court examined whether the TLC Board had the authority to promulgate the rule. Second, it examined whether the TLC Board exceeded its regulatory powers in violation of the nondelegation doctrine. Whereas New York focused on the city charter to answer these overarching questions,[281] Ohio examined whether the TLC Board's powers conflicted with state law.

First, applying statutory rules of construction set forth in the Ohio Revised Code ("the Code" or "the Revised Code") and from the court's own precedent,[282] the court concluded that the Code's other provisions limited the seemingly broad language of § 3709.21 because the Ohio General Assembly intended for the entire state public health statute[283] to be effective[284] and feasibly executed.[285] Similarly, the court stated that words in a statute must not be construed to be redundant or to ignore any other word in the statute.[286] Moreover, courts may consider similar laws to determine legislative intent[287] and should give a reasonable construction to each title of the Code to ensure that each has proper force in relation to the others.[288] Consequently, the court considered § 3709.21 in the context of the full chapter[289] and full code.[290]

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conflicting with the respective local charters); *infra* notes 370–74 and accompanying text (describing how Massachusetts examined the issue of health regulations conflicting with the respective local charters).

277. *See D.A.B.E.*, 773 N.E.2d at 540–41.

278. *Id.* at 541.

279. *See id.*

280. *See supra* Part II.A.1. Though New York addressed a more specific question of whether the NYC Board had "legislative authority" to promulgate the Sugary Drinks Portion Cap Rule, both courts essentially examined whether the respective boards had the legal authority to promulgate the regulations.

281. *See supra* notes 228–34 and accompanying text.

282. *See, e.g.*, *D.A.B.E.*, 773 N.E.2d at 542.

283. *See* OHIO REV. CODE ANN. XXXVII (West 2013). Title 37 is called "Health—Safety—Morals"; titles are further broken down into chapters.

284. *See D.A.B.E.*, 773 N.E.2d at 541 (citing OHIO REV. CODE ANN. § 1.47(B) (listing the presumptions the general assembly works under when enacting statutes)).

285. *See id.* at 542 (citing OHIO REV. CODE ANN. § 1.47).

286. *See id.* at 543 (citing several cases for the proposition).

287. *See id.* at 541–42 (citing *State ex rel. Pratt v. Weygandt*, 132 N.E.2d 191 (Ohio 1956), and OHIO REV. CODE ANN. § 1.49(D) to explain how courts should construe ambiguous statutes).

288. *See id.* at 542 (citing Maxfield v. Brooks, 144 N.E. 725 (Ohio 1924)).

289. *See* OHIO REV. CODE ANN. XXXVII, ch. 3709. Chapter 3709 of the health statute is entitled "Health Districts."

Doing so, the court concluded that the general assembly did not intend to grant local boards of health plenary authority to promulgate *any* regulation the TLC Board believed necessary for public health purposes because such a reading would render large portions of Revised Code Title 37 and other titles superfluous.[291] Identifying examples from § 3709 and the rest of the Code, the court described in detail which specific areas of public health local boards of health can regulate.[292]

Second, the court considered the underlying nondelegation issue by examining whether the TLC Board was granted implicit power to promulgate the rule.[293] The court first explained that though local boards of health are granted broad regulatory powers,[294] at times boards take actions that impermissibly surpass the scope of their administrative rulemaking authority.[295] As agencies may only exercise the regulatory power conferred upon them by the general assembly, these actions turn their regulatory efforts into legislative action.[296]

Furthermore, the court explained that the general assembly's grant of power may be explicit or implicit.[297] Implied powers exist only to the extent that they are necessary to exercise an express power.[298] Thus, if there is no explicit power, there necessarily is no implicit grant of power to effect an explicit power.[299] If there is any question as to whether the general assembly intended to delegate a power or to the scope of such power, the doubt must be resolved against the grant.[300] As the TLC Board was not expressly delegated the plenary power to promulgate *any* regulation

290. *See D.A.B.E.*, 773 N.E.2d at 542. This meant that the court not only considered the Health Districts chapter of the health law, but also other laws such as Ohio Revised Code Annotated title IX, chapter 955, the chapter that governs dog ownership. *See id.* at 543.

291. *See id.* For example, Ohio Revised Code § 955.26 allows a health district board of health to quarantine and vaccinate dogs for rabies. *See id.* at 543. The enactment of this provision indicated to the court that Ohio Revised Code § 3709.21 did not vest local boards with plenary authority; if it did, Ohio Revised Code § 955.26, as well as many other sections, would be redundant. *See id.*

292. *See id.* at 542–43 (noting a few of those areas to be in construction and demolition matters; sewage and disposal systems; and monitoring food preparation places). The court also explained that a narrow reading of Ohio Revised Code § 3709.21 would not "eviscerate" the ability of boards of health to effectively and expeditiously respond to new public health threats because the general assembly has delegated emergency action powers in other provisions of the code. *See id.* at 546–47.

293. By contrast, New York examined the nondelegation issue by applying the four-part *Boreali* test. *See supra* notes 240–52 and accompanying text.

294. *See D.A.B.E.*, 773 N.E.2d at 545 (citing Weber v. Butler Cty. Bd. of Health, 74 N.E.2d 331, 337 (Ohio 1947)).

295. *See id.*

296. *See id.*

297. *See id.*

298. *See id.*

299. *See id.*

300. *See id.* at 545–56. This is a Dillon's Rule-type interpretation: when there is a question about which powers a local government has, the power is narrowly construed. *See* BRIFFAULT & REYNOLDS, *supra* note 21, at 270.; *cf.* Diller, *supra* note 71, at 1870 (coming to a similar conclusion about the Washington case conducting a "Dillon's Rule type approach").

it deemed necessary,[301] it also lacked an implied power to adopt the smoking ban.[302] Moreover, the court affirmed that § 3709.21 was a rules-enabling statute: it governs procedure, but does not grant substantive regulatory authority.[303] Thus, the actual regulatory authority to act in a specific public health area must come from an additional, specific grant of authority from the general assembly.[304]

Citing statistics and health reports about the harms of smoking, the court concluded that despite how "well intentioned and beneficial" the Regulation may have been, the court would not extend by implication the general assembly's grant of authority beyond the above explained limits.[305] "[U]nless the General Assembly or a local municipality with home-rule power decides otherwise," the TLC Board did not have the authority to adopt the Regulation.[306]

3. Tacoma-Pierce County: Delegation As Defined by Preemption

In *Entertainment Industry Coalition v. Tacoma-Pierce County Health Department*,[307] the Supreme Court of Washington invalidated the Tacoma-Pierce County Board of Health's ("TPC BOH" or "the TPC Board") resolution ("the Resolution") prohibiting smoking in all public establishments.[308] The court considered whether this local regulation conflicted with existing state law and found that it did.[309] Like Massachusetts,[310] the court found that the TPC Board had broad regulatory powers to promulgate health regulations.[311] Accordingly, the court did not focus on whether the TPC Board had power to promulgate the rule like the New York[312] and Ohio[313] courts did. Rather, it focused on whether the broad power the TPC Board did have conflicted with higher state power. The analysis, however, mirrors the Ohio analysis[314] in that it looks exclusively to state law as opposed to local law.[315]

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301. *See supra* notes 282–92 and accompanying text.
302. *See D.A.B.E.*, 773 N.E.2d at 546.
303. *See id.* at 547.
304. *See id.*
305. *Id.* at 549.
306. *Id.* (footnote omitted). This suggests that though the state had not granted this power, either the city of Toledo or Lucas County—if it adopted a charter—could grant the TLC Board the authority to promulgate the Regulation.
307. 105 P.3d 985 (Wash. 2005) (en banc).
308. *See id.* at 986–87.
309. *See id.* at 987–88.
310. *See infra* Part II.A.4.
311. *See Entm't Indus. Coal.*, 105 P.3d at 987.
312. *See supra* Part II.A.1.
313. *See supra* Part II.A.2.
314. *See supra* Part II.A.2.
315. *Cf. supra* Part II.A.1; *infra* Part II.A.4.

