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Eatin' Good? Not in This Neighborhood: A Legal Analysis of Disparities in Food Availability and Quality at Chain Supermarkets in Poverty-Stricken Areas

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EATIN' GOOD? NOT IN THIS NEIGHBORHOOD†
A LEGAL ANALYSIS OF DISPARITIES IN FOOD
AVAILABILITY AND QUALITY AT
CHAIN SUPERMARKETS IN
POVERTY-STRICKEN AREAS

Nareissa Smith*

Many Americans—especially the poor—face severe hurdles in their attempts to secure the most basic of human needs—food. One reason for this struggle is the tendency of chain supermarkets to provide a limited selection of goods and a lower quality of goods to patrons in less affluent neighborhoods. Healthier items such as soy milks, fresh fish, and lean meats are not present in these stores, and the produce that is present is typically well past the peak of freshness. Yet, if the same patron were to go to another supermarket owned by the same chain—but located in a wealthier neighborhood—she would find a wide selection of healthy foods and fresh produce. What are the poor people who live in the inner cities—who are disproportionately African American and Latino—to do? How can they obtain healthy food against these odds?

This Article argues that the actions of the supermarkets are unconscionable, and therefore proposes a federal law that will prevent chain grocery stores from engaging in such practices. The Article first examines the scope of the problem created by these supermarket practices. The Article then explains why current laws are inadequate to address this issue. Finally, the Article proposes that Congress use its authority under the Commerce Clause to enact legislation that would require supermarket chains to carry the same selection and quality of goods at all stores in the same chain.

† “Eatin’ Good in the Neighborhood” is the former slogan of the Applebee’s chain of family restaurants. See Database of Slogans, Restaurant Advertising Slogans, <http://www.textart.ru/database/english-advertising-slogans/restuarant-advertising-slogans.html> (last visited June 12, 2008).

* Assistant Professor, Florida Coastal School of Law. I would like to thank my family, especially my daughter, first and foremost, for tolerating the long hours spent in my office while I completed this Article. I would also like to thank all those who attended my presentation of this Article at the Mid-Atlantic People of Color Conference in January 2006, particularly Professor Darren Hutchinson of the Washington College of Law at American University for serving as my mentor at that conference. I would also like to thank the librarians at Howard University—Rhea Ballard Thrower and Eileen Santos—for all of their help, and the wonderful library staff at Florida Coastal, including Nickie Singleton, Martha Smith, Colleen Manning, and Natalie Harper, Interlibrary Loan Librarian extraordinare. Last but not least, I wish to thank my research assistants: Bernice Mireku, Debbie Kim, Homer I. MacMillian, and Antoinette Magli. Without them, this project surely would not have come to fruition. Thanks to one and all.

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INTRODUCTION

"Food for all is a necessity. Food should not be a merchandise, to be bought and sold as jewels are bought and sold by those who have the money to buy. Food is a human necessity, like water and air, it should be available."

—Pearl S. Buck¹

★ ★ ★

Imagine for a moment that you are a single mother attempting to make ends meet. Your second job has just laid you off, pushing your ends

1. Food Quotes, <http://www.foodreference.com/html/qfood.html> (last visited July 7, 2008).

further apart.² Despite your financial straits, your three children still need to eat. You go to your neighborhood grocery store. While you know the store is inadequate, you cannot afford the taxi or bus fare to a better store. You arrive and begin shopping. You read somewhere that the USDA defines a healthy diet as one that “[e]mphasizes fruits, vegetables, whole grains, and fat-free or low-fat milk and milk products; [i]ncludes lean meats, poultry, fish, beans, eggs, and nuts; and [i]s low in saturated fats, trans fats, cholesterol, salt (sodium), and added sugars.”³ You decide to follow the guidelines. Once in the store, you try to find some fresh fruit. You go to the produce section and discover oranges with white spots and apples that are more brown than red. You look for other fresh fruit, but given the limited selection, you settle on some canned peaches in heavy syrup. You look for lean ground beef, but there isn’t any in the store—only the type mottled with large amounts of fat. You select one pound of the marbled meat. Finally, you try to find a loaf of whole-wheat bread, but the store only has white bread. You pay the cashier, and leave the store disgusted and sad. You vow to do better next time, but in reality, you know that this scene will repeat itself innumerable times.

★ ★ ★

Food plays an essential role in the life of every human being. It provides fuel for the many functions our bodies must perform each day.⁴ Therefore, food “is arguably the most critical thing that promotes health.”⁵

2. It is quite possible for a person with a job—indeed multiple jobs—to struggle to make ends meet. In her best-selling book *NICKEL AND DIMED*, author Barbara Ehrenreich described her experiences trying to live on minimum wage in America for three months in various cities. See generally *BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001). She concluded that even when she worked two jobs, she failed to meet her monthly living expenses in each of the three cities where she conducted her experiment. See *id.* at 196–98.

3. MyPyramid.gov, USDA Dietary Guidelines, <http://www.mypyramid.gov/guidelines/index.html> (last visited June 12, 2008).

4. For instance:

The human body can be thought of as an engine that releases the energy present in the foods and utilizes it partly for the mechanical work performed by muscles and in secretory processes and partly for the work necessary to maintain its structure and functions. The performance of this work is associated with the production of heat; heat loss is controlled so as to keep body temperature within a narrow range. Unlike other engines, the human body is continually breaking down (catabolism) and building up (anabolism) its component parts. Certain foods supply nutrients essential to the manufacture of the new material and provide energy needed for the chemical reactions involved.

Nutrition, human. *Encyclopedia Britannica*, nutrition, human, <http://search.eb.com/eb/article-2500631> (last visited Sept. 25, 2005).

All food, however, is not created equal. Different foodstuffs have different nutritional values, and as such, vary in their ability to fuel the human machine. Some foods—particularly those high in fiber and low in saturated fats, harmful cholesterol and sodium—have a high nutritional value and are highly recommended by nutritional professionals.⁶ Conversely, foods that are low in fiber, but high in fat, low density cholesterol, sugar, and sodium have very little nutritional value. In fact, there is so little nutritional value that these foods are colloquially (and sometimes affectionately) referred to as “junk food.”⁷

Because food is so important to health, dietary choices can directly impact a person’s wellbeing. For instance, a diet that is high in fiber and incorporates fresh fruits and vegetables can prevent cellular oxidation and lower the risk of developing certain cancers.⁸ Conversely, a diet that emphasizes unhealthy foods is more likely to lead to obesity.⁹ Being overweight or obese increases the risk of developing many diseases and conditions, including hypertension, Type 2 diabetes, coronary heart dis-

5. Elisabeth Eisenhauer, *In Poor Health: Supermarket Redlining and Urban Nutrition*, 53 GEOJOURNAL 125, 125 (2001).

6. For example, the United States Department of Agriculture (USDA), the agency in charge of setting recommended daily allowances of nutrients and making food recommendations such as the “food pyramid” recommends that Americans “[c]onsume a variety of nutrient-dense foods and beverages within and among the basic food groups while choosing foods that limit the intake of saturated and trans fats, cholesterol, added sugars, salt, and alcohol.” See News Release, *New Dietary Guidelines Will Help Americans Make Better Food Choices, Live Healthier Lives* (Jan. 12 2005), available at <http://www.hhs.gov/news/press/2005pres/20050112.html> (last visited July 7, 2008). In addition, the American Heart Association urges Americans to forego foods high in saturated fats, trans fats and cholesterol in favor of eating “a variety of fruits and vegetables” and “a variety of grain products, including whole grains.” American Heart Association, *Fat*, <http://www.americanheart.org/presenter.jhtml?identifier=4582> (last visited July 7, 2008).

7. Junk food is generally defined as food that is “high in calories but low in nutritional content.” Comment, Nicki Kennedy, *Stop in the Name of Public Policy: Limiting “Junk Food” Advertisements During Children’s Programming*, 16 COMMLAW CONSPECTUS 503, 517 n. 104 (2008) (citing the Merriam Webster Online Dictionary).

8. See National Library of Medicine & National Institutes of Health, *MedlinePlus: Medical Encyclopedia, Diet and Disease*, <http://www.nlm.nih.gov/medlineplus/ency/article/002096.htm> (last visited July 8, 2008).

9. Research is working diligently to establish a link between food choices and obesity. A comprehensive National Health and Nutrition Examination Survey conducted by the University of California (Berkeley) found the following:

It is notable that many of the nutrient-poor energy sources seen in these data come from snack foods and beverages: soft drinks, pastries, chips, candy. These analyses did not examine the foods by eating occasion (meal vs. snack). However, it is likely that a pattern of snacking on such nutrient-poor energy sources is a component of the increasing obesity problem in the United States.

ease, stroke, gallbladder disease, osteoarthritis, sleep apnea, and endometrial, breast, and colon cancers.¹⁰ The bottom line is that dietary choices matter.

Since people can generally choose which foods to consume, it is easy to assert that a person can avoid adverse health consequences simply by eating a healthy diet. While this statement is attractive in theory, in practice, the theory cannot hold. The theory fails in this instance because dietary choices are not made in a vacuum. Some Americans are fortunate enough to live near a grocery store that stocks a wide variety of healthy foods and an extensive selection of fresh produce products. However, many Americans have more limited access to food.

The young mother in the vignette at the beginning of this Article did not have a single quality grocery store in her neighborhood. Therefore, she was restricted to her neighborhood grocery store. Unfortunately, that store's selection and quality of food was sub-standard. Thus, the young mother's choices are to: 1) spend precious money and time (if any) on travel to a better store; or 2) purchase the inferior food offered in her neighborhood. Any true choice exists only in theory. In practice, true food choice is restricted to those fortunate enough to be in close proximity to it.

The dilemma of the young mother at the beginning of the Article is an everyday reality for the American poor. Studies have shown that poor persons, particularly poor persons of color in inner cities, confront three problems in acquiring food: 1) there are no grocery stores in their neighborhoods; 2) the grocery stores that are located there have an inferior selection; and 3) the inner city stores charge higher prices for food than in suburban stores.¹¹ While each of these three areas presents a special concern, this Article will focus on the second problem—the disparity in quality and selection in grocery stores in poor neighborhoods heavily populated by non-whites versus those located in more affluent and less racially diverse areas.

While much of the legal discussion on food has focused on the liability of fast-food restaurants and junk-food manufacturers for the growing obesity epidemic, the legal literature has not yet examined how grocery stores—which remain the primary food source for most Americans—contribute to the obesity epidemic and other health problems by failing to provide a variety of healthy foods to customers in impoverished neighborhoods of color. This Article argues that the law should prohibit chain grocery stores¹² that operate in more than one area of a city from

10. Centers for Disease Control and Prevention, *Overweight and Obesity: Defining Overweight and Obesity*, <http://www.cdc.gov/nccdphp/dnpa/obesity> (last visited July 8, 2008).

11. Each of these problems will be explained in greater depth in Part I, *infra*.

12. The foregoing terms should be defined for clarity. The industry definitions are as follows: A grocery store is “[a]ny retail store selling a line of dry grocery, canned goods, or

providing a high level of service in one area and a lower level of quality and service in another—particularly when the area receiving the lesser service is more likely to be populated by poor, non-whites.

This Article will proceed in three parts. Part I will demonstrate that chain grocery stores in poor areas do not make healthy foods available, or that when they are available, they are of poor quality. Part II will explain why current law is not very useful in combating this problem. Part III will proffer solutions to the problems at hand. Part III-A will examine approaches that might be taken by the Legislative branch to rectify this disparity. Part IV will summarize the conclusions and recommendations.

I. THE PROBLEM

To be certain, the legal literature has discussed how the law might be used to address the problem of obesity. However, the literature has scarcely, if ever, mentioned the relationship between grocery stores and obesity.¹³ While some articles briefly mention the disparity in service,¹⁴ only

nonfood items plus some perishable items.” Food Marketing Institute, Facts & Figures: Key Facts, Number of Stores, http://www.fmi.org/facts_figsl?fuseaction=superfact (last visited July 8, 2008). A “supermarket” is “[a]ny full-line self-service grocery store generating a sales volume of \$2 million or more annually.” *Id.* A “chain” is “[a]n operator of 11 or more retail stores.” *Id.* Despite the formal definitions, to increase readability, the terms “grocery store” and “supermarket” will be used interchangeably. However, when either term is used, the assumption throughout the article should be that the discussion concerns chain supermarkets.

13. Some of the articles referencing obesity are: Jess Alderman, et al., *Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90 (2007); Maurice Ashe, et al., *Local Venues for Change: Legal Strategies for Healthy Environments*, 35 J.L. MED. & ETHICS 138 (2007); Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 51 EMORY L.J. 1645 (2004); 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 (2007); Ellen Fried & Michele Simon, *The Competitive Food Conundrum: Can Government Regulations Improve School Food?*, 56 DUKE L.J. 1491 (2007); Guadalupe T. Luna, *The New Deal and Food Insecurity in the ‘Midst of Plenty’*, 9 DRAKE J. AGRIC. L. 213 (2004); Joseph P. McMenamin & Andrea D. Tiglio, *Not the Next Tobacco: Defenses to Obesity Claims*, 61 FOOD & DRUG L.J. 445 (2006); P.K. Newby, *Are Dietary Intakes and Eating Behaviors Related to Childhood Obesity? A Comprehensive Review of the Evidence*, 35 J.L. MED. & ETHICS 35 (2007); Wendy Collins Perdue, et al., *Legal Frameworks for Preventing Chronic Disease*, 33 J.L. MED. & ETHICS 94 (Special Supp. 2005); David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681 (2008).

14. See, e.g., John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 801, 806 (2008) (noting briefly that “parents shop at grocery stores with overpriced and low-quality food” and have “limited access to adequate grocery stores” but focusing primarily on how this is a result of structural racism with no mention of how grocery stores might be remedied); David Dante Trout, *Ghettos Made Easy: The Metamarket/AntiMarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 473 (2000) (noting as part of a general overview of land use theory that “ghetto supermarkets . . . consistently sell poor quality goods at such high prices that ghetto consumers will conduct elaborate schemes to reach supermarkets in middle class

two articles have mentioned solutions, and even then, only in passing. For instance, the article *Fighting Childhood Obesity through Performance-Based Regulation of the Food Industry* lists ten solutions that the authors call “command and control” theories for dealing with the obesity epidemic, such as subsidizing grocery stores to enable them to sell fruits and vegetables.¹⁵ However, they ultimately reject the “command and control” solutions in favor of “performance-based regulation,” which relies less on government intervention.¹⁶ Hence, the focus of the article is holding merchants accountable for selling “bad” foods to children, and does not directly address methods that would ensure that inner city residents receive the same quality and selection as their suburban counterparts.¹⁷ The second article, *The Fat Fight*, clearly notes that “[s]upermarkets in low-income and minority areas also have less fresh fruits and vegetables than supermarkets in wealthier and primarily white neighborhoods.”¹⁸ However, this is a general comparison and does not focus on comparing stores in the same chain. Moreover, the article suggests that the federal government use its spending powers to promote the use of fruits and vegetables in inner city markets, but the three-paragraph proposal is vague and does not focus on the problem of intra-chain discrimination.¹⁹

A similar gap exists in the discrimination literature. Much has been written about the discrimination African Americans and Latinos face in daily life in areas including banking,²⁰ environmental issues,²¹ health care,²²

areas,” but providing no central focus on the grocery store issue); Sayward Byrd, Comment, *Civil Rights and the “Twinkie” Tax: The 900-Pound Gorilla in the War on Obesity*, 65 LA. L. REV. 303 (2004); Andrea Freeman, Comment, *Fast Food: Oppression through Poor Nutrition*, 95 Cal. L. Rev. 2221, 2240 (2007) (noting that local inner city grocery stores cannot afford to stock fresh fruits and vegetables, but focusing primarily on fast food).

15. Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity through Performance-Based Regulation of the Food Industry*, 56 DUKE L.J. 1403, 1410 & n.25 (2007).

16. *See id.*

17. *Id.* at 1410 n. 25 & 1439–43. The article mentions subsidizing grocery stores in low income areas. However, after the brief mention, the bulk of the article focuses on assigning businesses a share of the blame for selling junk food to children. Moreover, the subsidy proposal is focused on corner stores and convenience stores, not grocery stores.

18. Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Program*, 112 PENN ST. L. REV. 529, 540 (2007).

19. *Id.* at 577 (mentioning the encouragement of fruit and vegetable consumption in inner cities but not focusing on chain stores as “chains avoid the inner city”).

20. *See, e.g.*, Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121 (2004); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending*, 87 MINN L. REV. 1 (2002).

21. *See, e.g.*, Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); Julie Hurwitz & E. Quita Sullivan, *Using Civil Rights Laws to Challenge Environmental Racism*, 2 J. L. SOCIETY 5 (2001).

22. Vernellia R. Randall, *Eliminating Racial Discrimination in Health Care: A Call for State Health Care Anti-Discrimination Law*, 10 DEPAUL J. HEALTH CARE L. 1 (2006).

municipal services,²³ public transportation,²⁴ shopping,²⁵ and taxicab service.²⁶ However, the discrimination discourse has not yet focused on the disparate treatment that chain grocery stores inflict upon their inner city customers on a daily basis.

Thus, there is no article that focuses squarely on the problem of inadequate service and quality in inner city stores and offers concrete solutions to those problems. This Article should help ignite the conversation.

This section will briefly summarize the problem addressed in this Article. Subsection A will provide a quick overview of the American obesity epidemic. Subsection B will examine the problems that African Americans, Latinos and others face when attempting to purchase food, with particular focus on the issues of inadequate selection and quality at supermarkets.

23. See Mary J. Cavins, *Annotations, Discrimination in Provision of Municipal Services or Facilities as Civil Rights Violation*, 51 A.L.R.3d 950 (1973).

24. See, e.g., Richard A. Marcantonio & Angelia K. Jongco, *From the Back of the Bus to the End of the Line: The Discriminatory Funding of Public Transit in California*, 34 HUM. RTS. Q. 10 (2007); Sean B. Seymore, *Set the Captives Free! Transit Inequity in Urban Centers, and the Laws and Policies which Aggravate the Disparity*, 16 GEO. MASON U. CIV. RTS. L.J. 57 (2005).

25. See, e.g., Regina Austin, *A 'Nation of Thieves': Securing Black People's Right to Shop and Sell in White America*, 1994 UTAH L. REV. 147 (1994); Claudine Columbres, *Targeting Retail Discrimination with Parens Patriae*, 36 COLUM. J.L. & SOC. PROBS. 209 (2003); James P. Nehf, *Effective Regulation of Rent to Own Contracts*, 52 OHIO ST. L.J. 751 (1991); Desiree A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989 (2004); Desiree A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001); Matt Graves, Note, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159 (2001).

26. See, e.g., Loren Paige Ambinder, Note, *Dispelling the Myth of Rationality: Racial Discrimination in Taxicab Service and the Efficacy of Litigation under 42 U.S.C. § 1981*, 64 GEO. WASH. L. REV. 342 (1996); Danita L. Davis, Note, *Taxi! Why Hailing a New Idea about Public Accommodation Laws may be Easier than Hailing a Taxi*, 37 VAL. U. L. REV. 929 (2003); Timothy Sandefur, *Can You Get There from Here? How the Law Still Threatens King's Dream*, 22 LAW & INEQ. 1 (2004).

A. The Obesity Epidemic

1. America's Obesity Problem

America is currently in the throes of an obesity epidemic.²⁷ America's struggle with weight is not a new one. The trend toward expanding waist-lines was noted as early as the mid-1970s.²⁸ However, the problem gained widespread attention in the early 1990s as Americans became increasingly overweight.²⁹ While only 10.4 % of men and 14.9 % of women were considered obese in the period from 1960–62, those numbers roughly doubled to 19.9% and 25.1% respectively, by 1994.³⁰ The most recent statistics indicate that 66.3% of the American population is obese or overweight.³¹

Although the current obesity trends are disconcerting, more troubling is the fact there is no relief on the horizon. The number of overweight and obese people in has *risen*, rather than declined, in recent years.³² Even more disturbing is the fact the number of obese people in America has steadily increased over this period as well.³³ From 1971 to 2004, the rate of overweight children aged 2–5 nearly tripled from five percent to 13.9%.³⁴ This trend is particularly troubling because an increase in childhood obesity predicts even higher increases in future adult obesity rates, as obese children are more likely to grow into overweight and obese adults.³⁵

27. Obesity can be defined in many ways, but is most commonly defined using the body mass index or "BMI" standard, which is calculated using a person's weight and height. Centers for Disease Control, *Overweight and Obesity*, BMI-Introduction, <http://www.cdc.gov/nccdphp/dnpa/obesity> (last visited July 8, 2008). Obese adults have a BMI of more than 30. Overweight is defined as a BMI between 25–29. Centers for Disease Control, *Overweight and Obesity: Defining Overweight and Obesity*, <http://www.cdc.gov/nccdphp/dnpa/obesity> (last visited July 8, 2008).

28. Shiriki Kumanyika, *Minisymposium on Obesity: Overview and Some Strategic Considerations*, 22 ANN. REV. PUB. HEALTH 293, 294 (2001).

29. *Id.*

30. *Id.*

31. Centers for Disease Control, *NCHS Health E Stats*, Table 1, http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_adult_03.htm. (last visited July 8, 2008)[hereinafter NCHS Health E Stats].

32. *Id.* at Table 2.

33. Kumanyika, *supra* note 28, at 295.

34. NCHS Health E Stats, *supra* note 31.

35. Kumanyika, *supra* note 28, at 295; Karen Cullen et al., *Food Category Purchases Vary by Household Education and Race/Ethnicity: Results from Grocery Receipts*, 107 J. AM. DIET. ASSOC. 1747, 1747 (2007) ("Overweight youth are likely to remain overweight as adults . . .").

2. The Causes

Having considered the extent of the overweight and obesity problem, the causes of the phenomenon must be considered. The most obvious cause is “an imbalance between energy intake and energy expenditure.”³⁶ In plain English, individuals are taking in more calories (through food) than they are using (through activity and exercise). Hence, many of the causes of obesity “operate at the level of individual lifestyle choices.”³⁷ However, the public health literature acknowledges that while individual choices do play a role, the causes of obesity are “multifactorial,” and include genetics and the local environment.³⁸

One of the most studied aspects of the local environment has been the food resource environment. This environment includes the number and type of food stores in a neighborhood, as well as the variety, types, and quality of foods available in those stores.³⁹ The studies note that “[b]y ignoring the food environment, nutrition education programs designed to encourage healthier eating habits may be ineffectual, not because consumers are unresponsive to educational efforts, but because the food environment creates extra barriers to their adoption.”⁴⁰ The research provides “increasing evidence that neighborhood resources condition those [food] choices.”⁴¹ One article states that “variations in access to healthy

36. Maida Galvez et al., *Race and Food Store Availability in an Inner-City Neighborhood*, 11 PUB. HEALTH NUTRITION 624, 624 (2008).

37. Sanae Inagami et al., *You Are Where You Shop: Grocery Store Locations, Weight, and Neighborhoods*, 31 AM. J. PREV. MED. 10, 10 (2006).

38. Elizabeth Baker, *The Role of Race and Poverty in Access to Foods that Enable Individuals to Adhere to Dietary Guidelines*, 3 Preventing Chronic Disease 1 (2006), available at http://www.cdc.gov/pcd/issues/2006/jul/05_0217.htm. See also Kimberly Morland et al., *Supermarkets, Other Food Stores, and Obesity: The Atherosclerosis Risk in Communities Study*, 30 AM. J. PREV. MED. 333, 333 (2006) (“The high prevalence of obesity results from the interaction of environmental, behavioral, and genetic factors. Although genetic factors are important . . . the contextual effect of residential areas create the context for the population distribution of adiposity.”).

39. See Simone French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309, 309–10 (2001) (noting that “eating-related” environmental influences include “trends in the food supply and eating away from home; food advertising, promotion, and education; and food pricing.”); Kimberly Morland et al., *The Contextual Effect of the Local Food Environment on Residents’ Diets: The Atherosclerosis Risk in Communities Study*, 92 AM. J. OF PUB. HEALTH 1761, 1762 (noting that places considered as part of the food environment are, inter alia, “supermarkets, grocery stores, convenience stores, and specialty food stores.”).

40. Karen Jetter & Diana Cassady, *The Availability and Cost of Healthier Food Alternatives*, 30 AM. J. OF PREVENTIVE MED. 38, 43 (2006).

41. Inagami, *supra* note 37, at 10. See also Baker, *supra* note 38, at 2 (“[R]esearchers have suggested that the ability to make healthy choices is influenced not only by the location of the food outlet but also by the selection of items in the outlet.”); *id.* at 7 (“[I]t may not be the location of the food outlets but the selection of food in the outlets that is associated with the ability to meet recommendations on dietary intake.”); LaVona Blair Lewis

foods have been demonstrated to influence observed food choices . . . The food options available at these [markets] almost certainly influence people's choices of what they consume on a day to day basis."⁴²

The point on "choice" is critical. Conventional wisdom states that food purchasers are free to choose among a variety of foods. Indeed, one article has noted:

The basis of the obesity defense is that the consumers are free to choose and are capable of saying no . . . The key argument is that everyone has personal responsibility for his or her eating habits and is free to choose among the available foods. The notion of freedom to choose is codified in expert panel and agency reports that exhort the public to "choose" healthy as opposed to unhealthy foods.⁴³

However, this view overlooks the fact that choices in the food context, as choices in other areas of life, operate under constraints. Indeed, it has been noted that while "[f]ood is arguably the most critical 'thing that promotes health' . . . in urban areas food choice is often severely constrained."⁴⁴ While "[l]attitude in personal choices related to eating and physical activity tends to be greatest among the socially advantaged,"⁴⁵ the converse is also true. The disadvantaged struggle to find and afford healthy foods. Indeed, it has been noted that "foods recommended by health authorities are sometimes more expensive and less available in poor areas."⁴⁶

If the food environment influences food choice, the components of the food environment must be examined. While people obtain food from numerous sources, "[t]he presence of food stores, and the availability of healthful products in those stores, appear to be important contributors to healthy eating patterns among neighborhood residents."⁴⁷ Furthermore, "[t]he spatial accessibility of supermarkets and the availability, selection, quality, and price of foods at retail outlets are important components of

et al., *African Americans' Access to Healthy Food Options in South Los Angeles Restaurants*, 95 AM. J. PUB. HEALTH 668, 668 ("[W]hen nutritional resources are limited . . . the environment makes it more difficult for residents to sustain any effort to eat a healthy diet."); Adam Drewnowski & Nicole Darmon, *Food Choices and Diet Costs: an Economic Analysis*, 135 JOURNAL OF NUTRITION 900, 900 (2005) ("Rising obesity rates have long been linked to the food environment.").

42. David C. Sloane et al., *Improving the Nutritional Resource Environment For Healthy Living*, 18 J. GEN. INTERNAL MED. 568, 569 (2003).

43. Drewnowski & Darmon, *supra* note 41, at 903.

44. Eisenhauer, *supra* note 5, at 125.

45. Kumanyika, *supra* note 28, at 299.

46. Morland, *supra* note 39, at 1761; See also Karen Glanz, *Nutrition Environment Measures Survey in Stores (NEMS-S)*, 32 AM. J. PREV. MED. 282, 287 (2007) ("Previous studies have shown healthful foods are less available in low-income or minority neighborhoods.").

47. Glanz, *supra* note 46, at 282.

community food security.”⁴⁸ Finally, supermarkets are a primary source of food. Nearly sixty percent of all of the dollars spent on foods to be consumed at home are spent at supermarkets.⁴⁹ Moreover, in 2007, chain supermarkets accounted for nearly eighty-two percent of all grocery stores.⁵⁰ Thus, any serious discussion of combating obesity in America must discuss the impact that grocery stores have on the foods available for consumption. Since grocery stores provide such a significant portion of the food Americans consume, if Americans are to eat healthier diets, grocery stores must provide healthy options for purchase.

B. How Grocery Stores Complicate the Problem of “Choice”

As previously stated, it would be easy for one to argue that the relationship between grocery stores and obesity is overstated. The argument could be structured as follows: “A person entering a grocery store is not forced to buy particular items. A person can buy apples or apple pie, rice cakes or cupcakes, baked chicken or fried chicken.” This logic may seem attractive because in the abstract, people do have the ability to choose the foods that they consume. However, this theory assumes that all persons have access to the same foods.

The poor—in particular poor African Americans and Latinos residing in America’s inner cities—are not equally situated when it comes to food access. “Communities with higher proportions of African Americans have . . . fewer supermarkets and may have more expensive and lower-quality foods for sale.”⁵¹ Similarly, “neighborhoods with large black populations will also find, on average, higher prices, and sizes, dirtier stores, and worse quality of fresh products.”⁵² Finally, “[w]ealthier neighborhoods have more high-quality grocery stores per capita, with fresh fruits and vegetables available in greater variety. In contrast, poorer urban . . . areas may have few or no grocery stores with poorer quality foods and limited selection of produce.”⁵³ Thus, poor persons of color face three major

48. Shannon N. Zenk et al., *Fruit and Vegetable Access Differs by Community Racial Composition and Socioeconomic Position in Detroit, Michigan*, 16 *ETHNICITY & DISEASE* 275, 275 (2006).

49. ERS/USDA Briefing Room—Food Marketing System in the U.S.: Food Retailing, [http://www.ers.usda.gov/Briefing/FoodMarketingSystem/foodretailing .htm](http://www.ers.usda.gov/Briefing/FoodMarketingSystem/foodretailing.htm) (click “Download an excel file” under “Foodstore sales by segment, 2005.”) (last visited Jul. 8, 2008).

50. Food Marketing Institute, *Facts & Figures: Key Facts, Number of Stores*, http://www.fmi.org/facts_fig/keyfacts/?fuseaction=stores (last visited Jul. 8, 2008).

51. Zenk et al., *supra* note 48, at 275.

52. Bruce F. Hall, *Neighborhood Difference in Retail Food Stores: Income versus Race and Age of Population*, 59 *ECON. GEO.* 282, 294 (1983).

53. Adam Drewnowski & Anne Barratt-Fornell, *Do Healthier Diets Cost More?*, 39 *NUTRITION TODAY* 161, 166–67 (2004).

problems in obtaining food: 1) a lack of stores in their neighborhoods; 2) higher prices; and 3) a narrower selection of inferior goods when stores are present. This Article will focus on the third problem.

This Article presupposes that when a grocery chain decides to locate in a low income area, that decision triggers an obligation to provide the same basic selection of goods and the same quality of goods and services in that area as it would in any other area. Thus, that problem is the focus of this Article.

