

## VIEWPOINT

# The Historic Role of Boards of Health in Local Innovation

## New York City's Soda Portion Case

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**Childhood and adult obesity** pose major risks for cancer, diabetes, and cardiovascular disease, with poor individuals affected disproportionately. Despite intense political attention, high obesity rates—34.9% nationally and 47.8% among African American adults—have not abated, remaining essentially unchanged from 2003 to 2012.<sup>1</sup> With current policies failing, new ideas are needed. Cities and states—in their historic role as public health “laboratories”—have demonstrated creativity. Boards of health, with their unique mandates, represent an engine of innovation, with the New York City Board of Health (NYCBH) soda portion limit offering a salient illustration. Yet on June 26, 2014, New York State's highest court struck down the Board's rule, holding the Board lacked authority.<sup>2</sup>

### Local Health Agencies: Innovations and Political Barriers

Public health agencies have special responsibilities to promote healthy behaviors. Boards of health govern 70% of the approximately 2744 local health departments in the United States.<sup>3</sup> Health boards have di-

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verse institutional structures, but state law usually requires the appointment of board members. The Commissioner of Health leads the NYCBH, which was created in 1866 and is composed of 10 expert members appointed by the mayor.

As with most local agencies, the NYCBH evolved to respond to new public health threats. In the 19th century, boards of health controlled infectious diseases (eg, anthrax, cholera, yellow fever, and tuberculosis) through sanitation and quarantine, as well as regulating food safety and noxious environments. The pioneering work of Hermann Biggs—spurred by the new science of bacteriology—formed the first laboratory in 1892. In the early 20th century, the NYCBH grappled with conditions of squalor, while expanding child and maternal services. With the emergence of polio in the mid-20th century and then AIDS, the Board shifted priorities to meet these new challenges.

It did so again in the late 1990s with the resurgence of multidrug-resistant tuberculosis. Today, the NYCBH performs complex functions related to health budgets, emergency preparedness, and inspections.<sup>4</sup>

Cities are facing a modern-day epidemic with the health and economic effects of obesity, requiring local agencies to assume new responsibilities for which they have distinct expertise. They can foster community action, tailor initiatives to local concerns, and act more flexibly than legislatures, with streamlined rule-making processes.<sup>5</sup> Boards can implement and measure the effectiveness of obesity policies that then diffuse to other jurisdictions. Despite their promise, boards of health face dwindling resources, federal or state preemption, and charges of paternalism—as graphically illustrated by the NYCBH soda portion rule.

### Portion Size and Obesity

In September 2012, the NYCBH prohibited food service establishments from selling sugary beverages in containers larger than 16 ounces, acting on evidence of a strong association between soda consumption, weight gain, and diabetes.<sup>6</sup> Low-income communities of color, moreover, often targeted in alluring product promotions, disproportionately consume large sugary beverages. Food companies funded and mobilized community opposition to the rule,<sup>7</sup> and 6 business associations brought a lawsuit. New York's highest court struck down the rule, holding that the Board trespassed on the elected City Council's authority. Although the Court did not limit the Council's power, this ruling could chill local innovation, given local agencies' unique position to devise innovative solutions to urgent health concerns.

### Local Powers to Promote Healthy Living

The portion-size rule provoked national controversy, with charges of “Nanny Bloomberg,” yet the scope of health agencies' powers became the deciding factor. The Court narrowly construed the NYCBH's authority, reasoning it was merely administrative—limited to rules necessary to carry out delegated powers. This constricted characterization of the Board's authority ignored its rich historical legacy, with the first Greater New York City Charter empowering it to add to or amend any part of the Sanitary Code. As the Board pioneered bold responses to extant challenges, the courts repeatedly affirmed its broad, “nearly legislative” powers. Without an expansive view of its powers,

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the NYCBH could not have stemmed major threats facing the city's population. With the epidemiologic transition from infectious to noncommunicable diseases, today's salient threats include poor diet, physical inactivity, and smoking.

The NYCBH issued its portion rule as the City Council and state legislature were hampered by political paralysis. Public health laws are often framed broadly, granting agencies flexibility to respond to emerging threats without seeking legislative approval for each action. The Court's ruling could stifle local innovation, leaving novel measures open to legal challenge.

### The "Art" and "Science" of Public Health

The Court's decision mirrored a national conversation about the government's role. The portion cap embodied a compromise among competing values—the economic effect of industry regulation, higher food costs, and personal responsibility. Some criticized the rule for its inconsistencies and limited evidentiary basis. The rule included sodas, energy drinks, and sweetened teas, but not alcoholic beverages and milky coffees. It applied to restaurants, movie theaters, and mobile food carts, but not to supermarkets and convenience stores. The Board, moreover, could not produce definitive evidence of effectiveness.

These critiques ignore the fundamental truth that policy making is shaped by vested interests, requiring complex trade-offs. Incremental action is a hallmark of successful health policies. It is inherently difficult to prove that a single intervention changes behavior. Tobacco control, for example, evolved over 50 years through tax increases, marketing restrictions, and public smoking bans. Obesity prevention is complex and contentious—a multifaceted interplay of genetics, behavior, and environment. The portion cap, in isolation, might not stem the obesity epidemic, but a suite of nutritional policies acting over time could reduce population weight gain.

Health policy making is both "science" and "art," relying on limited evidence while attempting to transform social norms.

Unless agencies can experiment with novel ideas, it will be harder to evaluate and learn. With soda sizes substantially increasing (along with consumer waistlines), the Board acted to make smaller portions the easier choice. Although the portion limit remains untested, the NYCBH acted on evidence that soda consumption is hazardous to health and larger servings alter consumer behavior.

The Court's opinion suggests that the legitimacy of agency action should be measured by public support. Yet localities have pushed the boundaries of public opinion in highly contested areas, including tobacco control, alcohol harm reduction, and injury prevention. Agencies often have to move ahead of public opinion, which is shaped by aggressive industry lobbying and marketing. Many initiatives faced formidable public and industry resistance but became well accepted and successful—for example, *trans* fat bans and smoke-free laws.

Charges of paternalism also can block innovation. Yet the NYCBH rule is minimally intrusive, returning portion sizes to reasonable historic levels. Portion limits, moreover, are less restrictive than outright bans—in essence, simply creating a financial and practical disincentive to overconsumption. Drawing on behavioral economics research, the rule resets the default option.

The ecological model of public health shows that autonomy is constrained by pervasive social, economic, and cultural cues.<sup>8</sup> Low-income communities of color often lack basic resources such as education, income, and access to affordable fresh fruits and vegetables. The portion-size rule would disproportionately affect disadvantaged individuals who drink the largest amount of soda and can least afford 2 smaller-sized servings. Yet government's failure to reduce the unequal burden of obesity-related disease and early death represents a greater injustice. Enhancing opportunities to choose a healthy life path better serves the interests of justice, but the Court's judgment will make it more difficult to realize this social aspiration.

#### ARTICLE INFORMATION

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