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The Legal Anatomy of Product Bans to Protect the Public’s Health*

James G. Hodge, Jr.** and Megan Scanlon***

I. INTRODUCTION

The vast array of products available to American consumers can be used or consumed safely. There are products, however, that pose significant threats to individual and community health and safety even when used as intended. Some of these products kill thousands of people each year (e.g., tobacco, alcohol, salt, guns) or lead to long- or short-term physical and mental disabilities (e.g., lead-based paints, asbestos).

Others present less significant risks to most users (e.g., caffeinated beverages). Some products are inherently dangerous only in the hands of certain consumers (e.g., children’s toys). And some products with known, sometimes significant risks (e.g., prescription and over-the-counter drugs) are sold lawfully because their benefits outweigh their potential for harms to intended users.

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3. When warning labels were used, seventy-seven percent of consumers chose the age-appropriate toy. Jean Langlois et al., The Impact of Specific Toy Warning Labels, 265 JAMA 2848, 2849 (1991).

4. The Food and Drug Administration (FDA) is responsible for approval of drugs. See
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Underlying the lawful sale and use of any product is a concomitant responsibility of government, manufacturers, and sellers to assess the risks of harm to the public’s health. When risks are identified, legal or policy options to address them abound. Products may be re-designed (e.g., automobiles, lawn mowers), re-packaged with warnings (e.g., cigarettes), or restricted to specific users (e.g., alcohol). In some cases, federal, state, or local governments may also ban the sale or use of products that threaten the public’s health through various legal routes and processes. That government may ban harmful products to protect communal health is well founded. When and how government may legally implement such bans is less understood and not easily answered.

Certain products that threaten individual health are taken off the market almost the moment after their risks are discovered (e.g., contaminated drugs); others remain available for decades despite known serious risks or may be restricted only for minors even though risks continue through adulthood (e.g., tobacco). At the same time, balancing product risks and benefits for individuals and communities leads to variances among banned products and creates an incomplete proxy for determining which products can be prohibited. Broader themes are at play when assessing and implementing product bans in the interests of communal health.

Against a backdrop of clear and objective governmental powers to proscribe harmful products are countervailing arguments grounded in law, policy, and ethics that influence the consideration and implementation of these bans. The use and efficacy of public health product bans are predicated on identifying and navigating a complex legal and political environment that simultaneously supports bans on one hand, and rejects them on the other. Lacking a definitive, existing assessment, we seek to lay out a framework for identifying and implementing bans that are legally effective, and avoiding those that are not.

Part II succinctly reviews the spectrum of products, focused notably on consumables, whose bans are arguably justified by threats to the public’s


5. Hodge, supra note 1, at 135-40.


health. Three selected case studies focused on trans fats, marijuana, and tobacco help illustrate the legal and policy issues underlying product bans. Themes culled from these case studies and other attempts to ban products contribute to the analyses in Part III, which explores the legal paths used to ban products that harm individual or communal health in contrast with key legal arguments that may derail such bans. These arguments include structural and rights-based constitutional claims designed to preempt statutory or regulatory authorities, as well as procedural hurdles that temporarily or permanently stall product bans.

Based on this information, Part IV sets forth core elements that affect when and how a product may be banned in furtherance of the public’s health. Collectively, these factors establish the “legal anatomy” of product bans for which non-legal components are interwoven. Ethical considerations arise, often related to the juxtaposition of perceived paternalistic objectives behind product bans and their imposition on consumer choices. Bans that are legally and ethically viable may only become operational if they are also scientifically grounded and politically supported. Finally, we address the need to determine suitable consumers for specific products, and effectively targeting appropriate populations for certain product bans.

II. BANNING PRODUCTS TO PROTECT THE PUBLIC’S HEALTH: PAST AND PRESENT

Protecting individual and communal health in the United States are common justifications for product bans both historically and in present-day. During the Colonial Era, colonies enacted laws to prohibit the sale of adulterated bread and other “unwholesome provisions.”8 In 1888, the U.S. Supreme Court upheld a state ban on oleomargarine to protect the public’s health.9 New York City restricted lead paint for health-related reasons in 1959.10 In 1988, the federal Consumer Products Safety Commission

8. Colonies passed the laws to protect and promote both public health and trade. Wallace F. Janssen, America’s First Food and Drug Laws, 30 FOOD DRUG COSM. L.J. 665, 666-69 (1975). For example, bakers would substitute cheap ground beans or chalk in the place of more expensive flour when making bread. Id. By regulating the weight of baked goods, the colonies protected health and trade interests alike. Id.
9. Powell v. Pa., 127 U.S. 678, 685 (1888) (“The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large.”). Oleomargarine is also known as margarine. See Gerry Strey, The “Oleo Wars”: Wisconsin’s Fight over the Demon Spread, 85 Wis. Mag. Hist. 3 (2001).
10. New York City banned the use of lead paint twelve years before the federal government enacted a similar ban. David Rosner & Gerald Markowitz, Why It Took Decades of Blaming Parents Before We Banned Lead Paint, THE ATLANTIC (Apr. 22, 2013), http://www.theatlantic.com/health/archive/2013/04/why-it-took-decades-of-blaming-parents-before-we-banned-lead-paint/275169/ (“In the case of lead paint, after three decades of industry lobbying, propaganda, and denial of danger, local health departments began to assert...
(CPSC) banned lawn darts after the game caused thousands of injuries and several deaths.\textsuperscript{11}

The list of products banned for public health purposes is extensive. It includes items ranging from asbestos\textsuperscript{12} and insulation foam containing formaldehyde,\textsuperscript{13} to Buckyballs\textsuperscript{14} and toys found in children’s fast-food meals.\textsuperscript{15} Public health bans further encompass several consumable products, such as raw milk,\textsuperscript{16} haggis,\textsuperscript{17} Four Loko\textsuperscript{18} and other energy drinks,\textsuperscript{19} food coloring themselves. In 1949, Maryland’s House of Delegates passed a bill banning the use of lead paint on children’s toys and furniture—a law that was repealed under industry pressure the following year. A few years later, the City of Baltimore health department required a warning label be placed on paint cans.”).