1. Exploration of Studies

This section will examine studies comparing the quality and selection of foods at chain stores in inner cities to chain stores in other areas. While these studies are not yet numerous, their impact is undeniable. The goal of this discussion is two-fold: 1) to demonstrate the existence of issues with respect to the availability; and 2) to demonstrate that the problem is not isolated to one city or one part of the country.

a. Washington, DC and San Francisco

The problems of inequality in food access and food quality are not new. A 1969 Congressional Report by the Committee on Government Affairs outlined the problems experienced by shoppers at chain grocery stores in Washington, D.C. and San Francisco.⁵⁴ The report began by noting that consumers in "low-income, inner-city areas are frequently sold lower quality merchandise."⁵⁵ The report discussed the availability of advertised items, as well as the quality of the items provided.

With respect to availability, the study found that many advertised items were not available in inner city chain grocery stores. The report began by noting that when all of the chain stores in San Francisco were combined, an average of six percent of the advertised items were not found on the shelves.⁵⁶ The report continued to note that when the results were analyzed by location and income, it was clear that "[c]onsiderably more items were unavailable in low income areas."⁵⁷ In San Francisco, poorer consumers were two percent less likely to find advertised items than their counterparts in wealthier areas.⁵⁸

54. Staff of H. Comm. On Govt. Operations, 91st Cong., Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco (1969) [hereinafter *Food Chain Selling Practices*].

55. *Id.* at 3.

56. *Id.* at 6, 29.

57. *Id.* at 30.

58. *Id.* at 30.

The difference in Washington, D.C. was more stark. "For all chain-stores surveyed in Washington, 14 percent of items advertised were unavailable."⁵⁹ When availability in higher income areas was compared to that in lower income neighborhoods, a large disparity was apparent. While the stores in Washington, D.C.'s wealthier neighborhoods experienced only eleven percent unavailability, stores in the poorer areas were missing twenty-three percent of the advertised items.⁶⁰

In addition to availability, the report examined the quality of the merchandise offered by the stores in various areas of each city. The study began by noting that prior studies conducted by the Bureau of Labor Statistics and the USDA, "contain[ed] some indication that quality may be inferior in low-income stores."⁶¹ In its own study, the Committee found that "hardly any 'prime' meats are sent to low-income area stores."⁶² In addition, "[a] little over ten percent of the meat products surveyed in the lower income stores were reported as having a "fair" or "poor" appearance. In higher income area stores this finding was reported for about seven percent of the items surveyed."⁶³ Despite these findings, the Committee was reluctant to contribute any lack of quality to malfeasance by the store chains, choosing instead to focus on consumer preferences and patterns and poor store management as an explanation.⁶⁴

With respect to produce, the Committee noted that "some crates of premium quality produce might be sent mainly to high-income areas."⁶⁵ However, the Committee declined to find this action was a result of discrimination by the stores.⁶⁶

In summary, the beginnings of a problem with supermarket availability and quality were outlined as early as 1969. Since that time, the problems have become more stark, and the literature has expanded to reflect the continuing disparities.

59. *Id.* at 6, 29.

60. *Id.* at 30.

61. *Id.* at 37. The prior studies had noted that while only two percent of high-income areas had meat with excessive fat content, seven percent of the lower-income stores carried that product. Moreover, while seven percent of the produce in the higher income areas studied was considered poor, that number increased to ten percent in the lower income areas. *Id.*

62. *Id.* at 37.

63. *Id.* at 38.

64. *Id.* at 38-39.

65. *Id.* at 38.

66. *Id.*

b. Augusta, GA

A 2003 study compared six stores in Augusta, Georgia—three stores each from two different grocery chains.⁶⁷ Then, the three stores from each chain were divided into three socio-economic status (SES) groups based on available census data.⁶⁸ For each chain, the study included one store in a high income neighborhood, one store in a middle income neighborhood, and one store in a low income neighborhood for each of the two chains.⁶⁹ The census data conclusively showed that the low-income neighborhoods had a higher concentration of non-white residents.⁷⁰ The low-income census tracts had minority populations of 59% and 89%, whereas the high-income census tracks claimed fewer than 20% minority residents.⁷¹

The researchers asked the study participants to evaluate strawberries, bananas, and green grapes⁷² purchased at each of the stores for appearance and taste on a nine-point scale, with 1 being “extremely rotten” and 9 being “extremely fresh.”⁷³ The researchers devised a blind study, so the evaluators were not told beforehand which produce originated from which stores.⁷⁴

For appearance, the high-income stores received an average score of 4.74.⁷⁵ The appearance of the food at the medium-income stores was rated 3.30.⁷⁶ The low-income stores received the lowest score, 2.46.⁷⁷ The results were similar for the taste of the food.⁷⁸ The food from the high-income stores received a 4.50, the highest scores for taste.⁷⁹ The middle-income stores received a 3.47.⁸⁰ The low-income stores again fell into last place, scoring only 2.53.⁸¹

67. Richard Topolski et al., *Grapes of Wrath: Discrimination in the Produce Aisle*, 3 ANALYSES OF SOCIAL ISSUES AND PUB. POL'Y 111, 113-14 (2003). The authors did not identify the chains that were visited during the study.

68. *Id.* at 113.

69. *Id.* at 113-14.

70. *See id.* at 114.

71. *See id.*

72. *Id.* at 113. While this study focused solely on fruit, the authors “believe[d] that the results could easily be extended to other forms of perishable foods.” *Id.* at 116-17.

73. *Id.* at 114.

74. *Id.*

75. *Id.* at 115.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

While these quantitative data clearly demonstrate that the appearance and taste of the food increases as the income level increases,⁸² the qualitative reports from the study also bolster this conclusion. The Augusta study revealed that the participants often declined to taste the produce from the low-income markets.⁸³ In fact, three participants so flatly refused to taste the food from the low-income markets that those foods had to be dropped from the study.⁸⁴ The fact that some of the participants deemed the subject food unfit for consumption speaks volumes about what the poor encounter in grocery stores on a regular basis.

Finally, the Augusta study connected the lack of healthful food options to the diet and health of poor, non-white Americans. The study stated that while federal guidelines recommend two or more servings of fresh fruit daily, "African Americans are less likely to meet this guideline on a consistent basis than Caucasians . . . The scarcity of adequate fresh fruit options may be one of the factors influencing this disparity."⁸⁵ The authors further noted that the absence of options was not without consequence. They stated:

In the absence of fewer quality perishable goods, such individuals may resort to purchasing nutritionally inferior grocery items such as processed or junk foods . . . As a result, they will have reduced intake of vitamins and minerals considered essential for a maximally healthy development. In addition to the personal cost to these individuals, *there exists a potential for the incursion of long-term societal costs in areas such as health care and education.*⁸⁶

Thus, when adequate food is not provided equally across the nation, there is a possibility that we will all pay the price.

c. Detroit

The Detroit News studied the issue of grocery stores in that city as part of its 2001 "Left Behind" series on poverty in the city.⁸⁷ The series

82. *Id.* at 116. The authors stated, "[c]onsistent with our hypothesis, the results indicate that participants rated produce from supermarkets in low SES neighborhoods as both appearing and tasting less fresh than their counterparts in high SES neighborhood supermarkets." *Id.*

83. *Id.* at 116.

84. *Id.*

85. *Id.* at 118.

86. *Id.* at 117 (emphasis added).

87. Gregg Krupa, *Groceries Cost more for Poor*, DETROIT NEWS, Aug. 21, 2001, available at <http://www.detroitnews.com/special-reports/2001/poverty/821lead/821lead.htm> (last visited July 19, 2007).

began by noting the dearth of grocery stores in the areas.⁸⁸ However, it continued to state, "It is not just a question of proximity and price, but also choice and selection . . . Inner-city stores tend to get the bottom of the range of vegetables and meat."⁸⁹ The article continues on to state:

A frequent complaint of grocery shoppers in poorer areas is that produce is of poor quality. There was also some evidence [of] that at the Farmer Jack on Joseph Campau [an inner city grocery store], where much of the corn and all of the watermelon was far browner than the same produce at the two Farmer Jacks in Macomb County [a suburban area], on previous days.⁹⁰

Thus, the Detroit report also demonstrates that the problem is one that goes beyond any one city or section of the country.

d. New York, New York

In April 1991, the Department of Consumer Affairs for the City of New York commissioned a report entitled, "The Poor Pay More . . . for Less." Part I of the report studied the problems faced by poor in attempting to shop for groceries.⁹¹ The agency studied the availability of stores, the price differentials, and most important, the quality of the groceries.⁹² The study concluded that the selection and quality of the goods in the inner city was inferior to that in the suburbs. To wit:

Less expensive (and more fatty) bacon is sold instead of the brands seen at supermarkets elsewhere. Fresh produce is especially limited, often with fresh vegetables such as spinach unavailable. The fresh produce that is displayed is, we found, often not fresh; lettuce is commonly wilted, carrots and celery rubbery, broccoli yellowed, if there is any at all.⁹³

The study then compared the differences between the goods that were sold at the stores. The study conducted a "special comparison" between an A&P market in Greenwich Village to a similarly sized A&P market in Harlem.⁹⁴ The researchers found that the Harlem store had more canned

88. *See id.*

89. *Id.* (quoting Peter K. Eisenger, Wayne State University Professor and author of TOWARD AN END OF HUNGER IN AMERICA).

90. *Id.*

91. New York Dep't of Consumer Affairs, *The Poor Pay More . . . for Less, Part 1: Grocery Shopping* (April 1991) [hereinafter *Poor Pay More*].

92. *Id.* at 27.

93. *Id.* at 28.

94. *Id.*

goods, more snack foods, and more candy.⁹⁵ In fact, the Harlem store had candy in each checkout aisle, compared to only two aisles in the Greenwich store.⁹⁶ The Greenwich Village store had a “wide selection” of breads, including several types of wheat breads, while the Harlem store with a “smaller selection” was noted to have possibly only one brand of whole wheat bread.⁹⁷ Moreover, while the Greenwich store had an “ample” supply of alternative milks—e.g., soy milks—the Harlem store had a “smaller” supply.⁹⁸

In addition, the Harlem store had fewer types of produce available. While the Greenwich Village store had four types of apples and three types of grapes, the Harlem store had one less variety of each fruit.⁹⁹ In addition, the Harlem store did not have eggplant, snow peas, corn, or celery, and had fewer kinds of lettuce.¹⁰⁰ With respect to meat, the Harlem store emphasized pork and had a “small” chicken selection, compared to the “large” chicken selection in Greenwich Village.¹⁰¹ Moreover, unlike the Greenwich store, the Harlem store had no fresh fish.¹⁰²

e. Summary

The foregoing studies demonstrate three things quite clearly. First, when shopping for food, poor persons in the inner cities face a disparity in selection. The supermarkets in their neighborhoods do not carry the same products as their suburban counterparts, even though both are part of the same chain. Second, when perishable products are carried, the products in the inner city grocery stores are inferior to those that are sold in more affluent, more racially homogenous areas even though stores in both neighborhoods are part of the same chain. Finally, these studies come from San Francisco, California, Washington, D.C., Augusta, Georgia, Detroit, Michigan, and New York, New York. These are cities of varying sizes, ethnicities, and geographical regions. When these studies are taken together, it cannot be argued that this is a local or regional problem confined to one city or one part of the country. Rather, the fact that similar results were obtained in quite different areas of the country demonstrates that this is a national, rather than a local problem.

95. *Id.* at xix app. d.

96. *Id.*

97. *Id.* Please note that “possibly” is used because the researchers did not consistently record whether the bread was white or wheat, but where noted, the Greenwich store is clearly at an advantage.

98. *Id.*

99. *Id.* at xix–xx.

100. *Id.* at xx.

101. *Id.*

102. *Id.*

2. Rebuttals

While the facts and figures put forth in the foregoing section paint a compelling picture, some may be wary of holding chain stores responsible for current disparity for a variety of reasons. However, these criticisms can be refuted.

First, critics may assert that stores, as businesses, have no obligation to stock products that will not sell. The reasoning goes, "If people won't eat these foods, stores shouldn't stock them and let them go to waste." However, there is little, if any, evidence that the poor care less about what they eat than other groups. One study noted that "fruits and vegetables were consistently the most frequently offered definition of healthful eating regardless of income or race."¹⁰³ Thus, the poor do desire healthy food options.¹⁰⁴ Moreover, lower income shoppers desperately want healthy foods in their neighborhoods. One Minnesota study provided the following first person accounts:

See, my thing is fruits and vegetables. I don't care if I have meat or not, that's not the issue for me, okay, so I would probably want a big drive of fresh, I'm talking about all kinds of lettuce, not just your normal iceberg. I want variety. I want the variety of foods that I like. I like guavas. I like pineapples. I like kiwi, mango . . . I want variety. That's what I would have . . .

"I really like to have organic produce or whatever . . . there's nothing like that around here

"I want to see fresher fruits and vegetables and more choices in the stores because they're limited in the stores as to what you can buy."¹⁰⁵

Therefore, it simply cannot be said that poorer people do not care for healthier foods.

103. Nicole Eikenberry & Cheryl Smith, *Healthful Eating: Perceptions, Motivations, Barriers, and Promoters in Low-income Minnesota Communities*, 104 J. AM. DIET. ASSOC. 1158, 1160 (2004).

104. Indeed, an older government study showed that both food stamp recipients and those not receiving food stamps spent roughly the same amount—less than two percent of the grocery bill—on green vegetables. See Paul E. Nelson, Economics, Statistics, and Co-operatives Service, U.S. Dep't of Agric., *Do Food Stamp and Other Customers Buy the Same Products in Supermarkets?*, Agric. Econ. Report No. 421 (March 1979), available at http://naldr.nal.usda.gov/NALWeb/Agricola_Link.asp?Accession=CAT87202104 (last visited Aug. 13, 2008).

105. Deja Hendrickson et al., *Fruit and Vegetable Access in Four Low-income Food Deserts Communities in Minnesota*, 23 J. AGRIC. & HUMAN VALUES, 371, 377 (2006).

Second, merely assuming that the poor do not like healthier items because these items sometimes fail to sell at inner city stores neglects an important reality. When foods are not available in low income neighborhoods, the poor will often travel to stores outside of their neighborhoods.¹⁰⁶ Thus, at present, it is almost impossible to know whether these items would sell well at these stores or not. So, this is a classic “chicken or egg?” situation. Since stores in poor neighborhoods currently do not stock a variety of fresh items, this question cannot be satisfactorily answered until the chain stores provide the same selection and quality of food in all neighborhoods.

Third, there is an argument that cultural norms must be respected. For example, the vice president of a New York City grocery store chain was quoted as saying, “Supermarkets sell what the customer wants. If their ethnic background is such that they buy sweets, that’s what you have to sell. For example, Hispanics drink sweet sugary sodas, and that’s what you have to sell.”¹⁰⁷ Studies have shown that different cultures have different norms when it comes to food.¹⁰⁸ However, cultural differences do not necessarily translate into a total lack of concern about healthy eating. Indeed, one study demonstrated that while African Americans have a rich tradition of “soul food,” foods that are generally fatty and high in calories and sodium, African Americans were willing to change their practices slightly—for instance, by substituting turkey for pork—to eat healthier while preserving the cultural heritage.¹⁰⁹ Thus, any “cultural concerns” should not be a barrier. Cultural practices and healthy eating from a well-stocked grocery store can co-exist.

Finally, it may be said that stores, as businesses, should be most concerned about the “bottom line,” and not about the social ramifications of their decisions. However, continued discrimination in this area is bad business. A recent study in Madison, Wisconsin showed that African American shoppers, though initially less familiar with organic produce, were actually more open to the idea of buying organic than similarly situated Caucasian shoppers.¹¹⁰ The article ended by noting, “[I]f demand by African Americans for organic food is indeed limited by access and familiarity, and the generally positive attitudes found in this study are

106. See Eikenberry, *supra* note 103, at 1160 (With participant noting the time and cost associated with travelling to obtain the desired healthier foods).

