

# **Regulating Tobacco, Alcohol and Unhealthy Foods**

The Legal Issues

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# 10 United States

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## 1 Introduction

In furtherance of public health goals, multiple levels of government in the United States ('US') have sought to reduce the incidence of non-communicable diseases ('NCDs') by influencing the conduct of enterprises involved in the tobacco, alcohol and unhealthy food businesses. In this chapter, I first explain the implications of the complex nature of the US government for regulation in this field, before providing examples of recent public health measures targeted at these three risk factors for NCDs. The balance of the chapter explores a range of legal attacks brought by the relevant industries on public health measures in this field. The chapter demonstrates the difficulties arising for public health regulation as a result of the litigious nature of US society and the propensity of the courts to be wary of interference with business interests.

## 2 The complex nature of US government: federal, state and local health measures

Some of the regulatory action in addressing NCD risk factors in the US has been at the federal (or national) level through legislation enacted by the US Congress and regulations adopted by administrative agencies (such as the Food and Drug Administration ('FDA')). It is critical to appreciate at the outset that because the US does not have a parliamentary form of government, the President is in a very different position from that of the typical Prime Minister, who can ordinarily get the Parliament to enact the laws put forward by the government currently in power. In the US, the legislature (the US Congress) is comprised of two houses – the Senate and the House of Representatives – and either or both may well be under the control of a political party other than the President's. Either of those branches of Congress can block the adoption of what the President proposes. Moreover, even if the Senate, say, is controlled by the party in the White House, still the chair of the specific committee through which any proposed legislation must go has the power to block a proposed law, and committee chairs often do this even when they and the President belong to the same party. Hence, industry opponents of proposed legislation have many points at which they can battle to

defeat it. Executive departments like the FDA are somewhat more under the President's control. But independent administrative agencies such as the Federal Trade Commission are another matter. Although those sorts of agencies are typically run by a five-member board in which there is a 3–2 majority (including the key chair position) who are Presidential appointees from the President's party, nonetheless, once in office, agency chairs (and members) have substantial freedom to pursue their own agendas.

At the state level, the story is much the same. Legislatures and executive departments under the control of the state's Governor can also seek to regulate companies involved with alcohol, tobacco and unhealthy foods. Indeed, the US is a nation ideologically rooted in 'federalism', which means for these purposes that 'public health' is normally viewed as primarily a problem for state (and local) government to deal with, rather than the national (federal) government. Of course, in today's world, the reality is that the federal government has more powerful taxing and other powers than do states, and many problems transcend state (and even national) boundaries. Still, public health legislation in the US remains primarily state legislation, and among other things this means that the law can vary considerably from state to state. To give one brief illustration, although national tobacco control policy is quite weak in the US,<sup>1</sup> in the state of Washington it is reasonably strong (and smoking prevalence rates are relatively low, about 17 per cent of adults); by contrast, the state of Kentucky has a very weak tobacco control program (and smoking rates there are very high, about 29 per cent of adults).<sup>2</sup>

Finally, many key public health measures are initiated at the local level. These turn out to be extremely important (albeit again raising the problem of uneven policy from place to place). Local government is complex in the US, but most important here are cities and counties, in addition to local boards of health (or similarly named bodies). Cities are usually contained within the borders of counties (although San Francisco, for example, is a somewhat unusual exception, being both a city and a county). In some places, cities take the lead on local public health matters and counties, if they act at all, focus primarily on geographic areas within counties that are not organised into cities (often this means somewhat less populated suburban or rural areas). But elsewhere county government takes the lead adopting policies applicable to (or quickly adopted by) cities within their territories. The legal powers of cities, counties and local boards of health vary significantly from place to place. And, of course, while city and county legislators sometimes lead the way, at other times they follow the lead of their elected chief executives (like mayors or chairs of boards of supervisors).

One reason that public health advocacy groups will seek reform through local governmental action is that they believe their political leverage is strongest there. Local citizens can more easily lobby local political actors; those actors may more directly feel accountable to local political opinion; and those in the alcohol, tobacco and unhealthy food industries might be less able to fight back, especially if many localities are simultaneously considering similar measures and these businesses are seen as outsiders who don't have local health values on their side. Hence, it is common for public health advocates to seek early adoption of new ideas in places

like San Francisco and New York City with the hope that from there they and colleagues around the country can promote diffusion to ever more places.<sup>3</sup>

While it is possible, of course, to impact the nation as a whole all at once via the US Congress, that is precisely where public health advocates often feel that industry has the most clout. This potential difference in political strength at different levels of government has resulted in the alcohol, tobacco and unhealthy food industries adopting a 'pre-emption' strategy, as discussed in more detail below. For example, these industries seek to get weak state laws adopted that (either expressly, or, with the cleverness of their lawyers later on, impliedly) preclude stronger laws from being put into place at the local level; or similarly, they seek a weak federal regime to occupy the field thereby blocking what might be stronger state or local laws.

### **3 Examples of recent public health measures aimed at tobacco, alcohol and unhealthy foods**

Public health laws and regulations proposed and adopted in the US with respect to tobacco, alcohol and unhealthy foods may be grouped in various ways. Below is one way of grouping them:

- 1) Excise (or similar) taxes that seek to discourage demand for socially undesirable products such as cigarettes, alcoholic beverages and sugar-sweetened sodas by forcing a price increase that it is assumed the tax will generate.
- 2) Bans on the sale or use of certain products (or ingredients in products), such as trans fats.
- 3) Partial bans such as: making illegal the sale to minors of certain products such as tobacco and alcohol; imposing portion size limits on, say, sweetened carbonated drinks; forbidding businesses from combining the sale of unhealthy children's meals with toy giveaways; enacting neighbourhood density limits, such as allowing a limited number of stores to sell alcoholic beverages in an area, or blocking new business permits for undesirable retailers such as fast food outlets; requiring apartment complexes or some parts of them to be smoke free; precluding the sale of cigarettes in less than a full pack or at a discount price; forbidding pharmacies to sell unhealthy items such as cigarettes.
- 4) Marketing restrictions such as: forbidding television advertising for tobacco products and beverages with high alcohol content; banning particular advertisements from being shown on certain sorts of television programs or at certain times, eg excluding unhealthy food advertising on television programs aimed at children; restricting billboard use, such as preventing posters for tobacco products to appear near schools or day care centres; limiting where products may be placed in stores, such as forcing alcohol products to be under lock and key or otherwise unavailable for customer self-service, or requiring food store check-out aisles to be free of certain unhealthy food that might otherwise prompt impulse purchases or pressure by children to have parents buy them.

- 5) Required warnings and disclosures such as: demanding that calorie counts appear on restaurant menu labels; having processed foods list their sugar, salt and fat quantities on product package labels; insisting that risk-of-harm warnings be included in advertisements of products such as cigarettes and alcoholic spirits.

