

2012

No Toy For You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?

Alexis M. Etow

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Health Law Commons](#)

Recommended Citation

Etow, Alexis M. "No Toy For You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?" American University Law Review 61, no.5 (2012): 1503-1542.

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

No Toy For You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?

COMMENTS

NO TOY FOR YOU! THE HEALTHY FOOD INCENTIVES ORDINANCE: PATERNALISM OR CONSUMER PROTECTION?

ALEXIS M. ETOW*

The newest approach to discouraging children's unhealthy eating habits, amidst increasing rates of childhood obesity and other diet-related diseases, seeks to ban something that is not even edible. In 2010, San Francisco enacted the Healthy Food Incentives Ordinance, which prohibits toys in kids' meals if the meals do not meet certain nutritional requirements.

Notwithstanding the Ordinance's impact on interstate commerce or potential infringement on companies' commercial speech rights and on parents' rights to determine what their children eat, this Comment argues that the Ordinance does not violate the dormant Commerce Clause, the First Amendment, or substantive due process. The irony is that although the Ordinance likely avoids the constitutional hurdles that hindered earlier measures aimed at childhood obesity, it intrudes on civil liberties more than its predecessors. This Comment analyzes the legality of the Healthy Food Incentives Ordinance to understand its implications on subsequent legislation aimed at combating childhood obesity and on the progression of public health law.

* Junior Staff Member, *American University Law Review*, Volume 61; J.D. Candidate, May 2013, *American University, Washington College of Law*; B.A., Psychology, 2007, *Princeton University*. Many thanks to my Comment adviser Professor Lindsay Wiley for her invaluable guidance and insights; Professor Vladeck and Professor Marcus for their helpful input; the members of the *American University Law Review* for all their support and hard work during the editing process and publication of this piece, especially Julia Boisvert, Mary Gardner, Chris Walsh, and Brian Westley; and to my friends and family, particularly my parents and sister, for their constant moral support.

TABLE OF CONTENTS

Introduction.....	1505
I. Background	1509
A. The Impetus for the Healthy Food Ordinance.....	1509
1. Early government efforts aimed at childhood obesity.....	1509
2. The food industry's role: allowing the fox to guard the henhouse	1510
3. The use of toys to attract child consumers	1511
B. Taking a Different Approach: The Healthy Food Ordinance.....	1512
C. Constitutional Issues Implicated by the Ordinance	1513
1. Modern dormant Commerce Clause	1513
2. Commercial speech and the First Amendment	1516
3. Substantive due process and the Fourteenth Amendment	1519
II. The Healthy Food Ordinance Survives Constitutional Challenge Because it is Narrowly Tailored, Advances Compelling Interests, and Does Not Unduly Burden Interstate.....	1521
A. Effect on Interstate Commerce	1521
B. Restraint on Commercial Speech	1525
1. Regulating what restaurants sell, not what they say ..	1525
2. Marketing partnerships	1526
3. Surviving <i>Central Hudson</i>	1527
C. Interference with Substantive Due Process.....	1530
1. Using <i>Lorillard</i> and <i>West Coast Hotel</i> to frame San Francisco's compelling interests	1532
2. The Ordinance's narrow-tailoring	1534
III. What is Next? Response to the Ordinance and Future Implications	1535
A. National Impact: Additional Legal Measures and Industry Changes.....	1535
B. Potential Regulatory Responses.....	1537
1. Setting a price floor	1537
2. Instituting an excise tax	1539
C. Implications of the Ordinance and Future Measures	1540
Conclusion	1542

INTRODUCTION

A colleague told us of her four-year-old daughter at the supermarket seeing Betty Crocker's Disney Princess Fruit Snacks with Cinderella, Snow White, and the Little Mermaid on the box.

Daughter: "I want that."

Mother: "What is it?"

Daughter: "I don't know."¹

As the anecdote above portrays, children are heavily influenced by the food industry's commercial tactics without even realizing it.² Recognizing children's lucrative vulnerability, fast food marketers spend over \$660 million each year on sales strategies that directly target children as young as three years old.³ These marketing practices combined with the prevalence of unhealthy foods in supermarkets and fast food restaurants have contributed to alarming trends in children's health.⁴ Fast food restaurants have commonly been named one of the primary culprits for providing high-calorie, low-nutrient foods that come with excessive sodium and saturated fat, which lead to obesity and other diet-related diseases.⁵ Not only are more meals consumed outside the home today, but children consume almost twice as many calories when they eat out.⁶

1. KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *FOOD FIGHT* 107 (2004).

2. See Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 79 (2006) (revealing that children do not understand that marketing techniques are commercially motivated).

3. JENNIFER L. HARRIS ET AL., YALE RUDD CTR. FOR FOOD POLICY, FAST FOOD F.A.C.T.S.: EVALUATING FAST FOOD NUTRITION AND MARKETING TO YOUTH 12 (2010), available at http://fastfoodmarketing.org/media/FastFoodFACTS_Report.pdf.

4. See James O. Hill et al., *Modifying the Environment to Reverse Obesity*, 2005 ENVTL. HEALTH PERSP. 108, 109 (asserting that marketing unhealthy foods directly to children is a contributing factor to today's rising obesity rates).

5. See Jonathan Berr, *Lawsuit Threat: McDonald's Happy Meal Toys Make Kids Fat*, DAILYFINANCE.COM

(June 22, 2010, 5:20 PM), <http://www.dailyfinance.com/2010/06/22/mcdonalds-happy-meal-toys-lawsuit/> (noting that some health experts hold McDonald's and other fast food purveyors partly culpable for America's obesity epidemic); see also HARRIS ET AL., *supra* note 3, at 128 (explaining that over thirty percent of fast food calories consist of sugar and saturated fat—empty calories that far surpass children's daily recommended caloric intake). Childhood obesity rates have nearly tripled in the past thirty years, and diet-related diseases such as hypertension, heart disease, high cholesterol, and type 2 diabetes have similarly skyrocketed. See INST. OF MED., LOCAL GOVERNMENT ACTIONS TO PREVENT CHILDHOOD OBESITY 1 (2009) (reporting that the high prevalence of childhood obesity is likely to decrease the life expectancy and quality of life for today's generation of children).

6. See HARRIS ET AL., *supra* note 3, at 116 (finding that of the 689 sampled parents with children two to eleven years old, sixty-six percent took their children to McDonald's on at least a few occasions a month, and twenty-two percent went at least once a week); Devon E. Winkles, Comment, *Weighing the Value of Information: Why the*

In response to these pressing diet-related concerns, the law can be a powerful and necessary tool for protecting children's health.⁷ Equally important is our constitutional framework, which ensures that these legal strategies do not unjustifiably infringe upon civil liberties.⁸ Constitutional safeguards played a central role in hampering early attempts to combat childhood obesity, such as efforts to eliminate advertisements targeting child audiences.⁹ As a result, some states and municipalities have turned to developing new and more innovative ways to address childhood obesity and diet-related illnesses.¹⁰

In 2010, Santa Clara County and the city of San Francisco made history by passing the first-ever local ordinances that prohibit restaurants from providing free toys in meals for children that do not meet established nutritional requirements.¹¹ Despite well-intentioned interests, the ordinances have generated substantial concerns and criticism from the food industry and members of the public who accuse San Francisco and Santa Clara County of creating the ultimate "nanny state"—telling children they cannot have a toy unless "they eat their fruits and vegetables."¹² Even former Mayor Gavin Newsom of San Francisco opposed the ban, alleging that it inappropriately interferes with the role of parents who have the ultimate right and

Federal Government Should Require Nutrition Labeling for Food Served in Restaurants, 59 EMORY L.J. 549, 552 (2009) (revealing that while children consume an average of 420 calories when they eat a meal at home, they consume an average of 770 calories when they eat out).

7. See LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 29 (2d ed. 2008) (claiming that public health law can offer "innovative solutions to the most implacable health problems"). Lawrence Gostin delineates seven ways that the government or private citizens can protect the public's health through the law, including: taxation; alteration of the informational environment, built environment, or socioeconomic environment; direct regulation; indirect or tort regulation; and deregulation. See *id.* at 29–38 (warning that while each of these tools may be highly beneficial to the public health, they often raise social, ethical, and legal concerns that require thorough attention and analysis).

8. See Richard A. Epstein, *Let the Shoemaker Stick to His Last: A Defense of the "Old" Public Health*, 46 PERSP. IN BIOLOGY & MED. S138, S149 (2003) (articulating that the "hard question" is determining what forms of public intervention are allowable when protected liberty interests are at stake).

9. See Westen, *supra* note 2, at 86 (discussing the difficulty in creating regulations that only affect advertisements that "deceive" young children).

10. See INST. OF MED., *supra* note 5, at 3–4 (suggesting that local governments can improve community food access and establish public programs to combat obesity).

11. S.F., CAL., HEALTH CODE art. 8, § 471. to .9 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow "Health Code" hyperlink; then follow "Article 8: Food and Food Products" hyperlink); SANTA CLARA, CAL., CODE OF ORDINANCES § A18-352 (2010).

12. *The Daily Show* (Comedy Central broadcast Jan. 3, 2011), available at <http://www.thedailyshow.com/watch/mon-january-3-2011/san-francisco-s-happy-meal-ban>.

responsibility to determine their children's food choices.¹³ These concerns over the paternalistic nature of the ordinances, coupled with the ordinances' unprecedented approach to countering childhood obesity, raise two critical questions: (1) whether such a regulation would survive challenges under the dormant Commerce Clause, and commercial speech and substantive due process doctrines;¹⁴ and, (2) if so, what its implications would be on future attempts to regulate childhood obesity.¹⁵

This Comment argues that, unlike earlier attempts to curtail childhood obesity, San Francisco's Healthy Food Incentives Ordinance (Healthy Food Ordinance or the Ordinance) avoids the constitutional challenges that thwarted its predecessors, yet is ironically more indicative of paternalistic overreach. Not only is the Ordinance more invasive than prior attempts to regulate children's diets, but it also sets the table for increased government intervention to determine what children eat.¹⁶ The constitutionality and permissibility of the Healthy Food Ordinance, therefore, commands further legal inquiry because of its far-reaching implications, not only on nationwide efforts to combat obesity, but also pertaining to the future of public health law.¹⁷

13. Consumers opposed to the Ordinance have also voiced this concern. See Edward Abramson, *The End of the Happy Meal?*, PSYCHOL. TODAY (Dec. 27, 2010), <http://www.psychologytoday.com/blog/its-not-just-baby-fat/201012/the-end-the-happy-meal> (reasoning that part of the public outcry stems from parents feeling that the Ordinance calls into question their parenting abilities); see also Berr, *supra* note 5 (contending that blaming fast food restaurants for childhood obesity wrongly absolves parents of the duty to tell their children "no").

14. See *Happy Meals Banned in Santa Clara County, California*, LEGAL BITES (May 3, 2010, 1:14 PM), <http://www.nkms.com/legalbites/index.php/2010/05/happy-meals-banned-in-santa-clara-county-california/> (raising dormant Commerce Clause concerns because the toy bans will be unduly burdensome for nationwide restaurants); Rachel Gordon, *Plan to Limit Toys with Meals Faces First Test*, S.F. CHRON., at A-1 (citing the industry's Free Speech allegations); Jonathan Turley, *San Francisco Bans Happy Meals and Other Fast-Food Meals Served with Toys*, JONATHANTURLEY.ORG (Nov. 12, 2010), <http://jonathanturley.org/2010/11/12/san-francisco-bans-happy-meals-and-other-fast-food-meals-served-with-toys/> (indicating potential due process claims).

15. See *infra* Part III (discussing the Ordinance's immediate and potential impacts).

16. In August 2000, New Mexico state officials took a three-year-old child into state custody after her parents failed to treat her obesity. Shireen Arani, Comment, *State Intervention in Cases of Obesity-Related Medical Neglect*, 82 B.U. L. REV. 875, 875-78 (2002). This concept of treating childhood obesity as parental abuse, combined with the Healthy Food Ordinance's grant of broad authority to the government to dictate what children should eat, raises significant concerns.

17. Although this Comment does not delve into the policy implications of the Healthy Food Ordinance, the Ordinance epitomizes the modern trend in public health regulation that has prompted criticism from legal commentators like Richard Epstein. Epstein contends that the government's authority to regulate health-related concerns should be limited to communicable diseases. See Epstein, *supra* note 8, at

Part I of this Comment begins by exploring the impetus behind the Healthy Food Ordinance, specifically the role of the government and food industry's past struggles to develop effective anti-obesity strategies. It then discusses the enactment of the Healthy Food Ordinance, which provides a new, more invasive approach to combating childhood obesity than previously attempted. Part I ends by summarizing the background of the constitutional doctrines implicated by the Ordinance—the dormant Commerce Clause, commercial speech, and substantive due process.

Part II analyzes the legality of the Ordinance under the three constitutional doctrines introduced in Part I. First, it demonstrates that the Ordinance does not violate the dormant Commerce Clause because the nutritional requirements are not unduly burdensome. Second, it delves into the question of whether the Ordinance constitutes a restriction on commercial speech and argues that, even if it does, it would survive intermediate scrutiny. Third, it contends that substantive due process is the most appropriate doctrinal tool to address the public's concerns over the paternalistic nature of the Ordinance but concludes that this doctrine does not pose any substantial threat to the Ordinance.