\textsuperscript{14} CPSC first filed a complaint against the maker of Buckyballs in 2012 to ban the product. Press Release, Consumer Prod. Safety Comm’n, CPSC Sues Maxfield & Oberton Over Hazardous Buckyballs and Buckycube Desk Toys Action Prompted by Ongoing Harm to Children from Ingested Magnets (July 25, 2012), http://www.cpsc.gov/en/Newsroom/News-Releases/2012/CPSC-Sues-Maxfield—Oberton-Over-Hazardous-Buckyballs-and-Buckycube-Desk-Toys-Action-prompted-by-ongoing-harm-to-children-from-ingested-magnets/. Buckyballs are small, round rare earth magnets that are sold as toys and desktop accessories. Id. When children swallow them the toy can pinch or trap intestines, which may require surgery to remove. Id. Since they went on the market in 2009, numerous incidents involving children have been reported. Id. In January 2011, a four-year-old boy had his intestine perforated after he swallowed three magnets he thought were chocolate candy. Id.

\textsuperscript{15} In 2010, Santa Clara County, California became the first in the nation to ban toys from fast-food children’s meals that were high in calories, salt, fat, and sugar, based on the notion that banning the toys would make the meals less appealing to kids. Alice Park, Can Fast-Food Toy Bans Really Help Kids Eat Better?, TIME (Dec. 8, 2011), http://healthland.time.com/2011/12/08/can-fast-food-toy-bans-really-help-kids-eat-better/.


\textsuperscript{17} Since 1971, the U.S. has banned the food, haggis, imported from the United Kingdom because it contains sheep lung. Jon Kelly, The offal truth about American haggis, BBC NEWS (Jan. 22, 2013), http://www.bbc.co.uk/news/magazine-21128089.

\textsuperscript{18} Letter from Joann M. Givens, Acting Director, Office of Compliance, Ctr. for Food Safety & Applied Nutrition, Food & Drug Admin., to Jaisen Freeman, Chris Hunter & Jeff
dyes, sassafras oil, cyclamate, and sulfite preservatives used on fresh fruits and vegetables. Some products, like the artificial sweetener saccharin, are banned temporarily and later reauthorized for commercial use. More recently, state and local governments have tried unsuccessfully to ban genetically modified foods and sugared sodas served in large containers.


21. FDA banned sacfrone in 1960. Refusal to Extent Effective Date of Statute for Certain Specified Food Additives, 25 Fed. Reg. 12,412, 12,412 (Dec. 3, 1960) (codified at 21 C.F.R. pt. 121); see also 21 C.F.R. § 189.180(b) (West, WestlawNext through May 15, 2014; 79 Fed. Reg. 27,771) (“Food containing any added sacfrone, oil of sassafras, isosacfrone, or dihydrosacfrone, as such, or food containing any sacfrone, oil of sassafras, isosacfrone, or dihydrosacfrone, e.g., sassafras bark, which is intended solely or primarily as a vehicle for imparting such substances to another food, e.g., sassafras tea, is deemed to be adulterated.”).

22. Cyclamate is used as an artificial sweetener in fifty-five countries, but it is banned in the U.S. See Claire Suddath, Are Artificial Sweeteners Really That Bad for You?, TIME (Oct. 20, 2009), http://content.time.com/time/health/article/0,8599,1931116,00.html.


A. Justifying Product Bans

Different reasons motivate product bans. Laws criminalizing heroin, for example, are relatively straightforward; no one may possess or use this product because of known physical harms to individuals and secondary harms to society.27 The federal government’s temporary saccharin ban proved more complex and raised important policy questions about scientific findings, certainty, and who should bear the health risk.28 Other bans focus on specific audiences to help safeguard vulnerable populations.29 To illustrate the gamut of justifications and related common themes for product bans, consider the following three case studies centered on different types of products: (1) trans fats, (2) marijuana, and (3) tobacco.

1. Trans Fats

In November 2013, the FDA determined that partially hydrogenated oils (PHOs) (the primary source of trans fat) are not generally recognized as safe for use in food based on scientific evidence showing the health risks associated with their consumption.30 As a result, PHOs are classified as food additives and require FDA preapproval for use.31 This new legal classification is expected to practically ban trans fats from future use.