## **4 Industry legal attacks on public health measures**

### ***4.1 Types of legal attack***

When laws, regulations and other initiatives of the sort just described are launched (or about to be launched) that the impacted industry does not favour, but has exhausted its many opportunities to block in conventional political fora, the typical next move is for the industry to consider attacking these measures in court. This chapter is primarily organised around these legal attacks.

Put simply, federal initiatives on behalf of public health will typically be attacked in court as either violating the *United States Constitution* or as illegal behaviour by the adopter of the measure at issue (eg it is beyond the legal power of the agency to regulate in the way it proposes, or the agency has illegally failed to follow the proper procedure in adopting the regulations). For measures pursued at the state level, industry legal attacks can include claims that the measures they are complaining about violate the *United States Constitution* and/or the relevant state constitution or are pre-empted by federal legislation, or that the state agency promulgating them either does not have the legal power to do so or did so in an illegal manner. A similar set of legal challenges is available to attack local measures, with both federal and state pre-emption potentially looming over them. This sort of litigation may be brought by industry in a state or federal court, depending on the issue at stake (although sometimes the industry has a choice about where to sue).

This does not of course mean that industry attacks everything, or that industry wins all of the legal attacks it launches. But business has won what might be thought a surprising number of important cases (as detailed below), and even when industry does not win, its lawyers are often able to use the litigation strategy to impose a substantial delay on the implementation of public health measures.

### ***4.2 Statutory claims: pre-emption case examples***

As noted above, pre-emption cases centre on legal arguments that actions of higher levels of government have precluded the targeted (typically stronger) actions of lower levels. The pre-emption claim has been an especially powerful legal tool for the tobacco industry.

Since the 1950s, tobacco companies have been the object of civil actions (tort claims) for money damages by smokers (or their heirs).<sup>4</sup> For years, the tobacco industry mounted vigorous and universally successful defences against these

claims.<sup>5</sup> In the 1980s and early 1990s, however, when considerable unflattering information became increasingly available to the public about what the tobacco industry had long known about the dangers of its products,<sup>6</sup> a new round of lawsuits was filed, and some thought these were far more promising.<sup>7</sup> To be sure, going back to 1969, cigarette packages and advertisements contained the nationally required statement: 'Warning: The US Surgeon General Has Determined that Cigarette Smoking Is Dangerous to Your Health'.<sup>8</sup> But a lawsuit filed in New Jersey in 1983 claimed, among other things, that a stronger warning should have been provided, and a jury eventually awarded money damages to the surviving husband of the deceased smoker.<sup>9</sup> When this *Cipollone* case<sup>10</sup> was finally resolved in 1992, however, a divided US Supreme Court decided that state 'failure to warn' tort claims were pre-empted by s 5 b of the federal cigarette labelling law, which provides: 'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act'.<sup>11</sup> The court determined that awarding money damages via tort law for the failure to provide a stronger warning amounted to a precluded 'requirement ... based on smoking and health'.

Since then, tobacco companies have invoked this pre-emption language in the *Federal Cigarette Labeling and Advertising Act* ('FCLAA')<sup>12</sup> in a variety of settings. For example, in 1999, the Attorney General of the State of Massachusetts adopted rules that precluded tobacco advertising on billboards located within 1000 feet (about 300 meters) from schools and playgrounds.<sup>13</sup> The purpose of these rules was to protect children from being assaulted by appealing cigarette advertisements when leaving their school grounds, especially when the sale of tobacco products to minors has long been illegal. The tobacco industry challenged these rules, and with respect to cigarette advertising the industry won once again on the ground that this state regulation was pre-empted by the federal law. Specifically, in the 2001 *Lorillard* case, a divided US Supreme Court held that the pre-emption provision applied not merely to advertising *content* restrictions (as Massachusetts had argued, but also to *locational* restrictions, and since the billboard ban was based on concerns about smoking and health (and not just about preventing crime, as Massachusetts had argued), the state rules were struck down.<sup>14</sup>

In 2009, however, Congress enacted an exception to the pre-emption provision that permits some restrictions on promotional activity.<sup>15</sup> This exception states that 'a State or locality may enact statutes and promulgate regulations, based on smoking and health ... imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes'. It was clearly understood that this amendment was meant to overturn this aspect of the *Lorillard* decision.

At that same time, New York City's Board of Health adopted rules that required merchants to place signs in retail stores where tobacco is sold.<sup>16</sup> The signs were to contain one of three vivid graphic warnings about the use of tobacco products, as well as a smoking quit-line phone number. New York City argued that this was a valid restriction on the *sale* of cigarettes, but in 2012 the federal Court of Appeals

found that these new signs amounted to the imposition of additional content to the nationally mandated uniform warning. As a result, this regime was said to have added a forbidden additional 'requirement' with respect to the promotion of cigarettes that did not qualify under the recent amendment and therefore was still pre-empted by the FCLAA.<sup>17</sup>

By contrast, the city of Providence, Rhode Island, was recently successful in fending off a pre-emption claim. Hoping to reduce the sale of tobacco use by young people, the city adopted two ordinances that (i) restrict the city's tobacco and cigarette retailers from reducing prices on tobacco products by means of coupons and certain multi-pack discounts and (ii) restrict the sale of certain flavoured tobacco products other than cigarettes.<sup>18</sup> Late in 2013, the federal Court of Appeals upheld these ordinances, concluding that they impose limitations primarily on prices and product features rather than on advertising and promotion.<sup>19</sup>

Turning to the area of unhealthy foods, when New York City sought to require chain restaurants to post on their menus (and menu boards) the number of calories in the meals they offered, this initiative initially also ran into pre-emption problems. The first version of the law applied only to those chains that had already voluntarily made calorie information available (albeit usually not in the prominent way required by the new law).<sup>20</sup> This version was invalidated in 2007 by a federal trial judge<sup>21</sup> on the ground that it was pre-empted by the federal *Nutrition Labeling and Education Act*.<sup>22</sup> The judge's ruling was very technical and perhaps motivated by a sense that the city had unfairly leaned on those firms that had already been more forthcoming with calorie data. He explained how New York City could come into compliance with the federal regime, and it did so by adjusting the menu labelling requirement to apply to all chains with 15 or more stores.<sup>23</sup> This revised version was upheld against a renewed pre-emption challenge by both the original trial judge<sup>24</sup> and, in 2009, the federal Court of Appeals.<sup>25</sup>

The important message here is that federal courts in the US are regularly called upon to interpret somewhat opaque federal legislation and apply its provisions to state and local exercises of their ordinary powers in order to decide whether Congress meant to pre-empt such laws. Although the US Supreme Court often speaks of a 'presumption against pre-emption',<sup>26</sup> lawyers representing industry have been able to convince the courts that a number of important measures that otherwise would be valid are no longer available to lower levels of government. We have also seen that it is at least possible for a higher level of government (namely Congress) to respond to a judicial pre-emption ruling by providing that, regardless of whether or not the courts had interpreted the existing statute correctly, for the future the rules are clearly changed and states and localities can proceed to enact certain sorts of measures if they wish.<sup>27</sup> This sort of 'corrective' change may be made in the field of pre-emption because the legal question is a matter of whether the higher level of government wants to control public health policy concerning the issue. A very different situation applies to objections that industry makes to legislation on the basis of the *United States Constitution*, to which I now turn.

