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The Rules of Consumption: The Promise and Peril of Federal Emulation of the Big Apple's Food Laws

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NOTES

The Rules of Consumption

THE PROMISE AND PERIL OF FEDERAL EMULATION OF THE BIG APPLE'S FOOD LAWS

I. INTRODUCTION

It is not just the usual suspects that are causing American consumers to suffer from obesity and diabetes. Actually, highly caloric fare entices our nation in the most unexpected restaurants and food service establishments (FSEs). Since the passage of New York City Health Code Regulation 81.50¹ (Regulation 81.50) many New York City (NYC) residents have discovered that the places they have consistently regarded as more healthful are, in fact, not good for their health at all. For example, there are 1140 calories in Le Pain Quotidien's Mediterranean Platter, a seemingly wholesome and nutritious plate comprised of vegetable spreads and assorted organic breads.² Likewise, there are 1060 calories in California Pizza Kitchen's most healthful sounding appetizer—Lettuce Wraps with minced chicken and shrimp.³ Unfortunately, these secretly fattening menu items are not just fooling the residents of NYC—this is a problem affecting all of America.

In enacting Regulation 81.50, NYC pioneered the menu calorie-disclosure movement and provided our nation with an essential litmus test.⁴ The constitutional success of the NYC law encouraged many other states and cities across America to

¹ N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50 (2008).

² *Sharing Platters*, LE PAIN QUOTIDIEN, <http://www.lepainquotidien.com/files/Core%20-%20AC%20IX%2008%20-%20No%20price.pdf> (last visited Jan. 6, 2011).

³ *Appetizers*, CALIFORNIA PIZZA KITCHEN, <http://www.cpk.com/menu/pdfs/main-dessert-nutritional-menu.pdf> (last visited Jan. 4, 2011).

⁴ N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50.

adopt their own versions of calorie-disclosure laws.⁵ As this legislative trend was rapidly spreading, it was the appropriate time for the federal government to adopt a clear national mandate on menu calorie disclosures and take advantage of this stepping stone towards reducing our nation's levels of obesity and diabetes.⁶ Congress preempted these myriad state and local solutions by passing the Patient Protection and Affordable Care Act (PPACA), which included a federal calorie-disclosure provision.⁷ In doing so, Congress obviously considered the benefits that a federal mandate would provide for not only restaurants and FSEs nationwide, but also for all American citizens.⁸ Despite the likely benefits of this law, however, this note argues that Congress should recognize that not all food-based health initiative laws are constitutionally proper. Recent NYC mandates go beyond mere information disclosure by regulating what people may consume.

In Part II, this note will review the rocky development of Regulation 81.50 and discuss its requirements. In Part III, this note will focus on the Second Circuit's decision in *New York State Restaurant Ass'n v. New York City Board of Health*, and discuss how NYC's calorie-disclosure law prevailed over two federal constitutional challenges.⁹ In addition, Part III will discuss how NYC inspired other cities and states to adopt

⁵ See *infra* text accompanying notes 106-30.

⁶ See N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50. Because it is outside the scope of the forthcoming analysis, this note does not offer much background on the extent of the obesity and diabetes crises. However, for excellent recent commentary on the extent of these epidemics and their relatedness to calorie consumption, see Tamara Schulman, Note, *Menu Labeling: Knowledge for a Healthier America*, 47 HARV. J. ON LEGIS. 587, 589-91 (2010); see also Brent Bernell, *The History and Impact of the New York City Menu Labeling Law*, 65 FOOD & DRUG L.J. 839, 840-45 (2010); Eloisa C. Rodriguez-Dod, *It's Not a Small World After All: Regulating Obesity Globally*, 79 MISS. L.J. 697, 697-99 (2010). For another recent discussion of obesity and its relatedness to the consumption of sugary drinks, see Jonathon Cummings, *Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages*, 34 SEATTLE U. L. REV. 273, 278-81 (2010).

⁷ See Lauren F. Gizzi, Note, *State Menu-Labeling Legislation: A Dormant Giant Waiting to Be Awoken by Commerce Clause Challenges*, 58 CATH. U. L. REV. 501, 533 (2009) ("Congress must adopt a federal law to ensure that restaurants can comply with such regulations in a convenient manner, and also take a considerable step toward ending the onslaught of obesity in the United States.").

⁸ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, § 4205(b) (2010) (codified as amended in scattered sections of the U.S.C.). Importantly, it has been noted that "there are many . . . ways that the federal government could intervene to improve . . . Americans' health. Legislators could . . . enact legislation like New York City's new law which requires some restaurants to provide better nutritional information." David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 373-74 (2007).

⁹ *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

similar laws.¹⁰ In Part IV, this note will review several failed federal attempts to enact a national menu calorie-disclosure law and discuss why it was the best time to adopt a national mandate. Part IV will also analyze expected constitutional challenges to the federal menu calorie-disclosure law and explain why these challenges also will not be successful. Then, in Part V, this note will discuss other food-based health initiatives considered and adopted by the NYC government and argue that similar measures should not be pursued as federal mandates. Lastly, in Part VI, this note will conclude that the federal government has appropriately passed the menu calorie-disclosure provision in the PPACA and should continue to pursue other educational methods to diminish the prevalence of obesity, diabetes, and other life-threatening epidemics in our nation.

II. NYC CALORIE-DISCLOSURE LAW

Regulation 81.50 is now a constitutionally-sound calorie-disclosure law, requiring all restaurants and FSEs in NYC with fifteen or more locations nationally to display the caloric contents of each menu item, anywhere that menu items are listed.¹¹ But this was not always the case. This section discusses the original version of the law, its prior constitutional violations, and the subsequent amendments made by the NYC legislature, which pioneered the calorie-disclosure movement in America.¹²

A. *The Law as Originally Drafted*

In December 2006, NYC's Department of Health and Mental Hygiene, Board of Health ("Board of Health"), issued a Notice of Adoption of the most recent amendment to Article 81: Regulation 81.50.¹³ Through this new amendment, NYC hoped to facilitate consumers' ability to make healthier choices when eating at restaurants and other FSEs by forcing them to

¹⁰ See *infra* text accompanying notes 106-30.

¹¹ See N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50.

¹² For recent discussions of the development of Regulation 81.50, see Bernell, *supra* note 6, at 845-52, and Rodriguez-Dod, *supra* note 6, at 701-06.

¹³ N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, BD. OF HEALTH, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.50) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE 1 (2006) [hereinafter NOTICE OF ADOPTION 1], available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf>.

consider calorie information at the moment of purchase.¹⁴ NYC believed that providing consumers with calorie information before they purchased food would result in weight loss and healthier lifestyles, and thus reduce the epidemics of obesity and diabetes.¹⁵

NYC's concern about calories grew out of the rapidly rising obesity rate among its citizens.¹⁶ The Board of Health noted that "[c]onsumers consistently underestimate the nutrient levels in food items and overestimate the healthfulness of restaurant items."¹⁷ While some restaurants and other FSEs voluntarily provided consumers with "nutrition information," the methods employed were clearly insufficient, as the obesity rate in NYC continued to rise.¹⁸ For example, many businesses were placing calorie information on the company website.¹⁹ But the obvious problem with this method was that consumers needed to have access to the Internet at the point of purchase in order to make informed decisions.²⁰ In addition to the company-website-display method, some companies published information "in brochures, on placemats covered with food items, or on food wrappers, where the information is hard to find or difficult to read and only accessible after the purchase is made."²¹ It is no surprise that

¹⁴ See *id.* ("By requiring posting of available information concerning restaurant menu item calorie content, so that such information is accessible at the time of ordering, this Health Code amendment will allow individuals to make more informed choices that can decrease their risk for the negative health effects of overweight and obesity associated with excessive calorie intake.").

¹⁵ See *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 120-21 (2d Cir. 2009) ("Seeking to combat rising rates of obesity and associated health care problems, in December 2006, the New York City Board of Health adopted the precursor to the current Regulation 81.50 . . . [which] mandated that *any* [FSE] *voluntarily* publishing calorie information post such information on its menus and menu boards.").

¹⁶ See NOTICE OF ADOPTION 1, *supra* note 13, at 2 (recognizing that "the obesity rate among U.S. adults more than doubled over the past three decades from 14.5% in 1971-1974 to 32.2% in 2003-2004. In New York City, more than half of adults are overweight and one in six is obese. . . . 21% of New York City kindergarten children are obese.").

¹⁷ *Id.* (citation omitted). "Recent studies found that 9 out of 10 people underestimated the calorie content of less-healthy items by an average of more than 600 calories (almost 50% less than the actual calorie content)." *Id.*

¹⁸ *Id.* ("Current voluntary attempts by some [FSEs] to make available nutrition information are inadequate particularly because the information is usually not displayed where consumers are making their choices and purchases.").

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

these second-rate methods had little, if any, impact on consumers' food purchasing decisions.²²

In considering possible solutions to the rising obesity epidemic, NYC reviewed the success of the federal Nutrition Labeling and Education Act (NLEA).²³ Since its enactment, the NLEA has noticeably affected consumer attitude and decision making in regards to prepackaged food products purchased in stores.²⁴ Despite its successes, the NLEA exempted restaurants from its nutrition labeling requirements, leaving people dining outside the home to hazard an estimate about the nutrient content of their food choices at the point of purchase.²⁵ NYC hoped that by extending the calorie information mandate to include certain restaurants, healthful decision-making practices would result because of consumers' timely access to such information.

In the Notice of Adoption of Regulation 81.50, NYC argued that recent reports indicated that an overwhelming majority of resident consumers would like to have calorie information at certain restaurants and FSEs made available to them, and were eagerly awaiting the enactment of this new legislation.²⁶ NYC noted that "approximately 2,200 written and oral comments" were received from the public, and that "all but 22 supported the amendment."²⁷ With this great support from NYC residents, the regulation was enacted on March 1, 2007.²⁸ Regulation 81.50 required calorie disclosure only in places that voluntarily chose to post such information on their menus and menu boards—about ten percent of NYC's restaurants and FSEs.²⁹

²² *Id.*

²³ Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (2004) (codified as amended at 21 U.S.C. § 343).

²⁴ NOTICE OF ADOPTION 1, *supra* note 13, at 2 ("Three-quarters of American adults report using food labels, and about half (48%) report that nutrition information on food labels has caused them to change their food purchasing habits." (citations omitted)).

²⁵ *Id.*

²⁶ *Id.* at 3 ("Six nationally representative polls have found that between 62% to 87% of Americans support requiring restaurants to list nutrition information.").

²⁷ *Id.* at 4.

²⁸ *Id.*

²⁹ *Id.* at 3 ("This provision does not require any FSE to engage in analysis of the nutrition content of its menu items, but does require restaurants that make such information publicly available to their customers to post it in plain sight, so it is available at the time of ordering.") The new health code only applied to "standard menu item[s] offered on a regular and ongoing basis that [are] prepared from a standardized

B. The Problem: NYC May Not Only Regulate Voluntary Information

Those subject to the provisions of Regulation 81.50 immediately responded with protest.³⁰ The law “was met with vigorous objection from . . . restaurants and prompted many to stop voluntarily making such information available.”³¹ The New York State Restaurant Association (NYSRA) brought a lawsuit against the Board of Health³² challenging Regulation 81.50 on several grounds, including that it was preempted by a federal law, the NLEA.³³ In a decision issued on September 11, 2007, Judge Richard Howell of the United States District Court for the Southern District of New York awarded judgment in favor of the NYSRA.³⁴ The court held that Regulation 81.50 was preempted by the NLEA as it only mandated disclosure of calorie information from restaurants and other FSEs that voluntarily posted nutrition information, which “amounted to a ‘voluntary nutrient content claim,’ a category of disclosure that no state can regulate as mandated by the preemption provisions of the NLEA.”³⁵

The opinion concluded with obvious disappointment. The court stated that it understood the “wisdom of Regulation 81.50” and it believed this type of health-reform legislation would be successful in combating obesity and other public-health concerns.³⁶ Although the NYC law was ultimately ruled unconstitutional, the court subtly encouraged the Board of Health to adopt a new regulatory approach that would fall within the small, unpreempted gap of the NLEA.³⁷

recipe” and did not regulate “[n]on-standard items, including daily specials and experimental items.” *Id.*

³⁰ N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, 556 F.3d 114, 121 (2d Cir. 2009).

³¹ *Id.*

³² N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, 509 F. Supp. 2d 351, 352 (S.D.N.Y. 2007).

³³ *Id.*

³⁴ *Id.* at 363.

³⁵ Gizzi, *supra* note 7, at 517-18.

³⁶ N.Y. State Rest. Ass’n, 509 F. Supp. 2d at 354.

³⁷ *Id.*

C. *The Solution: A New and Improved Piece of Legislation*

The Board of Health got the message, and on January 22, 2008, it enacted the current version of Regulation 81.50.³⁸ Providing the same reasoning as it had for its original attempt, NYC again cited the local prevalence of two health-related epidemics, obesity and diabetes, and the need for this legislative health reform.³⁹ The specific mandate of the revised Regulation 81.50 provided that all restaurants and FSEs in NYC with fifteen or more locations nationally, operating under the same name and offering the same fare on their menus, were subject to regulation.⁴⁰ The new version of Regulation 81.50 provided a more “flexible” rule of disclosure than the repealed regulation.⁴¹

The Board of Health also highlighted that, in recent years, consumers have been eating outside of their homes more often, facilitated by the proliferation of restaurant chains and

³⁸ N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE, BD. OF HEALTH, NOTICE OF ADOPTION OF A RESOLUTION TO REPEAL AND REENACT § 81.50 OF THE NEW YORK CITY HEALTH CODE 1-2 (2008) [hereinafter NOTICE OF ADOPTION 2], available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50-0108.pdf> (“[T]he Federal court clearly affirmed the authority of local governments to mandate that restaurants disclose nutritional information.”); see also N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, 556 F.3d 114, 121 (2d Cir. 2009); Gizzi, *supra* note 7, at 518 (“[T]he New York City Board of Health voted to adopt a new bill to require menu-labeling, this time applying the provision to all New York chain restaurants, not just those that already provide nutrition information to the public.”); Diane Cardwell, *City Tries Again to Require Restaurants to Post Calories*, N.Y. TIMES, Jan. 23, 2008, at B2.