107. See Poor Pay More, *supra* note 91, at 29 n. 35.

108. See, e.g., Collins Airhihenbuwa & Shiriki Kumanyika, *Cultural Aspects of African American Eating Patterns*, 1 ETHNICITY AND HEALTH 245 (1996)(describing the unique African American food traditions and habits).

109. Delores C.S. James, *Factors Influencing Food Choices, Dietary Intake, and Nutrition-Related Attitudes among African Americans: Application of a Culturally Sensitive Model*, 9 ETHNICITY & HEALTH 349, 363 (2004).

110. Lydia Zepeda et al., *Organic Food Demand: A Focus Group study Involving Caucasian and African American Shoppers*, 23 AGRIC. & HUMAN VALUES 385, 390–91 (2006).

widespread, African Americans could represent a potential market for organic foods.”¹¹¹

Moreover, “[s]ince all people require food on a daily basis and shop for it frequently, food retailers should be recognized as far more than simply another retail establishment.”¹¹² Grocery stores, like any business, have a duty to be good corporate citizens. This is especially true in an urban environment where the residents are more limited in their shopping options. Therefore, chain supermarkets have a special responsibility to their communities to not only serve them, but to serve them well.

3. Conclusion

In conclusion, the studies effectively show that residents of poorer neighborhoods—who also happen to be predominately African American and Latino—have less access to quality produce and healthy food items. As a result, poor non-whites are less likely to eat a healthy diet and therefore, more likely to encounter serious health problems related to diet, including obesity and its sequelae. Therefore, grocery stores should be compelled to provide similar selection and service in all neighborhoods that they serve.¹¹³

111. *Id.* at 392.

112. Heather Stouder, Office of the Mayor, Madison Wisconsin, *Grocery Stores in City Neighborhoods: Supporting Access to Food Choices, Livable Neighborhoods, and Entrepreneurial Opportunities in Madison, Wisconsin* at 8 (May 2004), available at <http://www.ci.madison.wi.us/planning/Grocery%20Store.pdf> (last visited Sept. 5, 2008).

113. It should be noted that the USDA has instituted a Farmer’s Market Nutrition Program (FMNP) to provide “fresh . . . locally grown fruits and vegetables to WIC participants.” See USDA, WIC Farmers’ Market Nutrition Program (2008), available at <http://www.fns.usda.gov/wic/WIC-FMNP-Fact-Sheet.pdf> (last visited Aug. 13, 2008); see also 7 C.F.R. § 248.1 (2009). However, this program is not sufficient to remedy the problems outlined in this Article for at least three reasons. First, the FMNP is limited to WIC recipients, and not all persons affected by the disparity in selection and quality at stores participate in WIC. Second, currently, the FMNP is offered only in “certain areas” of 46 participating states, and therefore is not a program that is available even to all WIC recipients. In fact, although there are nearly eight million WIC participants, only 2.5 million of these participate in the FMNP. See USDA, WIC Farmers’ Market Nutrition Program (2008), available at <http://www.fns.usda.gov/wic/WIC-FMNP-Fact-Sheet.pdf> (last visited Aug. 13, 2008). Therefore, a large number of WIC participants would not be able to take advantage of the FMNP. Finally, the FMNP, by its very nature, is a seasonal program. See USDA, Wholesale and Farmers’ Markets, <http://www.ams.usda.gov>, (follow “Wholesale and Farmers Markets” hyperlink; then follow “USDA Farmers Market” (noting that the USDA run Farmer’s Market is open from June to October each year); see also Yolanda Suarez-Balcazar et al., *African Americans’ Views on Access to Healthy Foods: What a Farmers’ Market Provides*, 44 JOURNAL OF EXTENSION Article 2FEA2, available at <http://www.joe.org/joe/2006april/a2.shtml> (last visited Sept. 5, 2008) (noting that farmers markets, while helpful, are “not a year-round option”). Therefore, the FMNP would represent a helpful resource for some, but surely not all, of the persons affected by the disparities discussed in this Article.

II. PROBLEMS UNDER EXISTING LAW

As will shortly be explained, our current legal framework is not equipped to address the problem of unequal selection and quality at grocery stores. Although a discussion of unworkable solutions may seem like a detour, this Article proposes new legislation, and it would be irresponsible to propose a change in the law unless truly needed.

Subsection A will examine the possibility of an equal protection claim. Subsection B will discuss the prospect of a fundamental rights claim. Subsection C will explain why current federal civil rights statutes are of little help. Finally, Subsection D will address the problems with seeking recourse through current administrative remedies.

A. Is Equal Protection Applicable?

The Fourteenth Amendment states that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁴ When a classification affects a particular group with immutable racial, ethnic, or religious characteristics, strict scrutiny is applied.¹¹⁵ As the literature outlined in the previous section indicates, African Americans, Latinos, and other communities of color are more likely to live in neighborhoods that provide inadequate choice and quality of goods.¹¹⁶ Because race plays a role, strict scrutiny analysis could be appropriate.

However, before the Fourteenth Amendment can be applied, any potential plaintiff must make two showings. First, the plaintiff must demonstrate that the unequal treatment was perpetuated by a state actor. Second, for racial discrimination claims, equal protection analysis requires a demonstration of discriminatory intent.¹¹⁷ Both requirements will now be examined.

114. U.S. CONST. amend. XIV, § 1.

115. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that “all legal restrictions which curtail the civil rights of a single racial group” should be subject to “the most rigid scrutiny”).

116. See *supra* Part II.B.1.

117. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that discriminatory impact without discriminatory intent is insufficient under the Fourteenth Amendment).

1. The State Action Problem

a. Grocery stores and the Government

The Food Stamp Program is a federal program which provides assistance to needy families for food purchases.¹¹⁸ The federal government funds the program by giving federal funds to state agencies, which then determine whether applicants are eligible for benefits.¹¹⁹ The benefits are provided to recipients in the form of vouchers or Electronic Benefits Transfer cards.¹²⁰ The Special Supplemental Nutrition Program for Women, Infants, and Children, commonly known as WIC, also provides vouchers for specific food items to eligible participants.¹²¹

These benefits can be redeemed at any authorized retail food store.¹²² To become an authorized retailer, a store must be approved by the federal government. The retailers are subjected to what has been called "extensive" regulation.¹²³ There are approximately 200,000 authorized Food Stamp retailers¹²⁴ and 46,000 authorized WIC retailers.¹²⁵

The role of chain supermarkets in these programs cannot be understated. One study notes that although chain supermarkets comprised only fifteen percent of authorized retailers in the Washington, D.C. area, that group of stores was responsible for sixty percent of food stamp redemptions.¹²⁶ Nationally, chain stores account for the same percent of eligible retailers, but seventy-seven percent of all redemptions.¹²⁷

118. See USDA, Quick Facts: Food Stamps, available at http://www.fns.usda.gov/cga/FactSheets/FSP_Quick_Facts.htm (last visited Aug. 13, 2008). After this Article was written, the Food Stamp Program was renamed the Supplemental Nutrition Assistance Program. See USDA, Supplemental Nutrition Assistance Program: Home, <http://www.fns.usda.gov/FSP/snap.htm> (last visited April 24, 2009) (explaining reasons for change and effective date of October 1, 2008). For convenience, the program will be referred to as the Food Stamp Program in this Article.

119. See *id.* (noting the division of responsibility between state and federal government); see also 7 U.S.C.A. § 2020 (a) (2005) (allocating eligibility determinations to the state government); JAMES B. WADLEY, 5 WEST'S FED. ADMIN. PRAC. § 5753 (4th ed. 2008).

120. See Wadley, *supra* note 119, § 5753.

121. See USDA Food and Nutrition Service, Nutrition Program Facts: WIC, <http://www.fns.usda.gov/wic/WIC-Fact-Sheet.pdf> (last visited Aug. 13, 2008) [hereinafter *USDA Nutrition Program Facts*].

122. See *id.*; See also Wadley, *supra* note 119, § 5753.

123. Wadley, *supra* note 119, § 5754.

124. USDA Food and Nutrition Service, Food Retailers in the Food Stamp Program: Characteristics and Service to Program Participants i (Feb. 1997).

125. See USDA Food and Nutrition Service, WIC at a Glance, <http://www.fns.usda.gov/wic/aboutwic/wicataloglance.htm> (last visited March 6, 2009).

126. See Margaret Andrews et al., USDA Econ. Research Serv., *Using USDA's Thrifty Food Plan to Assess Food Availability and Affordability*, 24 FOOD REV. 45, 48 (2001).

127. *Id.*

b. The Law on State Action

It is well settled that the Fourteenth Amendment applies only to state action.¹²⁸ Nevertheless, the Court has allowed private parties to be subjected to the terms of the amendment under certain conditions. First, the Court considers whether “the [challenged] deprivation . . . [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible”; and second, whether “the party charged with the deprivation . . . may fairly be said to be a state actor.”¹²⁹ The second prong asks whether the private entity has “performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government.”¹³⁰ The validity of the first prong has been challenged.¹³¹ Therefore, the analysis here will focus on the second

128. Civil Rights Cases, 109 U.S. 3, 11 (1883) (“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment.”).

129. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982)

130. *Brentwood Acad. V. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 305 (Thomas, J., dissenting). The *Brentwood* decision was controversial as it attempted to add another test to the existing list—“pervasive entwinement.” See *id.* at 298. This was controversial because, as the dissent stated, prior to *Brentwood*, the Court “ha[d] never found state action based upon mere ‘entwinement’” and that the new test “lack[ed] any support in our state-action jurisprudence.” *Id.* at 305, 312 (Thomas, J., dissenting). To date, *Brentwood* is the only case in which the Court has employed the test. Moreover, the Court did not state how much “entwinement” would be enough to generate a finding of state action. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* (3d ed. 2006). Therefore, this Article will focus on the tests that are clearly established.

131. For example:

The first prong doesn't seem meaningful. If I run somebody over in my car, I am “exercising a privilege having its source in state authority,” i.e., the driver's license. But this doesn't shed any light on the state action issue. Why should the resolution of that issue be in any way affected by the fact that I was driving rather than walking?

Craig Bradley, *Untying the State Action Knot*, 7 J. CONTEMP. LEGAL ISSUES 223, 237 (1996). Professor Bradley continues to state that by contrast, the second prong will generally be “dispositive of the state action issue.” *Id.* Furthermore, in their treatise, Professors Rotunda and Nowak state that the question posed in the prong “may well be of little practical importance in deciding any state action case.” JOHN E. NOWAK AND RONALD D. ROTUNDA, 2 *TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE* 1000 (4th ed. 2007).

Even if the prong remains valid, it could present problems for plaintiffs attempting to sue grocery chains. Again, the test requires an examination of “whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority.” *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1144 (3d Cir. 1995). “In other words, we ask, under what authority did the private person engage in the allegedly unlawful acts?” *Id.* As an example, the plaintiff in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972), failed to meet the first prong because “the Pennsylvania Liquor Control Board play[ed] absolutely no part in establishing or enforcing the membership or

prong. When grocery stores are considered, the most relevant focus for the second prong is the symbiotic relationship test.¹³²

The symbiotic relationship test originated in *Burton v. Wilmington Parking Authority*.¹³³ In *Burton*, the Eagle Coffee Shoppe ("Eagle") was sued by several African American plaintiffs for failing to serve them based on their race.¹³⁴ Eagle leased space in a parking garage owned by the city of Wilmington, Delaware.¹³⁵ During the construction of the garage, the city learned that it would not be able to afford the project unless it entered into

guest policies of the club that it licenses to serve liquor," and therefore there was no relationship between the state and the private discrimination. *Id.* (discussing *Moose Lodge No. 107* as a "good illustration of how this first prong of the inquiry is applied" despite the fact that the case predates *Edmonson v. Leesville Concrete*, 500 U.S. 614 (1991), which is generally credited with establishing the two-pronged approach).

A similar result might occur on the present facts. Potential plaintiffs might advocate for a broader reading of the term "authority." The plaintiffs would argue that the discrimination practiced by the grocery stores is aided and abetted by the fact that they are allowed to participate in and benefit from government programs. Perhaps the court could be persuaded to view "authority" as stemming from the mere relationship with a governmental entity.

Nevertheless, if the result in and subsequent interpretation of the *Moose Lodge No. 107* decision is any indication, plaintiffs will be unlikely to prevail on this point. In *Moose Lodge No. 107*, the Court found that while the state did provide liquor licenses, and that the liquor license benefitted the private discriminating party, the government did not assist the private entity in its discrimination. 407 U.S. at 175-76. Similarly, in the grocery store context, while the states and the grocery stores have a relationship, there is no state or federal law requiring poorer service in the affected neighborhoods. Thus, it will be difficult to prove that the lack of quality and variety in the stores exists due to some state fiat. If this is the touchstone, as it appears to be, plaintiffs will certainly encounter difficulty on this prong.

132. The public function test applies where a private entity "perform[s] a function that has been 'traditionally exclusively reserved to the State.'" *Brentwood*, 531 U.S. at 309 (Thomas, J., dissenting)(internal citation omitted). In *Brentwood*, the Court's most recent state action case, the dissent noted that "[t]he organization of interscholastic sports is neither a traditional nor an exclusive public function of the States." *Id.* (Thomas, J., dissenting). Here, similar to *Brentwood*, the government has not established a tradition of selling food to the public. Therefore, grocery stores would not become state actors under this test.

The government coercion test applies when the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). In *Blum*, the Court considered state funding and state regulation as indicators of this encouragement. *Id.* at 1007-1011; see also *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982) (explaining the approach used in the *Blum* decision). Retail stores may be subject to government regulation in some instances. However, in both *Blum* and *Rendell-Baker*, the Court was reluctant to find that even extensive regulations and significant funding met these goals. See *Blum*, 457 U.S. at 1007-1011; *Rendell-Baker*, 457 U.S. at 840-41.

133. 365 U.S. 715 (1961).

134. *Id.* at 716.

135. *Id.*

long-term leases with private commercial tenants.¹³⁶ Therefore, the city entered into a lease with Eagle wherein it promised to pay for the remaining construction, furnish utilities, and make repairs.¹³⁷ For its part, Eagle was given a tax exemption and allowed to occupy the premises.¹³⁸ The Court held that there was a high “degree of state participation and involvement in discriminatory action.”¹³⁹ Despite this strong language, the Court cautioned that given the “very ‘largeness’ of government,” there will be a number of relationships between government and private parties, and not all of these will result in a finding of state action.¹⁴⁰

c. Applying the Test

Grocery stores can make several arguments against a finding of state action. Even *Burton* recognized that mere cooperation with the government will not make a private entity a state actor.¹⁴¹ The fact that the stores must be licensed by the government will also be insufficient.¹⁴² Although the regulation of stores has been called “extensive,” the Court has held that even “extensive” regulation may not result in state action.¹⁴³

Nevertheless, there are facts which bring this issue closer to *Burton* than any of the other cases that followed. In *Blum* and *Rendell-Baker*, private entities were undertaking tasks—such as caring for the sick and educating children—that benefited the government. However, local gov-

136. *Id.* at 719.

137. *Id.* at 720.

138. *Id.* at 719-720.

139. *Id.* at 724.