In 1852, the Oregon Territory legislature formed Pierce County, which later was recognized as a legal subdivision of Washington State.[316] The city of Tacoma is located within Pierce County.[317] State law provides that its counties have a commission form of government.[318] In 1948, however, a constitutional amendment allowed counties to adopt home rule charters that would grant them, inter alia, the power to form county governments different than those provided for by state law.[319] Pierce County adopted a home rule charter in 1981 and subsequently changed its government structure—instead of a commissioner form of government, it now has a council-elected executive form of government,which is similar to a mayor-city council form of government.[320] Voters elect the county executive, and they also elect the city council as the legislative branch.[321] However, as many commentators have noted, Washington home rule does not actually grant much power to localities.[322]

In a council-elected executive form of government, the county's legislative body establishes either a county health department or a health district to address public health issues.[323] The health department or health district further establishes a local board of health to supervise all public health matters.[324] In Pierce County and other counties with a home rule charter, the county has legislative authority to appoint to the board both elected officials and nonelected members.[325]

On December 3, 2003, the TPC BOH adopted a resolution mandating smoke free air in all indoor places including areas at a distance of twenty-five feet from doors and windows, including ventilation areas of those indoor places.[326] The Resolution placed on local businesses stricter

316. *See* WASH. CONST. art. XI, § 1; *Pierce County Profile*, EMP. SEC. DEP'T, WASH. STATE (Aug. 2014), https://fortress.wa.gov/esd/employmentdata/reports-publications/regional-reports/county-profiles/pierce-county-profile [http://perma.cc/BZT9-JBC4].

317. *See About Tacoma*, PIERCE COUNTY, WASH., http://www.co.pierce.wa.us/index.aspx?nid=659 (last visited Oct. 21, 2015) [http://perma.cc/9E66-RYCU].

318. *See* WASH. CONST. art. XI, § 5; Meredith A. Newman & Nicholas P. Lovrich, *Washington*, *in* HOME RULE IN AMERICA, *supra* note 52, at 438; *County Forms of Government*, MRSC: LOCAL GOVERNMENT SUCCESS, http://www.mrsc.org/subjects/governance/locgov12.aspx (last visited Oct. 21, 2015) [http://perma.cc/D26T-HAVX].

319. *See* WASH. CONST. art. XI, § 4; Newman & Lovrich, *supra* note 318, at 438; *County Forms of Government*, *supra* note 318.

320. *See County Forms of Government*, *supra* note 318.

321. *Id.*

322. *See, e.g.*, Newman & Lovrich, *supra* note 318, at 437 (noting that courts often apply Dillon's Rule in construing home rule powers, thus affirming the "state's preeminence in intergovernmental relationships"); Michael Monroe Kellogg Sebree, Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155, 177 (1989) (calling Washington home rule "illusory"); Richard Shattuck, *A Cry for Reform in Construing Washington Municipal Corporation Statutes*—Chemical Bank v. Washington Public Power Supply Systems, 59 WASH. L. REV. 653, 655 (1984) (noting that Washington adopted a narrow Dillon's Rule-type approach to home rule).

323. WASH. REV. CODE ANN. §§ 70.05, 70.08, 70.46 (West 2011).

324. *See id.* § 70.05.060.

325. *See id.* § 70.05.035.

326. *See* Entm't Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep't, 105 P.3d 985, 987 (Wash. 2005) (en banc). Pierce County was the first locality in Washington to issue such a sweeping ban. *See* Sandi Doughton, *Pierce County Adopts Sweeping Ban on Smoking; Legal*

smoking restrictions than did state law[327]: the Washington Clean Indoor Air Act ("the State Smoking Act") provided, "No person may smoke in a public place except in designated smoking areas."[328] Though the State Smoking Act limited smoking, it still allowed bars, taverns, bowling alleys, tobacco shops, and restaurants to be designated as smoking areas in their entirety.[329] The state law further provided that local health departments could adopt regulations to implement the law.[330] The Entertainment Industry Coalition challenged the Resolution, claiming it conflicted with the State Smoking Act[331] because the Resolution mandated a total smoking ban in public areas expressly exempted under the state law.[332]

To determine whether the local regulation conflicted with higher state law, the court applied a preemption analysis.[333] Under state law, local health departments had broad power to adopt regulations.[334] That broad delegation, however, did not include the power to promulgate regulations that conflict with state law.[335] Such a conflict exists when a local regulation prohibits something that is permitted by state law; that regulation is thus invalid under "conflict preemption," which occurs when an ordinance and statute cannot be harmonized.[336]

Fight Ahead, SEATTLE TIMES (Dec. 4, 2003, 12:07 AM), http://community.seattletimes.nwsource.com/archive/?date=20031204&slug=smokeban040 [http://perma.cc/BHX7-TFZS]. King County and Spokane, two other Washington counties, also considered banning indoor smoking, but declined to do so because their lawyers and the Attorney General determined they lacked the necessary legal authority. *See id.* The Pierce City Council had considered a ban at least once before in 1993, but rejected it. *See* Associated Press, *Smoking Ban Rejected by Pierce County Council*, SEATTLE TIMES (Mar. 26, 1993, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=19930326&slug=1692640 [http://perma.cc/QU8K-Q9EG].

327. *See Entm't Indus. Coal.*, 105 P.3d at 987.

328. *See id.*; *see also* WASH. REV. CODE ANN. § 70.160.040(1) (West 2004). This statute was repealed in 2005 and replaced with WASH. REV. CODE ANN. § 70.160.030 (West 2011), a law prohibiting smoking in all public places and places of employment. It is beyond the scope of this Note to consider the currentness of the laws examined in these decisions. Rather, this Note focuses on the analytical methods used by courts to determine whether a health board may regulate in a certain public health area.

329. *See Entm't Indus. Coal.*, 105 P.3d at 987; WASH. REV. CODE ANN. § 70.160.040(1).

330. *See* WASH. REV. CODE ANN. § 70.160.080. This provision also allowed local fire departments or fire districts to adopt implementation regulations. *Id.*; *see also Entm't Indus. Coal.*, 105 P.3d at 987.

331. *See Entm't Indus. Coal.*, 105 P.3d at 987; *see also* WASH. REV. CODE ANN. § 70.160.040(1).

