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# THE ZONING DIET: USING RESTRICTIVE ZONING TO SHRINK AMERICAN WAISTLINES

*Allyson C. Spacht\**

## INTRODUCTION

Would you like fries with that? Unfortunately, this phrase has become all too common to American adults and children alike. Fast food has become imbedded in American culture. McDonald's golden arches are more recognizable than the Christian cross.<sup>1</sup> In a survey of American children, ninety-six percent were able to identify Ronald McDonald, who was the second most recognized fictional character after Santa Claus.<sup>2</sup> Each year, Americans spend more money on fast food than on higher education, personal computers, or new cars.<sup>3</sup> The amount of money that Americans spend on fast food trumps their combined spending on movies, books, magazines, newspapers, videos, and recorded music.<sup>4</sup> Americans are taking advantage of the ubiquity of fast food restaurants in the United States. Nearly one-quarter of the country's population visits a fast food restaurant on any given day.<sup>5</sup>

The omnipresence of fast food is receiving much of the blame for the obesity epidemic in America.<sup>6</sup> Experts agree that a strong correlation exists between the abundance of fast food restaurants and obesity.<sup>7</sup> This correlation is due, in part, to the availability of large, inexpensive, energy-dense portions at fast food restaurants, coupled

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1 ERIC SCHLOSSER, *FAST FOOD NATION* 4 (2001).

2 *Id.*

3 *Id.* at 3.

4 *Id.*

5 *Id.*

6 *See id.* at 242.

7 *See id.*

with the high frequency with which Americans consume fast food.<sup>8</sup> Many states are responding to this epidemic by employing a variety of tools to foster public health, including “snack taxes,” public education campaigns, and bans on trans fats.<sup>9</sup> Additionally, many communities are using zoning regulations to restrict or exclude fast food restaurants. These types of zoning ordinances have traditionally been enacted under the guise of community aesthetic concerns, but, within the past several years, local governments have begun to consider employing land use restrictions for the express purpose of promoting public health.

In July 2008, the Los Angeles City Council unanimously approved an Interim Control Ordinance (ICO) “designed to address the imbalance in food options currently available in South Los Angeles.”<sup>10</sup> The ordinance proposes a one-year moratorium on new fast food restaurants in the South Los Angeles, Southeast Los Angeles, West Adams, Baldwin Hills, and Leimert Park community planning areas.<sup>11</sup> The ordinance defines a fast food restaurant as “[a]ny establishment which dispenses food for consumption on or off the premises, and which has the following characteristics: a limited menu, items prepared in advance or prepared or heated quickly, no table orders, and food served in disposable wrapping or containers.”<sup>12</sup> The ICO was drafted and passed in order to

provide a strong and competitive commercial sector which best serves the needs of the community, attract uses which strengthen the economic base and expand market opportunities for existing and new businesses, enhance the appearance of commercial districts, and identify and address the over-concentration of uses which are detrimental to the health and welfare of the people of the community.<sup>13</sup>

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8 JULIE SAMIA MAIR ET AL., CTRS. FOR LAW & THE PUBLIC'S HEALTH, THE USE OF ZONING TO RESTRICT FAST FOOD OUTLETS 10 (2005), <http://publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf>.

9 See *infra* Part I.B.

10 Press Release, Councilwoman Jan C. Perry, South Los Angeles Fast Food Interim Control Ordinance Unanimously Approved by Los Angeles City Council (July 29, 2008) (on file with author) [hereinafter Perry Press Release]. The ICO was drafted in response to a motion by Councilwoman Jan C. Perry, whose Ninth District includes much of South Los Angeles. *Id.* The motion was seconded by Councilman Bernard Parks, whose entire Eighth District is within the affected area. *Id.*

11 *Id.*

12 L.A., Cal., Ordinance 180103 (July 29, 2008).

13 *Id.*

The over-concentration of fast food restaurants in the South Los Angeles region motivated the drafting and passage of the ordinance.<sup>14</sup>

The goal of the ICO is to allow city planners to analyze the quantity of fast food restaurants in these communities and to develop solutions to combat the extreme imbalance that has resulted in these areas from decades of spot zoning and neglect in community planning and development.<sup>15</sup> With minimal land remaining for development in these areas, the ICO allows city planners to determine what types of businesses best suit a community with the highest incidence of diabetes in the county and an obesity rate that is nine percent above the county average.<sup>16</sup> The ICO enables council members to actively attract healthier options to these communities, including grocery stores and sit-down restaurants, by preserving the limited existing land for such uses.<sup>17</sup> Councilwoman Jan C. Perry, author of the ICO, and fellow supporters of the ordinance argue that “[m]aking healthy decisions about food is difficult when people have small incomes, the grocery store is five miles away and a \$1 cheeseburger is right around the corner.”<sup>18</sup> The ICO serves as just one of the many planning tools the Los Angeles City Council hopes to employ “‘to attract sit-down restaurants, full service grocery stores, and healthy food alternatives . . . in an aggressive manner.’”<sup>19</sup>

A movement to regain American health and well-being has begun, and the Los Angeles ICO is just one weapon in the country’s expanding arsenal. Battles are being waged around the country, with schools eliminating soda, cities banning trans fats, and, most recently, New York City requiring certain food service establishments to display calorie content on menus and menu boards.<sup>20</sup> The Los Angeles ICO,

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14 See *id.* Recent reports show that forty-five percent of the restaurants in South Los Angeles are fast food outlets with minimal seating, whereas only sixteen percent of the restaurants in the west side of the city are fast food outlets. *Id.*

15 The ICO is designed as a stop-gap measure to allow City Planning time to study the effects of these establishments as they pertain to community design, pedestrian activity, traffic and other important urban planning issues. Perry Press Release, *supra* note 10.

16 Molly Hennessy-Fiske, *Panel OKs Fast-Food Curbs*, L.A. TIMES, July 23, 2008, at B2.

17 A grocery store and sit-down restaurant package is presently being marketed to developers and retailers to attract these establishments to the area. Perry Press Release, *supra* note 10. Incentive packages are being designed to further assist this effort, including underground power lines, expedited site plan review, and land assemblage assistance. *Id.*

18 Kim Severson, *Fast Food Intervention*, N.Y. TIMES, Aug. 13, 2008, at F1.

19 Perry Press Release, *supra* note 10 (quoting Jan C. Perry).

20 Severson, *supra* note 18.

however, is truly radical in nature because it appears to be the first instance of a local government prohibiting a certain type of restaurant for health, rather than aesthetic, reasons.<sup>21</sup> Municipalities often use different types of zoning regulations as tools to restrict or exclude fast food restaurants;<sup>22</sup> however, they are careful to predicate such ordinances on the protection of the unique and aesthetic character of the community.<sup>23</sup> While other communities have proposed similar types of regulations,<sup>24</sup> the Los Angeles ICO appears to be the first regulation approved that explicitly defines the “health and welfare of the people of the community” as one of its purposes.<sup>25</sup>

Critics have already begun to speak out, many claiming that this type of regulation is too paternalistic and does not credit the intellect of the over 500,000 people who live in the South Los Angeles area.<sup>26</sup> They see this type of government control over the “built environment” as an imposition of government officials’ values on the public and believe that the sale and purchase of food should operate in a free-market system.<sup>27</sup> The National Restaurant Association opposes the ban, agreeing that the government has an interest in solving the American obesity epidemic because of its impact on health costs, but averring that lawmakers have overstepped their bounds.<sup>28</sup> It argues that restaurants are not the sole cause of the obesity epidemic, but because lawmakers cannot control the food being consumed at home, or the lack of physical activity in Americans’ daily regimens, they have therefore turned to the only place where they can exert control, caus-

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21 *Id.*

22 MAIR ET AL., *supra* note 8, at 40.

23 *Id.*

24 *Id.* at 52–53.

