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# OF FAT PEOPLE AND FUNDAMENTAL RIGHTS: THE CONSTITUTIONALITY OF THE NEW YORK CITY TRANS-FAT BAN

Katharine Kruk\*

## INTRODUCTION

In December 2006, New York City passed a ban on using artificial trans-fats in all New York City restaurants.<sup>1</sup> The City authorized this action based on New York City Charter sections 558 and 1043.<sup>2</sup> New York City legislators and trans-fat critics favored the ban based on its professed purpose—to cut down on heart-disease-related deaths.<sup>3</sup> The New York City trans-fat ban, however, unfairly restricts the rights of the citizens of New York City who enjoy eating foods with trans-fats,<sup>4</sup> and restaurateurs whose livelihoods are dependant on producing tasty food in an economical fashion.

This Note will analyze the constitutionality of the New York City trans-fat ban and similar bans that have been introduced or proposed in Philadelphia,<sup>5</sup> California,<sup>6</sup>

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<sup>1</sup> RULES OF THE CITY OF NEW YORK, tit. 24 § 81.08 (2007), available at [http://24.97.137.100/nyc/rcny/title24\\_81\\_08.asp](http://24.97.137.100/nyc/rcny/title24_81_08.asp) [hereinafter R.C.N.Y.].

<sup>2</sup> The New York City Department of Health and Mental Hygiene, Board of Health stated that

[t]his amendment to the Health Code is promulgated pursuant to §§ 558 and 1043 of the Charter. Section 558(b) and (c) of the Charter empowers the Board of Health to amend the Health Code and to include in the Health Code all matters to which the Department's authority extends. Section 1043 grants the Department rule-making authority.

N.Y. City Dep't of Health & Mental Hygiene, Bd. of Health, Notice of Adoption of an Amendment (§ 81.08) to Article 81 of the New York City Health Code, at 1 (2006), <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf> (last visited Feb. 26, 2010) [hereinafter N.Y. Notice of Adoption]; see also N.Y. CITY CHARTER § 558 (2008), available at <http://24.97.137.100/nyc/charter/entered.htm>; *id.* § 1043.

<sup>3</sup> See N.Y. Notice of Adoption, *supra* note 2, at 2.

<sup>4</sup> Citizens of Philadelphia, California, Boston, and Montgomery County, Maryland, jurisdictions which have subsequently followed New York City's lead or are in the process of doing so, are also restricted by trans-fat bans.

<sup>5</sup> Marcia Gelbert, *Bakers Frosted By Trans Fat Ban*, PHILA. INQUIRER, June 1, 2007, at B7.

<sup>6</sup> Michael C. Dorf, *What California's Trans Fat Ban Teaches Us About Federalism*, FINDLAW, June 29, 2008, <http://writ.lp.findlaw.com/dorf/20080729.html>.

Boston,<sup>7</sup> and Montgomery County, Maryland.<sup>8</sup> First, a scientific discussion explaining what trans-fats are and the health risks they pose. Second, this Note will discuss the appropriate level of due process scrutiny that should be applied to the New York City trans-fat ban. In order to determine the level of scrutiny the ban should receive under the Fifth and Fourteenth Amendments, this Note will compare the dangers of trans-fats to the interests and dangers considered in other prominent substantive due process cases. Next, this Note will argue that the New York City trans-fat ban, enacted in December 2006, violates the constitutional rights of restaurateurs and restaurant patrons in New York City. The trans-fat ban decimates natural law theories of autonomy and self-determination, and is likewise violative of the substantive due process rights of New Yorkers as it improperly abridges their right to make decisions regarding their health and diet. Finally, trans-fat bans also pose constitutional difficulties under the Takings Clause and the dormant Commerce Clause. These constitutional arguments will be evaluated as well.<sup>9</sup>

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<sup>7</sup> Boston Public Health Comm'n, *A Regulation to Restrict Foods Containing Artificial Trans Fat in the City of Boston* (2008), available at [www.bphc.org/boardofhealth/regulations/Forms%20%20Documents/regs\\_transfat-Mar08.pdf](http://www.bphc.org/boardofhealth/regulations/Forms%20%20Documents/regs_transfat-Mar08.pdf).

<sup>8</sup> Miranda S. Spivack, *Montgomery Bans Trans Fats in Restaurants, Markets*, WASH. POST, May 16, 2007, at A1.

<sup>9</sup> New York City's trans-fat ban may run afoul of the dormant Commerce Clause. U.S. CONST. art. 1, § 8, cl. 3. Municipalities are permitted to enact laws and regulations pursuant to their police powers, or "the ability of state and local governments to regulate for the health, safety, and welfare of a community." Jackson S. Davis, Note, *Fast Food, Zoning, and the Dormant Commerce Clause: Was It Something I Ate?*, 35 B.C. ENVTL. AFF. L. REV. 259, 260 (2008). The dormant Commerce Clause functions to prevent state and local governments from hindering interstate commerce through heavy-handed exercises of their police powers. *Id.*

The clause arose due to forms of economic protectionism employed by the states under the Articles of Confederation. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 430 (1982). At that time, Congress had no authority with which to regulate interstate commerce, and states enacted various tariff regimes against one another, hindering economic development and fostering conflict. Elizabeth Young Spivey, *Trans Fat: Can New York City Save Its Citizens From This "Metabolic Poison,"* 42 GA. L. REV. 273, 295 (2007). Recognizing these behaviors as counterproductive, the Founding Fathers sought to curtail such economic gamesmanship post-Articles of Confederation by creating "a national union 'indivisible through an energetic and common pursuit of commerce.'" *Id.* at 295-96.

Under the dormant Commerce Clause, if a state or municipal law is found to be "facially discriminat[ory], discriminatory in purpose, or has intolerable effects on interstate commerce," then it may be struck down as unconstitutional. *Id.* at 296. Though the New York trans-fat ban only applies to restaurants located in the City, "the law is still subject to examination under the Commerce Clause." *Id.*; see U.S. CONST. art. 1, § 8, cl. 3.

To analyze the New York trans-fat ban under the dormant Commerce Clause, the actions of the City must first be found either facially discriminatory, discriminatory in purpose or having a discriminatory effect upon interstate commerce, similar to the analysis given to a federal action. See U.S. CONST. art. 1, § 8, cl. 3; Spivey, *supra*, at 295. Laws that are facially discriminatory are clearly prohibited by the dormant Commerce Clause. See *City of Philadelphia v.*

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New Jersey, 437 U.S. 617, 624 (1978) (explaining that “where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected”). Determining whether a state or local law is facially discriminatory is a simple, facial analysis—simply put, if a state or municipality enacts a law that clearly discriminates against out-of-state companies or products in interstate commerce, it is a facial violation of the dormant Commerce Clause. *See id.* at 625–28. New York City’s ban is not facially discriminatory, as it bans restaurants from serving trans-fats regardless of their headquarters or the origin of the trans-fats served.

Similarly, any argument that the trans-fat ban is discriminatory in purpose can be easily dispensed with. The trans-fat ban does not impede out-of-state trans-fat producers, distributors or users in a different manner, or to a greater extent than intra-city users. *See* R.C.N.Y., tit. 24 § 81.08 (2007), available at [http://24.97.137.100/nyc/rcny/title24\\_81\\_08.asp](http://24.97.137.100/nyc/rcny/title24_81_08.asp). By way of illustration, Patsy’s Pizzeria, located solely in Manhattan, cannot serve artificial trans-fats any more than McDonald’s, headquartered in Illinois. (In the estimation of this author, Patsy’s is the greatest pizzeria in New York, serving authentic, thin-crust pizza, generously garnished with fresh basil. Civil Procedure geeks may be familiar with Patsy’s not for their delicious pizzas and ricotta calzones, but rather for the infamous Rule 11 sanctions case involving the beloved pizzeria. *See* Patsy’s Brand, Inc. v. I.O.B. Realty, Inc., 317 F.3d 209 (2003) (awarding over \$250,000 in attorney’s fees due to fraudulent filings in Lanham Act claim and leveling nearly \$100,000 in sanctions against the defendant’s attorney Frank Brija)).

As for discriminatory effect, courts have generally found it where laws “so closely parallel statutes that concededly violate the Constitution that those laws are likewise subject to judicial invalidation.” Spivey, *supra*, at 297 (quoting DAN T. COENEN, CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 231 (2004)). The trans-fat ban arguably has a discriminatory effect on out-of-state businesses because it damages profit margins for national food companies by raising costs for out-of-state businesses active in the New York City food industry. National restaurants and food distributors typically prepare food in a central location, then ship the prepared foods for final cooking to franchises throughout the country. *Id.* at 299–300. French fries, for example, are blanched and fried by food processing companies before being frozen and shipped to restaurants, where they are fried a second time. *Id.* at 299. These french fries are prepared at processing plants in unimaginably large batches—the frying vats can hold up to 25,000 pounds of oil. *Id.* For out-of-state manufacturers making french fries for national consumption, switching over to trans-fat free oil in order to accommodate a single city would be a costly endeavor. Such a switch would likely include a complete transition in fryer technology and oil choice, or building a separate frying vat to accommodate municipalities requiring trans-fat free products. *Id.* at 299–300.