³⁹ NOTICE OF ADOPTION 2, *supra* note 38, at 2-4 (discussing the epidemics and noting that “diabetes has more [than] doubled in New York City in the past decade, and hospitalizations for long-term complications of diabetes have been rising steadily”).

⁴⁰ *Id.* at 10. “Fifteen was found to be an appropriate cut-off to focus on chains with standardized menus, and will cover the vast majority of such chain restaurant locations.” *Id.*

⁴¹ *Id.* at 11 (“The reenacted rule . . . provides one, more flexible standard for displaying calorie information, incorporating the lessons learned by the [Board of Health] from its analysis of many proposed alternative designs and its discussions with industry representatives. All of the alternative design elements that were considered approvable have been incorporated into the reenacted rule.”). The current standard can be summed up as follows:

Calorie information will have to be displayed as prominently as either the menu item’s name or price . . . [and] will also be provided on item tags where food is displayed. . . . This rule mandates posting only of calories, the single most important piece of nutrition information, at the point of selection. FSEs are, of course, not . . . precluded from providing additional nutrition information voluntarily. . . . [and] are also free to add disclaimers about possible slight variations from listed calorie content.

Id.

FSEs serving easily attainable and inexpensive food.⁴² Since most consumers are not knowledgeable about the nutritional information of the menu items they purchase for consumption, nor are they likely to accurately estimate the caloric content of these items, NYC once again stressed that without Regulation 81.50, its residents would continue to practice uninformed nutritional decision-making and gain weight.⁴³ NYC specifically emphasized the “calorie information gap . . . contributing to people choosing higher calorie items” and that providing such information “in a time, place, and manner that can inform decisions will help bridge this gap.”⁴⁴ NYC concluded its new proposal by providing information based on statistics and local polls, which displayed remarkable results.⁴⁵ For example, consumers with the calorie information of menu items at the point of purchase tended to consume approximately fifty less calories than those without that information, and also selected items with almost 100 fewer calories than their original menu choices.⁴⁶ As these results showed a dramatic decrease in caloric consumption, it followed that the new menu calorie-disclosure law would likely increase the health of NYC citizens. The only remaining obstacle was whether Regulation 81.50 could successfully fight another constitutional battle against the NYSRA.

III. ROUND II: *NYSRA v. N.Y.C. BOARD OF HEALTH*

The NYSRA again challenged Regulation 81.50 in court.⁴⁷ This time, however, the NYSRA was not met with the same favorable result. The following section discusses the NYSRA’s undersupported preemption challenge, meritless First Amendment claim, and failed arguments that the court should review the issue using a higher level of scrutiny.⁴⁸

⁴² *Id.* at 1-2.

⁴³ *Id.* at 5 (“[T]he systematic underestimation of calories suggests that consumers have distorted perceptions of calorie content and *de facto* have been misled to view oversized, high-calorie portions as ‘normal’ portions, containing acceptable numbers of calories.”).

⁴⁴ *Id.* at 6.

⁴⁵ *Id.* at 6-7.

⁴⁶ *Id.* at 7.

⁴⁷ *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 545 F. Supp. 2d 363 (S.D.N.Y. 2008).

⁴⁸ For other recent discussions of the NYSRA’s unsuccessful second attempt at challenging Regulation 81.50, see Rodriguez-Dod, *supra* note 6, at 705-06. See also Bernell, *supra* note 6, at 852-61; Jodi Schuette Green, *Cheeseburger in Paradise? An*

A. *The NYSRA Loses Both of Its Constitutional Claims*

On April 18, 2008, Judge Howell issued a decision upholding the new Regulation 81.50 as constitutional.⁴⁹ On June 12, 2008, the United States Court of Appeals for the Second Circuit heard the NYSRA's appeal asking the court to reverse the lower court's decision.⁵⁰ On February 17, 2009, Judge Pooler issued the decision of the court.⁵¹

1. Preemption or Not Preemption? That Was the Question

The first of the two bases the NYSRA used to challenge Regulation 81.50 was preemption by the NLEA. According to the Supreme Court, in order to determine whether federal law preempts a state regulation, a court should completely concern itself with the legislative purpose and goal of the federal Act.⁵² There are several ways for a court to detect whether a preemption problem exists. One, "[c]onflict preemption," is present when "compliance with both federal and state regulations is a physical impossibility," or a "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"⁵³ Thus, in analyzing whether conflict preemption was present in this case, the Second Circuit had the difficult task of determining whether the new Regulation 81.50 clashed with the NLEA in such a way that made it inherently unconstitutional. Throughout nine pages of detailed discussion, Judge Pooler upheld the law as constitutional.⁵⁴

The NLEA "amended the Federal Food, Drug and Cosmetic Act" (FFDCA), and dictated that all food sold for human consumption must include "a nutrition label with

Analysis of How New York State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation, 59 DEPAUL L. REV. 733, 746-65 (2010).

⁴⁹ *N.Y. State Rest. Ass'n*, 545 F. Supp. 2d at 365, 369.

⁵⁰ *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 114 (2d Cir. 2009).

⁵¹ *Id.* at 114, 117.

⁵² *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 96 (1992) (noting that the "question whether a certain state action is pre-empted by federal law is one of congressional intent" (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985))).

⁵³ GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 276 (5th ed. 2005) (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁵⁴ See generally *N.Y. State Rest. Ass'n*, 556 F.3d at 123-31.

specified nutrients and other information.”⁵⁵ The intent of the NLEA was to “clarify and to strengthen the Food and Drug Administration’s legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods.”⁵⁶ Although the purpose of the NLEA and its accompanying requirements seem straightforward, the Second Circuit declared it “a labyrinth.”⁵⁷ The court suggested that determining whether a preemption issue was present was a tricky endeavor, especially because the implementing agency regulations were somewhat inconsistent with the NLEA.⁵⁸

First, looking directly at the text of the NLEA, the court narrowed the focus of its opinion by noting that the foundation for preemption questions arose from two specific sections.⁵⁹ Section 343(q), “entitled ‘nutrition information,’” discusses information that must be made available and mandates that “basic nutrition facts” be indicated on the label of most food items sold for human consumption.⁶⁰ Section 343(r), “entitled ‘[n]utrition levels and health-related claims,’” discusses information that a seller may choose to volunteer on the nutrition label of its food products regarding any health benefits or nutrients in that item.⁶¹ Restaurants like the members of the NYSRA do not fall within the scope of this federal law, and thus do not have to display nutrition information of the food they serve.⁶² However, according to these NLEA sections, if a restaurant or FSE deliberately and voluntarily chooses to display not just the bare bones calorie

⁵⁵ Steve Keane, *Can a Consumer’s Right to Know Survive the WTO?: The Case of Food Labeling*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 291, 297 (2006) (citing Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended at 21 U.S.C. § 343 (2004))).

⁵⁶ Gizzi, *supra* note 7, at 520 (quoting H.R. REP. NO. 101-538 at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 3336, 3337).

⁵⁷ *N.Y. State Rest. Ass’n*, 556 F.3d at 117.

⁵⁸ *Id.*

⁵⁹ *Id.* at 118 (noting that Sections 343(q) and (r) “are the statutory bases from which the preemption questions in this case stem”); see also Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended at 21 U.S.C. § 343(q), (r) (2004)).

⁶⁰ *N.Y. State Rest. Ass’n*, 556 F.3d at 118; see also 21 U.S.C. § 343(q)(1).

⁶¹ *N.Y. State Rest. Ass’n*, 556 F.3d at 119; see also 21 U.S.C. § 343(r)(1).

⁶² See 21 U.S.C. § 343(q)(5)(A)(i); see also *N.Y. State Rest. Ass’n*, 556 F.3d at 118 (“Restaurants, NYSRA’s membership, are exempt from Section 343(q)’s mandatory nutrition information labeling requirements; they do not have to attach a Nutrition Facts panel to food they serve.”). “[T]he NLEA does not regulate nutrition information labeling on restaurant food, and states and localities are free to adopt their own rules.” *Id.* at 120.

information of food products, but also information on health value and nutritional content of its offered fare, then it must conform to both sections.⁶³

The court also looked at the language of the supplementary agency regulations passed in accordance with the NLEA.⁶⁴ It found that a distinction was drawn between nutrition information and nutrition claims, with the former open to expansion by state and local legislation, while the latter is completely preempted by the NLEA.⁶⁵ Consequently, the Second Circuit had to decide if the numerical calorie disclosures required by Regulation 81.50 of NYC restaurants and FSEs on their menus and menu boards are preempted “claims” under Section 343(r) of the NLEA, or unpreempted “nutrition information” under Section 343(q) of the federal law.⁶⁶

On one hand, the court found that the NLEA defined “nutrition information” to mean objective reports, displaying simply the numerical quantity of calories in a food item.⁶⁷ On the other hand, the NLEA characterized “claims” as being subjective statements on food labels or other branding criteria that in any way, explicitly or implicitly, depict a level of nutrients or are related to the overall health benefits offered by the food product.⁶⁸ Therefore, in most cases, it would be obvious to a court when a state or local law regulated objective or

⁶³ *N.Y. State Rest. Ass’n*, 556 F.3d at 120 (“When a restaurant chooses to characterize the level of any nutrient which is of the type required by Section 343(q) to be in the label or labeling of the food, it must conform to Section 343(r)’s requirements.” (citation omitted)). “The NLEA, however, *does* generally regulate nutrition content claims on restaurant foods, and states and localities may only adopt rules that are identical to those provided in the NLEA.” *Id.*

⁶⁴ Specifically, two of the agency regulations, 343-1(a)(4) and 343-1(a)(5), were passed as counterparts to the two aforementioned NLEA sections, and exist to further dictate the scope of the NLEA’s preemption on state and local legislation. *See N.Y. State Rest. Ass’n*, 556 F.3d at 120. The first, 343-1(a)(4), relates to NLEA Section 343(q) and “preempts any state or local requirement for nutrition labeling of food that is not identical to the requirement of section 343(q), *except* a requirement for nutrition labeling of food which is exempt (i.e. restaurant exception).” *Id.* The second, 343-1(a)(5), relates to NLEA Section 343(r) and explicitly “preempts state or local governments from imposing any requirement on nutrient content claims made by a food purveyor in the label or labeling of food that is not identical to the requirement of section 343(r).” *Id.*

⁶⁵ *N.Y. State Rest. Ass’n*, 556 F.3d at 123.

⁶⁶ *Id.*

⁶⁷ *See* 21 U.S.C § 343(q)(1)(c) (2004); 21 C.F.R. § 101.9(c)(1) (2006); *see also N.Y. State Rest. Ass’n*, 556 F.3d at 124.

⁶⁸ *See N.Y. State Rest. Ass’n*, 556 F.3d at 124-25. The agency regulation describes “calorie content claims” to include “calorie free, free of calories . . . without calories, trivial source of calories, negligible source of calories, [and] dietarily insignificant source of calories.” 21 C.F.R. § 101.60(b)(1) (2006).

subjective labeling of foods, and thus whether such legislation is preempted.⁶⁹ In this case, the type of menu labeling information controlled by Regulation 81.50 was neither confusing nor ambiguous.⁷⁰ The court determined that Section 343(r) provided that

in order for a Section 343(q)-type statement not to be a claim . . . it must appear with the other information required or permitted by the NLEA for packaged food, or applicable state or local law for restaurant food, which here, would be that required by Regulation 81.50—the total number of calories.⁷¹

Thus, the Second Circuit concluded that the NLEA did not preempt the current version of Regulation 81.50, as it only mandated the disclosure of “quantitative information,”⁷² but that the law prohibited any further regulation by the Board of Health on “nutrient content claims.”⁷³ Accordingly, Regulation 81.50 was upheld as valid, as it merely orders the disclosure of caloric facts, and nothing else.

2. Freedom of Speech Does Not Mean Freedom to Resist Speech

The new Regulation 81.50 emerged victorious from the first challenge, but still faced a second challenge brought under the First Amendment by the NYSRA. Here too, however, the Second Circuit held that Regulation 81.50 did not violate the constitutional right of free speech.

a. First Amendment Background

The court found that because restaurants are commercial entities, the type of speech they engage in is

⁶⁹ *N.Y. State Rest. Ass'n*, 556 F.3d at 120 (“[S]tates are not preempted from adopting nutrition information labeling laws as defined by Section 343(q), but are preempted from adopting nutrient claim laws as defined by Section (r).”).

⁷⁰ See Richard J. Wegener, *Calorie Information on Fast-Food Menus? Court Upholds NYC Menu Labeling Law*, FREDRIKSON & BYRON, P.A. (Feb. 24, 2009), http://www.fredlaw.com/articles/marketing/mark_0902_rjw.html (“The court concluded that calorie displays are more accurately termed ‘information,’ and that federal law does not preempt states from legislating with respect to such information in restaurants.”).

⁷¹ *N.Y. State Rest Ass'n*, 556 F.3d at 127-28.

⁷² *Id.* at 124.