Even though many foods once contained trans fats, there is scant public opposition facing the ban.32 Support for banning trans fats grew over several decades as studies consistently showed that its consumption contributed significantly to high cholesterol and heart disease.33 In 2003, the FDA be-

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29. Certain bans, like those on tobacco and alcohol, are based on the recognition that minors and young adults should receive greater protection under the law.
33. Dariush Mozaffarian et al., Trans Fatty Acids and Cardiovascular Disease, 354 N. ENGL. J. MED., 1601, 1611 (2006) (“[G]iven the 1.2 million annual myocardial infarctions and deaths from [coronary heart disease] in the U.S., near-elimination of industrially produced trans fats might avert between 72,000 (6 percent) and 228,000 (19 percent) [coronary heart disease] events each year.”); see also Ctrs. for Disease Control & Prevention, Nutrition for Everyone: Trans Fat (updated Jan. 8, 2014), http://www.cdc.gov/nutrition/everyone/
gan requiring trans fat information on package nutrition labels, which allowed consumers to make informed purchases of products with the additive.\textsuperscript{34} Multiple restaurant chains also pledged to stop using trans fats.\textsuperscript{35} New York City, Cleveland, Philadelphia, and California banned trans fats from restaurant menus altogether.\textsuperscript{36} Over time, data about negative health effects, local and industry practices instituting bans, and consumer support for removing trans fats bolstered FDA’s plans to ban it entirely.\textsuperscript{37}

2. Medical Marijuana

Unlike with trans fats, marijuana bans are going in the opposite direction as states ease restrictions on its use. Historically, state and federal authorities classified marijuana alongside other illegal drugs, such as heroin, because they considered it highly addictive and lacking legitimate medical use. States initially regulated the drug by adopting the Uniform Narcotic Drug Act in the 1930s.\textsuperscript{38} After taking many steps to ban marijuana importation, exportation, and manufacturing, Congress banned these activities in 1970 by listing marijuana as a “Schedule I” substance in the Controlled Substances Act.\textsuperscript{39} As social attitudes about marijuana for medicinal purposes change, however, so are states’ policies. In 1996, California legalized

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\item basics/health/2013/9/23 AM, http://www.thenatlantic.com/health/archive/2013/11/when-trans-fats-were-healthy/281274/.
\item N.Y.C., N.Y., HEALTH CODE § 81.08 (2006); CLEVELAND, OHIO, CODIFIED ORDINANCE 241.42 (2011); PHILA., PENN., CODE § 6-307 (2007); CAL. HEALTH & SAFETY CODE § 114377 (West, WestlawNext, through Ch. 16 of 2014 Reg.Sess. and all propositions on the June 3, 2014 ballot).
\item More people also bought menu items with zero percent trans fat after the restriction went into place, representing an eighty-six percent increase in these healthier options over a two-year period. Park, supra note 15.
\item Although Congress passed the Harrison Act in 1914, it did not apply to the sale, distribution, or possession of preparations containing minimal amounts of narcotic drugs, i.e. less than two grains of opium, one eighth of a grain of heroin. Ch. 1, § 6, 38 Stat. 785 (1914); see also Harry Anslinger, The Reason for the Uniform State Narcotic Legislation, 21 GEO. L.J. 52, 52-62 (1932) (discussing state marijuana laws and need for national regulation). States adopted the Uniform Narcotic Drug Act over a period of years roughly between 1934-38. See Thomas Quinn & Gerald McLaughlin, Evolution of Federal Drug Control Legislation, 22 CATH. U. L. REV. 586, 602 (1972).
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3. Tobacco

Although the risks of using marijuana for medical purposes are not entirely known, harms from tobacco use are well documented.\footnote{\textit{U.S. Gov’t Accountability Office, Tobacco Use and Public Health: Federal Efforts to Prevent and Reduce Tobacco Use Among Youth} (2003), \textit{available at} http://www.gao.gov/assets/250/240728.pdf.} As early as 1938, studies linked cigarette smoking to higher cancer rates and heart disease.\footnote{Johns Hopkins University Professor Raymond Pearl released a report about tobacco use and poor health outcomes in 1938, Raymond Pearl, \textit{Tobacco Smoking and Longevity}, 87 \textit{Science} 216 (1938). Similarly, in 1939, Franz Hermann Müller of the University of Cologne’s Pathological Institute completed a study that found an extremely strong relationship between smoking and lung cancer. Franz Hermann Müller, \textit{Tabakmißbrauch und Lungenkarzinom}, 49 \textit{Zeitschrift für Krebsforschung} 57 (1940). An article published in Reader’s Digest in 1952 is also noted for influencing public opinion about cigarettes. Roy Nott, \textit{Cancer by the Carton}, \textit{Reader’s Digest} 737 (1952).} By 1964, when the Surgeon General’s Advisory Committee on Smoking and Health released its seminal report concerning tobacco effects on health, nearly every state already had laws prohibiting the sale of ciga-


rettes to minors. 46 Since then, the federal government has continued to strictly regulate tobacco product use by, or exposure to, minors. Recent court opinions and FDA rules further strengthen tobacco restrictions. 47 For instance, in 2009, the FDA banned cigarettes with fruit and clove flavors in part because of their appeal to children. 48 It is currently deciding whether to ban menthol cigarettes for similar reasons. 49

Polls indicate that adults strongly favor regulating tobacco products when children are involved. 50 Correspondingly, states and municipalities have adopted additional laws concerning the use of tobacco products in the presence of minors. Seven states and one territory (along with several other cities and counties), for example, ban smoking in cars when children are also present. 51 The growing number of state and city laws limiting where and when adults can use tobacco products emphasizes how product bans succeed when they are focused on protecting the health of minors, even though they may fail if applied to adults. Recent calls for bans on the sale and pos-

46. Michael Cummings, Programs and Policies to Discourage the Use of Tobacco Products, 21 Oncogene 7349, 7358-59 (2002).
50. For example, outdoor smoking bans are a growing trend. Outdoor Smoking Bans Next Battleground in War over Tobacco (poll) (Aug. 8, 2013), http://www.cleveland.com/nation/index.ssf/2013/08/outdoor_smoking_bans_next_batt.html (“Secondhand smoke is harmful. It’s particularly harmful to children,” said Councilwoman Mary Cheh of the District of Columbia, one of more than 90 U.S. municipalities or counties considering an outdoor smoking law.”).
session of caloric-sweetened beverages among minors in the United States take a similar tact. 52