25 L.A., Cal., Ordinance 180103 (July 29, 2008).

26 See Severson, *supra* note 18. “The crime in all of this is that people are sitting around meddling into the very minutiae of what people are putting into their mouths’ . . . .” *Id.* (quoting Joe R. Hicks, former Executive Director of Los Angeles’s Human Relations Commission).

27 See Lawrence O. Gostin, *Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity*, 297 JAMA 87, 89 (2007) (discussing legal interventions to combat the American obesity epidemic). “Built environment” can be defined as structures that form an individual’s living space. See *id.* But see Wendy C. Perdue et al., *Public Health and the Built Environment: Historical, Empirical, and Theoretical Foundations for an Expanded Role*, 31 J.L. MED. & ETHICS 557, 561 (2003) (“Government is already highly involved in the built environment through direct intervention and regulation. Thus, the political choice is not *whether* to plan the built environment, but *how* to plan it under optimal conditions that benefit the population. And this choice ought to be influenced by evidence about the associations between land use and health.” (footnote omitted)).

28 Severson, *supra* note 18.

ing fast food restaurants to take the fall for Americans' poor personal choices.<sup>29</sup>

There are also several types of constitutional challenges that may potentially be raised in opposition to this kind of legislation, and it is only a matter of time until the courts are forced to address the constitutional validity of this type of land use regulation. First, restrictive fast food zoning may violate substantive due process, which requires that zoning regulations be rationally related to a legitimate government interest.<sup>30</sup> Fast food zoning may also violate the Takings Clause of the Fifth Amendment,<sup>31</sup> which requires the government to pay just compensation when it imposes an unfair burden on a landowner.<sup>32</sup> However, because zoning for public health often provides legislatures with broader discretion to zone than other goals, courts often defer to legislatures regulating for public health purposes. Furthermore, the fact that prohibiting certain types of food establishments does not deprive property owners of all economically viable uses of their land strongly suggests that fast food zoning would most likely survive such challenges.<sup>33</sup> While the roles of substantive due process and the Takings Clause have decreased in land use cases, the dormant Commerce Clause has played an increasing role in challenges to the validity of restrictive land use planning mechanisms such as restrictive zoning.<sup>34</sup>

This Note argues that restrictive zoning of fast food restaurants to combat obesity as a matter of public health is a valid exercise of a municipality's police power and survives constitutional challenges raised under the dormant Commerce Clause. Part I of this Note examines the American obesity epidemic, including the possible

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29 See *id.*

30 See 6 PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* § 35.04(1)(b) (Eric Damian Kelly ed., 2009).

31 U.S. CONST. amend 5 (“[N]or shall private property be taken for public use, without just compensation.”).

32 See *Armstrong v. United States*, 364 U.S. 40, 49 (1960); JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* § 16.2, at 682 (1998).

33 See MAIR ET AL., *supra* note 8, app. B at ii–iii.

34 See John M. Baker & Mehmet K. Konar-Steenberg, “*Drawn from Local Knowledge . . . And Conformed to Local Wants*”: *Zoning and Incremental Reform of Dormant Commerce Clause Doctrine*, 38 LOY. U. CHI. L.J. 1, 2–3 (2006) (“With the proliferation of measures by local governments to preserve the local character of their communities in the face of sprawling retail development, the trickle of land use cases in which the dormant Commerce Clause plays a significant role seems likely to turn into a flood . . . . As these cases begin to percolate up through the system, it seems likely that the Supreme Court will soon be confronted with demands to clarify how its dormant Commerce Clause doctrine applies in zoning cases.” (footnotes omitted)).

causes and solutions for this public health emergency. Part II discusses the origins of zoning in state police power and the delegation of this power to local governments to regulate for the health and welfare of their communities. Part III examines the dormant Commerce Clause and the limitations it places on the states' ability to regulate economic activities. Finally, Part IV argues that local governments have the ability to restrictively zone fast food restaurants under their police powers in the interest of the public's health and welfare. This type of land use control does not violate the dormant Commerce Clause because it is neither facially discriminatory nor unduly burdensome to interstate commerce, and the benefit it provides to the health and welfare of the community outweighs its incidental commercial burden. Therefore, the ICO approved in Los Angeles, as well as a permanent fast-food-restrictive zoning ordinance, are two constitutionally valid tools that may be placed in the nation's arsenal in its battle against the American obesity epidemic.

## I. THE AMERICAN OBESITY EPIDEMIC

Obesity in America has become such a prevalent and alarming issue that it can no longer be ignored. This epidemic is attributable in large part to the ubiquity of fast food in the United States. Many local governments have begun to wage war against ballooning waistlines in an attempt to recapture American health. A variety of tactics are being employed, including public-education campaigns, healthy-living initiatives, and so-called snack taxes. Recently, local governments began using land use regulations to restrict or exclude fast food restaurants from their communities. While most local governments restrictively zone fast food restaurants under the stated purpose of protecting community aesthetics while reaping the health benefits of their exclusion, municipalities are now exploring the possibility of restrictively zoning fast food establishments for the express purpose of combating obesity.

### A. *Obesity in America*

America cannot continue to close its eyes and claim ignorance to a serious health concern that permeates its city streets, its office buildings, and its schools. According to a poll by Trust for America's Health, eighty-five percent of Americans believe that obesity has become an epidemic in the United States.<sup>35</sup> In 2003–2004, an esti-

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35 JEFFREY LEVI ET AL., TRUST FOR AMERICA'S HEALTH, *F AS IN FAT 3* (2007), <http://healthyamericans.org/reports/obesity2007/Obesity2007Report.pdf>.

mated thirty-two percent of American adults were obese.<sup>36</sup> Obesity rates have continued to rise in thirty-one states, with the adult obesity rate exceeding twenty percent in forty-seven states and the District of Columbia.<sup>37</sup> In 2007, two-thirds of American adults were obese or overweight.<sup>38</sup> American children are also suffering, with twenty-five million children already obese or overweight.<sup>39</sup>

Obesity potentially leads to a variety of increased health risks, including type 2 diabetes, coronary heart disease, and hypertension.<sup>40</sup> The obesity epidemic continues to increasingly drain American resources as overweight and obesity lead to a variety of direct and indirect costs for taxpayers every year.<sup>41</sup> An estimated \$117 billion in obesity costs were incurred in 2000 alone.<sup>42</sup>

Surprisingly, few studies have been conducted to determine the specific factors in our environment that facilitate obesity.<sup>43</sup> Most experts agree that biology alone cannot explain the extreme weight gain observed over the past few decades.<sup>44</sup> Body weight is affected by a number of factors, including genetic, metabolic, environmental, behavioral, cultural, and socioeconomic influences.<sup>45</sup> The consensus among experts is that environmental factors, specifically excessive calorie consumption and inadequate physical activity, have caused American waistlines to balloon.<sup>46</sup>

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36 *Id.* at 5.

37 *Id.*

38 *Id.* at 9 (defining obesity as “an excessively high amount of body fat or adipose tissue in relation to lean body mass” and overweight as an “increased body weight in relation to height, which is then compared to a standard of acceptable weight”).

39 *Id.* at 3.

40 WEIGHT-CONTROL INFO. NETWORK, NAT’L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, STATISTICS RELATED TO OVERWEIGHT AND OBESITY 1 (2007), *available at* <http://win.niddk.nih.gov/publications/PDFs/stat904z.pdf>.

41 OFFICE OF DISEASE PREVENTION & HEALTH PROMOTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 9 (2001), *available at* <http://www.cdc.gov/nccdphp/dnpa/pdf/CalltoAction.pdf> (“Direct health care costs refer to preventive, diagnostic, and treatment services related to overweight and obesity (for example, physician visits and hospital and nursing home care). Indirect costs refer to the value of wages lost by people unable to work because of illness or disability, as well as the value of future earnings lost by premature death.”).

42 *Id.* at 10. Sixty-one billion dollars were spent on direct costs and fifty-six billion dollars were spent on indirect costs.

