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## Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson

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# LOCAL HEALTH AGENCIES, THE BLOOMBERG SODA RULE, AND THE GHOST OF WOODROW WILSON\*

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## INTRODUCTION

Local government scholars have paid significant attention to local "innovation" in the sphere of regulatory policy.<sup>1</sup> And for good

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1. "Regulatory policy" as used here means governmental policy that regulates economic, professional, or environmental behavior. See GRAEME BOUSHEY, POLICY

reason. Many of these local innovations diffuse both horizontally, to other cities and counties, and vertically, to the state and federal levels, thus profoundly impacting the nation's regulatory landscape.<sup>2</sup> Local government scholars have devoted less effort to analyzing the form of these regulations,<sup>3</sup> often presuming that local law derives from ordinances passed by the general governing (and, usually, legislative) body of a city or county.<sup>4</sup> As a result, to the extent that scholarship considers the actors involved in formulating local policy, it usually focuses on elected officials like city councilors and mayors.<sup>5</sup> This Article highlights another, increasingly important source of local regulation: administrative rulemaking. Particularly in the realm of public health, cities have adopted many high-profile and innovative regulatory policies by administrative rule rather than by council-enacted ordinance.<sup>6</sup> Despite the increased importance of local

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DIFFUSION DYNAMICS IN AMERICA 64 n.4 (2010). For political scientists, “regulatory policy” is a category of government action distinct from “morality” or “governance” policy, each of which also seeks to “codify or alter behavior through regulatory regimes.” *Id.* For examples of local government law scholars analyzing local policy—including regulatory policy—innovation, see, e.g., Richard Briffault, *Home Rule for the Twenty-first Century*, 36 URB. LAW. 253, 259–60 (2004); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114–17 (2007) [hereinafter Diller, *Intrastate*]; Matthew Parlow, *Progressive Policy-making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 375–82 (2008).

2. See Diller, *Intrastate*, *supra* note 1, at 1119–22.

3. Cf. Charles R. Shipan & Craig Volden, *Policy Diffusion: Seven Lessons for Scholars and Practitioners*, 72 PUB. ADMIN. REV. 788, 793 (2012) (“[N]early all policy diffusion studies explore legislative adoption by state or national governments, while ignoring the equally important decisions made by executive agencies.”).

4. These ordinances are sometimes called “bylaws.” The nomenclature is not important. In cities or towns, it is usually the elected council (which may have a different name, like board of selectmen or board of aldermen) that has the authority to enact ordinances. At the county level, the governing legislative body is usually a board of commissioners, but in some states has a more idiosyncratic name like “commissioners court” or “board of chosen freeholders.” See, e.g., TEX. CONST. art. V, § 18(b) (“County Commissioners Court . . . shall exercise such powers and jurisdiction over all county business, as is conferred by [law] . . .”); N.J. STAT. ANN. § 40:20-1 (2013) (“The property, finances and affairs of every county shall be managed, controlled and governed by . . . ‘the board of chosen freeholders’ . . .”).

5. See, e.g., CLAYTON GILLETTE, LOCAL REDISTRIBUTION & LOCAL DEMOCRACY (2011) (focusing on the local legislative process); see also David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J.L. & POL. 419 (2007) (arguing that the lack of partisan competition in city council elections leads to “unrepresentative and uncreative” government in big cities).

6. For convenience this Article will refer only to “cities” even when the reference could just as easily, and correctly, include counties.

administrative rulemaking, scant scholarship—either in local government or administrative law—has wrestled with the doctrinal and normative questions flowing therefrom.<sup>7</sup>

The recent litigation challenging New York City’s cap on portion sizes of sugar-sweetened beverages—inaccurately called a “soda ban”—has brought the issue of local administrative rulemaking to the fore.<sup>8</sup> Although the city’s Board of Health promulgated the portion-cap rule, it was heavily promoted by Mayor Michael Bloomberg and is therefore frequently identified with him in the popular media.<sup>9</sup> This article uses the New York City portion-cap rule, or the “Bloomberg soda rule,” as well as public health regulations more generally, as a prism through which to analyze the distinctive characteristics of the local administrative process. Part I highlights cities’ impressive record of administrative regulation in the public health realm, surveying key regulatory policies that exceeded the federal and state regulatory floors in attempting to reduce tobacco use and obesity. Part II considers the intriguing doctrinal questions that arise when an agency of a city, which itself is an agent of the state, makes rules with the force of law, and how these questions have been addressed in the New York City portion-cap litigation and elsewhere.

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7. *But see* BERNIE BURRUS, ADMINISTRATIVE LAW AND LOCAL GOVERNMENT (1963). Burrus focuses primarily on the licensing decisions of local agencies. Of course, much scholarship has focused on zoning boards, which are often local agencies. Generally speaking, legal commentators have not painted zoning boards in a very flattering light. *See, e.g.*, Jerry L. Anderson et al., *A Study of American Zoning Board Composition and Public Attitudes Toward Zoning Issues*, 40 URB. LAW. 689, 692–97 (2008) (explaining common institutional designs for zoning boards in local jurisdictions); *id.* at 690 (noting that zoning boards are often less than neutral and “make land use decisions based on extra-legal factors,” thus “undermining their legitimacy”).

8. Indeed, as evidenced by recent blog postings, the portion-cap case has prompted a handful of legal academics to ponder seriously the issue of local administrative law. *See, e.g.*, Rick Hills, *Why Did Bloomberg’s Soda Portion Ban Bite the Dust? Was it Mayoral Imperialism, Judicial Activism, or Both?*, PRAWFSBLAWG (Mar. 11, 2013, 8:23 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/03/bloombergs-soda-portion-ban-bites-the-dust-defeat-for-an-imperial-mayor-or-victory-for-activist-judg.html>; Ethan Leib, *Local Separation of Powers?*, PRAWFSBLAWG (Mar. 15, 2013, 10:12 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2013/03/local-separation-of-powers-.html>; Aaron Saiger, *Non-delegation, now available in 32-ounce sizes*, CONCURRING OPINIONS (Mar. 12, 2013, 1:28 PM), <http://www.concurringopinions.com/archives/2013/03/nondelegation-now-available-in-32-ounce-sizes.html>.

9. *See infra* notes 214–15 and accompanying text.

Part III then addresses the compelling normative and theoretical questions raised by city administrative agencies' aggressive record in the public health sphere. Municipal regulation of the tobacco, food, and soda industries beyond the federal and state regulatory floors presents a challenge to the standard "public-choice" narrative of administrative action, which suggests that agencies are likely to be influenced, if not co-opted, by the powerful industries they are supposed to regulate. In addition to industry opposition, some local public health regulations, like New York City's portion-cap rule,<sup>10</sup> have aroused significant popular disapproval. To explain this sort of unpopular—perhaps even elitist—rulemaking, Part III turns to Woodrow Wilson's writings, as a political scientist, on administrative agencies. Wilson idealized agencies as apolitical, expert promulgators of "scientific" regulations that would benefit the public good. In the decades since, academics have widely lampooned Wilson's vision as naïve, more often viewing agency work as the product of interest-group influence. Part III explains why recent rulemaking by local administrative agencies strives to fit the Wilsonian mold. The Article concludes by assessing the legal challenge and "cultural attack" on the New York City portion-cap rule within the Wilsonian framework. Without a general acceptance of the legitimacy of expert-driven rulemaking, proposals like the portion-cap rule will be difficult to sustain.

### I. CITIES' RECORDS OF ADMINISTRATIVE RULEMAKING IN PUBLIC HEALTH

In the last two decades, local governments have been particularly eager to take on significant public health problems—particularly tobacco use and obesity.<sup>11</sup> With respect to tobacco use, cities have led in the enactment of clean indoor air policies,<sup>12</sup> spearheading a movement that eradicated second-hand smoke for tens of millions of Americans in public spaces like stores, restaurants, and bars.<sup>13</sup> Most

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10. See *infra* note 30.

11. See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. (forthcoming 2014) (manuscript at 7–25) [hereinafter Diller, *Innovate*].

12. *Id.* at 11–13; Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825, 829 (2006) (noting that more than 1600 local governments had passed laws in the area of clean indoor air policy).

13. See *Comprehensive Smoke-Free Laws, 50 Largest U.S. Cities—2000 and 2012*, 61 MORBIDITY & MORTALITY WKLY. REP. 914 (2012) (concluding that among

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of these regulations were enacted by ordinance, but in some instances, local health agencies promulgated administrative rules mandating smoke-free environments.<sup>14</sup> For example, the Boston public health authority and a number of other, smaller Massachusetts municipalities prohibited smoking in indoor public places by administrative rule, a practice sanctioned by the Massachusetts Supreme Judicial Court in 2001.<sup>15</sup> In West Virginia and Michigan, county public health agencies expanded the scope of the state's smoke-free workplace law to cover all indoor public places, which their respective state high courts upheld.<sup>16</sup> In other jurisdictions, however, local health agencies either doubted their own authority to regulate indoor smoking,<sup>17</sup> or had their regulations invalidated by the courts.<sup>18</sup> As secondhand smoke regulation continues to evolve—covering additional places like parks, residential buildings, and

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the fifty largest cities in the United States, the number that were covered by comprehensive smoke-free laws increased from one in 2000 to thirty in 2012).

14. See Diller, *Innovate*, *supra* note 11, at tbl. 2 (surveying smoke-free workplace policies of the top twenty-five cities by population and finding that of thirteen adopted, eleven were by ordinance, one by voter initiative, and one by administrative regulation).

15. See *Tri-Nel Mgmt., v. Bd. of Health of Barnstable*, 741 N.E.2d 37 (2001) (upholding the Barnstable health board's "absolute" prohibition on smoking in bars and restaurants); *Clean Air Works Workplace Smoking Restrictions*, Bos. Pub. Health Comm'n [hereinafter BPHC], (Dec. 9, 2002) (restricting smoking in enclosed workplaces).

16. See *McNeil v. Charlevoix Cnty.*, 772 N.W.2d 18 (Mich. 2009) (upholding multi-county public health agency rule); *Found. for Indep. Living v. Cabell-Huntington Bd. of Health*, 591 S.E.2d 744 (W. Va. 2003) (upholding county-city public health agencies' clean indoor air regulations).

17. See Sandi Doughton, *Pierce County Adopts Sweeping Ban on Smoking; Legal Fight Ahead*, SEATTLE TIMES, Dec. 4, 2003, [http://seattletimes.com/html/localnews/2001807047\\_smokeban040.html](http://seattletimes.com/html/localnews/2001807047_smokeban040.html) (noting that King County considered a smoking ban but "backed off after lawyers concluded [it] lacked the authority" to adopt one).

18. See, e.g., *Dutchess/Putnam Rest. Ass'n, v. Putnam Cnty. Dep't of Health*, 178 F. Supp. 2d 396 (S.D.N.Y. 2001) (invalidating county health agency rule restricting smoking in public places); *Leonard v. Dutchess Cnty. Dep't of Health*, 105 F. Supp. 2d 258 (S.D.N.Y. 2000) (same); *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 773 N.E.2d 536 (Ohio 2002) (holding that local health board lacked the authority to prohibit smoking in all indoor public spaces); *Entm't Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep't*, 105 P.3d 985 (Wash. 2005) (invalidating indoor smoking ban promulgated by county health board because it conflicted with state law).

outdoor areas<sup>19</sup>—some local health agencies continue to be at the vanguard of regulation.<sup>20</sup>

In addition to smoking bans, local health agencies have sought to clamp down on tobacco use through other regulatory methods. When numerous cities banned outdoor tobacco advertising in the 1990s, mostly by ordinance, others addressed the issue by health agency rule.<sup>21</sup> More recently, Boston and numerous other Massachusetts municipalities banned the sale of cigarettes in pharmacies through rules issued by their boards of health, and Boston's board of health also banned the sale of cigar wraps.<sup>22</sup> In 2009, New York City's Board of Health issued a rule requiring retailers selling cigarettes to display graphic warning posters near the area of sale.<sup>23</sup> Each of these rules sought to tighten the regulatory regime applicable to the tobacco industry and its affiliates within a particular jurisdiction.

With respect to combating obesity, evidence from big cities shows that food retail regulations have been implemented by administrative rule more frequently than tobacco restrictions.<sup>24</sup> New York City's Board has been particularly aggressive in the last decade. It was the first governmental entity in the United States to ban the use of artificial trans fats in restaurant foods,<sup>25</sup> and the first to require menu labels at franchise restaurants to post calorie counts on menu boards.<sup>26</sup> Soon after New York City's action, many other cities and counties adopted similar regulations, with some doing so by

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19. See Diller, *Innovate*, *supra* note 11, at 13 (discussing such "third-generation" smoke-free regulations).

20. See, e.g., Clean Air Works Workplace Smoking Restrictions, BPHC (Dec. 11, 2008) (extending workplace smoking ban to include adjacent outdoor areas like patios).

21. See Diller, *Innovate*, *supra* note 11, at 9 (noting that of the top twenty-five cities in population, nine adopted outdoor advertising restrictions by ordinance, while one—Seattle—lay within a jurisdiction whose city-county health authority adopted restrictions by administrative rule).