140. *Id.* at 725-26. In *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974), the Court reaffirmed this when it stated that paying taxes to the state and regulation by the state were insufficient to come within the ambit of *Burton*. See *id.* at 357-58. Moreover, in *Blum*, the Court spoke approvingly of *Jackson* and noted that merely being funded by the state will not create mutual benefits. See *Blum*, 457 U.S. 991, 1011 (“That programs undertaken by the State result in substantial funding of the activities of the private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.”)(citations omitted). Additionally, *Rendell-Baker* distinguished *Burton* by noting that merely entering into a contract with the state will not convert a private actor into a public one. See *Rendell-Baker*, 457 U.S. at 843 (“Here the school’s fiscal relationship with the State is not different from that of many contractors performing services for the government. No symbolic relationship such as existed in *Burton* exists here.”).

141. *Burton*, 365 U.S. at 725-26 (“Owing to the very ‘largeness’ of government, a multitude of relationships might appear to some to fall within the Amendment’s embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present.”).

142. See *Moose Lodge No. 107*, 407 U.S. at 176-77 (refusing to find that State of Pennsylvania’s decision to license a private club discriminating against African Americans did not turn it into a state actor).

143. *Jackson*, 419 U.S. at 357-58.

ernment entities are able to—and frequently do—operate health care facilities and schools without assistance from the private sector. By contrast, it is doubtful that the same is true for chain supermarkets. The government is not likely to begin providing food directly to the needy. Since the government cannot operate the program without private involvement, courts may be more willing to find state action.

Moreover, the scope of the programs is further proof that the government and the chain supermarkets share a special, mutual, relationship. The Food Stamp and WIC programs are national programs serving millions of Americans.¹⁴⁴ As in *Burton*, where the government benefited from private acts, here, the benefit to the government is that it can operate its food assistance programs without directly dispersing the food to eligible participants. In effect, the government has created a private distribution chain for its commodities programs, and chain grocery stores are the largest link in that chain. Since chain stores account for more than seventy-five percent of food stamp redemptions, it is clear that if every grocery chain in America stopped accepting food stamps tomorrow, the program would surely enter a tailspin as the government's distribution chain would be irrevocably disrupted. Without the participation of the chain stores, the programs could not be operated at all, or would operate at a much higher—and perhaps prohibitive—cost. Therefore, the government benefits from the chain stores' decision to accept food stamps.

The chain stores also benefit. First, federal food assistance recipients represent a reliable and steady stream of customers for the retailers.¹⁴⁵ Moreover, these customers pay with government vouchers or electronic funds granted through Electronic Benefits Transfer.¹⁴⁶ These methods ensure that the retailer will be paid and protects the retailer against losses from “bounced” checks or other invalid instruments. Indeed, the EBT program was devised and marketed as a way to make it easier—and more profitable—for retailers to participate in the food stamp program. Prior to this program, they had to redeem paper instruments at a bank.¹⁴⁷

144. See USDA Food and Nutrition Service, *WIC and Retail Grocery Stores Fact Sheet*, <http://www.fns.usda.gov/wic/wicretailstoresfactsheet.pdf> (last visited Aug. 13, 2008) (noting that 8.1 million persons receive WIC benefits each month);

145. Nationally, there are 23.9 million persons that receive food stamps. USDA Food and Nutrition Service, Food Stamp FAQ, <http://www.fns.usda.gov/fsp/faqs.htm#1> (last visited Sept. 20, 2008). Moreover, since the majority of food stamp purchases are made at chain stores, see *Andrews*, *supra* note 127, there is surely a constant stream of people going to the chain stores.

146. See 7 U.S.C.A. § 2019 (West 2009).

147. Affiliated Computer Services, *The Check is Not in the Mail: How ACS EPC Solutions Save Government Agencies Money—and Still Get Benefits to Program Recipients Faster* (2008), available at <http://www.acs-inc.com/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=1531> (last visited Aug. 14, 2008) (noting that former paper system was very inconvenient for retailers and further noting EBT program is so successful that benefits under Temporary Assistance for Needy Families (TANF) should also be distributed in this manner); Ana R. Quiñones &

In sum, there are mutual benefits here. The stores can rest assured in the fact that they will have dedicated revenue with a streamlined delivery of that revenue. More important, the government avoids the cost and administrative burden of providing commodities directly to those in need. The government saves money; the stores receive a loyal base of customers with reliable payments. Given the benefits on each side, *Burton* might apply here.

2. The Discriminatory Intent Dilemma

Part II, *supra*, demonstrates that it is the pattern or practice of chain grocery stores to provide a poorer selection and quality of foods in areas that are heavily African American and Latino. Even so, there is no explicit policy requiring poorer service in these areas. When a decision is made that is ostensibly race-neutral, the plaintiff must prove both discriminatory impact upon the plaintiff and a discriminatory intent on the part of the defendant.¹⁴⁸ In the present case, while the discriminatory effect should be easily proven,¹⁴⁹ the discriminatory intent requirement is likely to be an obstacle to any person attempting to sue grocery stores using the Fourteenth Amendment.

a. The Law on Discriminatory Intent

In defining discriminatory purpose, the Court has stated:

“Discriminatory purpose” . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.¹⁵⁰

While the fact that a racial group is disproportionately affected by a regulation standing alone is generally not enough to generate strict scrutiny, the court may consider that fact in evaluating intent.¹⁵¹ Other factors to be considered include: the historical background of the decision, “particularly if it reveals a series of official actions taken for invidious

Jean Kinsey, *From Paper to Plastic by 2002: Retailers' Perspective on Electronic Benefit Transfer Systems for Food Stamps* (The Retail Food Industry Center, Working Paper 00-06, Aug. 2000) (noting benefits of EBT program to retailers, including increased sales for retailers and “lower costs to implementing the food stamp program”).

148. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976).

149. See *supra* Part II.B.1.

150. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

151. See *Washington*, 426 U.S. at 241.

purposes,"¹⁵² departures from normal procedures;¹⁵³ and the legislative or administrative history.¹⁵⁴

b. Application of the law

Proving that grocery stores intentionally provide poorer service in predominately African American and Latino areas "because of" the race of the persons living in those areas will be difficult. First, the reasons for the disparity should be examined. Several ostensibly race neutral reasons have been proffered. One potential explanation is the possibility that stores in the different neighborhoods are managed in different styles with different standards.¹⁵⁵ Of course, if the store is not properly managed, the quality and selection of the merchandise will be affected. The quality of management is ostensibly race neutral, as stores in any neighborhood could be poorly managed.

Second, it could be argued that the choice to send particular items to particular stores is not a matter of race, but of business. In studying this problem, Congress noted that while low-income stores did not have premium quality meats, this was likely due to "consumer demand patterns."¹⁵⁶ This would also be a non-racial motivation. Of course, stores are first and foremost businesses, and if they stock items that do not sell, they are not operating under rational business principles.

Third, in its studies, Congress could not find any evidence of discriminatory intent. When it looked at the issue, it found that none existed. Congress stated that while "premium" produce might be sent to higher income areas, general produce is "packed in crates or bags which are not susceptible to quality sorting by the chain. Furthermore, it is too expensive and uneconomical to repack older produce and ship it to other stores, so that transfers of old produce are unlikely to occur."¹⁵⁷

Taking all of the above together, it is difficult to argue that the stores have chosen and arranged their merchandise in this manner "because of" the race of the customers. Nevertheless, there is the strong counterargument that remarks such as "Hispanics enjoy sugary foods" could show that the choices are based on race in some manner. However, the rebuttal argument is that all grocery stores do try to stock the foods that are popular in a given community. For instance, a store in a neighborhood with a significant Jewish population might make more of an effort to stock Kosher

152. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

153. *Id.* at 265.

154. *Id.*

155. Topolski, *supra* note 67, at 117.

156. *Food Chain Selling Practices*, *supra* note 54, at 37.

157. *Id.*

items. Thus, it is difficult to say that the choice is “because of” race when there are also cultural eating patterns involved. To the extent that the cultural eating patterns are not based on stereotypes, but are based in fact, the line between racism and practicality might be too blurred to say that the stores’ actions are based on race.

A second counterargument is that it is difficult to understand how the same substandard management could be present in several very different store chains in very disparate parts of the nation. On some level, therefore, one could argue that there must be something more to the story, especially since the persons primarily affected by this disparity are primarily African American and Latino. However, the stores would likely have the better of this argument as well. In the absence of any proof of explicit discrimination, advocates for plaintiffs would need to examine whether some type of unconscious racial bias was at play.¹⁵⁸ However, the courts have not been diligent about recognizing and penalizing unconscious biases.¹⁵⁹ Moreover, even if the court were to determine that some form of unconscious bias was at play here, it would most likely determine that the bias is one against social status rather than race. All poor persons serviced by an inadequate store in one of these areas—regardless of race—would fall prey to the mismanagement issues at the local store. Therefore, proving the intent to discriminate on the basis of race might be an insurmountable task.¹⁶⁰

158. See Charles Lawrence, *The Id, The Ego, and Equal Protection*, 39 STAN. L. REV. 317, 329–336 (1987) (explaining the nature of unconscious racial biases)

159. See Eva Paterson et al., *The Id, The Ego, and Equal Protection in The 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1179 (2008) (“[W]e have yet to see the courts acknowledge evidence of unconscious or institutional bias where it matters most: in Equal Protection Doctrine.”).

160. As previously noted, the literature indicates that African Americans, Latinos, and other minority groups are more likely to live in neighborhoods that do not have adequate grocery stores. However, as indicated, the grocery store chains could respond to such an allegation by stating that the motivation is economic, rather than racial. If such an argument were to be accepted by the courts, rational basis review might be appropriate. When poor persons are burdened, rational basis review is utilized, as wealth is not a suspect classification. See *Dandridge v. Williams*, 397 U.S. 471 (1970). If the chain stores are assumed to be state actors, rational basis review would be appropriate. See also *Anderson v. USAir, Inc.*, 619 F. Supp. 1191, 1196 (applying rational basis review to private action after assuming state action is present).

The stores would have little difficulty making the argument that they would pass rational basis review for the lack of choice. They would merely need to assert that there are legitimate business reasons for their decisions to stock their stores in a particular manner. See *id.* at 1194–95 (noting that discrimination against the blind in airline exit row seating was justified by safety concerns). Similarly, grocery stores could argue that quality items do not sell, and therefore are not stocked. See *supra* Part II. The courts would be likely to agree that this is a rational business choice.

With respect to quality, the stores would have slightly more difficulty justifying why poorer quality merchandise is sold in the stores. However, they could assert that there is no

c. Summary

For the foregoing reasons, it would be difficult to sue grocery stores under an equal protection theory. While proving state action might be possible, there would be considerable difficulties in proving the requisite discriminatory intent. Therefore, other avenues should be considered.

B. Fundamental Rights Analysis

A fundamental rights claim by potential plaintiffs would also be likely to fail. It is difficult to identify a fundamental right, as the concept remains "vague."¹⁶¹ Nevertheless, the Court has devised a test to evaluate fundamental rights claims. In *Washington v. Glucksberg*, the Court stated that fundamental rights are "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"¹⁶² Moreover, the Court considers whether there has been "a careful description of the asserted fundamental liberty interest."¹⁶³

San Antonio v. Rodriguez is likely to be instructive here.¹⁶⁴ In *San Antonio*, the court considered whether education is a fundamental right.¹⁶⁵ The plaintiffs were children and parents in low-income Texas school districts.¹⁶⁶ At the time of the case, Texas funded its public schools through a financing scheme that included property taxes.¹⁶⁷ Due to intractable residential segregation along class lines, schools in high income areas always had more tax dollars than their counterparts in less affluent areas.¹⁶⁸ The plaintiffs argued that this arrangement deprived them of the fundamental right to an education.¹⁶⁹ The court, while recognizing the importance of

intent to treat their impoverished customers differently from anyone else. See, e.g., Thomas F. LaMacchia, Note, *Reverse Accommodation of Religion*, 81 GEO. L.J. 117, 125 (1992) ("[T]hrough the use of rational basis review in equal protection cases, the Court acknowledged that the government can *intentionally* discriminate against certain groups as long as the classification is rational.") (emphasis added). Again, the Congressional testimony would support this position. Therefore, the stores would be likely to prevail on this point as well.

161. NOWAK & ROTUNDA, *supra* note 131, at § 15.7.

162. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

163. *Glucksberg*, 521 U.S. at 720-21.

164. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

165. *Id.* at 29.

166. See *id.* at 4-5.

167. See *id.* at 5, 6-7.

168. See *id.* at 8.

169. See *id.* at 29.

education, held there was no fundamental right to education.¹⁷⁰ More important for present purposes, the Court stated,

Whatever merit appellees' argument might have if a State's financing system occasioned an *absolute denial* of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only *relative differences* in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire *the basic minimal skills necessary* for the enjoyment of the rights of speech and of full participation in the political process.¹⁷¹

Thus, while the Court apparently left the door open to a fundamental rights challenge on this issue if the state had completely denied an education, the Court was reluctant to engage in an analysis that would require evaluating the relative quality of a particular educational system. In essence, the Court held that even if there were a fundamental right to education, there would be no fundamental right to the best education possible—only that education minimally necessary to survive.

The courts are likely to follow this reasoning in the food context. Just as there is only the right to the most minimal education, it is likely that courts will find that there is only a right—if any—to the food minimally necessary to survive and subsist. Humans can live and survive—though perhaps not thrive—on the foods available at the average chain store. If *San Antonio* applies, it is unlikely that courts will find that there is a fundamental right to the best food.

Indeed, the *San Antonio* court seemed to anticipate this result in its opinion. In rejecting the fundamental right to an education, the court noted that if it were to do so, the floodgates might open on other types of fundamental rights claims. The court stated, “Furthermore, the logical limitations on appellees’ nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent *food* and shelter?”¹⁷² The Court’s language here strongly suggests that the judges were reluctant to recognize education as a fundamental right because it might then be forced to recognize rights to food and lodging. Although this appears to be dicta, with this precedent, potential plaintiffs will have difficulty proving that there is a fundamental right to healthy food.

170. See *id.* at 35.

171. *Id.* at 36–37 (emphasis added).

172. *Id.* at 37.

C. Civil Rights Statutes

1. Title II of the Civil Rights Act of 1964

In response to the Civil Rights Movement of the 1960s, Congress passed the Civil Rights Act of 1964.¹⁷³ Title II of the Act declared, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."¹⁷⁴ Where food is concerned, places of public accommodation were defined as "any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station."¹⁷⁵

Title II will provide little assistance to plaintiffs attempting to sue chain stores. First, the plain meaning of the statute does not include grocery stores of any kind. When speaking of eating establishments, the statute quite clearly speaks only to establishments "principally engaged in selling food for consumption on the premises." By contrast, grocery stores are engaged primarily in the business of selling food that will be consumed off-premises, specifically in the home.¹⁷⁶ Thus, grocery stores do not appear to come within the text of the statute.¹⁷⁷

Even if the meaning were not clear, the statute could not fairly be interpreted to include grocery stores. The proper use of accepted canons of construction would guard against any other finding. For instance, the canon "expressio unius est exclusio alterius" means that where a statute sets forth "a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions."¹⁷⁸ As

173. See 42 U.S.C.A. § 2000a, et seq (West 2009).

174. *Id.* § 2000a(a).

175. *Id.* § 2000a(b)(1)-(4). The remaining portions of the act concern hotels and other lodging establishments as well as theaters, stadiums and other places of entertainment. See *id.* § 2000a(b)(1)-(3).

176. Food Marketing Institute, Facts & Figures: Key Facts, Number of Stores, http://www.fmi.org/facts_figs/?fuseaction=superfact (last visited July 8, 2008).

177. See, e.g., Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 N.W. U. L. REV. 1283, 1415 (1996) (noting that "Congress knows how to write a statute that applies to retail stores if it wants to do so" and further "[t]he fact that it specifically listed a small number of establishments strongly suggests that it did not intend to regulate the conduct of other businesses").

178. NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007).

applied to Title II, the relevant “things” to which the statute clearly refers are restaurants, cafeterias, lunchrooms, lunch counters, and soda fountains. Grocery stores and other retail establishments are not mentioned. Since they are not mentioned, under the principle of “*exclusio unius*,” the courts should find that retail establishments were intended to be excluded.¹⁷⁹ Other canons of construction indicate a similar result.¹⁸⁰

Second, the legislative history of act is fairly clear. In his exhaustive analysis of the subject, Professor Joseph William Singer stated:

[T]he legislative history supports the notion that the list [in Title II] was intended to be exhaustive. The House Report accompanying the bill that eventually became Title II of the Civil Rights Act of 1964 specifically states that the bill “prohibits discrimination in enumerated public establishments.” The Report also refers to “specified places of public accommodation,” and notes that paragraph (b) “defines certain establishments to be places of public accommodation.” “Enumerated establishments,” “specified places,” and “defining certain establishments” clearly

179. J.W. Singer, *supra* note 177 (reaching the same conclusion through the use of the *expressio unius est exclusio alterius* canon).

180. *Id.* In addition to plain meaning and *expressio unius*, Professor Singer finds that three other canons would make it difficult to find that retail stores are within the reach of Title II. He states:

Third, terms that are defined in a statute have technical meanings that are intended to differ from their ordinary meaning. If a term is specifically defined in a statute, the court should use the technical, not the ordinary, meaning of the word. “Each of the following is . . .” is a typical way to introduce a definition section. Fourth, “every word and clause must be given effect.” If the list of covered establishments is not exhaustive, there was no reason to put them in the statute. The drafters could simply have described businesses that serve the public and be done with it. Illustration was not necessary, and if it were, the drafters could have stated that “places of public accommodation include, but are not limited to . . .” The existence of a short list must therefore be intended to exclude places that are not included in the list.

Fifth, “[s]tatutes are to be read in the light of the common law and a statute affirming a common-law rule is to be construed in accordance with the common law.” The common-law rule understood in 1964 to be the universal rule was that innkeepers and common carriers (and in some states, places of entertainment) had duties to serve the public without unjust discrimination, while other businesses did not. The only purpose of the 1964 Civil Rights Act was arguably to implement that aspect of the common-law rule while overturning the pieces of the common-law rule that held that segregation was a “reasonable regulation” of private property open to the public and that “separate” facilities were “equal.”

Id. at 1415–16. This analysis adds strong support to the points made in the text. Since grocery stores are a type of retail establishment, if the statute does not cover retail stores, grocery stores are necessarily excluded for the same reasons.

suggest an intent to cover only such establishments as are listed in paragraph (b). Nevertheless, the Additional Majority Views of Hon. Robert W. Kastenmeier criticizes Title II as "deficient in that it guarantees equal access to only some public accommodations, as if racial equality were somehow divisible." He states:

[T]he bill would allow discrimination to continue in barber shops, beauty parlors, many other service establishments, *retail stores*, bowling alleys, and other places of recreation and participation sports, unless such places serve food. It is hard to follow a morality which allows one bowling alley to remain segregated, while another bowling alley down the street which serves sandwiches must allow Negroes to bowl.¹⁸¹

As the history notes, the drafters were fully aware that retail stores were not covered under the proposed statute.

In sum, the plain text, the construction, and the legislative history of Title II all suggest that retail stores are not covered by the statute. Thus, an amended statute or new statute would be needed to address this problem.

2. Title VI of the Civil Rights Act of 1964

Title VI of the 1964 Civil Rights Act may will prove unhelpful to potential plaintiffs. Title VI of the Act states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁸² While there are arguments to be made here,¹⁸³ the plaintiffs

181. *Id.* at 1416–17 (emphasis added).

182. 42 U.S.C. § 2000d (1964).

183. Plaintiffs would have several arguments to make in support of applying Title VI on these facts. They will likely be able to show that the stores receive federal assistance. For instance, a license is not federal financial support. *See, e.g.,* Gottfried v. F.C.C., 655 F.2d 297, 312–313 (D.C. Cir. 1981) (noting that while a broadcast license was a valuable commodity, it did not constitute "federal financial assistance" for Rehabilitation Act or Title VI purposes). However, the stores, while they must be granted government approval to accept Food Stamp or WIC benefits, get more than a mere government license. As stated, they are paid in the form of government vouchers, coupons, or electronic benefits, which are more than a license. This direct relationship goes beyond the mere granting of a government license to engage in an activity.

Plaintiffs would also be able to demonstrate that the stores are recipients of this aid. While the stores may argue that they are, at best, indirect recipients of federal assistance. However, the Court's recent cases have held that under certain circumstances, indirect benefits can be covered under the statute. *See, e.g.,* Grove City College v. Bell, 465 U.S. 555, 596 (1984) (finding that colleges were recipients of federal aid because, though aid went to students first, the students were merely "conduits" for the funds that were intended for the

will likely fail as they will not be able to prove the required mental state for the statute. The Supreme Court has held that plaintiffs may assert a private right of action under Title VI.¹⁸⁴ However, where the action is initiated under Title VI directly, as opposed to one of the regulations promulgated under Title VI, the plaintiff must prove that the defendant acted with discriminatory intent.¹⁸⁵ Title VI employs the same discriminatory intent standard as equal protection under the Fourteenth Amendment.¹⁸⁶ For the reasons stated in the previous subsection, the plaintiffs cannot demonstrate discriminatory intent.¹⁸⁷ Therefore, any claim under Title VI will fail.

3. Sections 1981, 1982, and 1983

Section 1981 states that all persons “shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .”¹⁸⁸ Section 1982 states, “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”¹⁸⁹

a. Section 1981

A section 1981 claim will not prevail because section 1981 requires a demonstration of discriminatory intent.¹⁹⁰ The requirements for discriminatory intent under section 1981 are similar to those under the Fourteenth Amendment.¹⁹¹ As explained in the prior section, plaintiffs

colleges). Here, the Food Stamp and WIC recipients are conducting the aid to the stores, which are the ultimate beneficiaries, as they must be compensated for the goods they sell. Thus, the plaintiffs may prevail on this argument.

184. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

185. *Id.* at 280–81. *See also* Lewis and Norman, *supra*, § 4.9 (“[P]roof of a violation of the statute itself, as opposed to its implementing regulations, requires evidence in some form of discriminatory intent.”) (citing *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983)).

186. 9 WEST’S FED. ADMIN. PRAC. § 11841 (3d ed. 2001) (“Courts have held that Title VI adopts or follows the Fourteenth Amendment’s standard of proof for intentional discrimination.”).

187. *See supra* Part II.A.2.

188. 42 U.S.C.A. § 1981(a) (West 2009).

189. 42 U.S.C.A. § 1982 (West 2009).

190. *See Gen. Bldg. Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 382–83 (1982). *See also* RODNEY SMOLLA, FED. CIVIL RIGHTS ACTS, § 13.10 (3d ed. 2008).

191. *See id.*

would fail to demonstrate the required discriminatory intent.¹⁹² Thus, the claim under section 1981 will fail.¹⁹³

b. Section 1982

A potential section 1982 suit would probably fail as well, for the same reason as the 1981 claim.¹⁹⁴ However, there are independent reasons why there may be problems with a section 1982 claim.

192. See *supra* Part I.A.1.a.

193. There is at least one additional reason why the plaintiffs will not prevail. Section 1981 applies only to contracts. The section has been interpreted to cover both existing and proposed contracts. Plaintiffs could certainly argue that shopping in a grocery store presents at least a proposed contract. Indeed, at least one scholar has noted: "By stocking the shelves, a store makes an offer, or a promise, to sell. By picking up the item, the customer accepts, and makes a return promise to pay. The contract is made at that point, and the sale, a separate transaction, is completed at the checkout counter." Charlotte H. Sanders, *Come Down and Make Bargains in Good Faith: The Application of 42 U.S.C. § 1981 to Race and National Origin Discrimination in Retail Stores*, 4 HASTINGS RACE & POVERTY L.J. 281, 310 (2007).

While plaintiffs have a strong argument on the contract issue, their ability to succeed is anything but certain. The biggest potential problem is that in most of the cases, the plaintiffs were complaining about service received at a particular store in a chain. They were not, however, complaining that the treatment at one store did not comport with the treatment or service at another store in the same chain, as suggested by the thesis of the present article. It is possible for the plaintiffs to make this argument, but since this type of claim has been rarely—if ever—brought under section 1981, it is uncertain that the plaintiffs would prevail. With such little guidance, a court could hold for the plaintiffs just as easily as it could hold for the grocery stores.

194. As noted, claims under section 1981 and 1982 are construed in a similar manner. Most important for present purposes, both section 1981 and 1982 have been interpreted to require discriminatory intent. See, e.g., SMOLLA, *supra* note 190, § 13.24 (noting that since the decision in *General Building Contractors*, "most lower courts have read *General Building Contractors* as authority for the proposition that § 1982 claims also require proof of discriminatory intent") (citing *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Hamilton v. Svatik*, 779 F.2d 383, 387 (7th Cir. 1985)). However, some writers have opined that the question of whether actions under section 1982 require discriminatory intent has not been completely resolved. See, e.g., Terenia U. Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENVTL. L.J. 189, 217 (1998) ("Courts have split on which [intent] test is the appropriate one to prove a violation of section 1982."); Valerie P. Mahoney, Note, *Environmental Justice: From Partial Victories to Complete Solutions*, 21 CARDOZO L. REV. 361, 392 n. 221 (1991) ("Unfortunately, to prevail in a suit employing section 1982, plaintiffs *probably* must satisfy the onerous discriminatory intent standard.") (emphasis added) (citations omitted); Brian S. Prestes, Comment, *Application of the Equal Credit Protection Act to Housing Leases*, 67 U. CHI. L. REV. 865, 871 n. 47 (2000) ("Whether discriminatory intent . . . is an element of a *prima facie* Section 1982 claim remains unclear.") (citations omitted). If the requirement of discriminatory intent does apply to section 1982 claims, our grocery store plaintiffs will fail for the reasons previously described for section 1981. However, because the question is unclear, the remaining elements of the section 1982 claim will be discussed.

The plaintiffs will have difficulty with the “personal property” issue. “Applied in the context of a purchase of personal property, the elements would appear to be: 1) plaintiff is a member of a racial minority; 2) he sought to purchase personal property; 3) he was unable to purchase the property; and 4) the property remained available for sale to others.”¹⁹⁵ The “right to purchase . . . personal property” has been interpreted in a narrow fashion. In *Leach v. Heyman*’s, the court concluded the plaintiff could not prevail under § 1982 because he was able to purchase the items that he had selected.¹⁹⁶ “Nothing that he wanted to buy was withheld from him, or only made available to him on terms and conditions that differed from the terms and conditions pursuant to which it was available to others.”¹⁹⁷

Applied to the present issue, the result will likely be the same. The plaintiffs in this situation, even if they are confronted with a worse grade of food, are not prevented from making purchases. Thus, the chances of prevailing on this claim are weak.

c. Section 1983

The plaintiffs will also have difficulty prevailing under section 1983. Section 1983 provides for liability for any person who “under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . .”¹⁹⁸ The most relevant portions of the statute are the “color of law” requirement and the “rights, privileges, and immunities.”

The “color of law” requirement should be easily met by the plaintiffs. The Supreme Court has said that the “color of law” requirement is “identical” to the “state action” requirement of the Fourteenth Amendment.¹⁹⁹ In the prior section, this Article outlined why grocery chains might be considered state actors. Under current law, if the stores are

195. *Leach v. Heyman*, 233 F.Supp.2d 906, 911 (N.D. Ohio 2002).

196. *Id.*

197. *Id.*

198. 42 U.S.C. § 1983 (West 2009).

199. *Edmondson Oil Co.*, 457 U.S. at 929 (“Similarly, it is clear that in a § 1983 action brought against a state official, the statutory requirement of action “under color of state law” and the “state action” requirement of the Fourteenth Amendment are identical.”). See also MARY MASSARON ROSS & EDWIN P. VOSS, JR., *SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION* 23 (3d ed. 2006) (“The Supreme Court and the lower courts have generally treated color of state law and state action as meaning the same thing.”).

cloaked with state authority, this would bring them within the scope of section 1983.²⁰⁰ Thus, the plaintiffs could prevail on this point.

However, the “rights, privileges, and immunities” portion of the claim will be more difficult. It is well established that plaintiffs may assert Fourteenth Amendment rights under section 1983.²⁰¹ However, the Fourteenth Amendment claim was addressed earlier in this Article. As stated there, the Fourteenth Amendment claim would fail for lack of discriminatory intent.²⁰² Therefore, this is not an adequate ground to support the section 1983 claim.

A second avenue might be to find a federal law that would require grocery stores to refrain from discriminating among stores in its chains. Unfortunately, there is no statute that accomplishes this goal. However, the federal Food Stamp Act does have a provision stating that “in the certification of applicant households for the food stamp program, there shall be no discrimination by reason of race, sex, religious creed, national origin, or political beliefs.”²⁰³ The Court has stated that plaintiffs can use the Food Stamp Act to file a section 1983 claim.²⁰⁴ While the statute clearly prohibits “discrimination,” it references discrimination in “the certification of households” for benefits eligibility. It says nothing about discrimination in the quality or variety of foods that are available. Additionally, the plain meaning of the statute does not admit to any alternate interpretation. Therefore, plaintiffs are unable to seek relief through this vein.

Moreover, even if section 1983 were available on these facts, it would only help those who are actually food stamp program beneficiaries. While many of the persons affected by chain store discrimination may be food stamp beneficiaries, not all of them will be. Many of the “working poor” do not qualify for or apply for governmental nutrition assistance.²⁰⁵

200. See, e.g., *Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584 (10th Cir. 1999) (finding state action for § 1983 purposes where the defendant helped the state operate a drug treatment program).

201. *Ross & Voss, supra* note 199, at 15 (rights that may be enforced under section 1983 include “the Fourteenth Amendment rights to substantive and procedural due process and to the equal protection of the laws”).

202. See *supra* Part I.A.1.a. See also Mark M. Hager, *Harassment and Constitutional Tort: The Other Jurisprudence*, 16 *HOFSTRA LAB. & EMP. L.J.* 279, 307 (1999) (“A case of unconstitutional discrimination under § 1983 requires proof of discriminatory intent.”)

203. 7 U.S.C. § 2020 (c) (West, Westlaw through P.L. 110-260).

204. See 17 *FED. PROC. L. ED.* § 42:1025 (“Food stamp claimants may bring a civil rights action under 42 U.S.C.A. § 1983 against state officials for violations of the Food Stamp Act.”)(citing *Victorian v. Miller*, 813 F.2d 718 (5th Cir. 1987)). See also *Haskins v. Stanton*, 794 F.2d 1273 (7th Cir. 1986)(finding private right of action under Food Stamp Act); *Gonzalez v. Pingree*, 821 F.2d 1526 (11th Cir. 1987) (same). *But see* *Able Sales Co., Inc. v. Mead Johnson Puerto Rico, Inc.*, 420 F.Supp.2d 1 (D.P.R. 2006) (declining to find private right of action under WIC act); *Banco de Ponce v. Hinsdale Supermarket Corp.*, 663 F.Supp. 813 (1987) (same).