43 James O. Hill et al., *Modifying the Environment to Reverse Obesity*, in *ESSAYS ON THE FUTURE OF ENVIRONMENTAL HEALTH RESEARCH* 108, 108 (Thomas J. Goehl ed., 2005).

44 MAIR ET AL., *supra* note 8, at 9.

45 OFFICE OF DISEASE PREVENTION & HEALTH PROMOTION, *supra* note 41, at 1.

46 *Id.*



Much of the blame for the U.S. obesity epidemic has been placed on the ubiquity of fast food. The per capita number of fast food restaurants in the United States doubled between 1972 and 1999,<sup>47</sup> and by 2002 there were approximately 222,000 fast food outlets in the United States, which generated an estimated \$130.1 billion in annual sales.<sup>48</sup> Studies reveal that fast food “may contribute to high intake of energy, fat, sodium, carbonated soft drinks, and fried potato, and low intake of milk, fruits, vegetables, dietary fiber, and some vitamins.”<sup>49</sup> There also appears to be a close correlation between the abundance of American-style fast food restaurants and obesity around the world.<sup>50</sup>

Experts suggest three reasons for the correlation between fast food and obesity: the availability of large, inexpensive portions; the high energy density of these foods; and the frequency with which fast food is consumed by Americans.<sup>51</sup> Generally, food portion sizes have continually increased in the United States over the past three decades.<sup>52</sup> Thus, Americans are eating more food and, in the case of fast food, more energy-dense food.<sup>53</sup> Furthermore, Americans are consuming fast food with increasing frequency. In 1970, Americans only spent twenty-five percent of their total food costs away from home, a number that increased to nearly half by 1999.<sup>54</sup> The percentage of meals consumed at fast food restaurants continues to increase at a faster rate than those consumed at any other type of restaurant.<sup>55</sup>

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47 Richard A. Dunn, Obesity and the Availability of Fast-Food 1 (Mar. 31, 2008) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=989363#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=989363#).

48 Sahasporn Paeratakul et al., *Fast-Food Consumption Among US Adults and Children: Dietary and Nutrient Intake Profile*, 103 J. AM. DIABETIC ASS'N 1332, 1332 (2003); see also SCHLOSSER, *supra* note 1, at 3 (discussing that, while fast food originally began as a handful of hot dog and hamburger stands, it is now served in a variety of American localities and establishments including restaurants, drive-throughs, stadiums, schools at all levels of education, trains, superstores, gas stations, and even hospital cafeterias).

49 Paeratakul et al., *supra* note 48, at 1334.

50 SCHLOSSER, *supra* note 1, at 242.

51 MAIR ET AL., *supra* note 8, at 10.

52 *Id.*

53 Energy density is a measure of the amount of energy calories per weight in a particular food. *Id.* at 11. Fast foods are more energy dense than other types of food because they are higher in fat. *Id.* Foods with higher energy densities would not be of such great concern if consumers expended the excess energy they consume through physical activity. “[O]nly 10 extra kilocalories per day of unexpended energy amounts to an extra pound of weight per year . . . .” *Id.* at 12–13.

54 *Id.* at 14.

55 *Id.*

*B. Possible Solutions to the American Obesity Epidemic*

Many states have heard the call to action and have begun to take steps to combat the obesity epidemic in America. The majority of people support government involvement to address the American obesity problem.<sup>56</sup> State governments have responded in a variety of ways, including public-education campaigns, healthy-living initiatives for state government employees, and public-private partnership development.<sup>57</sup> Some states have enacted snack taxes, taxing junk foods in an effort to reduce consumption of that food group.<sup>58</sup> Local governments are also taking action to combat American obesity. For example, in December 2006, the New York City Board of Health mandated that those food service establishments that serve food with standardized production and portion sizes and that publicly provide calorie information must prominently display their food's calorie content on their menus or menu boards.<sup>59</sup> The Board of Health also issued a ban on all but trace amounts of trans fats in city restaurants.<sup>60</sup> There have also been school-based initiatives to improve the quality of food served in schools. School breakfast, lunch, and after-school snack programs are offered as part of a coordinated effort between state school systems and the United States Department of Agriculture (USDA) Food and Nutrition Service.<sup>61</sup> The USDA subsidizes states that meet the national nutrition guidelines and offer "free or reduced cost" meals to children coming from low-income households.<sup>62</sup> Seventeen states

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56 LEVI ET AL., *supra* note 35, at 85 ("A majority of adults (51 percent) say that the primary responsibility for tackling the obesity epidemic should come from a combination of individuals and government. Eighty-one percent of Americans believe that government should have some role in addressing the issue.").

57 *Id.* at 17.

58 *Id.* at 35.

59 *Id.* at 20. The U.S. District Court for the Southern District of New York upheld this law after it was challenged by the New York State Restaurant Association. The court found that the law was not preempted by the Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered sections of 21 U.S.C.), which explicitly left power to state and local governments to impose mandatory nutrition labeling on restaurants. Press Release, N.Y. City Law Dep't, Federal Court Upholds New York City Health Code Provision Requiring Certain Restaurants to Post Calorie Information on Menu and Menu Boards (Apr. 16, 2008), available at <http://www.nyc.gov/html/law/downloads/pdf/pr041608.pdf>.

60 LEVI ET AL., *supra* note 35, at 20.

61 *Id.* at 29.

62 *Id.*

have established stricter nutritional standards than those recommended by the USDA.<sup>63</sup>

Communities across the country have also employed zoning restrictions to restrict or exclude fast food restaurants.<sup>64</sup> Some communities have chosen only to ban drive-through service, which has relatively the same effect as a total fast food ban as sixty percent or more of fast food business stems from drive-through service.<sup>65</sup> The stated purpose of these zoning regulations is to protect the unique and aesthetic character of the community.<sup>66</sup> Instead of an outright ban on fast food restaurants, some cities have banned "formula" restaurants.<sup>67</sup> Other cities have established bans that only affect certain areas of the locality.<sup>68</sup> Fast food ubiquity is also being controlled by setting quotas for the number of restaurants or food service establishments allowed within a given area.<sup>69</sup> Finally, some municipalities have restricted the expansion of fast food restaurants by establishing limitations on the density of fast food restaurants, that is, by limiting the number of fast food restaurants per unit space or through explicit spacing requirements.<sup>70</sup> While most of these municipalities have predicated their

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63 *Id.* Many Americans have become extremely concerned about childhood obesity and view schools as a starting point to tackle the obesity epidemic. *Id.* at 85.

64 MAIR ET AL., *supra* note 8, at 40. These types of zoning restrictions have been passed for reasons other than the protection of the public from the threat of obesity. However, some have been enacted for public health purposes. *Id.*

65 *Id.* Typically, it would be unprofitable for fast food outlets to open in a locality where drive-throughs are prohibited, making this type of restrictive zoning a successful deterrent.

66 *Id.* For example, the city of Concord, Massachusetts established an explicit ban on all drive-in or fast food restaurants. CONCORD, MASS., ZONING BYLAW § 1.2 (2008), available at [http://www.concordma.gov/Pages/ConcordMA\\_BOA/zone/2008ZoningBylawCOMPLETE.pdf](http://www.concordma.gov/Pages/ConcordMA_BOA/zone/2008ZoningBylawCOMPLETE.pdf). One of the purposes of this ban, as set forth in the zoning bylaws, is "to preserve and enhance the development of the natural, scenic and aesthetic qualities of the community." *Id.* § 4.7.1.

67 MAIR ET AL., *supra* note 8, at 43 ("The definition [of 'formula' restaurants] can be drafted and interpreted broadly to include a local restaurant that has only one other similar restaurant in the area or interpreted narrowly to include only large national chain restaurants.").

68 *Id.* at 45. For example, the City and County of San Francisco banned all "formula retail use[s]," which include fast food outlets, in the four-block Hayes-Gough Neighborhood Commercial District. S.F., CAL., PLANNING CODE § 703.3(e) (2008), available at <http://www.municode.com/Resources/gateway.asp?pid=14139&sid=5>.