B. Policy Perspectives Underlying Bans

As illustrated in these brief case studies, public health-driven product bans reflect recurring themes. First, a strong public health rationale is generally necessary to sustain a ban on products that allegedly harm individual or communal health. Any negative impacts caused by products cannot merely be suggested or illusory. Some amount of harm or a known negative health outcome must be attributed to the product. For example, the public associates poor health outcomes with trans fats and tobacco products because studies have consistently shown that these products are harmful, medical practitioners communicate these harms, and individuals (or people they know) experience them often to their own detriment. At some point, the perceived benefits of using these consumables are outweighed by their significant damaging health effects. In contrast, positive health outcomes associated with medical marijuana use may weigh more favorably against the negative impacts of prolonged use. 53

Second, public opinion strongly influences whether a product should be banned, spurring policymakers to act. 54 Public opinion supports the continued strict regulation of tobacco and, conversely, the lessening of restraints on marijuana. 55 Third, incremental government action through local or state restrictions, coupled with corporate initiatives, may contribute to a national


53. There is not a clear consensus among health professionals regarding whether medical marijuana’s benefits outweigh its risks. While most medicines derived from nature are tested before they reach the public, the process to evaluate marijuana has been confounded by its status as an illegal drug. The seminal Institute of Medicine report on medical marijuana does not clarify the issue. See INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 1-12 (1999), available at http://www.nap.edu/openbook.php?record_id=6376. Rather, the report suggests that more research about the risks and benefits of medical marijuana is needed. Id. It concludes, however, that smoking marijuana is not preferred because “numerous studies suggest that marijuana smoke is an important risk factor in the development of respiratory disease.” Id. at 6.

54. Public opinion also drove FDA to re-examine Bisphenol A (BPA) after it went on the market. FDA initiated additional studies regarding the product’s safety “[b]ecause of concerns expressed [by the public] in the last few years.” Food & Drug Admin., Update on Bisphenol A (BPA) for Use in Food Contact Applications (updated Mar. 2013), http://www.fda.gov/newsevents/publichealthfocus/ucm064437.htm. Thus government intervention can also be used to restore public confidence in a product, such as BPA, if it can clearly demonstrate that the product is safe.

ban. Fourth, product bans are more socially accepted when used to protect vulnerable populations, notably those who lack capacity to make decisions for themselves, such as minors or persons particularly susceptible to health risks.  

Finally, product bans are not intended to curtail every risk, as evinced by some failed or attempted bans. Product bans are more successful when used to address unwanted or involuntary risks, such as exposure to secondhand smoke in public places or formaldehyde used in temporary housing. Whenever consumers are unable to consciously accept the risks associated with a product, banning a product may be appropriate.

III. EXPLORING LEGAL PATHS AND PITFALLS OF PUBLIC HEALTH BANS OF PRODUCTS

Accompanying the varied policy perspectives that underlie product bans are several legal powers and processes to effectuate them. Attorneys general and private citizens may bring lawsuits challenging the safety or regulation of a product. Congress may enact statutes that have legal implications nationwide, or a city council may pass an ordinance banning a product or

56. For example, sulfite preservatives were banned after asthmatics (persons with accentuated health risks) suffered adverse health events. In various contexts, vulnerable populations may also include individuals with disabilities, pregnant women, elderly persons, certain members of ethnic minorities, people with language barriers, and the poor. See, e.g., David Blumenthal et al., The Efficacy of Primary Care for Vulnerable Population Groups, 30 HEALTH SERVS. RES. 253 (1995) (discussing vulnerable populations in a primary healthcare setting).

57. The temporary saccharin ban demonstrates this point. Relying on a Canadian study that demonstrated saccharin caused cancer in laboratory rats, the FDA stated that a human would have to drink 800 cans of diet soda each day to reach the level of exposure as that of the Canadian rats. The FDA banned the substance, however, because federal law required it to ban all food additives that cause cancer in animals. The saccharin ban did not last long. Saccharin is now one of the most popular artificial sweeteners in use. See Schultz, supra note 28.

58. This policy perspective — consumers’ ability to make an informed and voluntary decision regarding health risks - underlies the reasoning behind product bans for minors as well. Minors are not legally deemed to have the same mental capacity as adults when making decisions about their actions. Thus, minors may not be able to make fully informed decisions about the products that they use or purchase, which justifies limiting their access to certain products. Similarly, adult consumers could not easily discern which foods contained trans fats. Therefore, consumers could not make an informed decision about certain products until the FDA required food labels to list trans fat content. Consumer behavior, together with studies showing the negative health outcomes associated with trans fats, laid the groundwork for the ban.

store in certain locales.\textsuperscript{60} Federal, state, and local agencies may also promulgate regulations to proscribe products pursuant to legislative delegations. Yet, the legal authority to ban products for public health purposes also includes countervailing individual and commercial protections. The primary legal themes implicated by public health-driven product bans are examined below.