332. *See Entm't Indus. Coal.*, 105 P.3d at 987. Presumably, the TPC Board passed the Resolution under the regulatory authority provided by the state law that described the local board of health's powers and duties, as well as under the State Smoking Act that granted local boards power to implement it. *See* WASH. REV. CODE ANN. § 70.05.060(3) (West 2007) (stating that local boards of health shall "[e]nact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof"); *Id* § 70.160.080 ("Local fire departments or fire districts and local health departments may adopt regulations as required to implement this chapter.").

333. *See Entm't Indus. Coal.*, 105 P.3d at 987–88; *see also supra* notes 106–10 and accompanying text.

334. *See Entm't Indus. Coal.*, 105 P.3d at 987; *see also* WASH. REV. CODE ANN. § 70.05.060.

335. *See Entm't Indus. Coal.*, 105 P.3d at 987.

336. *See id.* at 987–88.

By prohibiting all smoking in indoor public places, the local regulation made it impossible for local business owners to designate smoking areas as permitted by the State Smoking Act.[337]

Because the TPC Board was not expressly granted authority to promulgate rules inconsistent with the State Smoking Act, it did not have that power.[338] After all, a statutory delegation to an agency or board must be denied if there is any doubt as to the delegation's existence.[339] By explicitly mandating smoke-free public indoor areas, the regulation impermissibly eviscerated the state law exemption and thus was invalid.[340]

4. Barnstable: Deference to Local Power

In *Tri-Nel Management v. Board of Health*,[341] the Supreme Judicial Court of Massachusetts upheld the Barnstable Board of Health's ("Barnstable BOH" or "the Barnstable Board") regulation proscribing smoking in food service establishments, lounges, and bars.[342] The court found that the Barnstable Board did not exceed the state legislature's grant of authority.[343] Applying aspects of the analyses in the preceding case studies, Massachusetts considered both whether the Barnstable Board had the power to adopt the regulation and also whether its regulation conflicted with state law.

Massachusetts has a long history of local government, dating back to precolonial times.[344] In 1966, Massachusetts formally amended its constitution to add the Home Rule Amendment, which provides local governments the power to determine which governmental structure best suits the locality's needs.[345] The Home Rule Procedures Act further defines home rule authority.[346] By delegating home rule power to the municipalities, the Massachusetts legislature seemingly retains considerable control over them; however, the state generally "honor[s] the principle and tradition of local government."[347]

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337. *See id.* at 987; *see also* WASH. REV. CODE ANN. § 70.160.040(1).

338. *See Entm't Indus. Coal.*, 105 P.3d at 988.

339. *See id.*; Diller, *supra* note 71, at 1870 (calling this a "Dillon's Rule-like approach to the agency's powers").

340. *See Entm't Indus. Coal.*, 105 P.3d at 988. Anticipating that the court may find the regulation preempted, the TPC Board had offered two counterarguments based on the nondelegation and equal protection doctrines. *See id.* The court explained that both doctrines were misapplied and unpersuasive. *See id.*

341. 741 N.E.2d 37 (Mass. 2001).

342. *See id.* at 40.

343. *See id.*

344. *See* Meredith Ramsay, *Massachusetts*, *in* HOME RULE IN AMERICA, *supra* note 52, at 203–04; *see also* MASS. CONST. art. LXXXIX, § 1 ("It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters . . . .").

345. *See* MASS. CONST. art. LXXXIX, § 6; Ramsay, *supra* note 344, at 204.

346. *See* MASS. GEN. LAWS ANN. ch. 43B (West 2014).

347. Ramsay, *supra* note 344, at 205; *see also* George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 845, 859 n.63 (1991) (noting both that Massachusetts does not limit municipal power or state

The town of Barnstable was established in 1639.[348] Barnstable has since adopted a home rule charter.[349] Though called a town, its charter labels it a city, thus making it a municipal corporation.[350] Barnstable has a town manager-town council government.[351] The town council appoints the town manager[352] and may remove the manager.[353]

Local boards of health in Massachusetts are local arms of both the Massachusetts Department of Public Health and the Massachusetts Department of Environmental Protection.[354] Town boards of health are composed of three or more people that are either appointed by the town's board of selectmen or elected directly by the townspeople.[355] Reflecting Massachusetts's history of strong home rule, the board of selectmen may even serve as the board of health under certain circumstances.[356]

Barnstable has a three-member board of health appointed by the town council.[357] State law does not impose any expertise requirements for appointment to the board of health.[358] Though local boards of health are empowered by the state, local government charters retain power over how local health agencies function; Barnstable reserves the right to abolish the agency and appoint its officers.[359]

On February 10, 2000, the Barnstable BOH adopted a regulation that absolutely banned smoking "in all food service establishments, lounges and bars."[360] The Barnstable Board contended it had authority to act pursuant to a state statute that provided a board may make "reasonable health regulations" subject to certain procedural requirements.[361] Prior to the effective date, Tri-Nel Management, Inc. (doing business as The Windjammer Lounge) sued for a preliminary injunction to prevent enforcement of the regulation.[362]

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authority to deny municipal power and that Massachusetts adopts a liberal test for determining when control measures should be applied).

348. *History of Barnstable County, Massachusetts*, CAPECODHISTORY.US (July 2006), http://capecodhistory.us/Deyo/Barnstable.htm [http://perma.cc/6W5L-754F].

349. *See* CHARTER OF THE TOWN OF BARNSTABLE, § 1-2 (2004), http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H].

350. *See id.* § 1-4; *see also supra* note 9 and accompanying text.

351. *See* CHARTER OF THE TOWN OF BARNSTABLE, § 1-3, http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H].

352. *See id.* § 4-1.

353. *See id.* § 4-7.

354. *See More About Massachusetts Boards of Health*, MASS. ASS'N OF HEALTH BOARDS, http://www.mahb.org/boh.htm (last visited Oct. 21, 2015) [http://perma.cc/5E98-6LF5].

355. *See* MASS. GEN. LAWS ANN. ch. 41, § 1 (West 2014).

356. *See id.* § 21.

357. *See* CHARTER OF THE TOWN OF BARNSTABLE, § 10-7(k)(3), http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H].

358. *See* Diller, *supra* note 71, at 1879.

359. *See* CHARTER OF THE TOWN OF BARNSTABLE, §§ 2-4, 5-1(a)(1), http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H]; *see also* MASS. GEN. LAWS ANN. ch. 17.

360. *See* Tri-Nel Mgmt. v. Bd. of Health, 741 N.E.2d 37, 40 (Mass. 2001).

361. *See* MASS. GEN. LAWS ANN. ch. 111, § 31; *Tri-Nel Mgmt.*, 741 N.E.2d at 40.

362. *See Tri-Nel Mgmt.*, 741 N.E.2d at 40.

The court explained why each of the plaintiff's arguments were unsupported by law. Four arguments concerned the Barnstable Board's scope of power as defined by the state enabling statute, the state constitution, and the town charter. The other arguments addressed potential conflicts with state laws.