22. See *Local Legislative Efforts by State*, TOBACCOFREERX.COM, [http://www.tobaccofreerx.com/local\\_efforts.html](http://www.tobaccofreerx.com/local_efforts.html) (follow "Local Efforts" hyperlink) (listing restrictions adopted by Massachusetts municipalities); Regulation Restricting the Sale of Tobacco Products in the City of Boston, BPHC (Dec. 11, 2008).

23. N.Y.C. HEALTH CODE § 181.19 (2012). The Second Circuit ruled that the New York City Board's rule was preempted by federal law. See *23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174, 180 (2d Cir. 2012).

24. Diller, *Innovate*, *supra* note 11, at 61.

25. N.Y.C. HEALTH CODE § 81.08 (2012).

26. See *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 120–21 (2d Cir. 2009) (discussing the original N.Y.C. HEALTH CODE § 81.50, adopted in 2006, and subsequent changes thereto).

administrative rule rather than by local ordinance. As in the tobacco context, Boston and other Massachusetts municipalities banned trans fats administratively rather than by ordinance.<sup>27</sup> Other notable jurisdictions include King County, Washington, whose Board of Health adopted both menu labeling and trans fat regulations by administrative rule,<sup>28</sup> and Nashville-Davidson County, whose Board of Health adopted a menu labeling rule that was later preempted by the state legislature.<sup>29</sup>

Perhaps the highest-profile obesity prevention policy adopted by an administrative agency is New York City's portion-cap rule, which was supposed to take effect in March 2013, but is currently stayed by court order.<sup>30</sup> Aimed at reducing the consumption of sugary drinks like soda in order to prevent obesity and other health problems, the rule would have capped the size of containers in which sugary beverages could be served in certain retail settings.<sup>31</sup> No other jurisdiction has yet adopted a similar rule, but others expressed interest before the litigation achieved its success to date.<sup>32</sup>

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27. See A Regulation to Restrict Foods Containing Artificial Trans Fats in the City of Boston, BPHC (Mar. 13, 2008); see also, e.g., Katheleen Conti, *Bans on Trans Fats Coming in New Year*, BOS. GLOBE, Nov. 6, 2011, [http://www.boston.com/news/local/articles/2011/11/06/lynn\\_bans\\_trans\\_fats\\_chelsea\\_could\\_be\\_next/](http://www.boston.com/news/local/articles/2011/11/06/lynn_bans_trans_fats_chelsea_could_be_next/) (describing efforts of Lynn and Chelsea boards of health to ban trans fats); NEEDHAM HEALTH DEP'T, TOWN OF NEEDHAM TRANS FAT BAN, (2009), available at <http://www.needhamma.gov/DocumentCenter/Home/View/2422> (noting that Needham town board of health promulgated trans fat ban in March 2009); *Trans Fat Policy*, CAMBRIDGE PUB. HEALTH DEP'T, [http://www.cambridgepublichealth.org/policy-practice/trans\\_fat\\_policy/index.php](http://www.cambridgepublichealth.org/policy-practice/trans_fat_policy/index.php) (last updated Sept. 2010) (noting that the Cambridge health department adopted a rule banning trans fats in July 2008). But see David Abel & John M. Guilfoil, *Brookline OKs Trans Fat Ban*, BOS. GLOBE, June 1, 2007, [http://www.boston.com/news/local/articles/2007/06/01/brookline\\_oks\\_trans\\_fat\\_ban/](http://www.boston.com/news/local/articles/2007/06/01/brookline_oks_trans_fat_ban/) (recounting Brookline's adoption of trans fat ban by town meeting).

28. KING COUNTY, WASH., BD. OF HEALTH CODE § 5.10.016 (2013) (menu labeling); *id.* § 5.10.035 (restricting artificial trans fats).

29. 2010 Tenn. Pub. Acts 614 (overriding Nashville rule) (codified at TENN. CODE ANN. § 68-14-303 (2013)); Jenny Upchurch, *Nashville Restaurants Ordered to Post Calories*, TENNESSEAN, Mar. 6, 2009 (noting that the city-county health department issued the rule).

30. N.Y.C. HEALTH CODE § 81.53 (2013), *enforcement stayed by* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584-2012, 2013 WL 1343607 (N.Y. Sup. Ct. Mar. 11, 2013), *aff'd*, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013).

31. See N.Y.C. HEALTH CODE § 81.53.

32. See Leon Stafford, *Soda Wars: Cities Seek Restrictions, Taxes to Curb Obesity*, ATL. J.-CONST. (Nov. 12, 2012, 6:38 AM), <http://www.ajc.com/news/news/local/soda-wars-cities-seek-restrictions-taxes-to-curb-o/nS4b2/> (noting that officials in Washington, D.C., and Cambridge, Mass., were considering emulating New York City's portion-cap rule).



In a variety of instances, action first taken at the local level by an administrative agency has diffused “horizontally” to other jurisdictions, many (if not most) of which adopt the policy by ordinance rather than by administrative rule. For instance, although New York City first adopted menu labeling as a Board-promulgated rule, a number of other cities and counties later adopted the same or similar regulation by council enactment.<sup>33</sup> Why some cities are more likely to use the administrative process rather than the ordinance-enacting process is a complicated question, and it is beyond this Article’s scope to propose a complete answer. Legal doctrine, geographic jurisdiction, and institutional design play major roles, and this Article will explore these issues in some detail. Funding, staffing, institutional culture, and local political culture are also relevant. Public health scholars have studied local agency effectiveness in considerable depth, sometimes considering at least some of the above factors, but most studies focus on service provision or overall effectiveness rather than the use of regulatory authority specifically.<sup>34</sup>

In addition to their role in stimulating horizontal policy diffusion, local administrative agencies can stimulate vertical policy migration. This process occurs when a state legislature or Congress passes laws that mimic or borrow from the local regulations, or when higher-level administrative agencies promulgate their own rules emulating local agency rules. Often, the migration process is a combination of both. For instance, after local-level adoption of menu labeling, at least five states passed menu labeling statutes between 2008 and 2010,<sup>35</sup> while

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33. See COLLEEN IP INTELLECTUAL PROP. LAW, STATE AND LOCAL MENU NUTRITION LABELING LEGISLATION SUMMARY (AUGUST 2011) (2011), available at [http://www.collenip.com/services/FINAL\\_Menu\\_Labeling\\_Laws\\_Chart.pdf](http://www.collenip.com/services/FINAL_Menu_Labeling_Laws_Chart.pdf) (listing seven local jurisdictions that adopted menu labeling regulations by ordinance, including Suffolk County, N.Y., which adopted an ordinance specifically delegating authority to its health board to promulgate rules on the matter).

34. *E.g.*, Zhuo (Adam) Chen et al., *Obesity Prevention: The Impact of Local Health Departments*, 48 HEALTH SERVS. RES. 603 (2013); Sandy J. Slater et al., *Missed Opportunities: Local Health Departments as Providers of Obesity Prevention Programs for Adolescents*, 33 AM. J. PREV. MED. S246, S247 (2007) (including “enacting new health regulations” as “advocacy activities” studied, but not focusing on them); Xinzhi Zhang et al., *Obesity Prevention and Diabetes Screening at Local Health Departments*, 100 AM. J. PUB. HEALTH 1434 (2010). *But see* Jennifer L. Pomeranz, *The Unique Authority of State and Local Health Departments to Address Obesity*, 101 AM. J. PUB. HEALTH 1192, 1193 (2011) (“Approximately half of the public health departments in the country can promulgate regulations; however, only approximately 17% report enacting regulations as a primary activity.”).

35. These states were California, Maine, New Jersey, Oregon, and Vermont. See *Trans Fat and Menu Labeling Legislation*, Nat’l Conf. of State Legs.,

one state—Massachusetts—adopted a menu labeling regime by administrative regulation.<sup>36</sup> In 2010, Congress included a menu labeling provision as part of the Affordable Care Act, although implementing regulations are still pending from the Food and Drug Administration (FDA).<sup>37</sup> As the menu labeling example demonstrates, administrative action by one or more local governments can constitute the crucial *first* step in the policy diffusion process; without such administrative action, certain policies might never make it to higher levels of government.<sup>38</sup> The administrative action on the tobacco and obesity fronts is also remarkable because in each context, the local administrative agency is regulating to the detriment of politically powerful industries and their allies for the purpose of conferring diffuse benefits on the public, thus challenging the standard public-choice account of agency action, as discussed in Part III.

## II. LOCAL AGENCIES' UNIQUE DOCTRINAL FOOTING

Per foundational federal constitutional doctrine, local governments are “convenient agencies,” or “creatures” of the state.<sup>39</sup> If they serve city and county governments, therefore, local public health authorities might be seen as agencies of the state’s agencies, or agents “twice removed” from state control. If, on the other hand, local public health agencies are seen as created directly by state law, independent of the local governments to which they are linked, then they are theoretically equivalent to local governments themselves, or to state agencies. The theoretical conception of local agencies can

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<http://www.ncsl.org/issues-research/health/trans-fat-and-menu-labeling-legislation.aspx> (last visited Oct. 14, 2013).

36. See 105 MASS. CODE REGS. 590.009(G) (2013); see also Jason Szep, *Massachusetts Sets Tough Fast-food Menu Rules*, REUTERS (May 13, 2009), <http://uk.reuters.com/article/2009/05/13/food-massachusetts-idUKN1341315720090513> (describing Massachusetts’s menu-labeling rules as toughest in the United States because they applied to menu labels on drive-through boards as well).

37. Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573-77 (2010) (codified at 21 U.S.C. § 343(q)(5) (2006 & Supp. V 2011)).

38. See Diller, *Intrastate*, *supra* note 1, at 1129 (citing Roderick M. Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21 (2007)). But see Shipan & Volden, *supra* note 12, at 827, 840 (finding evidence to support the proposition that, in states with low levels of legislative professionalism, local enactment of a policy can release pressure on the state legislature to adopt a similar policy).

39. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); cf. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476 (1982) (describing local school boards as “creatures of the state”).

have practical implications. If local agencies are city sub-agents, then they should be subject to direct city control much like state and federal administrative agencies are (usually) subject to control by the legislatures that created them and whose laws they “enforce.”<sup>40</sup> Moreover, if local agencies are city creatures, then their powers should be as great as—and no greater than—the power of the cities they serve. By contrast, if agencies are direct creatures of the state, the extent of their powers should be circumscribed by state law only. As the ensuing discussion shows, there is some variation in how states frame the powers of local agencies.

### A. State or Local Source of Power

Most state courts that have analyzed the scope of local health agency powers have looked primarily, if not exclusively, to state law. For instance, in Massachusetts, the courts routinely cite the state delegation statute, which simply declares that “[b]oards of health may make reasonable health regulations,” as the font of broad authority for local regulations.<sup>41</sup> Relying on this provision, Massachusetts courts have upheld a variety of local health agency rules regulating smoking or tobacco distribution more strictly than state law.<sup>42</sup> In doing so, the courts have not concerned themselves with the extent of the city’s powers, despite the fact that local charters also address local health agencies and some charters reserve the right to abolish the agencies and appoint their officers.<sup>43</sup> Massachusetts municipalities

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40. Some agencies at the federal level are designed to have more institutional independence from the executive, *see generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (reviewing and analyzing the distinction between “independent” and “executive” agencies), but Congress retains the authority to legislatively override a rule promulgated by even an independent agency.

41. *See, e.g.*, *Tri-Nel Mgmt. v. Bd. of Health of Barnstable*, 741 N.E.2d 37, 41 (Mass. 2001) (citing MASS. GEN. LAWS ch. 111, § 31).

42. *E.g.*, *Am. Lithuanian Naturalization Club, Athol, Mass. v. Bd. of Health of Athol*, 844 N.E.2d 231, 238 (Mass. 2005) (upholding regulation prohibiting smoking in enclosed areas of membership associations); *Loyal Order of Moose, Inc., Yarmouth Lodge # 2270 v. Bd. of Health of Yarmouth*, 790 N.E.2d 203, 207 (Mass. 2003) (upholding regulation prohibiting smoking “in all food service establishments, lounges, and bars”); *Tri-Nel Mgmt. v. Bd. of Health of Barnstable*, 741 N.E.2d 37, 41 (Mass. 2001) (citing MASS. GEN. LAWS ch. 111, § 31) (upholding Barnstable regulation that prohibited indoor smoking); *RYO Cigar Ass’n v. Bos. Pub. Health Comm’n*, 950 N.E.2d 889 (Mass. App. Ct. 2011) (upholding BPHC’s ban on the sale of cigar wraps).

43. *E.g.*, CHARTER OF THE TOWN OF BARNSTABLE, MASS. §§ 2-4 & 5-1, *available at* [http://www.town.barnstable.ma.us/TownManager/charter\\_current.pdf](http://www.town.barnstable.ma.us/TownManager/charter_current.pdf).