\textbf{A. Federal, State, and Local Authority to Regulate Products}

Federal, state, and local governments are empowered to regulate products that harm public health under different legal authorities. Chief among the federal government’s ability to ban products is Congress’ use of its commerce authority and powers to tax and spend. The Commerce Clause of the U.S. Constitution directs Congress “[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian tribes.”\textsuperscript{61} Courts have broadly interpreted this Clause, consistent with the “Necessary and Proper” Clause,\textsuperscript{62} and Congress has long relied on it to legislate in many fields to promote and protect public welfare.\textsuperscript{63} Congress used its Commerce authority to adopt the Food, Drug, and Cosmetic Act of 1938, which established a comprehensive scheme for regulating drugs.\textsuperscript{64} Congress similarly exercised its commerce power to pass the Consumer Protection Act in 1972, authorizing CPSC to protect consumers from unsafe products.\textsuperscript{65}

In addition to regulating trade among the states, Congress may also legis-

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\item U.S. Const. art. I, § 8.
\item Id.; see also Champion v. Ames, 188 U.S. 321 (1903) (holding that lottery tickets are items of commerce and Congress’ power to regulate includes the power to prohibit); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911); United States v. Lexington Mill & Elevator, 232 U.S. 399 (1914) (developing Commerce Clause jurisprudence).
\item See, e.g., Thomas L. Parkinson, Congressional Prohibitions of Interstate Commerce, 16 Colum. L. Rev. 367, 368 (1916) (discussing the breadth of Commerce Clause power based on the Supreme Court’s decision to uphold “congressional prohibitions of interstate commerce enacted for the protection of public morals or for the advancement of the public welfare,” rather than limiting congressional power to the \textit{regulation} of interstate commerce) (emphasis added); Louis Maier, Federal Regulation of Manufacturing under the Interstate Commerce Power, 24 Marq. L. Rev. 175 (1940) (discussing cases in which the federal government extended the scope of its authority over previously unregulated activities by using the commerce clause).
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late in areas that do not at first glance appear to trigger interstate commerce, such as the local manufacture and consumption of a product consistent with state law.\(^\text{66}\) Congress can regulate purely intrastate activity as long as such activity has a “substantial effect” on interstate commerce when considered in the aggregate.\(^\text{67}\) Commerce authority can thus be used to ban products from commerce, either through direct legislation or agency rulings or regulations.

Congress can also indirectly ban or limit consumer goods through its tax and spend powers.\(^\text{68}\) The power to set tax levels means Congress can discourage risky behavior, such as smoking,\(^\text{69}\) and reward health-promoting activities, such as physical exercise.\(^\text{70}\) Congress can similarly use its spending power to influence state lawmaking so long as its efforts are not unduly coercive upon states.\(^\text{71}\) To encourage states to change the drinking age, for example, Congress passed a law in 1984 that withheld highway funds from states that did not raise their legal drinking age from eighteen to twenty-one.\(^\text{72}\) The spending measure effectively banned alcohol use among eighteen to twenty-one year-olds even though the impetus was to prevent highway-related deaths and injuries due to alcohol use. Spending powers further allow Congress to indirectly regulate or ban products by determining which federal agencies or research projects to fund. In 2008, for example, Congress provided CPSC with more resources to regulate toys containing

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67. Congress is authorized to regulate non-economic local activity if the regulation is “a necessary part of a more general regulation of interstate commerce.” Gonzales, 545 U.S. at 37 (citing United States v. Lopez, 514 U.S. 549, 561 (1995)).
70. For example, the Affordable Care Act provides financial incentives for workplace wellness programs. Laura Anderko et al., Promoting Prevention Through the Affordable Care Act: Workplace Wellness, 9 Preventing Chronic Disease E175 (2012). Congress continues to raise taxes on cigarettes, which significantly curbs the average consumer’s ability to purchase them. K. J. Meier & M. J. Licari, The Effect of Cigarette Taxes on Cigarette Consumption, 1955 through 1994, 87 AM. J. PUB. HEALTH 1126 (1997) (finding increased taxes on cigarettes are associated with less tobacco consumption); see also Prabhat Jha & Richard Peto, Global Effects of Smoking, of Quitting, and of Taxing Tobacco, 370 N. ENGL. J. MED. 60 (2014).
lead, including through government-imposed bans.

Unlike Congress, which must rely on enumerated powers to act, states (and local governments through state delegation) possess broad powers to regulate in the interests of the public’s health, safety, and general welfare. Known collectively as “police powers,” this residual authority of sovereign governments, as reflected in the Tenth Amendment, allows government to ban products in specific settings or among particular groups. States have often exercised their police powers to protect the health and safety of their citizens without the need to link measures to commercial activity, taxes, or spending objectives. Police powers support, for instance, restrictions on tobacco use in public or private places and minors’ consumption of calorie-sweetened beverages at schools.

States and cities can also strategically use zoning and licensing laws to ban products in limited ways. States typically control licensing policies and procedures, though local authorities may impose additional licensing requirements if they are not preempted. For example, states may establish strict licensing criteria to regulate products that pose public health risks. Some municipalities use their licensing authority to ensure that outlets selling tobacco, alcohol, or fast food products are restricted from certain areas. Although licensing or zoning may not be used to ban products entirely,
they effectively outlaw them from certain zones to curtail the prevalence of harmful products among minors or other vulnerable consumers.

B. Constitutional Limitations

The government’s authority to ban products is broad, but it is not unlimited. Constitutional restrictions of government power and protection of individual rights may curtail government’s ability to simply ban a product that presents a health risk. Courts may invalidate state or local product bans, for example, that interfere with interstate commerce. The Dormant Commerce Clause, drawn implicitly from federal Commerce authority, prohibits states and localities from passing regulations affecting interstate commerce. The U.S. Supreme Court relied on the Dormant Commerce Clause when, in 2005, it struck down state laws that prohibited online wine sales. Because the laws resulted in different treatment of in-state (in-store wine sales) and out-of-state (online wine sales) economic interests, the Court found them unconstitutional. Thus, the laws did not withstand Dormant Commerce Clause scrutiny even though they were designed to prevent minors from purchasing alcohol in furtherance of community health.