Finally, Part III discusses the implications of the Ordinance, focusing on companies' changes to their marketing practices in response to the Ordinance and on steps cities wishing to implement a similar law might take to ensure fast food companies do not evade the Ordinance's directives. Part III concludes by discussing the repercussions of our current constitutional framework under the Due Process Clause, which, in its attempt to balance civil liberties and government interests, permits the implementation of increasingly innovative—and intrusive—public health regulations.

S139 (asserting that under the “new” public health regime, obesity is misleadingly referred to as an “epidemic,” to justify government coercion). According to Epstein, “[t]here are no non-communicable epidemics.” *Id.* at S154. Under the traditional or “old” public health model, only communicable diseases, which have a singular and definitive source, justified direct government intervention. *Id.* at S141. The key question to determine whether something constitutes a public health epidemic that requires government regulation is whether there is a system of private rights in place to protect individuals. *Id.* at S143. Under this theory, obesity would not constitute a true epidemic because tort remedies are available. *Id.*

I. BACKGROUND

A. *The Impetus for the Healthy Food Ordinance*1. *Early government efforts aimed at childhood obesity*

Regulatory attempts to restrict junk food marketing targeting children started over a quarter-century ago. In 1978, the Federal Trade Commission (FTC) tried to promulgate a regulation that limited children's exposure to advertisements promoting junk food.¹⁸ The FTC relied on empirical data indicating that children have not yet developed the same cognitive abilities to differentiate commercial advertising or to understand its persuasive function.¹⁹ Among other restrictions, the proposed regulation sought to: "Ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising."²⁰

One of the major challenges the FTC encountered, however, was determining which television shows to target. As the FTC discovered, *I Love Lucy* was young children's favorite show, making it difficult to implement this regulation without also limiting adults' exposure to advertisements.²¹ Moreover, a restriction on all advertisements during children's programming was excessive and highly contested by both the food industry and television networks.²² These legal obstacles, combined with political opposition, forced the FTC to abandon its proposed regulation.²³ As a result, the food industry's

18. See Westen, *supra* note 2, at 79 (characterizing the proposed regulations as "the most radical agency initiative ever conceived" at the time).

19. See *id.* at 81 ("To a very young child, a Tony the Tiger commercial came across as follows: 'Hi, I'm Tony the Tiger . . . I'm your friend, and I want you to eat Sugar Frosted Flakes because I want you to grow up to be big and strong like me.'").

20. The two other proposals aimed to:

(b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks;

(c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers.

43 Fed. Reg. 17,967, 17,969 (Apr. 27, 1978).

21. Westen, *supra* note 2, at 86.

22. See *id.* at 85 (reasoning that a complete ban on advertisements during Saturday morning television would leave networks without any sponsorships, thereby creating a disincentive for children's programming).

23. See *id.* at 84 (explaining that when President Reagan was elected in 1980, he appointed a new head of the FTC, who opposed the rule, thereby preventing its enactment); *id.* at 86 (delineating some of the substantive problems that hampered the proceeding, such as being unable to narrowly tailor the regulation so that it only

marketing ventures today are primarily self-regulated.²⁴

2. *The food industry's role: allowing the fox to guard the henhouse*

Many of the kids' meals offered at fast food restaurants today far exceed the nutritional limits recommended by experts.²⁵ While the Institute of Medicine recommends that elementary school-age children consume *no more than* 650 calories and 636 milligrams of sodium in a fast food meal,²⁶ a standard McDonald's Happy Meal containing a cheeseburger, small fries, and low-fat chocolate milk jug contains 700 calories, 1060 milligrams of sodium, and 27 grams of fat.²⁷ Although some fast food chains recently pledged to advertise only "better-for-you"²⁸ choices to children, and in fact began offering healthier options such as fruits, vegetables, and low-fat milk, some health advocates criticize these efforts as insufficient.²⁹ Prior to the passage of the Healthy Food Ordinance, studies revealed that healthier options were not provided unless specifically requested.³⁰ Instead, fast food chains like McDonald's and Burger King would serve French fries as the default side dish in kids' meals at least eighty-six percent of the time and soft drinks at least fifty percent of

restricted children's exposure to junk food advertisements and not adults' exposure).

24. The Obama administration recently created the Interagency Working Group on Food Marketing to Children, which has proposed voluntary guidelines to improve the industry's self-regulation efforts. See Julian Pecquet, *Chamber of Commerce Assails Proposed Food Marketing Restrictions*, HEALTH WATCH: THE HILL'S HEALTH CARE BLOG (June 30, 2011, 11:53 AM), <http://thehill.com/blogs/healthwatch> (contending that even though the proposed recommendations would be voluntary, they have still received criticism for "hav[ing] a chilling effect on commercial speech").

25. See HARRIS ET AL., *supra* note 3, at 47 (defining "kids' meals" as fast food combinations specifically designed for children that consist of a main dish, side, beverage, and usually a toy or other premium).

26. Meanwhile, 410 calories and 544 milligrams of sodium are the acceptable ceilings for preschool-age children. *Id.*

27. See MCDONALD'S, NUTRITION INFORMATION FOR MCDONALD'S HAPPY MEALS 3 (2011). These numbers reflect the nutrition information of Happy Meals prior to the menu changes that McDonald's made in July 2011. See *infra* Part III.C (discussing the efforts made by McDonald's to improve the wholesomeness of its Happy Meals).

28. See C.L. PEELER ET AL., THE CHILDREN'S FOOD AND BEVERAGE ADVERTISING INITIATIVE IN ACTION: A REPORT ON COMPLIANCE AND IMPLEMENTATION DURING 2008, at 19 (2009), available at <http://www.bbb.org/us/storage/0/Shared%20Documents/finalbbbs.pdf> (outlining the voluntary pledge made by McDonald's and Burger King to only advertise their healthier offerings).

29. See HARRIS ET AL., *supra* note 3, at ix (suggesting that these "better-for-you" television ads do not actually encourage healthier eating, but instead focus on promoting the toys themselves and attaining brand loyalty); *id.* at 129-30 (pointing out that restaurants could more effectively increase the sale of healthier items by promoting them more *inside* the restaurant).

30. See *id.* at 112 (finding that nearly all fast food restaurant employees serve soda and French fries as the default options in kids' meals).

the time.³¹ Only eleven percent of parents ordered healthier sides, and a reported eighty-eight percent of parents claimed they were unaware of these more wholesome options.³² Additionally, these “better-for-you” products were often merely added as part of the backdrop in advertisements.³³ Therefore, despite the industry’s seemingly commendable attempts at self-regulation, these methods were ultimately ineffective.³⁴

3. *The use of toys to attract child consumers*

Marketers and sociologists alike identify children as “surrogate salesmen,” capable of convincing their parents through “pester power” to buy them what they want.³⁵ For fast food restaurants, the most lucrative tool for attracting child consumers are the free toys in kids’ meals, which receive the largest portion—\$360 million—of child-oriented marketing expenditures.³⁶ From *Transformers* to *101 Dalmations*,³⁷ successful toy promotions have doubled or tripled the weekly sales of kids’ meals.³⁸ In 1997, an estimated four Happy Meals were sold for every child in the United States between the ages of

31. *Id.* at 112–13.

32. Christina Rexrode, *Happy Meals Change to Apples, Fewer Fries*, WASH. TIMES (July 27, 2011), <http://www.washingtontimes.com/news/2011/jul/27/happy-meals-change-to-apples-fewer-fries/>; see HARRIS ET AL., *supra* note 3, at 113 (noting that soda is still the most popular beverage ordered in kids’ meals and that only eight percent of parents request plain milk instead of soda, juice, or flavored milk for their children).

33. Instead, advertisements focused on the enticing appeal of the restaurant itself and its toy offerings. HARRIS ET AL., *supra* note 3, at 59–60.

34. *But see* Emily Bryson York, *Happy Meal Suit Raises More than Food, Marketing Questions*, CHI. TRIBUNE (Dec. 15, 2010), http://articles.chicagotribune.com/2010-12-15/business/ct-biz-1216-mcd-suit-20101215_1_corporate-accountability-international-ban-toys-ronald-mcdonald (quoting Dawn Jackson Blatner, a dietician and spokeswoman for the American Dietetic Association, who acknowledged that McDonald’s Happy Meals have “come a long way” from their unwholesome past).

35. See ERIC SCHLOSSER, *FAST FOOD NATION* 43 (2001) (identifying the goal of marketing to children as “get[ting] kids to nag their parents and nag them well”).

36. HARRIS ET AL., *supra* note 3, at 13. The first kids’ meal, marketed under the name “Happy Meal,” was created in 1977 by a local advertising agency in Kansas City and originally consisted of a hamburger, French fries, and a soda in packaging resembling circus trains. See JOHN F. LOVE, *MCDONALD’S: BEHIND THE ARCHES* 313 (1986) (contending that the instant success of Happy Meals foreshadowed their lucrative future).

37. See Kayla Webley, *A Brief History of the Happy Meal*, TIME (Apr. 30, 2010), <http://www.time.com/time/nation/article/0,8599,1986073,00.html> (listing some of the most popular toy characters offered in McDonald’s Happy Meals).

38. See SCHLOSSER, *supra* note 35, at 47 (citing a BRANDWEEK article claiming “the key to attracting kids is toys, toys, toys”); see also ERIC CLARK, *THE REAL TOY STORY: INSIDE THE RUTHLESS BATTLE FOR AMERICA’S YOUNGEST CONSUMERS* 148–49 (2007) (disclosing that Wendy’s quadrupled its spending on the toys in its kids’ meals after conducting a study revealing the significant majority of parents who are influenced by their children’s food preferences and the influential role toys play in that decision).

three to nine during the first ten days of the McDonald's Teenie Beanie Baby campaign.³⁹ Moreover, these promotions usually offer numerous variations of a toy, thereby encouraging children to make repeat visits to obtain the complete set.⁴⁰

B. Taking a Different Approach: The Healthy Food Ordinance

Recognizing the appeal of kids' meal toys and believing more needed to be done than the fast food industry's self-regulated efforts to curb unhealthy eating among children, Santa Clara County enacted a law restricting restaurants from providing toys in kids' meals that were excessively high in total calories, sodium, fat, and sugar.⁴¹ The ordinance prevents any kids' meal from providing a toy incentive if the meal contains more than 485 calories, 600 milligrams of sodium, thirty-five percent of total calories from fat, more than ten percent of total calories from saturated fats, and more than ten percent of calories from added sugars.⁴²

Six months later, in November 2010, San Francisco's Board of Supervisors voted to enact a similar ordinance, "regulat[ing] the sales practices of restaurants physically packaging or tying a free toy (or other incentive item) with unhealthy food for children."⁴³ San Francisco's Healthy Food Incentives Ordinance,⁴⁴ which took effect in December 2011, requires that all meals offering a toy incentive not only include a fruit and vegetable,⁴⁵ but also contain *less than*: 600

39. See CLARK, *supra* note 38, at 149 (recounting that following the success of toy campaigns, such as the McDonald's Teenie Beanie Baby promotion, some joked that fast food restaurants were "now toy stores serving food on the side"); SCHLOSSER, *supra* note 35, at 47 (explaining that during the first ten days of launching its Teenie Beanie Baby promotion, McDonald's sold over 100 million Happy Meals, doubling its sales).

40. See CLARK, *supra* note 38, at 149 (disclosing that as part of Burger King's *Rugrats* promotion, the fast food company offered twelve collectible toys and four wristwatches, resulting in double-digit sales increases); SCHLOSSER, *supra* note 35, at 47 (revealing that in 1999 McDonald's offered over eighty different types of Furby toys).

41. See Sharon Bernstein, *San Francisco Bans Happy Meals*, L.A. TIMES (Nov. 2, 2010), <http://articles.latimes.com/2010/nov/02/business/la-fi-happy-meals-20101103> (discussing the impetus behind the Healthy Food Ordinance).

42. SANTA CLARA, CAL., CODE OF ORDINANCES § A18-352 (2010).

43. S.F., CAL., HEALTH CODE art. 8, § 471.1 to .9 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow "Health Code" hyperlink; then follow "Article 8: Food and Food Products" hyperlink). The Ordinance defines "incentive item" as "any toy, game, trading card, admission ticket or other consumer product, whether physical or digital, with particular appeal to children and teens but not including . . . any coupon, voucher, ticket, toke, code, or password." *Id.* § 471.3.