### 4.3 Constitutional claims: commercial free speech examples

#### 4.3.1 Commercial vs political or artistic speech

In 1976, the US Supreme Court abandoned its prior position (established in *Valentine* in 1942)<sup>28</sup> that the 'free speech' clause of the First Amendment to the *United States Constitution*<sup>29</sup> did not apply to 'pure commercial advertising'. Specifically, in *Virginia Pharmacy*, the court concluded that the First Amendment protected not only individual political speech and artistic speech, but also 'commercial' speech,<sup>30</sup> the court accordingly invalidated a law that prohibited advertising the prices of prescription drugs.<sup>31</sup> In effect, the court used the First Amendment to deal with what is perhaps best seen as a problem of unfair competition (better handled perhaps by changes in antitrust/competition laws). Paving the way for chain pharmacies especially to promote their lower prices, the court concluded that, because listeners have a right to receive information about product prices, price advertisements must be given free speech protection.

To be sure, just as defamatory speech and obscene speech are not protected by the First Amendment, neither is false and misleading advertising. But truthful advertisements, informing consumers about where to buy certain products and for how much money, were brought by the court in *Virginia Pharmacy* within the First Amendment. This sort of speech was not given as complete protection as is given, say, to political speech (as the court later clarified in *Central Hudson* in 1980).<sup>32</sup> Nonetheless, in the years to follow the court has struck down many advertising restrictions as inconsistent with the 'free speech' clause.<sup>33</sup>

#### 4.3.2 Tobacco and alcohol advertising

One important example concerns the effort of the State of Rhode Island to preclude advertisements promoting low-priced alcoholic beverages.<sup>34</sup> Although plausibly justified as a public health measure designed to reduce alcohol consumption, as a practical matter this law was best viewed as a politically successful effort by small local alcohol sellers to ward off competition by large, price-cutting competitors,<sup>35</sup> again something perhaps better dealt with by antitrust laws. But in *44 Liquormart*,<sup>36</sup> this advertising restriction was seen as a free speech issue, and despite a specific provision in the *United States Constitution* giving states special authority to regulate the sale of alcohol,<sup>37</sup> the Rhode Island restriction was invalidated just as other advertising bans had been.

Tobacco advertising on billboards has also been given First Amendment protection. As noted above, in the *Lorillard* case, cigarette advertisers successfully blocked Massachusetts' restrictions on the proximity to schools of tobacco advertising on the ground that such restrictions were pre-empted by the FCLAA. In addition, in the same opinion, the US Supreme Court concluded that tobacco companies also had First Amendment rights to advertise, again focusing on the rights of adults to receive information via billboards about tobacco products.<sup>38</sup> This part of the court's opinion had the effect of invalidating rules that would otherwise



have done away with billboard advertisements for cigars, chewing tobacco and other non-cigarette tobacco products in most of the State<sup>39</sup> (since state regulation of those tobacco products was not pre-empted by the national cigarette labelling law).<sup>40</sup> The court noted that, in urban areas, the 1000 foot from school restriction almost entirely precluded billboard advertising, and in light of that interference in the right of adults to receive tobacco advertising, the restriction was too sweeping and hence invalid.<sup>41</sup>

In the same opinion, the court upheld Massachusetts' requirements that cigarettes may not be placed on open shelves for self-service by customers but rather had to be physically obtained from store clerks.<sup>42</sup> The court viewed these measures as largely about the regulation of sales rather than of speech or advertising and promotion and hence not precluded by either the First Amendment or the FCLAA.<sup>43</sup>

#### *4.3.3 Textual and graphic warnings on tobacco products*

Seeing the success of First Amendment claims in a variety of contexts, industry lawyers have been quick to make even more aggressive arguments against various government actions, perhaps sensing that the US Supreme Court's conservative justices (or at least some of them) now view the commercial free speech doctrine as a tool for pushing back against all sorts of public regulation – in line with the wider deregulation agenda of their ideological bedfellows in the political process.

For example, in 2009, the US Congress passed a statute calling for nine stronger rotating text warnings to be placed on cigarette packages and ordered the Food and Drug Administration to select graphic images that illustrate those warnings that cigarette companies would also have to display on the packs.<sup>44</sup> This is a strategy that has been used in many other nations including, for example, Australia and Canada.<sup>45</sup> The FDA also interpreted the statute to require that tobacco companies limit themselves to black-and-white text and no colour advertising in their advertisements in most media (sometimes called 'tombstone advertising' provisions),<sup>46</sup> a variation on the 'plain packaging' strategy already employed in Australia.<sup>47</sup> The industry launched legal attacks on both the limits on what it could display in its advertisements and the required graphic images. In line with the earlier decisions noted above, the tombstone advertising limit has been struck down by a federal Court of Appeals as violating the industry's affirmative right to free speech.<sup>48</sup> Moreover, the industry has made at least some headway with its claim that the graphic image requirement violates the so-called 'compelled speech' feature of the First Amendment, as I explain further below.

By way of background, during World War II, some schoolchildren and their parents objected to the requirement that during the school day they had to recite the Pledge of Allegiance to the US government, a pledge that was (and in some places still is) routinely recited in government (public) schools. The text of what children recite technically pledges allegiance to the US flag as a representation of the republican government and ideals for which it stands. Although the objecting families centrally had religious objections to the pledge, the case was presented

as a free speech claim. In the resulting *Barnette* case, the US Supreme Court agreed that forcing someone to speak can violate the First Amendment just as a prohibition on speaking can.<sup>49</sup> This, of course, was an example of requiring individual children to recite a political statement with which they did not agree. The compelled speech doctrine was later applied, for example, to a law in the state of Florida that required newspapers to provide free space in the paper for politicians they attack in editorials<sup>50</sup> (a provision purportedly justified on the ground that the press was becoming too powerful in determining which candidates were being elected).<sup>51</sup> In effect, the 'right of reply' law mandated the carrying of a substantial 'letter-to-the-editor' from a political figure the paper had criticised. The US Supreme Court also held this to be unconstitutional compelled speech.<sup>52</sup> Again, this case involved political speech, and the court feared that the Florida requirement would chill the willingness of the press to take political stands in the first place.