A full legal analysis of the dormant Commerce Clause and trans-fat ban is beyond the scope of this Note, and would require a tedious walk through the unsettled minefield of dormant Commerce Clause and *Pike* test scholarship. *See* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Pike* test is employed when “a law indirectly affects interstate commerce and regulates evenhandedly . . . [in which case] the court . . . examine[s] whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the putative local benefits.” Ill. Rest. Ass’n v. City of Chicago, 492 F.Supp.2d 891, 898 (N.D. Ill. 2007) (citing *Pike*, 397 U.S. at 142). While the Supreme Court has used the *Pike* test in analyzing appropriate dormant Commerce Clause issues, other courts have declined to employ it, leading to great unrest and confusion in dormant Commerce Clause jurisprudence. For those desiring a more exhaustive treatment of the dormant Commerce Clause issues presented by New York City’s trans-fat ban, Jennifer Young Spivey’s note on trans-fat regulations and the dormant Commerce Clause is both thorough and insightful. *See* Spivey, *supra*.

## I. THE HISTORY AND LEGISLATIVE MOTIVATIONS OF TRANS-FAT BANS IN THE UNITED STATES

In order to appreciate the legislative motivations and history underlying the New York City trans-fat ban, it is important to understand what trans-fats are and the health risks they pose. This section will explain what trans-fats are, where trans-fats come from, and the effects trans-fats have on the health and diet of Americans. This section will also discuss the history of trans-fat regulations in the United States, both from administrative agencies like the Food and Drug Administration and, more recently, from individual organizations, states, and municipalities.

### A. *What Is Trans-Fat and Where Does It Come From?*

A “[t]rans fat is a common name for a type of unsaturated fat with trans isomer fatty acid(s).”<sup>10</sup> Trans-fats, otherwise known as “partially hydrogenated oils,” are created in an industrial process that adds hydrogen to liquid vegetable oils to make them more solid.<sup>11</sup> Hydrogenation makes oils and fats more solid,<sup>12</sup> increases their shelf life, and maintains the flavor and texture of foods containing such fats.<sup>13</sup> Trans-fats are relatively inexpensive, improve the texture of foods fried in them, can be used for a long time in commercial fryers, and increase the shelf life and flavor of foods.<sup>14</sup> While there are a multitude of practical, economic, and culinary benefits unique to trans-fats, they are also decidedly not “heart healthy.”<sup>15</sup>

The vast majority of trans-fats are artificially produced through hydrogenation processes;<sup>16</sup> however, some trans-fats are found naturally in foods such as dairy products and red meats.<sup>17</sup>

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<sup>10</sup> Carmen Filosa, *Trans Fat Bans: The Next Regulatory Taking?*, 29 J. LEGAL MED. 99, 100 (2008).

<sup>11</sup> American Heart Association, *Trans Fats*, <http://www.americanheart.org/presenter.jhtml?identifier=3045792> (last visited Feb. 26, 2010) [hereinafter American Heart Association].

<sup>12</sup> *See id.*; Mayo Clinic, *Trans Fat is Double Trouble for Your Heart Health*, <http://www.mayoclinic.com/health/trans-fat/CL00032> (last visited Feb. 26, 2010) [hereinafter Mayo Clinic].

<sup>13</sup> American Heart Association, *supra* note 11.

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g.*, American Heart Association, *supra* note 11 (explaining that trans-fats affect the way the body processes cholesterol and make individuals more susceptible to cholesterol issues, heart disease, stroke and type two diabetes); Mayo Clinic, *supra* note 12 (warning that “[a] high LDL cholesterol level in combination with a low HDL cholesterol level increases your risk of heart disease, the leading killer of men and women”).

<sup>16</sup> Filosa, *supra* note 10, at 100.

<sup>17</sup> *See* Susan Okie, *New York to Trans Fats: You're Out!*, 356 NEW ENG. J. MED. 2017, 2018 (2007).

*B. The Impact Trans-Fats Have On Health*

Trans-fats are among the most damaging kinds of fat found in the American diet.<sup>18</sup> Trans-fats affect the balance of low-density lipoproteins (LDL cholesterol) and high-density lipoproteins (HDL cholesterol) in the body.<sup>19</sup> Scientific studies show that “consumption of saturated fat, trans fat, and dietary cholesterol raises low-density lipoprotein (LDL), or ‘bad cholesterol,’ levels”<sup>20</sup> while simultaneously “lower[ing] . . . good (HDL) cholesterol levels.”<sup>21</sup> The effects trans-fats have on cholesterol levels are particularly troubling because LDL (bad cholesterol) “transports cholesterol throughout [the] body . . . [and] when elevated, builds up in the walls of [the] arteries, making them hard and narrow.”<sup>22</sup> HDL, or “good cholesterol,” “picks up excess cholesterol and takes it back to [the] liver.”<sup>23</sup> Simply put, trans-fats add hardening cholesterol into the blood stream and suppress the production of cleaning cholesterol that balance out their hardening counterparts.<sup>24</sup> According to the Mayo Clinic, trans-fats also increase triglyceride<sup>25</sup> and inflammation levels.<sup>26</sup>

The impact that trans-fats have on the production of HDL and LDL cholesterol, triglycerides and inflammation affects the heart and overall health of those who eat trans-fats.<sup>27</sup> A high LDL level “can cause atherosclerosis, a dangerous accumulation of fatty deposits on the walls of the arteries.”<sup>28</sup> Such deposits “can reduce blood flow through the arteries.”<sup>29</sup> Atherosclerosis can be especially dangerous if the arteries in the chest or abdomen are affected.<sup>30</sup> In such cases, the deposits can result in “chest pain and other symptoms of coronary artery disease.”<sup>31</sup> Further, if the hardened “deposits tear or rupture, a blood clot may form and block the flow of blood or break free and

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<sup>18</sup> See *id.* at 2017; see also N.Y. Notice of Adoption, *supra* note 2, at 2 (stating that heart disease is the leading cause of death in New York City, accounting for 23,000 deaths in 2004).

<sup>19</sup> U.S. Food & Drug Administration, *Revealing Trans Fats*, 37 FDA CONSUMER MAG., Sept.–Oct. 2003, [http://www.pueblo.gsa.gov/cic\\_text/food/reveal-fats/reveal-fats.htm](http://www.pueblo.gsa.gov/cic_text/food/reveal-fats/reveal-fats.htm).

<sup>20</sup> Filosa, *supra* note 10, at 100–01.

<sup>21</sup> American Heart Association, *supra* note 11.

<sup>22</sup> Mayo Clinic, *supra* note 12.

<sup>23</sup> *Id.*

<sup>24</sup> See *id.*; see also American Heart Association, *supra* note 11; U.S. Food & Drug Administration, *supra* note 19.

<sup>25</sup> See Mayo Clinic, *supra* note 12. Triglycerides are a particular type of fat present in the bloodstream. Like HDL cholesterol, triglycerides may “contribute to hardening of the arteries (atherosclerosis) or thickening of the artery walls.” *Id.*

<sup>26</sup> *Id.* (“Trans fat appears to damage the cells lining blood vessels, leading to [increased] inflammation” when the body sustains an injury.)

<sup>27</sup> See *id.*; American Heart Association, *supra* note 11; U.S. Food & Drug Administration, *supra* note 19.

<sup>28</sup> Filosa, *supra* note 10, at 101.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

plunge an artery downstream.”<sup>32</sup> This in turn could cause the blood flow to the heart to stop, in which case a heart attack will occur.<sup>33</sup> Likewise, if there is a restriction of the blood flow to the brain, then there is a heightened risk of suffering from a stroke.<sup>34</sup>

### *C. Development of Trans-Fat Regulations and Legislation*

The health risks associated with trans-fat consumption have garnered great attention and public concern.<sup>35</sup> As a result of this widespread public concern, governments, at several levels, decided to take active steps to regulate and decrease the consumption of foods containing trans-fats.<sup>36</sup>

In 2006, the Food and Drug Administration [FDA] passed regulations requiring that the level of artificial trans-fats in food products be displayed on the nutritional information label.<sup>37</sup> All foods sold in grocery stores must conform to the FDA’s trans-fat regulations.<sup>38</sup> Functionally speaking, the FDA’s regulations on artificial trans-fats neither ban nor reduce the amount of trans-fats present in grocery store food.<sup>39</sup> Rather, the FDA regulations simply serve to make consumers aware of what they are eating.<sup>40</sup> The choice is left to food producers, grocers and consumers as to whether they will choose to eat foods containing trans-fats or opt for healthier alternatives.

Unlike their federal counterparts, certain states and municipalities have begun to regulate artificial trans-fats at a local level, employing increasingly paternalistic and oppressive tactics to get the pro-health message to the forefront of the American consciousness.<sup>41</sup> North Carolina, for example, helped set in motion the wave of local trans-fat regulations currently sweeping the nation.<sup>42</sup> In 2005, North Carolina banned the use of artificial trans-fats in public school meals.<sup>43</sup> Though the North Carolina ban garnered little attention, it opened the door to increased trans-fat regulation and paved the way for broader bans, such as the one adopted by New York City.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Trans-fats have been bemoaned on television, through print media, and on dedicated anti-trans-fat websites, such as BanTransFats.com. *See, e.g.*, JUDITH SHAW, TRANS FATS: THE HIDDEN KILLER IN OUR FOOD (2004); Ban Trans-Fats: The Campaign To Ban Partially Hydrogenated Oils, <http://www.bantransfats.com/> (last visited Feb. 26, 2010).