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enjoy reasonably broad home rule, at least with respect to regulatory matters, so the issue of authority has remained academic because none of the litigated cases involved an expressed disagreement between an elected governing body of a locality and its board of health.<sup>44</sup> In Boston and Cambridge, as explained below, state law expressly delegates power directly to public health agencies that are largely independent of those cities.<sup>45</sup>

The Washington state courts have also looked to state law as the source of local health agency powers, and, in doing so, purport to uphold local rules so long as they do not conflict with state law. For instance, in considering a challenge to the Tacoma-Pierce County Health Department's ban on smoking in all public accommodations in the county (a rule that went beyond the strictures of state law at the time) the court noted that the Department's authority derived "solely from statutory delegation."<sup>46</sup> Although the specific statutory delegation in question was quite broad, allowing health boards to enact "rules and regulations as are necessary in order to preserve, promote and improve the public health,"<sup>47</sup> the court found the local antismoking rule invalid because it conflicted with state law on the matter.<sup>48</sup> In applying standard "conflict" or "preemption" analysis,<sup>49</sup> the court ostensibly treated the agency rule like an ordinance enacted by a city or county legislative body. In discussing the agency's powers, however, the court noted that "[a] statutory delegation to an agency . . . is limited to those powers expressly granted, and if any doubt exists related to the granting of the power, it must be denied."<sup>50</sup>

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44. For more on Massachusetts home rule, including its application of the "private law exception," see Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1127 & n.90 (2012).

45. See *infra* notes 109–18 and accompanying text.

46. *Entm't Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep't*, 105 P.3d 985, 987 (Wash. 2005).

47. *Id.* (citing WASH. REV. CODE § 70.05.060(3)). The court also cited a state law provision that directs a local health board to "[p]rovide for the control and prevention of any dangerous, contagious or infectious disease within the jurisdiction of the local health department." *Id.* at 987 (citing WASH. REV. CODE § 70.05.060(4)).

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

49. In some states, "conflict" is a subcategory of preemption, whereas in others, it is a separate category of analysis altogether. Diller, *Intrastate*, *supra* note 1, at 1141 n.129.

50. *Entm't Indus. Coal.*, 105 P.3d at 988. Interestingly, in making this observation, the court cited a case involving the city of Seattle, *Employco Personnel Serv. v. City of Seattle*, 817 P.2d 1373 (1991), indicating that Dillon's Rule remains applicable to Washington municipalities to some extent despite the common understanding that Washington is a home-rule state. See, e.g., Ryan M. Carson, Note,

Did this Dillon's Rule-like approach to the agency's powers affect the case's outcome?<sup>51</sup> Likely not, but in another case from a year earlier, *Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health*, three dissenting justices hinted that county home-rule should have affected the analysis of a challenged agency rule.<sup>52</sup>

In *Parkland*, water districts within the geographic boundaries of the city-county health board challenged the board's authority to require them to fluoridate their water.<sup>53</sup> A bare majority of the court found that the local rule (adopted as a binding "resolution") "irreconcilably conflict[ed]" with a state law on the matter that established a procedure by which water districts could decide whether to fluoridate.<sup>54</sup> The dissent, however, believed that the state law merely established one procedure for fluoridation that a county health board was free to supersede, and, therefore, there was no conflict between the agency's resolution and the state law.<sup>55</sup> In voting to uphold the health board's powers, the dissent expressly noted the home-rule powers of the county the board served.<sup>56</sup> While both the majority and the dissent purported to engage in run-of-the-mill preemption analysis, for the dissent, county home rule may have been a "plus factor" tipping the scales in favor of the validity of the board's rule.

If Washington shows the potential dangers to local health agencies' authority when viewed as purely creatures of the state, Michigan and West Virginia demonstrate the opposite: agencies' perceived independence of the counties they serve may result in enhanced, or at least more secure, powers. For instance, Michigan counties do not enjoy "home rule" in the standard sense of the word.<sup>57</sup> Yet when a

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*Chinks in the Armor: Municipal Authority to Enact Shoreline Permit Moratoria After Biggers v. City of Bainbridge Island*, 31 SEATTLE U. L. REV. 177, 184 (2007) (referring to Washington's "home-rule doctrine").

51. *Accord* 1 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 9b, at 93 (2d ed. New York, James Cockcroft & Co. 1873); *see also id.* § 55, at 173.

52. 90 P.3d 37, 40–42 (Wash. 2004).

53. *Id.* at 38.

54. *Id.* at 40.

55. *Id.* at 40–42 (Ireland, J., dissenting).

56. *Id.* at 41 ("The Board's police powers arise from a statutory delegation by the legislature. Pierce County is a home rule charter county.").

57. *See Mudge v. Macomb Cnty.*, 534 N.W.2d 539, 544 (Mich. Ct. App. 1995) ("A county, as a political subdivision of the state, possesses only those powers delegated to it by constitution or statute.") (citing *Wright v. Bartz*, 62 N.W.2d 458 (Mich. 1954)), *rev'd in part on other grounds*, 580 N.W.2d 845 (Mich. 1998); *see also* MICH. COMP. LAWS § 45.3 (2013) ("Each organized county shall be a body politic and corporate, for the following purposes, that is to say: To sue and be sued, to purchase and hold real and personal estate for the use of the county; to borrow money for the

multi-county public health agency promulgated a smoke-free rule that went further than Michigan's statewide law at the time, the Michigan Supreme Court unanimously affirmed the agency's authority to so regulate.<sup>58</sup> Citing to the Michigan statutory provisions that delegated the power to "[a]dopt regulations to property safeguard the public health" to local health authorities,<sup>59</sup> the court concluded that these provisions justified the Northwest Michigan Community Health Agency's (NMCHA) smoke-free workplace rule.<sup>60</sup> Under the state's statutory scheme for local health agencies, the elected governing body (county commission) of each member county of the NMCHA had to approve, and did in fact approve, the proposed rule.<sup>61</sup> (Indeed, under this scheme, the possibility of "conflict" between the agency and any constituent county was nonexistent; one dissenting county out of four, even if the least populous, could have vetoed the NMCHA's rule.) The county commissioners were thus able to give final approval to a health agency rule that each commission may have had dubious authority to enact on its own.<sup>62</sup>

In West Virginia, the disparity between county power and county health agency power is even more pronounced. West Virginia has relatively weak home rule for cities, and counties possess even less

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purpose of erecting and repairing county buildings, and for the building of bridges, to make all necessary contracts, and to do all other necessary acts in relation to the property and concerns of the county." The Michigan Constitution allows counties to adopt their own charters, but doing so does not confer any additional powers on counties; rather, the adoption of a charter primarily allows the county to reorganize its leadership structure. MICH. CONST. art. VII, § 2.

58. See *McNeil v. Charlevoix Cnty.*, 772 N.W.2d 18 (Mich. 2009).

59. *Id.* at 23 (citing MICH. COMP. LAWS § 333.2435(d)); see also *McNeil*, 772 N.W.2d at 38 (citing MICH. COMP. LAWS § 333.2441(1) (granting health agencies the power to adopt regulations "that are necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department")).

60. The NMCHA consists of Antrim, Charlevoix, Emmet, and Otsego counties. *McNeil*, 772 N.W.2d at 20. Justice Markman and the two other dissenters agreed with the majority's conclusion that the NMCHA had the authority to ban smoking in settings not then covered by state law, see *id.* at 36 (Markman, J., dissenting) ("I concur with the majority's conclusion that . . . the NMCHA possessed the authority to adopt that part of the clean indoor air regulation that restricts smoking . . ."), but disagreed regarding whether the agency could use a particular enforcement mechanism, *id.*

61. See MICH. COMP. LAWS § 333.2441; see also *McNeil*, 772 N.W.2d at 21.

62. Whether county commissions had the power to enact smoking regulations beyond the strictures of state law has not been litigated. At least four counties passed ordinances that did so and none, apparently, were challenged in court. See *Wayne Bans Smoking at Work*, DET. NEWS, Mar. 18, 2005, at E1.

authority.<sup>63</sup> Nonetheless, the state supreme court has upheld the authority of local health agencies, which are organized at the county or joint county-city level, to promulgate indoor air restrictions that are stricter than those imposed by state law.<sup>64</sup> In doing so, the court has cited the state legislature's "broad delegation of power" to local boards to make rules for "the promoting and maintaining of clean and safe air."<sup>65</sup> Perhaps because they enjoy substantial power, local boards of health have been more aggressive in regulating indoor smoking in West Virginia than elected local entities.<sup>66</sup> Like Michigan, local elected bodies in West Virginia have the power to block the implementation of county rules, and at least a handful have done so.<sup>67</sup> But if county commissioners have the authority to *initiate* smoke-free laws, which is questionable under West Virginia home-rule doctrine, it appears that they prefer to let health departments move first.<sup>68</sup>

In other states, courts have interpreted health boards' powers narrowly in finding agency action unauthorized, or the state legislature has specifically withdrawn power from local agencies. For instance, the Ohio Supreme Court concluded that the Toledo-Lucas County Board of Health lacked the authority to promulgate a rule banning smoking in all public places in the county.<sup>69</sup> Despite a state statute seemingly granting local boards wide-ranging authority to "make such orders and regulations as are necessary for public health,"<sup>70</sup> the court held that boards are not vested with "unlimited

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63. Kenneth A. Klase, *West Virginia*, in HOME RULE IN AMERICA 446, 451 (Dale Krane et al. eds., 2001) (describing municipal home rule in West Virginia as very limited and observing that counties have even less authority than the "token home rule" afforded to cities).

64. *E.g.*, Found. for Indep. Living v. Cabell-Huntington Bd. of Health, 591 S.E.2d 744 (W. Va. 2003).

65. *Id.* at 751 (citing W. VA. CODE R. § 16-2-11(a)(1)(ii)).

66. *See id.* at 750 n.3 (noting that the local health boards covering forty-six of the state's fifty-five counties have adopted clean indoor air regulations).

67. *See, e.g.*, Clark Davis, *Cabell Set to Implement Smoking Plan*, W. VA. PUB. BROADCASTING (Feb. 5, 2010), <http://www.wvpubcast.org/newsarticle.aspx?id=13049> (noting that in Berkeley and Marion Counties the elected commissioners blocked the health departments' implementation of proposed antismoking regulations).

68. Indeed, at least one city has waited for the health department to act before implementing its own clean indoor air ordinance. *See* Stacy Moniot, *Monongalia County Approves Smoking Ban*, 12 WBOY.COM (Jan. 23, 2012 3:42 PM), <http://www.wboy.com/story/16481526/2012/01/09/monongalia-county-approves-smoking-ban> (explaining how Morgantown deferred implementation of its city ordinance pending county health department's promulgation of a rule).

69. D.A.B.E., Inc. v. Toledo Lucas Cnty. Bd. of Health, 773 N.E.2d 536 (Ohio 2002).

70. *Id.* at 547 (citing OHIO REV. CODE § 3709.21).

authority to adopt regulations addressing all public-health concerns.”<sup>71</sup> Although the court recognized that “local boards of health are better situated than the General Assembly to protect the public health,” it believed that a smoking ban went too far, repeatedly invoking the notion that boards cannot act in “any area of public health,” without explaining which areas they may regulate without further legislative delegation.<sup>72</sup>

Courts in New Jersey and North Carolina also found local health board efforts to regulate smoking invalid, albeit for more idiosyncratic reasons. In New Jersey, one trial court held that a regional health commission lacked the power to ban smoking in indoor public places because the state had preempted the power to ban smoking unless justified as a fire safety measure; while municipalities may have had the authority to enact fire safety measures, unelected health boards did not.<sup>73</sup> In North Carolina, the state appellate court relied heavily on a couple of New York state administrative law cases (including *Boreali v. Axelrod*, which has been featured prominently in the New York City portion-cap litigation<sup>74</sup>) to hold that a county health agency smoking ban amounted to an exercise of legislative, rather than administrative, power.<sup>75</sup> Finally, in Tennessee, the state legislature responded to the Nashville-Davidson County health department’s attempt to require that calorie counts be posted on menu labels by specifically withdrawing the power of any “non-elected” local entity (i.e., an appointed board of health) to issue such rules.<sup>76</sup>

In all of the above instances, state law was the driving force in determining whether a local health agency’s action was within the scope of its authority. In the New York City portion-cap case, local law has assumed a more prominent role. The plaintiffs challenging the portion-cap rule argue that the Board of Health exceeded its

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71. *Id.*

72. *Id.*

73. *LDM, Inc. v. Princeton Reg’l Health Comm’n*, 764 A.2d 507, 523–24, 530 (N.J. Super. Ct. Law Div. 2000).

74. *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987). For a discussion of *Boreali* and its role in the portion-cap litigation, see *infra* notes 82–95 and accompanying text.

75. *City of Roanoke Rapids v. Peedin*, 478 S.E.2d 528, 533 (N.C. Ct. App. 1996). The court never actually decided whether the state had delegated the power to regulate smoking to a local health board; even if the state had so delegated, the court would have held the board’s rule unconstitutional because the board took non-health-related criteria into account when fashioning the rule. *Id.* at 535.