Seeing that the commercial speech doctrine could be used to attack bans on advertising, tobacco companies have now attacked, as unconstitutional compelled speech, the requirement that they include the FDA's selection of graphic images.

It appears that nearly everyone in the business sector concedes that government can require product sellers to print government mandated disclosures of facts. Indeed, for this reason tobacco companies have not attacked, and are not likely to attack, the new text warnings that Congress now requires.<sup>53</sup>

Yet, it should be noted that, in other contexts, where the 'facts' are claimed to be controversial, just this sort of attack has been successfully made. For example, in the 1990s, the State of Vermont, in effect, required food retailers to post a notice disclosing which, if any, of the milk it offered for sale came from cows that were treated with a synthetic growth hormone ('rBST'). The FDA at the time had concluded that the milk from cows treated with rBST was no different from traditional milk,<sup>54</sup> but there had been considerable public concern about the use of this new technology, and surveys of Vermont citizens suggested that a good share of the public wished to know whether the milk it was being offered came from cows that were so treated.<sup>55</sup> Yet a divided federal Court of Appeals enjoined the operation of the Vermont law on the ground that consumer curiosity was an insufficient basis for compelling a disclosure that dairy farmers using the treatment did not want retailers to make.<sup>56</sup>

So, too, in 2010, the city of San Francisco adopted an ordinance requiring labels on mobile telephones to disclose the specific amount of electronic radiation they emit, and then later amended the law requiring instead that cell phone sellers generally inform consumers that there may be a risk of harm from cell phone emissions and what consumers might do to reduce that possible risk.<sup>57</sup> But even if citizens might wish to know about this potential danger, since any actual danger is thought to be speculative at this point, both the initial and amended versions were attacked in court, and, after a temporary injunction was granted,<sup>58</sup> the city decided to abandon the litigation and agreed not to enforce the ordinance.<sup>59</sup> Again, industry was successful in using the compelled speech doctrine.

On the other hand, the First Amendment attack on New York City's menu labelling requirement (discussed above),<sup>60</sup> which also raised 'compelled speech' claims, failed when the Court of Appeals concluded that calorie counts were facts that the government clearly had the right to demand that food sellers disclose with their products.<sup>61</sup>

The Vermont and San Francisco decisions seem ironically inconsistent with the original idea underlying the application of the First Amendment's free speech clause to commercial speech: that consumers have a right to receive information. In these decisions, where state or local government is responding to public demand, courts, in effect, are stepping in and effectively precluding consumers from receiving information that many would like to have. Although it is commonly said that the best way to deal with speech you disagree with is to encourage more speech, the judiciary here is behaving paternalistically (or, some might say, it is simply being hostile to regulation): sellers cannot be required to convey information when the alarm raised is of scientific dubiousness and where, as a result, in the court's view, a different branch of government might be misleading the public. Of course, Vermont and San Francisco could rent billboard space or mail flyers to voters expressing the very concerns that motivated the invalidated laws, and that would surely be legal. But it probably makes a substantial difference if government is unable to put the information right in front of consumers just as they are making product purchase decisions.

Returning then to the graphic images the FDA selected to be placed on cigarette packages, the industry complained that these images (unlike the text) do not convey 'facts' but rather are emotional appeals intentionally designed to get people not to smoke (that is, to quit, or not to start, or not to relapse after having previously quit).<sup>62</sup> And while one US Court of Appeals upheld the general power of Congress and the FDA to require graphic images,<sup>63</sup> in 2012 the Court of Appeals for the District of Columbia (by a divided 2-1 vote) later held the specific images selected by the FDA to be unconstitutional compelled speech.<sup>64</sup>

At one point, the majority of the District of Columbia Court says of the graphic images: 'They are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting'.<sup>65</sup> This seems a not unfair appraisal. Yet, later in the opinion, the majority finds that despite the widespread requirement in nations throughout the world that cigarette packs carry such warnings, there is no persuasive evidence that they actually make any significant difference in reducing smoking prevalence rates.<sup>66</sup> And, as a result of that finding, the court concluded that the government could not force tobacco companies to carry messages designed to reduce the sale of its products even if the companies probably had little to worry about in terms of lost sales.<sup>67</sup> (Of course, the companies surely do worry about lost sales, and there is a certain irony here that had the images been shown clearly to work elsewhere in driving down smoking rates, they might well have been upheld.)<sup>68</sup> The FDA so far has chosen not to appeal the matter to the US Supreme Court and instead is currently reconsidering whether there are other graphic images it might require that the Court of Appeals would approve.<sup>69</sup>

There is some reason to doubt the sensibility of this decision on a number of grounds. First, just how do you illustrate graphically the fact that ‘cigarettes cause lung cancer’ without showing an unattractive picture of a diseased lung next to a healthy one, or that ‘cigarettes can kill you’ without showing a clearly dead (not sleeping) body, and so on? That such photos appeal to the emotions of the viewers fails to counter the argument that the photos are illustrating facts. Second, in any event, it is ludicrous to say that the text warnings themselves are merely designed to create informed consumers who are to decide for themselves whether or not to smoke. These warnings are required to be placed on the packs and on cigarette advertisements because the public, through government, has decided that smoking is bad and wants to discourage it (without making it formally illegal, other than with respect to sales to teens, given past experience with alcohol prohibition and current experience with marijuana prohibition). Therefore, the fact-emotion distinction seems the wrong way to analyse these issues.

I believe that there is a better way to look at these new text warnings and required graphic images (as well as the disclosures challenged in the Vermont and San Francisco cases discussed above). They should be treated as instances of government requiring business owners to carry a *government* message on their product packaging as a condition of being allowed to sell the product. That is, what is being compelled is the carrying of government speech, and that should be made quite clear if need be (eg ‘the US Surgeon General wants you to know that cigarettes cause strokes and heart disease’). Cigarette companies are not compelled to say they believe the message (as were the schoolchildren in the pledge case), and surely no viewer of the package would take the photos at stake in the *RJ Reynolds* case to be messages from the tobacco companies.

The government clearly has the right to convey this view, for example, on billboards, on television, in schools and the like. To be clear, we, through our elected leaders, have the right to say that we want people not to smoke (just as government has the right to tell the public that some people are concerned about rBST in milk and mobile telephone emissions, just as government has the right to encourage people to take public transport instead of driving automobiles and so on).