⁷³ *Id.* at 123 (“The NLEA does not preempt New York City from adopting its own requirements for nutrition information labeling . . . *but* it does generally preempt it from adopting different rules for nutrient content claims.”).

commercial speech.⁷⁴ Thus, a restaurant or FSE may challenge legislation it believes conflicts with its First Amendment commercial speech rights.⁷⁵ Similarly, the Supreme Court has consistently recognized that the First Amendment protects the inverse of the right to speak: the right not to speak.⁷⁶ Nevertheless, even though the First Amendment unquestionably protects commercial speech, the protection offered is less extensive than the speech rights afforded to noncommercial speech.⁷⁷ Yet, the inquiry does not end with the conclusion that the speech affected is commercial speech, as different levels of protection are given to commercial entities based on the type of speech regulated.⁷⁸

The Second Circuit had previously held that the test used for regulations of commercial speech is “the more permissive means-ends test from *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.”⁷⁹ In addition, the Second Circuit had found that the rational basis test applies when evaluating commercial speech disclosure laws.⁸⁰ In *Zauderer*, the Court recognized that there exist “material differences between purely factual and uncontroversial disclosure requirements and outright prohibitions on speech,” and that “[r]egulations that compel purely factual and uncontroversial commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech.”⁸¹ Applying this holding to the current challenge brought before it, the Second Circuit

⁷⁴ *Id.* at 131 (“As commercial speech is speech that proposes a commercial transaction [and] Regulation 81.50 requires disclosure of calorie information in connection with a proposed commercial transaction—the sale of a restaurant meal, the form of speech affected . . . is clearly commercial speech.” (citation omitted)).

⁷⁵ Keane, *supra* note 55, at 307 (“A food producer may also challenge a government-mandated food label on the ground that it conflicts with his free speech rights under the First Amendment.”).

⁷⁶ *See, e.g.,* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”); *see also* Keane, *supra* note 55, at 307.

⁷⁷ *See* *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *see also* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980) (“The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

⁷⁸ *N.Y. State Rest. Ass’n*, 556 F.3d at 132.

⁷⁹ Keane, *supra* note 55, at 311; *see also* *Zauderer*, 471 U.S. at 651.

⁸⁰ Rules “mandating that commercial actors disclose commercial information” are subject to the rational basis test. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114-15 (2d Cir. 2001).

⁸¹ *Id.* at 113.

subjected Regulation 81.50 to rational basis review, found that a reasonable relationship existed between the new law and its intended purpose, and accordingly gave its condolences to the NYSRA.⁸²

b. The Push for Heightened Scrutiny

In a final effort to save its case, the NYSRA argued that the Second Circuit should apply strict scrutiny, rather than a rational basis review, as the Supreme Court's jurisprudence since *Zauderer* has increasingly recognized greater protection of commercial speech.⁸³ The NYSRA further contended that the holding in *Zauderer* is limited to misleading commercial speech, and exists merely as a jurisprudential effort to prevent deception.⁸⁴ Thus, the NYSRA urged the court to designate *Zauderer* as jurisprudence limited to the sphere of unreliable commercial speech.⁸⁵ It argued that "calories are not inherently dangerous" and because "people cannot survive without consuming calories," the issue should receive a different standard of review.⁸⁶ The NYSRA reasoned that the Board of Health did nothing more than assert its point of view in Regulation 81.50—that calories are dangerous—and that this distinguishes it from what has previously been allowed in mandatory disclosure laws based on factual information.⁸⁷

In contrast, the Board of Health argued that Regulation 81.50 is completely based on objective facts that even the members of the NYSRA agree with: the calorie content

⁸² *N.Y. State Rest. Ass'n*, 556 F.3d at 134 ("[A]ccordingly, rational basis applies and NYSRA concedes that it will not prevail if we apply that test.").

⁸³ Brief for Plaintiff-Appellant at 43, *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892) ("The rational basis standard is not consistent with the Supreme Court's First Amendment jurisprudence, which recognizes robust protection of commercial speech and has consistently forbidden forced communication by a private citizen of a governmental message.").

⁸⁴ *Id.* at 44 ("In the many years since *Zauderer*, the . . . Court has never applied the rational basis standard to non-misleading commercial speech. Indeed, in *United Foods*—decided 16 years after *Zauderer*—the Court expressly rejected the wider application of rational basis review as urged by the [Board of Health] here and limited the *Zauderer* standard to laws necessary to prevent deception."); see also *Zauderer*, 471 U.S. at 651 (upholding the speech restriction and finding that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers"); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

⁸⁵ Brief for Plaintiff-Appellant at 47, *N.Y. State Rest. Ass'n*, 556 F.3d 114.

⁸⁶ *Id.*

⁸⁷ Brief for Defendant-Appellee at 38, *N.Y. State Rest. Ass'n*, 556 F.3d 114.

information that they were being forced to disclose.⁸⁸ The Board of Health noted that the NYSRA only disagreed with providing such information.⁸⁹

Ultimately, the Second Circuit agreed⁹⁰ with the Board of Health that the NYSRA's argument was "completely meritless," because the posting of factual information alone could never be understood as an expression of an opinion.⁹¹

c. Applying Rational Basis

Unconvinced by the argument for heightened scrutiny, the court applied the *Zauderer* rational-basis test.⁹² As expected, the Second Circuit held that NYC "has plainly demonstrated a reasonable relationship between the purpose of Regulation 81.50's disclosure requirements and the means employed to achieve that purpose."⁹³ The court credited NYC's stated purposes for the legislation in the Notice of Adoption: to increase consumer awareness of the calorie content of menu items and influence point of purchase decisions.⁹⁴

The court also found that hard facts and a guarantee of the regulation's success did not need to be shown at this point, thus recognizing that the Board of Health was not obligated to support its legislation with "evidence or empirical data to sustain rationality."⁹⁵ Rather, NYC's findings regarding consumption habits of its citizens when eating outside of the home provided enough of a rational basis for Regulation 81.50.⁹⁶ Citing the Notice of Adoption, the court said that these findings clearly and sufficiently displayed that

the obesity epidemic is mainly due to excess calorie consumption, often resulting from meals eaten away from home. Americans . . . are eating out more than in the past and when doing so, typically eat

⁸⁸ *Id.* at 36. "Here, the inclusion of factual information on the menu conveys no point of view." *Id.* at 38 ("Informing the public about safe toxin disposal is non-ideological; it involves no 'compelled recitation of a message' and no 'affirmation of belief.'" (citing *Env'tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 850 (9th Cir. 2003))).

⁸⁹ *Id.* at 36.

⁹⁰ See *N.Y. State Rest. Ass'n*, 556 F.3d at 132-34.

⁹¹ Brief for Defendant-Appellee at 38-39, *N.Y. State Rest. Ass'n*, 556 F.3d 114.

⁹² *N.Y. State Rest. Ass'n*, 556 F.3d at 134.

⁹³ *Id.*

⁹⁴ *Id.* ("Citing what it termed an 'obesity epidemic,' New York City enacted Regulation 81.50 to: (1) reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associate with it.>").

⁹⁵ *Id.* at 134 n.23 (quoting *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001)).

⁹⁶ *Id.* at 135.

more than they do at home, and in just one meal ordered in a fast food restaurant, might consume more than the advised daily caloric intake.⁹⁷

Further, the court explained that these findings and observations were not only made by NYC, but also recognized in reports commissioned by the Food and Drug Administration (FDA), the Center for Disease Control, and the United States Department of Agriculture.⁹⁸ In light of this substantial support for the goals and purpose of Regulation 81.50,⁹⁹ the court held that the menu calorie-disclosure mandate was rationally and reasonably related to its ultimate goal of combating diabetes and obesity.¹⁰⁰

⁹⁷ *Id.*; see also NOTICE OF ADOPTION 1, *supra* note 13, at 3-4.

⁹⁸ *N.Y. State Rest. Ass'n*, 556 F.3d at 135. “A 2006 FDA-commissioned report concluded that ‘obesity has become a public health crisis of epidemic proportions.’” *Id.* (quoting THE KEYSTONE REPORT, FORUM ON AWAY-FROM-HOME FOODS: OPPORTUNITIES FOR PREVENTING WEIGHT GAIN AND OBESITY 4 (2006) [hereinafter KEYSTONE REPORT]). “Another Study concluded that rising obesity rates led to increasing diabetes rates . . .” *Id.* (citing CTR. FOR DISEASE CONTROL, NAT’L CTR. FOR HEALTH STATISTICS, NAT’L DIABETES SURVEILLANCE SYS., PREVALENCE OF DIABETES (1980-2005), available at <http://www.cdc.gov/diabetes/statistics/prev/national/tablepersons.htm>). “Further, studies have linked obesity to eating out. The Keystone Report also concluded that the consumption of high-calorie meals at fast-food restaurants is a significant cause of obesity, stating that ‘[e]ating out more frequently is associated with obesity, higher body fatness, and higher body mass index.’” *Id.* (quoting KEYSTONE REPORT, *supra*, at 27). “The United States Department of Agriculture has observed that away-from-home foods have lower nutritional quality than home foods and found a correlation between increased caloric intake and eating out.” *Id.* (citation omitted).

⁹⁹ Beyond the studies the case discussed, many briefs were filed on behalf of organizations supporting the Board of Health’s new calorie-disclosure regulation. See Brief for Rudd Center for Food Policy & Obesity at Yale University as Amici Curiae Supporting Defendants-Appellees and Arguing for Affirmance at 3-4, *N.Y. State Rest. Ass’n*, 556 F.3d 114 (“If NYSRA’s First Amendment arguments are accepted, . . . [t]he regulatory structure of consumer protection in the United States, which relies heavily on promoting information transparency to encourage informed consumer decision-making, will be thrown into jeopardy, as will the government’s ability to combat the obesity epidemic through regulations promoting knowledgeable consumer choice and personal responsibility.”); see also Brief of the FDA as Amici Curiae in Support of Affirmance at 2-3, *N.Y. State Rest. Ass’n*, 556 F.3d 114 (“Because the Regulation compels an accurate, purely factual disclosure of the calorie content of restaurant menu items, and addresses a legitimate state interest in preventing or reducing obesity among its citizens by making accurate calorie information available to consumers, there is a rational connection between the disclosure requirement and the City’s purpose in imposing it such that the Regulation survives constitutional analysis.”); see generally Brief for U.S. Congressman Henry Waxman et al. as Amici Curiae in Support of Appelles and for Affirmance, *N.Y. State Rest. Ass’n*, 556 F.3d 114. This extended support was praised in commentaries following the court decision, including commendation from the American Medical Association. See Amy Lynn Sorrel, *Fed Court Upholds New York City’s Calorie-posting Rule*, AM. MEDICAL ASS’N (Mar. 9, 2009), <http://www.ama-assn.org/amednews/2009/03/09/prsb0309.htm>.

¹⁰⁰ *N.Y. State Rest. Ass’n*, 556 F.3d at 136 (“In view of all the above findings, Regulation 81.50’s calorie disclosure rules are clearly reasonably related to its goal of reducing obesity.”).

Regulation 81.50 survived both of the NYSRA's constitutional challenges. Eventually, the outcome of these challenges would prove to be not just a victory for NYC, but for general public health reform in all of America.

B. The Aftermath: NYC Inspires the Nation

The Second Circuit best explained the phenomenon:

Now, every time New Yorkers walk into or use the drive-through of certain chain restaurants, they are informed, for instance, that the taco salad contains 840 calories, the sausage and egg breakfast sandwich contains 450 calories, and the premium hamburger sandwich with mayonnaise contains 670 calories, but without mayonnaise contains 510 calories.¹⁰¹

And so it began—every NYC resident dining at a regulated business was forced to face the calorie content of their food choices in the crucial moment when they decided what to eat. Once Regulation 81.50 was back in effect, restaurants began noticing real differences in customers' ordering choices.¹⁰² Newspapers, blogs, and other media sources frequently reported on the success of the law—its influence quickly became a popular headline.¹⁰³ Along with the local attention the NYC calorie-disclosure law was receiving, other cities and states also took notice of Regulation 81.50 and its success against legal challenges.¹⁰⁴ Consequently, these cities and states began drafting, enacting, and implementing their own calorie-disclosure legislation.¹⁰⁵

¹⁰¹ *Id.* at 121; see also Schulman, *supra* note 6, at 598 (stating if “the goal of menu-labeling is to influence the dietary decisions of a wide range of consumers, merely making nutritional information available *somewhere* is not enough” and discussing how consumers must be presented with this information at the point of purchase).

¹⁰² See, e.g., *New York City Rave Reviews for Menu Labeling*, CTR. FOR SCI. IN THE PUB. INTEREST, http://cspinet.org/new/pdf/nyc_review_fact_sheet.pdf (last visited Jan. 6, 2011); see also *Musings of an Obesity Medicine Doc and Certifiably Cynical Realist*, WEIGHTY MATTERS, <http://www.weightymatters.ca/2008/07/proof-nyc-menu-board-calories-change.html> (last visited Jan. 6, 2011) [hereinafter *Musings*]; Ronnie Caryn Rabin, *New Yorkers Try to Swallow Calorie Sticker Shock, 600 Calorie Muffins? The First City to Adopt Law Faces Unappetizing Surprises*, MSNBC.COM (Jul. 16, 2008), <http://www.msnbc.msn.com/id/25464987>.

¹⁰³ See, e.g., sources cited *supra* note 102.

¹⁰⁴ See generally *State and Local Menu Labeling Policies*, http://cspinet.org/new/pdf/ml_map.pdf (last visited Jan. 6, 2011) (displaying the various state and local menu labeling policies either passed, implemented, or introduced as of February 2010).