<sup>36</sup> SHAW, *supra* note 35, at 102.

<sup>37</sup> *See* 21 C.F.R. §§ 101.1–106 (2006).

<sup>38</sup> Filosa, *supra* note 10, at 102 (citing 21 C.F.R. § 101).

<sup>39</sup> *See* 21 C.F.R. §§ 101.1–106.

<sup>40</sup> *See id.*

<sup>41</sup> *See* Filosa, *supra* note 10, at 102.

<sup>42</sup> “For nutritional purposes, the public schools shall not (i) use cooking oils in their school food programs that contain trans-fatty acids or (ii) sell processed foods containing trans-fatty acids that were formed during the commercial processing of the foods.” N.C. GEN. STAT. § 115C-264(b) (West 2007).

<sup>43</sup> *Id.*

Next, in 2006, New York City passed the first high-profile trans-fat regulation—a ban on artificial trans-fats in all New York City restaurants.<sup>44</sup> Since then, Philadelphia,<sup>45</sup> California,<sup>46</sup> Boston,<sup>47</sup> and most recently Montgomery County, Maryland,<sup>48</sup> have enacted or proposed artificial trans-fat bans.

The New York City trans-fat ban disallowed restaurants from serving dishes with more than one-half of a gram of artificial trans-fat.<sup>49</sup> The City's motivation<sup>50</sup> was to drastically reduce New Yorkers' intake of trans-fats, set an example for other municipalities, and improve the health of New York City residents.<sup>51</sup> Some chain restaurants saw the "french fries on the trees" and changed their cooking methods to omit trans-fats ahead of the 2006 ban.<sup>52</sup> National fast food chains were particularly responsive to the New York City ban.<sup>53</sup> Fast food chains such as Kentucky Fried Chicken eliminated trans-fats from their restaurants nationwide in response to the proposed New York City ban.<sup>54</sup>

If the purpose of trans-fat regulation is simply to promote a healthier dietary pattern and lifestyle for Americans, it is unclear whether the let-do federal approach or the more stringent approach adopted by New York City will be more effective. What is clear, however, is that the paternalistic ban in New York City potentially

<sup>44</sup> See Charisse Jones & Nanci Hellmich, *NYC Bans Trans Fats In Restaurants*, USA TODAY, Dec. 6, 2006, at 1A; Thomas J. Lucek & Kim Severson, *New York Bans Most Trans Fats In Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1.

<sup>45</sup> Gelbert, *supra* note 5.

<sup>46</sup> Dorf, *supra* note 6.

<sup>47</sup> Boston Public Health Comm'n, *supra* note 7.

<sup>48</sup> Spivack, *supra* note 8.

<sup>49</sup> See R.C.N.Y., tit. 24 § 81.08 (2007).

<sup>50</sup> The New York City Board of Health and Mental Hygiene stated that over 23,000 New Yorkers die every year from heart disease, and thus trans-fat in restaurant food in New York "represents an important contribution to cardiovascular risk for New York City diners." N.Y. Notice of Adoption, *supra* note 2, at 2.

<sup>51</sup> *Id.* ("By restricting [restaurants] from serving food that contains artificial trans fat . . . we can reduce New Yorkers' exposure to an avoidable [health] hazard . . .").

<sup>52</sup> Filosa, *supra* note 10, at 103 ("In October of 2006, the fast food chain KFC announced that it was banning all of its United States restaurants from using trans fat in its chicken. KFC's system-wide rollout was completed by April 2007. KFC is not the only restaurant . . . Wendy's, . . . Burger King [and] McDonald's" have all taken steps or fully implemented a trans-fat free cooking scheme.").

<sup>53</sup> See, e.g., Bruce Horowitz, *KFC Plans 'Important' Trans Fat 'Milestone'*, USA TODAY, Oct. 30, 2006, at 1B.

<sup>54</sup> It should be noted that many national chains made the decision to go trans-fat free nationwide after New York City announced the trans-fat ban. Filosa, *supra* note 10, at 102. Kentucky Fried Chicken, Wendy's, and Burger King, for example, all chose to adopt use of trans-fat free oils nationwide. *Id.* Industry analysts suggested that the nationwide switch was necessary because New York City represented such a large portion of food sales. *Id.* It would have been economically inefficient to transition New York City over on its own—especially when other cities were likely to follow in their footsteps.



runs afoul of the due process rights of New York City residents and restaurateurs. The New York City trans-fat ban also poses Takings Clause and dormant Commerce Clause issues that will be plumbed in this Note. While scientific evidence and common sense both suggest that Americans should eat healthily and reduce the amount of trans-fats in their diet, it is inappropriate for government at any level to make, unilaterally and with an iron fist, health-related decisions for its citizens.

## II. SUBSTANTIVE DUE PROCESS CLAUSE ANALYSIS

### *A. Assessing the Proper Level of Due Process Scrutiny for Consumers and Purveyors of Trans-Fats*

The Due Process Clause provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>55</sup> Such cases are evaluated using the framework of Due Process Clause jurisprudence and are divided up based on levels of scrutiny.<sup>56</sup> Existing case law and prevailing jurisprudence guide judges in determining how strictly they will guard the principle or right in question. Historically, cases that deal with the right to privacy and other constitutionally-guaranteed, fundamental rights have been evaluated by courts under the framework of strict scrutiny.<sup>57</sup> This is the highest level of protection that a court can afford a due process case.<sup>58</sup> Rights that are not expressly provided for in the Constitution and rights that do not rise to the level of “liberty interests” are given lesser forms of scrutiny—namely intermediate tier scrutiny or rational basis scrutiny.<sup>59</sup>

At the heart of the argument against an all-out trans-fat ban is the notion that Americans are entitled to make decisions for themselves. This notion holds especially

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<sup>55</sup> U.S. CONST. amend. XIV.

<sup>56</sup> See generally Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 VAND. L. REV. 793 (2006) (examining the highest level of review—strict scrutiny).

<sup>57</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845–48 (1992) (“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”). The majority in *Casey* went on to explain in a most synthesized and eloquent fashion that

liberty is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion . . . and so on. It is a rational continuum which, broadly speaking, includes a freedom from *all substantial arbitrary impositions and purposeless restraints*, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

*Id.* at 848 (emphasis added) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961)).

<sup>58</sup> See generally Winkler, *supra* note 56 (analyzing the rise of strict scrutiny and its supposed “fatal” quality to any statute subjected to it).

<sup>59</sup> See *id.* at 799.

true when the decisions in question relate to the right of individuals to make decisions about their health. The Supreme Court has applied the framework of strict scrutiny to several health-related rights, including the right to an abortion.<sup>60</sup> Health-related rights are generally considered to be part of the bundle of privacy rights that are given strict scrutiny in the Due Process Clause context, in the interest of protecting the Fourteenth Amendment's ever-evolving "realm of personal liberty."<sup>61</sup>

Residents of New York City who frequent restaurants that are no longer allowed to use trans-fats have a substantive Due Process Clause claim related to a noneconomic right.<sup>62</sup> Arguably, citizens of New York City have a privacy right to make their own health-related decisions, including what healthy and unhealthy foods they eat.

Restaurateurs affected by the ban, however, have a due process argument arising in an economic due process context.<sup>63</sup> New York restaurateurs might argue that New York City has required an action of them that violates their best economic interests. Here, restaurant owners are not complaining that their personal rights or liberty interests have been infringed, but rather that their economic interests have been *frustrated*. Economic due process rights are evaluated using rational basis review, the least exacting due process standard available.<sup>64</sup>

#### *B. Economic Due Process Clause Analysis Under Carolene Products*

The Due Process Clause protects the substantive and procedural rights of individuals against governmental abuses and intrusions.<sup>65</sup> Due process jurisprudence has developed such that economic rights are given a less rigorous analytical treatment than other liberty interests and rights.<sup>66</sup> In the famous case, *United States v. Carolene Products*, the Supreme Court laid out the framework for economic, rational basis

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<sup>60</sup> See *Casey*, 505 U.S. 833; *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>61</sup> See, e.g., *Casey*, 505 U.S. at 847.

<sup>62</sup> Compare *Lochner v. New York*, 198 U.S. 45 (1905) (discussing an employee's or employer's right to contract to work sixty hours or more per week in a bakery), with *Roe*, 410 U.S. at 164 (ruling on the right of a woman and her physician to choose whether to have an abortion, subject to certain state imposed limitations).

<sup>63</sup> See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

<sup>64</sup> See generally *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (explaining that rational basis review is the standard used in economic Due Process Clause analyses because courts want to defer to the legislature as to economic and business relations enacted). In *Williamson*, the Court held that if there was a legitimate interest that the legislature might have intended to remedy using the means they did, then those means satisfied the rational basis review. *Id.* at 489.

<sup>65</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) (explaining that due process "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." (quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting))).