76. See *supra* note 29.



delegated authority in promulgating the rule.<sup>77</sup> They stress that the Board's powers emanate from—and are circumscribed by—the city charter and any ensuing delegations, or lack thereof, from the city council.<sup>78</sup> The City, by contrast, has sought to premise the Board's powers more on state law than on local law, arguing that the Board exercises “plenary powers of legislation” delegated directly by the state legislature.<sup>79</sup> In its recent decision, *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health*,<sup>80</sup> the Appellate Division of the New York Supreme Court invalidated the rule, largely accepting the plaintiffs' invitation to focus on the city council, rather than the state legislature, as the font of the Board's powers.<sup>81</sup>

Looming over the Appellate Division's analysis in *New York Statewide Coalition* was the peculiar New York Court of Appeals precedent of *Boreali v. Axelrod*.<sup>82</sup> In *Boreali*, the Court of Appeals invalidated an attempt by the Public Health Council, a state administrative agency, to impose smoke-free regulations that were more stringent than those imposed by state legislation.<sup>83</sup> In invalidating the restrictions, the court held that, despite the Council's seemingly broad delegated powers to “deal [with] any matter affecting the public health,”<sup>84</sup> the “coalescence” of various “circumstances” pushed the Council's action to the wrong side of the “difficult-to-define” line between “administrative rulemaking and legislative policymaking.”<sup>85</sup> One such “circumstance” was that the state legislature had tried and failed repeatedly to pass more stringent

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77. See generally Brief of Plaintiffs-Petitioners-Respondents at 17–23, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 2013 N.Y. Slip Op. 05505 (N.Y. App. Div. Apr. 24, 2013) (No. 653584/12).

78. *Id.* at \*5.

79. Brief for Respondents-Appellants at 17–18, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 2013 N.Y. Slip Op. 05505 (N.Y. App. Div. Apr. 24, 2013) (No. 653584/12) (internal quotation marks omitted).

80. 970 N.Y.S.2d 200 (N.Y. App. Div. 2013).

81. *Id.* at 206 (“The Board of Health . . . derives its power . . . directly and solely from . . . the City Council.”). *But see id.* at 211 (also discussing “the laws of the state,” including “the City Charter's Enabling Act”).

82. *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987); see also *N.Y. Statewide Coal.*, 2013 WL 3880139, at \*3 (noting that the “landmark decision in *Boreali*” is “the starting point for the analysis”).

83. 517 N.E.2d at 1351–52.

84. *Id.* at 1353 (citing N.Y. PUB. HEALTH LAW § 225(5)(a)).

85. *Id.* at 1355.

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smoking regulations.<sup>86</sup> This record indicated to the court that the Council's rule went beyond normal "interstitial" rulemaking and intruded on "legislative policy-making."<sup>87</sup> In articulating the distinction between these two supposedly separate categories, the *Boreali* majority notably relied on nondelegation principles that have been largely disavowed at the federal level, thus making New York state a particularly inviting jurisdiction in which to challenge agency action.

Subsequent court opinions have applied *Boreali* to local administrative agencies in New York.<sup>88</sup> Like state agencies, therefore, local agencies in New York are constrained by an unusually robust nondelegation canon. In the portion-cap rule case, the Appellate Division read the city charter with *Boreali* in mind, interpreting narrowly the city charter's grant of authority to the Board to regulate "all matters affecting health in the city of New York."<sup>89</sup> In spite of this seemingly broad language, the Appellate Division limited the Board's authority to protecting the public from "inherently harmful matters" like diseases and unsafe food.<sup>90</sup> Ironically, the court did not consider the notion that obesity might be a disease.<sup>91</sup> Notwithstanding myriad evidence linking soda consumption to obesity and other health ills, the court ruled that the Board could not regulate soda because it is not a "health hazard per se," but is only dangerous when consumed excessively.<sup>92</sup> The Appellate Division's constricted view of the Board's authority was in significant tension with the Board's record of promulgating other rules to fight obesity,

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86. *Id.* at 1352 (citing "some 40 bills"); *id.* at 1356 ("[T]he agency acted in an area in which the Legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions.").

87. *Id.* at 1355–56.

88. *See, e.g.,* Dutchess/Putnam Rest. & Tavern Ass'n v. Putnam Cnty. Dep't of Health, 178 F. Supp. 2d 396 (S.D.N.Y. 2001) (invalidating county health board regulation restricting indoor smoking in public places on the basis of *Boreali*); Leonard v. Dutchess Cnty. Dep't of Health, 105 F. Supp. 2d 258 (S.D.N.Y. 2000) (same); Justiana v. Niagara Cnty. Dep't of Public Health, 45 F. Supp. 2d 236 (W.D.N.Y. 1999) (same); Nassau Bowling Proprietors Ass'n v. Cnty. of Nassau, 965 F. Supp. 376 (E.D.N.Y. 1997) (same).

89. NEW YORK CITY, N.Y., CHARTER § 556.

90. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 211 (N.Y. App. Div. 2013).

91. *See* Andrew Pollack, *A.M.A. Recognizes Obesity as a Disease*, N.Y. TIMES, June 19, 2013, at B1.

92. *N.Y. Statewide Coal.*, 970 N.Y.S.2d at 211.

like requiring calorie counts on menu boards and banning trans fats, which had not been challenged in court on administrative grounds.<sup>93</sup>

Another curious element of *Boreali's* reasoning that the Appellate Division relied on in invalidating the portion-cap rule was the record of legislative inaction in regulating sugar-sweetened drinks. In applying this *Boreali* “factor,” the court focused on not just the state legislature’s failed attempts to regulate soda more stringently, but also the New York City Council’s.<sup>94</sup> The *Boreali* court’s reliance on legislative *inaction* as evidence of administrative overreach is a dubious approach, inviting opponents of a regulation to introduce legislation doomed to fail to bolster legal attacks on the regulation’s validity.<sup>95</sup> For this reason, the New York Court of Appeals has backed away from this aspect of *Boreali's* reasoning in other cases.<sup>96</sup> Regardless, applying this prong of *Boreali*, as the Appellate Division did, at the local level puts city boards of health at a graver disadvantage. Their authority may be constricted by failed legislation at both the state *and* local levels.

The City has appealed the Appellate Division’s ruling to New York’s highest court, the Court of Appeals.<sup>97</sup> The court’s assessment of the portion-cap rule’s validity will depend in large part on whether the court re-affirms *Boreali's* peculiar reasoning regarding separation of powers under the state constitution. To be sure, a state is not compelled to follow federal jurisprudence in interpreting its own

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93. See *supra* notes 25–26 and accompanying text. The New York City Council adopted the Board’s trans fat rule as legislation *post hoc*, thus shielding it from a legal challenge similar to the one brought against the portion-cap rule. See New York City, N.Y., Int. No. 0517-2007 (codified at NEW YORK CITY, N.Y. ADMIN. CODE § 17-192 (2013)).

94. *N.Y. Statewide Coal.*, 971 N.Y.S.2d at 212 (“[B]oth the City and State legislatures have attempted, albeit unsuccessfully, to target sugar sweetened beverages.”).

95. *Boreali*, 517 N.E.2d at 1359 (Bellacosa, J., dissenting) (arguing that the majority’s approach to legislative inaction “will be welcomed by opponents of all kinds of existing laws” who argue for constricted agency authority).

96. See, e.g., *Bourquin v. Cuomo*, 652 N.E.2d 171 (N.Y. 1995) (rejecting the argument that an executive order is invalid because it is “substantially similar” to a bill that failed in the legislature); *Rent Stabilization Ass’n of N.Y.C. v. Higgins*, 630 N.E.2d 626, 631–32 (N.Y. 1993) (rejecting relevance of twenty-seven failed attempts to amend a statute in deciding whether an agency’s similar interpretation of the statute was correct).

97. Chris Dolmetsch, *N.Y. City Asks Top State Court to Review Large-Soda Ban*, BLOOMBERG NEWS (Aug. 5, 2013), <http://www.bloomberg.com/news/2013-08-05/n-y-city-asks-top-state-court-to-review-large-soda-ban.html>.

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constitution,<sup>98</sup> but the *Boreali* majority relied on numerous federal sources in articulating the nondelegation principle supposedly embodied in the New York State Constitution.<sup>99</sup> In doing so, the *Boreali* majority mistakenly considered the federal nondelegation doctrine alive and well even though it had been effectively interred for years.<sup>100</sup> If the Court of Appeals were to deem the portion-cap rule within the Board's delegated power, and not unlawful "legislation" per *Boreali*, the City must still defend the rule against the claim, accepted by the trial court but not specifically addressed by the Appellate Division, that the rule is an "arbitrary and capricious" exercise of administrative power.<sup>101</sup> Part III discusses this attack on the rule in more depth.

### B. Institutional Design

Most courts treat the question of whence does local health agency authority emanate, discussed above, as distinct from the issue of how an agency's officials are chosen. As Part III will explain, however, the method of choosing agency officials, and whether such officials have relevant professional expertise, are integrally related to the Wilsonian argument for the legitimacy of agency rulemaking. State law usually provides at least the skeletal outline of how a health agency's board should be constituted. Many, if not most, states require the appointment of local health board members, although some states allow for them to be popularly elected, or allow an already-elected legislative body to also serve as a board of health.

Before proceeding, a quick terminology note is in order. Many states have local "departments" of health that also contain a "board" of health. Usually, the "board" is the governing body of the "department," with the authority to adopt rules that department officials execute. Sometimes, the executive head of the department is also a member of the governing board. For this reason, lawsuits

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98. See Hans A. Linde, *The State and the Federal Courts in Governance: Vivé La Difference*, 46 WM. & MARY L. REV. 1273 (2005).

99. *E.g.*, *Boreali*, 517 N.E.2d at 1353, 1355–56 (citing TRIBE, AMERICAN CONSTITUTIONAL LAW, a treatise on the *federal* constitution).

100. See *Boreali*, 517 N.E.2d at 1360 (Bellacosa, J., dissenting) (criticizing majority's "reliance on the anachronistic nondelegation theory" that has "in the main" been "subsequently overruled").

101. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health and Mental Hygiene, 970 N.Y.S.2d 200, 206 (N.Y. App. Div. 2013).

challenging a “board”-adopted rule often name the “department” as a defendant as well.<sup>102</sup>

In jurisdictions where health board members are appointed, the applicable law often requires that board members possess work experience or educational credentials evidencing expertise in the field. Whether and to what extent appointments made by executive officials are subject to legislative confirmation varies. A full survey of health agencies’ design is beyond the scope of this article; the discussion below focuses on the selection and appointment mechanisms for the agencies in three jurisdictions with prominent records of public health innovation—namely, Massachusetts (focused on the health boards of Boston and towns), Washington (focused on King County-Seattle), and New York City.

### 1. *Massachusetts: Towns and Boston*

Due to the variety of forms of local government in Massachusetts (cities, towns, villages, etc.), state law prescribes different methods of constituting boards of health.<sup>103</sup> I focus here on towns and the city of Boston since the boards of health of each have promulgated noteworthy regulations restricting the use and availability of tobacco.<sup>104</sup> With respect to towns, judicial decisions have upheld the authority of health boards in Athol, Barnstable, and Yarmouth, specifically, to regulate smoking.<sup>105</sup> Massachusetts law prescribes that town boards of health be composed of three or more persons either appointed by the board of selectmen (the general governing body of the town) or elected directly by the town’s voters, “unless other provision is made by law or vote of the town.”<sup>106</sup> In some instances, the board of selectmen themselves can serve as the board of health.<sup>107</sup> State law does not require any specific expertise of town health board members. In practice, Barnstable and Yarmouth have three- and five-member boards of health, respectively, appointed by the board of

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102. *See, e.g.,* Dutchess/Putnam Rest. & Tavern Ass’n v. Putnam Cnty. Dep’t of Health, 178 F. Supp. 2d 396, 398 (S.D.N.Y. 2001) (naming both the Putnam County Department of Health and the Putnam County Board of Health as defendants while the court’s opinion primarily discusses the “Board”).

103. *See* MASS. GEN. LAWS ch. 111, §§ 26, 26A-D (cities); §§ 27A, 27B (regional or joint boards of health) (2013); *id.* ch. 41 §§ 1, 1A (towns).

104. *See supra* notes 15, 22 and accompanying text.

105. *See supra* note 42.

106. MASS. GEN. LAWS ch. 41, §§ 1, 1A.

107. *Id.* § 21.

selectmen, while Athol has a three-member board appointed by the city manager.<sup>108</sup>

The Boston Public Health Commission is a different creature altogether, created by a special act of the Massachusetts legislature in 1995 as an independent agency, constituting its own political subdivision.<sup>109</sup> The BPHC replaced the former Boston Department of Health and Hospitals.<sup>110</sup> State law provides for a governing board (referred to as “the Board of Health”) of seven members, with six appointed by the mayor of Boston subject to city council approval; the seventh member is the chief executive officer of the private, nonprofit Boston Medical Center, who serves *ex officio*.<sup>111</sup> Of the six mayoral appointees, two must be trustees of neighborhood health centers affiliated with the Medical Center, and one must be selected from a list of nominees proposed by “representatives of organized labor” appointed by the mayor.<sup>112</sup> The three board seats that do not require any particular affiliation are currently filled by a physician, a medical doctor who is also a director of a hospital center and a professor at Harvard Medical School, and an associate dean at Boston University’s school of public health.<sup>113</sup> All members of the commission serve staggered three-year terms, and may be removed

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108. ATHOL, MASS., TOWN CHARTER § 5-3-9(j) (2007), *available at* [http://www.athol-ma.gov/egov/docs/1228756223\\_273803.pdf](http://www.athol-ma.gov/egov/docs/1228756223_273803.pdf) (noting that the town manager has the power to appoint three members of the board of health, one of whom must be a “professional health practitioner”); BARNSTABLE, MASS., TOWN CHARTER § 10-7(k)(3) (2004) (noting that the board of selectmen appoints members of board of health), *available at* <http://www.town.barnstable.ma.us/TownClerk/TownCode.pdf>; *Board of Health*, TOWN OF BARNSTABLE, <http://www.town.barnstable.ma.us/BoardOfHealth> (last visited Oct. 14, 2013) (listing three members of board); *Board of Health*, YARMOUTH, MASS., <http://www.yarmouth.ma.us/index.aspx?NID=474> (last visited Sept. 4, 2013) (listing five members of board).