The legal issue then is to what extent may the public place its view on the products in question? As I see it, this sort of regulatory restriction does not involve the First Amendment so long as it does not preclude the tobacco sellers from also conveying their message (which the graphic image requirement surely does not). To be sure, at the extreme, using up too much of a product’s packaging could amount to a ‘taking’ of property without compensation under the Fifth Amendment of the *United States Constitution*. Indeed, sometimes courts and commentators talk about these matters as government using what might otherwise be viewed as people’s private property to serve as a billboard for the government’s message. But the legal doctrine in that area of constitutional law (the Fifth Amendment, not the First Amendment) would seem to readily allow the government to claim a substantial portion of one side of the cigarette package for its message without that amounting to a regulatory taking.<sup>70</sup> Whether this view of how to think about

the so-called ‘compelled commercial speech’ cases will ultimately carry the day remains to be seen.<sup>71</sup>

#### 4.3.4 *Prohibition on tobacco sales in pharmacies*

Turning now to a matter raising a variety of complex constitutional law issues, the city of San Francisco recently adopted an ordinance banning the sale of tobacco in pharmacies.<sup>72</sup> The idea behind the law is that pharmacies are supposed to reflect and promote health, and selling cigarettes is the opposite of that. Philip Morris attacked the law as violating its free speech rights, saying in effect that by offering its products for sale via pharmacies it was engaging in advertising (through the product packs) that is legally protected. This argument was roundly rejected on the ground that the law banned the sale of a product, not advertising.<sup>73</sup>

The San Francisco law initially applied only to stores that were primarily pharmacies<sup>74</sup> and thereby exempted from its reach ‘big box’ stores such as WalMart, Safeway and the like that included a pharmacy within their premises but where the pharmacy business accounted for only a small share of their revenues. Because of this exemption, the San Francisco law was next challenged by Walgreen, a large pharmacy chain, which protested that it was singled out for regulation when its competitors (or at least some of them) were not. This complaint rested on the Equal Protection clause of the *United States Constitution*. Normally, courts apply only a ‘rational basis’ test to challenged laws like this,<sup>75</sup> and almost always some rational basis is found for distinctions that are made – after all, Walgreen centrally presents itself as a pharmacy, and WalMart does not. But, surprisingly, a California appeals court at least preliminarily sided with Walgreen.<sup>76</sup> Instead of appealing the legal ruling, San Francisco amended its law to eliminate the big box exception,<sup>77</sup> thereby removing Walgreen’s objection.

This caused Safeway then to sue, claiming now that it was penalised in ways that did not apply to other grocery chains that sold cigarettes but did not operate pharmacies within their facilities. While one readily sees the delicate policy choice that San Francisco had to make, one can also see why retailers of tobacco products such as Safeway were unhappy that they could no longer sell cigarettes when some of their competitors could. This time, however, a federal district court applied the normal rational basis test and upheld the distinction between Safeway and other grocery chains in the face of an equal protection challenge.<sup>78</sup> Hence, the measure went into effect, leaving big box stores in San Francisco with the option of either removing tobacco sales or removing pharmacies from their premises.

What seems clear for now is that tobacco, alcohol and unhealthy food companies will be quick to invoke their ‘free speech’ (and other constitutional) rights whenever they can fashion even a plausible legal challenge to public health regulation; and their position has gained considerable support from the federal courts, not only where government tries to limit anything that could be termed an advertisement, but also when government seeks to have product sellers provide information to would-be buyers. Of course, government, if sufficiently stymied by

lawsuits, could, for example, impose ever higher taxes on these products without a serious fear of unconstitutionality. Yet, not only are such taxes politically more difficult to adopt, at least sometimes they are not as carefully targeted in ways that other public health measures might be, albeit measures that are more vulnerable to legal defeat.

#### **4.4 Attacking the scope of legal authority: *ultra vires* examples**

##### *4.4.1 New York City Board of Health: limiting soda sizes*

Former New York City Mayor Michael Bloomberg devoted considerable attention during his time in office to promoting a range of public health initiatives, including controls on second hand smoke,<sup>79</sup> eliminating trans fats from restaurant food<sup>80</sup> and requiring calorie counts to be posted on chain restaurant menus.<sup>81</sup> One ongoing target of his has been what he views as, and public health leaders agree is, the American over-consumption of sweetened beverages.<sup>82</sup> He supported ideas such as significantly taxing the purchase of these sodas,<sup>83</sup> and preventing those low income Americans who are given food stamps from using those stamps to buy sugar-sweetened beverages.<sup>84</sup> Neither of these was adopted. Instead, the New York City Board of Health adopted perhaps his most controversial proposal: limiting the portion size of the sale of these beverages by restaurants to 16 ounces (about 500 millilitres).<sup>85</sup> People could buy additional servings and in effect consume as much as they like. But the cup or glass size had to be limited on the theory that most people would not pursue a second serving, and this would in turn reduce consumption in places where the default standard serving absent the law was more than 16 ounces, or often even as much as twice that amount.<sup>86</sup>

Before this measure went into effect, it was attacked on a range of grounds by soda retailers, and as of this writing those attacks have been successful. The trial judge held that this rule was ‘arbitrary and capricious’ (eg because it applies only to some sweetened beverages and only to some establishments that sell such beverages, while failing to ban ‘refills’) and therefore is unconstitutional.<sup>87</sup> It is questionable whether a judge should override a justifiable public health measure such as this because of the way the drafters resolved certain policy details. Governments regularly adopt all sorts of arguably right but in the end wrong or meaningless or ineffective laws, and the remedy for this is supposed to be repeal in the political process, not invalidation by the judge.

In addition, the trial judge found that the Board of Health did not have the legal authority to adopt such a rule, in effect concluding (after extensive review of the history of the Board’s delegated powers) that it could regulate only with respect to communicable diseases and not NCDs.<sup>88</sup> Such a broad holding threatens not only this policy but other policies that the Board adopted under Mayor Bloomberg’s time in office.

The city appealed, and the appeals court, on a narrower basis, affirmed the trial judge’s conclusion that because of the way this particular measure was drafted, presented and decided, the ‘Board of Health overstepped the boundaries of its

lawfully delegated authority'.<sup>89</sup> The city then further appealed the case to New York's highest court, which in October 2013 agreed to decide the matter.<sup>90</sup>

It seems clear that had the City Council adopted the portion size limit, that would have been well within its legal authority. But apparently the Mayor did not have the votes for that, which explains why he instead sought approval and obtained it through the Board of Health, a very special institution in New York City. Hence, while this legal battle, as it now stands, represents an example of a so far successful challenge to an action being beyond the legal power of the enacting body, it is perhaps a special case.