<sup>66</sup> See *Carolene Prods.*, 304 U.S. at 152-54 (holding that economic due process arguments are evaluated under a rational basis theory).

review.<sup>67</sup> *Carolene Products* presented facts quite similar to those in the trans-fat ban. Pursuant to the Commerce Clause,<sup>68</sup> Congress passed the Filled Milk Act, prohibiting the “shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat.”<sup>69</sup> The Court reasoned that they should not overturn economic legislation unless there is no possible set of facts that support a government’s rationale for a questioned piece of legislation.<sup>70</sup> Exercising deference to the legislature when dealing with economic due process cases has become standard practice post-*Carolene Products*,<sup>71</sup> and economic regulations will not be overturned on due process grounds unless no possible set of facts could support an underlying legislative rationale.<sup>72</sup>

The next section will briefly discuss a potential economic due process claim brought by New York City restaurateurs. Operating under the analytical framework of *Carolene Products*, it is clear that New York restaurateurs would *not* have a tenable due process claim arising out of the trans-fat ban.

### *C. Application of Economic Due Process Analysis to New York City Restaurateurs*

The New York City trans-fat ban was enacted to help reduce the consumption of trans-fats by New Yorkers, thereby reducing heart-disease-related illnesses and deaths.<sup>73</sup> Operating under the framework of *Carolene Products*, courts should defer to the New York City Board of Health unless they find no possible set of facts or circumstances that would support the rationale underlying the trans-fat ban.<sup>74</sup>

One need not look hard to find factual, scientific evidence in support of the trans-fat ban’s legislative motivation. Trans-fats affect the balance of low-density lipoproteins (LDL cholesterol) and high-density lipoproteins (HDL cholesterol) in the body,<sup>75</sup> potentially leading to increased build-up of hardened cholesterol deposits in the arteries.<sup>76</sup> Such deposits can reduce blood flow through the arteries,<sup>77</sup> and may lead to a heart attack or stroke.<sup>78</sup>

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<sup>67</sup> *Id.* at 154 (“[W]here the legislative judgment is drawn in question, [courts] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.”).

<sup>68</sup> *Id.* at 146.

<sup>69</sup> *Id.* at 145–46.

<sup>70</sup> *Id.* at 147.

<sup>71</sup> *See, e.g.,* *United States v. Lopez*, 514 U.S. 549, 604 (1995); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 422 (Conn. 2008).

<sup>72</sup> *See Carolene Prods.*, 304 U.S. at 147 (“Hence Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare.”).

<sup>73</sup> *See* N.Y. Notice of Adoption, *supra* note 2, at 2.

<sup>74</sup> *Carolene Prods.*, 304 U.S. at 147.

<sup>75</sup> U.S. Food & Drug Administration, *supra* note 19.

<sup>76</sup> Mayo Clinic, *supra* note 12.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

Based on the opinions of the American Heart Association, the Food and Drug Administration and the Mayo Clinic, a court could easily find that trans-fats pose health risks to those consuming them.<sup>79</sup> Operating then under the standard laid out in *Carolene Products*,<sup>80</sup> courts would likely decline to overturn the trans-fat ban based on an alleged infringement of the substantive, economic due process rights of New York City restaurateurs. This outcome is particularly likely in light of the factual similarities between the trans-fat ban and the Filled Milk Act considered in *Carolene Products*.<sup>81</sup>

### III. A NEW YORK CITY RESIDENT'S SUBSTANTIVE DUE PROCESS CLAIM

#### A. Generally

Due Process Clause jurisprudence has come to embrace the notion that “cases suggest . . . specific guarantees in the Bill of Rights” and that those guarantees “have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>82</sup> Found in these “penumbras” are many due process rights,<sup>83</sup> including the “right of personal privacy . . . or zones of privacy,”<sup>84</sup> in health-related matters such as abortion and refusal of life-sustaining medical treatment.<sup>85</sup>

Courts have recognized that a “substantive-due-process analysis has two primary features.”<sup>86</sup> First, courts look to see if the state has allegedly impinged upon a fundamental right or liberty interest “deeply rooted in [our] Nation’s history and tradition[s].”<sup>87</sup> Next, courts ask for a “careful description” of the fundamental liberty

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<sup>79</sup> For a more in-depth discussion of the risks posed by trans-fats and the evolution of such risks for trans-fat consumers, see *supra* Part I.B.

<sup>80</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153–54 (1938).

<sup>81</sup> *Id.* at 145–46, 154–55 (describing the Filled Milk Act and stating that rational basis review and will be performed on the facts of each particular case).

<sup>82</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citing *Poe v. Ullman*, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting)).

<sup>83</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (“In a line of decisions . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding support for privacy rights in penumbral areas as applied to marriage rights); *Griswold*, 381 U.S. at 484–85 (discussing the penumbras of the Bill of Rights); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding penumbral support for privacy rights in the context of familial relationships).

<sup>84</sup> *Roe*, 410 U.S. at 152.

<sup>85</sup> See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 270 (1990) (explaining that in many situations an individual has “a right of privacy grounded in the Federal Constitution to terminate [life-sustaining medical] treatment”); *Roe*, 410 U.S. at 153.

<sup>86</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>87</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); see also *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (stating that the pledges made by certain amendments are “implicit in the concept of ordered liberty”); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (stating that a state is free to regulate its procedure as long as it does not offend a principle “so rooted in the traditions and conscience of our people as to be ranked as fundamental”).

interest called into question.<sup>88</sup> In evaluating whether the right impinged upon truly rises to the level of a fundamental liberty interest, courts look to our nation's history, legal traditions, and practices as "guideposts for responsible decisionmaking."<sup>89</sup>

If a court determines that the right called into question is truly fundamental so as to be "implicit in the concept of ordered liberty," then any alleged violation of that right will be evaluated using the strict scrutiny standard.<sup>90</sup> The strict scrutiny standard requires that "[w]here certain 'fundamental rights' are involved . . . regulation[s] limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."<sup>91</sup> Non-fundamental rights are subjected to intermediate or rational basis scrutiny.<sup>92</sup>

### *B. Level of Due Process Scrutiny To Be Applied*

The right to eat foods containing trans-fats, if so stated, is admittedly not a fundamental constitutional guarantee deserving strict scrutiny under the Due Process Clause. However, to cast the right impinged upon by the City of New York in such a narrow fashion would be a dangerous and inattentive treatment. What New York City has done is place limitations on the rights of its citizens to *make decisions related to their health*. New York City has substituted the judgment of its residents with legislative fiat, stripping citizens of their ability to choose whether to eat foods that might have a negative impact on their health. Put differently, New Yorkers can no longer inform themselves of the dangers of eating trans-fats and decide whether or not to indulge in restaurant foods containing trans-fats. Rather, New York City has decided for its citizens that trans-fats in restaurants pose distinct health risks and should therefore be unavailable to the public. The right to make such health-related decisions has been the subject of many cases, most notably the abortion line of due process cases,<sup>93</sup> in which the right to make health-related decisions was held to rise to the level of a fundamental right.<sup>94</sup>

On a common sense level, the analogy between the health-related rights central to abortion cases (the right to make the decision to have an abortion free from

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<sup>88</sup> See *Reno v. Flores*, 507 U.S. 292, 302 (1993); see also *Cruzan*, 497 U.S. at 277–78 (concluding that the magnitude of fundamental rights warrants specifics instead of a general statement).

<sup>89</sup> *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

<sup>90</sup> *Palko*, 302 U.S. at 325.

<sup>91</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citations omitted).

<sup>92</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (applying rational basis review to Washington's assisted-suicide ban and determining that no fundamental right to determine the time and method of one's own demise existed); *United States v. Carolene Prods. Co.* 304 U.S. 144 (1938) (applying rational basis standard to economic Due Process Clause rights).

<sup>93</sup> The "abortion line" of due process cases includes, among others, *Roe*, 410 U.S. 113, and *Griswold*, 381 U.S. 479.

<sup>94</sup> See *Roe*, 410 U.S. at 155–56.

government intervention) and the health-related right raised by the trans-fat ban (the right to make dietary decisions free from government intervention) is fairly instinctive.<sup>95</sup> Framing this argument, however, in the context of the Due Process Clause is a slightly more challenging needle to thread.

Following the example of the Supreme Court, this section looks to our nation's history, legal traditions, and practices as "guideposts for responsible decisionmaking."<sup>96</sup> What such an exploration makes clear is a long-standing jurisprudential pattern of protecting society's right to make health-related decisions and, similarly, a tradition of issuing purely advisory regulations pertaining to food choices.<sup>97</sup> Both of these factors suggest that the right to make health-related decisions is already identified as a fundamental right, deeply rooted in American traditions and deserving of the strictest scrutiny afforded by due process.

In *Roe v. Wade*, the Court stated that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>98</sup> The Court then went on to discuss the various "detriment[s] that the State would impose upon the pregnant woman by denying this choice,"<sup>99</sup> including *medical risks and complications*, distress to the mother, psychological harm to the mother and to the child.<sup>100</sup> In its conclusion, the *Roe* Court stated that "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."<sup>101</sup> The language of the *Roe* opinion makes clear that the Supreme Court attended to the right to have an abortion, and the scope of such a right, as a health-related, medical decision. Though the Court attached certain limitations to the right

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<sup>95</sup> An abortion is a medical procedure that women may elect to undergo and has an impact on their health. Diet is a series of decisions that all individuals make that has an impact on our health. Both diet and abortion, as well as the right to refuse life-sustaining medical procedures, are decisions that impact health, and that individuals make, at least to some extent, with their health interests in mind. Both diet and abortion are intensely personal in nature. The decision to have an abortion is admittedly a graver decision, however, many individuals in the United States select their diets for ethical, religious, and health reasons—all of which are of a personal nature. *See, e.g.*, *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008) (recognizing that a Muslim inmate's request for *halal* meat as part of his diet was a fundamental right under the First Amendment).