Similarly, a local ordinance banning chain restaurants unlawfully interfered with interstate commerce. In 2008, the Eleventh Circuit Court of Appeals determined that a city ordinance prohibiting “formula restaurant[s]” and limiting the size of “formula retail” establishments discriminated against interstate commerce. Although the ordinance restricted in-state

2003) (holding that denial of liquor license was not arbitrary and capricious when petitioner’s establishment was within 200 feet of a church in violation of local law); see also Wooten et al., supra note 77, at 73-74; Alicia Fabbre, Will County Seeks Time on Marijuana Law: Board Expected to Delay Setting Rules, Ch. Trib., Dec. 17, 2013, at S9 (“Municipalities and county boards can enact rules to regulate them, but cannot prohibit such facilities from locating in their jurisdictions.”); Yesenia Robles, Garden City Pot Shops Give Town Chance to Stand Out, Repeat History, DENV. POST, Dec. 17, 2013, http://www.denver post.com/news/ci_24744797/garden-city-pot-shops-give-town-chance-stand (“Since Colorado voters legalized possession of up to an ounce of marijuana for adults, many municipalities have adopted ordinances to outlaw the recreational business within their boundaries.”); Jennifer Steinhauer, Fast-Food Curb Meets With Ambivalence in South Los Angeles, N.Y. TIMES, Aug. 8, 2008, at A12 (reporting that in July 2008, the Los Angeles City Council passed a one-year moratorium on opening or expanding fast food establishments).


81. Id. at 489, 492-94 (“The States offer two primary justifications for restricting direct shipments from out-of-state wineries: keeping alcohol out of the hands of minors and facilitating tax collection.”).

82. Cachia v. Islamorada, 542 F.3d 839, 840 (11th Cir. 2008) (“Cachia brought a complaint against Islamorada before the district court seeking damages and injunctive relief on the grounds that the ordinance violated the Equal Protection, Due Process, Privileges and Immunities, and Commerce Clauses of the U.S. Constitution, as well as the terms of the Florida Constitution.”).

83. Id. at 842.
and out-of-state establishments alike, “the regulation serve[d] as an explicit barrier to the presence of national chain restaurants,” in violation of the Dormant Commerce Clause.\(^8^4\) A local ban on milk from distant dairies and a state ban on imported solid waste have also failed to withstand Dormant Commerce Clause scrutiny, despite strong, underlying public health objectives.\(^8^5\) State or local product bans may therefore violate the Clause if they favor in-state (or local) interests over out-of-state interests.

The U.S. Constitution also protects private property held by individuals and businesses from government’s inherent power to take it (i.e., through eminent domain).\(^8^6\) The Fifth Amendment Takings Clause requires government to pay owners “just compensation” if their private property is taken for public use.\(^8^7\) Pursuant to the Fourteenth Amendment, the Takings Clause extends to states, each of which has its own constitutional takings provision. Though takings generally apply to land or buildings, a regulatory taking occurs when a government restricts the use of private property to the point where the property no longer has an economically viable use.\(^8^8\) Many companies, for example, argued that public smoking bans amounted to a regulatory taking of their business interests without just compensation.\(^8^9\) Product bans that impact the economic viability of certain businesses may face regulatory takings challenges.\(^9^0\)

Free speech issues arise whenever government attempts to limit product access or use through advertising restrictions. The First Amendment protects not only individual speech,\(^9^1\) but also commercial speech.\(^9^2\) Accordingly, courts have struck down laws that prohibit businesses from advertis-

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84. Id.
85. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (“In thus erecting an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of the people, if reasonable nondiscriminatory alternatives . . . are available.”); Phila. v. N.J., 437 U.S. 617, 628 (1978).
86. U.S. CONST. amend. V.
87. Id.
90. However, product bans clearly grounded in public health principles, such as the ban on asbestos, will defeat regulatory takings challenges because the liability associated with continued use of the product (severe injury or death) outweighs arguments of economic injury.
91. U.S. CONST. amend. I.
ing prescription drug prices or the qualities of tobacco products based on successful free speech arguments.\textsuperscript{93} Entities and individuals may also argue that state laws impinging on their free speech rights are unconstitutional, as illustrated by a dairy in Oregon that challenged the state’s raw milk advertising ban.\textsuperscript{94} Rather than banning commercial speech about a product entirely, laws may survive free speech challenges and more effectively influence public health if they require companies to disclose more information about a product, as in the earlier case of trans fat labeling.\textsuperscript{95}

The Ex Post Facto Clause of the U.S. Constitution prevents government from retroactively changing legal consequences for an action committed prior to the law or rule change.\textsuperscript{96} Government cannot retroactively punish someone for buying or selling a legal product if that product is later made illegal.\textsuperscript{97} Nonetheless federal agencies may apply their rules retroactively to protect the public’s health where Congress has expressly granted them such powers.\textsuperscript{98} In 1994, for example, Congress expressly authorized FDA to regulate dietary supplements in a manner similar to food products.\textsuperscript{99} FDA thus became responsible for keeping adulterated and unsafe dietary supplements off the market, which meant certain products (e.g., Ephedra) became illegal to buy or sell even though they had previously been on the market. Congress’ express grant of authority to FDA to regulate these products defeated manufacturers’ Ex Post Facto claims.\textsuperscript{100}

\textbf{C. Regulatory or Procedural Hurdles}

Parties may have strong legal arguments that support product bans in the interests of public health, but procedural or regulatory missteps may affect


\textsuperscript{95} N.Y. State Rest. Assoc. v. N.Y.C. Bd. of Health, 556 F.3d 114, 134 (2d Cir. 2009).