205. See Randy Albelda and Heather Boushey, *Bridging the Gaps: A Picture of How Work Supports Work in Ten States* 20-21, available at <http://www.bridgingthegaps.org/>

However, the bulk of “working poor” tend to live in neighborhoods that are likely to have moderate to high levels of poverty.²⁰⁶ Thus, they are likely to shop at the same places and face the discrimination as their neighbors. The relief should be made available to the widest population possible. Thus, on both law and policy, this is an inadequate remedy.²⁰⁷

D. Administrative Remedies

Federal regulations may provide some assistance, but ultimately lack the depth to adequately address the issue of store discrimination. There are several regulations and administrative proclamations that prohibit discrimination in the administration of the Food Stamp Program. For instance, regulations governing the Food Stamp Act state:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of the applicant or recipient to which these regulations apply. These regulations apply, but are not restricted, to *unequal treatment* in priority, *quality*, quantity, methods or charges for service, use, occupancy or benefit, participation in the service or benefit available, or in the use, occupancy or benefit of any structure, facility, or improvement.²⁰⁸

publications/nationalreport.pdf (last visited April 28, 2009) (noting that in the ten states surveyed, nearly 66% of the families did not qualify for Food Stamp benefits); see *id.* at 28 (discussing reasons why persons that do qualify for federal assistance are declined or do not apply).

206. See Margery Austin Turner and Karina Fortuny, Residential Segregation and Low-Income Working Families 9, available at http://www.urban.org/UploadedPDF/411845_residential_segregation_liwf.pdf (last visited April 24, 2009) (noting that 14% of the working poor live in high poverty neighborhoods, while another 35% live in low-poverty neighborhoods).

207. It should be noted that if some state law existed to this effect, a plaintiff in an individual state challenging chain store discrimination might be able to use that state law as the basis of a section 1983 claim. However, as outlined in the prior section, this is a national problem requiring a national solution. While state laws might help plaintiffs residing in certain states, it will not alleviate this as a national issue. As stated in the text, relief should be made available to as many people as possible. Limiting relief to those fortunate to live in a particular state will not accomplish this goal.

208. 7 C.F.R. § 15.3 (West 2003)) (emphasis added). See also 7 C.F.R. § 246.8 (West 2008) (stating “no person shall, on the grounds of race . . . be excluded from participation in, be denied benefits of, or otherwise subject to discrimination under the [WIC] program”); Food and Nutrition Service Ins. No. 113-1 (Nov. 8, 2005) (“The U.S. Department of Agriculture prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs,

Plaintiffs could benefit from this approach. Assuming that plaintiffs would file complaints with the Department of Agriculture,²⁰⁹ one benefit is that the regulations apparently do not require proof of discriminatory intent.²¹⁰ In addition, the USDA has the authority to investigate any questions of unequal treatment based on race or the other classes it is empowered to protect.²¹¹ Such an investigation could result in sanctions for the store if the non-compliance is not rectified.²¹² Relieving the plaintiffs of the heavy burden of discriminatory intent makes the case easier to prove, as the evidence clearly demonstrates that people of color are adversely affected by the policies of the chain stores. In addition, the USDA has the authority to investigate any questions of unequal treatment based on race or the other classes it is empowered to protect.²¹³ Such an investigation could result in sanctions for the store if the non-compliance is not rectified.²¹⁴

Despite the ability to investigate, the USDA regulations will provide little in the way of long-term solutions for several reasons. First, the USDA does not require a store to provide a certain level of quality of merchandise to become a certified retailer for its programs.²¹⁵ Thus, the stores have little incentive to take affirmative steps to stock fresh, healthy foods unless and until there is a complaint.

Second, and perhaps more relevant, the USDA's civil rights charge is directed at the protection of those that are recipients of the agency's

reprisal, or because all or part of an individual's income is derived from any public assistance program.").

209. The regulations do not appear to create a private cause of action in favor of a plaintiff. Therefore, it appears the way to force compliance with the regulations is to file a complaint with the U.S.D.A. See, e.g., Food and Nutrition Service Ins. No. 113-1, Appendix A (Nov. 8, 2005) (outlining complaint procedures and requiring the complaint to be filed with the "Secretary of Agriculture" within 180 days of the alleged discrimination).

210. See, e.g., *id.* at 4 (defining discrimination as "[t]he act of distinguishing one person or group of persons from others, either intentionally, by neglect, or by the effect of actions or lack of actions based on their protected bases") (emphases added).

211. It should be noted that 7 C.F.R. § 15.3, the non-discrimination section, is located in sub-part A of the regulations, which is entitled "Non-Discrimination in Federally Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964. The WIC regulations have the same purpose. See 7 C.F.R. § 246.8 (a) (noting that "The State agency shall comply with the requirements of Title VI of the Civil Rights Act of 1964" in ensuring that no recipients are discriminated against)

212. See *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001)(requiring proof of discriminatory intent for actions under Title VI itself, but permitting actions under its implementing regulations).

213. Telephone interview with Anita Cunningham, Branch Chief, Federal Programs Branch of USDA Food and Nutrition Service Civil Rights Office. Friday, April 24, 2009 (notes on file with author).

214. See *id.*

215. See *id.* See also E-mail correspondence with Cora Russell, Acting Chief, Retailer Management and Issuance Branch Benefit Redemption Division, Tuesday, April 21, 2009 (on file with author).

services.²¹⁶ Thus, the agency could only investigate claims by current food stamp beneficiaries. As previously noted, while many of the persons affected by chain store discrimination may be food stamp recipients, not all of them will be.²¹⁷ Second, as noted, the USDA can only provide assistance for those persons falling into a protected category.²¹⁸ While the forgoing analysis indicates that persons of color will be more likely to fall victim to the stores' discriminatory practices, a person of any race could be affected.²¹⁹ Moreover, a sole Caucasian person living in a primarily African-American or Latino neighborhood would be just as affected by the horrible practices, though it would be much harder for that person to claim discrimination on the basis of *her* race. Thus, the current regulations are somewhat limited in scope.

1. Summary

In conclusion, while there are many approaches potential plaintiffs might take to challenge chain store practices, none will provide relief to the broad range of potential plaintiffs. The largest hurdle is the absence of discriminatory intent, which forecloses several paths to judicial redress. Since current law does not provide a clear avenue to relief, a new path must be created.

III. THE PROPOSED REMEDIES

While current law does not provide a remedy to the problem of grocery store discrimination, current law does provide the tools to craft a remedy. The ability of each branch to approach this problem will now be examined, focusing on the legislative branch.²²⁰

216. See USDA Food and Nutrition Service, Home Page—Mission and Vision, <http://www.fns.usda.gov/cr/> (last visited Friday, April 24, 2009) (noting that the Office's mission is to protect "FNS customers and employees" from discrimination on a prohibited basis).

217. See also Part III.C.3.c. *supra*.

218. See note 208 *supra*. See also, Food and Nutrition Service Ins. No. 113-1, Appx.E (Nov. 8, 2005) (Appendix E is a "Sample Complaint Form" listing "Race/Color, National Origin, Sex, Religion, Age, Disability" as the basis for complaints).

219. See USDA Food and Nutrition Service—FAQ, <http://www.fns.usda.gov/fsp/faqs.htm#22> (last visited Friday, April 24, 2009).

220. The legislative branch is the proper focus for several reasons. While the president would not be able to act directly due to a lack of Congressional or statutory authorization on this point, see, e.g., *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), agencies, which also fall under the umbrella of the Executive Branch, see, e.g., *NOWAK & ROTUNDA*, *supra* note 131, § 4.8(b), may be able to assist. Agencies have the power to adopt rules that have the force of law. See *id.* (noting same). This power is unlikely to be helpful in this context. In order for an agency to make binding rules, a specific statute must give the agency the authority to do so. See, e.g., WILLIAM FUNK & RICHARD SEAMON, ADMINIS-

A. Congress' Authority under the Commerce Clause

Congress is granted many powers under the constitution. The Fourteenth Amendment grants Congress the power to enforce the provisions of the amendment through "appropriate legislation."²²¹ Additionally, Congress has the power to tax and spend. Finally, the Commerce Clause states that Congress can regulate "commerce . . . among the several states."²²² Using Congress' spending power²²³ or

TRATIVE LAW 137 (2d ed. 2006) (stating same). In this instance, there is no current law that the agencies could use as a platform from which to launch new rulemaking. While the Department of Agriculture is the most likely candidate for the task of overseeing grocery store policies, the agency does not have general rulemaking authority, and there is no statute that would grant it the authority to pass rules in this context.

Finally, while the agencies must have statutory authorization to pass legislative rules, they may pass interpretive rules without such authorization. *See id.* However, this power is unlikely to be helpful here. The agency would have to interpret current laws. Even if it changed its interpretation of what "discrimination" means under the Food and Nutrition Service guidelines, this new interpretation would not be of much use, as the only persons that would be able to benefit from the interpretation would be those who are participants in federal food programs. As previously stated, to reach as many people as possible, the law should not be tied to the operation of any particular program. *See supra* note 207. Congress has the ability to reach more of the American public, so it is the appropriate actor here.

221. U.S. CONST. amend. XIV, § 5.

222. U.S. CONST. art. I, § 8, Cl. 1,3.

223. The power to spend is two-fold. John V. Jacobi, *Federal Power, Segregation, and Mental Disability*, 39 HOUS. L. REV. 1231, 1272 (2003) (distinguishing Congress' "direct" spending power from its "conditional" spending power). The power can be used to impose conditions on states to encourage them to comply with federal mandates, or the government can spend the money directly for its programs. *See id.* When Congress attempts to use its authority to encourage compliance with conditions, the spending must be for the general welfare, the condition must be unambiguously stated, and Congress may not impose an unconstitutional condition. *See South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

Turning to the current issue, the states receive money from the federal government to operate their food stamp programs. *See* 7 U.S.C. § 2020(a) (2005) ("The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons and the control and accountability thereof."). Thus, one method of addressing the disparity in services provided by chain stores would be to require the States to require non-discrimination by retail stores as a condition of receiving federal funds under the Food Stamp program. However, the States currently do not certify the retail stores for participation in the federal programs. Rather, the stores are certified by the federal government. *See* 7 U.S.C.A. § 2018(a)(1) (West 2009) ("No retail food store . . . shall be approved to be authorized or reauthorized for participation in the food stamp program unless an authorized employee of the Department of Agriculture, a designee of the Secretary, or if practicable, an official of the State or local government designated by the Secretary, has visited the store or concern for the purpose of determining whether the store or concern should be approved or reauthorized."). This is not an issue under the commerce clause, as private citizens engaging in practices affecting interstate commerce can be regulated. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (allowing

Fourteenth Amendment powers²²⁴ may be difficult on these facts. Therefore, this section will focus on describing how Congress can use its power under the Commerce Clause to remedy the stated problem.

Congress to regulate single farmer engaged in private industry where his practices in the aggregate affected interstate commerce).

Congress can also use its spending powers to affect the decisions of private actors with which it does business. *Rust v. Sullivan*, 461 U.S. 173, 197–200 (1991) (affirming Congress' authority to attach conditions to grants given to private and public health service providers). In this instance, the federal government has already required that any retailer wishing to participate in a federal program must sign an assurance of non-discrimination. *See, e.g.*, Food and Nutrition Service Instruction No. 113 (requiring such). Thus, any activity in this regard under the spending clause is likely to be redundant to the laws that are currently in place.

Moreover, even if current laws were amended or an entirely new law was to be written to address the foregoing issues, for policy reasons, the spending clause is not the wisest choice to address the problem of chain store discrimination. The spending clause applies only where the federal government has spent money. Therefore, any law under the spending clause would not reach stores that currently do not agree to accept food stamps. While it may be assumed that a majority of stores do participate in these programs, *see, e.g.*, *United States v. Harrington*, 108 F.3d 1460, 1473 (D.C. Cir. 1997) (Sentelle, J., dissenting) (rejecting application of interstate commerce clause to robbery by stating, "There is no corner grocery in Kansas that does not stock orange juice from Florida or California; none in Florida or California that does not stock salt from some other state."), the commerce clause would reach any stores involved in interstate commerce regardless of their relationship to any government programs. Thus, the commerce clause has the potential to have a broader impact.

224. Congress' enforcement powers under the Fourteenth Amendment are likely to be of little assistance here. While earlier Court decisions interpreted Congress' powers under section 5 of the fourteenth amendment broadly, *see Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."), the Supreme Court later severely limited Congress' authority under Section 5, noting that any congressional action under this section must be "proportional" and "congruent" to the problem at issue. *City of Boerne v. Flores*, 521 U.S. 507, 530–34 (1997). First, the scope of Congress' powers under this section is currently in flux and quite difficult to define with precision. *See, e.g.*, Samuel Estricher & Margaret H. Lemos, 2000 SUP. CT. REV. 109, 110 (2001) ("The Court's recent Section 5 jurisprudence has met with both confusion and consternation in the legal academy."); Calvin Massey, 76 GEO. WASH. L. REV. 1 ("Few questions of constitutional law are as uncertain as the scope of Congressional power to enforce the substantive provisions of the Fourteenth Amendment."). Second, Congress' power under section five does not reach private activity. *See United States v. Morrison*, 529 U.S. 598, 623–624 (2000) (discussing and holding that state action is required). While there is an argument to be made on state action, *see supra* Part II.A.1., it is far from certain that the courts will accept this argument. Finally, section five can only address the deprivation of constitutional rights. *See Flores*, 521 U.S. at 518–19 (reiterating that Congress can only act to remedy "constitutional violations"). However, here, it would be difficult to ascertain exactly what constitutional right is at issue. Arguably, it is the Fourteenth Amendment, but as previously explained, the Fourteenth Amendment will not apply on these facts. *See supra* Part II. In sum, given the uncertainty of the requirements and the hurdle of state action, a law under section five is unlikely to be helpful in addressing chain store discrimination. The benefit of legislating under the commerce clause is that no state is required. As long as the chain grocery stores

1. Current Commerce Clause Law

The Supreme Court initially interpreted the Commerce Clause in an expansive manner, permitting Congress to regulate a wide range of activities as commerce.²²⁵ However, the court later adopted a more restrictive interpretation that limited commerce to the actual transport of goods.²²⁶ This narrow interpretation persisted until the “court packing controversy” of 1937, after which the court adopted a much broader interpretation that allowed Congress to regulate a wide range of activities.²²⁷

The Court’s broad interpretation persisted until the Court’s 1995 decision in *Lopez*. That case—along with the later cases of *Morrison* and *Gonzales v. Raich*—represented a shift toward a more narrow Commerce Clause jurisprudence. The *Lopez* counterrevolution narrowed the Clause in several ways. First, Congress can regulate the channels and instrumentalities of interstate commerce, things “in interstate commerce,” and “those activities having a substantial relation to interstate commerce.”²²⁸ Second, Congress can regulate intrastate activity that, when aggregated, has a substantial effect on interstate commerce.²²⁹ Third, Congress’ authority to regulate intrastate activity under the “substantial effect” prong is strongest

are engaged in interstate commerce, which nearly all of them are, the stores would be subject to regulation under the commerce clause.

225. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190–94 (1824) (giving the word “commerce” a broad construction).

226. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (“Commerce succeeds to manufacture, and is not a part of it.”); *Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936) (limiting commerce to the “transportation, purchase, sale, and exchange of commodities between the citizens of the different states” and excluding manufacture).

227. Gregory W. Watts, Note, *Gonzales v. Raich: How to Fix a Mess of “Economic” Proportions*, 40 AKRON L. REV. 545, 585 (2007) (“While President Roosevelt threatened a court-packing plan to save the New Deal legislation from judicial invalidation by loading the Court with justices willing to find his policies constitutional, the then-existing Court abandoned the restrictive interpretations in the Commerce Clause in favor of an almost plenary power interpretation.”). See also *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937) (rejecting previous interpretation limiting commerce clause to “transactions which can be deemed to be an essential part of a ‘flow’ of interstate or foreign commerce”).