<sup>96</sup> *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

<sup>97</sup> *See, e.g.*, 21 C.F.R. § 101.1 (2006) (requiring that food be labeled properly with nutritional information and ingredients); *id.* at § 104.5 (establishing nutritional guideline limits in order to classify food products including beef and eggs into grades); *id.* at § 130.3 (laying out very basic food quality standards for commercial foods, namely that no unfit ingredients or poison may be included in foods intentionally).

<sup>98</sup> *Roe*, 410 U.S. at 153.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 163.

to have an abortion, it held that the right to privacy extended to this controversial medical procedure.<sup>102</sup> The same right of privacy would inferentially extend to the right to make dietary choices under a privacy rationale. Both abortion and dietary rights are, at their core, health-related,<sup>103</sup> so if the solemn, profound decision to abort a fetus is shaded beneath the due process penumbra, surely the occasional, (and dare I say) unimportant, decision to eat Kentucky Fried Chicken, containing trans-fats, is shielded from the abrasive sunlight of government intrusion as well.

Additional support exists for the notion of a fundamental right to make health-related decisions.<sup>104</sup> As in *Roe*, the Court in *Washington v. Glucksberg* and *Cruzan v. Director, Missouri Department of Health* cast both holdings in terms of health-related rights retained by individuals as against the State.<sup>105</sup> In *Washington v. Glucksberg*, the Court was forced to examine the outer limits of what the right of privacy and the Due Process Clause protect.<sup>106</sup> The Supreme Court declined in *Glucksberg* to acknowledge a so-called “right to die” protected by the Due Process Clause and the right of privacy.<sup>107</sup> The *Glucksberg* Court rejected the argument that the right to die was the natural extension of prior decisions, namely *Cruzan*, regarding knowing refusal of life-sustaining medical treatment.<sup>108</sup> Importantly, though, the Court reaffirmed its earlier holdings in cases dealing with refusal of life-sustaining measures “recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water.”<sup>109</sup>

The decision to refuse life-sustaining measures is unarguably a health-related right. In *Glucksberg*, the Supreme Court explained that the “[c]onstitutional recognition of the right to bodily integrity underlies the assumed right . . . to require physicians to terminate artificial life support.”<sup>110</sup> It is that same interest in one’s bodily integrity and autonomy that calls into question the propriety of the trans-fat ban. The *Cruzan* decision protects the right of individuals to refuse life-sustaining medical care, a health-related decision of the utmost gravity.<sup>111</sup> Further, the Supreme Court held

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<sup>102</sup> See, e.g., *id.*

<sup>103</sup> See *id.* at 155 (characterizing abortion as a “medical” decision that the state may regulate at some point); *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008) (recognizing that the plaintiff’s meal choice was a “medical,” as well as a religious, issue).

<sup>104</sup> “The right to make decisions regarding one’s own bodily integrity and medical treatment is embraced in the federal constitutional right of privacy.” AM. JUR. 2D CONSTITUTIONAL LAW § 605 (1998).

<sup>105</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 716–17 (1997); *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 281 (1990).

<sup>106</sup> See *Glucksberg*, 521 U.S. 702 (addressing whether the so-called “right to die” falls underneath the privacy penumbra).

<sup>107</sup> *Id.* at 728.

<sup>108</sup> See *id.* at 725 (citing *Cruzan*, 497 U.S. at 280–81).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 778.

<sup>111</sup> See *Cruzan*, 497 U.S. at 279.

that the decision to refuse life-sustaining measures, a decision inherently medical in nature and inevitably fatal by design, was a fundamental right.<sup>112</sup> Surely protecting an individual's right to make poor, but by no means fatal, health-related decisions is a protection subsumed into such marquee due process cases regarding medical decisions. This conclusion seems especially tenable given that the same fundamental right to autonomy and bodily integrity in making medical decisions underlies *Glucksberg*, *Cruzan* and the right to make dietary decisions.

### C. Application

If the ability to make dietary choices is a health-related right sheltered by the notions of privacy, "bodily integrity" and personal autonomy inherent in the Due Process Clause,<sup>113</sup> then the New York City trans-fat ban must be analyzed under strict scrutiny.<sup>114</sup> This Note has already identified the fundamental right infringed upon by the trans-fat ban (the ability to make one's own health-related decisions) and the government's rationale underlying the trans-fat ban (to reduce heart-disease-related deaths).<sup>115</sup> Now, using the construct of strict scrutiny, this section will evaluate whether New York City's trans-fat ban violates the due process rights of New Yorkers. Two factors must be analyzed, namely, the gravity of the City's interest in passing the trans-fat ban and the tailoring of the trans-fat ban.<sup>116</sup> If the right to make dietary decisions is a health-related privacy right, then it is considered a fundamental liberty interest, and the government's interest in abridging that right must be compelling and narrowly tailored, such that no less restrictive means were available.<sup>117</sup>

One can only surmise how a court might characterize the level of governmental interest presented in the trans-fat ban. Using due process parlance, there are two options available—legitimate<sup>118</sup> and compelling.<sup>119</sup> There is no bright line rule used in determining whether an interest is legitimate or compelling, so this section will address the level of New York City's interest in improving heart health by way of comparison to other leading cases.

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<sup>112</sup> *Id.*

<sup>113</sup> *Glucksberg*, 521 U.S. at 778.

<sup>114</sup> *See Glucksberg*, 521 U.S. at 721; *Cruzan*, 497 U.S. at 279; *Roe v. Wade*, 410 U.S. 113, 147–64 (1973).

<sup>115</sup> *See* N.Y. Notice of Adoption, *supra* note 2, at 2.

<sup>116</sup> *See, e.g.,* *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) ("Our opinions applying the doctrine known as 'substantive due process' hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.").

<sup>117</sup> *See Glucksberg*, 521 U.S. at 721 (noting that fundamental liberty interests may not be infringed "unless the infringement is narrowly tailored to serve a compelling state interest" (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

<sup>118</sup> *Roe*, 410 U.S. at 162 ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . .").

<sup>119</sup> *See id.* at 162–63.



In *Roe v. Wade*, the Supreme Court held that “a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.”<sup>120</sup> Safeguarding health and maintaining safe medical procedures are compelling state interests under *Roe*.<sup>121</sup> Within *Roe*, the Court also identified the ability for individuals to have a safe abortion as a legitimate state interest.<sup>122</sup> So, on the one hand, the State has a compelling interest to provide safe medical procedures, maintain medical standards and safeguard its people’s health.<sup>123</sup> The State’s interest in regulating abortion to ensure safety, however, is couched in terms of legitimate interests.<sup>124</sup>

Government was also held to have a legitimate interest in discouraging suicide.<sup>125</sup> In *Glucksberg*, the Supreme Court held that Washington’s ban on assisted suicide was rationally related to the State’s interest in discouraging suicide, a legitimate interest.<sup>126</sup> In *Glucksberg*, the Court relied largely on the holding of *Cruzan v. Director, Missouri Department of Health*.<sup>127</sup> In pertinent part, the *Cruzan* Court held that the State has a legitimate interest in the “protection and preservation of human life” as it applied to the informed refusal of life-sustaining medical procedures.<sup>128</sup>

In the present case, New York City asserts that it has an interest in preventing heart disease and improving the health of its citizens.<sup>129</sup> New York City’s interest sounds most similar to the state interests asserted in *Roe* and in *Cruzan* due to their shared underlying themes of autonomy in making health-related decisions. New York City’s motivation to help police and protect its citizens’ health is virtually identical to the state’s professed purpose in *Roe*, wherein the State also asserted its interest in “safeguarding health.”<sup>130</sup> In *Roe*, the Court recognized the State’s interest in safeguarding the health of its people and helping to maintain medical standards as a compelling interest.<sup>131</sup> This is a virtually identical rationale to that justifying the New York City trans-fat ban.<sup>132</sup>

On one hand, the language used to justify the trans-fat ban is closely analogous to that used in *Roe*. On the other hand, *Roe* dealt with a particular medical procedure—a

<sup>120</sup> *Id.* at 154.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 150 (“The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.”).

<sup>123</sup> *Id.* at 154.

<sup>124</sup> *Id.* at 163.

<sup>125</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 729–30 (1997).

<sup>126</sup> *Id.* at 729.

<sup>127</sup> See, e.g., *Glucksberg*, 521 U.S. at 710–11, 720; see also *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269–85 (1990).

<sup>128</sup> *Cruzan*, 497 U.S. at 280.

<sup>129</sup> N.Y. Notice of Adoption, *supra* note 2, at 1–2.

<sup>130</sup> *Roe v. Wade*, 410 U.S. 113, 154 (1973).

<sup>131</sup> *Id.*

<sup>132</sup> See N.Y. Notice of Adoption, *supra* note 2, at 2.

more contained and specific health-related activity than dietary choices at large.<sup>133</sup> Still, a court might find that New York City's interest in safeguarding the health of its citizens is similar to the health-related rights considered compelling in *Roe* as, in fact, both governmental interests are simply safeguarding the health of citizens. A court, however, might determine, due to the lesser immediacy of the trans-fat ban's health impact, that the governmental interest asserted therein is not as pressing as those addressed in *Roe*. In that case, a court would find the governmental interest most analogous to those governmental interests asserted in *Cruzan* and *Glucksberg*. Were this the case, the New York ban would fail strict scrutiny due to the lacking gravity of the governmental interest asserted (assuming, of course, that the court held the right to make dietary, health-related decisions a fundamental right).