69 MAIR ET AL., *supra* note 8, at 49.

70 *Id.* at 50. The City of Bainbridge Island, Washington uses a density limitation to restrict the number fast food outlets.

Any formula take-out food restaurant may not exceed 4000 square feet and must be in a building that is shared with at least one other business that

zoning on some type of aesthetic ground, the City of Los Angeles appears to be the first city to pass an interim control ordinance restricting fast food outlets for the express purpose of combating American obesity by addressing the over-concentration of fast food restaurants which, according to the ordinance's purposes, are "detrimental to the health and welfare of the people of the community."<sup>71</sup>

## II. THE POLICE POWER AND ZONING

Public land use controls, such as zoning, are exercises of states' police power.<sup>72</sup> Under the police power, states have the authority to enact laws to promote the health, safety, morals, and public welfare of the community.<sup>73</sup> The police power predates the Constitution, arising from the states' sovereignty and their inherent authority over certain issues.<sup>74</sup> Alexander Hamilton wrote, "[t]he State governments by their original constitutions are invested with complete sovereignty," arguing that the states would retain all of their inherent powers that were not delegated to the federal government by the Constitution.<sup>75</sup> When the states ratified the Constitution, they agreed to give up some aspects of their sovereignty to the federal government but did not forfeit all of their authority.<sup>76</sup> The Constitution granted the federal government limited and enumerated powers and left to the states the remaining sovereign authority of the United States.<sup>77</sup> This "residual sovereignty," as described by Chief Justice John Marshall, includes that "immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government."<sup>78</sup>

Although the power to zone lies exclusively with the states, they may delegate the power to regulate land use to local governments,

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is not a formula take-out food restaurant. Only one formula take-out food restaurant is permitted per parcel, lot or tract on which all or a portion of the building is located. No drive through facilities are allowed.

BAINBRIDGE ISLAND, WASH., MUNICIPAL CODE § 18.41.050(B)(1) (2008), *available at* <http://www.mrsc.org/mc/bainbridge/bainis18/bainis1841.html#18.41.050>.

71 L.A., Cal., Ordinance 180103 (July 29, 2008).

72 JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 3.5 (2d ed. 2007).

73 *Lochner v. New York*, 198 U.S. 45, 53 (1905); JUERGENSMEYER & ROBERTS, *supra* note 72, § 3.5.

74 STEVEN J. EAGLE, *REGULATORY TAKINGS* § 2-3 (3d ed. 2005).

75 THE FEDERALIST NO. 31, at 164 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

76 MAIR ET AL., *supra* note 8, at 28.

77 D. Benjamin Bartos, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 475 (2004).

78 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

including municipal corporations such as cities, villages, towns, and counties.<sup>79</sup> Traditionally, almost all of the police power was delegated to local governments.<sup>80</sup> In recent decades, however, certain state legislatures have begun to remove some of this power from local governments and institute state control instead.<sup>81</sup> Most states delegate the power to control land use to local municipalities through zoning-enabling acts.<sup>82</sup> Local zoning is then valid unless the procedures established in the enabling act are not adequately followed.<sup>83</sup>

Zoning regulations were first declared constitutional in *Village of Euclid v. Ambler Realty Co.*,<sup>84</sup> which affirmed comprehensive zoning as a permissible exercise of the police power and the protection of public health as a permissible goal of zoning laws.<sup>85</sup> *Euclid* involved a zoning ordinance that divided a municipality into a number of zones ranging from most restrictive, where relatively few land uses were allowed, to least restrictive, where all land uses were allowed.<sup>86</sup> The property owner had purchased a tract of land for industrial purposes prior to the zoning scheme, which zoned the tract for residential uses, significantly decreasing its market value.<sup>87</sup> Ambler Realty sought to enjoin the enforcement of the zoning ordinance, arguing that it violated Section 1 of the Fourteenth Amendment<sup>88</sup> by depriving the company of

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79 JUERGENSMEYER & ROBERTS, *supra* note 72, § 3.5.

80 *Id.*

81 *Id.*

82 *Id.* Almost every state has adopted enabling acts substantially patterned after the Standard State Zoning Enabling Act, released in 1924, which was the result of the work of an Advisory Committee appointed by then-Secretary of Commerce, Herbert Hoover. *Id.* § 3.6. Most states still use this format while adopting piecemeal modifications over the years. *Id.* The first three sections of the Standard Act state the purposes of the zoning regulation and establish its scope. *Id.* The subsequent sections provide provisions for adopting the legislation and making amendments. *Id.* There are additional provisions calling for the establishment of a zoning commission or planning commission. *Id.* The Standard Act also allows for the establishment of a Board of Adjustment to hear appeals from enforcement of the zoning ordinance, establish acceptable exceptions, and give variances. *Id.* Finally, the Standard Act contains provisions for enforcement of the zoning regulations. *Id.*

83 *Id.* However, zoning that does not follow the procedures established under the enabling act can be held valid under other authority, such as the power to establish building codes. *Id.*

84 272 U.S. 365 (1926).

85 *Id.* at 379–81. As a result, this type of cumulative zoning has come to be called “Euclidean” zoning. See Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1704 (1998).

86 *Vill. of Euclid*, 272 U.S. at 380.

87 *Id.* at 384.

88 U.S. CONST. amend XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

its property without the due process of law and that it denied Ambler Realty equal protection of the law.<sup>89</sup> The Supreme Court disagreed and granted the municipality a fair amount of deference, concluding, “[T]he reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>90</sup>

*Euclid* conclusively established that zoning for public health is a legitimate exercise of a state’s police power. Since *Euclid*, courts have continued to give great deference to municipalities in reviewing zoning laws established to protect the public health.<sup>91</sup>

### III. THE DORMANT COMMERCE CLAUSE

The dormant Commerce Clause is an implied legal doctrine that evolved from the Supreme Court’s interpretation of the Commerce Clause. The dormant Commerce Clause limits the states’ ability to regulate economic activities on which Congress has been silent. In practice, the dormant Commerce Clause prevents the states from passing legislation that unduly burdens or discriminates against interstate commerce. Courts apply a two-part analysis to dormant Commerce Clause challenges, first looking at whether the challenged law is discriminatory on its face (and, as a result, *per se* invalid), and, in the alternative, at whether a facially neutral law has a disproportionate effect on interstate commerce. The difficulty in dormant Commerce Clause analysis is determining where to draw the line between discrimination and incidental effect—a decision which will often determine the fate of a piece of economic legislation.

#### A. *The Evolution of the Dormant Commerce Clause*

Article I, Section 8 of the Constitution provides that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>92</sup> If Congress acts within its delegated power to regulate commerce, a congressional act will preempt any state statute that conflicts with it.<sup>93</sup>

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89 *Vill. of Euclid*, 272 U.S. at 384.

90 *Id.* at 395 (citing *Thomas Cusack Co. v. City of Chi.*, 242 U.S. 526, 530–31 (1917) and *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905)).

91 *MAIR ET AL.*, *supra* note 8, at 32.