#### 4.4.2 *Food and Drug Administration: regulating tobacco*

The legal strategy used by industry of attacking the scope of legal authority of a regulating body might be better illustrated by tobacco's attack on an effort in the 1990s by the FDA.<sup>91</sup> Prior to that time, it had been largely taken for granted that the FDA did not have jurisdiction over tobacco products.<sup>92</sup> Yet, FDA head Dr David Kessler (who is both a physician and lawyer) finally concluded that it was socially intolerable that the product causing the greatest number of preventable deaths in the nation each year – cigarettes (and related tobacco products) – would remain essentially unregulated by the federal government.<sup>93</sup> Existing federal jurisdiction had been effectively exercised only with respect to cigarette smuggling (and contraband trafficking)<sup>94</sup> and the collection (and evasion) of tobacco taxes.<sup>95</sup>

When Kessler and his lawyers proposed to assert FDA jurisdiction, they first focused on the idea that even if the FDA could not regulate cigarettes directly, it had the right to regulate the nicotine they contained, since nicotine seemed to meet the statutory definition of a 'drug'.<sup>96</sup> Agency officials gathered evidence showing how carefully the tobacco companies mixed the types of tobacco leaves they utilised so as to achieve a targeted level of addictive nicotine in their products. One serious legal hurdle, however, was that if nicotine-carrying cigarettes were viewed as a new product coming onto the 1990s market as a 'drug', they would surely be banned. They clearly are not 'safe' and obviously could not be shown to be so 'effective' in curing some health problem as to be permitted with warnings about their lethal quality.<sup>97</sup> But Kessler did not propose to make future sales illegal. So, he and his lawyers adjusted their legal focus and further claimed that cigarettes were drug-delivery devices, and as 'medical devices' the agency not only had jurisdiction over them but also had more flexibility as to how to regulate them.<sup>98</sup> In 1995, Kessler proposed a medley of regulatory measures through which he hoped the agency could achieve a substantial reduction in smoking rates, especially among youths.<sup>99</sup> Having lost in battle against the FDA in the regulatory process, the tobacco industry attacked this effort in court, and in due course the US Supreme Court sided with industry, as I now explain.

In 2000, in the *Brown and Williamson* case,<sup>100</sup> the Supreme Court concluded (in a 5–4 vote) that Congress had deliberately intended tobacco products to fall out-

side the jurisdiction of the FDA,<sup>101</sup> so that this effort by the agency amounted to an illegal overreach and was not entitled to the judicial deference that is frequently given to an agency's interpretation of its authority.<sup>102</sup> Taking a big picture overview of drug and device regulation, the court majority concluded that, if tobacco products were to be regulated under the then existing legal structure, the regulatory solution would be to ban them from the marketplace,<sup>103</sup> something that the FDA had no intention of doing. The court also viewed other statutory measures regulating tobacco, such as the FCLAA, as having been enacted with the understanding that it was Congress, and not the FDA, that was to make tobacco policy for the nation.<sup>104</sup>

Interestingly enough, this regulatory initiative did not go away, and in due course a substantial share of what Kessler proposed was actually adopted by Congress. In 2009, it enacted the *Family Smoking Prevention and Tobacco Control Act* (discussed above), with the result that at least certain sorts of FDA oversight of tobacco products is now the law, but with the proviso that the FDA has no authority to ban them as unsafe.<sup>105</sup>

These two examples – the New York City portion-size limit law and the attempt by the FDA to seize regulatory control of tobacco products – show how the impacted industries will by no means accept new innovative public health initiatives advanced by government, and will vigorously pursue legal avenues to rein in measures that they can convince judges are beyond the existing authority of those adopting them. This experience also shows that legislation by core legislative bodies – Congress, state legislatures and city councils – will not be vulnerable to such challenges in the way that actions by public health bodies such as the FDA and the New York City Board of Health are.

## 5 Conclusion

This chapter illustrates that various sorts of public health measures aimed at tobacco, alcohol or unhealthy foods that seem quite sensible to the governmental body adopting them may turn out in the US to be invalid. That there is more 'adversarial legalism' in the US than elsewhere is well known.<sup>106</sup> That the big tobacco, alcohol and unhealthy food companies would vigorously fight to protect their interests is hardly a surprise. But this chapter shows what might well be surprising elsewhere – how effective those industries have been, using a variety of legal arguments, in convincing often badly divided courts to come out their way. Many of these outcomes, especially the First Amendment constitutional rights cases, would probably be different in other nations. Yet not only is the US especially wedded to 21st century capitalism, in turn our courts, which seem to some to be increasingly politicised, appear to be generally leery of public health measures that regulate business. Perhaps this is not surprising if many judges start with a strong ideological commitment to the private market, for then public health measures that seek to have widespread population effects that may be characterised as undermining the current preferences of individual consumers immediately become suspect.



**Notes**

- \* Many thanks to Aram Boghosian for research assistance.
- 1 See generally Robert Rabin and Stephen Sugarman (eds), *Regulating Tobacco* (Oxford University Press, 2001).
  - 2 American Lung Association, *State Rankings* (2013) <<http://www.stateoftobaccocontrol.org/state-grades/state-rankings/>>; Meg Riordan, *Key State-specific Tobacco-related Data & Rankings* (30 July 2013) Campaign for Tobacco-Free Kids <<http://www.tobaccofreekids.org/research/factsheets/pdf/0176.pdf>>.
  - 3 See, eg, Mark Wolfson, *The Fight Against Big Tobacco: The Movement, the State, and the Public's Health* (Aldine De Gruyter, 2001).
  - 4 Robert Rabin, 'Institutional and Historical Perspectives on Tobacco Tort Liability' in Robert Rabin and Stephen Sugarman (eds), *Smoking Policy: Law, Politics and Culture* (Oxford University Press, 1993) 110, 111.
  - 5 Ibid 111–18.
  - 6 Ibid 118–25.
  - 7 Robert Rabin, 'The Third Wave of Tobacco Tort Litigation' in Rabin and Sugarman, *Regulating Tobacco*, above n 1, 176, 179–85.
  - 8 *The Federal Cigarette Labeling and Advertising Act* ('FCLAA'), enacted in 1965, as amended by the *Public Health Cigarette Smoking Act of 1969*, 15 USC §§ 1331–40 (2012). In 1984, Congress again amended the FCLAA in the *Comprehensive Smoking Education Act*, Pub L No 98-474 (1984), which introduced a scheme of four rotating warnings. More recent amendments are discussed below.
  - 9 *Cipollone v Liggett Group Inc*, 505 US 504, 512 (1992).
  - 10 *Cipollone v Liggett Group Inc*, 505 US 504 (1992).
  - 11 FCLAA § 5(b).
  - 12 See above n 8.
  - 13 940 Code of Mass Regs § 21.01–2000.
  - 14 *Lorillard v Reilly*, 533 US 525, 551 (2001).
  - 15 *Family Smoking Prevention and Tobacco Control Act*, Pub L No 111-31, § 203 (2009), codified at 15 USC § 1334(c) (2012).
  - 16 NY City Health Code § 181.19.
  - 17 *23-34 94th Grocery Corp v New York City Board of Health*, 685 F 3d 174 (2nd Cir, 2012).
  - 18 Providence, Rhode Island Code of Ordinances §§ 14-303, 14-309.
  - 19 *National Association of Tobacco Outlets Inc v City of Providence Rhode Island*, F 3d (1st Cir, 2013) <<http://media.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=13-1053P.01A>>.
  - 20 Original Regulation 81.50.
  - 21 *New York State Restaurant Association v New York City Board of Health (NYSRA I)*, 509 F Supp 2d 351 (SD NY, 2007).
  - 22 21 USC 343 (q), (r), 343–1 (a) (4), (5).
  - 23 Amended Regulation 81.50.
  - 24 *New York State Restaurant Association v New York City Board of Health (NYSRA II)*, 2008 WL 1752455 (SD NY, 2008).
  - 25 *New York State Restaurant Association v New York City Board of Health*, 556 F 3d 114, 135 (2nd Cir, 2009). For the story of the New York experience and surrounding litigation, see Thomas Farley et al, 'New York City's Fight over Calorie Labeling' (2009) 28 *Health Affairs* 1098.
  - 26 See, eg, *Medtronic Inc v Lohr*, 518 US 470, 485 (1996).
  - 27 See above n 15 and corresponding text.
  - 28 *Valentine v Chrestensen*, 316 US 52 (1942).
  - 29 Government 'shall make no law ... abridging the freedom of speech ...'.
  - 30 *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, 425 US 748 (1976).
  - 31 Va Code Ann § 54-524.35 (1974).