109. *See* 1995 MASS. ACTS ch. 147 § 3(a) (codified at MASS. GEN. LAWS ch. 111 app. §§ 2-1 to 2-15 (2013)).

110. *Id.* § 2-1(a).

111. *Id.* § 2-3(b). The BPHC’s composition was to some extent contingent on the approval of a merger between Boston City Hospital and Boston University Medical Center, which ultimately occurred and was another major focus of the 1995 Act. *See id.* § 2-5; *Our History*, BOS. PUB. HEALTH COMM’N, <http://www.bphc.org/about/bphchistory/Pages/Home.aspx> (noting that in 1996, the BPHC “was formed, resulting from the merger of Boston City Hospital and Boston University Hospital”).

112. MASS GEN. LAWS ch. 111 app. § 2-3(b) (2013).

113. *See Board Member Profiles*, BOS. PUB. HEALTH COMM’N, <http://www.bphc.org/boardofhealth/boardmembers/Pages/Home.aspx> (last visited Oct. 14, 2013) (describing members Paula Johnson, Joseph Betancourt, and Harold Cox).

by the mayor only for cause and after a public hearing.<sup>114</sup> Members of the board are unpaid.<sup>115</sup> Consistent with other boards of health in the state, the BPHC possesses the power to promulgate “reasonable health regulations not inconsistent” with state regulations or law,<sup>116</sup> and the Massachusetts courts have similarly interpreted this grant of authority broadly.<sup>117</sup> Given that it is a separate corporate body, it is questionable whether BPHC regulations can be overruled by the Boston city council. Like Boston, Cambridge also has an independent public health commission that was established by state statute and that has at times also been a leader in public health regulation.<sup>118</sup>

## 2. New York City

The New York City health agency is a creature of both state law and the city charter. Per the charter, the Department of Health and Mental Hygiene (DHMH) has and exercises “all powers of a local health department set forth in law.”<sup>119</sup> The Board of Health is part of DHMH and is its policymaking arm, empowered to add to, amend, or repeal the city’s health code “for security of life and health in the city.”<sup>120</sup> The mayor appoints the commissioner of the Department, who must be a doctor of medicine with credentials or experience in public health,<sup>121</sup> and also serves as a member of the Board. The other ten members of the Board include five members who must be experienced physicians and five others who must possess experience and credentials in the sciences.<sup>122</sup> All are appointed by the mayor and serve without pay for six-year terms.<sup>123</sup> Whether appointments require council approval is not mentioned in the city charter, but the

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114. MASS. GEN. LAWS ch. 111 app. § 2-3(b) (2013).

115. *Id.*

116. *Id.* § 2-7(a)(15).

117. *See, e.g.,* RYO Cigar Ass’n v. Bos. Pub. Health Comm’n, 950 N.E.2d 889 (Mass. App. Ct. 2011) (upholding BPHC’s ban on the sale of cigar wraps).

118. *See* MASS. GEN. LAWS ch. 111 app. §§ 3-1 to 3-21 (2013); *see also, e.g., Policy & Practice, Smoke-free Workplaces*, CAMBRIDGE PUB. HEALTH DEP’T, <http://www.cambridgepublichealth.org/policy-practice/policy-advocacy/smoke-free-workplaces/> (describing how the Cambridge Public Health Department, like the BPHC, took action to limit smoking in indoor public places before state law did so).

119. NEW YORK CITY, N.Y., CHARTER § 551.

120. *Id.* § 558(b).

121. *Id.* § 551.

122. *Id.* § 553.

123. *Id.*

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practice appears to be that the council provides its advice and consent to nominations.<sup>124</sup> Board members can be removed by the mayor due to “official misconduct,” “negligence,” or other unprofessional conduct, so long as provided a hearing with counsel if requested.<sup>125</sup> Unlike the BPHC, the DHMH and the Board within it are part of the political subdivision that is the city of New York, and, presumably, the Board’s changes to the city health code can be overturned or modified by the city council. Yet, as noted above, the City has argued in its portion-cap case appeal that the Board exercises plenary legislative authority directly delegated by the state legislature.<sup>126</sup> This argument implies, although the City has not so asserted directly, that only the state legislature, and *not* the city council, has the authority to overturn Board-adopted rules.

*3. Washington: King County-Seattle*

One of the more aggressive agencies in enacting public health regulations, the King County-Seattle Board of Public Health, or King County Board of Health (KCBOH) is a creature of state law, county and city code, and county-city agreement.<sup>127</sup> The Board consists of eleven members, ten of whom vote on policy.<sup>128</sup> Three are members of the King County council appointed by that council’s chair; three are elected officials of Seattle appointed by the city council; and two are elected officials from other municipalities within King County appointed by the Sound Cities Association.<sup>129</sup> The remaining two

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124. See Brief for Respondents-Appellants at 6, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 654584/12 (N.Y. App. Div. Mar. 25, 2013).

125. NEW YORK CITY, N.Y., CHARTER § 554.

126. See *supra* note 79 and accompanying text.

127. See KING CNTY., WASH., CODE ch. 2.35 (2013); SEATTLE, WASH., MUNICIPAL CODE § 3.30.010 (2013) (referring to 1981 agreement between Seattle and King County regarding health board composition and department funding); WASH. REV. CODE § 70.05.035 (2013) (allowing home-rule county legislative authorities to prescribe selection mechanisms for a board of health, but requiring that a majority be elected officials); *id.* § 70.08.010 (establishing framework for “Combined City-County Health Departments”).

128. KING CNTY., WASH., CODE § 2.35.021 (2013).

129. *Id.* § 2.35.021 (providing that other municipalities agree upon a method of selection); *Membership Roster of the King County Board of Health*, KING COUNTY, <http://www.kingcounty.gov/healthservices/health/BOH/members.aspx> [hereinafter, KING COUNTY] (noting that the Sound Cities Association appoints the “suburban” members). There are a couple of apparent discrepancies between code and practice. The King County Code says only that the “city” of Seattle appoints its members, without indicating whether this is done by the mayor or council, but the KCBOH web



voting members are “health professionals,” one of whom should have “knowledge of environmental health, including knowledge of septic systems and groundwater quality,” each appointed with an affirmative vote of the prior eight officials totaling at least seven.<sup>130</sup> In calculating votes of the Board, the three county councilmember’s votes are given double weight, thus creating thirteen total votes.<sup>131</sup> All of the elected officials serve terms of just one year, while the “health professionals” serve three-year terms.<sup>132</sup> There is no express provision for removal from office, and it appears that Board members are not paid.<sup>133</sup> If there were a conflict between a KCBOH rule and the legislative desires of King County, Seattle, or another King County city, it is unclear whose rule would trump.

As compared to Boston and New York City, the KCBOH is far more regional, encompassing numerous municipalities and unincorporated territory. (Of course, New York City is in a way a regional government itself, comprising five counties and eight million-plus people, as compared to King County’s two million, so the comparison is crude.) With respect to institutional independence, the KCBOH’s members are predominantly drawn from elected bodies of the county or constituent cities, whereas the BPHC is a separate body corporate and the New York City Board is appointed directly by the mayor.<sup>134</sup> The KCBOH might be less independent than the BPHC, but perhaps more independent than the New York City Board because many of the KCBOH members are officials elected in their own right, and, therefore, presumably less beholden to any other elected official.<sup>135</sup> Relatedly, insofar as eleven of its thirteen votes are cast by members holding other elected office, the KCBOH may have

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site says the city council makes the appointments. *Id.* The Code also states that the county chair appoints county members, KING CNTY., WASH., CODE § 2.35.021.A.1 (2013), but the KCBOH web site says they are appointed by the county council. KING COUNTY, *supra*.

130. KING CNTY., WASH., CODE § 2.35.021.A.4 (2013). The final, nonvoting member is a health professional appointed by a majority vote of the rest of the board. *Id.*

131. *Id.* § 2.35.021.A.1.

132. *See* KING COUNTY, *supra* note 129.

133. *See* KCBOH CODE § 2.04.020(F) (2013), <http://www.kingcounty.gov/healthservices/health/BOH/code.aspx> (noting reimbursement only for expenses).

134. *See supra* Parts II.B.1–2 (discussing the BPHC and the New York City Board of Health).

135. For instance, the current membership from Seattle includes city councilors, including the council president. *See* KING COUNTY, *supra* note 129.

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the most democratic legitimacy, or at least political acumen.<sup>136</sup> On the other hand, due to its large number of elected officials, none of whom need have any expertise in the fields of medicine or public health, the KCBOH is much less “expert”-dominated than the BPHC or the New York City Board. Massachusetts towns’ boards are the least “expert”-dominated, at least by design, requiring no or little specific credentials or experience for members.<sup>137</sup>

Before moving on to the more theoretical discussion below, one more doctrinal note is in order. Essential to the administrative process’s legitimacy at any level is the extent to which rulemaking is transparent and involves the public. The details of the various entities’ rulemaking processes are also determined by an amalgam of state and local law. New York City, for instance, has its own administrative procedure act that is codified in the city charter.<sup>138</sup> A full review of local administrative procedure is beyond the scope of this Article, but the more open and transparent the process, the more likely the local administrative action will be perceived as legitimate by the public, the courts, and other elected officials. Standard elements of process should include the publication of a notice of a public hearing, at least one hearing at which members of the public and interested parties may testify, and perhaps some response by the board to the testimony elicited.<sup>139</sup> From anecdotal observations in the cases discussed above, it appears that the rulemaking process at the local level may not be as thorough—or at least not as drawn-out—as the process at the federal level.<sup>140</sup>

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136. The elected officials’ claim to democratic legitimacy is somewhat weakened by the fact that voters elect these officials to general lawmaking bodies, like the city council, and not directly to the health board.

137. Only Athol requires one (of three) members to be a “professional health practitioner.” *See* ATHOL, MASS., TOWN CHARTER, at § 5-3-9.

138. *See* NEW YORK CITY, N.Y., CHARTER §§ 1041–47 (“City Administrative Procedure Act”).

139. *See, e.g.*, KING COUNTY, WASH., BOARD OF HEALTH CODE §§ 2.04.140, 2.04.175 (2013) (describing notice-and-comment process for rule adoption).

140. *See, e.g.*, MASS. GEN. LAWS ch. 111, § 31 (2013) (requiring only that a summary “describ[ing] the substance of any regulation made by a board of health . . . be published once in a newspaper of general circulation in the city or town, and such publication shall be notice to all persons”); *see also infra* note 170.

### III. LOCAL HEALTH AGENCY RULEMAKING AS WILSONIAN RULEMAKING?

The emerging role of local health agencies as leaders in combating obesity and tobacco use raises interesting questions for those who study regulation, administrative law, and policy innovation. This Part will largely attempt to cabin the question of local innovation generally, focusing more specifically on the uniqueness of the innovation that results from local health agencies. This Part thus begins from the premise that the heightened regulation that has emerged from the local administrative sphere would not have occurred absent agency action. In other words, if there were *only* the local lawmaking process, some key innovations—such as trans fat bans, menu labeling, many tobacco restrictions, and a portion cap on soda—would have never emerged or diffused to the degree that they have. As is the case at the state and federal levels, agencies are not perfect agents of elected bodies, and their work does not directly represent the “will” of the legislature they serve. For example, a major thrust of the portion-cap litigation is that the New York City Council did not pass, and never would have passed, the regulation.<sup>141</sup> Notably, the Bloomberg administration did not respond to the trial court ruling by seeking to obtain similar legislation from the city council. From the public positions taken by many councilors, it appears that any attempt to do so would have been fruitless.<sup>142</sup>

If local health agencies *are* regulating certain powerful industries like Big Tobacco,<sup>143</sup> the food industry, and the soda industry to a

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141. N.Y. State Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dept. of Health & Mental Hygiene, 970 N.Y.S.2d 200, 212 (N.Y. App. Div. 2013).

142. See *Id.* at 204 (citing a letter submitted to Mayor Bloomberg by fourteen members of the city council opposing the proposed portion-cap rule); Brief of Amici Curiae New York City Council Members, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 2013 N.Y. Slip Op. 05505 (N.Y. App. Div. Apr. 25, 2013) (No. 653584/12) (brief opposing portion-cap rule submitted on behalf of twenty-three (of fifty-one) council members); see also Michael M. Grynbaum, *In N.A.A.C.P., Soda Industry Finds Ally*, N.Y. TIMES, Jan. 24, 2013, at A20 (noting that “several members of the City Council’s Black, Latino and Asian Caucus” oppose the rule). Indeed, perhaps in response to the portion-cap litigation, Mayor Bloomberg has rolled out his more recent proposals to improve the public health—namely, requiring that retail stores place cigarettes out of customer view and raising the legal age for buying tobacco to twenty-one—as legislation before the city council rather than as proposed administrative rules. See Anemona Hartocollis, *City Plan Sets 21 as Legal Age to Buy Tobacco*, N.Y. TIMES, Apr. 23, 2013, at A1 (discussing both proposals).