92 U.S. CONST. art. I, § 8, cl. 3.

93 1 MICHAEL KENT CURTIS ET AL., *CONSTITUTIONAL LAW IN CONTEXT* 554 (2d ed. 2006). In order to be a valid exercise of its delegated power, an act of Congress must

Accordingly, courts have interpreted the Commerce Clause to include a dormant aspect, involving the negative effect of the Commerce Clause when Congress has not spoken on a subject.<sup>94</sup> This dormant Commerce Clause limits the states' ability to regulate commercial activities on which Congress has not actively legislated, thus reserving a zone of commercial regulation for Congress.<sup>95</sup> However, the dormant Commerce Clause's preemptive effect is only conditional because Congress can authorize a state to regulate a certain economic activity that would otherwise violate the dormant Commerce Clause.<sup>96</sup>

There are several justifications for the dormant Commerce Clause. At the time the Founders drafted the Constitution, the states were erecting major trade barriers against one another.<sup>97</sup> The Constitution served as a tool for promoting economic efficiency by moving the country towards a common market system.<sup>98</sup> The dormant Commerce Clause protects people and commerce from the economically protectionist actions of states by prohibiting a state from passing legislation that would burden or discriminate against interstate commerce.<sup>99</sup> The clause also protects out-of-staters, who would otherwise have relatively little protection from the regulating state's political process.<sup>100</sup>

Determining where the police power of the states ends and where the dormant Commerce Clause begins is often a difficult task. Today, a two-part analysis is applied to determine the validity of state regulations affecting interstate commerce. The first step in analyzing state economic legislation is to determine whether the law discriminates on its face against interstate commerce.<sup>101</sup> The Supreme Court has

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not exceed any constitutional limitation on congressional power, not just those established by the Commerce Clause. *See id.*

94 *See id.*

95 *See id.*; *see also* Nathan E. Endrud, Note, *State Renewable Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV. J. ON LEGIS. 259, 265 (2008) ("It has long been recognized that while the clause is explicitly a positive grant of authority to Congress to regulate interstate commerce, it also has an implicit 'negative' or 'dormant' aspect in limiting the authority of States to regulate in the same way.").

96 CURTIS ET AL., *supra* note 93, at 555. Other limitations on the states' powers, such as the Privileges and Immunities Clause or the Equal Protection Clause, are not limits that Congress can authorize the states to violate.

97 *Id.* at 554.

98 *Id.*

99 *See id.* at 555.

100 *Id.*

101 *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

defined discrimination as “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>102</sup> State laws motivated solely by economic protectionism are subject to a “virtually *per se* rule of invalidity.”<sup>103</sup> Courts subject such statutes to strict scrutiny and render them invalid unless the State can demonstrate a compelling interest for its regulation.<sup>104</sup> The regulatory means employed must be the least restrictive available with respect to their burden on interstate commerce.<sup>105</sup>

The second part of the analysis is invoked “[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental.”<sup>106</sup> Here, the courts use a balancing test to determine whether the interstate burden imposed by the law outweighs the local benefits.<sup>107</sup> If this is found to be the case, the law is generally held unconstitutional.<sup>108</sup> This far more deferential analysis is known as the “*Pike* balancing test.”<sup>109</sup>

### B. *The Line Between Discrimination and Incidental Effect*

Both the Supreme Court and scholars have noted the difficulty in identifying exactly where discrimination ends and “incidental effect” begins.<sup>110</sup> An example of this problem is illustrated by a pair of cases with similar facts but dissimilar outcomes: *Hunt v. Washington State Apple Advertising Commission*<sup>111</sup> and *Minnesota v. Clover Leaf Creamery*

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102 *Ore. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

103 *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978).

104 *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

105 *Id.*

106 *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

107 *See id.* (“If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”). The Court gave only a vague explanation of the application of the test, indicating that it was a question of degree once a legitimate local purpose is found. Ryan Tichenor, Note, *The Public Entity End Run: Government Actor’s Exception to Dormant Commerce Clause Considerations*, 15 MO. ENVTL. L. & POL’Y REV. 435, 440 (2008).

108 *Pike*, 397 U.S. at 142.

109 *See generally id.* (establishing the balancing test).

110 *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) (“We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach.”); Baker & Konar-Steenberg, *supra* note 34, at 6.

111 432 U.S. 333 (1977).



Co.<sup>112</sup> *Hunt* involved a 1973 North Carolina statute that required all apples sold, offered for sale, or shipped to the state to bear a USDA grade and that did not accept any state grading systems.<sup>113</sup> The Washington State Apple Advertising Commission brought suit claiming that the statute unconstitutionally discriminated against interstate commerce.<sup>114</sup> The Court found that the facially neutral North Carolina statute had a discriminatory effect on interstate commerce.<sup>115</sup> The discrimination in *Hunt* took several forms.<sup>116</sup> The statute raised the cost of business for Washington apple growers in the North Carolina market, while leaving the costs of their North Carolina counterparts unaffected.<sup>117</sup> The statute also eliminated the competitive advantage that Washington's apple industry had earned by creating its own individual, extensive grading system.<sup>118</sup> Finally, the statute served as a competitive leveler by prohibiting the Washington growers from marketing their apples under their state's grade, operating to the advantage of local North Carolina apple growers.<sup>119</sup>

*Clover Leaf* concerned a 1977 Minnesota statute banning the retail sale of milk in plastic, nonreturnable, nonrefillable containers, while allowing the sale of milk in other nonreturnable and nonrefillable containers, such as cardboard milk cartons.<sup>120</sup> The Court found that the statute was not facially discriminatory because it "'regulate[d] evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers [were] from outside the State."<sup>121</sup> The Court applied the *Pike* balancing test and found that the burden imposed on interstate commerce was "relatively minor" as milk products could continue moving freely across the Minnesota border because most dairies packaged their products in more than one type of container.<sup>122</sup> While the Court acknowledged that the Minnesota pulpwood producers were "likely to benefit signifi-

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112 449 U.S. 456 (1981).

113 *Hunt*, 432 U.S. at 335.

114 *Id.* At the time of the case, Washington State was the largest producer of apples in the country and used an industry-accepted grading system that was equivalent or superior to the USDA's grades and standards. *Id.* at 336.

115 *Id.* at 352-53.

116 *Id.* at 350.

117 *Id.* at 351.

118 *Id.*

119 *Id.*

120 *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 458 (1981).

121 *Id.* at 471-72 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

122 *Id.* at 472.

cantly from the Act at the expense of out-of-state firms,”<sup>123</sup> the Court nonetheless found that

[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominately in-state industry. Only if the burden on interstate commerce clearly outweighs the State’s legitimate purposes does such a regulation violate the Commerce Clause.<sup>124</sup>

The most common explanation for the disparate outcomes of these cases is that the North Carolina statute in *Hunt* appeared to have a somewhat discriminatory purpose, while the Court accepted the Minnesota statute in *Clover Leaf* as an innocent environmental measure.<sup>125</sup> The Court still, however, appears to inconsistently apply the doctrine. In *Hunt*, the Court noted that while there was evidence of protectionist intent in the record, there was no need to attach an economic protectionist motive to the North Carolina statute to resolve the case.<sup>126</sup> However, four years later in *Clover Leaf*, the Court characterized *Hunt* as being decided precisely on that ground—intentional discrimination.<sup>127</sup> While the legal world is still left questioning this distinction, these cases appear to “suggest that the difference between discriminatory effect and incidental burdens is whether there is evidence of discriminatory purpose.”<sup>128</sup>

The Supreme Court has not yet addressed how the dormant Commerce Clause applies to zoning.<sup>129</sup> Municipal zoning laws do not generally discriminate between in-locality and out-of-locality residents.<sup>130</sup> Therefore, courts will have to weigh the interests of the locality against the burden the ordinance places on interstate commerce.<sup>131</sup> As the history of the dormant Commerce Clause illustrates, “facially neutral but burdensome local regulations . . . tend to avoid

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123 *Id.* at 473.

124 *Id.* at 474.

125 Baker & Konar-Steenberg, *supra* note 34, at 7.

126 *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 352 (1977) (“[W]e need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case . . .”).

127 Baker & Konar-Steenberg, *supra* note 34, at 7 (citing *Clover Leaf*, 449 U.S. at 471 n.15).

128 *Id.* This idea does not in any way create a bright-line rule and more recent case law has done nothing to further illuminate the distinction. *Id.*

129 *Id.* at 3.

130 Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1122 (2008).