- 32 *Central Hudson Gas & Electric Corp v Public Service Commission of New York*, 447 US 557 (1980). (Restrictions on commercial speech must be carefully tailored to serve and in fact further very important governmental interests.)
- 33 For example, the right of lawyers to advertise was upheld in *Bates v State Bar of Arizona*, 433 US 350 (1977).
- 34 Rhode Island Gen Laws §3-8-7 (1987).
- 35 In her dissent in *Rhode Island Liquor Stores Assn v Evening Call, Pub Co*, 497 A 2d 331, 342, n 10 (RI 1985), Justice Murray suggested that the advertising ban was motivated, at least in part, by an interest in protecting small retailers from price competition.
- 36 *44 Liquormart Inc v Rhode Island*, 517 US 484 (1996).
- 37 *United States Constitution* amend XXI, § 2. This amendment was adopted in 1933 and repealed amend XVIII, which had been ratified in 1919 and, during the interim 14 years, had imposed alcohol prohibition in the US.
- 38 *Lorillard v Reilly*, 533 US 525, 566 (2001).
- 39 *Ibid* 562 3.
- 40 *Ibid* 553.
- 41 *Ibid* 565.
- 42 940 Code of Mass Regs §§ 21.04(2)(c)-(d), 22.06(2)(c)-(d) (2000).
- 43 *Lorillard v Reilly*, 533 US 525, 567-70 (2001).
- 44 *Family Smoking Prevention and Tobacco Control Act*, Pub L No 111-31, § 2 (2009).
- 45 See Chapters 16 and 11 of this volume respectively.
- 46 21 CFR § 1140.32(a).
- 47 *Tobacco Plain Packaging Act 2011* (Cth). See also Chapter 17 of this volume.
- 48 *Discount Tobacco City & Lottery Inc v US*, 674 F 3d 509 (6th Cir, 2012).
- 49 *West Virginia State Board of Education v Barnette*, 319 US 624 (1943).
- 50 Florida Statute s 104.38 (1973).
- 51 *Miami Herald Publishing Co v Tornillo*, 418 US 241, 249-50 (1974).
- 52 *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974).
- 53 *Family Smoking Prevention and Tobacco Control Act*, Pub L No 111-31, § 203, amending 15 USC 1333, s 4 (a)(1).
- 54 *International Dairy Foods Association v Amestoy*, 92 F 3d 67, 69 (1st Cir, 1996).
- 55 Vt Stat Ann tit 6 § 2754.
- 56 *International Dairy Foods Association v Amestoy*, 92 F 3d 67 (1st Cir, 1996). In an interesting variation on this theme, 14 years later, a different federal Court of Appeals enjoined the State of Ohio's regulations that sought to restrict voluntary efforts by milk producers to identify their products as being free from rBST, also relying on the First Amendment: *International Dairy Foods Association v Boggs*, 622 F 3d 628 (6th Cir, 2010). In light of more recent research findings, this court panel thought that wanting to know whether your milk came from cows treated with rBST was considerably more than a matter of consumer curiosity. Together, these two milk hormone cases show the courts being quite supportive of private enterprise being able to speak or not speak as it wishes, while being hostile to government interference with those preferences, regardless of whether government seems motivated by a desire to be sure consumers are told about rBST or to dissuade consumers from thinking there is a difference between the two types of milk.
- 57 On the initial law, see Jesse McKinley, 'San Francisco Passes Cellphone Radiation Law', *New York Times* (online), 15 June 2010 <<http://www.nytimes.com/2010/06/16/us/16cell.html>>. On the amended law, see Amy Gahran, 'San Francisco Passes Cell Phone Radiation Law, but What's the Risk?' *CNN* (online), 28 July 2011 <<http://www.cnn.com/2011/TECH/mobile/07/28/san.francisco.cellphone.law/>>.
- 58 *CTIA – The Wireless Assn v City & Cnty of San Francisco*, 827 F Supp 2d 1054 (ND Cal 2011).