¹⁰⁵ See *id.*

1. The Triumph of Regulation 81.50

Residents of NYC noticed the calorie postings and began to change their eating habits. The transformation started as early as the first enactment of the calorie-disclosure legislation, even before the completion of the initial lawsuit challenging its constitutionality.¹⁰⁶ Now, many New Yorkers who see calorie information on a menu before purchasing fare end up ordering less caloric food.¹⁰⁷ If this diet alteration in favor of healthier, lower-calorie options already being made by some New Yorkers continues to gain popularity, it could soon inspire more residents and start drastically reducing cases of obesity and diabetes in NYC.¹⁰⁸

Journalists, bloggers, and critics wildly reported positive predictions about the new NYC law,¹⁰⁹ addressed how effective Regulation 81.50 would be in reducing obesity levels in NYC, and favorably discussed recent independent case studies.¹¹⁰ For example, in one study conducted shortly after the first version of Regulation 81.50 was passed, a reporter interviewed a woman, who was about to order her usual breakfast, but then noticed the caloric content of her choice.¹¹¹ She found out that her favorite chocolate chip muffin at Dunkin' Donuts had 630 calories.¹¹² This woman told the reporter that she “was blown away,” and that she did not expect her “little muffin” to have 630 calories in it.¹¹³ Similarly, another case study documented a reporter watching a table of women reading menus after sitting down to dine at T.G.I. Friday's.¹¹⁴ The reporter noticed that these women, upon seeing

¹⁰⁶ See Rabin, *supra* note 102.

¹⁰⁷ See *ACS Supports Calorie Labeling in Albany*, N.Y. ACTION CENTER (July, 28, 2009), <http://www.acscan.org/action/ny/updates/451> (“In NYC, fast food customers who saw calorie information displayed purchased 52 fewer calories than those who didn't see the information.”). For an example of a menu displaying caloric information, see *Menus & Menu Boards with Nutrition Information*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/menulabeling/boards.html> (last visited Jan 6, 2011).

¹⁰⁸ See *Menu Labeling Laws—Sweeping The Nation?*, FIRST MOVERS (Feb. 22, 2009), http://firstmovers.blogspot.com/2009/02/menu-labeling-laws-sweeping-nation_22.html [hereinafter FIRST MOVERS] (“[T]he New York City Department of Health projected that menu labeling in the City will prevent at least 30,000 new cases of diabetes in the next five years.”).

¹⁰⁹ See, e.g., *Musings*, *supra* note 102; see also Rabin, *supra* note 102.

¹¹⁰ See *Musings*, *supra* note 102; see also Rabin, *supra* note 102.

¹¹¹ Rabin, *supra* note 102.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

the caloric content of the menu items, wore identical expressions of shock and disgust.¹¹⁵ Following their appalling discovery of the actual caloric content in most menu choices, the reporter recalled that two of the women “asked about the suddenly popular Classic Sirloin—at 290 calories, it was one of the lowest calorie items on the menu—but learned the restaurant ran out by the time the dinner rush started.”¹¹⁶ As the information in these case studies indicates, many NYC consumers are making healthier, lower calorie food choices. Because of this, it was greatly anticipated that other states would soon follow suit.¹¹⁷

2. Adoption of Similar Laws Elsewhere

As was predicted, NYC is no longer alone in forcing disclosure of calorie content on menus. With the similarly stated purpose of combating the national epidemics of obesity and diabetes in their own states or cities, legislatures around the United States followed suit and adopted different calorie-disclosure regulations.¹¹⁸ Thus, “[w]hat once seemed like the far-fetched idea of a health-nut legislator” was no longer considered so extreme, as “state and local menu-labeling laws [went] into effect all over the country, forcing many in the restaurant industry to comply with their parameters.”¹¹⁹

New laws have been enacted from coast to coast by both state and local legislatures. Just as NYC was the first city to enact a menu calorie-disclosure law,¹²⁰ California became the first state to do so.¹²¹ Unfortunately, however, the success of Regulation 81.50 did not influence everyone. Some states, like Georgia and Ohio, took the opposite route and passed legislation that ensures their state and local governments

¹¹⁵ *Id.*

¹¹⁶ *Id.* In comparison, the reporter noted that “Friday’s pecan-crusting chicken salad, served with mandarin oranges, dried cranberries and celery, has 1,360 calories.” *Id.*

¹¹⁷ See, e.g., Wegener, *supra* note 70.

¹¹⁸ Gizzi, *supra* note 7, at 502 (“In an effort to combat the obesity epidemic, certain states and local governments have proposed or passed legislation requiring chain restaurants to post nutrition information alongside item prices on menus or menu boards.”); see also *Nutrition Labeling in Chain Restaurants*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/nutritionpolicy/MenuLabelingBills2007-2008.pdf> (last visited Jan. 6, 2011).

¹¹⁹ Gizzi, *supra* note 7, at 514.

¹²⁰ See *FIRST MOVERS*, *supra* note 108.

¹²¹ See *California First State in Nation to Pass Menu Labeling Law*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/new/200809301.html> (last visited Feb. 6, 2011); see also Gizzi, *supra* note 7, at 516.

would never support menu calorie-disclosure laws.¹²² The governments that followed NYC's lead have adopted various types of calorie-disclosure laws, some stricter than Regulation 81.50 and some more lenient.¹²³ Many of these proposed bills and passed laws contained similar menu labeling requirements as Regulation 81.50, regulating disclosure only in restaurants and FSEs with a certain amount of locations nationally.¹²⁴ Similarly, many states utilize a different measuring approach, applying only to restaurants and FSEs with a specific number of locations statewide, rather than nationwide.¹²⁵ Further, while Regulation 81.50 merely requires disclosure of caloric information, other state laws require disclosure of additional nutrient information, such as fat content.¹²⁶

As local and state legislatures increasingly adopted more calorie-disclosure bills, the burden on restaurants and FSEs with locations across the United States was bound to increase. These national and regional chains already had dozens of laws to comply with,¹²⁷ sometimes even varying within the same state.¹²⁸ As nutrition disclosure laws multiply, so too

¹²² See *Restaurant Industry Successes in Menu Board/Calorie Posting Wars*, NOWPUBLIC.COM, <http://www.nowpublic.com/health/restaurant-industry-successes-menu-board-calorie-posting-wars> (last visited Feb. 6, 2011).

¹²³ For examples of laws that are more strict than Regulation 81.50, see KINGS CNTY., WASH. BD. OF HEALTH CODE, ch. 5.10.015 (2008) ("The nutrition labeling of food shall include, but not be limited to, the total number of calories; . . . [t]otal number of grams of saturated fat; . . . carbohydrate; and . . . milligrams of sodium."). See also Rabin, *supra* note 102. For examples of laws that are more lenient, see CAL. HEALTH & SAFETY CODE § 114094 (West Supp. 2009). See also *California First State in Nation to Pass Menu Labeling Law*, *supra* note 121.

¹²⁴ See, e.g., KINGS CNTY., WASH. BD. OF HEALTH CODE, ch. 5.10.015 (stating that the labeling law requires restaurants with fifteen or more locations nationally to disclose caloric information).

¹²⁵ See, e.g., CAL. HEALTH & SAFETY CODE § 114094 (stating that the labeling law requires restaurants with twenty or more locations statewide to disclose caloric information).

¹²⁶ Gizzi, *supra* note 7, at 515.

¹²⁷ See H.B. 54, 24th Leg., 2008 Reg. Sess. (Haw. 2007), available at <http://www.capitol.hawaii.gov/session2008/bills/HB54.htm> (regulating ten or more establishments); S.F. 2158 82nd Gen. Assem., 2008 Sess. (Iowa 2008) (regulating twenty-one or more locations within the state); S.B. 211, 2008 Leg., 2008 Reg. Sess. (Ky. 2008) (regulating twenty or more locations statewide); S.B. 1290, 185th Gen. Court, 2007-2008 Sess. (Mass. 2007) (regulating ten or more locations across the United States); A. 1407, 213th Leg. 2008 Sess. (N.J. 2009) (regulating twenty or more locations in New Jersey); A. 729, 2007 State. Assem., 2007 Sess. (N.Y. 2007) (regulating fifteen or more locations nationally as well as five locations in New York); see also Gizzi, *supra* note 7, at 515 n.104; *State and Local Menu Labeling Policies*, *supra* note 104.

¹²⁸ See generally *State and Local Menu Labeling Policies*, *supra* note 104.

does the cost of compliance for these restaurants.¹²⁹ As a result, “[i]f even a portion of [the pending legislations in various cities and states] eventually pass, [these laws would] significantly affect interstate commerce.”¹³⁰ Thus, absent the national mandate to preempt these local and state laws, the cost of a meal at regulated restaurants and FSEs would likely increase, as these businesses would need to find new ways to carry the greater financial burden of compliance. To mitigate the financial burden, it became necessary for the federal government to step in.

IV. IT WAS THE APPROPRIATE TIME FOR CONGRESS TO PASS A FEDERAL CALORIE-DISCLOSURE LAW

Because of the increasing popularity of menu calorie-disclosure laws, not only do chain restaurants and other FSEs have no choice whether or not to share nutrition information, or how to convey that information, but they now also have to comply with a variety of special requirements that are particular to each jurisdiction.¹³¹ As a result of this jurisdictional issue, it became even more important for Congress to recognize that “the most effective route to fighting obesity . . . [is] old-fashioned ‘command and control’ federal legislation, given the national government’s ability and arguable obligation to improve Americans’ food supply, lifestyle habits, and education about the health risks of obesity.”¹³²

A. *Previous Attempts Were Failures*

A federal menu calorie-disclosure law had been contemplated for some time.¹³³ Actually, proponents of the NLEA were willing to enact a national calorie-labeling

¹²⁹ See Kim Leonard, *Calorie Disclosure in Store for Food Chains*, PITTSBURGH TRIB. REV. (Jul. 2, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/business/s_688598.html.

¹³⁰ See Gizzi, *supra* note 7, at 519.

¹³¹ See *id.* at 527 (“Now, not only will restaurants be unable to choose the method by which they convey nutrition information to customers, but they will also have to follow the requirements of various jurisdictions.”).

¹³² Burnett, *supra* note 8, at 414; see also Edieth Y. Wu, *McFat—Obesity, Parens Patriae, and the Children*, 29 OKLA. CITY U. L. REV. 569 (2004) (stating that childhood obesity is a huge problem and that our federal government should be the one to do something about it).

¹³³ For recent discussions on prior federal attempts at a menu calorie-disclosure law, see Green, *supra* note 48, at 740-45. See also Devon E. Winkles, *Weighing the Value of Information*, 59 EMORY L.J. 549, 551-54 (2009).

requirement for restaurant and FSE menus as early as 1990.¹³⁴ The law did not come to fruition as “the restaurant industry lobbied vehemently against such a regulatory burden” and, ultimately, “Congress compromised and provided restaurants certain exemptions to the labeling requirements of [the NLEA], concluding that the federal government should be cautious when intervening in the states’ right to protect the health and safety of their citizens.”¹³⁵

Though this area was within states’ police powers, there was no widely recognized purpose or need to burden restaurants with the national menu labeling regulation, and the idea for the federal menu calorie-disclosure law was soon forgotten. Almost twenty years later, and now clearly faced with a desperate need and purpose for such a federal law—as obesity and diabetes have become national epidemics—Congress finally had a change of heart.¹³⁶

The federal bill that ultimately passed was not the first of its kind; in recent years, both houses made similar attempts. First, in 2003, both houses introduced the Menu Education And Labeling Act (MEAL Act) to the 108th Congress.¹³⁷ The MEAL Act was designed to “address the lack of readily-accessible information about fast-food ingredients by requiring restaurant chains to clearly display the number of calories, grams of saturated fat, and milligrams of sodium in their food.”¹³⁸ Similar to Regulation 81.50, public interest groups praised the MEAL

¹³⁴ Gizzi, *supra* note 7, at 522 (citing LAURA SIMS, *THE POLITICS OF FAT: FOOD AND NUTRITION POLICY IN AMERICA* 200 (1998)).

¹³⁵ *Id.*; see also 136 CONG. REC. H5840 (1990).

¹³⁶ Burnett, *supra* note 8, at 366 (“Legislation in the House and Senate that would have a positive effect on America’s obesity epidemic, to the extent such laws have been proposed, has almost always been unsuccessful.”).

¹³⁷ See Menu Education and Labeling Act, H.R. 3444, 108th Cong. (2003); see also S. 2108, 108th Cong. (2003).

¹³⁸ Burnett, *supra* note 8, at 366; see also H.R. 5563, 109th Cong. (2006); S. 3484, 109th Cong. (2006); H.R. 3444, 108th Cong. (2003); S. 2108, 108th Cong. (2003). Also noting the requirements of the MEAL Act, one blogger stated that the

bill exempts condiments, items placed on a table or counter for general use, daily specials, temporary menu items, and irregular menu items. Interestingly, the bill would also require restaurants that sell self-serve food, such as through salad bars or buffet lines, to place a sign that lists the number of calories per standard serving adjacent to each item, and would require vending machine operators to provide a conspicuous sign disclosing the number of calories to each item.

FIRST MOVERS, *supra* note 108.

Act and the restaurant industry despised it.¹³⁹ The restaurant industry focused its protests against an intentional gap in the federal legislation, which gave states the option to regulate the disclosure of more information than the law required.¹⁴⁰ This first attempt at a federal menu calorie labeling law was strict—perhaps too strict—and for this reason it died in committee in the 108th, 109th, and 110th Congresses.¹⁴¹

Then, in September 2008, the Senate introduced the Labeling Education And Nutrition Act (LEAN Act) to the 110th Congress.¹⁴² This also never became more than a bill.¹⁴³ Refusing to accept defeat, both houses, as recently as March 2009, reintroduced companion LEAN Acts to the 111th Congress.¹⁴⁴ This proposed legislation

look[ed] to expand current packaged food labeling law to require a uniform national nutrition labeling standard for chain [FSEs], while providing a reasonable range of flexibility for the restaurant. While the LEAN Act would require a uniform national nutrition standard, the law also would provide for a single set of guidelines in [sic] how nutrition information is calculated and will provide legal protection for those restaurants that abide by the law. As larger chain restaurants with standard menus and standard methods of preparation are better situated to meet such requirements, the LEAN Act would apply only to chains with 20 or more units.¹⁴⁵

¹³⁹ See, e.g., Brief of Plaintiff-Appellant at 4-10, *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892); see also FIRST MOVERS, *supra* note 108.