First, the court stated that the board did not exceed the authority granted by the state public health statute[363] because its plain language indicated that boards may adopt reasonable health regulations.[364] Next, the court considered the Barnstable Board's expertise in the matter.[365] Plaintiffs argued that the regulation was unreasonable because exposure to tobacco smoke in bars and restaurants was insufficient to adversely affect health.[366] In assessing the regulation's reasonableness, the court gave the regulation the same level of deference it would to a legislative enactment, noting that "[h]ealth regulations have a strong presumption of validity."[367] Moreover, the court deferred to the Barnstable Board's expertise and experience regarding smoking.[368] Based on this expertise and the rational relationship between the regulation and its stated health purpose, the court found the regulation reasonable.[369]

Furthermore, the court was unpersuaded by the plaintiffs' argument that the Barnstable Board's actions violated the town charter's "Division of Powers" provision.[370] The town charter provided that "[a]ll legislative powers of the town shall be exercised by a town council."[371] The court noted that the charter also stated that all town powers are vested in the town council, *unless* otherwise provided by law or by the charter.[372] Here, the Barnstable administrative code stated that "regulatory" committees, such as the Barnstable Board, have "legal authority to promulgate rules and regulations."[373] Hence, like the state legislature, the town council also delegated to the Barnstable Board regulatory power to protect the town's public health.[374]

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363. *See* MASS. GEN. LAWS ANN. ch. 111 § 31 ("Boards of health may make reasonable health regulations.").

364. *See Tri-Nel Mgmt.*, 741 N.E.2d at 41.

365. *See id.* at 41–42.

366. *See id.* at 41.

367. *See id.*

368. *See id.* at 41–42. The court noted that though the plaintiff's presented no evidence for their contention that tobacco smoke cannot cause negative health effects from only limited contact, the defendant Barnstable BOH presented four reports to the contrary. *See id.* at 41–42 n.7.

369. *See id.* at 41.

370. *See id.* at 45 (quoting CHARTER OF THE TOWN OF BARNSTABLE, § 1-3 (2004), http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H]).

371. *See id.* (quoting CHARTER OF THE TOWN OF BARNSTABLE, § 1-3).

372. *See id.*; *see also* CHARTER OF THE TOWN OF BARNSTABLE, § 2-3.

373. *See Tri-Nel Mgmt.*, 741 N.E.2d at 45–46; *see also* BARNSTABLE ADMINISTRATIVE CODE § 241-8(I)(1)(b) (stating that standing committees, such as the Barnstable Board, have "legal authority to promulgate rules and regulations, decide individual cases and enact policy").

374. *See Tri-Nel Mgmt.*, 741 N.E.2d at 45–46.

The plaintiffs also raised a series of arguments involving state law. The court considered whether the state public health law[375] delegated authority in a manner that violated the Massachusetts constitution's separation of powers provision.[376] Plaintiffs argued the provision prohibited the state legislature from delegating to local governments and local boards of health the power to make laws.[377] Still, the court recognized that whether a delegation is proper is "a question of degree" and not an inflexible principle.[378]

To determine whether the state legislature had improperly delegated legislative power, the court considered three factors: (1) whether the legislature delegated the task to make essential policy decisions instead of the task to implement "legislatively determined policy"; (2) whether the state law provided adequate guidance for the local authority to implement the legislatively determined policy; and (3) whether the act included safeguards to control abuse of discretion.[379] First, the state's legal history indicated that the state legislature made an appropriate policy decision in delegating to local municipalities the power to adopt reasonable regulations about local public health.[380] Furthermore, the state made a policy decision to regulate smoking and even allowed municipalities to adopt stricter regulations.[381] Second, by mandating that local regulations must address public health and be reasonable, the state legislature had provided sufficient guidance for the regulation's implementation.[382] Third, these limitations outlined the "boundaries of regulatory discretion" and prevented the Barnstable Board from abusing its discretion.[383] Thus, the court found that all three factors were satisfied and, therefore, no separation of powers violation existed.[384]

The plaintiffs also argued that the state public health law[385] delegated the specific authority to regulate only areas enumerated in other sections of the same chapter.[386] The court discredited this argument.[387] In prior cases, the

375. *See* MASS. GEN. LAWS ANN. ch. 111, § 31 (West 2014).
376. *See Tri-Nel Mgmt.*, 741 N.E.2d at 44; *see also* MASS. CONST. art. XXX.
377. *See Tri-Nel Mgmt.*, 741 N.E.2d at 44.
378. *See id.*
379. *See id.* at 44–45 (quoting Trailer Park Inc. v. Chelmsford, 469 N.E.2d 1259 (Mass. 1984)). Though this test sounds very similar to the nondelegation *Boreali* test applied in the New York context, *see supra* notes 240–43 and accompanying text, *Boreali* was decided three years after *Tri-Nel Mgmt*. *See* Boreali v. Axelrod, 517 N.E.2d 1350, 1355–58 (N.Y. 1987). Neither case references the other.
380. *See Tri-Nel Mgmt.*, 741 N.E.2d at 45 (citing case law from 1831 and 1903 that showed that localities may regulate local public health); *see also* MASS. GEN. LAWS ANN. ch. 111, § 31.
381. *See Tri-Nel Mgmt.*, 741 N.E.2d at 45; *see also* MASS. GEN. LAWS ANN. ch. 270, § 22.
382. *See Tri-Nel Mgmt.*, 741 N.E.2d at 45.
383. *See id.*
384. *See id.* at 45–46.
385. *See* MASS. GEN. LAWS ANN. ch. 111, § 31.
386. *See Tri-Nel Mgmt.*, 741 N.E.2d at 42.
387. *See id.* (noting the case law that the plaintiffs relied upon for this argument predated the enactment of state public health law and thus did not support their argument); *cf.* Part II.A.2–3 (describing how the Ohio and Washington courts were persuaded by similar arguments).

court had interpreted the state public health law as having created "a comprehensive, separate, *additional source* of authority for health regulations" that gave boards plenary power to adopt reasonable health regulations.[388]

Next, the court found no indication that the legislature intended to preempt local governments from promulgating smoking bans.[389] Plaintiffs argued that the existence of a state smoking law[390] evinced legislative intent to preempt local governments from promulgating smoking bans, thus violating the Home Rule Amendment.[391] The court noted that the plaintiffs misconstrued the Home Rule Amendment: the amendment granted local governments broad powers that they did not have prior to the amendment, but it did not act as a limitation on local governments from legislating in areas in which the state already legislated.[392] The amendment only required that municipalities exercise power consistent with the state constitution and state laws.[393]

Finally, the court found the regulation did not conflict with the state law governing smoking in public places because there was no clear legislative intent to preclude local action.[394] The state law prohibited smoking in restaurants with a seating capacity exceeding seventy-five persons, except in specifically designated smoking areas.[395] The state legislature, however, specifically authorized municipalities to impose stricter smoking regulations in public places.[396] The local law did not conflict with the state law, but rather furthered it.[397]

388. *See Tri-Nel Mgmt.*, 741 N.E.2d at 42 (emphasis added) (citing Bd. of Health of Woburn v. Sousa, 338 Mass. 547, 550 (1938)).

389. *See id.* at 43.

390. The decision does not indicate which state smoking law this refers to. Presumably, they are referring to MASS. GEN. LAWS ANN. ch. 270, § 22. *See infra* note 394.

391. *See infra* note 394; *see also* MASS. CONST. art. LXXXIX, § 6 ("Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court . . . and which is not denied, either expressly or by clear implication, to the city or town by its charter."). Massachusetts also has a home rule statute that was not implicated in this argument. *See* MASS. GEN. LAWS ANN. ch. 43B.