\textsuperscript{96} U.S. CONST. art 1, § 9.

\textsuperscript{97} In the context of product bans, the Ex Post Facto clause is often subject to further argument. See, e.g., Samuels v. McCurdy, 267 U.S. 188, 193 (1925) (stating that during the Prohibition era the Court held that a state statute prohibiting the possession of alcohol did not violate the Ex Post Facto Clause because possession is a continuous act. The individual could not be punished for his behavior or possession of alcohol before the law changed, but could be punished for his continued possession thereafter).


\textsuperscript{100} See Nutraceutical Corp. v. Von Eschenbach, 459 F.3d 1033, 1038, 1043 (10th Cir. 2006) (noting that “Congress imposed a duty on the FDA to keep adulterated dietary supplements off the market” and that “FDA correctly followed the congressional directive to analyze the risks and benefits of EDS in determining that there is no dosage level of EDS acceptable for the market.”).
whether a product ban is implemented. All product bans, for instance, must conform to due process. The Fifth and Fourteenth Amendments prohibit government from depriving people of life, liberty, or property without due process of law (procedural due process) and guarantee that they will not encroach on the rights of citizens (substantive due process). Procedural due process shields legal processes (e.g., the right to notice, the right to stand trial) when government action deprives a person of life, liberty, or property. Thus government may violate procedural due process by failing to provide affected parties with notice or the opportunity for a hearing before banning a product. Substantive due process, in contrast, focuses on whether there is sufficient justification for governmental decisions to dispossess an individual of his or her rights.\textsuperscript{101} As a result, government must ground public health-driven product bans in scientific evidence that sustains negative health outcomes.

Failing to appropriately justify and rationalize the product ban exposes regulators to substantive due process challenges because their actions may be deemed arbitrary.\textsuperscript{102} The attempted New York City soda ban in 2013 tested this standard.\textsuperscript{103} At the trial level, the ban failed primarily because it targeted only certain vendors and outlets. The trial judge did not criticize the perceived weak link between sugary drinks and obesity. Rather, he opined that the regulation “is arbitrary and capricious because it applies to some but not all food establishments in the city . . . and the loopholes inherent in the rule” gut its purpose.\textsuperscript{104}

The Administrative Procedure Act (APA) sets forth rulemaking practices requiring federal agencies to solicit public input and respond to comments

\begin{itemize}
\item \textsuperscript{101} Erwin Chemerinsky, \textit{The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise}, 25 LOY. L.A. L. Rev. 1143, 1149 (1992).
\item \textsuperscript{102} Mathews v. Eldridge, 424 U.S. 319, 332 (1976); see Coleman v. Mesa, 284 P.3d 863, 870 (Ariz. 2012). Additionally, product bans that infringe on fundamental rights (e.g., owning a firearm) may violate substantive due process protection. See generally McDonald v. Chi., 130 S. Ct. 3020 (2010). States that ban products without infringing on “fundamental rights,” however, may succeed against due process claims. See Williams v. Attorney Gen. of Ala., 378 F. 3d 1232, 1233 (11th Cir. 2004) (upholding Alabama ban on the commercial distribution of “any device designed or marketed as useful primarily for the stimulation of human genital organs for anything of pecuniary value.” (internal citations omitted)). At.la. Code § 13A-12-200.2(a)(2) (West, WestlawNext through Act 2014-413 of the 2014 Regular Session).
\item \textsuperscript{103} See N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 970 N.Y.S.2d 200, 208-09 (2013).
\end{itemize}
when proposing and issuing regulations. For example, the Consumer Product Safety Information Act of 2008 granted CPSC with new regulatory and enforcement tools to regulate or ban unsafe products.\textsuperscript{105} To effectuate the new law, CPSC implemented regulations concerning product safety and product bans, which included periods of public comment and hearings regarding the proposed regulations.\textsuperscript{106} CPSC’s failure to follow the APA would invalidate its regulations upon a challenge.

Finally, proper legal channels must be followed when implementing a product ban. When the New York City Board of Health tried to enact a portion ban for large sodas, as discussed above, the appellate court held that the Board acted outside its lawfully delegated authority.\textsuperscript{107} Pursuant to the state’s separation of powers doctrine, New York administrative agencies may only affect policy mandated by statute. The legislature must speak about a policy before an agency may undertake interstitial rulemaking – only then can the rule survive.\textsuperscript{108} Accordingly, product bans may only survive challenge if they follow these regulatory and procedural pathways.

IV. PRESCRIBING FUTURE IMPLEMENTATION OF PUBLIC HEALTH BANS

As conceived above, public health bans refer to governmental efforts to prohibit the sale or possession of specific products in an otherwise open market because of the product’s deleterious health impacts. In contrast, manufacturers or suppliers may voluntarily remove products from the market for many reasons, including poor sales resulting from consumer health concerns. While the end result of voluntary product removals can be the same as government-mandated bans, the tenuous nature and unpredictability of such removals necessitate more definitive guidance for when and how government should prohibit products in response to public health concerns.

To this end, the legal anatomy of successful public health product bans is constituted of a series of core elements. Conversely, the absence of these core elements may doom attempts to prohibit products for which legal and other justifications are scant or missing either at the initial stage of proposed bans (e.g., tobacco) or later when existing bans are reconsidered (e.g.,


\textsuperscript{106} Safety Standard for Magnet Sets, 77 Fed. Reg. 53,781 (Sept. 4, 2012). Individuals and businesses may also petition the CPSC to regulate or ban certain products. For CPSC’s list of the petitions online, see http://www.cpsc.gov/en/Regulations-Laws—Standards/Rulemaking/Petitions/.