131 *Id.*

judicial scrutiny.”<sup>132</sup> This is the case despite the fact that many land use regulations, like anti-big box store or fast food outlet ordinances, have a somewhat protectionist purpose and effect.<sup>133</sup> Many of these land use regulations will pass judicial muster because they are often passed for aesthetic or safety purposes. However, these local anticompetitive regulations are beginning to attract the attention of scholars and litigators.<sup>134</sup>

#### IV. USING RESTRICTIVE ZONING TO SHRINK AMERICAN WAISTLINES

The positive correlation between fast food and obesity leads to the conclusion that by reducing the availability of fast food and displacing these restaurants with healthier food and lifestyle options, local governments can encourage a healthier lifestyle for their communities.<sup>135</sup> Local governments are using restrictive zoning as a legal intervention to control overweight and obesity in their communities.<sup>136</sup> Restrictive zoning for the express purpose of the public's health, safety, morals, and welfare is a valid exercise of the police power delegated to local governments by the states.<sup>137</sup> Fast food zoning will survive constitutional challenges under the dormant Commerce Clause because it is neither facially discriminatory towards interstate commerce nor unduly burdensome to this type of commerce.

##### A. A Valid Exercise of the Police Power

The power to legislate solely in the interest of the public's health, safety, morals, and general welfare is reserved for the states, who have delegated some of their authority to local governments.<sup>138</sup> “[A]ll fifty

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132 *Id.*

133 *Id.*

134 One such land use regulation is the San Francisco anti-chain restaurant ordinance, which explicitly seeks to protect its residents' opportunities for employment and local business ownership. S.F., CAL., PLANNING CODE § 703.3(a)(2) (2008), available at <http://www.municode.com/Resources/gateway.asp?pid=14139&sid=5> (“San Francisco needs to protect its vibrant small business sector and create a supportive environment for new small business innovations. One of the eight Priority Policies of the City's General Plan resolves that ‘existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced.’”).

135 See MAIR ET AL., *supra* note 8, at 20 (“Zoning provides a useful tool for reducing access to fast food restaurants and for encouraging healthier alternatives.”).

136 Gostin, *supra* note 27, at 88.

137 See LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW 91–95 (2d ed. 2008).

138 See U.S. CONST. amend. X; GOSTIN, *supra* note 137, at 91–95.

states have delegated at least some of their zoning authority to local governments . . . .”<sup>139</sup> Therefore, local governments make most zoning decisions.<sup>140</sup> The United States Supreme Court describes the police power as “one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.”<sup>141</sup>

An examination of the history of zoning suggests that public health provides the strongest legal basis for zoning.<sup>142</sup> Zoning in the United States originated in New York City in 1916, when New York became the first city to adopt a comprehensive zoning ordinance, for the express purpose of protecting the quality of light and air.<sup>143</sup> States and cities began to establish land use restrictions to prevent the spread of disease as cities began to grow rapidly in the nineteenth and early twentieth centuries.<sup>144</sup> Some cities restricted the expansion of urban cemeteries while others placed height limits on buildings to ensure proper access to light and air for the health of the community.<sup>145</sup>

While much of the focus on public health in terms of land use was lost to concerns over property value, today, many local governments have begun to refocus their efforts on legislating towards community wellness.<sup>146</sup> States and local governments realize that they are “in a unique position to physically reshape communities in ways that are good for public coffers, private balance sheets, and the personal health of the states’ respective citizens.”<sup>147</sup> Many cities and states are currently legislating to protect health and wellness by supporting community design initiatives such as smoking bans, water fluoridation mandates, and infrastructure improvements, thereby encouraging people to live healthier lifestyles.<sup>148</sup> Similar efforts have been specifi-

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139 MAIR ET AL., *supra* note 8, at 28–29.

140 *See id.* at 29.

141 *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909).

142 *See* MAIR ET AL., *supra* note 8, at 32, 36.

143 *See* Bruce Bragg et al., *Land Use and Zoning for the Public’s Health*, 31 J.L. MED. & ETHICS 78, 78 (2003); *see also* MAIR ET AL., *supra* note 8, at 33–34 (discussing the 1913 report recommending height, bulk, and use restrictions to protect the public health, which led to the 1916 ordinance).

144 MAIR ET AL., *supra* note 8, at 33.

145 *Id.*

146 *See* Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh in on Wellness*, 5 IND. HEALTH L. REV. 185, 193 (2008); Bragg et al., *supra* note 143, at 79.

147 Baker, *supra* note 146, at 194 (suggesting that “community design efforts might be the most politically and legally viable tool to legislate toward wellness”).

148 *See id.* at 194–95.

cally focused on the public's nutritional health, including trans-fats bans and the New York City calorie-posting requirement.<sup>149</sup>

Both historical and modern applications of restrictive zoning lead to the conclusion that a local government may restrictively zone fast food restaurants to combat obesity and overweight. While many municipalities currently restrict or ban fast food restaurants through restrictive zoning by legislating under the guise of protecting community aesthetics,<sup>150</sup> local governments have not generally employed land use planning or regulations as a mechanism to directly impact food consumption and nutrition.<sup>151</sup> This type of legislation is likely to be met with some resistance due, in part, to the universal acceptance of fast food.

While American culture is inculcated with fast food, many other forms of previously accepted cultural norms have been restrictively zoned and survived bitter criticism as somewhat revolutionary land use restrictions. The first famous example is the 1995 New York City resolution that restrictively zoned nonobscene adult entertainment throughout the city's five boroughs.<sup>152</sup> The resolution was enacted based on a 1993 study conducted by the New York City Division of City Planning linking adult businesses to neighborhood deterioration, including increased crime, decreased property values, and reduced shopping and commercial activities.<sup>153</sup> The City sought to remedy the secondary effects of adult businesses in the community. The community strongly resisted the resolution, in part because the adult entertainment industry was burgeoning in New York City at that time.<sup>154</sup> The New York City resolution passed constitutional muster by

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149 See *supra* notes 59–60 and accompanying text.

150 See *supra* notes 64–71 and accompanying text.

151 Perdue et al., *supra* note 27, at 560.

152 Rachel Simon, Note, *New York City's Restrictive Zoning of Adult Businesses: A Constitutional Analysis*, 23 FORDHAM URB. L.J. 187, 187 (1995).

153 Memorandum from the N.Y. State Office of Gen. Counsel on Municipal Regulation of Adult Uses, <http://www.dos.state.ny.us/cnsl/lu03.htm> (last visited Oct. 26, 2009) [hereinafter Memorandum].

154 See Simon, *supra* note 152, at 189–90 (“In 1965, there were only nine adult entertainment establishments in New York City because of heavy restrictions on the sale of pornography. By 1976, after the City lifted the restrictions, the number of adult businesses flared to 151. By 1993 the number of adult establishments reached an estimated 177. . . . The DCP estimate[d] that at [that] rate of increase, by the year 2002, the number of bookstores, peep shows, and stores selling adult videos [would have] increase[d] by 197 percent, to approximately 250 . . . .” (footnotes omitted)).

only *restricting* adult uses within the community rather than *prohibiting* them entirely.<sup>155</sup>

Another example of a heavily resisted land use restriction is the restrictive zoning of “big box” retail stores, which emerged as part of the battle against sprawl accompanying suburbanization in the United States.<sup>156</sup> These types of retailers, including Costco, Target, Home Depot, and Wal-Mart, have been termed “category killers” due to their predisposition to completely dominate a segment of the market and force out smaller retail stores who cannot compete with the price points of the behemoths.<sup>157</sup> While big box retail outlets drive out competition with their low prices, they still know where to set prices so as to maximize their profits.<sup>158</sup> In 2006, Wal-Mart earned more than \$312 billion dollars in net sales, a nine percent increase over 2005.<sup>159</sup> While some individuals claim to be ethically opposed to these category killers, people are often driven through their doors by the burden that shopping elsewhere places on their wallets.<sup>160</sup> As a result of the rapid expansion of the big box retailers, many municipalities suffer from greyfield epidemics.<sup>161</sup> Big box stores abandon their large storefronts for even larger spaces with more shelf space to increase their selection of products, leaving obsolete concrete warehouses that serve as an eyesore for the community.<sup>162</sup> These greyfields have an even bigger impact on the health, safety, and general welfare of small communities, which have slower, less congested lifestyles and a stronger sense of community.<sup>163</sup>

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155 Memorandum, *supra* note 153. “[T]he Court of Appeals held that New York City’s effort to address the negative secondary effects of adult establishments is not constitutionally objectionable under any of the applicable federal or state constitutional standards.” *Id.* (citing *City of N.Y. v. Stringfellow’s of N.Y., Ltd.*, 749 N.E.2d 192 (N.Y. 2001)).