Even if the City of New York's interest could be construed as a compelling governmental interest that would stand up to the rigors of strict scrutiny, the poorly tailored fit of the trans-fat ban calls its legitimacy into question. When a fundamental right has been called into question on due process grounds courts have generally held "that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest."<sup>134</sup> A state or municipality can narrowly tailor its restriction by "pursuing . . . [a] governmental interest in a manner narrowly tailored to minimize the restraint on liberty."<sup>135</sup> Proper tailoring is important because it reduces "the problem of overinclusiveness<sup>136</sup> [or underinclusiveness<sup>137</sup>], along with the attendant risk that an overbroad statute will be applied in an undesirable discriminatory fashion."<sup>138</sup>

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<sup>133</sup> See *Roe*, 410 U.S. at 163 (noting that the state "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health").

<sup>134</sup> *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

<sup>135</sup> *Reno v. Flores*, 507 U.S. 292, 300 (1993).

<sup>136</sup> An overinclusive law is one that functionally extends to matters beyond the particular scope of what the government seeks to regulate. For an example of an overinclusive statute, see *Regalado Cuellar v. United States*, 553 U.S. \_\_; 128 S. Ct. 1994 (2008), which discussed in pertinent part the "fit" of a money laundering statute. The Court explained that:

[T]he structural meaning of 'design' is both overinclusive and underinclusive: It would capture individuals who structured transportation in a secretive way but lacked any criminal intent (such as a person who hid illicit funds *en route* to turn them over to law enforcement); yet it would exclude individuals who fully intended to move the funds in order to impede detection by law enforcement but failed to hide them during transport.

*Id.* at 2004.

<sup>137</sup> An underinclusive statute is one that fails to extend to all matters that should properly be addressed by a particular ordinance or regulation. For an example of an underinclusive statute see *Beard v. Banks*, 548 U.S. 521 (2006) (discussing a jail policy disallowing certain potentially flammable materials, but failing to extend the prohibition to many other flammable liquids).

<sup>138</sup> Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 34 (2008).

The New York City trans-fat ban applies only to “food service establishment[s] . . . [and] mobile food unit commissar[ies].”<sup>139</sup> The ban does not extend to grocery stores, wholesalers or “food that is being served directly to patrons in a manufacturer’s original sealed package.”<sup>140</sup> Additionally, the ban only applies to artificial trans-fats, not to naturally occurring trans-fats.<sup>141</sup> Trans-fats occurring naturally in dairy products and in red meats<sup>142</sup> are not subject to the ban.<sup>143</sup>

Since the City Health Department’s stated purpose in enacting the trans-fat ban was to reduce heart-disease-related deaths and improve the heart health of New Yorkers,<sup>144</sup> the fact that the trans-fat ban has such a narrow purview suggests that the regulation may be underinclusive.<sup>145</sup> To begin, the ban only applies to artificial trans-fats, estimated to account for 80% of dietary trans-fats.<sup>146</sup> From the start then, the trans-fat ban applies only to four-fifths of trans-fats. More startling is the fact that, by New York City’s own research, restaurant foods only account for, at most, one-third of the calories in the diet of the average American.<sup>147</sup> The trans-fat ban only applies to the 33% of foods purchased in restaurants, not to the 67% of foods purchased in grocery stores and through wholesalers.<sup>148</sup> The fact that naturally occurring trans-fats, grocery store products, and products served in restaurants but labeled in their original packaging, are not included in the ban,<sup>149</sup> means that the vast majority of trans-fats are not regulated by the ban. Only a certain specific group (restaurants and vendors) are covered by the ban. This failure to include such a large portion of the trans-fats available on the market suggests that the trans-fat ban is very poorly tailored. Consequently, even if a court construed New York City’s governmental interest in enacting the trans-fat ban to be compelling, the ban would fail the analytical framework of strict scrutiny due to its poor fit.

#### IV. REGULATORY TAKINGS ISSUE POSED BY THE NEW YORK CITY TRANS-FAT BAN

The Fifth Amendment to the United States Constitution states that “private property [shall not] be taken for public use, without just compensation.”<sup>150</sup> This

<sup>139</sup> R.C.N.Y., tit. 24 § 81.08(a) (2007), available at [http://24.97.137.100/nyc/rcny/title24\\_81\\_08.asp](http://24.97.137.100/nyc/rcny/title24_81_08.asp).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* § 81.08(a)–(b).

<sup>142</sup> The New York City Board of Health estimated that 20% of trans-fats in the American diet are not artificially produced, but occur naturally in red meats, dairy, and other sources of natural trans-fat. See N.Y. Notice of Adoption, *supra* note 2, at 2.

<sup>143</sup> R.C.N.Y., tit. 24 § 81.08(a)–(b), available at [http://24.97.137.100/nyc/rcny/title24\\_81\\_08.asp](http://24.97.137.100/nyc/rcny/title24_81_08.asp).

<sup>144</sup> See N.Y. Notice of Adoption, *supra* note 2, at 1–2.

<sup>145</sup> See *supra* note 143.

<sup>146</sup> See N.Y. Notice of Adoption, *supra* note 2, at 2.

<sup>147</sup> *Id.* at 3.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1.

<sup>150</sup> U.S. CONST. amend. V.

constitutional right was extended to state and local governments through the Fourteenth Amendment.<sup>151</sup> Takings Clause jurisprudence requires that in order for a taking to be valid it must be motivated or enacted for public use<sup>152</sup> and just compensation must be paid for the taking.<sup>153</sup> Further, the Supreme Court has determined that taking property for a broad, public purpose that accomplishes a legitimate state interest<sup>154</sup> is the functional equivalent of taking private property for “public use.”<sup>155</sup>

Takings can be both literal and regulatory.<sup>156</sup> A literal or physical taking is the condemnation of real property by the government.<sup>157</sup> A regulatory taking, on the other hand, occurs when the government, whether federal, state or local, enacts legislation that diminishes the utility, value or profitability of land to such an extent that compensation for the individual’s losses is just and appropriate.<sup>158</sup>

The Supreme Court articulated the framework for analyzing regulatory takings in the case *Penn Central Transportation Co. v. New York City*.<sup>159</sup> In *Penn Central*, the Court identified several factors to be analyzed in deciding whether a government action amounted to a regulatory taking.<sup>160</sup> The Court considered the “character of the government action,”<sup>161</sup> the economic repercussions of such an action,<sup>162</sup> and the extent to which government actions affected the profit expectations of the business/land

<sup>151</sup> U.S. CONST. amend. XIV, § 1.

<sup>152</sup> See, e.g., *United States v. Causby*, 328 U.S. 256, 264 (1946) (discussing whether frequent low altitude flights over owner’s property were for public use and the type of activity that could constitute a “taking”); see also, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 126–29 (1978). New York City designated Grand Central Terminal to be a landmark. *Id.* at 115. The owners of Grand Central Terminal had planned on building an office high rise over the pre-existing station, but the landmark designation made that difficult. *Id.* at 116–17. The Court discussed whether a landmark designation was the kind of public good or interest typical in Takings Clause jurisprudence, and whether disallowing Penn Central from constructing an office building which they had made architectural preparations to construct would amount to a regulatory taking. *Id.* at 122.

<sup>153</sup> U.S. CONST. amend. V.

<sup>154</sup> See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 243 (1984) (“Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.”).

<sup>155</sup> *Id.* at 243–44; see also *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

<sup>156</sup> Compare *Kelo v. City of New London*, 545 U.S. 469 (2005) (allowing the transfer of land from one private owner to another in order to further economic development and benefits to the community at large), with *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (explaining that the over-regulation of private land can lessen the value and utility of that land to such an extent that it is considered a “taking” and compensation to the owner is warranted).

<sup>157</sup> See, e.g., *Kelo*, 545 U.S. at 477; *Midkiff*, 467 U.S. at 240–44.

<sup>158</sup> See, e.g., *Penn Cent.*, 438 U.S. at 127 (1978) (“[A] state statute . . . may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”); *Mahon*, 260 U.S. at 414–15.

<sup>159</sup> *Penn Cent.*, 438 U.S. at 104.

<sup>160</sup> See *id.* at 124–25.

<sup>161</sup> *Filosa*, *supra* note 10, at 105.

<sup>162</sup> *Id.*

holder.<sup>163</sup> Using the framework set forth in *Penn Central* and other leading cases, this section will analyze whether the New York City trans-fat ban could be considered an improper regulatory taking.