44. The focal point of this piece is San Francisco's ordinance.

45. Specifically, the Healthy Food Ordinance requires that qualifying meals contain at least 0.5 cups of fruits and 0.75 cups or more of vegetables, excepting meals served at breakfast. *Id.* § 471.4.

calories, 640 milligrams of sodium, thirty-five percent of total calories from fat, and ten percent saturated fat.⁴⁶ Unlike previous health mandates that only placed restrictions on certain types of restaurants, the Healthy Meal Ordinance applies to all restaurants, regardless of how many other locations they own or whether they provide fast food or sit-down service.⁴⁷

C. *Constitutional Issues Implicated by the Ordinance*

1. *Modern dormant Commerce Clause*

The Ordinance warrants review under the dormant Commerce Clause because many of the major companies affected by its mandates are national corporations, which market products in interstate commerce. To understand the dormant Commerce Clause, it is necessary to start with the Commerce Clause, which declares that “Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.”⁴⁸ Implicit in this doctrine is its negative inverse, known as the dormant Commerce Clause, which limits a state or municipality’s ability to implement regulations affecting interstate commerce⁴⁹ without Congress’s authority.⁵⁰ The dormant Commerce

46. *Id.* The Ordinance also outlines standards for single food items, which must contain less than thirty-five percent of total calories from fat and less than ten percent of calories from added sugars. *Id.*

47. *Compare id.* § 471.3 (applying to any retail food establishment), with Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573 (2010) (regulating only chain restaurants operating twenty or more stores under the same name).

48. U.S. CONST. art. I, § 8, cl. 3; *see* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 182–83 (1824) (defining commerce as “intercourse” between and among states). To determine whether Congress has the authority to regulate a particular activity, courts typically ask whether it has “such a close and substantial relation to interstate commerce.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). Under the Commerce Clause, Congress has the authority to regulate both the channels—such as highways, rivers, railroads, and airways—as well as the instrumentalities—including trucks, boats, trains, and airplanes—that transport commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

49. Modern jurisprudence pertaining to the Commerce Clause reveals divergent interpretations of where to draw the line between commercial and non-economic activities. *Compare* *United States v. Morrison*, 529 U.S. 598, 613 (2000) (reasoning that gender-based violence was not commerce and therefore could not be regulated by Congress), *and* *Lopez*, 514 U.S. at 557, 561 (narrowing the definition of “interstate commerce” and determining that a federal law prohibiting individuals from knowingly possessing a gun in a school zone did not substantially affect interstate commerce and was therefore unconstitutional), *with* *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (holding it constitutional for Congress to regulate commerce among the states by prohibiting the cultivation and possession of medicinal marijuana).

50. *See* *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003) (explaining that “although the [Commerce] Clause is phrased as an affirmative grant of congressional power, it is well established that it contains a negative or ‘dormant’ aspect” that restricts states from unjustifiably discriminating

Clause, therefore, acts as a safeguard against economic protectionism by the states.⁵¹

In modern dormant Commerce Clause jurisprudence, the Supreme Court has identified three scenarios in which it will invalidate a state or municipal law.⁵² First, if a law is overtly discriminatory against out-of-state commerce, it is considered per se invalid.⁵³ In *City of Philadelphia v. New Jersey*,⁵⁴ the Court overturned a New Jersey statute that explicitly restricted the importation of most out-of-state solid waste to reduce the prevalence of landfills in the state.⁵⁵ The Court explained that a law, such as the one at issue, which “overtly blocks the flow of interstate commerce at a State’s borders,” is subject to a stricter standard of judicial review.⁵⁶

Second, if a state or municipal law is facially neutral, it may still violate the dormant Commerce Clause if it has a discriminatory effect or purpose.⁵⁷ For example, in *Hunt v. Washington State Apple Advertising Commission*,⁵⁸ the Court held that North Carolina’s statute regarding the labeling of apple containers violated the dormant Commerce Clause because it placed an unconstitutional burden on the State of Washington, the nation’s largest producer of apples.⁵⁹ The statute in question prevented apple producers from using any label on their apple containers unless it followed the United States

against or excessively burdening interstate commerce).

51. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521–22 (1935) (asserting that states and local regulations may not place an undue burden on interstate commerce); *Am. Marine Rail NJ, LLC v. City of Bayonne*, 289 F. Supp. 2d 569, 578 (D.N.J. 2003) (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)) (alleging that the dormant Commerce Clause’s purpose is to prevent states from favoring in-state commerce at the expense of out-of-state economies).

52. Lauren F. Gizzi, Comment, *State Menu-Labeling Legislation: A Dormant Giant Waiting to be Awoken by Commerce Clause Challenges*, 58 CATH. U. L. REV. 501, 506 (2009).

53. *Id.* at 510.

54. 437 U.S. 617 (1978).

55. See *id.* at 625 (believing that this would prevent environmental hazards associated with improper waste disposal).

56. See *id.* at 624 (alleging that overt attempts to regulate interstate commerce constitute pure “economic protectionism”).

57. Gizzi, *supra* note 52, at 511.

58. 432 U.S. 333 (1977).

59. See *id.* at 350–52 (reasoning that the discriminatory nature of the statute unlawfully imposed a greater financial burden on Washington apple producers by: requiring them to change their labels solely for containers shipped to North Carolina; preventing them from advertising their stricter standards for apple quality in North Carolina; forcing them to lower their standards to those outlined in the USDA; and providing a competitive advantage for North Carolina growers who only had to comply with one labeling standard). A multi-million dollar operation, Washington’s commercial production and sale of apples contributed substantially to its economy. *Id.* at 336. Washington apple producers shipped 500,000 containers of apples to North Carolina each year. *Id.* at 337.

Department of Agriculture's grading system.⁶⁰ This substantially burdened states, such as Washington, which used their own industry-accepted grading system.⁶¹

Third, even if the state or municipal law is not discriminatory on its face, in its effect, or in its purpose, it may be deemed unconstitutional if its burden on interstate commerce outweighs the state's purported interests.⁶² Statutes that do not directly discriminate against out-of-state commerce are subject to the *Pike v. Bruce Church, Inc.*⁶³ balancing test.⁶⁴ In *Pike*, the Supreme Court held that an Arizona law preventing local cantaloupe from being packaged out-of-state violated the dormant Commerce Clause because the state's interest in promoting the reputation of Arizona growers did not outweigh the economic burden imposed upon the respondent cantaloupe grower.⁶⁵ The *Pike* balancing test was again utilized in *Brown & Williamson Tobacco Corp. v. Pataki*.⁶⁶ There, the United States Court of Appeals for the Second Circuit deemed the section of New York's Public Health Statute prohibiting cigarette sellers and common contract carriers from selling and distributing cigarettes directly to New York consumers constitutional under the dormant Commerce Clause.⁶⁷ Applying the *Pike* balancing test, the court determined that the statute's interference with interstate commerce was not excessive in light of the state's substantial interest in protecting the health of its minors by limiting their access to cigarettes.⁶⁸

60. See *id.* at 336 (asserting that the state of Washington's grading system was at least equivalent, if not superior, to the standards developed by the U.S. Department of Agriculture).

61. See *id.* at 338 (ruling that North Carolina's grading restrictions would unduly burden Washington State apple producers because it would require them to abandon their already-established, well-recognized, and highly expensive grading system).

62. Cf. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-74 (1981) (upholding a state ban on plastic nonreturnable milk containers because its principal purpose sought to conserve natural resources and prevent solid waste disposal problems, not discriminate between interstate and intrastate commerce).

63. 397 U.S. 137 (1970).

64. See *id.* at 142 (establishing that such statutes will be upheld as long as their subsequent burdens do not outweigh the government interest involved and this interest could not be achieved through less burdensome means).

65. See *id.* at 144, 146 (contending that the law may have been upheld had the government's interest been more compelling).

66. 320 F.3d 200 (2d Cir. 2003).

67. *Id.* at 217.

68. See *id.* (reasoning that the statute's effects on interstate commerce were de minimis and incidental "at most" because it only limited one method for selling cigarettes to smokers in New York and did not "obstruct or impede the flow of cigarettes into New York State").

2. *Commercial speech and the First Amendment*

The Ordinance has also generated concerns that it unlawfully infringes on companies' commercial speech rights.⁶⁹ Just because a product is bought or sold, however, does not automatically qualify the related speech as commercial.⁷⁰ Two important factors in identifying commercial speech are the existence of a speaker—typically the seller—and an audience—the consumer.⁷¹ The Supreme Court has consistently identified commercial speech as expression that does “no more than propose a commercial transaction,”⁷² involves the economic interest of the seller and consumer,⁷³ and is likely to influence the consumer's commercial decision-making.⁷⁴

Traditionally, commercial speech was not considered a guaranteed right under the First Amendment⁷⁵ of the United States Constitution.⁷⁶ Not until *Bigelow v. Virginia*⁷⁷ did the Supreme Court recognize that the First Amendment's protection of speech extended to paid commercial advertisements.⁷⁸ Concerned about paternalism, the Court reasoned that, while in some cases advertising “may be subject to reasonable regulation that serves a legitimate public interest[,]” it should not be “stripped of all First Amendment protection.”⁷⁹ The Court reaffirmed this position the following year

69. Gordon, *supra* note 14.

70. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) (holding that although donations were sought, selling religious literature did not constitute a commercial activity that could be restricted by the government).

71. *Kasky v. Nike, Inc.*, 45 P.3d 243, 256 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *dismissed*, 539 U.S. 654 (2003) (per curiam) (dismissing writ of certiorari as improvidently granted).

72. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

73. See *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720, 732 (Cal. 2000) (referencing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980)).

74. See *Kasky*, 45 P.3d at 262 (explaining that regardless of the subject of the speech under question, it is considered commercial if it will sway the consumer to make a desired commercial decision).

75. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

76. See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (recognizing that the Constitution imposes no restraint upon the government with respect to the regulation of “purely commercial advertising”); see also Nicki Kennedy, Comment, *Stop in the Name of Public Policy: Limiting “Junk Food” Advertisements During Children's Programming*, 16 COMMLAW CONSPECTUS 503, 507 (2008) (explaining that the Supreme Court did not view commercial speech as constitutionally protected until 1975).

77. 421 U.S. 809 (1975).

78. See *id.* at 818 (ruling that there should not be a blanket restriction against advertisements receiving First Amendment protection merely because they appear in the form of an advertisement).

79. *Id.* at 826.

in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁸⁰ ruling that speech merely proposing a commercial transaction deserves at least some protection under the First Amendment.⁸¹

Four years later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁸² the Court developed the current test to determine whether restrictions on commercial speech are unconstitutional under the First Amendment.⁸³ Only commercial speech that is lawful and not false or misleading is subject to First Amendment protection.⁸⁴ Thus, determining whether the expression in question is inherently deceptive or misleading is the first step in the four-pronged *Central Hudson* test.⁸⁵ Second, a court must assess whether the asserted government interest is substantial.⁸⁶ Third, the limitation on commercial speech must directly advance the government's interest.⁸⁷ And finally, the regulation must be narrowly tailored, meaning it must be no more extensive than necessary to serve that interest.⁸⁸

In *Lorillard Tobacco Co. v. Reilly*,⁸⁹ the Supreme Court employed the *Central Hudson* test to overturn state regulations limiting the way manufacturers marketed, sold, and distributed cigars and smokeless tobacco products in Massachusetts.⁹⁰ The regulations at issue banned

80. 425 U.S. 748 (1976).

81. *Id.* at 762 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

82. 447 U.S. 557 (1980).

83. *Id.* at 566. The *Central Hudson* test applies a form of intermediate scrutiny. See Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 860 (2010) (characterizing the *Central Hudson* test as falling between strict scrutiny review, which courts apply to review restrictions on other forms of speech, and rational basis review, which courts reserve for regulations that do not censure speech).

84. See *Cent. Hudson*, 447 U.S. at 566 (articulating that this is the threshold question of commercial speech analysis).

85. See *id.* (applying step one of the four-part test to determine that the expression under question was neither inaccurate nor unlawful).

86. See *id.* at 568–69 (asserting that the government's two goals in banning an electrical utility's promotional advertising—ensuring energy conservation and fair utility—constituted substantial interests, consequently passing the second prong of the test).

87. See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (“[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”).

88. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (explaining that to satisfy the *Central Hudson* test, the law under question must be a “reasonable fit” between the government's substantial interest and the means with which it seeks to achieve that interest).

89. 533 U.S. 525, 556 (2001).

90. See *id.* at 565–66 (declaring that Massachusetts's regulations on the outdoor and point-of-sale advertising of tobacco failed the third and fourth steps of the *Central Hudson* test).

outdoor advertisements promoting cigars or smokeless tobacco within a 1000-foot radius of any school or playground in Massachusetts.⁹¹ Although the state had a substantial and compelling interest in preventing minors' tobacco usage, the Supreme Court concluded that the Massachusetts Attorney General failed to prove that these regulations were not more extensive than necessary, as required by the fourth prong of *Central Hudson* test.⁹² Likewise, the Court deemed the restrictions prohibiting stores from displaying tobacco advertisements lower than five feet from the floor an unconstitutional restriction of commercial speech.⁹³ It reasoned that the "blanket height restriction [did] not constitute a reasonable fit" with the state's aim to decrease underage tobacco usage.⁹⁴

In one of the Supreme Court's most recent decisions addressing the protection of speech under the First Amendment, *Sorrell v. IMS Health Inc.*,⁹⁵ the Court determined that Vermont's law restricting the sale and use of physicians' prescriber-identifying information triggered heightened scrutiny under the First Amendment.⁹⁶ Contrary to the majority, Justice Breyer's dissenting opinion argued that the statute constituted nothing more than an economic regulation and should instead be subject to intermediate scrutiny under *Central Hudson*.⁹⁷ The Court, however, ultimately adopted a very broad definition of speech, characterizing the "creation and dissemination of information [as] speech within the meaning of the First Amendment."⁹⁸

91. See *id.* at 561 (finding that the Massachusetts Attorney General inappropriately based this blanket regulation on a prior FDA ruling implementing the same requirements without adequately considering the diverse impacts these restrictions would have on varying geographical landscapes).