¹⁴⁰ FIRST MOVERS, *supra* note 108.

¹⁴¹ See Bill Summary and Status, H.R. 3444, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h3444>: (last visited Feb. 6, 2011); see also H.R. 3895:MEAL Act, <http://www.govtrack.us/congress/bill.xpd?bill=h110-3895> (last visited Jan. 8, 2011); Bill Summary and Status, H.R. 5563, 109th Cong. (2006), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h5563>: (last visited Feb. 6, 2011); Bill Summary and Status, S. 3484, 109th Cong. (2006), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN03484>: (last visited Feb. 6, 2011); Bill Summary and Status, S. 2108, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s2108>: (last visited Feb. 6, 2011).

¹⁴² Labeling Education and Nutrition Act of 2008, S. 3575, 110th Cong. (2008).

¹⁴³ See H.R. 1398, 111th Cong. (2009); see also S. 558, 111th Cong. (2009); Bill Summary and Status, H.R. 1398, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR01398>:|/home/LegislativeData.php?n=BSS;c=111|; Bill Summary and Status, S. 558, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00558>:|/home/LegislativeData.php?n=BSS;c=111|.

¹⁴⁴ Also, the National Restaurant Association has urged members of Congress to co-sponsor the LEAN Act of 2008. See *Public Policy Issue Briefs*, NAT'L RESTAURANT ASSOC., <http://www.restaurant.org/government/issues/issue.cfm?Issue=menulabel> (last visited Jan. 8, 2011).

¹⁴⁵ Jim Coen, *Labeling Education and Nutrition Act of 2008 (LEAN Act)*, DDIFO (Feb. 20, 2009), <http://www.ddifo.org/labeling-education-and-nutrition-act-of-2008-lean-act/>; see also Evan Goodman, *Something's Gotta Give, But What Will It Take?*, FULL SPECTRUM

As the LEAN Act was less demanding than its predecessor, the MEAL Act, it gained support from many different arenas—including a former dissenter, the National Restaurant Association (NRA).¹⁴⁶ Specifically, one of the reasons for this newfound support was that this bill was a “compromise,”¹⁴⁷ as the LEAN Act would only regulate the areas of the restaurant industry that our government needed to control in order to fight obesity.¹⁴⁸ Another reason for the widespread support was that a lenient national law would be much less burdensome for restaurants and FSEs than complying with the various laws at the state and local levels.¹⁴⁹ Moreover, as state and local laws went into effect, patrons were becoming more aware that they needed to be able to individually access caloric information in order to make more healthful choices when dining out.¹⁵⁰ Still, even with this tremendous support, the LEAN Act never made it past committee.¹⁵¹

BLOG (Aug. 24, 2009, 1:58 PM), <http://www.spectrumsience.com/blog/2009/08/24/some-thing's-gotta-give-but-what-will-it-take/#more-595> (“The goal of The LEAN Act is to reduce caloric intake among restaurant patrons by exposing them to the contents of what they are eating. Because most people do not know the nutritional value (or lack thereof) in food they eat when dining out, awareness is a key step towards healthy eating.”).

¹⁴⁶ See Parke Wilde, *New Advocacy Coalition Backs National Menu Labeling*, U.S. FOOD POL'Y BLOG (June 12, 2009, 10:14 AM), <http://usfoodpolicy.blogspot.com/2009/06/new-advocacy-coalition-backs-national.html>; see also FIRST MOVERS, *supra* note 108 (“Although no federal menu labeling requirements exist, the topic has gained momentum in recent years, especially now that the National Restaurant Association is actively supporting the Labeling Education and Nutrition (LEAN) Act, introduced in the 2008 Congressional session.”).

¹⁴⁷ Wilde, *supra* note 146 (“First, the bill is a compromise bill, providing the restaurant chains with some of their key policy priorities, including preserving a good deal of flexibility in deciding how to present the information and protection from what the restaurants describe as ‘frivolous’ lawsuits.”).

¹⁴⁸ Goodman, *supra* note 145 (“[T]he bipartisan LEAN Act of 2009 is designed to help curb the obesity epidemic by introducing nutrition labeling of food offered for sale in [FSEs]. . . . [I]t calls for accessible, reliable nutrition information to be displayed in chain restaurants and is a stepping stone on a long path to improving the health of Americans.” (internal quotation marks omitted)).

¹⁴⁹ Wilde, *supra* note 146 (“As with other important nutrition labeling policies in the past, such as the current nutrition facts panel on packaged food, an important sector of the food industry chose to support a new government policy in return for more consistent and less burdensome regulation across jurisdictions.”).

¹⁵⁰ Goodman, *supra* note 145 (“[T]he consequences of dining out . . . include higher intakes of fat, sodium, and soft drinks, and lower intakes of nutrient-dense foods such as vegetables. . . . [H]alf of Americans’ diets consist of food consumed outside the home. . . . The LEAN Act is only one potential intervention to help curb the obesity epidemic in America. This legislation works on the individual level in order to increase access to information.” (internal quotation marks omitted)).

¹⁵¹ See *H.R. 1398: Labeling Education and Nutrition Act of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h111-1398> (last visited Jan. 10, 2011).

B. Current Attempt Was Finally a Success

The most recent attempt to implement a federal calorie-disclosure law occurred as this note was being drafted. Our nation had been experiencing a tremendous push for universal health reform.¹⁵² Thus, incorporated within each of the various bills drafted by the 111th Congress were menu calorie-disclosure stipulations.¹⁵³ The decision to include these provisions was the result of compromise and recognition that state and local regulations were increasingly developing across our nation.¹⁵⁴ Although the requirements of the federal bill were not dissimilar to those proposed and enacted at the state and local level,¹⁵⁵ nor were they drastically different than what was proposed under the LEAN Act, strong alliances formed in favor of this legislation and groups prepared to lobby for its enactment.¹⁵⁶ In fact, the law's one-time biggest opponent became its greatest supporter.¹⁵⁷

After many years of protest, the NRA and the "food police," a public policy interest group, vocalized their support for one bill, and publicly declared that a federal mandate would be the best solution.¹⁵⁸ These groups recognized that a single, consistent standard would lessen the burden on restaurants and FSEs nationwide.¹⁵⁹ A NRA spokesperson stated that the organization believed that this bill had the most potential to

¹⁵² See generally HEALTHCARE.GOV, <http://www.healthcare.gov> (last visited Jan. 31, 2011).

¹⁵³ See generally *Nationwide Menu Labeling to Be Included in Health Reform*, ROBERT WOOD JOHNSON FOUND. (June 10, 2009), <http://www.rwjf.org/pr/product.jsp?id=44028&topicid=1024>.

¹⁵⁴ See generally Sean Gregory, *Fast Food: Would You Like 1,000 Calories with That?*, TIME.COM (June 29, 2009), <http://www.time.com/time/magazine/article/0,9171,1905509,00.html> ("Spurred by the passage of a slew of state and local menu-labeling laws, on June 10 the Senate reached a bipartisan agreement to include a federal menu-labeling law as part of comprehensive health-care reform.")

¹⁵⁵ See sources cited *supra* note 127.

¹⁵⁶ See generally Jerry Hirsch, *Calorie-Listing Bill Spawns Industry Fight*, L.A. TIMES (Aug. 3, 2009), <http://articles.latimes.com/2009/aug/03/business/fi-menu3>.

¹⁵⁷ *Id.*

¹⁵⁸ See *id.*; see also *Public Policy Issue Briefs*, *supra* note 144; Stephanie Rosenbloom, *Calorie Data to Be Posted at Most Chains*, N.Y. TIMES (Mar. 23, 2010), <http://www.nytimes.com/2010/03/24/business24menu.html> (The "measure was approved by Congress with little public discussion, in part because restaurant chains supported it. They had spent years fighting such requirements, but they were slowly losing the battle.")

¹⁵⁹ Hirsch, *supra* note 156 ("The restaurant trade group's priority is getting rid of local laws in favor of one national, uniform standard for menu labeling, which it says will make it easier for the national chains to standardize their menus and policies.")

prevent “a patchwork of harmful regulation and legislation” from springing up all around the country.¹⁶⁰

On September 17, 2009, the House of Representatives released H.R. 3590, formally known as the Patient Protection and Affordable Care Act (PPACA).¹⁶¹ After resolving differences between the chambers, Congress passed the PPACA.¹⁶² Finally, on March 23, 2010, President Obama signed the bill into law, and it became Public Law No. 111-148.¹⁶³ After all the amendments, still included in the depths of this law is a menu-labeling provision, which like the aforementioned local and state laws, requires certain restaurants and FSEs to post calorie information.¹⁶⁴

Section 4205 of the PPACA¹⁶⁵ was the result of negotiations with the NRA, which, as noted above, wanted a solution to the ever-increasing disparities in the laws being enacted at the state and local levels.¹⁶⁶ This provision requires restaurants and FSEs with twenty or more locations nationally to provide calorie information at the point-of-purchase for standard, unchanging food items, and to post this information in an obvious and unambiguous manner next to the name of each item on menus.¹⁶⁷ Thus, this provision does not apply to items that are temporarily offered as a daily special, items that are not listed on the establishment’s menus such as condiments or custom orders, items offered on a menu for sixty days or less, nor items that are part of a traditional market test lasting less

¹⁶⁰ *Id.*

¹⁶¹ See *Patient Protection and Affordable Care Act*, TAXATION TIMES (Mar. 3, 2010), <http://www.taxationtimes.com/2010/124-stat-119/#history> [hereinafter TAXATION TIMES Article]; see also Patient Protection and Affordable Care Act § 4205 (2010), Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of the U.S.C.).

¹⁶² TAXATION TIMES Article, *supra* note 161.

¹⁶³ *Id.*; see also Patient Protection and Affordable Care Act § 4205(b).

¹⁶⁴ Patient Protection and Affordable Care Act § 4205(b).

¹⁶⁵ For a recent, more detailed discussion of the creation and requirements of section 4205, see Michelle I. Banker, *I Saw the Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience*, 65 FOOD & DRUG L.J. 901, 904-07 (2010). See also Bernell, *supra* note 6, at 865-67.

¹⁶⁶ See Margie King, *New Federal Health Care Reform Legislation Requires Calorie Disclosure on Menus*, EXAMINER.COM (Mar. 30 2010, 9:40 PM), <http://www.examiner.com/nutrition-in-philadelphia/new-federal-health-care-reform-legislation-requires-calorie-disclosure-on-menus>.

¹⁶⁷ Patient Protection and Affordable Care Act § 4205(b); see also Schulman, *supra* note 6, at 608 (stating that restaurants will have to offer calorie information for these menu items “on menus, menu boards, and drive-through menus”).

than ninety days.¹⁶⁸ The law also exempts small businesses from regulation.¹⁶⁹

Different from Regulation 81.50, the PPACA also requires that these establishments post on their menus a sort of warning statement, notifying customers of the suggested daily caloric intake.¹⁷⁰ In addition, the law requires restaurants to clearly inform customers that if they are interested in knowing additional or more detailed nutritional information about each standard menu item, it will be made available to them upon request.¹⁷¹ Lastly, the law allows restaurants that do not fall under its purview to voluntarily disclose calories on their menus.¹⁷²

Ultimately, section 4205 will be enforced by the FDA.¹⁷³ In August, 2010, the FDA released both a draft guidance document describing implementation of certain portions of the law, and a final guidance document describing the effect the federal law will have on state and local laws already in existence.¹⁷⁴ In these plans, the FDA recognized that the “industry may need additional information and time to comply with the new provisions” and that it expected “to refrain from enforcement action for a time period that will be provided in the guidance once it is finalized.”¹⁷⁵ After this announcement, the FDA was expected to begin enforcing this mandate before 2011.¹⁷⁶ More importantly, the law requires that the FDA offer its final proposal for implementation of this regulation by

¹⁶⁸ Schulman, *supra* note 6, at 608.

¹⁶⁹ *See id.*; *see also* Jean Spencer, *Menu Measure: Health Bill Requires Calorie Disclosure*, WALL ST. J. (Mar. 22, 2010), <http://blogs.wsj.com/washwire/2010/03/22/menu-measure-health-bill-requires-calorie-disclosure>.

¹⁷⁰ *See* Patient Protection and Affordable Care Act § 4205(b); *see also* Schulman, *supra* note 6, at 608.

¹⁷¹ *See* Patient Protection and Affordable Care Act § 4205(b).

¹⁷² *See id.*

¹⁷³ *See* King, *supra* note 166; *see also* Banker, *supra* note 165, at 906 (internal quotation marks omitted) (“The statute also directs the FDA to consider a variety of potentially thorny practical issues while drafting regulations, including standardization of recipes and methods of preparation, reasonable variation in serving size and formulation of menu items, space on menus and menu boards, inadvertent human error, training of food service workers, and variations in ingredients. . . . [and] to specify the format and manner of the nutrient labels.”).

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* The FDA also asked the public to comment on what it believed would be a reasonable amount of time before demanding compliance. *See id.*

¹⁷⁶ *See, e.g.,* Client Advisory, *FDA Moving Quickly to Enforce New Calorie Labeling Requirements for Restaurant Menus and Vending Machines*, KELLEY DRYE (Oct. 5, 2010), http://www.kelleydrye.com/publications/client_advisories/0597 [hereinafter Kelley Drye Client Advisory].

March 23, 2011.¹⁷⁷ By the time this note went to press, however, the FDA still had not set forth any proposals.