143. “Big Tobacco” is a somewhat ambiguous term. For a working definition, see Diller, *Innovate*, *supra* note 11, at 3 n.2.

greater degree than local elected officials would regulate on their own, at least in many prominent instances, what accounts for this regulatory zeal? And is this heightened regulation justified when put forward by officials who are less democratically accountable than city councilors and mayors? In many ways, the challenge to the Bloomberg soda rule presses these questions to a degree not seen in the other challenges to local agency authority since the rule is unpopular with many elected officials, the public at large, and, of course, the regulated industries. With respect to the regulated industries, in particular, the record of heightened local regulation deviates starkly from the public-choice narrative that holds that administrative agencies are particularly susceptible to undue influence wielded by well-funded industry interest groups.

#### A. Public Choice as the “Dominant” Model of Agency Action, and Other “Contenders”

While not “the only game in town,” public-choice scholarship has assumed a prominent place in the academic pantheon, particularly as a means of describing the administrative process, with most accounts focusing on the federal level.<sup>144</sup> Briefly put, public choice rejects the notion that persons in public positions pursue “the public good,” and instead assumes that public officials, like all other persons, rationally pursue their own interests.<sup>145</sup> Public choice has traditionally taken an especially dim view of the administrative process, viewing agency officials as prone to manipulation by powerful “special interest groups.”<sup>146</sup> Under this account, agency action is far more likely to benefit special interests than to serve what others might call the “public good”—the more weakly held preferences of a diffuse majority.<sup>147</sup> More recent and nuanced versions of public choice have

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144. RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 1 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) [hereinafter, “RESEARCH HANDBOOK”].

145. See Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, in RESEARCH HANDBOOK, *supra* note 144, at 19 (observing that public choice theory assumes that “political actors—the individuals, groups, and politico-legal institutions that make public law—act on the basis of rational self-interest”).

146. See STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 14–25 (2008) (recounting public choice’s “cynical” view of administrative regulation).

147. *Id.*; Mashaw, *supra* note 145, at 23 (“[P]olicies having widely distributed benefits and costs will not be adopted even if they would substantially improve general welfare.”) (citing Michael Hayes, *Lobbyists and Legislators: A THEORY OF*

modified this dim portrayal of agency decision-making, but the conventional public-choice narrative has showed significant staying power among a large number of academics.<sup>148</sup>

There are a variety of reasons why the standard public-choice narrative may be inapplicable in certain local health agency settings. Borrowing from Steven Croley, the public-choice explanation for administrative agencies favoring powerful interest groups breaks down into two arguments. First, agencies can be expected to conform to legislative preferences regarding regulatory outcomes (which Croley calls the “legislative dominance” claim of public-choice theory), and those preferences result from legislators seeking to obtain interest groups’ help with re-election in exchange for favorable regulatory treatment (the “legislator motivation” claim).<sup>149</sup> Second, and alternatively, agencies themselves are inclined to favor certain interest groups, irrespective of legislative influence, due to pathologies like the “revolving door” of employment between regulators and the regulated (the “agency favoritism” claim).<sup>150</sup>

At the local level, the legislator motivation and legislative dominance claims of public-choice theory may not lead to pro-industry outcomes for several reasons. With respect to “legislator motivation,” city councilors may not be as motivated to protect or promote the tobacco and food industries as their counterparts are at higher levels of government. Why local legislators are differently motivated is a question largely outside the scope of this Article, and one I have addressed in depth in other work.<sup>151</sup> In short, industries may have less influence on *local* legislators for at least a couple of key reasons. The low profile and utter lack of competition in some city

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POLITICAL MARKETS (1981)). In this sense, the public-choice account overlaps with the “capture theory” of the administrative process, although there are distinctions between the two. “Capture” generally assumes that agencies are unduly influenced by the large industries they seek to regulate, whereas public-choice theory acknowledges that any interest group, including but not limited to industry groups, may exert a strong influence on the regulatory process. Capture also frequently focuses more on industries obtaining favorable adjudications from agencies, whereas public-choice more broadly applies to both rulemaking and adjudication. For more on “capture,” see Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1059–67 (1997); Joel A. Mintz, *Has Industry Captured the EPA? Appraising Marver Bernstein’s Captive Agency Theory After Fifty Years*, 17 FORDHAM ENVTL. L. REV. 1 (2005).

148. See *Introduction*, RESEARCH HANDBOOK, *supra* note 144, at 5 (noting the increasing “sophisticat[ion]” and “complex[ity]” of public choice models).

149. See CROLEY, *supra* note 146, at 44–48.

150. *Id.* at 48–52.

151. See generally Diller, *Innovate*, *supra* note 11.

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legislative elections may make such elections less “price-sensitive,” and thereby diminish the relative influence of well-funded industry interest groups on legislators’ motives.<sup>152</sup> Further, regulation that promotes the public health may be closer to the ideological views of the local legislators’ constituents than they are to the average views of constituents at higher levels of government.<sup>153</sup>

Conversely, the interest groups that lobby *for* public health measures may have more clout with city councilors than they do with state legislators and members of Congress. Indeed, public-choice theory acknowledges that legislator motivations are driven by interest group pressure, and these interest groups include so-called “public interest groups” like those that purport to promote the public health.<sup>154</sup> For a public-choice theorist, these groups are no more virtuous than the soda and tobacco industries. Even on public choice’s own terms, however, it is difficult to explain why public health groups would be especially powerful at any level of government. They contribute comparatively little to campaigns, spend comparatively little on lobbying, and advocate many proposals that are unlikely to attract broad public support.<sup>155</sup> To be sure, such groups may be *relatively* more influential in the local legislative sphere for a variety of reasons, but that is a long way from explaining why they have achieved such notable successes in the local administrative forum.

The second prong of the legislative explanation for administrative action—the legislative dominance claim—focuses more specifically on agency innovation. If legislative preferences for public health regulation are held steady across levels of government (admittedly a strained assumption), local health agencies might still regulate more aggressively if city councils are less able to “dominate” agencies than their legislative counterparts at other levels of government. The elements of institutional design discussed in Part II likely affect the degree of dominance a local legislature exercises over its health agency. In Boston, for instance, the BPHC is a completely independent entity not subject to the city council’s direct control.

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152. *Id.* at 40–45.

153. *Id.* at 46–50.

154. *See id.* at 39 (noting that the existence of “public interest” groups “jeopardizes” public choice’s claim that interest groups only pursue their members’ narrow interests).

155. *See, e.g.,* Diller, *Innovate*, *supra* note 11, at 31–33 & n.167 (noting that industry groups far outspend public health organizations on lobbying).

While the council plays a role in determining the board's membership by approving mayoral appointees, it appears to lack the power to overrule BPHC rules, and exercises limited authority over the Commission's budget.<sup>156</sup> In New York City, the mayor appoints all of the Board of Health's members, apparently with the advice and consent of the council by custom,<sup>157</sup> in contrast to the federal model, in which high-level agency appointments require Senate confirmation by law.<sup>158</sup> Other factors that may influence legislative dominance, such as the extent to which legislators hold agencies' feet to the fire through hearings and other methods, are likely a matter of local political culture. In short, there may be plausible reasons why some big city health authorities may be less beholden to the legislature than, say, federal agencies are to Congress.

It is notable that to the extent that legislative control of health agencies is weakened in places like Boston and New York City, executive control is strengthened. Particularly in New York City, the mayor's power to appoint all Board members pivots the usual public-choice inquiry from *legislative* motivation to *executive* motivation. Curiously, many public-choice accounts of agency action focus on legislators' interests, but ignore or downplay the degree to which elected officials are influenced by interest-group pressure.<sup>159</sup> Similarly, Steven Croley's critique of the public-choice narrative for the federal administrative process emphasizes the importance of presidential support, but does not explain what motivates the president to provide such support.<sup>160</sup> If the public-choice account is to have any salience in explaining aggressive public health action by local agencies, it must explain why mayors like Michael Bloomberg are motivated to promote the public health at the expense of well-funded interest groups like the food, soda, and tobacco industries.

There may be plausible explanations. In Bloomberg's case, his immense fortune no doubt enables him to pursue goals that are less

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156. See MASS GEN. LAWS ch. 111 app. § 2-8(c) (2013) (allowing the mayor to "approve" or "reject" the BPHC's proposed budget).

157. See *supra* note 124 and accompanying text.

158. See, e.g., Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 924, 926 (2009) (noting that, in 2008, there were 1141 federal positions requiring Senate confirmation, including all "principal officers," as required by the Constitution).

159. See Mashaw, *supra* note 145, at 36 (noting that "critical actors," like the President, are often missing from the public-choice discussion).

160. See CROLEY, *supra* note 146, at 275-77, 302 (noting the importance of White House support in protecting agencies' decisions from Congressional backlash).

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available to other politicians who rely to a much greater extent on campaign contributions to retain office.<sup>161</sup> Freed from such demands, Bloomberg can pursue goals that are less obviously “rational,” but that might still fit in the modern public-choice framework, such as promoting his national profile and enhancing his ego.<sup>162</sup> For Boston, on the other hand, insofar as Mayor Thomas Menino appointed officials to the BPHC who aggressively promoted public health, another explanation would be required. Perhaps the explanation lies in the exceptional longevity of his mayoral tenure.<sup>163</sup>

As for public choice’s alternative claim of “agency favoritism,” there may be reasons why local agencies are less hospitable to the food, soda, and tobacco industries than higher-level agencies. Local agencies may be more removed from the “revolving door” culture of lobbyists, lawyer, and think tanks that some commentators accuse of poisoning agency work at the federal level.<sup>164</sup> The requirement of expertise for at least some members of the policymaking boards of local health agencies may minimize the degree to which political “hacks” influence the rulemaking process.<sup>165</sup> Agency culture may also play a role. Indeed, consistent with public choice’s premise that all persons, including those who serve in regulatory roles, promote their own self-interest, there is a longstanding, if now somewhat discredited, public-choice account *for* heightened regulation. Administrators might prefer enhanced regulation, the story goes,

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161. Forbes, for instance, estimates Bloomberg’s net worth to be \$31 billion as of October 2013. *The World’s Billionaires*, FORBES, <http://www.forbes.com/profile/michael-bloomberg/> (last visited Oct. 14, 2013).

162. See Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 320–24 (2002) (discussing the “deep ambivalence within public choice scholarship about whether the interests that constitute self-interest . . . are limited to material matters, or whether they extend to such discarnate concerns as power, prestige, and leisure”).

163. Katharine Q. Seelye & Jess Bidgood, *Beloved but Ill, Boston Mayor Won’t Run Again*, N.Y. TIMES, Mar. 29, 2013, at A11 (noting that upon the end of his final term, Menino will have been Boston’s mayor for twenty straight years).

164. See David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 510 & n.13, 512–16 (recounting the “revolving door indictment” against agencies popular in academic literature, including among public choice scholars).

165. Requiring agency members to have certain professional qualifications, however, is not unique to the local level. See HENRY B. HOGUE, CONG. RESEARCH SERV., STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS app. (2008) (listing numerous examples of high-ranking federal agency appointments that require specific qualifications by statute).



because it increases their power and budgets.<sup>166</sup> The sum of this tour de public choice is that for those who embrace its descriptive power, there is much work to be done to explain why certain local agencies have been at the forefront of public health regulation. Public-choice tools might help explain why local agencies have been *more* aggressive than their higher-level counterparts, but clearly, the standard public-choice narrative, with its gloomy description of agencies hemmed in by powerful industry groups, is a weaker affirmative explanation for the regulatory record of many local public health agencies.

While public choice is perhaps the most prominent academic account of agency action, there are other “contenders” that I will address briefly here. A strong strain of local government scholarship roots itself in the civic republican tradition;<sup>167</sup> likewise, some administrative law scholars have turned to civic republicanism as a justification for the administrative state.<sup>168</sup> There is a potential overlap, therefore, in these two accounts, focusing on the local administrative forum. For reasons explained elsewhere, I am a skeptic of the civic republican (or its conceptual sibling, the communitarian) argument for local innovation generally.<sup>169</sup> Big-city innovations like the portion-cap rule only bolster this skepticism for a couple of reasons. First, the amount of public “deliberation” before and during these policies’ adoption was minimal.<sup>170</sup> Second, the fact

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166. See Mashaw, *supra* note 145, at 36 (recounting William Niskanen’s claim of “budget maximization,” and the ensuing criticism thereof). For more on this claim, see *infra* note 183).

167. See, e.g., Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 152–57 (2008) (making normative argument for a civic republican model of local government).

168. The seminal piece here is Mark Seidenfeld’s *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

169. See Diller, *Innovate*, *supra* note 11, at 44–45. For criticism of the civic republican account in the administrative context, see CROLEY, *supra* note 146, at 62–65 (faulting the civic republican narrative for being “vague with respect to exactly who participates [in administrative decision-making] and what their behavioral motivations are”).