92. See *id.* at 565 (pointing out that even though the regulations had the well-intentioned aim of restricting children's exposure to tobacco, they would completely and unfairly eliminate lawful advertising to adult consumers in some parts of Massachusetts).

93. *Id.* at 567.

94. See *id.* at 566–67 (reasoning that the height requirement was arbitrary and illogical because not all children are under five-feet tall and even if they were, the displays would still be visible to them).

95. 131 S. Ct. 2653 (2011).

96. *Id.* at 2659.

97. See *id.* at 2675 (Breyer, J., dissenting) ("Vermont's statute neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view."). Similarly, the United States Court of Appeals for the First Circuit has characterized prescriber-identifying information—at issue in *Sorrell*—as "a mere 'commodity' with no greater entitlement to First Amendment protection than 'beef jerky.'" *Id.* at 2666 (majority opinion) (citing *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52–53 (1st Cir. 2008)).

98. *Id.* at 2667.

3. *Substantive due process and the Fourteenth Amendment*

Finally, the Ordinance calls into question the permissibility of San Francisco's authority to determine what children should eat⁹⁹—a role traditionally reserved for parents.¹⁰⁰ San Francisco's proposal generated much debate among consumers, consumer advocacy and health organizations, and the food industry regarding this issue.¹⁰¹ The Fourteenth Amendment of the United States Constitution forbids the states from depriving any individual of "life, liberty, or property, without due process of law."¹⁰² The Due Process Clause of the Fourteenth Amendment is elemental in ensuring that states and municipalities do not overstep their bounds when exercising their police powers.¹⁰³

In determining whether a law violates substantive due process under the Fourteenth Amendment, the court first determines whether the liberty interest at issue is a fundamental right.¹⁰⁴ The

99. S.F., CAL., HEALTH CODE art. 8, § 471.1 to .9 (2011), *available at* <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow "Health Code" hyperlink; then follow "Article 8: Food and Food Products" hyperlink).

100. See Abramson, *supra* note 13 ("Feeding our child is an essential part of our responsibility as a loving parent [sic].").

101. Part of the challenge in imposing restrictions on fast food in the name of combating obesity is that there are numerous "contributing" factors. See Sharon Bernstein, *Happy Meal Toys Could Be Banned in Santa Clara County*, L.A. TIMES (Apr. 27, 2010), <http://articles.latimes.com/2010/apr/27/business/la-fi-happy-meals-20100427>

(quoting Daniel Conway, spokesman for the California Restaurant Association, who claimed that if the government "wants to take away the toys that are making kids fat, take away Xboxes, take away PlayStations, take away flat-screen TVs").

102. U.S. CONST. amend. XIV, § 1. The Due Process Clause covers both procedural due process—which protects an individual's right to fair and impartial legal proceedings—and substantive due process—which safeguards an individual's liberties from government interference and is subsequently the focus of this section. See *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972) (defining procedural due process); *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (defining substantive due process). For the purposes of this Comment, this section will only touch upon the principles of substantive due process that are most relevant to examining the tension between parents' fundamental right to take care of their children and the state's authority to promote the health and well-being of its citizens.

103. "Police powers" refer to the authority states delegate to cities and municipalities, allowing them to implement regulations that best protect and promote the health, safety, and welfare of their citizens. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (providing examples of the traditional police powers such as, "[p]ublic safety, public health, morality, peace and quiet, [and] law and order"); Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89, 89 (Supp. s1 2011) (defining "police power" as "the authority to regulate for the health, safety, and welfare of the community"). Here, the California Constitution has explicitly delegated such police powers to its cities, including San Francisco. See CAL. CONST. art. 11, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.").

104. See *Cruzan v. Mo. Dept. of Health*, 497 U.S. 261, 281 (1990) (right to refuse medical treatment is a fundamental right); *Zablocki v. Redhail*, 434 U.S. 374, 383

type of asserted interest indicates which level of judicial review the court should apply.¹⁰⁵ If the interest at issue is not a fundamental right, the court applies a more flexible standard, rational basis review, which asks whether the law is rationally related to a legitimate government purpose.¹⁰⁶ Under rational basis review, the party challenging the legality of the law holds the burden of proof.¹⁰⁷ As long as the court believes the government sought to achieve a legitimate purpose through reasonable means, it will uphold the constitutionality of the law at issue.¹⁰⁸

On the other hand, if the court deems the asserted interest a fundamental right, it must apply strict scrutiny to determine whether the law in question is necessary to further a compelling government interest.¹⁰⁹ Under strict scrutiny review, the government has the burden of proof to demonstrate that the law at issue was necessary to achieve its compelling interest.¹¹⁰ To be considered “necessary,” the law must be narrowly tailored—that is, not more burdensome than

(1978) (right to marriage is a fundamental right); *Griswold*, 381 U.S. at 485 (1965) (right to control reproduction is a fundamental right).

105. See *Griswold*, 381 U.S. at 503–04 (White, J., concurring) (acknowledging the importance of characterizing the nature of the right at issue to determine the proper level of judicial review).

106. See *Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

107. The challenger must prove that the law does not advance any legitimate government interest or is not a reasonable means to attain that interest. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993) (explaining that because an issue receiving rational basis review holds a “strong presumption of validity,” the party challenging its legality has “the burden ‘to negative every conceivable basis that might support it’” (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973))).

108. In *Washington v. Glucksberg*, the Supreme Court determined that there was no fundamental right to physician-assisted suicide because it was not deeply rooted in historical, legal traditions, and, on the contrary, had been universally criminalized throughout history. 521 U.S. 702, 710 (1997). The Court ultimately upheld the Washington law prohibiting physician-assisted suicide, finding that it reasonably served several legitimate government interests—including preserving human life; preventing suicide; protecting “the integrity and ethics of the medical profession;” safeguarding vulnerable groups, such as the impoverished, elderly, and terminally ill; and avoiding a slippery slope effect that would lead to voluntary, or even involuntary euthanasia. *Id.* at 728–32.

109. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (stating that a compelling interest is one “of the highest order” that would legitimize infringing upon a fundamental liberty); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (establishing that a stricter level of scrutiny ought to be applied to cases that facially appear to violate the Constitution, hinder the political process, or discriminate against “discrete and insular minorities”).

110. See *Reno v. Flores*, 507 U.S. 292, 341 (1993) (Stevens, J., dissenting) (asserting that the government had the burden to prove that detention supported a legitimate interest).

necessary to achieve the government's ends; otherwise, it will fail strict scrutiny.¹¹¹

While due process is essential to protecting the liberty interests of citizens from states' or municipalities' unlawful exercise of police powers, clearly defining what constitutes a protected liberty interest is less straightforward.¹¹² The Supreme Court has never explicitly asserted what constitutes a "compelling" government interest, but it has acknowledged that a state or municipality may interfere with citizens' fundamental rights, if such interference is necessary to protect "health, safety, and general welfare."¹¹³ For example, in *West Coast Hotel Co. v. Parrish*,¹¹⁴ the Court held that the government's attempt to prevent the unlawful exploitation of female workers was compelling for two reasons—such exploitation not only adversely affected the workers themselves, but also burdened taxpayers who were forced to pay what the workers lost in wages.¹¹⁵ Citing these two compelling interests, the Court subsequently upheld the constitutionality of the minimum wage law in question.¹¹⁶

II. THE HEALTHY FOOD ORDINANCE SURVIVES CONSTITUTIONAL CHALLENGE BECAUSE IT IS NARROWLY TAILORED, ADVANCES COMPELLING INTERESTS, AND DOES NOT UNDULY BURDEN INTERSTATE COMMERCE

A. *Effect on Interstate Commerce*

Because many of the companies affected by the Healthy Food Ordinance are national corporations, the Ordinance invariably

111. See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (finding that while the government had a compelling interest to compensate victims of crimes, the statute was not narrowly tailored to achieve this end and consequentially unconstitutional).

112. Only the first eight amendments of the Constitution enumerate protected individual rights. U.S. CONST. amends. I–VIII. For asserted interests not included in the text of the Constitution, the Supreme Court must rely on precedent to determine whether the interest is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); "deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); or essential to "define one's own concept of existence," *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion).

113. See *Yoder*, 406 U.S. at 220 (determining that the compulsory education law did not constitute a compelling interest because it was not necessary to protect the health and welfare of children).

114. 300 U.S. 379 (1937).

115. *Id.* at 399.

116. See *id.* at 400 (affirming the Supreme Court of Washington's judgment to validate a state law aimed at protecting women and minors from unjust working conditions).

affects interstate commerce and therefore warrants review under the dormant Commerce Clause. For a local law to withstand a challenge under the dormant Commerce Clause, the state or municipality—in this case San Francisco—must have a substantial local interest that does not impose excessive burdens on interstate commerce.¹¹⁷

On its face, the Healthy Food Ordinance does not discriminate against out-of-state interests, nor is it motivated by simple economic protectionism, as was the case of the government actions at issue in *City of Philadelphia* and *Hunt*.¹¹⁸ Unlike the New Jersey statute at issue in *City of Philadelphia*, which drew territorial distinctions that unlawfully excluded the importation of solid or liquid waste from other states,¹¹⁹ the Healthy Food Ordinance does not prevent certain restaurants from providing toys in kids' meals because they are out-of-state companies.¹²⁰ Instead, it focuses on the nutritional quality of the meal itself, regardless of whether the restaurant is a local business or nationwide chain.¹²¹ Nor does the Healthy Food Ordinance have a discriminatory purpose or effect like the North Carolina statute that was struck down in *Hunt*.¹²² Its stated intent is "to improve the health of children and adolescents in San Francisco by setting healthy nutritional standards for children's meals sold at restaurants in

117. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (holding that a law interfering with interstate commerce is constitutional unless its burden on interstate commerce significantly outweighs a state's legitimate interests); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970) (overturning an Arizona law imposing strict requirements on the production and packaging of fruits and vegetables shipped to other states because the burdens outweighed the state's de minimis interest to promote its growers' reputations).

118. See *City of Phila. v. New Jersey*, 437 U.S. 617, 629 (1978) (finding a New Jersey law facially discriminatory and therefore in violation of the dormant Commerce Clause); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352–53 (1977) (overruling a North Carolina law because of its discriminatory effect).

119. *City of Philadelphia*, 437 U.S. at 618.

120. Similar to the statute at issue in *Clover Leaf Creamery*, the Healthy Food Ordinance ensures a legitimate state interest—protecting children's health—as opposed to promoting "simple economic protectionism," as was the case in *City of Philadelphia*, 437 U.S. at 624.

121. The Healthy Food Ordinance is similar to the Maryland statute preventing petroleum producers or refiners from operating retail service stations in Maryland in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 120–21 (1978). There, the Court pointed out that "Maryland's entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless." *Id.* at 125.

122. Compare S.F., CAL., HEALTH CODE art. 8, § 471.1 to 471.9 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow "Health Code" hyperlink; then follow "Article 8: Food and Food Products" hyperlink) (explaining that promoting healthier menu options at fast food restaurants is the impetus behind the Healthy Food Ordinance), with *Hunt*, 432 U.S. at 352–53 (ruling that a North Carolina law was unconstitutional because of its discriminatory effect), and *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 676–78 (1981) (plurality opinion) (deeming an Iowa statute unlawful because it had a discriminatory purpose).

combination with free toys or other incentive items.”¹²³ Additionally, the law does not place this burden solely on large chain restaurants, but instead broadly defines “restaurant” as any “establishment that . . . prepares food for human consumption at the retail level.”¹²⁴ Therefore, a restriction prohibiting restaurants from providing toys in kids’ meals that fail to meet the established nutritional requirements burdens both local *and* out-of-state businesses.¹²⁵

Based on modern dormant Commerce Clause jurisprudence, the Healthy Food Ordinance would likely pass constitutional muster under the *Pike* balancing test because the Ordinance advances a legitimate state interest that outweighs any potential burdens on interstate commerce.¹²⁶ Unlike the statute at issue in *Pike*, which was solely driven by the state’s economic interests,¹²⁷ the Healthy Food Ordinance is a public health issue, an area “where the propriety of local regulation has long been recognized.”¹²⁸ The Healthy Food Ordinance more closely resembles the New York law regulating the shipment and sale of cigarettes that was upheld in *Pataki*.¹²⁹ Not only do the Healthy Food Ordinance and the New York statute in *Pataki* share the same governmental interest—safeguarding the health of minors by limiting their exposure to products deemed to adversely affect their health—but this concern outweighs the de minimis effects both statutes have on interstate economies.¹³⁰

123. HEALTH CODE art. 8, § 471.2.

124. *Id.* § 471.3.

125. In upholding the Minnesota statute at issue in *Clover Leaf Creamery*, the Court noted that a law’s detrimental impacts on its own, in-state economic interests usually indicate an absence of economic protectionism. 449 U.S. 456, 473 n.17 (1981).