Nevertheless, the law has been enacted, and although it may take some time,¹⁷⁸ our nation is gearing up for the enforcement of national menu calorie disclosure.¹⁷⁹ Congress has finally passed legislation that preempts almost all future menu calorie-disclosure regulations on the state and local level, and makes many existing regulations, including Regulation 81.50, ineffective and void.¹⁸⁰

C. *Potential Legal Challenges to the Federal Law*

Although most commentators have supported section 4205 of the PPACA,¹⁸¹ the adoption of this national calorie-disclosure law will still likely meet many forms of criticism. Since it was signed into law, the efficacy of this provision has already been criticized in some journal and law review articles for a variety of reasons, ranging from the fact that it does not include smaller restaurants within the scope of regulation to the fact that it only makes calorie-disclosure compulsory and does not require disclosure of other important information such

¹⁷⁷ Patient Protection and Affordable Care Act § 4205(b); Banker, *supra* note 165, at 906 (“The statute gives the FDA a one year time limit to promulgate regulations for implementing its provisions and requires the agency to submit a quarterly report to Congress regarding the status of proposed regulations.”); *see also* Kelley Drye Client Advisory, *supra* note 176.

¹⁷⁸ Spencer, *supra* note 169 (“The [FDA] needs to come up with regulations, and as a result, many Americans won’t likely see calories disclosures for three to four years.”); *but see generally* FDA Expects to Issue Menu Labeling Proposal by March 23, NAT’L REST. ASS’N, http://www.restaurant.org/nra_news_blog/2011/01/fda-expects-to-issue-menu-labeling-proposal-by-march-23.cfm (last visited Feb. 4, 2011); Andy Hodges, *Fast Food Calories News Reveals Health Care Restaurant Law*, NEWSOXY (Mar. 25, 2010), <http://www.newsoxy.com/fast-food/calories-news-12833.html> (“If a legal battle ensues, as often happens with new federal regulations, the effect date could conceivably be years away.”).

¹⁷⁹ Claire E. Castles, *For 500 Additional Calories, Do You Still Want Fries With That?*, ABA HEALTH ESOURCE (Oct. 2010), <http://www.abanet.org/health/esource/Volume7/02/castles.html> (“By removing the calorie and nutritional labeling exception for certain establishments from the federal labeling requirement, the industry may now rely on a federal standard for compliance with the labeling requirements.”).

¹⁸⁰ *See* Rosenbloom, *supra* note 158 (“More than a dozen states have been considering labeling measures or have already passed them, though many have not yet taken effect. The new legislation overrides many existing laws, though some localities will be able to continue enforcing rules that are more stringent than the federal requirements. New York City, for instance, is expected to continue requiring chains with 15 or more outlets to post nutritional data, compared with the standard of 20 outlets in the federal law.”).

¹⁸¹ *See, e.g.*, Castles, *supra* note 179 (stating that this national decree will tremendously “assist in creating healthier communities, improve wellness and prevent disease”).

as fat content of food.¹⁸² The effectiveness of this law remains to be seen, and given the recent, inconsistent studies regarding the value of Regulation 81.50 in NYC, it is clear that it will take many years before a well-supported argument is possible.¹⁸³ At this point, however, it is possible to predict forthcoming legal challenges to section 4205 of the PPACA.

The lawsuit discussed in Part III of this note indicates that the federal law would likely survive a First Amendment challenge,¹⁸⁴ but other constitutional challenges can still be expected.¹⁸⁵ First, as some articles have suggested, “litigation may arise regarding the extent to which [section] 4205 preempts state and local laws.”¹⁸⁶ While this note agrees that such proceedings are inevitable, it is impossible at this point to determine the success or failure of such claims, as that will vary based on the specific attributes of the local or state law being challenged.¹⁸⁷ Second, a lawsuit alleging that the federal calorie-disclosure law is unconstitutional under the due process clause of the Fifth Amendment would not likely be successful, as this provision “targets a large subset of restaurants” and the government has at the very least a rational basis for the law.¹⁸⁸ Lastly, and discussed in some detail below, critics will likely

¹⁸² For arguments criticizing the compulsory menu labeling provision, see, for example, Banker, *supra* note 165, at 917-21, and Schulman, *supra* note 6, at 608-09 (stating that the provision is “an excellent start,” but “it does not constitute an ideal solution to implementing menu-labeling policy on a national level if the goal is to maximize the policy’s potential impact on the national weight crisis” and that “it misses an important opportunity for broad menu-labeling implementation by exempting smaller, non-chain restaurants”).

¹⁸³ This note does not discuss these studies in detail, as the impact of the new federal law is tangential to its main argument. For recent articles discussing the results of each study, see, for example, Schulman, *supra* note 6, at 599-603; Banker, *supra* note 165, at 911-13; Bernell, *supra* note 6, at 867-70; Sheila Flesichhacker & Joel Gittelsohn, *Carrots or Candy in Corner Stores?: Federal Facilitators and Barriers to Stocking Healthier Options*, 7 *IND. HEALTH L. REV.* 23, 52 (2010) (“Even though the menu labeling law is based on a strong public health rationale and founded on consumer rights, further work is needed to understand the impact these policy changes have had (e.g. in New York) and will have (e.g. nationwide on consumer behavior, dietary intakes, and health conditions). Initial research on [Regulation 81.50] found some positive effects on low-income consumer awareness, but not any significant impacts on caloric consumption.”).

¹⁸⁴ For a more detailed analysis of a potential First Amendment challenge to the PPACA, see generally Bernell, *supra* note 6, at 862-63.

¹⁸⁵ For another recent discussion of the legal challenges the federal law will likely face, see *id.* at 861-64.

¹⁸⁶ Banker, *supra* note 165, at 926.

¹⁸⁷ One caveat to this statement is that in general, a preemption challenge may be successful if the law requires “claims” to be made, and not only “factual nutritional information.” Bernell, *supra* note 6, at 861-62.

¹⁸⁸ Banker, *supra* note 165, at 927.

claim that the law is beyond Congress's vested power to regulate interstate commerce.¹⁸⁹

Our federal Constitution bestows Congress with the power to regulate commerce through the Commerce Clause.¹⁹⁰ Since this grant of authority, "the . . . Court has extracted the notion that the Commerce Clause is an affirmative grant of power to Congress to restrict independent state action in order to promote nationwide free trade."¹⁹¹ That is, besides its obvious ability to regulate interstate activities, Congress can regulate intrastate activities that substantially affect interstate commerce.¹⁹² Here, because of the variety of state and locally mandated menu calorie-disclosure laws established before the federal mandate was passed, "the burden on interstate commerce [was] certain, especially if states continue[d] to adopt different regulations."¹⁹³

Critics will likely argue that the law does not fall within Congress's Commerce Clause authority. Specifically, they will contend that the states possess a "residuum of power" to create public health and safety laws, which reflect local concerns, even if these laws do affect interstate commerce.¹⁹⁴ Such state laws are presumably valid and subject to such regulation because public health and welfare consistently fall within the ambit of state authority and are primarily local concerns.¹⁹⁵ These critics will reason that Congress is overstepping its bounds with such legislation and entering into state police-power territory.

However, it is not likely that this challenge would be successful. Today, the Court's jurisprudence gives Congress

¹⁸⁹ For another recent discussion of the likely commerce clause challenge, see *id.* at 927-28.

¹⁹⁰ U.S. CONST. art. 1, § 8, cl. 3. ("[The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

¹⁹¹ Gizzi, *supra* note 7, at 507; see also *Gibbons v. Ogden*, 22 U.S. 1, 4 (1824) (where John Marshall first defined "commerce" to mean "intercourse," and further explained that the Constitution uses the word "among," indicating that power to regulate interstate commerce didn't extend to commercial activities entirely within a state).

¹⁹² See *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

¹⁹³ Gizzi, *supra* note 7, at 525. Moreover, "in giving Congress the power to regulate commerce among the states, the Commerce Clause impliedly requires the states to refrain from placing economic barriers between themselves and other states that would disrupt the unified national economy." *Id.* at 504.

¹⁹⁴ See *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945) ("[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern.").

¹⁹⁵ See *id.*

broad power under the Commerce Clause,¹⁹⁶ and the disclosure of calorie content on chain restaurant menus would be an example of an activity that substantially affects interstate commerce. The sales from these regulated businesses unarguably affect interstate commerce, accounting for billions of dollars spent by American consumers.¹⁹⁷ Moreover, chain establishments—those restaurants to be affected by such a regulation—are interstate in nature, as most of these companies have locations in more than one state.¹⁹⁸ Thus, the burden on these businesses is an interstate one.¹⁹⁹ For these reasons, the Court would likely find Congress well within its Commerce Clause authority to pass section 4205 of the PPACA.

Further, section 4205 of the PPACA, in fact, decreases a burden on interstate commerce. Specifically, “[i]f the individual states [continued to] mandate[] dissimilar sets of rules and regulations according to their own interests, the nation would be nothing more than fifty independent countries coexisting under the guise of one name, each imposing its own taxes and other economic burdens on the other.”²⁰⁰ Every regulated restaurant and FSE would have had to follow a variety of regulations, as each law would be exclusive to its city or state. For that reason, it is likely that the Court would find that the Framers of our federal Constitution wanted to circumvent this type of arduous undertaking by granting supreme Commerce Clause power to our national Congress.²⁰¹

Another argument opponents may offer would center on the federalism theory that the states are the laboratories of

¹⁹⁶ See *Raich*, 545 U.S. 1; see also *United States v. Lopez*, 514 U.S. 549, 558 (1995).

¹⁹⁷ Elizabeth Young Spivey, *Trans Fat: Can New York City Save Its Citizens from This “Metabolic Poison”?*, 42 GA. L. REV. 273, 291 (citing ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 293 (2002)). “In 2001, Americans spent more than \$110 billion on fast food, more than on higher education or new cars.” *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See *supra* text accompanying notes 127-30.

²⁰⁰ *Gizzi*, *supra* note 7, at 508; see also *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 532 (1949) (stating that the national effect would “set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported” (internal quotation marks omitted)).

²⁰¹ *Gizzi*, *supra* note 7, at 531 (“This onerous task is precisely what the Framers sought to avoid by creating a unified republic and vesting the Commerce Clause power in Congress.”); see also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (“[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”).

democracy.²⁰² Those who are against the passage of the federal calorie-disclosure law would posit that the aforementioned burden on these restaurants is worth the cost. They would suggest that through varying attempts, the states would continue to strive for a perfect solution to these life-threatening epidemics and, ultimately, find a successful one.²⁰³ But these opponents fail to realize that the federal calorie-disclosure law does not fully rid the states of their authority within this realm. In fact, although the federal law in its current form preempts most state and local regulation, those governments may still pass laws for unregulated restaurants and may also still have more stringent disclosure requirements than the federal mandate.²⁰⁴ Accordingly, states may still experiment with new legislation and be within the broad scope of section 4205 of the PPACA. Thus, although this constitutional challenge will likely arise, it is unlikely that it will prevail.

V. WHERE SHOULD CONGRESS DRAW THE LINE?

Americans enjoy being oblivious, so this federally mandated menu calorie-disclosure law is nothing short of a nightmare for many. The reality, unfortunately, is that our increasing national weight gain seems to be directly related to consistent dining in these regulated establishments, as their customers are eating not only a greater amount of food than they would at home, but are eating much unhealthier food as well.²⁰⁵ Now, in every town, city, and state, American citizens

²⁰² Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1261 (2009) (“Most theories of federalism rest upon an autonomy model that depicts states as sovereign policymaking enclaves, able to regulate separate and apart from federal interference. State autonomy helps create laboratories of democracy, diffuse power, foster choice, safeguard individual rights, and promote vibrant participatory opportunities for citizens.”).

²⁰³ Supporting this argument, in 1932, Justice Brandeis wrote, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁰⁴ See generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.); see also *Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling Laws*, FDA.GOV (Aug. 2010), <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm223408.htm>.

²⁰⁵ For a more detailed discussion of the relative unhealthiness of food consumed outside the home, see Schulman, *supra* note 6, at 594-97.

will have to face the glaring truth of their food choices in these regulated restaurants and FSEs. Alas, illustrating how this will impact the American dining experience, one blogger wrote,

The new calorie law is a murderer! Yes, it has killed my pleasure of eating out! . . . For Gods [sic] sake, who wants to know all this? I dine out once a week with my family simply for the pleasure of eating. I'm already savvy on a lot of calorie education, buddy! The television, newspapers, health journals, slimming spas, doctor's [sic] chambers are all bombarding people day in and day out with information on calories and high and low calorie foods. I really don't need to be reminded of all that once more when I'm going to a food joint to deliberately indulge in my favorite food once in a while.²⁰⁶

But it is exactly this carefree attitude that has led to America's unhealthy status. Although many commentators have noted that magazines, television, and other media sources are sufficient means to create widespread awareness on high and low calorie food choices, they have ignored that this method was practiced for years, without notable success. Likely, the reason for the failure of those methods is because when Americans read magazines or watch television they are not standing in line or sitting at a table, waiting to place an order for food. When calorie information is on menus, staring patrons in the face, it cannot be ignored or forgotten.

Just as NYC inspired cities and states across the nation to adopt calorie-disclosure laws that ultimately led to the recent federal mandate, it has also inspired local and state governments to pass other innovative food laws designed to combat obesity, diabetes, and other life-threatening epidemics.²⁰⁷ This section addresses three recent NYC food-based health initiatives in particular. First, NYC, in passing its trans fat ban,²⁰⁸ was the earliest of many state and local governments to enact such regulation.²⁰⁹ Second, NYC has

²⁰⁶ *Who Cares for the Calorie Law?*, IFOOD, <http://www.ifofood.tv/node/93263> (last visited Jan. 6, 2011).

²⁰⁷ *Does New York City's Trans-Fat Ban Go Too Far?*, ALLBUSINESS.COM (Jul. 31, 2010), <http://www.allbusiness.com/medicine-health/diseases-disorders-obesity/14883438-1.html> ("New York City banned the use of trans fats in all restaurants in the city in 2006. Philadelphia, California, Boston and Montgomery County, Md. have subsequently passed similar bans on the use of trans fats in restaurants.")

²⁰⁸ N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.08(a)-(b) (2008).