156 Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 URB. LAW. 907, 907 (2005).

157 See Dwight H. Merriam, *Breaking Big Boxes: Learning from the Horse Whisperers*, 6 VT. J. ENVTL. L. 7, 7–8, 10 (2005).

158 *Id.* at 10.

159 Betsy H. Sochar, Comment, *Shining the Light on Greyfields: A Wal-Mart Case Study on Preventing Abandonment of Big Box Stores Through Land Use Regulations*, 71 ALB. L. REV. 697, 701 (2008).

160 Merriam, *supra* note 157, at 8 (“It is the hundreds of millions of bargain-hungry shoppers who feed these formats and cause them to grow to sumo-like proportions. . . . ‘Wal-Mart has not become the world’s largest retailer by putting a gun to our heads and forcing us to shop there.’” (quoting Robert B. Reich, *Don’t Blame Wal-Mart*, N.Y. TIMES, Feb. 28, 2005, at A19)).

161 Sochar, *supra* note 159, at 702–03.

162 See *id.*

163 *Id.* at 703.

In order to combat the negative impact of big box retailers, many municipalities have successfully utilized restrictive zoning regulations to limit their growth and prevent greyfields.<sup>164</sup> Several types of zoning ordinances have been used to restrict or exclude big box retailers, including aesthetic specifications in zoning ordinances and size-cap zoning ordinances.<sup>165</sup> While local governments restrictively zone big box retailers under the pretext of aesthetic concerns, many have expressed, within the text of the ordinance or in statements from supporters of the ordinance, economic protectionism as a goal.<sup>166</sup> These types of zoning ordinances have survived constitutional challenges brought by the big box retailers because they are tied to the general health, safety, and welfare of the public.<sup>167</sup>

Local governments have already been successful in restrictively zoning fast food restaurants for the protection of public health, such as pedestrian safety, congestion, and air and environmental quality.<sup>168</sup> While no reported court decisions discuss land use restrictions utilized specifically for the purpose of reducing overweight and obesity, several cases have upheld zoning restrictions on fast food restaurants for other public health goals such as traffic concerns,<sup>169</sup> public health necessity,<sup>170</sup> and community need.<sup>171</sup> The courts' willingness to uphold these types of zoning laws, coupled with the undisputed pres-

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164 *Id.* at 706.

165 *Id.* at 710–13.

166 See Denning & Lary, *supra* note 156, at 913; see, e.g., TOWN OF WARWICK, N.Y., COMPREHENSIVE PLAN § 3.4 (2008) (listing protectionist purposes for the 60,000 square foot limit on retail businesses including to “[s]upport small locally owned businesses and retail centers which are in character with the Town’s largely rural environment” and to “[c]reate a commercial atmosphere friendly to small business and home occupations”); RIVER FALLS, WIS., TOWN CODE § 17.075(1) (2003), available at <http://www.riverfallstown.com/codeindex.html> (describing the purpose of an ordinance requiring retail stores exceeding 150,000 square feet in gross floor area to apply for a special use permit as “ensur[ing] that large-scale retail developments are compatible with surrounding land uses and contribute to the unique community character of River Falls . . . and it’s [sic] citizens are protected”).

167 Sochar, *supra* note 159, at 730.

168 MAIR ET AL., *supra* note 8, at 54. In *Bellas v. Planning Board*, No. 00-P-1837, 2002 WL 31455225, at \*1 (Mass. App. Ct. Nov. 4, 2002), the Appeals Court of Massachusetts upheld the planning board’s denial of a special permit for a drive-through window at a Dunkin Donuts because of evidence that the added traffic resulting from the addition of a drive-through window, combined with the number of school children passing through the area during peak hours, would threaten pedestrian safety. *Id.* at \*2.

169 See *Bellas*, 2002 WL 31455225, at \*2.

170 See *SBA, Inc. v. City of Asheville City Council*, 539 S.E.2d 18, 21 (N.C. Ct. App. 2000) (finding that the requirement that a proposed use of property is “reasonably necessary for the public health or general welfare” is valid, suggesting that such a

ence of an American obesity epidemic and its negative effects on the country's health and economy, lead to the conclusion that courts are likely to uphold zoning laws aimed at combating obesity.

Restrictive zoning of fast food restaurants is a valid exercise of a local government's police power because it is rationally related to the public's health, which is, as discussed above, the strongest basis for zoning laws.<sup>172</sup> The use of the police power to protect the public welfare is "broad and inclusive."<sup>173</sup> The Supreme Court gives great deference to legislative bodies in establishing reasonable plans to protect the public.<sup>174</sup> In *Berman v. Parker*,<sup>175</sup> the Court found that "[t]he values [public welfare] represents are spiritual as well as physical, aesthetic as well as monetary."<sup>176</sup> "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."<sup>177</sup> Therefore, because of the overwhelming evidence regarding the severity of the American obesity epidemic,<sup>178</sup> and the Court's discretionary approach to police power cases, ordinances enacted to combat obesity will be upheld as a valid exercise of the police power.

This conclusion finds further support in the historical use of restrictive zoning to restrict or eliminate adult entertainment establishments and big box retailers. Like the New York City resolution

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requirement is a legitimate exercise of municipal zoning power in North Carolina and possibly other states).

171 See *Scadron v. Zoning Bd. of Appeals*, 637 N.E.2d 710, 713 (Ill. App. Ct. 1994) (interpreting a zoning requirement that a use be "necessary for the public convenience" to require the applicant to "demonstrate that the community will derive at least some benefit from the proposed use" and affirming the City of Chicago's denial of a use permit for failure to show that the use was "necessary for public convenience or in any manner expedient to public welfare").

172 See *supra* note 142 and accompanying text.

173 *Berman v. Parker*, 348 U.S. 26, 32, 33 (1954) ("Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."); see also *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (describing the police power as "one of the most essential powers of government, one that is the least limitable").

174 *Berman*, 348 U.S. at 33; see also *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (establishing a deferential approach to judicial review of land use regulations).

175 348 U.S. at 26.

176 *Id.* at 33.

177 *Id.*

178 See *supra* Part I.A.



that restrictively zoned adult entertainment establishments,<sup>179</sup> restrictive zoning of fast food restaurants seeks to combat the secondary effects of the restaurants' overwhelming presence, including overweight and obesity. In addition, restrictive ordinances, such as the Los Angeles ICO, only *restrict* the expansion of fast food restaurants within the community rather than eliminate them altogether, a distinction that allowed the New York resolution to survive constitutional challenge.<sup>180</sup> As illustrated by the restriction of big box retailers in many communities, local governments have successfully employed land use planning techniques for the implicit purpose of economic protectionism of their communities. Therefore, in the case of fast food, it can be argued that municipalities may zone to achieve, in part, healthful protectionism since the public health is the strongest basis for zoning laws. Furthermore, like restrictive zoning of big box retailers, zoning restrictions on fast food establishments will survive constitutional challenge because they too are tied to the health and welfare of the community.

It is important to note that, while restrictive zoning of fast food restaurants for the express purpose of combating obesity is a valid exercise of the police power, local governments are best advised to assert multiple justifications for their ordinances to avoid constitutional criticism and scrutiny. Many municipalities currently restrict or ban fast food restaurants through restrictive zoning legislated under the guise of protecting community aesthetics.<sup>181</sup> While local governments can restrictively zone these establishments for the sole purpose of combating overweight and obesity, including this purpose with a variety of previously accepted goals serves to prevent a certain level of resistance to the legislation. Skillfully drafted ordinances enable municipalities to receive the same judicial deference that their predecessors traditionally have. An example of a mixed-purpose ordinance is the Los Angeles ICO, which includes among its purposes, commercial market expansion, aesthetic protectionism, and the health and welfare of the community.<sup>182</sup> Such an ordinance will be upheld under the police power as protecting public health, safety, and welfare.