126. See *Exxon*, 437 U.S. at 126 (clarifying that a state regulation’s impact on interstate commerce does not, in and of itself, constitute a violation of the dormant Commerce Clause). Central to assessing whether a state or municipality has the power to regulate interstate commerce is the question of whether the state or municipality’s interest is deemed sufficient to justify this commercial interference. *Id.* As articulated by the Court in *Clover Leaf Creamery*: “[o]nly if the burden on interstate commerce clearly outweighs the State’s legitimate purposes does such a regulation violate the Commerce Clause.” 449 U.S. at 474.

127. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970) (explaining that the Arizona act was passed to prevent tarnishing the reputation and returns of Arizona growers).

128. See *id.* (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 796 (1945) (Douglas, J., dissenting)).

129. Compare S.F., CAL., HEALTH CODE art. 8, § 471.4 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow “Health Code” hyperlink; then follow “Article 8: Food and Food Products” hyperlink) (regulating incentives at all restaurants in the county), with *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216, 219 (2d Cir. 2003) (reasoning that preventing direct shipment of cigarettes to the consumer places was a “de minimis burden on interstate commerce” because it “applies evenhandedly to both in-state and out-of-state businesses and does not impede the flow of goods in interstate commerce”).

130. In *Pataki*, both parties agreed that a state has a legitimate interest in

Recent initiatives by fast food purveyors to improve the nutritional quality of kids' meals tip the *Pike* balancing scale in favor of the Healthy Food Ordinance.¹³¹ Restaurants affected by the Ordinance could still argue that it imposes an undue burden because they would have to change their business operations and marketing campaign only in the counties that have enacted the Healthy Food Ordinance.¹³² This contention is severely weakened by fast food restaurants' recent attempts to offer and promote more wholesome kids' meals.¹³³ In light of these already-proposed improvements, fast food purveyors would avoid the burdensome task of having to reinvent their menus as a result of the new regulations.¹³⁴ Moreover, some of these restaurants already offer several existing combinations that satisfy all but the Healthy Food Ordinance's vegetable requirement.¹³⁵

protecting the health of its citizens by restricting minors' access to cigarettes and, more generally, decreasing cigarette consumption. See 320 F.3d at 217 (declaring that the New York statute at issue effectively promotes this interest and only has incidental effects on interstate commerce).

131. See *Happy Meal Gets a Makeover*, THE CHART (July 26, 2011, 1:35 PM), <http://thechart.blogs.cnn.com/> (reporting that "[t]he new Happy Meal with four pieces of McNuggets, apple slices, smaller French Fries and 1% milk has 410 calories, 19 grams of fat and 560 milligrams of sodium"); see also *infra* Part III.A (detailing some of the industry's menu changes following the passage of the Ordinance).

132. Not only would companies have to make concessions for the counties that have enacted similar bans, but they would have to make further adjustments depending on the nutritional standards established by the state or municipality. For example, the bill proposed by Councilman Leroy Comrie in New York City sets stricter standards than those required in San Francisco. Each meal would have to contain less than 500 calories and 600 milligrams of sodium, as opposed to San Francisco's 600 calorie and 640 milligrams of sodium maximums. Compare Meredith Melnick, *New York City Council Considers Banning Happy Meal Toys*, TIME (Apr. 6, 2011), <http://healthland.time.com/2011/04/06/new-york-city-council-considers-banning-happy-meal-toys/> (summarizing New York City's proposed standards), with S.F., CAL., HEALTH CODE art. 8, § 471.4 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow "Health Code" hyperlink; then follow "Article 8: Food and Food Products" hyperlink) (outlining San Francisco's nutritional requirements).

133. Presumably, companies like McDonald's and Burger King have already changed their marketing campaign, advertising only their healthier items to children. See PEELER, *supra* note 28, at 19 (outlining the pledge to only advertise healthier offerings that fast food companies like McDonald's and Burger King have volunteered to follow).

134. See *infra* Part III.A (noting several fast food companies' attempts to improve the nutritional quality of their kids' meals). In July 2011, McDonald's announced its short-term and long-term goals to continue making Happy Meals healthier for children by significantly reducing sodium, added sugars, saturated fats, and calories. *Happy Meal Gets a Makeover*, *supra* note 131. Moreover, these changes are purportedly voluntary, as opposed to being instigated by the Healthy Food Ordinance. See Rexrode, *supra* note 32 (quoting Cindy Goody, the senior director of nutrition for McDonald's, who denied that the Happy Meal changes resulted from recent regulations like the Healthy Food Ordinance).

135. With the addition of a vegetable, the new McDonald's Happy Meal containing four pieces of chicken McNuggets, apples slices, French fries, and one-

Opponents might also challenge the Ordinance's legality under the dormant Commerce Clause by portraying the link between the consumption of kids' meals and childhood obesity as tenuous at best.¹³⁶ Dormant Commerce Clause jurisprudence, however, suggests that if the law affecting interstate commerce is an attempt to protect public health or safety, it will likely be upheld because states have traditionally assumed the duty of ensuring the well-being of their citizens.¹³⁷ Courts are more lenient toward laws protecting the health and safety of citizens even if their effects are slight and the means of achieving those results are not wholly direct.¹³⁸

B. *Restraint on Commercial Speech*

While the Healthy Food Ordinance does not unlawfully impinge on the dormant Commerce Clause, it is susceptible to First Amendment challenges. However, unlike prior attempts to regulate child-targeted marketing, the Ordinance does not run afoul of the commercial speech doctrine because the Ordinance is narrowly tailored and directly advances a substantial government interest.

1. *Regulating what restaurants sell, not what they say*

Similar to companies who use cartoon characters in their advertisements to directly appeal to children,¹³⁹ some fast food companies provide free toy giveaways in kids' meals as a marketing tool to entice children to buy their products.¹⁴⁰ While both advertisements and premiums targeted at children share the same

percent milk would be able to contain a toy under the Ordinance's health requirements. *Happy Meal Gets a Makeover*, *supra* note 131.

136. See Hill, *supra* note 4, at 108–09 (“[F]ew studies have been conducted to identify the specific factors in the current environment that facilitate obesity.”).

137. See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 687 (1981) (Rehnquist, J., dissenting) (criticizing the majority opinion for “intrud[ing] upon the fundamental right of the States to pass laws to secure the safety of their citizens”); *Jacobson v. Massachusetts*, 197 U.S. 11, 28–29 (1905) (granting greater judicial deference to state regulation pertaining to public health concerns); see also Gizzi, *supra* note 52, at 509 (asserting that issues concerning the public well-being are “quintessential” subjects of state or local, as opposed to federal, regulation).

138. See *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 217 (2d Cir. 2003) (maintaining that even if the regulations only slightly decrease the sale of cigarettes to minors, the underlying government interest was foremost to the regulations being upheld).

139. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 558 (2001) (noting the significant increase in tobacco products purchased by youths following the introduction of Joe Camel).

140. Roy Bergold, the former head of advertising at McDonald's, stated that “companies have found that kids are a lot more tempted by the toys than the food.” Roy T. Bergold, Jr., *The Obesity Debate*, QSR MAGAZINE (Nov. 2010), <http://www.qsrmagazine.com/roy-bergold/obesity-debate>.

goals—appealing to children to establish brand loyalty and increase consumption—the Healthy Food Ordinance is meaningfully different from prior attempts to restrict child-targeted marketing because the Ordinance regulates companies’ business conduct, as opposed to their speech.¹⁴¹ Unlike toy incentives offered in kids’ meals, the Court deemed the information at issue in *Sorrell* “speech” because it was “essential to advance human knowledge and to conduct human affairs.”¹⁴² Here, the language of the Ordinance specifically states: “[t]he City does not seek to limit or regulate any speech, communication or advertising on the part of any restaurant in any manner. Nor does the City seek to ban entirely the practice of tying free toys with children’s meals.”¹⁴³ The distinction is important because of the constitutional issues raised by opponents of the FTC’s efforts to restrict junk food advertisements aimed at children.¹⁴⁴ At most, the Healthy Food Ordinance would have an *indirect* impact on commercial speech because companies would have to change their advertising schemes.¹⁴⁵ As the Supreme Court noted in *Sorrell*, the First Amendment does not preclude regulations governing conduct or commerce that merely inflict *incidental* burdens on speech.¹⁴⁶

2. *Marketing partnerships*

While the foregoing reasons demonstrate why restaurants providing toys in kids’ meals would not have a valid claim against the Healthy Food Ordinance on commercial speech grounds, companies that form marketing contracts with these restaurants to promote their movie, television show, or apparel may have a viable claim.¹⁴⁷ For

141. See Diller & Graff, *supra* note 103, at 92 tbl.2 (categorizing Santa Clara’s Healthy Food Ordinance as an attempt to regulate *business operations*).

142. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011).

143. S.F., CAL., HEALTH CODE art. 8, § 471.1 (2011), *available at* <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow “Health Code” hyperlink; then follow “Article 8: Food and Food Products” hyperlink).

144. See *supra* Part I.A.1 (discussing the constitutional hurdles that thwarted earlier government attempts to restrict child-targeted marketing).

145. The Supreme Court has traditionally viewed advertisements as commercial speech. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (permitting First Amendment protection for advertisements containing liquor prices); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (employing First Amendment protection for advertisements listing prescription drug prices).

146. See *Sorrell*, 131 S. Ct. at 2664–65 (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

147. See CLARK, *supra* note 38, at 148 (detailing the history of the Happy Meal toy from offering a McDonald’s character figurine in its primary years to today’s practice of offering toys tied with major motion pictures). In August 2011, McDonald’s launched a three-week campaign in partnership with Skechers, offering toy versions

example, capitalizing on the marketing potential of fifty-eight million customers who frequent McDonald's on a daily basis, Twentieth Century Fox (Fox) formed a partnership with McDonald's in 2009 to promote five of its upcoming blockbuster releases.¹⁴⁸ For movie studios like Fox, the packaging of, and the toy incentives in, Happy Meals are the ideal way to advertise their recent or upcoming film releases to millions of prospective movie viewers, some of whom the studio may not have reached with other forms of advertising.¹⁴⁹ Even though this commercial expression comes in the form of a toy, the Supreme Court has made clear that the First Amendment protects more than mere spoken or written words.¹⁵⁰ The Court's liberal interpretation of "speech" supports the contention that the Healthy Food Ordinance infringes upon movie studios' protected speech.¹⁵¹ Therefore, this Comment next analyzes the constitutionality of the Healthy Food Ordinance under the assumption that it does regulate speech.¹⁵²

3. *Surviving Central Hudson*

If the Healthy Food Ordinance constitutes a restriction of commercial speech, it would be subject to intermediate scrutiny under *Central Hudson*.¹⁵³ Comparisons with *Lorillard* and the FTC's failed attempt to restrict child-targeted advertising provide an insightful lens through which to analyze the legality of the Healthy

of Twinkle Toes, Skechers Kids' sneakers for girls. Karlene Lukovitz, *McD's Latest Happy Meal Toys: Mini Skechers*, MEDIAPOST NEWS (Aug. 25, 2011, 12:31 PM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_id=157436.

148. McDonald's has also formed partnerships with other major film studios, such as Disney and DreamWorks Animation SKG Inc. See Claudia Eller, *Twentieth Century Fox Orders Up Movie Pact with McDonald's*, L.A. TIMES (May 14, 2009), <http://articles.latimes.com/2009/may/14/business/fi-ct-mcfox14> (reporting that Disney ended its ten-year partnership with McDonald's because the studio wanted to separate itself from fast food after launching a healthy-eating campaign).

149. See *id.* (revealing that the use of Happy Meal toys and packaging to promote recent releases is a popular marketing tool for movie studios that are trying to cut back on their advertising costs).

150. In depicting the versatility and comprehensiveness of the First Amendment, the Supreme Court asserted that symbolism in the form of the "unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll" still constitutes speech. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1985).

151. See *Sorrell*, 131 S. Ct. at 2667 (declaring prescriber-identifying information for pharmaceutical marketing purposes a form speech).

152. See *infra* Part II.A.3 (applying the *Central Hudson* test to analyze whether the Healthy Food Ordinance would survive commercial speech challenges).

153. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (following the precedent of *Central Hudson* to assess the constitutionality of regulations limiting commercial speech).

Food Ordinance under the commercial speech doctrine.¹⁵⁴

A court would likely uphold the Ordinance under *Central Hudson* because a municipality has a substantial interest in safeguarding children's health, which the Ordinance directly advances, and the regulation is no more extensive than necessary to achieve this interest. As long as the toy promotion is not false, misleading, or unlawful, it would at least survive the first prong of *Central Hudson*.¹⁵⁵ The Healthy Food Ordinance would pass the second prong of the *Central Hudson* test under the same rationale adopted in *Lorillard*—the Court relied on policy-based reasoning to conclude that states had a legitimate concern to regulate minors' consumption of tobacco products when tobacco use at the time was the most pressing health issue in the United States.¹⁵⁶ In *Lorillard*, the Court explained that children lack the cognitive abilities to recognize the persuasive ploys of advertising.¹⁵⁷ As previously discussed, food purveyors similarly recognize the vulnerability of children as marketing subjects and utilize techniques that directly target child consumers.¹⁵⁸ Contrary to the food industry's claim that its marketing practices only influence children's brand preferences, the World Health Organization

154. Like the regulations at issue in *Lorillard*, the Healthy Food Ordinance represents the government's attempt to protect children from marketing that could adversely impact their health. See S.F., CAL., HEALTH CODE art. 8, § 471.2 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow "Health Code" hyperlink; then follow "Article 8: Food and Food Products" hyperlink) (stating the Ordinance's purpose to promote healthier eating habits among children, particularly when they eat out at restaurants); see also *Lorillard*, 533 U.S. at 533 (citing the goals of the restrictions on tobacco advertisements as trying to decrease the high number of adolescent smokers).