170. See, e.g., *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 653584-2012, 2013 WL 1343607, at \*4 (N.Y. Sup. Ct. Mar. 11, 2013), *aff’d*, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013) (noting that the rule was proposed on June 12, 2012, with public comments due in writing or at a hearing held on July 24, 2012); Michael M. Grynbaum, *Strong Words from Both Sides at a Hearing on Bloomberg’s Soda Ban*, N.Y. TIMES, July 25, 2012, at A19 (observing that “few of the dozens of speakers who turned out at [the] hearing . . . represented the average soda-drinker on the street,” and identifying, “more or less,”

that New York City, whose population of eight million-plus exceeds that of all but eleven states, has been at the forefront of such innovation in the administrative sphere complicates the civic republican account, given that the Big Apple is hardly the New England township of Tocquevillian lore so romanticized by communitarians.<sup>171</sup> Perhaps civic republicans would have better luck explaining some of the innovations adopted by health boards in small Massachusetts towns like Athol, Barnstable, and Yarmouth.

The other account for agency action generally that is worth noting as a contrast to the public-choice school is Steven Croley's forceful argument that administrators are capable of regulating for the public good. Croley argues that the arduous processes federal law requires of administrative action, combined with rigorous executive and judicial review, can provide the right setting for rules that serve the public good.<sup>172</sup> As a rebuttal of the public-choice school as applied to any level of government, Croley's work is most valuable. As an affirmative account for local administrative rulemaking, however, Croley's account, which focuses solely on the federal administrative system, is less helpful. Because Croley focuses on the rigorous *process* for regulating at the federal level, his argument has less salience at the local level where the procedural requirements may be less robust.<sup>173</sup> Further, and more fundamentally, much of what Croley likes about the federal administrative process is that it involves the public and, ultimately, can promulgate rules that the public supports.<sup>174</sup> As a defense of local administrative action like New York City's portion-cap rule, Croley's account falters, since the rule lacks public support.<sup>175</sup> While the portion-cap rule may be the starkest example of an unpopular agency rule, others, like the trans fat ban, met some degree of public skepticism before ultimately gaining

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those testifying against the rule as representatives of either the soda industry or its affiliates and those testifying in favor of the rule as academics and health professionals).

171. See *New York (City)*, *New York*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited Sept. 4, 2013) (estimating the 2012 population of New York City to be 8,336,697).

172. See generally CROLEY, *supra* note 146.

173. See, e.g., *supra* note 170.

174. See, e.g., CROLEY, *supra* note 146, at 256 (noting that various examples of "socially beneficial regulation" "enjoyed public acceptance, or at least generated no public opposition").

175. See Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Soda Ban, Calling it an Overreach by Bloomberg, a Poll Finds*, N.Y. TIMES, Aug. 23, 2012, at A19.

acceptance.<sup>176</sup> To defend at least some of the rules that local health agencies have issued, particularly in the realm of obesity prevention, one needs a justification that depends less on popular opinion. For that more expert-based—and perhaps elitist—account, this paper now turns to Woodrow Wilson.

### B. The Wilsonian Administrative State

Writing as a political scientist, before he would achieve far more notoriety as governor of New Jersey and then President of the United States, Woodrow Wilson made the case for the “scientific” administration of government.<sup>177</sup> Rooted in the Progressive movement’s push for civil service reform, Wilson believed that scientific administration by trained experts who did not owe their appointment to politicians would make government more efficient and businesslike, and therefore more able to serve the public good.<sup>178</sup> By “scientific,” Wilson did not mean a government administered by physicists and biologists, but rather that the administration of government be treated like a science (as political science had been before it) and then staffed by those trained in its methods.<sup>179</sup> Wilson’s argument was in some ways a call for the establishment of schools dedicated to training public administrators that are now common in universities, but were unheard-of at the time.<sup>180</sup> Wilson looked to

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176. While I was unable to find a poll testing public reaction to the trans fat ban in New York City or any other jurisdiction, the media commentary regarding proposed bans was often quite negative, in New York City and elsewhere. *E.g.*, John Tierney, *One Cook Too Many*, N.Y. TIMES, Sept. 30, 2006, at A15 (“This is the biggest step yet in turning the Big Apple into the Big Nanny.”); *see also* Brittany Schaeffer, *No Fries for You!*, WILLAMETTE WEEK, Oct. 25, 2006, [http://www.wweek.com/portland/article-6206-no\\_fries\\_for\\_you\\_.html](http://www.wweek.com/portland/article-6206-no_fries_for_you_.html) (noting “[f]ears of overzealous government regulation” and warning readers, disingenuously, to “[e]at your doughnuts while you still can” as Multnomah County, Ore., considered adopting a trans fat ban). *But see* Roni Caryn Rabin, *Calorie Labels May Clarify Options, Not Actions*, N.Y. TIMES, June 17, 2007, <http://www.nytimes.com/2007/07/17/health/nutrition/17cons.html?pagewanted=print> (citing a 2005 poll finding that eighty-three percent of consumers wanted nutritional information in restaurants, which the author took as overwhelming support for menu labeling).

177. *See* Woodrow Wilson, *The Study of Administration*, in WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 231, 234 (Ronald J. Pestritto ed., 2005) (“[T]here should be a science of administration which shall seek to straighten the paths of government . . .”).

178. *See id.* at 231–34.

179. *See id.* at 232–34, 240.

180. *See, e.g.*, *About WWS: History*, PRINCETON UNIV. WOODROW WILSON SCH. OF PUB. & INT’L AFFAIRS, [http://www.princeton.edu/about\\_wws/history/](http://www.princeton.edu/about_wws/history/) (last visited Oct. 14, 2013) (noting that the school was created in 1930 “in the spirit of Woodrow

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Continental Europe as an inspiration for scientific governmental administration, but was sensitive to the challenge of importing its model to the American democratic system.<sup>181</sup> To that end, Wilson acknowledged a role for politics and public opinion to supervise governmental decisions at an abstract level, but urged that administrators be given broad discretion to implement these plans as they saw fit.<sup>182</sup> Wilson is now considered the leading early advocate of the modern American administrative state, even if his vision of an apolitical civil service promoting the public good had more classical antecedents,<sup>183</sup> and is frequently derided by contemporary scholars as naïve.<sup>184</sup>

Other prominent social scientists of the early twentieth century like Frank Goodnow and Max Weber reinforced Wilson's vision of a "more rational, less political government" in their writings.<sup>185</sup> Their views were further refined during the New Deal by defenders of the rapidly expanding administrative state like James Landis. Landis argued that specialized agencies were well-positioned to enact better policy, and less likely to be influenced by "impertinent considerations" (like politics) when doing so.<sup>186</sup> To some extent, Kenneth Culp Davis carried on the intellectual torch from Wilson and Landis, defending broad delegations to agencies as necessary given

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Wilson's interest in preparing students for leadership in public and international affairs").

181. See Wilson, *supra* note 177, at 235–37 (discussing administration in France and Prussia).

182. See *id.* at 243 (discussing the "proper relations between public opinion and administration").

183. See, e.g., WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 193 (1971) (noting that the view that "honest men insulated from political and economic pressure will act in the public interest . . . derives from Confucius and Plato and has dominated the modern literature on public administration since Woodrow Wilson").

184. E.g., *id.*; David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 99 & n.12 (2000) (citing Wilson as "[t]he most famous American advocate of an apolitical scientific administration," which "naïvely assumed away political influence in the administrative process").

185. David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 405 & nn.18–19 (2002) (citing works of Goodnow and Weber).

186. *Id.* at 405 & nn.21–23 (citing JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938)); see also Merrill, *supra* note 147, at 1056 (citing Landis as "the most obvious example" of a "neo-progressive[] who thought that the answer to interest group influence was to insulate expert administrative agencies from ordinary politics").

Congress's inability to grapple with minute details and complex scientific questions better left to experts in the relevant field.<sup>187</sup>

Although the Wilsonian vision of administrative agencies has lived on to some extent, public choice has largely eclipsed it in the academic world. For public-choice scholars, the “early Progressives” like Wilson “merely succeeded in transferring political bargaining from the legislative arena . . . to the administrative arena.”<sup>188</sup> Because public choice rejects the notion of any individual pursuing the public good—or even the notion of a public good outright—the idea that an agency might remain apolitical, much less that an apolitical agency will create better policy, is utterly fanciful. As a partial heir to the Wilsonian school, Steven Croley rejects the public-choice account and offers his more process-based argument for the administrative state.<sup>189</sup> Croley, however, believes that the administrative process will result in rules that enjoy public support. Croley, therefore, hopes that the administrative process will achieve the political success that Wilson so deliberately eschewed, and in that respect departs from Wilson’s emphasis on scientific, technocratic rulemaking.

### C. The New York City Portion-Cap Rule as Wilsonian Rulemaking?

For supporters of local public health regulation, the Wilsonian vision of administrative rulemaking offers a compelling narrative for the kind of innovation that has occurred at the local level. In this regard, the New York City portion-cap rule stands out as perhaps the archetypal example of Wilsonian rulemaking on the local level. The rule is “scientific,” beneficial to the public health, and almost certainly would not have emerged from the ordinary political process. Legions of empirical data demonstrate that individual consumption patterns are influenced by serving sizes.<sup>190</sup> Substantial empirical study

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187. See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 26 (1982) (citing Davis as an “adhere[nt]” of “a Wilsonian view of administrative government”) (citing 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.15, at 206–07 (2d ed. 1978)); see also KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TEXT* 12–13 (3d ed. 1972) (arguing that a legislative body is “ill suited for . . . applying to shifting and continuing problems the ideas supplied by scientists or other professional advisers”).

188. Aranson et al., *supra* note 187, at 26.

189. See *supra* notes 172–72 and accompanying text.

190. See generally, Nicole Diliberti et al., *Increased Portion Size Leads to Increased Energy Intake in a Restaurant Meal*, 12 OBESITY RES. 562 (2004); Lisa R.

shows that increased consumption of sugar-sweetened beverages, influenced in part by the “super-sizing” of soda and other sugar-rich, nutrient-poor beverages, has contributed to the meteoric rise in obesity in the United States over the last thirty years, as well as to other health problems like coronary disease and dental caries.<sup>191</sup> It is reasonable, therefore, for health experts to conclude that mandated decreases in portion sizes, even if avoidable with additional effort, might decrease the consumption of obesogenic beverages, and thereby make a dent in the obesity rate in New York City and beyond.<sup>192</sup>

Despite the public health-based argument for limiting portion sizes, the rule is one that the political system at any level of government is unlikely to adopt. The rule was immediately unpopular with the New York City public and many public officials, attracting significant mockery from the popular media and commentators.<sup>193</sup> Perhaps more importantly, the rule aroused the ire of—by threatening economically—not just the powerful soda industry, but also its allies (on this issue, at least) like the fast-food industry, other retailers, and

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Young, *The Contribution of Expanding Portion Sizes to the US Obesity Epidemic*, 92 AM. J. PUB. HEALTH 246 (2002).

191. See, e.g., INST. OF MED., ACCELERATING PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION 167 (Dan Glickman et al. eds., 2012) (identifying sugary drinks as “the single largest contributor of calories and added sugars to the American diet”); K.E. Heller et al., *Sugared Soda Consumption and Dental Caries in the United States*, 80 J. DENTAL RES. 1949 (2001) (finding significant associations between soda consumption and decayed, missing, or filled surfaces of teeth for persons over twenty-five years of age); Vasanti S. Malik et al., *Intake of Sugar-Sweetened Beverages and Weight Gain: A Systematic Review*, 84 AM. J. CLINICAL NUTRITION 274, 274 (2006) (“The weight of epidemiologic and experimental evidence indicates that a greater consumption of SSBs is associated with weight gain and obesity.”); Gail Woodward-Lopez et al., *To What Extent Have Sweetened Beverages Contributed to the Obesity Epidemic?*, 14 PUB. HEALTH NUTRITION 499 (2010) (concluding that sweetened beverage intake “has made a substantive contribution to the obesity epidemic experienced in the USA in recent decades”).

192. See N.Y.C DEP’T OF HEALTH & MENTAL HYGIENE, BD. OF HEALTH, NOTICE OF AN ADOPTION OF AN AMENDMENT (§ 81.53) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE (2012) available at <http://www.nyc.gov/html/doh/downloads/pdf/notice/2012/notice-adoption-amend-article81.pdf>.

193. See, e.g., Grynbaum & Connelly, *supra* note 175 (reporting that sixty percent of New York City residents opposed the rule); *The Daily Show with Jon Stewart: Drink Different* (Comedy Central broadcast May 31, 2012), available at <http://www.thedailyshow.com/watch/thu-may-31-2012/drink-different> (mocking the rule).

unions.<sup>194</sup> Politically influential groups like the NAACP,<sup>195</sup> which receives significant financial support from the soda industry, also publicly opposed the rule.<sup>196</sup> Industry groups immediately spent over a million dollars advertising against the rule even before the Board of Health approved it, hoping to shape and solidify public dislike of the rule.<sup>197</sup> While super-rich, term-limited Mayor Bloomberg was impervious to the industry's assault, one wonders whether a majority of city councilors, had the council enacted such a policy by ordinance, would have withstood such a barrage.<sup>198</sup> On the other hand, as unpaid, appointed volunteers, many of whom have public health and medical credentials, the Board's members were probably less likely to waver than city councilors in the wake of industry and public opposition. For all of these reasons, the Board's rule seemed to fit the mold of Wilsonian rulemaking even if the portion cap's impact on public health was empirically indeterminate at the time of the rule's adoption.<sup>199</sup>

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194. See, e.g., Grynbaum & Connelly, *supra* note 175 (noting that the American Beverage Association's members stood to lose millions from the implementation of the rule and launched a "big-budget public-relations effort" to oppose it).