392. *See Tri-Nel Mgmt.*, 741 N.E.2d at 43.

393. *See id.*

394. *See id.*; *see also* MASS. GEN. LAWS ANN. ch. 270, § 22.

395. *See Tri-Nel Mgmt.*, 741 N.E.2d at 43–44; MASS. GEN. LAWS ANN. ch. 270, § 22.

396. *See Tri-Nel Mgmt.*, 741 N.E.2d at 44; *cf. supra* notes 327–30 and accompanying text (describing how the corresponding Washington State statute allowed local health departments authority to adopt regulations to implement the state smoking law). *But see supra* Part II.A.2 (describing the interaction between a smoking regulation promulgated by Toledo-Lucas County, Ohio, and Ohio state law).

397. *See Tri-Nel Mgmt.*, 741 N.E.2d at 44; *cf. supra* notes 339–42 and accompanying text (describing how the local smoking regulation in Pierce County, Washington, frustrated the state smoking law application).

B. Comparing the Case Studies: Commonalities in Methodologies

Though the above cases may appear incongruent, the judicial methods employed therein share common features. The decisions regarding New York, New York;[398] Lucas County, Ohio;[399] Pierce County, Washington;[400] and Barnstable, Massachusetts,[401] fall on a continuum from most restrictive to least restrictive of their local board of health's regulatory power. Though New York and Ohio found that their boards did not have broad regulatory power, Washington and Massachusetts found that their boards did. Yet the courts determined that local public health boards for a city in New York and the counties in Ohio and Washington surpassed their regulatory authority (whether limited or not). The local public health board for a small town in Massachusetts, however, acted within its authority. In arriving at these conclusions, the courts addressed—sometimes implicitly—two overarching questions: First, did the board have the legal authority to promulgate the rule? Second, did the board's exercise of power conflict with a higher governmental power?

In addressing these issues, New York and Ohio employed similar analyses. First, they considered whether the boards had broad authority to promulgate rules—and in New York's case, the court more specifically asked if the board had legislative authority.[402] To answer this threshold question, New York looked primarily to local law,[403] and Ohio looked exclusively to state law;[404] both ultimately found that their boards did not have broad authority.[405] In so doing, the courts highlighted that there is no one body of law a court *must* look to: local and/or state law may define local agency action.[406]

Second, the New York and Ohio courts analyzed whether the boards surpassed their limited regulatory powers.[407] Both courts applied a nondelegation analysis and found that the boards did exceed their regulatory authority.[408] Accordingly, both regulations were struck down.[409]

By contrast, Washington and Massachusetts found that their boards had broad authority[410] and consequently focused their inquiries on whether the boards' regulations conflicted with state law.[411] Washington conducted an

398. *See supra* Part II.A.1.
399. *See supra* Part II.A.2.
400. *See supra* Part II.A.3.
401. *See supra* Part II.A.4.
402. *See supra* notes 224–39, 282–92 and accompanying text.
403. *See supra* notes 229–34 and accompanying text.
404. *See supra* notes 282–92 and accompanying text.
405. *See supra* notes 238, 291 and accompanying text.
406. *See* Diller, *supra* note 71, at 1868; *see also supra* notes 176–86, 306 and accompanying text.
407. *See supra* notes 240–52, 293–306 and accompanying text.
408. *See supra* notes 240–52, 293–306 and accompanying text.
409. *See supra* notes 252, 306 and accompanying text.
410. *See supra* notes 334, 363–64 and accompanying text.
411. *See supra* notes 333–40, 365–83, 385–97 and accompanying text.

explicit preemption analysis,[412] whereas Massachusetts conducted a nondelegation analysis similar to that employed in New York,[413] indicating that both preemption and nondelegation analyses may be appropriate mechanisms by which to determine a local board of health's scope of power. Pierce County's local regulation was struck down because it conflicted with the state smoking law, making the state law's implementation impossible.[414] The Barnstable regulation, however, did not conflict with Massachusetts state law because the state legislature had specifically allowed localities to implement stricter regulations than the state law; the regulation was upheld.[415]

Framing these analytical methods according to the above two overarching questions may help to harmonize these seemingly incongruent decisions. Yet it still leaves unanswered certain questions: Why did different courts rely on state or local law or a combination thereof? Why did some courts apply the nondelegation doctrine, but others a preemption analysis? Why does home rule not uniformly validate these agency actions?[416] The next part of this Note explores how different historical, governmental, and political influences may help answer these questions and further suggests that an explicit "step-one" inquiry be undertaken when analyzing local board of health action—a novel solution not yet proposed in local administrative law.

III. HISTORY, GOVERNMENTAL STRUCTURE, AND POLITICS: GUIDING FACTORS IN JUDICIAL EXAMINATION OF LOCAL HEALTH AGENCY POWER

When analyzing future local board of health action, courts and policymakers should consider the approaches described above. But which of those approaches best suits analysis of a particular agency's actions? Should courts and policymakers apply state law or local law? This part proposes that courts and policymakers should conduct a step-one analysis of the locality's unique character (including factors such as history, governmental structure, home rule grant of power, population, and politics) before they apply one—or part of one—of the methods described in the case studies.[417]

Part III.A compares and contrasts the distinctive histories, governmental structures, and politics of New York City, Lucas Country, Pierce County, and Barnstable. Part III.B considers how these three considerations may

412. *See supra* notes 333–40 and accompanying text.
413. *See supra* notes 379–83 and accompanying text.
414. *See supra* note 340 and accompanying text.
415. *See supra* note 397 and accompanying text.
416. *See* Roberta A. Kaplan & Jacob H. Hupart, *Can New York City Govern Itself? The Incongruity of the Court of Appeals' Recent Cases Regarding Regulation of New York City by New York City*, 78 ALB. L. REV. 105, 116 (2015) ("[T]he legal principle of home rule should arguably provide greater protection to regulations promulgated by New York City, as opposed to mere administrative law, since it draws from a deeper and more potent source [home rule].").
417. *See supra* Part II.A.

specifically impact which arguments courts find persuasive. Finally, Part III.C proposes that when considering the scope of a local board's powers, courts and policymakers should first look to unique characteristics of the locality the board serves.

A. Explaining the Varied Judicial Review of Local Board of Health Action

Though the state supreme courts discussed above used similar analyses, these courts may have analyzed different factors and ultimately decided the cases differently because of the following considerations: (1) the locality's history, (2) its governmental structure, and (3) its politics. Though the decisions tend not to directly reference any of these three factors, the below survey of the four localities' history, government structure, and politics demonstrate that there are common threads that may indeed undergird the decisions.

New York City and Barnstable are the oldest of the four localities discussed: New York City was established in 1624[418] and Barnstable in 1639.[419] They are both municipal corporations.[420] But despite their similar length of existence and municipal characters, they do not give their local boards of health similar levels of discretion. This is possibly due to population size: in 2014, New York City had an estimated population of 8,491,079[421] while Barnstable had one of 44,529.[422] New York City's significantly larger population necessitates a larger administrative bureaucracy than Barnstable, which perhaps leads courts to more strictly scrutinize New York City agencies to ensure compliance with the law.[423] Though the New York Constitution and Home Rule Law both grant New York City seemingly broad powers, the New York Court of Appeals has consistently found that the state may enact laws that restrict local power.[424] Massachusetts, by contrast, has a long history of limited state involvement in local matters.[425] How broadly the New York and Massachusetts courts interpret local board of health regulatory power seems tied directly to the size of their administrative regimes and legal precedent.