#### A. Character of Government Action

As previously discussed, the New York City trans-fat ban required restaurateurs to stop serving foods containing trans-fats.<sup>164</sup> Under Takings Clause analysis, one must consider the character and scope of the actions taken<sup>165</sup> by New York City against restaurateurs and the government's interest in taking such actions.<sup>166</sup>

The New York City trans-fat ban was justified under the rationale that trans-fats cause heart disease.<sup>167</sup> Heart disease is the leading cause of death among residents of New York City.<sup>168</sup> In analyzing the actions of New York City legislators, however, courts will employ a balancing test between the interest being served by a regulation and the implications a regulation has upon the group affected by it.<sup>169</sup> Typically, if an individual or an insular group of individuals bear a burden in order for the community at large to incur some benefit, such a finding supports the notion that a regulatory taking has occurred.<sup>170</sup> That is certainly the case here: restaurateurs are the only group affected by the city's ban on trans-fats, even though grocers, farmers and wholesalers are permitted to continue shelving and selling products containing trans-fats.<sup>171</sup> Similarly, there is no clear reason why New York City chose to enact an all-out ban on trans-fats in restaurants, when most trans-fat regulations preceding the New York City ban were tailored to simply alert consumers to the trans-fats contained in the particular food item.<sup>172</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> See *supra* note 1 and accompanying text.

<sup>165</sup> The "character" of governmental actions refers to the type of activity or regulation put into effect in setting in motion a given regulatory taking claim. As an example, in *Penn Central*, the "character" of New York City's governmental action was designating a city tax block as a landmark. 438 U.S. at 110–11. Additionally, the "character" of governmental action refers to the scope of the benefit given and the burden on individuals affected by a regulation. In *Penn Central*, New York City designated Grand Central Terminal's city tax block a "landmark." This conferred a benefit upon all those who might frequent the landmark, Grand Central Terminal, and damaged Penn Central, who as a result of the landmark designation could not execute longstanding plans to add a skyscraper in the airspace above the landmark. *Id.* at 116–19.

<sup>166</sup> See *id.* at 124–26.

<sup>167</sup> See N.Y. Notice of Adoption, *supra* note 2, at 2; see also *supra* Part I.A.

<sup>168</sup> See N.Y. Notice of Adoption, *supra* note 2, at 2.

<sup>169</sup> "In essence, a court must balance the liberty interest of the private property owner against the government's need to protect the public interest through imposition of the restraint." Filosa, *supra* note 10, at 106.

<sup>170</sup> *Id.*

<sup>171</sup> See *supra* text accompanying note 148.

<sup>172</sup> Take for example the Food and Drug Administration's choice to put trans-fat information on nutritional labels in lieu of banning trans-fats altogether. See *supra* note 37. The Food and

The character of government action is evaluated, in the context of regulatory takings, under a fairness rationale.<sup>173</sup> Courts have not adopted “any ‘set formula’ for determining when ‘justice and fairness’ require . . . compensat[ion] by the government.”<sup>174</sup> In light of the foregoing factors and interests, and their similarities to leading regulatory takings cases, the New York City ban on trans-fats is likely improper and runs afoul of the fairness-based takings test. Had New York City either required grocers, wholesalers and farmers to stop selling products with greater than one-half of one gram of trans-fats or required restaurants to simply report on menus the trans-fats contained in items being served, then the City would have applied their regulations uniformly and fairly.<sup>175</sup> Since the City did not apply their regulatory scheme equally across all purveyors of food, excising a communal benefit from a very limited few, the character and fairness of the regulation is questionable.

### *B. Economic Impact of Regulation*

The economic impact of a regulation upon a group is another of the three elements plumbed when analyzing a regulatory taking.<sup>176</sup> Courts are concerned with the economic loss incurred by a property holder or business owner after a regulation is put in place limiting their ability to conduct business as usual.<sup>177</sup> In determining the economic impact a regulatory scheme has had upon a business, courts generally consider whether and to what extent normal business purposes have been retained by the owner despite new regulations,<sup>178</sup> and additionally, to what extent the profitability of a business has been damaged as a result of regulatory schemes.<sup>179</sup> Generally, in order for a court to rule that a taking has occurred, there must be a severe reduction in the value

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Drug Administration sought to achieve the same goals as New York City legislators, namely a reduction in heart-disease-related deaths, however they took a more tempered approach than New York’s complete ban on the preparation, sale, and consumption of trans-fats in restaurants.

<sup>173</sup> See Filosa, *supra* note 10, at 106.

<sup>174</sup> Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

<sup>175</sup> See Filosa, *supra* note 10, at 106, for a more in-depth discussion of the different ways that New York City could have handled enacting a trans-fat regulatory scheme so as to avoid issues with the fairness test inherent in Takings Clause analyses.

<sup>176</sup> See *id.* at 107–09.

<sup>177</sup> See *id.*

<sup>178</sup> See Penn Cent., 438 U.S. at 137–38 (holding that the economic impact focus in a takings analysis should not be solely on the loss of property value incurred, but should also take into consideration the number and viability of remaining uses and options available to the aggrieved party).

<sup>179</sup> See Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567 (Fed. Cir. 1994), for the court’s explanation concerning the economic impact felt by the owner of property or operator of a business as a result of an applied regulatory scheme. The court explained that such economic impact is “measured by the change, if any, in the fair market value caused by the regulatory imposition.” *Id.*

of the property in question<sup>180</sup> or few viable uses left for the property or business in light of the imposed regulations.<sup>181</sup>

Restaurateurs in New York City have a strong argument that their businesses have become less profitable as a result of the trans-fat regulations and, in some cases, that they have been effectively deprived of most or all viable uses for their property. Operating under the economic loss theory, restaurateurs have suffered considerable losses as a result of the trans-fat ban.<sup>182</sup> Trans-fats are admittedly much cheaper<sup>183</sup> than their non-hydrogenated counterparts and are less perishable.<sup>184</sup> The switch to trans-fat free oils, and in some cases, trans-fat reducing fryers,<sup>185</sup> is a costly endeavor for nationwide fast food chains,<sup>186</sup> and a veritable death sentence for small local restaurants and diners.<sup>187</sup>

Similarly, New York restaurateurs have a strong argument that the trans-fat ban amounts to a regulatory taking under the viable use rationale. If a property is zoned

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<sup>180</sup> See Filosa, *supra* note 10, at 107 n.81 (citing *Penn Cent.*, 438 U.S. at 104 (stating that a change in the value of a property from \$75,000 to \$25,000 did not constitute loss of an economically viable use)).

<sup>181</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (holding that an individual must suffer from a complete or an almost complete loss of viable usage in order to successfully argue that a regulatory taking has occurred).

<sup>182</sup> See Jennifer Davies, *Starbucks to Eliminate Trans Fat From Baked Goods, Pastries*, SAN DIEGO UNION-TRIB., Jan. 3, 2007, at A1 (explaining that a 35 pound tub of trans-fat cooking oil costs approximately \$25 and has a fry yield equivalent to 4,000 orders of McDonald's medium french fries, and that switching to trans-fat free oil would cost approximately \$10 more per unit for the same yield); see also Russell Berman, *Ban on Trans Fat in Restaurants Is Approved by New York City*, N.Y. SUN, Dec. 6, 2006, at 1; Tom Stroozas, *Trans Fats and Your Restaurant*, Gas Foodservice Equipment Network, <http://www.gfen.info/pdf/articles/cookinggas0907.pdf> (last visited Feb. 26, 2010).

<sup>183</sup> See Davies, *supra* note 182; Brad Johnson, *The World According to French Fries*, RESTAURANTS & INSTITUTIONS, July 15, 1997 (stating that in 1997 McDonald's USA went through 2.4 billion pounds of potatoes, accounting for 7% of the total national crop); American Heart Association, *supra* note 11; U.S. Food & Drug Administration, *supra* note 19; see also CalorieCount.com, *Food Details: Medium McDonald's French Fries*, <http://caloriecount.about.com/calories-mcdonalds-medium-french-fries-i53928> (last visited Feb. 26, 2010) (stating that a medium order of McDonald's french fries weighs 117 grams, or .258 pounds). Based on these facts, McDonald's sells approximately 9.6 billion orders of medium french fries per year. Switching to trans-fat free oil increases the overhead costs of McDonald's production at a rate of \$10 per 4,000 orders of medium fries. In the aggregate then, the switch to trans-fat free oil (not including adjustments to frying equipment) for french fries alone would cost McDonald's \$23,904,382 per year.

<sup>184</sup> See American Heart Association, *supra* note 11; U.S. Food & Drug Administration, *supra* note 19.

<sup>185</sup> See Stroozas, *supra* note 182.

<sup>186</sup> See Davies, *supra* note 182; see also *supra* note 180 and accompanying text.

<sup>187</sup> See Eating L.A., *Will the Trans Fat Ban Hurt Ethnic Restaurants?*, <http://eatingla.blogspot.com/2008/07/will-trans-fat-ban-hurt-ethnic.html> (July 26, 2008).

to operate as a restaurant,<sup>188</sup> and the restaurant can no longer economically subsist under the trans-fat ban, then all of the viable economic uses for which that property has been zoned have been extinguished.<sup>189</sup> Following the holding in *Penn Central*, such a set of circumstances would amount to a loss of viable use,<sup>190</sup> as a building zoned exclusively for purposes of operating a (defunct, post-trans-fat ban) restaurant could not be used for other purposes.