\textsuperscript{107} \textit{N.Y. Statewide Coal. of Hispanic Chambers of Commerce}, 970 N.Y.S.2d at 213.

\textsuperscript{108} \textit{Id.} at 211-12.
Navigating the legal environment ahead of forward-looking bans, as well as their reversals, involves public health justification, clear legal authority, ethically-sustainable grounds, political support or neutrality, and appropriate targeting of populations.

In the past, government may have sought to ban products in the interests of the public’s health with little or illusory scientific grounds to support its action. Today, federal, state, and local authorities are being held to a higher standard, requiring strong scientific support for imposing a market-wide or population-specific product ban. Even so, generating support through empirically-driven studies or clear scientific findings can be relatively easy. For example, showing that an infant’s toy contains lead paint may result in immediate market removal of the product because prior studies have proven that small amounts of lead exposure are dangerous to children’s health. In other cases, however, crafting and communicating scientific support for product bans is precarious, especially when it involves products whose harms are latent in small doses. Occasional exposures to particular insecticides among consumers of raw vegetables may raise few health risks. Yet regular exposures to the same insecticides among farm workers in the fields may implicate serious, long-term harms sustaining a product ban. As noted below, determining the targeted population for a product ban (e.g., farmers) is as essential as assessing the potential harms of occasional versus routine exposures.

Federal, state, and local governments have several legal routes allowing them to ban products in the interests of the public’s health. Identifying and selecting the appropriate source of legislative or regulatory power are critical to the success of the ban itself to counter legal arguments based on procedural or substantive principles raised by inapposite parties. Nevertheless, when there is sufficient scientific justification for product bans, adequate legal authority typically follows. Congress authorizes multiple federal agencies (e.g., FDA, CPSC, and EPA) to prohibit the sale or...
possession of products that harm communal health so long as they have scientific support. Consistent with, or in the absence of, federal actions, states (and local governments with sufficient home rule) are equipped with broader public health powers to intervene. Judicious use of these broad powers is essential to avoid the pitfalls of contrary legal arguments that can derail well-intended product bans.

What science supports and the law allows may still not result in an effective product ban if the means or ends of government action are not ethically-sustainable. American consumers are often reticent to allow government to dictate the terms in which specific products may or may not be sold. Communities may resist or reject public sector paternalism designed to protect autonomous consumers from product harms when they could essentially protect themselves from these products through their own choices. Attempts to control obesity in New York City by limiting soda consumption through container size limits have been summarily rejected by many as “nanny” state interventions. Even though empirical evidence and legal authority to institute the ban on large portion sizes of sodas may be sufficient, public acceptance of the measure is not.

The public’s perception of the ethicality of proposed bans is coupled with the political acceptability of governmental intervention. Political actors at all levels must either support, or at least remain neutral toward, proposed bans for obvious reasons. Absent political support, public health officials may be stymied in their attempts to even propose a ban. When political forces are neutral, apathy for proposed bans may result in inaction. Political resistance or opposition is a death knell for otherwise solid product ban proposals.

Finally, targeting appropriate populations is key to any proposed ban.

120. See HODGE, JR., supra note 1, at 183. New York City’s Mayor, Michael Bloomberg, and its Health Department’s campaign against the sale of large sugar-sweetened beverages (SSSBs) was meant to deter their consumption through education and restricted portion controls. On March 11, 2013, a local court blocked implementation of the City’s portion size proposal, which was affirmed on appeal on July 30, 2013, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607 (N.Y. App. Div. 2013).
121. No better example of this point exists than tobacco regulation in the United States. Prior attempts to regulate tobacco products by FDA may have led to a complete product removal given the significant harms of tobacco use coupled with no known benefits to consumers. However, in 2009, Congress clarified through the Family Smoking Prevention and Tobacco Control Act that tobacco was to remain a lawful product on the market notwithstanding significant controls on access among minors and restrictions on its advertising and promotion. See 21 U.S.C.A. § 387 (West, WestlawNext through Pub. L. No. 113-93 (excluding Pub. L. No. 113-79) approved Apr. 1, 2014).
Many products present few dangers to some consumers but adverse risks for others (e.g., pesticides). Banning such products for all consumers may lack legal grounding unless the only intended consumers for the product are those who may sustain harm (e.g., infant toys with lead paint as noted above). Defensible public health bans attempt to remove products that present clear harms to consumers who cannot obviate these risks through their own choices. In such cases, consumers are vulnerable to harms that government is uniquely positioned to measure and address. When consumers are otherwise adequately informed of product risks, can weigh their benefits, and self-determine whether to use the product, bans become less viable options.

V. Conclusion

Determining the essential legal elements, or anatomy, of product bans to protect the public’s health provides initial guidance, but the trail leading to successful bans remains rocky. Deviations from the beaten path may arise when the product targeted for prohibition, even among select populations, is entrenched in the market (e.g., soda), occupies a major part of the U.S. or global economy (e.g., tobacco), is readily available on the black market (e.g., illicit drugs), or shares all of these criteria (e.g., alcohol). Well-designed public health campaigns may lead to product bans only after raising public awareness of specific risks associated with product usage (e.g., trans fats). Industries may unilaterally respond by altering or removing harmful products. Government, however, indubitably has the power and ability to ban products when justified to preserve and promote communal health.