In contrast to cities, counties are involuntary subdivisions of the state.[426] Accordingly, counties' power structures are more "top-down" than

418. *See supra* note 197 and accompanying text.
419. *See supra* note 348 and accompanying text.
420. *See supra* notes 198, 350 and accompanying text.
421. *New York (city), New York*, U.S. CENSUS BUREAU (Sept. 3, 2015, 3:08 PM), http://quickfacts.census.gov/qfd/states/36/3651000.html [http://perma.cc/D54N-4YJP].
422. *Barnstable Town (city), Massachusetts*, U.S. CENSUS BUREAU (Sept. 24, 2015, 12:20 PM), http://quickfacts.census.gov/qfd/states/25/2503690.html [http://perma.cc/DR3V-MRGQ].
423. *See supra* notes 133–40 and accompanying text (describing concerns specific to state and local administrative law systems and how courts react to these systems).
424. *See* Stonecash, *supra* note 201, at 303.
425. *See supra* notes 344–47 and accompanying text.
426. *See supra* note 15 and accompanying text.

"bottom-up."[427] Moreover, the counties have existed for less time than New York City and Barnstable; the counties have also limited control over local matters. Lucas County was established in 1788,[428] and Pierce County was established in 1852.[429] They were both offered county home rule, but only Pierce County has enacted a county home rule charter.[430] Despite this difference, commentators have noted that neither has significant home rule power.[431] Ultimately, they seem to fall into the traditional category of quasi-corporations that exist to carry out state needs.[432]

Furthermore, the four states adopted their home rule amendments chronologically in relation to their places on the continuum[433]: New York in 1894 (most restrictive of local power),[434] Ohio in 1933,[435] Washington in 1948,[436] and Massachusetts in 1966 (least restrictive).[437] Because the first three have a longer history of addressing the parameters of home rule power, they may have developed more stringent limitations on home rule than Massachusetts.

Moreover, New York City, Lucas County, and Piece County are arguably more politicized than Barnstable—which was the only case study in which the local board of health was held to have acted within its delegated power. The localities differ in what types of governmental structures they utilize[438]: New York City has a strong mayor-council form of government,[439] Lucas County has a commissioner system,[440] Pierce County has a council-elected executive,[441] and Barnstable has a manager-council form of government.[442] Because the New York City executive and legislative branches are both elected, the competition between the two is highly politicized and implicates separation of powers issues.[443] The Lucas County board of

427. *See supra* note 43 and accompanying text.
428. *See supra* note 261 and accompanying text.
429. *See supra* note 316 and accompanying text.
430. *See supra* notes 266, 320 and accompanying text.
431. *See supra* notes 268, 322 and accompanying text.
432. *See supra* notes 13–16 and accompanying text.
433. *See supra* Part II.B.
434. *See* N.Y. CONST. art. IX; Briffault, *supra* note 43, at 85–86.
435. *See* OHIO CONST. art. X, §§ 1–4; Dustin, *supra* note 264, at 333.
436. *See* WASH. CONST. art. XI, § 4; Newman & Lovrich, *supra* note 318, at 437.
437. *See* MASS. CONST. art. 89, § 6; Ramsay, *supra* note 344, at 204.
438. *See supra* notes 23–40 and accompanying text.
439. *See* NEW YORK CITY CHARTER §§ 1, 21, http://codes.lp.findlaw.com/nycode/NYC [http://perma.cc/8HV4-P32B]; *see also* Fine & Caras, *supra* note 80 (describing various matters where the two branches have fought to establish authority).
440. *See* OHIO CONST. art. X, § 1; BALDWIN'S OHIO PRACTICE, *supra* note 261, § 1:2.
441. *See County Forms of Government*, *supra* note 318.
442. *See* CHARTER OF THE TOWN OF BARNSTABLE, § 1-3 (2004), http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H].
443. *See* Comment, 128 HARV. L. REV. 1508, 1515 (2015) (noting that though the "[*Statewide*] *Coalition* court clothed its decision in the trappings of the *Boreali* factors," the decision mirrored *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *Gonzales v. Oregon*, 546 U.S. 243 (2006), and their requirement of "clear legislative guidance for controversial agency choices with major political consequences, even when the agency's statutory mandate may appear to permit such choices"). *See generally* Bradley A. Benedict, Note, *Upsetting the Balance: Ignoring the Separation of Powers Doctrines in*

county commissioners is also elected, but shares administrative responsibility among the nine commissioners.[444] Pierce County is like New York City in that the executive and legislative branches are both elected.[445] Barnstable, however, differs from the others because its council appoints their executive leaders.[446] Its executive leaders are subject to council removal,[447] theoretically leading to less politicization than in New York City, Lucas County, or Pierce County.[448]

Courts examining localities with a history of conflict between the executive and legislative branches may be more sensitive to separation of powers issues than localities where management is less politicized. For example, the New York courts have regularly addressed separation of powers issues between the mayor and the city council, two branches with a highly politicized relationship.[449] Thus, in New York, the courts must step in to maintain a distinction between the two branches of government.[450] By contrast, the line between Barnstable's executive and legislative branches is harder to define because the legislature appoints the executive.[451] When examining localities where local governments are more politicized, courts are more likely to be concerned about separation of powers and may look to state law, especially if local law fails to maintain a separation of powers between local branches of government in a sufficiently strong manner.[452]

Council of New York v. Bloomberg, 72 BROOKLYN L. REV. 1261 (2007); Fine & Caras, *supra* note 80; *see also infra* note 449.

444. *See* OHIO CONST. art. X, § 1; BALDWIN'S OHIO PRACTICE, *supra* note 261, § 1:2.

445. *See supra* note 321 and accompanying text.

446. *See supra* note 351 and accompanying text.

447. *See supra* note 351 and accompanying text.

448. *See supra* note 33 and accompanying text.

449. See, for example, *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 482 N.E.2d 1 (N.Y. 1985), where the court found that Mayor Edward Koch violated separation of powers principles when he issued an executive order prohibiting city contractors from discriminating on the basis of sexual orientation. *See id.* The court found that Mayor Koch could not promulgate an order on an issue on which the council had not enacted any law. *See id.* at 10. Indeed, the only way the executive order's underlying goals were effectuated was when the city council finally passed a gay rights bill in 1986—after much convincing by Mayor Koch. *See* John J. Goldman, *N.Y. Passes Gay Rights Bill After 15-Year Debate*, L.A. TIMES (Mar. 21, 1986), http://articles.latimes.com/1986-03-21/news/mn-5113_1_gay-rights-bill [http://perma.cc/9A9V-3HYK]. This politicization has continued into the modern era and affected the Sugary Drinks Portion Cap Rule. *See* Siegel, *supra* note 3 (noting that promulgation of the Sugary Drinks Portion Cap Rule was seen as paternalism by Mayor Bloomberg, who worked closely with the board of health in the adoption of the rule); *see also* Michael Howard Saul, *Forward Push on Soda Ban: De Blasio Administration Considers New Ways to Cap Size of Sugary Drinks*, WALL STREET J. (Oct. 15, 2014, 10:31 PM), http://online.wsj.com/articles/new-york-city-mayor-bill-de-blasio-pushes-forward-on-soda-ban-1413421275 (noting Councilman Corey Johnson opposed the Sugary Drinks Portion Cap Rule because the regulation should be approved by the council and not the NYC BOH) [http://perma.cc/Q65P-QGUB].