### C. Investment Expectation of the Owner/Operator

The third prong of the Takings Clause inquiry revolves around the rule that a regulatory action may be “deemed a taking if the regulation interferes with the landowner’s distinct reasonable investment-backed expectations.”<sup>191</sup> In common sense terms, it is clear that restaurateurs invest great amounts of capital opening and developing their restaurants and that they do so in hopes that they will turn a profit.<sup>192</sup> A court considers three factors when determining whether a landowner’s investment expectations have been frustrated: (1) whether the industry an owner of land engaged in is highly regulated; (2) whether the owner was aware of the issues that the regulations in question sought to correct when they purchased the property in question; (3) whether it was reasonably foreseeable that regulations might inhere to the purchased property at the time the purchase was being considered.<sup>193</sup> There are policy rationales and principles of law motivating these three factors. First, courts are less apt to find a regulatory taking when land is used in an industry that is already highly regulated.<sup>194</sup> This makes logical sense—if someone enters into a business that is closely scrutinized by the government, it is foreseeable that a regulation could be enacted that would impinge upon his or her business model.<sup>195</sup> Second, courts are less likely to find

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<sup>188</sup> New York City has extremely complicated and strict zoning laws. Commercial activities are only permitted in certain districts, and within those districts strict limitations are placed on the size and nature of the commercial activities conducted by a given business. Use of a commercial property as a restaurant is not use permitted as of right, but rather it requires a special permit to be issued by the City. See ZONING RESOLUTION OF THE CITY OF NEW YORK art. III, ch.2 (2006).

<sup>189</sup> See Filosa, *supra* note 10, at 108–09 for an expanded articulation of this argument.

<sup>190</sup> See *id.* at 108.

<sup>191</sup> *Id.* at 109.

<sup>192</sup> See generally RestaurantOwner.com, *Industry Survey: How Much Does It Cost To Open A Restaurant?*, <http://www.restaurantowner.com/public/811.cfm> (last visited Feb. 26, 2010). Study data suggests that the average cost of starting up a restaurant ranges between \$125,000 and \$550,000, not including the costs associated with land or storefront purchase. *Id.* These costs, however, are based on data from across the nation. *Id.* As New York City real estate is wildly more expensive than real estate in most other areas of the country, New York City restaurateurs pay even greater costs for real estate on top of these basic start-up costs.

<sup>193</sup> See, e.g., *Apollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2004).

<sup>194</sup> See Filosa, *supra* note 10, at 111 (citing *Apollo Fuels*, 381 F.3d at 1349).

<sup>195</sup> *Id.* at 110 (expounding on the third *Apollo Fuels* factor, i.e., whether the claimant could



a regulatory taking if an individual purchased a piece of property aware that complicating regulations would likely be imposed on the property in the foreseeable future.<sup>196</sup>

In New York City, restaurateurs would have a very persuasive argument that their investment-backed expectations were frustrated by the trans-fat ban. The restaurant industry is regulated to a certain degree by the Food and Drug Administration and by local health inspection agencies.<sup>197</sup> “Culinary censorship” such as that contained in the trans-fat ban, however, was unheard of until the New York City trans-fat proposal. The Food and Drug Administration issues many regulations requiring basic safety and cleanliness in the *preparation* and packaging of foods, however the Food and Drug Administration has never made a practice of singling out specific, common foods and strictly regulating them.<sup>198</sup>

The second prong of the investment-expectation analysis requires speculation and conjecture; one cannot say with certainty whether a particular restaurant would satisfy that prong. That being said, certainly some restaurateurs in New York purchased a building with the expectation of starting a profitable restaurant, unaware of the desire of New York legislators to enact a trans-fat ban unprecedented in scope and forcefulness. Surely, this was the case for numerous restaurateurs in New York, and although the claims of individual restaurants would have to be evaluated on a case-by-case basis, many New York restaurants would meet this requirement.

Finally, the third prong of the investment-backed expectations analysis requires that the regulatory action complained of was not reasonably foreseeable at the time the aggrieved individual purchased their property.<sup>199</sup> Most New York City restaurateurs, excepting those who purchased restaurants after the trans-fat ban proposal, would have no difficulty satisfying the third prong of the analysis. No city had approved a trans-fat ban ahead of New York City.<sup>200</sup> Though the FDA had required labeling of trans-fats for several years before the trans-fat ban, no government took restrictive, as opposed to advisory, actions against trans-fats.<sup>201</sup>

#### *D. Takings Clause Conclusion*

Restaurant owners in New York City have a strong argument that a regulatory taking occurred when New York City banned trans-fats from its restaurants. First, the character of New York City’s trans-fat ban is suspect. The City of New York forced restaurateurs to single-handedly bear the burden of eliminating trans-fats for a professed

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have “reasonably anticipated” the possibility of regulation).

<sup>196</sup> *Id.*

<sup>197</sup> U.S. Food & Drug Administration, *Retail Food Protection: A Cooperative Program*, <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/default.htm> (last visited Feb. 26, 2010).

<sup>198</sup> See *supra* note 97.

<sup>199</sup> *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1348 (Fed. Cir. 2004).

<sup>200</sup> Thomas J. Lueck, *City Plans to Place Sharp Limits on Restaurants’ Use of Trans Fats*, N.Y. TIMES, Sept. 27, 2006, at A1.

<sup>201</sup> Lueck & Severson, *supra* note 44.

public purpose.<sup>202</sup> The City did not force supermarkets or wholesalers to stop selling groceries with trans-fats; they enacted regulations against one particular group in hopes of achieving their goals. Second, restaurants in New York were economically damaged by the trans-fat ban.<sup>203</sup> The costs of switching to trans-fat free products is high—especially for the small, independent restaurateur.<sup>204</sup> Making that switch, however, has hurt the bottom lines of every restaurant subject to the ban.<sup>205</sup> While many restaurants can still continue their business after enactment of the ban, restaurants that are no longer operable as a result of the trans-fat ban and are zoned purely for use as a restaurant have little or no viable use. Businesses that are severely economically damaged or have few viable uses left as a result of regulatory actions have been “taken” within the meaning of the Takings Clause.<sup>206</sup> Finally, the investment-backed expectations of New York restaurateurs were clearly frustrated by the trans-fat ban.<sup>207</sup> Startup costs are very high for restaurants,<sup>208</sup> and restaurateurs obviously want to turn a profit. New York City restaurant owners put in large amounts of capital to operate successful businesses. The restaurant owners affected by the ban were not operating in a strict regulatory climate.<sup>209</sup> Restaurants are monitored by local health inspectors and foods are regulated by the Food and Drug Administration.<sup>210</sup> A local municipality, however, had never dictated to restaurants what they could *serve* their patrons before 2006—and New York City sparked considerable outrage when it did so.<sup>211</sup> New York restaurants were not operating in a highly regulated climate, nor did the vast majority of restaurateurs have reason to know of any pending motions to introduce the trans-fat ban. Further, a total ban on trans-fat was not, prior to the New York City proposal, a likely or foreseeable economic development.<sup>212</sup> Under standard Takings Clause analysis, laid out in this section, it is clear that the rights of New York’s restaurant owners were likely violated by New York’s trans-fat ban.

#### V. FINDINGS AND CONCLUSION: OF FAT PEOPLE AND FUNDAMENTAL RIGHTS

There is no question that trans-fats pose health risks for those who consume them;<sup>213</sup> science and common sense both caution against ingesting such harmful foods

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<sup>202</sup> See R.C.N.Y., tit. 24 § 81.08 (2007), [http://24.97.137.100/nyc/rcny/title24\\_81\\_08.asp](http://24.97.137.100/nyc/rcny/title24_81_08.asp).

<sup>203</sup> See, e.g., Davies, *supra* note 182.

<sup>204</sup> See Filosa, *supra* note 10, at 104; see also *supra* note 183 and accompanying text.

<sup>205</sup> See, e.g., Davies, *supra* note 182.

<sup>206</sup> See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

<sup>207</sup> See Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2004).

<sup>208</sup> See generally RestaurantOwner.com, *supra* note 192.

<sup>209</sup> See *supra* note 200 and accompanying text.

<sup>210</sup> See *supra* note 197 and accompanying text.

<sup>211</sup> Lucek & Severson, *supra* note 44. Note that it is customary for municipalities to ensure basic care in preparation of food through the use of restaurant inspections. Again, however, New York City’s approach was novel in regulating the types of foods served in restaurants. *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See *supra* Part I.B.

in quantity. The negative effects of engaging in risky dietary behaviors, however, are risks that every individual must weigh independent of governmental intrusion. Government, at any level, is ill-equipped to make health decisions for its citizens; that it might force its judgment upon the people is a troubling and ridiculous notion.

Thankfully, American jurisprudence has developed prudently, its creators always mindful that troubling and ridiculous notions arise and are sometimes advocated. To that end, constitutional safeguards were put in place and have developed through case law to protect us as a nation from ourselves. The New York trans-fat ban, considered to be a troubling and ridiculous regulation by many, impinges upon several core constitutional principles, put in place to limit the authority of government over the people. The trans-fat ban violates the substantive due process rights of New Yorkers who have a liberty interest in their right to privacy and their right to make health-related decisions free from the long arm of the state. The ban also constitutes an improper regulatory taking under the Takings Clause, which guarantees that citizens will not be unreasonably stripped of their property without just compensation from the government.

The New York City trans-fat ban and its progeny in Philadelphia, California, Boston, and Montgomery County, Maryland, hollow out traditional American notions of individualism and autonomy. Such natural law principles have inspired the legal and social mores of our nation since time immemorial, and must be safeguarded as the sacred, democratic pillars they are.