²⁰⁹ *New York Passes Trans Fat Ban*, MSNBC.COM (Dec. 5, 2006, 5:30 PM), http://www.msnbc.msn.com/id/16051436/ns/health-diet_and_nutrition; see also *Trans Fat Bans in Restaurants*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/transfat/index.html> (last visited Feb. 3, 2011).

recently commenced a sodium reduction campaign²¹⁰ that is also spreading across the nation.²¹¹ Third, NYC has just proposed its newest initiative: banning the use of food stamps to purchase sugary drinks.²¹²

While there is a lot of recent criticism that section 4205 of the PPACA does not go far enough, our federal legislature should be wary of emulating the local and state food laws that go beyond mere information disclosure. Specifically, Congress should be careful not to pass laws similar to these other NYC food-targeting health-initiatives that regulate actual consumption. As many commentators have recently questioned where the legislative line should be drawn,²¹³ this note suggests that it should be drawn at educational mandates. While all of NYC's recent food laws are based on noble public goals, goals that could decrease the prevalence of obesity, diabetes, and other life-threatening epidemics in America, this note argues that some things should not be regulated at all.

A. *Funding the Epidemics*

It is no secret that American taxpayers are funding the growth of obesity, diabetes, and hypertension in America.²¹⁴ The hypertension epidemic alone places a gigantic burden on our

²¹⁰ *Cutting Salt, Improving Health*, NYC.GOV, <http://www.nyc.gov/html/doh/html/cardio/cardio-salt-initiative.shtml> (last visited Feb. 3, 2011) [hereinafter *Cutting Salt*].

²¹¹ *Legal and Policy Resources on Public Health "Winnable Battles," Sodium Reduction*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www2a.cdc.gov/phlp/winnable/sodium_reduction.asp (last visited Feb. 3, 2011); see also Tiffany O'Callaghan, *Next on New York's Health Agenda: Curbing Salt Intake* (Jan. 11, 2010), <http://healthland.time.com/2010/01/11/next-on-new-yorks-health-agenda-curbing-salt-intake> (stating that the campaign "includes public health organizations from several different cities (including Boston, Chicago, Los Angeles, Philadelphia, Seattle) and states (including Alaska, Delaware, Michigan, North Carolina, Tennessee).").

²¹² See Press Release, News from the Blue Room, Mayor Bloomberg and Governor Patterson Propose Excluding Sugary Drinks from Food Stamp Purchases in New York City (Oct. 7, 2010), <http://www.nyc.gov> (follow "News and Press Releases" hyperlink; then follow "2010 Events" hyperlink; then "October 2010" hyperlink; then scroll to "October 7, 2010"; then follow "Read the press release") [hereinafter *Sugary Drinks Press Release*].

²¹³ See, e.g., Rodriguez-Dod, *supra* note 6, at 720 ("Should governments intervene in a matter that is basically about choice? . . . Given the health crisis that the world is facing, legislation and programs at all levels should be allowed and encouraged."); see also Scott Hensley, *New York City Wants to Ban Food Stamps for Sodas*, NPR HEALTH BLOG (Oct. 7, 2010), <http://www.npr.org/blogs/health/2010/10/07/130399285/new-york-city-wants-to-ban-food-stamps-for-sodas>; see also *New York Passes Trans Fat Ban*, MSNBC.COM (DEC. 5, 2006), http://www.msnbc.msn.com/id/16051436/ns/health-diet_and_nutrition.

²¹⁴ See Cummings, *supra* note 6, at 287 ("Taxpayers already bear a significant portion of the U.S. healthcare costs associated with obesity.").

healthcare system, with costs around \$73.4 billion in just 2009.²¹⁵ Moreover, even fifteen years ago, medical costs related to obesity, which were partially funded by Medicaid and Medicare, were around \$78.5 billion per year.²¹⁶ In fact, it has been estimated that by 2018, “the annual medical burden of obesity across all private and public payors [will] be as high as \$344 billion per year.”²¹⁷ This increase in the cost of healthcare is directly related to the increasing rates of obesity in our country.²¹⁸ Although the idea of billions of dollars is not as shocking today as it once was,²¹⁹ these startling statistics perhaps may be the basis for an argument in the near future claiming that the federal government should pass further regulations like the NYC schemes discussed below.²²⁰ Although many support such efforts, this kind of legislation damages the foundation that makes our country America the free and should not be considered by Congress.²²¹

B. NYC’s Uninspiring & Misguided Pursuits

Many have questioned whether NYC should enact such paternalistic laws.²²² Convincing arguments have been made on both sides of the debate.²²³ On the one hand, as noted above, the obesity crisis in America is out of control, costing citizens billions of dollars as well as their lives. On the other hand, we

²¹⁵ See *A Population-Based Policy and Systems Change Approach to Prevent and Control Hypertension*, Institute of Medicine Consensus Report, INST. MED. NAT’L ACADS. (Feb. 22, 2010), <http://www.iom.edu/Reports/2010/A-Population-Based-Policy-and-Systems-Change-Approach-to-Prevent-and-Control-Hypertension.aspx>.

²¹⁶ Specifically, these federal health-insurance programs paid for about half of these medical costs. See Castles, *supra* note 179 (citation omitted).

²¹⁷ *Id.* (citation omitted). “Within the Centers for Medicare & Medicaid, the Office of the Actuary provides annuals [sic] projections of health care spending for categories within the National Health Expenditure Accounts. The National Health Expenditure Accounts track health spending by source of funds . . . and by type of service or service providers.” *Id.* at 1 n.4.

²¹⁸ See *id.* at 1.

²¹⁹ See *id.*

²²⁰ “[I]f Americans [do] not slim down as a result of menu labeling, the government might require restaurants to take further action . . . and they’ll push for more . . . I don’t think this is taking us down a very appetizing course.” Rosenbloom, *supra* note 158; see also Esther Choi, *Trans Fat Regulation: A Legislative Remedy for America’s Heartache*, 17 S. CAL. INTERDISC. L.J. 507, 538 (2008).

²²¹ “Derogative generalities such as the ‘nanny state,’ ‘big brother,’ and ‘food police’ are some of the characterizations used by citizens who oppose government regulation . . .” Cummings, *supra* note 6, at 290-91.

²²² See, e.g., Spivey, *supra* note 197, at 306 (“Does [New York City] have the power to enact this ban? . . . Should New York City enact this ban?”).

²²³ See generally *id.*

live in a country that is founded on few, but vital and fundamental, principles stemming from our federal Constitution. In the advent of the passage of the PPACA, and realistic threat of more paternalistic legislation passing in the future, this note sides with the latter in the debate.

1. The Paternalistic Schemes

This section offers a brief description of the three above-mentioned NYC schemes and explains why they are inherently unconstitutional. The justification provided by NYC for each of these initiatives is that it would directly and effectively combat the startling and increasing rates of obesity, diabetes, and hypertension amongst its citizens.²²⁴

a. Trans-Fat Ban

In one of the most intrusive forms of government involvement to date, on December 5, 2006, NYC passed a regulation²²⁵ that restricts all restaurants that hold a permit by the NYC Health Department²²⁶ from including more than 0.5 grams of artificial trans fats per serving²²⁷ in both food preparation and food served.²²⁸ However, the ban does not regulate natural trans fats, like those in dairy products or red meats.²²⁹ This amendment to the Health Code became effective on July 1, 2007, and allowed for a phase-in period of several months—between six and eighteen—depending on the use of trans fat in the establishment and the type of food it served.²³⁰

²²⁴ See Sugary Drinks Press Release, *supra* note 212; see also *Cutting Salt*, *supra* note 210; *The Regulation to Phase Out Artificial Trans Fat in New York City Food Service Establishments*, NYC.GOV, <http://www.nyc.gov/html/doh/downloads/pdf/cardio/cardio-transfat-bro.pdf> (last visited Feb. 3, 2011) [hereinafter *Trans Fat Ban*].

²²⁵ N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.08(a)-(b) (2008).

²²⁶ *Trans Fat Ban*, *supra* note 224.

²²⁷ This note does not discuss trans fats and the associated health risks in any detail; to learn more about this, see *id.*; see also *The Campaign to Ban Partially Hydrogenated Oils*, BAN TRANS FATS, <http://www.bantransfats.com/abouttransfat.html> (last visited Feb. 3, 2011).

²²⁸ See *Trans Fat Ban*, *supra* note 224.

²²⁹ *Id.*

²³⁰ See, e.g., *Cardiovascular Disease Prevention*, NYC.GOV, <http://www.nyc.gov/html/doh/html/cardio/cardio-transfat-healthcode.shtml> (last visited Feb. 3, 2011) (“[R]estaurants had until July 1, 2007, to make sure that all oils, shortening and margarine containing artificial trans fat used for frying or for spreads have less than 0.5 grams of trans fat per serving. Oils and shortening used to deep fry yeast dough and cake batter were not included in the first deadline. The second deadline was July

NYC, again, was the first city in the country to enact such a ban,²³¹ because, “[b]ased on the most conservative estimates, artificial trans fat kills at least 500 New Yorkers each year”²³²

b. Sodium-Reduction Initiative

On January 11, 2010, the Board of Health released the “National Salt Reduction Initiative,” which targets restaurants and FSEs and asks them to voluntarily reduce the salt levels in fare offered.²³³ NYC has appointed itself leader of this movement, seeking to reduce salt levels in both packaged and restaurant foods over the next five years by twenty-five percent.²³⁴ This initiative, if successful, could cut our national sodium intake by twenty percent.²³⁵ Unlike the mandatory trans fat ban, this scheme is currently voluntary.²³⁶ On the one hand, it is difficult to determine when this campaign will transform into a regulation, as many believe that it will not have a serious impact on national health because it does not seek to decrease sodium content enough.²³⁷ On the other hand, this campaign looks a lot like NYC’s original movement to cut trans fat from restaurant fare, which only became enforced after it did not work as a voluntary scheme.²³⁸ Accordingly, this note predicts that the sodium-reduction scheme will be compulsory in the very near future.

1, 2008. By that date, all foods containing artificial trans fat must have less than 0.5 grams of trans fat per serving.”)

²³¹ *New York Passes Trans Fat Ban*, MSNBC.COM, http://www.msnbc.msn.com/id/16051436/ns/health-diet_and_nutrition (last visited Feb. 3, 2011).

²³² See *Cardiovascular Disease Prevention*, *supra* note 230.

²³³ Tyler Anderson, *Hold the Salt: The Gathering Push for Sodium Reduction in Food Products*, FOOD LIABILITY L. BLOG (Jan. 15, 2010), <http://www.foodliabilitylaw.com/2010/01/articles/legislation-2/hold-the-salt-the-gathering-push-for-sodium-reduction-in-food-products>.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Cutting Salt*, *supra* note 210; see also William Neuman, *Citing Hazard, New York Says Hold the Salt*, N.Y. TIMES (Jan. 11, 2010), http://www.nytimes.com/2010/01/11/business/11salt.html?_r=1.

²³⁷ See, e.g., Tom Randall & Shannon Pettypiece, *New York Pushes for 25% Salt Reduction in U.S. Foods*, BLOOMBERG (Jan. 11, 2010), <http://www.bloomberg.com/apps/news?pid=21070001&sid=aMAGgUeMSmr4>.

²³⁸ Neuman, *supra* note 236.

c. Food Stamp Restriction

On October 10, 2010, NYC embarked on its most recent “public health push” when it asked the federal government to allow it to pass legislation that would ban citizens from using their food stamps to purchase sugary drinks that contain greater than ten calories per cup.²³⁹ But the law would not regulate beverages that do not contain added sugar, like juice or milk.²⁴⁰ Presently, the food stamp system, which has been in place for over fifty years, “does not . . . restrict any other foods based on nutrition.”²⁴¹ The only limitations on food stamps are that they may not be used to purchase “alcohol, cigarettes or items such as pet food, vitamins or household goods.”²⁴² The intention of the food stamp program is to aid those who need assistance, and not to dictate what they should or should not eat.²⁴³ Today, 1.7 million NYC residents receive food stamps and spend about \$135 million a year on sugary drinks.²⁴⁴

2. Due Process Concerns

Many NYC restaurant owners and patrons have opposed these campaigns and expressed their discontent with the government dictating what they can serve or eat.²⁴⁵ What these dissatisfied citizens likely do not realize, however, is that they are victims of more than just frustration, because with each enactment of these paternalistic schemes, they have also had one of their most fundamental rights violated. At the core of the problem is that American citizens have a right to privacy,²⁴⁶ and within that right, the privilege to determine what enters their bodies—or, in other words, to decide what

²³⁹ See Sugary Drinks Press Release, *supra* note 212; see also Hensley, *supra* note 213.

²⁴⁰ Hensley, *supra* note 213.

²⁴¹ *NY Seeks to Ban Sugary Drinks from Food Stamp Buys*, AETNA INTELIHEALTH, <http://www.intelihealth.com/IH/ih/IH/EMI/333/8015/1377711.html> (last visited Feb. 3, 2011).

²⁴² *Id.*

²⁴³ See, e.g., *Keep the Fizz in Foodstamps*, L.A. TIMES (Oct. 19, 2010, 2:00 AM), <http://www.newsobserver.com/2010/10/19/747915/keep-the-fizz-in-food-stamps.html>.

²⁴⁴ Terry J. Allen, *Should Food Stamps Be Used for Soda?*, ALTERNET (Dec. 7, 2010), http://www.alternet.org/vision/149116/should_food_stamps_be_used_for_soda.

²⁴⁵ Arun Kristian Das, *Chefs Call Proposed New York Salt Ban ‘Absurd,’* MYFOXNY (Mar. 11, 2010), http://www.myfoxny.com/dpp/news/local_news/new_york_state/chefs-call-proposed-new-york-salt-ban-absurd-20100310-akd (“[C]hefs and restaurant owners . . . are tired of politicians dictating what they can serve and what people can eat. They have opposed the city’s anti-sodium and anti-trans fat campaigns.”).