450. *See supra* notes 80–81, 242–43 and accompanying text.

451. Though the merging of the two branches may suggest that a stronger separation of powers doctrine should apply in Barnstable, that the citizens of Barnstable allow their legislature to appoint their executive more strongly indicates that separation of powers concerns weigh less heavily on them than in localities like New York City.

452. *See supra* Part I.A.3.

B. Comparing and Contrasting the Persuasiveness of the Parties' Arguments

Each court relied on various factors to determine whether to uphold or strike down a local board of health's regulations. Some factors considered were: (1) state laws and potential preemption reflecting a Dillon's Rule-like analysis; (2) separation of powers and nondelegation issues; (3) prior regulatory history; (4) local charters; and (5) agency expertise. Whether a court found these factors dispositive (or even at all persuasive) may be explained by the locality's history; the locality's governmental structure, which may politicize local governmental relationships; and the state's home rule history.[453] Whether a locality is a municipal corporation or a quasi-corporation implicates these three considerations.

As to the first factor, all four courts considered higher state law to some extent, which in each case implicated some variation of preemption analysis. New York briskly examined the relevant state law, likely because New York City is specifically exempted from many of the state's public health law provisions.[454] The court did, however, find it troubling that the NYC Board did not explain what would happen if an NYC Board regulation conflicted with a city council ordinance, which reflects a preemption-type concern.[455] The Ohio court relied heavily on state statutes to determine how state laws other than the health agency enabling statute limited which areas the Lucas County Board of Health could regulate, thereby conducting an unnamed preemption analysis.[456] Relying on an explicit preemption analysis, Washington looked specifically to its state smoking law to consider if it conflicted with the local smoking regulation.[457] That the first three courts looked to provisions other than the statute that directly spoke about the scope of local health agency power reflects a Dillon's Rule-like approach: because state or local law did not explicitly grant the boards power to regulate sugary beverage consumption or smoking in public areas, that power was denied to them.[458]

Only Massachusetts found the local regulation was not preempted by state law.[459] This may be explained by Massachusetts's long history of strong local self-government without state interference.[460] By contrast, New York City, Lucas County, and Pierce County all are subject to state interference despite all three constitutions having been amended to provide home rule. This may be in part because Massachusetts adopted home rule the latest—in 1966.[461]

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453. *See supra* Part III.A.
454. *See supra* note 227 and accompanying text.
455. *See supra* note 236 and accompanying text.
456. *See supra* notes 282–92 and accompanying text.
457. *See supra* notes 326–40 and accompanying text.
458. *See supra* notes 233, 300, 339 and accompanying text.
459. *See supra* notes 394–97 and accompanying text.
460. *See supra* notes 344–47 and accompanying text.
461. *See supra* note 345 and accompanying text.

Second, New York City's governmental structure is more politicized than the others.[462] In a municipality with a strong executive and a strong legislature, both branches may vie to gain more control. Only New York considered who drafted the rule (although the court found it unimportant).[463] The court possibly addressed the drafting issue because of the Sugary Drinks Portion Cap Rule's politicization, a portion limit rule that was described in the media as "[Mayor] Bloomberg's Soda Ban."[464]

Nevertheless, separation of powers and nondelegation concerns are usually implicated when examining agency action because agency action bypasses the political process.[465] Agencies are generally considered to be part of the executive branch of the government.[466] As is the case in all four localities, agency members are often appointed and thus may not be accountable to voters.[467] This accountability problem may be one reason that courts employ the nondelegation doctrine.[468]

In point of fact, all but Washington considered separation of powers and nondelegation issues. Once New York determined that the NYC Board did not have legislative powers, it applied the *Boreali* test to determine if it had crossed the line between rulemaking and lawmaking.[469] Ohio also noted that agencies sometimes take actions that impermissibly exceed their administrative rulemaking powers; to determine if this was the case, the court looked to the Ohio Revised Code to see if it implicitly or explicitly granted the Lucas County Board of Health the power to regulate smoking.[470] Massachusetts also considered the line between rulemaking and lawmaking. The court applied a three-part test that was similar to the *Boreali* test, but ultimately concluded that the line was not surpassed in this context.[471] Washington may not have applied a nondelegation test because of the precise nature of the local law: its implementation clearly frustrated the state law implementation.[472]

As to the third factor, though all four courts considered prior local board action to some extent, only the New York dissent undertook an extensive historical analysis of the NYC Board's development and actions to support

462. *See supra* note 449 and accompanying text.
463. *See supra* note 252 and accompanying text.
464. *See, e.g.*, Siegel, *supra* note 3; *see also supra* note 449 and accompanying text.
465. *See supra* notes 126, 136 and accompanying text.
466. *See supra* note 124 and accompanying text.
467. The executive branch appoints the eleven-member NYC BOH. *See* NEW YORK CITY CHARTER §§ 551, 553–54, http://codes.lp.findlaw.com/nycode/NYC [http://perma.cc/8HV4-P32B]. The Lucas County Board of Health members are also appointed. *See* OHIO REV. CODE ANN. § 3709.02 (West 2011); D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health, 773 N.E.2d 536, 539 (Ohio 2002). The Pierce County Council appoints the Pierce County Board of Health. *See* WASH. REV. CODE ANN. § 70.05.035 (West 2007); *County Forms of Government*, *supra* note 318. The Barnstable town council appoints the Barnstable Board of Health. *See* CHARTER OF THE TOWN OF BARNSTABLE, § 10-7(k)(3) (2004), http://www.townofbarnstable.us/TownClerk/TownCode.pdf [http://perma.cc/EC5R-LQ4H].
468. *See supra* notes 133–36 and accompanying text.
469. *See supra* notes 240–52 and accompanying text.
470. *See supra* notes 293–96 and accompanying text.
471. *See supra* notes 378–84 and accompanying text.
472. *See supra* notes 339–42 and accompanying text.

the court's conclusion that the board did have legislative powers.[473] This historical analysis was likely seen as necessary because the NYC BOH has switched between state and city control several times and has undergone several name changes, which leaves uncertain whether it is a state or local creature.[474] This was likely an important issue because of the separation of powers issues between the city and state. In the county contexts, it is likely less necessary to examine the board history because the board is accountable to the counties, which are firmly state creatures. In the case of Massachusetts, the court granted Barnstable Board regulations the same level of deference as they would to legislative enactments, which implies that whether the Barnstable Board was controlled by the state or locality was not terribly important.[475]

Additionally, the New York and Massachusetts courts looked at their respective local charters; Ohio and Washington did not. New York relied heavily on the New York City Charter in determining what powers the NYC Board had.[476] Massachusetts considered the Barnstable Charter's "Division of Powers" provision to conclude the town's legislative powers were all vested in the council, but that the town had delegated to the Barnstable Board the regulatory power to protect public health.[477] Because Lucas County has not adopted county home rule, it does not have a charter.[478] Pierce County's charter is not as extensive as the other charters.[479] This difference in focus on local charters may further be explained by the fact that only New York and Massachusetts courts were faced with deciding between competing legislative directives: the parties pointed to the local charter provisions as the source of the board's authority and the courts necessarily had to look at those charters.