155. In 1992, McDonald's Happy Meal promotion of *Batman Returns* generated public outrage among parents who blamed the fast food corporation for prompting young children to see such a graphically violent movie. See Anne Thompson & Pat H. Broeske, *Hawking 'Batman,'* ENT. WKLY. (July 10, 1992), <http://www.ew.com/ew/article/0,,311012,00.html> (conveying concerns that McDonald's falsely promoted *Batman Returns* as an appropriate film for children). This would likely be the type of false or misleading "speech" that would not warrant First Amendment protection.

156. *Lorillard*, 533 U.S. at 570; see *supra* Introduction (characterizing childhood obesity as a major health concern).

157. See *Lorillard*, 533 U.S. at 558 (referencing the Surgeon General's report and the Institute of Medicine's findings supporting the significant influence tobacco advertisements had on young people's decision to smoke cigarettes). Unlike the physicians who were the targeted audience in *Sorrell*, and whom the Supreme Court deemed were "sophisticated and experienced consumers," the government here has a greater obligation to protect children from influential marketing. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011) (citing *Edenfield v. Fane*, 507 U.S. 761, 775 (1993)).

158. See Hill, *supra* note 4, at 109 (holding marketing tactics aimed at promoting junk food directly to children partly responsible for the prevalence of childhood obesity); see also *supra* Part I.A.1 (illustrating the powerful effect kids' meal toys have in attracting child consumers).

concluded that the commercial advancement of high-calorie, low-nutrient products adversely affects children's health.¹⁵⁹

While the regulations in *Lorillard* failed the third prong of the Court's *Central Hudson* analysis, the Healthy Food Ordinance would likely survive this prong because its nutritional standards directly advance the government's interest in promoting children's health.¹⁶⁰ Kids' meal toys were specifically designed to incite children to relentlessly pester their parents to buy them fast food.¹⁶¹ In behavioral psychology, rewarding an individual for a purchase decision is a form of operant conditioning, which becomes problematic when the reward reinforces bad or unhealthy behavior.¹⁶² Unlike in *Lorillard*, where the Court disallowed Massachusetts's point-of-purchase restrictions because they failed to reasonably relate to the government's aims to dissuade minors from smoking tobacco, the Healthy Food Ordinance directly advances the government's interest in encouraging healthier eating habits among children.¹⁶³ The Ordinance's nutritional standards are not based on some arbitrary figure but instead parallel what has scientifically been found to be the acceptable maximums for children.¹⁶⁴ Therefore, restrictions on toys in kids' meals that exceed 600 calories or 650 milligrams of sodium do not constitute unreasonable, blanket requirements, as was the case with the outdoor ban and point-of-purchase restrictions in *Lorillard*.¹⁶⁵ On the contrary, these restrictions were thoughtfully and rationally designed to promote healthier food options for children.¹⁶⁶

Finally, the Healthy Food Ordinance satisfies the fourth prong of

159. WORLD HEALTH ORG., *MARKETING OF FOOD AND NON-ALCOHOLIC BEVERAGES TO CHILDREN 1* (2006), available at <http://www.who.int/dietphysicalactivity/publications/Oslo%20meeting%20layout%2027%20NOVEMBER.pdf>; see *supra* Introduction (articulating the significant impacts marketing has on children).

160. See *Lorillard*, 533 U.S. at 566–67 (noting that the blanket height restrictions on the point-of-purchase display of tobacco products do not directly advance the State's goal in limiting children's access to such products because not all youths are under five-feet tall, and even if they were, they could still look up and see the packets of cigars and smokeless tobacco).

161. See SCHLOSSER, *supra* note 35, at 43 (discussing the notion of pester power).

162. See Joanna Hull, *Playing with Children's Minds: The Psychological Effects of Tobacco Advertisements on Children*, 1 YORK SCHOLAR 1, 3 (2004) (citing Camel cigarette's "Camel Cash" promotion as a form of operant condition—enticing youths to buy cigarettes to be rewarded with free sunglasses and other giveaways).

163. Cf. *Lorillard*, 533 U.S. at 567 (holding that the blanket height restriction does not reasonably further the State's aim to decrease underage tobacco usage).

164. See HARRIS ET AL., *supra* note 3, at 47.

165. *Lorillard*, 533 U.S. at 534.

166. Cf. *id.* at 566–67 (overturning Massachusetts's ban on outdoor tobacco advertisements because the Attorney General unreasonably imposed requirements that did not take into consideration the specific and differing impacts they would have on the public depending on where individuals lived).

Central Hudson because it is not more extensive than necessary to serve San Francisco's interest. The advertisements at issue in *Lorillard* and in the FTC's advertising ban were deemed unconstitutional because they unlawfully limited adults' access to advertisements.¹⁶⁷ Even though in both cases the restrictions were aimed at protecting children's health and limiting their exposure to harmful products, they were not narrowly tailored to satisfy the fourth prong of the *Central Hudson* test.¹⁶⁸ Here, the Healthy Food Ordinance likely avoids these same constitutional pitfalls. The Healthy Food Ordinance does not have broad, sweeping effects that also adversely impact adult consumers.¹⁶⁹ Therefore, this case is distinguishable from *Lorillard* and prior attempts to restrict child-directed marketing because taking away toys in certain kids' meals would only impact children.¹⁷⁰

Moreover, San Francisco has already implemented less intrusive efforts aimed at childhood obesity, and these efforts further distinguish the Ordinance from earlier attempts to restrict marketing to children. In describing the purpose of the Ordinance, San Francisco outlined the numerous community programs it already offers—encouraging children to walk or ride their bicycles to school, discouraging soda consumption, and increasing families' access to wholesome foods—which address some of the contributing factors of childhood obesity.¹⁷¹ Additionally, because it only imposes limited restrictions—as opposed to outright bans, which was the case with earlier efforts aimed at childhood obesity—the Ordinance provides an incentive for restaurants to make the changes necessary to provide and promote more wholesome meals to children.¹⁷² These other measures demonstrate why the Healthy Food Ordinance is necessary and not excessive in addressing this multi-faceted issue.

C. *Interference with Substantive Due Process*

Even though the Ordinance survives dormant Commerce Clause

167. *Id.* at 561–63.

168. *Id.* at 561.

169. See SCHLOSSER, *supra* note 35, at 47 (explaining that Happy Meal toys advertisements are aimed at children aged three to nine).

170. *Lorillard*, 533 U.S. at 581.

171. See S.F., CAL., HEALTH CODE art. 8, § 471.1 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow “Health Code” hyperlink; then follow “Article 8: Food and Food Products” hyperlink) (listing the various other initiatives in San Francisco designed to improve children's health).

172. Cf. Pecquet, *supra* note 24 (quoting Professor Howard Beales, who pointed out that outright bans on products disincentivize companies from making improvements).

analysis and reconciles First Amendment issues that hampered previous childhood obesity regulations, it raises concerns of paternalism. Prior to the passage of the Healthy Food Ordinance, the restaurant industry lobbied hard to thwart its approval, basing its arguments on constitutional grounds.¹⁷³ The passage of the Ordinance garnered public criticism from consumers who fear the ban signifies “a paternalistic slippery slope.”¹⁷⁴ It even captured the attention of *The Daily Show with Jon Stewart*, which satirized the future of the “Crappy Meal”—devoid of its fun and colorful packaging and instead equipped with the Periodic Table of Elements, CPR instructions, and a toy figurine of Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services.¹⁷⁵

Because of the Ordinance’s paternalistic implications, substantive due process is the most logical doctrinal tool for assessing its constitutionality.¹⁷⁶ Although not explicitly stated in the Constitution, the Supreme Court has traditionally recognized parents’ right to raise their children without government interference as a fundamental interest.¹⁷⁷ From a practical standpoint, however, it would be ridiculous to imagine that anyone would challenge the Ordinance on these grounds, let alone that a court would find the Ordinance deserves strict scrutiny review. Nevertheless, the Healthy Food Ordinance lays the groundwork for states and municipalities to

173. See Gordon, *supra* note 14 (relaying California Restaurant Association spokesman Daniel Conway’s concerns that the Ordinance may violate First Amendment liberties).

174. In 2008, Mississippi Representative John Read proposed statewide legislation that would prohibit restaurants from serving obese customers. Nanci Hellmich, *Restaurants as Obesity Cops Doesn’t Sit Well*, USA TODAY (Feb. 5, 2008, 11:07 PM), http://www.usatoday.com/news/health/2008-02-05-obesity-restaurant-law_n.htm. Although Representative Read admitted the bill was merely aimed to raise public awareness of the issue, and not actually be enacted, such a proposal reveals the type of legal interventions that might follow the Healthy Food Ordinance. *Id.* But see Bernstein, *supra* note 101 (noting that some consumers believe their municipalities should enact similar bans that prohibit play areas at fast food restaurants).

175. *The Daily Show*, *supra* note 12.

176. See Travis Ramon, *San Francisco to Take Away Parents’ Rights: Ban on Happy Meals Coming*, YAHOO! VOICES (Nov. 9, 2010), http://www.associatedcontent.com/article/5990420/san_francisco_to_take_away_parents_pg2.html?cat=5 (contending that the Healthy Food Ordinance’s limitations on the options parents have when ordering kids’ meals for their children is overly intrusive and an abuse of the government’s police powers).

177. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (identifying parents’ care over their children as “perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court”); *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (categorizing a parent’s authority over one’s children as a fundamental right); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[T]he custody, care and nurture of the child reside first in the parents.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (asserting the right to protect family autonomy by controlling the upbringing of one’s children).

extend their authority from the public to private realms. Theoretically, if San Francisco can determine what meals are too unhealthy in restaurants, what is stopping local municipalities from setting limits on how many calories or how much sodium parents may feed their children at home? Therefore, assessing whether municipalities, like San Francisco, have a compelling interest in restricting what parents feed their children warrants careful consideration.

1. *Using Lorillard and West Coast Hotel to frame San Francisco's compelling interests*

The Supreme Court has traditionally held that state or municipal laws that are enacted to ensure the health, safety, and general welfare of its people do not violate the Fourteenth Amendment.¹⁷⁸ These laws, however, were primarily aimed at communicable diseases that posed a threat to the entire population.¹⁷⁹ Setting aside the debate of whether obesity constitutes a “public health” issue, the Ordinance still advances two compelling interests—the first of which is protecting the health and well-being of children by making unhealthy food less enticing.¹⁸⁰

Although a court has never had the opportunity to formally determine that preventing childhood obesity constitutes a “compelling” government interest, a comparison can be made with the Supreme Court’s view toward minors’ usage of tobacco products. In his concurring opinion in *Lorillard*, Justice Thomas highlighted the parallels between the high mortality rates resulting from tobacco use and obesity.¹⁸¹ He acknowledged that even though fast food has not been found to be addictive in the same way that science has found tobacco to be, fast food marketing that targets child consumers can

178. See *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”); *Prince*, 321 U.S. at 166 (noting that the private sphere of family life is not immune from government regulation in the furtherance of the public interest); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (overturning a parent’s challenges to the constitutionality of a regulation because the government had a legitimate interest in protecting public safety); *Reynolds v. United States*, 98 U.S. 145, 146 (1878) (same).

179. See, e.g., *Jacobson*, 197 U.S. at 39 (upholding Massachusetts’s compulsory vaccination law).

180. See S.F., CAL., HEALTH CODE art. 8, § 471.1 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow “Health Code” hyperlink; then follow “Article 8: Food and Food Products” hyperlink) (articulating the Healthy Food Ordinance’s goal to “increase the likelihood that parents will make healthier choices for their children when eating out”).

181. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 588 (2001) (Thomas, J., concurring).

have equally “deleterious consequences that are difficult to reverse.”¹⁸² Just as the Supreme Court in *Lorillard* characterized Massachusetts’s interest in restricting minors’ tobacco usage as “substantial, and even compelling,” so too would a court find that the Healthy Food Ordinance advances a compelling interest.¹⁸³ According to the Institute of Medicine’s June 2011 report on childhood obesity, “slightly more than twenty percent of children between the ages of two and five are already overweight or obese.”¹⁸⁴ Proponents of the Ordinance point out that the restrictions level the playing field between persuasive junk food marketers and parents who struggle to get their children to eat more wholesome foods.¹⁸⁵ In light of continually increasing rates of obesity and other diet-related illnesses among children and the influential role fast food marketers play in children’s food preferences, the government’s involvement in promoting healthier food choices is both pressing and necessary.¹⁸⁶

The second compelling interest pertains to the Ordinance’s attempt to quell rising healthcare expenses related to diet-related illnesses that impose economic burdens on taxpayers.¹⁸⁷ As the Supreme Court established in its *West Coast Hotel* decision, the government has a compelling interest in regulating matters that have economically adverse impacts on its citizens.¹⁸⁸ Childhood obesity is a substantial concern for states and municipalities because its economic costs continue into adulthood.¹⁸⁹ With \$168 billion being

182. *Id.* at 587; see also *supra* Part I.B.2 (discussing the persuasive impact toy incentives have on children and their food choices).