²⁴⁶ See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

they will or will not consume. Although many have opined that NYC has acted within its broad police powers to preserve public health and therefore has not overstepped its boundaries,²⁴⁷ these arguments fail to recognize that the above-mentioned regulation and pursuits offend our federal laws and are unconstitutional.

Although these regulations and pursuits would not likely violate the Commerce Clause²⁴⁸ or the Equal Protection Clause²⁴⁹ of our federal Constitution, all of these initiatives that go beyond information disclosure violate the Due Process clauses.²⁵⁰ The Due Process clauses of the Fifth and Fourteenth Amendments mandate that neither the federal government nor any state “shall . . . deprive [any person] of life, liberty, or property without due process of law.”²⁵¹ Similar to the First Amendment analysis discussed in Part III of this note,²⁵² courts decide challenges based on substantive due process using levels of scrutiny to determine how much protection it will afford to the right in question.²⁵³ Not all of our privileges as citizens are explicitly stated in the federal Constitution itself, but the Court has commonly found that the fundamental rights recognized in its jurisprudence are implicitly contained therein.²⁵⁴ The Court

²⁴⁷ See generally Spivey, *supra* note 197, at 293-94.

²⁴⁸ See *id.* at 294, 306. The only way, it seems, that such federal action could be problematic is if these issues were deemed by a federal court to be strictly of state concern, and thus the federal scheme would violate the Tenth Amendment. See Flesichhacker & Gittelsohn, *supra* note 183, at 35; see also Sarah Romero, *Local Bans on Trans Fats: A New (and Legal) Way Forward*, HARV. L. & POL'Y REV. (Apr. 5, 2007), <http://hlpronline.com/2007/04/transfat>. For an argument to the contrary, see Katharine Kruk, *Of Fat People and Fundamental Rights: The Constitutionality of the New York City Trans-Fat Ban*, 18 WM. & MARY BILL RTS. J. 857, 864 (2010).

²⁴⁹ *Does New York City's Trans-Fat Ban Go Too Far?*, *supra* note 207; see also *Is the New York City Board of Health's Ban on Trans Fats in Restaurants Constitutional?*, HELIUM: USNEWS (Apr. 24, 2008), <http://www.helium.com/items/1015112-is-the-new-york-city-board-of-healths-ban-on-trans-fats-in-restaurants> (“The Equal Protection Clause prohibits invidious discrimination, such as racial discrimination. ‘People in New York City’ or ‘people who like to eat trans fats’ are a far cry from the types of victims that the 14th Amendment was designed to protect. The Equal Protection Clause does not apply.”).

²⁵⁰ This note focuses solely on the substantive due process rights of American citizens that may be violated, and does not cover any economic due process infringements committed against the restaurant industry. For a discussion on whether a challenge brought against the New York City trans fat ban on economic due process grounds would be successful, see Kruk, *supra* note 248, at 866-67 (“[C]ourts 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.”).

²⁵¹ U.S. CONST. amends. V, XIV.

²⁵² See *supra* text accompanying notes 74-100.

²⁵³ See Kruk, *supra* note 248, at 864.

²⁵⁴ See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (stating that these rights are “implicit in the concept of ordered liberty”).

has found that substantive due-process rights are two-fold: the right must be “deeply rooted in [the] Nation’s history and tradition,”²⁵⁵ and it must be carefully described.²⁵⁶ If the Court determines that the legal interest being challenged is a fundamental right, the challenged restriction on the right will be subject to the highest level of scrutiny.²⁵⁷

The Court has decided many cases regarding “the right to privacy and other constitutionally-guaranteed, fundamental rights” and it has evaluated each of these cases “under the framework of strict scrutiny,” which, is the ultimate safeguard of due process rights.²⁵⁸ Most notably, the Court has applied strict scrutiny to a woman’s right to an abortion,²⁵⁹ which could be indicative of a fundamental right of Americans to control what does or does not enter their bodies.²⁶⁰ Each of the three recent NYC initiatives restrains the ability of residents to make their own consumption decisions; that is, to decide what ingredients or food products may or may not enter their bodies. If Congress responds to the recent critiques of section 4205 of the PPACA²⁶¹ by emulating these NYC laws, it is likely that it would be challenged as infringing on the guarantees of the due process clause.²⁶² This note predicts that the Court would strike down any such additions or amendments as unconstitutional.

It is likely that the Court would analyze the addition of any paternalistic restriction under strict scrutiny because these

²⁵⁵ Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); see also *Palko*, 302 U.S. at 325.

²⁵⁶ See, e.g., *Reno v. Flores*, 507 U.S. 292, 302 (1993).

²⁵⁷ See *Palko*, 302 U.S. at 325.

²⁵⁸ *Kruk*, *supra* note 248, at 864 & n.57 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-48 (1992) for the idea that the Constitution guarantees “a realm of personal liberty which the government may not enter”).

²⁵⁹ See *Planned Parenthood*, 505 U.S. at 845-48; see also *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 427 (1983); *Roe v. Wade*, 410 U.S. 113, 154-56 (1973).

²⁶⁰ See generally *Control Over One’s Body Not Just Right of Pregnant Women*, STATE NEWS (Oct. 15, 2010), http://www.stateneews.com/index.php/article/2008/10/control_over_ones_body_not_just_right_of_pregnant_women (“[A]n adult has the basic right of controlling his or her own body. . . . [T]his also must include controlling all of one’s own body, not just abortion.”); see also *Kruk*, *supra* note 248, at 865 (“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 . . . protecting the Fourteenth Amendment’s ever-evolving realm of personal liberty.” (internal quotation marks omitted)).

²⁶¹ Many articles have critiqued the federal government for not going far enough with the law. See, e.g., *Schulman*, *supra* note 6.

²⁶² As the federal equivalent of these laws is unconstitutional, for the same reasons this note contends that the law passed by NYC is equally unconstitutional.

NYC initiatives infringe a fundamental right. Assuming that the Court would find that the “right to make dietary decisions”²⁶³ or the right to determine what enters your body is a fundamental right,²⁶⁴ to survive strict scrutiny analysis the government would have to set forth a compelling justification for its law, showing the gravity of its interest in passing the law and that the regulation has been as narrowly-tailored as possible.²⁶⁵ To be narrowly tailored, the challenged legislation cannot be either overinclusive or underinclusive in its scope.²⁶⁶

The government’s proposed rationale would be the same as the rationale for its menu calorie-disclosure provision: to improve the health of citizens by decreasing rising national epidemics.²⁶⁷ Although this goal of reducing the prevalence of serious national epidemics would most likely be found to be compelling,²⁶⁸ the government’s position would certainly fail on the narrow-tailoring prong of the analysis, as each of these measures are underinclusive.²⁶⁹

²⁶³ Kruk, *supra* note 248, at 871.

²⁶⁴ See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (discussing the importance of fundamental rights in the realm of personal-health choices).

²⁶⁵ 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.”).

²⁶⁶ See, e.g., Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 478 (1989) (“Under strict scrutiny, apparently any overinclusion or underinclusion is too much.” (citing *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221, 231 (1987); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 632 (1969))).

²⁶⁷ See generally Press Release, FDA, FDA Releases Guidance on Federal Menu Labeling Requirements (Aug. 24, 2010), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm223880.htm>. The rationale underlying the New York City trans fat law sheds some guidance on what the purported federal justification would be. The 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.C. 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 1 (2006) [hereinafter NOTICE OF ADOPTION 3].

²⁶⁸ The Court has previously held that safeguarding the public health is a compelling interest. See *Roe v. Wade*, 410 U.S. 113, 147-64 (1973); see also *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 538 (1993) (stating, in dicta, that protecting the public interest is a legitimate governmental interest).

²⁶⁹ Kruk, *supra* note 248, at 873 n.137 (“An underinclusive statute is one that fails to extend to all matters that should properly be addressed by a particular ordinance or regulation.”).

First, the trans fat law is underinclusive as it only regulates artificial trans fats.²⁷⁰ Artificial trans fats only account for 80% of trans fats used in food preparation in restaurants and FSEs;²⁷¹ and so the ban, in its current form, “only applies to four-fifths” of the problem.²⁷² Clearly, the ban could be more narrowly tailored if it applied to currently exempt items such as natural trans fats, products sold in grocery stores, and/or food sold in restaurants in their original packaging.²⁷³ As these items are not included in the regulation, it follows that only a limited and specific portion of trans fats are being regulated, meaning that the ban is not narrowly tailored.

Second, it has been argued that the salt-reduction campaign does not go far enough to make any real difference as it only bans a minimal amount of sodium in regulated products.²⁷⁴ Likewise, the voluntary scheme only targets about 75 to 80 percent of the average person’s daily salt intake.²⁷⁵ In addition, the sodium-reduction campaign does not target table salt, which may still be placed on tables at these establishments, ready for consumer overuse.²⁷⁶ Accordingly, this scheme is also poorly tailored.

Finally, there is no doubt the Court would find that the food-stamp proposal is inadequately tailored. To start, this scheme only applies to a particular class of people, those using food stamps, and fails to regulate all other persons who do not use food stamps. Also, the ban would prevent the use of food stamps to purchase soda and other sugary drinks, but still allows for the purchase of other unhealthy and very sugary foods.²⁷⁷ Thus, like the trans fat ban and sodium-reduction

²⁷⁰ N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.08(a)-(b) (2008).

²⁷¹ NOTICE OF ADOPTION 3, *supra* note 267, at 2.

²⁷² Kruk, *supra* note 248, at 874.

²⁷³ See N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.08(a)-(b).

²⁷⁴ See, e.g., Randall & Pettypiece, *supra* note 237 (“The salt reduction won’t have as much impact on national health as [other initiatives like the calorie law and the trans fat law]. . . . A 50 percent reduction would be more appropriately ambitious.”).

²⁷⁵ Chuck Bennett, *Food-Nanny Mike Declares War on Salt in NYers Diets*, N.Y. POST (Jan. 11, 2010), http://www.nypost.com/p/news/local/food_nanny_mike_to_ny_halt_the_salt_XpeycWZo3bLV2ODxFkv8VM.

²⁷⁶ *Id.*

²⁷⁷ See Sherry F. Colb, *No Buying Soda with Food Stamps? Considering Mayor Bloomberg’s New Health Initiative*, FINDLAW (Oct. 27, 2010), <http://writ.news.findlaw.com/colb/20101027.html> (stating that there are “two under-inclusiveness problems involved in cutting sodas out of Food Stamp eligibility—as to the targeted population (only people receiving food stamps, rather than everyone in [NYC]) and as to the targeted products (sugary sodas, instead of all unhealthy foods)”).

pursuit, this measure would likely be struck down as unconstitutional.

C. *The Better Solution: Mandate More Educational Programs*

The federal menu calorie-disclosure law is a great start, but, as discussed above, Congress should avoid copying all of the NYC food-based health initiatives. Instead, our federal government should continue to explore other edifying, information-disclosure methods for regulation, as these methods do not compromise any fundamental rights guaranteed in our federal Constitution.²⁷⁸ This section discusses how the federal government has already implemented and should continue to adopt educational methods to combat our national epidemics.

In a 2003 speech, a former United States Surgeon General coined the phrase “health literacy,” which is “the ability of an individual to understand, access, and use health-related information and services.”²⁷⁹ Even before its new menu calorie-disclosure law, our federal government has taken this health-literate approach towards educating the public about their food choices. For example, the FDA enacted a rule in 2006, which requires all manufacturers of food products to state on the product’s Nutrition Facts label, in a separate line immediately under the statement of the product’s saturated fats, the amount of trans-fatty acids it contains.²⁸⁰ This legislation, functionally speaking, does not “ban nor reduce the amount of trans-fats present in grocery store food. . . . [but rather] simply serve[s] to make consumers aware of what they are eating.”²⁸¹ Thus, this recent regulation recognizes that American citizens should be informed about how much trans fat is contained within the food they purchase and does not create the same legal predicament as the NYC trans fat ban.

The principle is simple: instead of telling the public what to consume, teach them about what they are consuming so that they can make informed choices. This note urges

²⁷⁸ For a fantastic discussion of the appeal of information disclosure laws and their effects, see Winkles, *supra* note 133, at 557-72.

²⁷⁹ Vice Admiral Richard H. Carmona, U.S. Surgeon Gen., Remarks at the Am. Enter. Inst. Obesity Conference (June 10, 2003), available at <http://www.surgeongeneral.gov/news/speeches/obesity061003.htm>; see also Rodriguez-Dod, *supra* note 6, at 725.

²⁸⁰ See 21 C.F.R. §§ 101.1-.106 (2006).

²⁸¹ Kruk, *supra* note 248, at 862.

Congress to continue to enact mandates similar to the FDA's trans-fat-disclosure law and the PPACA's menu calorie-disclosure provision, as they will educate our nation without infringing on fundamental rights. Most importantly, by increasing society's knowledge through these measures, the federal government could potentially influence patrons to demand healthier options from regulated establishments, which would slowly eradicate our frightening national epidemics, without sacrificing America the free.

VI. CONCLUSION

The legal and social successes of Regulation 81.50 served as important inspiration for our federal government. As obesity and diabetes have become national health concerns, NYC pioneered a crucial step towards a healthier America. With simple calorie disclosure, consumers are educated about their food choices but still maintain the option of ignoring this nutritional information. Thus, although their enjoyment of their fare may be compromised, they still get to decide what they consume. Unfortunately, NYC's other recent food-based health initiatives have headed down a dangerous and unconstitutional path. NYC's recent schemes undermine the very foundation of one of the most important rights granted to all citizens by our federal Constitution. For that reason, Congress should not attempt to emulate these initiatives, but should instead focus its attention on creating more educational, information-disclosure regulations. It is these instructive mandates that will benefit our nation most of all.

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