Finally, only Massachusetts found the board's expertise very persuasive.[480] This may be because the Barnstable Board had specifically submitted four scientific reports in support of its position[481] and again because of Massachusetts's long tradition of deferring to local self-government.[482] Further, the New York court noted that the NYC Board could have chosen other common sense alternative methods to fight obesity rather than by limiting soda sizes—the court noted that these alternatives were not based on any sort of expertise, implying the court did not believe

473. *See supra* note 215 and accompanying text; *see also* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 551–57 (N.Y. 2014) (Read, J., dissenting).
474. *See supra* notes 212–15.
475. *See supra* notes 367–74 and accompanying text.
476. *See supra* notes 228–34 and accompanying text.
477. *See supra* notes 370–74 and accompanying text.
478. *See supra* note 266 and accompanying text.
479. *See supra* notes 316–22 and accompanying text.
480. *See supra* notes 365–69 and accompanying text.
481. *See supra* note 368 and accompanying text.
482. *See supra* notes 344–47 and accompanying text.

the NYC Board actually relied on any real expertise in drafting the Sugary Drinks Portion Cap Rule.[483]

C. A Step-One Inquiry: What Do the Locality's History, Governmental Structure, and Politics Demonstrate?

Before employing any of the analytical methods described above,[484] a court or policymaker should first consider the unique circumstances of the locality that the board serves. Such a step-one inquiry should include an examination of whether the locality is a municipal corporation or quasi-corporation, what type of governmental form the local government takes, and how these two factors have—or have not—implicated both horizontal and vertical separation of powers issues. The analysis should also consider to what extent separation of powers is implicated in the locality's politics.

This examination will help to demonstrate what method of inquiry is best suited to define the board's powers and may also create a more consistent body of law within a state. Moreover, such an open and direct acknowledgment of factors underlying judicial decisions may make the opinions more opaque—an opaqueness that was arguably lacking in the Sugary Drinks Portion Cap case.[485]

For instance, some commentators voiced concerns that the *Boreali* test was inappropriately applied to the Sugary Drinks Portion Cap Rule context because *Boreali* should not apply to state governmental actions—and not to local governmental actions.[486] One might imagine that such criticism would be stronger if the court applied the *Boreali* test not to a large urban government (which arguably functions more like a state government than that of a much smaller locality) but to a small New York town. This shows that though a particular test may be illuminating when applied to one local government, it may be ill-suited to another government that serves a smaller population or to one that has a smaller administrative agency infrastructure.

Applied in the Sugary Drinks Portion Cap Rule case, this "step-one" inquiry—examining whether New York City is a municipal or quasi-corporation, the type of governmental form it takes, and how its political structure raises separation of powers concerns—may have addressed some of the issues raised by the dissent. For example, the dissent maintained that *Boreali* should not apply to regulatory action taken by a city because the *Boreali* test relied on the state constitution.[487] The majority, however,

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483. *See* N.Y. Statewide Coal. v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 546–47 (N.Y. 2014).

484. *See supra* Part II.B.

485. *Cf. N.Y. Statewide Coal.*, 16 N.E.3d at 561 (Read, J., dissenting) ("What petitioners have asked the courts to do is strike down an *unpopular* regulation, not an illegal one.").

486. *See supra* note 241 and accompanying text. This assertion is premised on the idea that it is the local government—not the state government—that controls the NYC BOH.

487. *See N.Y. Statewide Coal.*, 16 N.E.3d at 558 (Read, J., dissenting) ("To my knowledge, before today we have never applied the *Boreali* separation-of-powers doctrine outside the context of state legislative delegations to state agencies under the state constitution. By extending *Boreali* to local governments . . . the majority takes a big step . . . .").

applied the *Boreali* test because New York State courts have used the *Boreali* test whenever the separation of powers or nondelegation doctrines are implicated.[488] This divide between the majority and the dissent reflects confusion over whether the NYC BOH was a city subagent subject to local control or a state agent subject to state law.[489]

If New York City were first characterized as a voluntarily created municipality as opposed to an involuntarily organized quasi-corporation, then New York City is an agency of the state. Assuming New York City controls the NYC BOH, the NYC BOH becomes a city subagent subject to local law—the NYC BOH is not a state-controlled agent with powers coequal to the city itself. This all indicates that *Boreali*—a test developed to apply to a state agency—should probably not apply.[490]

New York City, however, has a strong-mayor government and a long history of separation of powers conflict between the executive and legislative branches.[491] In order to prevent the executive and legislative branches from encroaching onto each other's authority, a court may need to step in—especially where, as here, the NYC BOH members were appointed by the mayor[492] and the NYC BOH's Sugary Drinks Portion Cap Rule was strongly influenced by the executive branch.[493] Accordingly, the *Boreali* test—the test New York courts use when a separation of powers issue arises—should apply despite the NYC BOH not being subject to state control. A nondelegation test defining when an agency implicates a separation of powers violation is likely the appropriate test because functional separation of powers concerns outweigh the formal difference between municipal corporations and quasi-corporations. Ultimately, then, *Boreali* should have applied to the Sugary Drinks Portion Cap Rule, but for reasons other than the Court of Appeals stated.

CONCLUSION

Determining the scope of a local board of health's regulatory power is important for many reasons: local boards may impermissibly regulate a state matter, their regulations may have broad effects surpassing the borders of the locality in which they are situated, the regulations may be more appropriately enacted by elected officials, and political players may use the boards to subvert the legislative process. Moreover, local regulations are often replicated at the state or federal level, suggesting that when local boards of health do act, they should act within the legal parameters. And because this requires different state courts to review local health agency

488. *See supra* note 241 and accompanying text.
489. *See supra* notes 176–86, 242 and accompanying text.
490. *See supra* note 487 and accompanying text.
491. *See supra* notes 439, 449 and accompanying text.
492. *See supra* notes 205–07 and accompanying text.
493. *See, e.g.*, Katherine Pratt, *Lessons from the Demise of the Sugary Drink Portion Cap Rule*, 5 WAKE FOREST J.L. & POL'Y 39, 47–52 (2015) (detailing Mayor Bloomberg's involvement in how the Sugary Drinks Portion Cap Rule was created, including how his New York City Obesity Task Force sought an alternative to a soda tax, which would be politically "out of the question").

action, incongruent local health agency discretion may result for different boards in different states—or even within different local boards of health in one state.

An examination of how courts view and analyze the scope of local health agency power helps explain the place that local boards of health hold in the grander struggle between local and state governments. Most importantly, this assessment of various state supreme court methodologies demonstrates that when future courts and policymakers review the parameters of a local board of health's discretion, they should first consider the locality's history, government structure, and politics.