183. See *Lorillard*, 533 U.S. at 562 (explaining that despite it being a compelling interest, the regulations at issue did not narrowly target minors, but affected adults as well, for whom smoking tobacco is a lawful activity).

184. INST. OF MED., *EARLY CHILDHOOD OBESITY PREVENTION POLICIES* 1 (2011), available at http://books.nap.edu/openbook.php?record_id=13124&page=1.

185. See Bernstein, *supra* note 101 (maintaining that it took years for one consumer to get her daughter to eat healthy food after going through a period of frequenting McDonald’s just to get the Happy Meal toy).

186. See *supra* Part I (detailing the current food environment and why new regulations, like the Healthy Food Ordinance, may be needed).

187. See Nancy Hellmich, *Rising Obesity Will Cost U.S. Health Care \$344 Billion a Year*, USA TODAY (Nov. 17, 2009 10:17 AM), http://www.usatoday.com/news/health/weightloss/2009-11-17-future-obesity-costs_N.htm (estimating obesity-related health-care costs to reach \$344 billion by 2018).

188. See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (allowing the State of Washington to enact a law regulating minimum wage on the grounds that it advanced a compelling state interest by not only preventing the unlawful exploitation of workers but also protecting taxpayers from bearing the burden of paying the workers’ lost wages). But see Jacob Sullum, *The War on Fat: Is the Size of Your Butt the Government’s Business?*, REASON (Aug./Sept. 2004), available at <http://reason.com/archives/2004/08/01/the-war-on-fat/singlepage> (contending that the logic of this argument could be extended to allow the government’s involvement in such mundane and personal issues as “whether you floss regularly”).

189. See S.F., CAL., HEALTH CODE art. 8, § 471.1 (2011), available at

spent annually on obesity—over sixteen percent of the nation’s healthcare expenses—the direct and indirect effects of obesity are financially burdensome and all-encompassing.¹⁹⁰ A recent White House press release emphasized the widespread impact of childhood obesity, stating that this “is not just a health or family issue alone. It is an economic issue that impacts workforces, job growth, and local budgets across the country.”¹⁹¹

2. *The Ordinance’s narrow-tailoring*

In addition to advancing compelling government interests, the Healthy Food Ordinance is narrowly tailored and would survive strict scrutiny.¹⁹² The Ordinance specifically provides that it does not aim to regulate fast food companies’ advertising nor ban the practice of providing toys with kids’ meals altogether.¹⁹³ Therefore, parents may still purchase meals that contain toys so long as the kids’ meal satisfies the Ordinance’s nutritional requirements; and yet, parents still have the option to purchase meals that do not satisfy those nutritional limits.¹⁹⁴ Consequently, the Healthy Food Ordinance is not overly burdensome and is arguably the least restrictive way to help parents select the most wholesome option for their children when eating out.¹⁹⁵ Because the Healthy Food Ordinance would likely survive strict scrutiny, it would also pass rational basis review, and

<http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow “Health Code” hyperlink; then follow “Article 8: Food and Food Products” hyperlink) (“As children and adolescents in San Francisco become adults, their high rates of obesity and overweight are likely to contribute to the already high economic costs of healthcare and loss of productivity associated with adult obesity in San Francisco.”); see also Carla Fried, *McDonald’s Hit by Happy Meal Toy Ban*, CBS NEWS: MONEY WATCH (Nov. 4, 2010, 11:50 AM), <http://moneywatch.bnet.com/economic-news/blog/daily-money/mcdonalds-hit-by-happy-meal-toy-ban/1510/> (attributing increased health insurance costs and Medicare expenses to the rising rates of obesity and other diet-related illnesses).

190. See Fried, *supra* note 189 (citing a recent study conducted by Cornell regarding the economic costs of obesity).

191. See Press Release, White House, Remarks by the First Lady at National League of Cities Conference (Mar. 15, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/15/remarks-first-lady-national-league-cities-conference> (delineating how childhood obesity adversely impacts balancing the budget and allowing economic growth in communities).

192. See also *supra* Part II.B.3 (analyzing the Healthy Food Ordinance under the fourth step of *Central Hudson* and finding that the requirements are not more extensive than necessary; therefore, the Ordinance is a narrowly tailored way to achieve the government’s interest in protecting children’s health).

193. HEALTH CODE art. 8, § 471.1 (clarifying that the Ordinance solely aims at improving the eating habits of children in San Francisco).

194. *Id.*

195. See *supra* Part II.B.3 (explaining that the Ordinance is not overly burdensome because it is restricted to children’s meals).

accordingly, the Ordinance would not violate the Fourteenth Amendment's Due Process Clause.¹⁹⁶

III. WHAT IS NEXT? RESPONSE TO THE ORDINANCE AND FUTURE IMPLICATIONS

A. *National Impact: Additional Legal Measures and Industry Changes*

Following the passage of the Ordinance, analogous regulations have appeared, foreshadowing the national impact this ban could have on fast food chains and on the public health.¹⁹⁷ In New York City—another city that has been aggressive in legislating to combat obesity—Councilman Leroy Comrie proposed to enact a similar ban with even stricter health requirements.¹⁹⁸ Similarly, in a class action lawsuit, the Center for Science in the Public Interest (CSPI) sued McDonald's for using Happy Meal toys to unlawfully exploit children's inability to recognize predatory advertising practices.¹⁹⁹ If CSPI prevails, the ban on toys in certain kids' meals could become a nationwide standard.²⁰⁰

In response to the Ordinance and mounting pressures, companies within the fast food industry have taken divergent approaches. For example, following the enactment of the toy bans in San Francisco and Santa Clara, Jack in the Box announced that it would not only start providing healthier kids' meal options but that it would also

196. Rational basis is a more flexible standard of review; therefore, it is not necessary to analyze the Ordinance under this test because it likely survives strict scrutiny. See *supra* Part I.C.3 (suggesting that the Ordinance would pass strict scrutiny because it advances compelling interests and is narrowly tailored). See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1282 (2007) (describing rational basis review as more highly deferential than strict scrutiny).

197. See Fried, *supra* note 189 (clarifying that San Francisco was not the first region to restrict toy marketing by fast food restaurants and suggesting similar ordinances may appear nationwide).

198. See Julie Gunlock, *New York Introduces the Un-Happy Meal*, NAT'L REV. ONLINE (Apr. 5, 2011), <http://www.nationalreview.com/corner/263974/new-york-introduces-un-happy-meal-julie-gunlock> (criticizing New York's proposed standards, which are modeled after San Francisco's Healthy Food Ordinance).

199. See Amended Class Action Complaint at 1–2, *Parham v. McDonald's Corp.*, No. CGC-10-506178 (S.F. Cty. Super. Ct. Jan. 5, 2011) (accusing McDonald's of using deceptive and unfair advertising practices to bait children and to obtain an unfair advantage over its competitors who choose not to give away toys); see also Dan Levine, *McDonald's vs. Mom in Happy Meal Lawsuit*, MSNBC.COM (Apr. 19, 2011, 12:30 PM), <http://forum.purseblog.com/up-to-the-minute/mcdonalds-vs-mom-in-happy-meal-lawsuit-677605.html> (explaining that McDonald's removed the suit to federal court in California).

200. See Fried, *supra* note 189 (suggesting that CSPI would like the toy ban to eventually be implemented nationwide).

discontinue selling toys with meals for children.²⁰¹

Although McDonald's denies being influenced by the passage of the Healthy Food Ordinance or these other legal measures,²⁰² it made subsequent changes to its Happy Meal offerings.²⁰³ In July 2011, McDonald's announced that it will not only serve apple slices without the previously included caramel sauce, but apples will be a default side in all Happy Meals.²⁰⁴ French fries will continue to come as a default item, but the serving size will be reduced.²⁰⁵ Additionally, fat-free chocolate milk and one-percent-fat white milk will be offered as drink options.²⁰⁶ McDonald's has also promised to continue reducing sodium, sugars, saturated fat, and calories, as well as introduce more fruit and vegetable options over the next several years.²⁰⁷

Most significantly, McDonald's announced—the day before the Ordinance was to go into effect—that parents can still buy toys for their children at each of the nineteen McDonald's locations in San Francisco, regardless of whether the meal complies with the Ordinance.²⁰⁸ Parents need only pay an extra ten cents, which will be donated to charity.²⁰⁹ The actions taken by McDonald's underscore

201. See Lisa Jennings, *Jack in the Box Makes Big Menu Changes*, NATION'S RESTAURANT NEWS (June 17, 2011), <http://nrn.com/article/jack-box-makes-big-menu-changes> (noting that despite the restaurant's denial that it was being motivated by outside pressures, Jack in the Box would end its twenty-year practice of providing toys in kids' meals and would also add healthier menu alternatives).

202. See Rexrode, *supra* note 32 (revealing that despite these changes occurring amidst recent regulations, such as the Healthy Food Ordinance, Cindy Goody, the senior director of nutrition for McDonald's, denies the changes are related to the Ordinance and instead asserts they are a response to customers requesting healthier choices).

203. See Press Release, McDonald's, McDonald's USA: Commitments to Offer Improved Nutrition Choices (July 26, 2011) [hereinafter McDonald's Press Release], available at http://www.aboutmcdonalds.com/mcd/newsroom/electronic_press_kits/mcdonalds_usa_commitments_to_offer_improved_nutrition_choices.html (outlining its plan to provide more wholesome kids' meals); see also *Happy Meal Gets a Makeover*, *supra* note 131 (asserting that the changes to Happy Meals are scheduled to begin in September 2011, with all 14,000 McDonald's chains in the United States to adopt this plan by the first quarter of 2012).

204. See McDonald's Press Release, *supra* note 203 (disclosing that McDonald's is also exploring alternatives to apples, such as other forms of produce and low-fat dairy items).

205. See *id.* (explaining that customers may request an extra bag of apples as an alternative side to French fries).

206. See *id.* (estimating that these changes will decrease the calories in Happy Meals by as much as twenty percent).

207. See *id.* (announcing that McDonald's plans to reduce the sodium by fifteen percent on all menu items by 2015 and adjust serving sizes to decrease added sugars, saturated fat, and calories by 2020).

208. See Stephanie Strom, *For A Dime, McDonald's Beats a Toy Ban*, N.Y. TIMES, Dec. 1, 2011, at B5 (explaining that McDonald's will continue to make toys available to customers because the company feels Happy Meals would not have the same appeal without the trinkets).

209. *Id.*

its attempt to circumvent the restrictions of the Ordinance.²¹⁰ While some health experts lament this as a loss for health advocates in the battle against childhood obesity and diabetes,²¹¹ health officials in San Francisco assert that this is just the beginning of the government's attempts to strengthen the Ordinance and improve children's health.²¹²

B. Potential Regulatory Responses

San Francisco's most successful response to the McDonald's Happy Meal changes would be to implement economic regulations on toys sold separately from kids' meals. According to the Supreme Court in *Nebbia v. New York*,²¹³ "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose,"²¹⁴ as long as it is not "unreasonable, arbitrary, or capricious."²¹⁵ The power to impose a price differential on a product was extended to cities in *People v. Cook*.²¹⁶ There, the court validated New York City's authority to impose a price differential on cigarettes, depending upon their tar and nicotine content.²¹⁷ It asserted that a city's exercise of its police powers is valid as long as the regulation is reasonably related to promoting the public health, and the means of enforcement do not exceed the limits of the city's police powers.²¹⁸

1. Setting a price floor

Following the principles established in *Nebbia* and *Cook*, San

210. See S.F., CAL., HEALTH CODE art. 8, § 471.4 (2011), available at <http://www.amlegal.com/library/ca/sfrancisco.shtml> (follow "Health Code" hyperlink; then follow "Article 8: Food and Food Products" hyperlink) (prohibiting the provision of a *free* toy incentive with kids' meals that do not meet the established nutritional requirements).

211. See Strom, *supra* note 208 ("In the battle over children's health, this is a win for obesity and diabetes.").

212. Dr. Rajiv Bhatia, director of occupational and environmental health at San Francisco's Department of Public Health, asserted that the city was going to learn from McDonald's response and "do what's necessary to improve regulation." *Id.*

213. 291 U.S. 502 (1934).

214. *Id.* at 537.

215. *Id.* at 525. Indeed, states have only acquired greater latitude to implement economic regulations since the Court's decision in *Nebbia* and the end of the *Lochner* era. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new [regulation].").

216. 312 N.E.2d 452 (N.Y. 1974).

217. *Id.* at 455–56 (finding that the New York State Constitution's "home rule" provision properly granted municipalities, like New York City, the authority to exercise police powers).