- 59 For a report on the San Francisco case and the settlement, see Chloe Albanesius, *San Francisco Drops Fight for Cell Phone Radiation Labeling Law* (8 May 2013) PCMag.com <<http://www.pcmag.com/article2/0,2817,2418719,00.asp>>.
- 60 See above n 25 and corresponding text.
- 61 *New York State Restaurant Association v New York City Board of Health*, 556 F 3d 114, 135 (2nd Cir, 2009).
- 62 *Required Warnings for Cigarette Packages and Advertisements*, 76 Fed Reg 36,628 (22 June 2011) contains objections that the cigarette companies made to the proposed images.
- 63 *Discount Tobacco City & Lottery Inc v US*, 674 F 3d 509 (6th Cir, 2012).
- 64 *RJ Reynolds Tobacco Co v Food and Drug Administration*, 696 F 3d 1205 (DC Cir, 2012).
- 65 Ibid slip op 20 <[http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/\\$file/11-5332-1391191.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/4C0311C78EB11C5785257A64004EBFB5/$file/11-5332-1391191.pdf)>.
- 66 ‘FDA has not provided a shred of evidence – much less the “substantial evidence” required by the APA – showing that the graphic warnings will “directly advance” its interest in reducing the number of Americans who smoke’: Ibid slip op 25.
- 67 Ibid slip op 30.
- 68 Moreover, more recent research has found that the graphic warnings in Canada have had a very substantial impact in lowering smoking rates: Jidong Huang, Frank Chaloupka and Geoffrey Fong, ‘Cigarette Graphic Warning Labels and Smoking Prevalence in Canada: A Critical Examination and Reformulation of the FDA Regulatory Impact Analysis’ (2013) *Tobacco Control*, published online first 11 November 2013 doi:10.1136/tobaccocontrol-2013-051170.
- 69 ‘FDA’s Graphic Cigarette Labels Rule Goes Up in Smoke after US Abandons Appeal’, *CBSNews* (online), 19 March 2013 <<http://www.cbsnews.com/news/fdas-graphic-cigarette-labels-rule-goes-up-in-smoke-after-us-abandons-appeal/>>.
- 70 The US law on ‘regulatory takings’ is well captured by *Penn Central Transportation Co v City of New York*, 438 US 104 (1978) and *Lingle v Chevron USA Inc*, 544 US 528 (2005).
- 71 Note that my argument concerning how to deal with government speech applied in the commercial setting would not apply to the Florida ‘right of reply’ case because, among other things, the message required there is not the government’s message (moreover, a newspaper is a special sort of commercial party because the core of its identity is bound up with free speech). Nor would it apply to the ‘pledge of allegiance’ case, as there the whole point of the school exercise was to require the pupils personally to take the pledge.
- 72 SF Health Code § 1009.92.
- 73 *Philip Morris USA v City and County of San Francisco*, 2009 WL 2873765 (Cal, 2009).
- 74 SF Health Code § 1009.93.
- 75 See, eg, *People v Hofsheier* (2006) 37 Cal 4th 1185, 1200 [39 Cal Rptr 3d 821, 129 P 3d 29].
- 76 *Walgreen Co v City and County of San Francisco*, 185 Cal App 4th 424 (Ct App, 2010).
- 77 In September 2010, the exception contained in the SF Health Code § 1009.93 was repealed.
- 78 *Safeway Inc v City and County of San Francisco* (ND Cal, No 11-00761 CW, 15 July 2011) <<http://www.courthousenews.com/2011/07/19/safeway.pdf>>.
- 79 For information on the *Smoke-Free Air Act of 2002* (NY), see *Smoke-Free Air Act of 2002*, NYC Health <<http://www.nyc.gov/html/doh/html/environmental/smoke-free-act.shtml>>.
- 80 NY City Health Code, § 81.08 (2006).
- 81 Ibid § 81.50.
- 82 See, eg, Robert Lustig, ‘Sugar: The Bitter Truth’ (speech delivered for *Current Controversies in Nutrition: Letting Science Be the Guide – Mini Medical School for the Public* presented by UCSF Osher Center for Integrative Medicine, 27 July 2009), University of California Television <<http://www.uctv.tv/shows/Sugar-The-Bitter-Truth-16717>>.

- 83 AG Sulzberger, 'Bloomberg Says a Soda Tax "Makes Sense"', *New York Times* (online), 7 March 2010 <<http://www.nytimes.com/2010/03/08/nyregion/08soda.html>>.
- 84 Robert Pear, 'Soft Drink Industry Fights Proposed Food Stamps Ban', *New York Times* (online), 29 April 2011 <<http://www.nytimes.com/2011/04/30/us/politics/30food.html>>.
- 85 NY City Health Code § 81.63.
- 86 For the evidence collected and presented by the Department of Health on behalf of the portion size limit, see Susan Kansagra, 'Maximum Size for Sugary Drinks: Proposed Amendment of Article 81 Response to Comments' (13 September 2012) <<http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>>.
- 87 *New York Statewide Coalition v. New York City Department of Health and Mental Hygiene* (NY Sup Ct, No 653584/12, 11 March 2013) slip op 27 <<http://online.wsj.com/public/resources/documents/sodaruling0311.pdf>>.
- 88 *Ibid* 28.
- 89 *New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Department of Health and Mental Hygiene* 110 AD 3d 1, 10 (NY Sup Ct, App Div, 30 July 2013) <[http://www.nycourts.gov/reporter/3dseries/2013/2013\\_05505.htm](http://www.nycourts.gov/reporter/3dseries/2013/2013_05505.htm)>. The appeals court did not reach the question of whether the Board's action was arbitrary and capricious.
- 90 'Top NY Court Agrees to Hear Bloomberg's Large Soda Ban Appeal', *Channel 4 New York* (online), 17 October 2013 <<http://www.nbcnewyork.com/news/local/Soda-Ban-Sugar-Drink-Mayor-Bloomberg-New-York-City-Ban-Appeal-Court-Judge-228194631.html>>.
- 91 For the story of this battle, see Theodore Ruger, 'FDA v Brown & Williamson and the Norm of Agency Continuity' in William Eskridge, Elizabeth Garrett and Philip Frickey (eds), *Statutory Interpretation Stories* (Foundation Press, 2010) 334.
- 92 See, eg, *Cigarette Labeling and Advertising – 1965: Hearings on HR 2248 before the House Committee on Interstate and Foreign Commerce*, 89th Cong, 1st sess, 193: '[t]he Food and Drug Administration has no jurisdiction under the Food, Drug, and Cosmetic Act over tobacco, unless it bears drug claims': FDA Deputy Commissioner Rankin.
- 93 David Kessler, *A Question of Intent: A Great American Battle with a Deadly Industry* (Public Affairs, 2001) 27.
- 94 For information about current efforts to deal with these issues by the Bureau of Alcohol, Tobacco, Firearms and Explosives, see *Alcohol & Tobacco*, United States Department of Justice <<http://www.atf.gov/content/alcohol-and-tobacco>>.
- 95 For information about the collection of tobacco taxes now the responsibility of the Alcohol and Tobacco Tax and Trade Bureau, see *Tobacco Industry*, United States Department of the Treasury <<http://www.ttb.gov/tobacco/index.shtml>>.
- 96 Kessler, above n 93, 62–3.
- 97 21 USC § 393(b)(2) (drugs); 21 USC: §§ 360c(a)(1)(A)(i), (B), (C) (devices).
- 98 *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents*, 60 Fed Reg 41314, 41314–11 (August 1995).
- 99 *Ibid*.
- 100 *FDA v Brown and Williamson*, 529 US 120 (2000).
- 101 *Ibid* 131–61.
- 102 See, eg, *Chevron USA Inc v Natural Resources Defense Council Inc*, 467 US 837 (1984).
- 103 *FDA v Brown and Williamson*, 529 US 120, 131–3 (2000).
- 104 *Ibid* 143–59.
- 105 *Family Smoking Prevention and Tobacco Control Act*, Pub L No 111-31, § 901 (2009).
- 106 Robert Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001).