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179 See Simon, *supra* note 152, at 187.

180 Memorandum, *supra* note 153. Had the New York resolution banned adult businesses, it would have been challenged, and most likely struck down, as a violation of the freedom of expression. See *id.* Furthermore, such a ban would have difficulty passing constitutional scrutiny under the dormant Commerce Clause.

181 See *supra* notes 64–71 and accompanying text.

182 See *supra* text accompanying note 13.

*B. Fast Food and the Dormant Commerce Clause*

A municipality's power to restrictively zone is limited to the extent that it violates the Constitution or is not rationally related to the protection of the public's health, safety, morals, or welfare.<sup>183</sup> While an ordinance that restrictively zones fast food restaurants is rationally related to the protection of the public's health and welfare, courts have yet to address whether it passes constitutional muster under the dormant Commerce Clause. Fast food zoning will survive constitutional challenge because it is not discriminatory on its face, and its incidental effects are not unduly burdensome on interstate commerce.

The first step in analyzing economic legislation is to determine whether it is discriminatory on its face and, as a result, per se invalid.<sup>184</sup> Because municipal zoning laws do not generally discriminate between in-locality and out-of-locality residents, these regulations usually satisfy the first step of dormant Commerce Clause analysis. However, even if this were not the case, an ordinance restrictively zoning fast food for health purposes, such as the Los Angeles ICO, is not facially discriminatory. The Los Angeles ICO does not treat in-state and out-of-state interests differently, or provide a benefit to the former at a cost to the latter.<sup>185</sup> While some might argue that a fast food

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183 MAIR ET AL., *supra* note 8, at 38.

184 *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

185 See *Granholm v. Heald*, 544 U.S. 460, 493 (2005) (striking down New York state statutes, which imposed additional burdens on out-of-state wineries seeking to sell and ship wine directly to New York customers, in violation of the dormant Commerce Clause); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 594–95 (1997) (invalidating a Maine property tax exemption, which benefited institutions that mostly served state residents and penalized institutions that did principally interstate business, as a violation of the dormant Commerce Clause); *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 108 (1994) (invalidating an Oregon state surcharge, which imposed a higher cost for in-state disposal of out-of-state waste than on in-state disposal of in-state waste, as a violation of the dormant Commerce Clause); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471–72 (1981) (finding a Minnesota statute regulating the type of containers in which milk could be sold in the state not facially discriminatory because it “regulate[d] evenhandedly” by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers [were] from outside the State” (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970))); *City of Phila. v. New Jersey*, 437 U.S. 617, 627 (1978) (finding that a New Jersey statute that prohibited the importation of most solid or liquid waste from outside of the state violated the dormant Commerce Clause); see also *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (“A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground

zoning ordinance is a protectionist measure, preventing national chains from entering the market and protecting local businesses, this is not an issue with ordinances that broadly define fast food. Such an ordinance restricts all types of fast food restaurants ranging from national chains to local taquerias and hot dog stands.<sup>186</sup> This type of broadly defined fast food zoning ordinance is therefore not facially discriminatory.

A fast food zoning ordinance also survives the second part of dormant Commerce Clause analysis, the *Pike* balancing test.<sup>187</sup> This part of the analysis is used to determine whether the burden placed on interstate commerce by the legislation is outweighed by its purported benefits.<sup>188</sup> A fast food ordinance prevents certain restaurants, including national chains, from entering the local market. However, as previously discussed, this is not a protectionist measure because the ordinance also places restrictions on local businesses trying to sell fast food to the local market. It is also important to note that both out-of-state and local food service establishments are not completely banned from the area and may freely operate a non-fast-food restaurant within the community.

The benefit fast food ordinances provide to a municipality far outweighs any incidental burden that restricting additional fast food restaurants from entering the community places on interstate commerce. Such ordinances not only prevent additional unhealthy dietary options from entering the market, but also reserve scarce land and retail property for healthier lifestyle options, such as grocery stores, recreational parks, and restaurants with more nutritional options. Even if the legislation has an incidental effect of shifting some business to in-state industry, the Supreme Court held in *Clover Leaf* that such a shift does not invalidate the legislation as long as it is serving a "substantial state purpose[ ]."<sup>189</sup> As in *Clover Leaf*, fast food zoning only has an incidental burden on interstate commerce, rather than a

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that they are required to satisfy local demands or because they are needed by the people of the State.").

186 See, e.g., L.A., Cal., Ordinance 180103 (July 29, 2008) (defining fast food restaurant broadly as "[a]ny establishment which dispenses food for consumption on or off the premises, and which has the following characteristics: a limited menu, items prepared in advance or prepared or heated quickly, no table orders, and food served in disposable wrapping or containers").

187 See *Pike*, 397 U.S. at 142.

188 *Id.*

189 *Clover Leaf*, 449 U.S. at 474.

discriminatory effect, which is acceptable when coupled with a substantial benefit.<sup>190</sup>

The American obesity epidemic is something that affects every American, whether in their own individual health or in healthcare costs, as the burden on the health care system continues to grow as a result of the negative medical effects of overweight and obesity.<sup>191</sup> Such a substantial and pervasive interest as the health of the country, or in this case the municipality, far outweighs any incidental burden on interstate commerce. It is the core purpose of the government to protect and promote human well-being, and the ability to live a healthy and fulfilling life cannot be undervalued.<sup>192</sup> Therefore, fast food zoning survives the second part of the dormant Commerce Clause analysis and is a constitutional application of the power of local governments to regulate to protect the health, safety, morals, and public welfare of the community.

#### CONCLUSION

With the majority of Americans believing that obesity is an epidemic in our country, all of us, including local governments, must play our parts in combating this problem. The prevalence of fast food in our culture and our neighborhoods is a major contributing factor to overweight and obesity in America. As the increasing rate of obesity in adults and children makes clear, individuals cannot successfully fight the battle against obesity alone. Left to our own devices, we continue to feed the epidemic and drain American resources through a variety of direct and indirect costs. Local governments have begun to intervene through land use planning to protect public health, safety, morals, and welfare, by restrictively zoning fast food outlets. Until recently, local governments have effectively zoned fast food for aesthetic or safety reasons, but never for the express purpose of combating obesity or directly impacting food consumption and nutrition. However, with the approval of the Los Angeles Interim Control Ordinance, the debate over the validity of zoning to combat obesity and promote a healthy lifestyle has been ignited.

Restrictive zoning to reduce obesity is a valid exercise of a municipality's police power. Public health is the strongest basis for zoning laws and has traditionally been upheld as a valid purpose by courts in

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190 See *supra* Part III.B.

191 See *supra* Part I.A.

192 Perdue et al., *supra* note 27, at 560 ("Health is vital to obtaining a livelihood, engaging in recreation and social interaction, as well as in participating in the political process.").

a variety of contexts. The states have a substantial interest in protecting the health and well-being of their citizens and reducing or eliminating the health concerns attributed to overweight and obesity. These ordinances are rationally related to the protection of public health and welfare and will survive constitutional challenge under the dormant Commerce Clause. They are not discriminatory on their face and will pass the *Pike* balancing test because their benefits—reducing obesity and its health risks—far outweigh any incidental interstate burdens that result.

While ordinances that encompass a mixed purpose, such as the Los Angeles ICO, will most likely face less constitutional criticism and scrutiny, this type of careful drafting is unnecessary to create constitutionally valid ordinances. Restrictive zoning of fast food outlets is one of many potentially successful tools that can be used to advance the battle against the American obesity epidemic. While critics may argue that the government has no right to interfere with our personal choices, they must acknowledge that the protection and promotion of human well-being is a core purpose of the government. Without our health, we as a people are unable to pursue the opportunities that our predecessors worked so hard to provide for us.