195. The New York State Conference of the NAACP filed an amicus brief opposing the portion-cap rule, see Brief of Amici Curiae N.Y. State Conf. of NAACP et al. at 1, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 2013 N.Y. Slip Op. 05505 (N.Y. App. Div. Apr. 25, 2013) (No. 653584/12), and the national president of the NAACP, Benjamin Jealous, publicly opposed the rule as well, Sal Gentile & Allison Koch, *NAACP President Comes Out Against Blocked NYC Soda Ban*, NBCNEWS.COM (Mar. 16, 2013), <http://www.nbcnews.com/id/51207127/t/naacp-president-comes-out-against-blocked-nyc-soda-ban/#.Ud3p5234Jvo>.

196. See Grynbaum, *supra* note 142 (describing the NAACP's "close ties to big soft-drink companies, particularly Coca-Cola," which donated "tens of thousands of dollars" to an NAACP health education program).

197. Michael M. Grynbaum, *In Soda Fight, Industry Focuses on the Long Run*, N.Y. TIMES, Sept. 12, 2012, at A28 (citing example of "New Yorkers for Beverage Choices," a soda industry-sponsored group, that "spent more than \$1 million on a public-relations campaign against" the rule before implementation).

198. By way of comparison, the San Francisco city council held firm after enacting an ordinance restricting toy giveaways with children's meals of low nutritional quality (often imprecisely and pejoratively referred to as a "Happy Meal ban"), San Francisco, Cal., Ordinance No. 290-10 (codified at SAN FRANCISCO, CAL., HEALTH CODE §§ 471.1-471.9), despite significant media ridicule of the regulation. See *The Daily Show with Jon Stewart: San Francisco's Happy Meal Ban* (Comedy Central broadcast Jan. 3, 2011), available at <http://www.thedailyshow.com/watch/mon-january-3-2011/san-francisco-s-happy-meal-ban> (mocking the ordinance in an interview with San Francisco City Supervisor Eric Mar).

199. Indeed, an empirical study released after the portion-cap rule's aborted implementation purports to demonstrate that the rule would not have reduced consumption, because consumers would instead buy bundles of servings that exceed

In other ways, however, the Board's promulgation of the portion-cap rule fell short of the Wilsonian ideal. As stressed by the rule's opponents, the Board of Health did not independently conjure up the rule. Rather, Mayor Bloomberg's office proposed the rule, which the Board then adopted verbatim, thus undercutting the Wilsonian argument for deference to the Board's scientific expertise.<sup>200</sup> That the mayor appoints all of the Board's members likely further weakened any claim by the Board to being an apolitical body focused on scientific solutions. Combined with the Board's apparent lack of deliberation regarding the mayor's proposal, the New York judiciary has thus far adjudged the rule as much an executive power-grab as an attempt to regulate for the public health of New Yorkers.

The mere fact that an agency board collaborates with an elected official, even one who appoints its members, should not ipso facto nullify the legitimacy of the resultant rule. After all, the members of the New York City Board possess a broad degree of expertise in the fields of medicine or health.<sup>201</sup> Presumably they played at least a screening function in approving Mayor Bloomberg's proposal. Moreover, requiring every local health agency to demonstrate that it thought of every rule on its own would impose a needless burden on local rulemaking. It would also limit policy diffusion by preventing local health agencies from borrowing other jurisdictions' innovations without re-inventing the regulatory wheel. Indeed, any flaws in the New York City Board's rulemaking process from a Wilsonian perspective do not necessarily justify judicial invalidation of the portion-cap rule. They simply demonstrate that, to lay better claim to the Wilsonian mantle, more agency independence in design and practice would be helpful. In this regard, the BPHC's status as a

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the rule's portion cap. See Brent M. Wilson et al., *Regulating the Way to Obesity: Unintended Consequences of Limiting Sugary Drink Sizes*, PLOS ONE, Apr. 2013, at 2. The study, however, measured only the amount of beverage purchased rather than consumed, and assumes that consumers will be offered bundled servings in a convenient fashion. See *id.*

200. See *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 970 N.Y.S.2d 200, 205 (N.Y. App. Div. 2013) (noting that Mayor Bloomberg initially announced the portion-cap rule); *id.* at 213 (“[T]he rule was drafted, written and proposed by the Office of the Mayor and submitted to the Board, which enacted it without any substantive changes.”).

201. See *supra* notes 121 and 122 and accompanying text; see also Brief for Respondents-Appellants at 6–7, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 2013 N.Y. Slip Op. 05505 (N.Y. App. Div. Mar. 25, 2013) (No. 654584/12) (listing the impressive professional credentials of the Board's members).



separate body corporate, along with the clear requirement of city council confirmation of its members, may be preferable.

The *New York Statewide Coalition* court also faulted the Board's portion-cap rule for not being Wilsonian enough in a different way. In holding that the rule amounted to unconstitutional legislation as opposed to permissible interstitial administrative rulemaking, the Appellate Division asked whether the agency acted "solely" within its area of expertise.<sup>202</sup> Under the Court of Appeals precedent of *Boreali v. Axelrod*, whether an agency considers "political, social, and economic" concerns outside of its "technical" area of expertise is a "circumstance" indicating potential usurpation of the legislative role.<sup>203</sup> In applying this *Boreali* "factor," the Appellate Division faulted the Board for various inconsistencies in the portion-cap rule.<sup>204</sup> The rule, for instance, did not apply to alcoholic beverages and certain milk, fruit, and coffee drinks.<sup>205</sup> The rule also applied only to some retail establishments, like restaurants, movie theaters, and stadiums, but not to others, like grocery and convenience stores.<sup>206</sup> The City claimed that the rule exempted grocery and convenience stores because the state's Department of Agriculture, rather than the City's Board of Health, has jurisdiction to regulate them.<sup>207</sup> To the Appellate Division, however, the exceptions based on practical and jurisdictional concerns indicated that the Board unduly balanced social and economic considerations in promulgating the rule.<sup>208</sup> In a similar vein, the trial court held that these various exceptions rendered the rule "arbitrary and capricious."<sup>209</sup>

Whatever the doctrinal garb, faulting the Board as a legal matter for considering practical concerns in promulgating the portion-cap rule is misguided. If, by requiring agencies to operate only within their areas of expertise, it reflects an embrace of Wilsonian

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202. *N.Y. Statewide Coal.*, 970 N.Y.S.2d at 212–13.

203. 517 N.E.2d 1350, 1351, 1355 (N.Y. 1987).

204. *N.Y. Statewide Coal.*, 970 N.Y.S.2d at 207 (referring to *Boreali's* self-described "circumstances" as "factors").

205. *Id.* at 205.

206. *Id.*

207. *Id.* at 209–10.

208. *Id.* at 210 ("[T]he selective restrictions enacted by the Board . . . reveal that the health of the residents of New York City was not its sole concern.").

209. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, No. 653584-2012, 2013 WL 1343607, at \*20 (N.Y. Sup. Ct. Mar. 11, 2013) ("[The rule] is arbitrary and capricious because it applies to some but not all food establishments in the City [and] excludes other beverages that have significantly higher concentrations of sugar sweeteners . . .").

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rulemaking, it is an unworkable hyper-Wilsonianism. Wilson wanted agencies to be more “scientific” than the political branches, but he did not expect them to be completely immune to practical and political considerations.<sup>210</sup> That they might consider social, economic, jurisdictional, and political implications in tempering the scope of their rules is not inconsistent with his vision. The Appellate Division’s approach, by contrast, requires that agencies willfully ignore real-world concerns like a rule’s public acceptance or practical enforceability. As the dissent in *Boreali* pointed out, such a view of the agency rulemaking process is simply unworkable.<sup>211</sup> Moreover, faulting the rule for its exceptions is inconsistent with the widely accepted notion that the government may attempt to regulate away a problem in piecemeal fashion.<sup>212</sup> The judicial decisions in the portion-cap litigation thus far are the distasteful fruit of *Boreali*’s tree of reasoning.<sup>213</sup> For the portion-cap rule to be upheld, the New York Court of Appeals may have to reconsider this curious precedent.

In addition to the legal challenge to the portion-cap rule, the rule has been subject to a ferocious “cultural attack” by the popular press, political commentators, and comedians of varied political stripes. The *New York Post* referred to Michael Bloomberg as the “Soda Jerk”;<sup>214</sup> Jon Stewart, Bill Maher, and Glenn Beck all railed against the portion cap,<sup>215</sup> and even the venerable *New York Times* applauded the trial court’s decision invalidating the rule.<sup>216</sup> In

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210. See Wilson, *supra* note 177, at 243 (contending that “public opinion” is “indispensable” and should play the role of “authoritative critic” in “superintending” administration).

211. See *Boreali v. Axelrod*, 517 N.E.2d 1350, 1359–60 (Bellacosa, J., dissenting) (criticizing the majority opinion for requiring the agency to “pristinely premise[]” its rule on public health concerns, as “[l]ife and government are not so neatly categorized”).

212. Cf. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (rejecting federal equal protection challenge to government regulation where regulation takes “one step at a time,” and noting that “[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others”).

213. See also *supra* notes 82–100 and accompanying text (discussing *Boreali*’s influence on *New York Statewide Coalition*).

214. *Soda Jerk!*, N.Y. POST, Feb. 24, 2013, at 1.

215. *Worst Mayor Ever: Bloomberg’s Soda Ban Passes 9-0*, GLENN BECK (Sept. 13, 2012, 4:34 PM), <http://www.glennbeck.com/2012/09/13/worst-mayor-ever-bloomberg%E2%80%99s-soda-ban-passes-9-0/>; *Real Time with Bill Maher* (HBO Broadcast Mar. 15, 2013), available at [http://www.realclearpolitics.com/video/2013/03/16/maher\\_bloombergs\\_ban\\_on\\_sodas\\_makes\\_liberals\\_look\\_bad.html](http://www.realclearpolitics.com/video/2013/03/16/maher_bloombergs_ban_on_sodas_makes_liberals_look_bad.html); *The Daily Show*, *supra* note 184.

216. Editorial, *Mayor Bloomberg’s Anti-Obesity Campaign*, N.Y. TIMES, Mar. 13, 2013, at A24.

criticizing the rule, much of the invective focused on Mayor Bloomberg himself, demonstrating that for the public, the rule was hardly seen as the work of an independent body of experts, but rather the brainchild of a politician who has become particularly well-known for public health crusades. Moreover, the rule tapped into a deep vein of resentment of any governmental intrusion on perceived “freedom to choose” what and how much to eat and drink.<sup>217</sup> Much of the public clearly either does not understand or does not agree with the scientific findings that “choice” is very much determined by a consumer’s environment.<sup>218</sup> Indeed, the Appellate Division faulted the Board for even considering behavioral economics in promulgating the rule.<sup>219</sup> For the obesity prevention movement to succeed, it will need to work much harder on educating the public in this regard. With respect to a restriction on food or beverage choice that is perceived as more tangible than, say, the trans fat ban (which did not ban any particular food or quantity of food, but just a particular ingredient), the American public appears less willing to defer to scientific experts.

### CONCLUSION

While they may be awkward doctrinal creatures, local public health agencies are increasingly at the vanguard of regulatory strategies to curb tobacco use and obesity. In a handful of states, their broad powers have allowed them to do as much, if not more, than elected local officials in that regard. Should courts and elected officials trust these unelected—yet sometimes expert—agencies’ judgments even when unpopular? Hopefully, the answer is at least a qualified yes, not simply because there may be some normative merit to the Wilsonian vision of administrative rulemaking, but because local agencies’ actions have destabilized and reshaped public opinion over time. For instance, while public opinion in New York and elsewhere may have

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217. For an interesting discussion of whether the federal Constitution protects such choices, see Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 738 (2013) (concluding that there is no such constitutional protection generally).

218. See Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1698–99 (2004); Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 985–86 (2013).

219. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, 970 N.Y.S.2d 200, 209 (N.Y. App. Div. 2013) (“[T]he Board’s decision effectively relies upon the behavioral economics concept that consumers are pushed into better behavior when certain choices are made less convenient.”).

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been cool to the trans fat ban initially,<sup>220</sup> this regulation is now taken in stride and appears to have succeeded at lowering the health risks associated with eating fast food.<sup>221</sup> Similarly, while the portion-cap rule may have been a shock initially, New Yorkers—and others—might warm to the idea eventually if it is allowed to proceed and is implemented smoothly. Depriving agencies of the ability to get out in front of public opinion would remove, at least in the public health sphere, a significant weapon from the arsenal of government action, particularly when the regulated industries wield significance influence over elected officials at higher levels of government through campaign contributions and lobbying. As public-choice theorists would readily acknowledge, “democracy” is easily throttled by entrenched defenders of the regulatory status quo. Sometimes elite experts, more insulated from the rough-and-tumble of politics, are the persons most capable of breaking that status quo. Their work will stake a better claim to legitimacy when their independence and expertise are less impeachable, and the public perceives their rulemaking as more than the rubber-stamping of an elected politician’s policy idea.

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220. *See supra* note 176.

221. *See* Sonia Y. Angell et al., *Change in Trans Fatty Acid Content of Fast-Food Purchases Associated with New York City’s Restaurant Regulation*, 157 ANNALS INTERNAL MED. 81 (2012).