218. *Id.*

San Francisco could implement a statute fixing a minimum price at which toys must be sold if the kids' meals they accompany do not meet the Ordinance's health requirements.²¹⁹ A law mandating that toys accompanying unhealthy kids' meals be sold at fair market value would help thwart companies, like McDonald's, from giving away toys virtually for free. For the following reasons, this regulation would meet all the requirements outlined in *Nebbia* and *Cook*, thereby constituting a valid exercise of police power.

First, California's Constitution has explicitly delegated the authority to exercise police powers to cities, like San Francisco.²²⁰ This is the preliminary step in analyzing the legality of a local law, and it was the first issue the court addressed in *Cook*.²²¹ Second, a law implementing a price differential on toys based on the nutritional content of the kids' meals they accompany closely parallels the law upheld in *Cook*, which imposed a price differential on cigarettes based upon their tar and nicotine content.²²² Accordingly, a court would likely find that a regulation establishing the price of toys in kids' meals falls well within the realm of San Francisco's delegated police powers—it would not infringe upon any other constitutional or general law, and the California State Legislature has not preempted San Francisco's ability to exercise this power.²²³

Third, the implementation of a price floor is reasonably related to San Francisco's interest in promoting its citizens' health and well-being. As discussed in the beginning of this Comment, toys and other incentive items offered with kids' meals are successful marketing tactics utilized by fast food companies to attract child consumers.²²⁴ And while there are numerous contributing factors to the obesity epidemic, research has established that high-calorie meals consumed outside the home are at least partially responsible.²²⁵ Consequently, it is reasonable for San Francisco to conclude that higher prices for toys purchased in conjunction with unhealthy kids'

219. For example, San Francisco could increase the price to fair market value or at least to the cost of production of these toys.

220. See CAL. CONST. art. 11, § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.").

221. See *Cook*, 312 N.E.2d at 455–56 (citing the New York State Constitution's "home rule" provision as expressly granting localities police powers).

222. *Id.*

223. See *id.* at 455 (identifying these issues as two potential limitations on a city's police power).

224. *Supra* Part I.A.3.

225. See Hill, *supra* note 4, at 110 (suggesting that the obesity epidemic can be partially attributed to the high fat and high sugar menu offerings at fast food restaurants and the more recent trend toward super-sized "extra value" meals).

meals would result in lower rates of obesity.²²⁶ A local law requiring companies to sell toys in kids' meals at fair market value or at the cost of production, therefore, would not exceed San Francisco's police powers.

2. *Instituting an excise tax*

San Francisco could also implement a tax on toys sold in conjunction with meals that do not meet the health standards of the Ordinance. Under California law, charter cities,²²⁷ like San Francisco, have the authority to "make and enforce all ordinances and regulations in respect to municipal affairs."²²⁸ Because local taxes fall under the umbrella of "municipal affairs,"²²⁹ cities may institute a local tax as long as the tax is not restricted by its own charter or preempted by state law.²³⁰ Here, neither California state law nor San Francisco local law prohibits San Francisco from imposing an excise tax on toys in kids' meals.²³¹ Therefore, San Francisco could tax restaurants selling toys in conjunction with unhealthy kids' meals that do not meet the health requirements imposed by the Ordinance.

Moreover, a "sin tax" to discourage the consumption of unhealthy foods and beverages is not a new idea to California.²³² In the past few

226. *Cf. Cook*, 312 N.E.2d at 455 (explaining the rationale behind New York's law—to force consumers to pay higher retail prices for more harmful cigarettes—and finding it reasonably related to the city's interest in ensuring its citizens' health).

227. Some cities adopt a city charter, which is like a constitution for local affairs. *See Miller v. City of Sacramento*, 136 Cal. Rptr. 315, 318 (Ct. App. 1977) (defining city charters).

228. CAL. CONST. art. 11, § 5.

229. *See W. Coast Adver. Co. v. City & Cnty. of S.F.*, 95 P.2d 138, 143 (Cal. 1939) ("No doubt is entertained upon the proposition that the levy of taxes by a municipality for revenue purposes, including license taxes, is strictly a municipal affair.").

230. *See Roble Vista Assocs. v. Bacon*, 118 Cal. Rptr. 2d 295, 297 (Ct. App. 2002) (conveying that preemption exists when a local law attempts to legislate in an area that is explicitly or implicitly regulated by state law).

231. An excise tax is typically imposed on a business selling a commodity related to a specific act or the enjoyment of a privilege, such as smoking cigarettes. *See United States v. 4,432 Mastercases of Cigarettes, More or Less*, 448 F.3d 1168, 1184–85 (9th Cir. 2006) (classifying the California cigarette tax law under question as an excise tax).

232. *See Kim Geiger & Tom Hamburger, States Poised to Become New Battleground in Soda Tax Wars*, L.A. TIMES, Feb. 21, 2010, at A22 (reporting California legislators' attempt to pass a bill taxing soda consumption in light of studies revealing the strong correlation between sugary soda consumption and obesity). While the efforts to implement a statewide soda tax ultimately failed, new research from the University of California, San Francisco, and Columbia University seems to have breathed new life into the debate. Their research revealed that a national tax on soda would not only raise \$13 billion each year but save taxpayers \$17 billion from decreased medical expenditures. Karen Kaplan, *Soda Tax Could Prevent 26,000 Premature Deaths, Study Finds*, L.A. TIMES (Jan. 10, 2012), <http://articles.latimes.com/2012/jan/10/news/la-heb-soda-tax-diabetes-obesity-20120110>.

years, California and a dozen other states have considered restructuring their taxes on soft drinks because of the strong evidence linking soda drinkers with poor health conditions.²³³ The health goals behind taxing sugary beverages are twofold: (1) the tax reduces consumption; and (2) the tax raises revenue to help fund school health programs, build parks, and support other recreational activities.²³⁴ Similarly, a tax on toys accompanying unhealthy kids' meals would not only prevent companies from circumventing the Ordinance, but it would also raise money to help fund health education programs in San Francisco.

C. *Implications of the Ordinance and Future Measures*

The Healthy Food Ordinance epitomizes the progression toward cleverer, yet more invasive, attempts to regulate obesity, raising important issues pertaining to the future of these regulations. From point-of-purchase labeling requirements at fast food and big chain restaurants,²³⁵ to soda taxes,²³⁶ bans on trans fats,²³⁷ fast food zoning ordinances,²³⁸ and even restrictions on food stamps,²³⁹ legislation aimed at curtailing obesity has become particularly pervasive in

233. In 2010, Colorado passed a bill to tax soft drinks. See Geiger & Hamburger, *supra* note 232 (noting that 12 states are considering altering taxes on soft drinks, and that Colorado's legislature recently passed a bill changing the tax treatment of such beverages).

234. *Id.*

235. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573-74 (2010) (requiring restaurants with twenty or more locations to display calorie information for food items on their menus and menu boards, including drive-through menu boards).

236. See *supra* Part III.B.2 (discussing the growing prevalence of "sin taxes" on soft drinks); see also Kelly D. Brownell & Thomas R. Frieden, *Ounces of Prevention—The Public Policy Case for Taxes on Sugared Beverages*, 360 NEW ENG. J. MED. 1805, 1805 (2009) (indicating that forty states already have some sort of sugary beverage tax and that several of these states are considering increasing this tax in response to the obesity epidemic).

237. See, e.g., Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1 (declaring New York as the first city in the United States to ban restaurants' use of trans fats).

238. See generally JULIE SAMIA MAIR ET AL., THE USE OF ZONING TO RESTRICT FAST FOOD OUTLETS: A POTENTIAL STRATEGY TO COMBAT OBESITY 1-4 (2005), available at <http://www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf> (discussing existing zoning laws that limit the presence of fast food restaurants and current case law).

239. In October 2010, Mayor Bloomberg requested permission from the federal government to prevent 1.7 million New Yorkers in the Supplemental Nutrition Assistance Program (SNAP) from purchasing sugar-sweetened beverages with their food stamps for a two-year period to study whether it would positively impact health. Anemona Hartocollis, *Food Stamps As New Front in Soda Wars*, N.Y. TIMES, Oct. 7, 2010, at A1. Similarly, Minnesota sought federal permission in 2004 to implement a ban disallowing food-stamp recipients from purchasing junk food—a request ultimately denied by the Department of Agriculture. *Id.* at A34.

recent years. The reformation of food in the school setting has also been at the forefront of this movement as numerous states have implemented regulations prohibiting the sale of soft drinks on school campuses.²⁴⁰ According to a study, during the 2009–2010 school year, fourteen states banned soda in school vending machines, and nineteen states disallowed the sale of soda in school cafeterias.²⁴¹ In 2003, Arkansas adopted an unprecedented approach to children's health by passing an act banning all vending machines from elementary schools and requiring schools to provide parents with report cards of their child's body mass index (BMI), their child's BMI percentile by age, and an explanation of the health impacts related to BMI, eating habits, and physical activity.²⁴² Most recently, the Obama Administration enacted the Healthy, Hunger-Free Kids Act of 2010,²⁴³ which sets new nutrition standards for school lunches.²⁴⁴

While these measures aimed at obesity—including the Ordinance and its possible responses—offer innovative ways to potentially alleviate this pressing health problem, they undoubtedly raise concerns of a paternalistic slippery slope. For example, when it comes to taxing soft drinks or even toys in kids' meals, where would governments draw the line? In light of increased efforts to address obesity and other health-related diseases, it would not be beyond the realm of possibility for such "sin taxes" to next extend to the grocery store—increasing the price of products deemed to be excessive in fat, sugar, or calories—or even to activities unrelated to food consumption. In fact, New York Assemblyman Felix Ortiz has already proposed a bill seeking to tax pastimes generally associated with sedentary lifestyles, including movie tickets, video games, and even DVD rentals.²⁴⁵ To an even greater extreme, Eric Topol, Former Chief of Cardiology at the Cleveland Clinic, believes that slender

240. Nicole Ostrow, *Banning Sugary Soda from School Fails to Cut Teen Consumption, Study Finds*, BLOOMBERG (Nov. 7, 2011, 4:00 PM), <http://www.bloomberg.com/news/2011-11-07/banning-sugary-soda-from-schools-fails-to-cut-teen-consumption.html> (noting that a number of states have implemented bans on soft drinks in school, but that programs banning all sugary drinks were more effective at reducing overall consumption of calorie-laden beverages).

241. *Id.*

242. ARK. CODE ANN. § 20-7-135 (West 2011).

243. Pub. L. No. 111-296, 124 Stat. 3183 (2010).

244. In December 2010, the White House announced the passage of the Healthy, Hunger-Free Kids Act, which, like the Healthy Food Ordinance, foreshadows the movement toward increased government intervention because of parents' inabilities to ensure that their children consume healthful foods. Penny Starr, *Michelle Obama on Deciding What Kids Eat: "We Can't Just Leave it Up to the Parents,"* CNSNEWS.COM (Dec. 13, 2010), <http://cnsnews.com/news/article/michelle-obama-deciding-what-kids-eat-we-can-t-just-leave-it-parents>.

245. Ceci Connolly, *Public Policy Targeting Obesity*, WASH. POST, Aug. 10, 2003, at A1.

taxpayers should receive a tax credit while “the people ruining our health care economics would pay the standard tax.”²⁴⁶ And while the reality of such legislation ever becoming law certainly appears unfathomable, it is unlikely that parents and their children twenty-five years ago imagined that the toys in their kids’ meals would one day be a point of contention and, in some cities, banned for health reasons.

CONCLUSION

The questions and subsequent analysis pertaining to the Healthy Food Ordinance’s constitutionality reveal its expansive reach and expose pivotal implications for the future of anti-obesity laws and regulations. Professor Mark Hall adeptly captured the complexity of public health issues, like obesity, observing: “[v]iewed from one perspective, these are issues of individual choice. Viewed from another perspective, however, each of these is a public health problem, one that justifies coercive government intervention to prevent individuals’ choices from harming themselves or others.”²⁴⁷ Indeed, the Healthy Food Ordinance falls within this gray area. On one hand, it embodies a creative solution to the food industry’s failure to adopt effective self-regulations and prior anti-obesity measures’ constitutional pitfalls. Yet, on the other, the Ordinance evokes paternalistic concerns regarding our most basic civil liberties.

Regardless of which perspective the Ordinance should be viewed from, however, the Healthy Food Ordinance seriously calls into question the constitutional framework that ensures our protected liberties. There is something amiss when more invasive measures, like the Healthy Food Ordinance, are almost certainly constitutional, yet substantially more intrusive than their predecessors, such as bans on junk food advertisements, which were stymied by the same doctrinal tools. To tackle a complex issue such as childhood obesity, while still preserving civil liberties, it is critical that these legal doctrines evolve into a cohesive body of law that produces more consistent results in the future.

246. See *id.* (reporting Topol’s declaration that if he were a government official, he would require each citizen to submit to a weigh-in at the post office every tax day). Equally ridiculous was Mississippi State Representative John Read’s proposed bill that would require restaurants to refuse service to overweight customers. Hellmich, *supra* note 174.

247. See Mark A. Hall, *The Scope and Limits of Public Health Law*, 46 PERSPS. IN BIOLOGY & MED. S199, S206 (2003) (“Lacking any one specific agent on which to focus health improvement strategies, the next best response is to target behaviors that will decrease various statistical risk factors.”).