228. It is important to note that there is a difference between things “in commerce” and things “affecting commerce.” It has been argued that the two are quite similar. While similar, the two remain distinct even in the post-*Lopez* era. The *Lopez* court mentioned them separately. Moreover, in *Reno v. Condon*, the Court upheld a statute based on Congress’ ability to regulate “things” in commerce. See *Reno v. Condon*, 528 U.S. 141, 148 (2000) (“[T]he personal, identifying information that the DPPA regulates is a “thin[g] in interstate commerce,” and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation.”) (emphasis added). In light of the differences, these items will be separately discussed.

229. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). See also *Gonzales v. Raich*, 545 U.S. 1, 11–13 (2005) (referencing and relying heavily on the Court’s previous decision in *Wickard v. Filburn*, 317 U.S. 111 (1942)).

when the activity itself is economic in nature.²³⁰ Fourth, the term “economic” should be granted a more defined, less broad meaning as “the production, distribution, and consumption of commodities.”²³¹ Finally, to ensure success upon judicial review, Congress should make factual findings, but the Court will not blindly defer to those findings if the activity is only tangentially related an economic activity.²³² These concepts will now be applied to the issue at hand.

2. Application of the Commerce Clause

In order to apply the Commerce Clause here, we must decide if food fits within one of the categories identified in *Lopez*. *Lopez* reaffirmed that Congress can regulate the channels and instrumentalities of interstate commerce, things “in interstate commerce”, and “those activities having a substantial relation to interstate commerce.” It should be easy to conclude that food is neither a channel nor an instrumentality of commerce.²³³ Nevertheless, food is either a “thing in commerce” or an item “substantially affecting commerce.”

Food is clearly a thing “in commerce.” Americans enjoy a variety of products in their grocery stores—Florida oranges,²³⁴ Washington apples,²³⁵ Michigan cherries,²³⁶ Vermont syrup²³⁷—that have arrived from

230. *United States v. Morrison*, 529 U.S. 598, 613 (2000) (stating “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).

231. *Raich*, 545 U.S. at 25–26.

232. See *Morrison*, 529 U.S. at 602, 610–14 (explaining the decision to reject Congressional findings regarding the extent of the effect of domestic violence on the economy as being too attenuated from the stream of interstate commerce).

233. DAN T. COENEN, *CONSTITUTIONAL LAW: THE COMMERCE CLAUSE* 32–33 n. 2 (2004) (noting that channels of commerce are the “corridors of movement and trade” such as highways and rail lines, while the instrumentalities of commerce are the “vehicles and other tools used in exploiting those corridors (planes, trains, ships, etc.)”).

234. See Hector Florin, *The Sorry State of Florida Citrus*, *TIME*, Aug. 28, 2008, available at <http://www.time.com/time/nation/article/0,8599,1836766,00.html> (last visited Sept. 8, 2008) (noting that Florida is “by far the largest . . . orange-producing state in the country”).

235. See *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 336 (1977) (“Washington State is the Nation’s largest producer of apples.”). See also USDA Foreign Agriculture Service, *The World Apple Situation* (Feb. 20, 2002), <http://www.fas.usda.gov/htp2/circular/2000/00-03/apple.htm> (last visited Sept. 8, 2008) (noting that Washington State was largest apple producing state in America).

236. Webpage of U.S. Senator Carl Levin (D-Mich), <http://levin.senate.gov/issues/index.cfm?mainissue-agriculture> (last visited Sept. 8, 2008) (noting that Michigan is the nation’s largest producer of tart cherries).

237. Vermont Maple Sugar Makers’ Association & Vermont Maple Foundation Homepage, <http://www.vermontmaple.org/> (last visited Sept. 8, 2008) (noting that Vermont is nation’s largest producer of maple syrup).

another state. The food in each store must travel from one state to another to be sold. Moreover, the amount of food in interstate commerce is not de minimis—"almost every state in the nation buys 85 to 90 percent of its food from someplace else."²³⁸ Thus, the movement of food in the grocery industry has a clear interstate quality. The Supreme Court has long recognized that Congress has the authority to regulate food traveling in interstate commerce.²³⁹ Moreover, the movement of food in interstate commerce has been the basis of the application of the commerce clause in other settings.²⁴⁰ Thus, the interstate nature of the grocery stores should provide a sufficient basis for the application of the Commerce Clause.

This argument may be criticized on several fronts. First, it may be asserted that while Congress is able to regulate food to ensure minimum health and safety standards,²⁴¹ requiring the food to be of a higher standard than that required for edibility would be one step removed from regulating commerce. This criticism should be easily refuted, however. In *Katzenbach v. McClung*,²⁴² the Supreme Court affirmed that

238. GREG PAHL, *THE COMPLETE IDIOT'S GUIDE TO SAVING THE ENVIRONMENT* 102 (Alpha Books 2001).

239. See, e.g., *Hippolite Egg Co. v. United States*, 220 U.S. 45, 57–58 (1911) (noting that Congress had the authority to pass the Pure Food and Drug Act of 1906 preventing the interstate shipment of adulterated food articles under its commerce powers).

240. See *Katzenbach v. McClung*, 379 U.S. 294, 296–97 (1964) (affirming constitutionality of Civil Rights Act of 1964 as applied to restaurant where "substantial portion of the food served in the restaurant had moved in interstate commerce").

241. See, e.g., *Hippolite Egg Co.*, 220 U.S. at 57–58 (noting that the Pure Food and Drug Act of 1906 preventing the interstate shipment of adulterated food articles under Commerce Clause); see also *United States v. 40 Cases, More or Less, or Six One Gallon Cans*, 289 F.2d 343, 346 (2d Cir. 1961) (noting that Food, Drug, and Cosmetic Act was constitutional because there was "no doubt of the power of Congress so to protect the public with respect to foodstuffs which have been shipped in interstate and foreign commerce") (citations omitted); *Mich. Meat Ass'n v. Block*, 514 F. Supp. 560, 561–62 (W.D. Mich. 1981) (discussing interstate commerce aspects of the Federal Meat Inspection Act).

242. 379 U.S. 294 (1964). On this same point, critics may urge that any reliance upon *Katzenbach* is outdated, as the Court's more recent cases—*Lopez*, *Morrison*, and *Raich*—represent a new Commerce Clause era. It is true that *Lopez* and *Morrison* indicated the Court's strong reluctance to allow Congressional regulation of non-economic activities. However, *Katzenbach* should remain good law today. To the extent that Congress is trying to regulate an ostensibly non-economic activity (discrimination) that has a substantial impact on interstate commerce (a discriminating restaurant that uses interstate commerce to aid its discrimination or a grocery store that carries many products moving in interstate commerce), it would seem that *Katzenbach* would fall in line with the teachings of the newer cases. Indeed, in the post-*Lopez* era, writers are still urging the use of the Commerce Clause to regulate businesses with substantial items moving in interstate commerce. See, e.g., Samuel J. Winokur, Note, *Seeing Through the Smoke: The Need for National Legislation Banning Smoking in Bars and Restaurants*, 75 GEO. WASH. L. REV. 662, 689 n.234 (2007) (suggesting that Congress use its Commerce Clause powers to ban smoking in public food establishments "based on the fact that bars and restaurants affect interstate commerce by obtaining their supplies and food from out of state").

the Civil Rights Act of 1964, enacted under Congress' Commerce Clause authority,²⁴³ could reach a restaurant that received a substantial portion of its food after it had travelled in interstate commerce.²⁴⁴ If the Commerce Clause can be used to require a business that is involved in interstate commerce to serve certain persons, it would also seem that the Clause would be available to require that all persons receive the same level of service.²⁴⁵

Second, critics may urge that even if the quality of the food could be regulated under the Commerce Clause, requiring the stores to expand their selection and carry more healthful items would not meet the standard. The critics would argue that the fact that people are unable to purchase healthful foods in their own neighborhoods is a local issue. Although the items may have travelled in interstate commerce, the failure to carry them is more removed from interstate commerce than whether the food is of a certain quality.

This argument can be refuted whether it is made with respect to the quality or selection argument.²⁴⁶ As previously stated, the food in the chain stores is of a lower quality in the inner city as compared to the suburbs. There is also a lack of healthy items offered for sale. These disparities are a factor in generating obesity in the affected neighborhoods.²⁴⁷ Even if the food itself is not the direct object of regulation, because its absence is a leading factor in turning the affected neighborhoods into obesogenic environments, the commerce clause should apply.

Obesity clearly has an impact on interstate commerce. Obesity can cause or worsen several medical conditions, such as hypertension, Type 2 diabetes, coronary heart disease, stroke, gallbladder disease, os-

243. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 245 (1964) (explaining that the Civil Rights Act of 1964 was enacted using Congress' power to "regulate interstate commerce").

244. See *Katzenbach*, 379 U.S. at 296–97 (finding that the fact that the Ollie's Barbeque restaurant received 45% of its meat from interstate commerce clause was sufficient to apply the commerce clause even though the restaurant was not located near an interstate and did not advertise to interstate travelers).

245. See, e.g., *Eddy v. Waffle House, Inc.*, 335 F. Supp.2d 693, 701–02 (D.S.C. 2004) (applying public accommodations portions of Civil Rights Act, which was passed under Congress' Commerce Clause authority, to claim of racialized denial of service and refusing to deny claim as to all plaintiffs); *Bobbitt v. Rage, Inc.*, 19 F. Supp.2d 512, 522 (W.D.N.C. 1998) (refusing to dismiss Title II public accommodations claim based on racial discrimination in service because "[b]eing singled out by the management of a restaurant and, on the basis of race, made to prepay for one's dinner when the normal practice is to pay after the meal, violates that customer's right to 'the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations' of that establishment").

246. On the quality argument, critics may assert that a lack of quality has no impact on interstate commerce because even if the food travels in interstate commerce, shoppers buy food at their local stores and eat it at their homes in their local neighborhoods.

247. See *supra* Part I.A.

teoarthritis, sleep apnea, and endometrial, breast, and colon cancers.²⁴⁸ Obesity is increasingly being treated as a disease in and of itself.²⁴⁹ Estimates indicate that caring for an obese employee can cost a company \$6,000 annually—more than \$1,500 above the average cost per employee.²⁵⁰ The most drastic option for treating obesity—gastric bypass surgery—can cost nearly \$30,000.²⁵¹ Indeed, annual hospital costs related to obesity for children alone were \$127 million in the period from 1997–1999, as compared to \$35 million in the period from 1979–1981.²⁵² For the total population, obesity created \$61 billion in direct medical expenses in 2000.²⁵³ Some pay the ultimate price, as obesity is responsible for 280,000 to 300,000 U.S. deaths per year.²⁵⁴ Thus, obesity is clearly an economic issue.

Not only is obesity an economic issue, it also has an affect on interstate commerce. As noted above, it affects the amounts that employers must pay for health care for their employees, creating a staggering health care bill. Health care is an interstate industry. In another context, Congress has stated that “Congress finds that the health care and insurance industries are industries affecting interstate commerce.”²⁵⁵ Indeed, it has been stated:

Lopez and *Morrison* require that activity be economic in nature and bear a substantial relationship to interstate commerce to fall within congressional power to regulate under the Commerce Clause . . . American hospitals and

248. See *supra* note 10.

249. See CTR. FOR THE ADVANCEMENT OF HEALTH, MAKING A HEALTHY LIFE AVAILABLE TO ALL 4 (2005), available at http://www.cfah.org/news/obesity_briefing/ (last visited Sept. 26, 2008).

250. See *id.* at 4–5.

251. See *id.* at 4.

252. See U.S. Dept. of Health and Human Services, Preventing Obesity and Chronic Diseases Through Good Nutrition and Physical Activity, <http://www.healthierus.gov/steps/summit/prevportfolio/PA-HHS.pdf> (last visited Sept. 26, 2008).

253. See *id.*

254. See Morland, *supra* note 38, at 333.

255. Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act, H.R. 5, 108th Cong. § 2(a)(2) (2003), cited in Nim Razook, *A National Medical Malpractice Reform Act (And Why The Supreme Court May Prefer to Avoid It)* 28 SETON HALL LEGIS. J. 99, 122 n.151 (2003). See also Martin Redish, *Doing It with Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 609 (1994) (“[I]t is likely that . . . Congress could demonstrate that health care, for the most part, is an industry involved in interstate commerce, and that it would be impracticable to require Congress to separate out whatever portion of the industry is actually intrastate.”); Ellwood F. Oakley, III, *The Next Generation of Medical Malpractice Dispute Resolution: Alternatives to Litigation*, 21 GA. ST. L. REV. 993, 996 (2005) (“Courts have held that state laws affecting arbitration agreements within the health care industry are subject to federal preemption because health care affects interstate commerce.”).

other providers of health care services are overwhelmingly private entities providing services in return for payment. Such businesses affect interstate commerce every bit as much as do businesses engaged in intrastate coal mining, intrastate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat.²⁵⁶

In light of these linkages, obesity is sure to be found to have a “substantial effect” on interstate commerce.

The counterargument here is that regulating obesity would run afoul of the teachings of *Lopez*, *Morrison*, and *Raich*. However, those cases would assist, rather than hinder the proffered interpretation. *Lopez* and *Morrison* stand for the proposition that Congress’ authority to regulate non-economic activity is limited. However, unlike the Gun Free School Zones Act or the Violence Against Women Act, which attempted to regulate activity that was non-economic in nature, here, Congress would be regulating an activity—the sale and consumption of food—that clearly has an impact on the economy.

Lopez and *Morrison* also teach that the connection between commerce and the regulated activity must be direct. It could be argued that the link between obesity and its impact on the economy is attenuated because there are intermediate steps—not to mention a time lapse—between the time a person shops at a store, the time a person becomes obese, and the time when that obesity will produce an effect on the economy. This indirect linkage might support an argument that the proposed link here is more akin to that in *Morrison*, where the Court said that even if there were economic effects of domestic violence, the impact on interstate commerce was too attenuated.

However, there is an important factor which would set this scenario apart from *Morrison*. In *Morrison*, the activity that Congress sought to regulate was itself non-economic in nature as there is no economic component to violent behavior against women. By contrast, not only does obesity have an effect on the economy through its devastating impact on the health care industry, it is the direct byproduct of an economic activity—namely, the purchase of food. While the impact on the economy may be delayed for an individual person, it is ever-present because in the nation at any given time, there will be a number of obese people, and a number of those people will have complications and co-morbidities that impact the national economy.

Finally, even if it were decided that the sale of food, the resulting obesity, and the impact on health care were all non-economic, all is not lost. The Court has stated that while “thus far in our Nation’s history

256. John V. Jacobi, *Federal Power, Segregation, and Mental Disability*, 39 Hous. L. Rev. 1231, 1266–67 (2003) (citing to *Lopez*, 514 U.S. at 559–60).

our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature," it would not "adopt a categorical rule against aggregating the effects of any noneconomic activity."²⁵⁷ If ever a non-economic problem called for Congressional attention it is obesity. Obesity and its impacts are devastating on a physical and emotional level for the affected individuals and, when aggregated, it also impacts our entire nation. If the Court disagrees, it should consider applying this as an alternate approach.

3. Summary

The foregoing paragraphs indicate that discrimination in the quality and selection of food in grocery stores impacts the national economy directly. As a result, Congress should be able to regulate this matter using its Commerce Clause powers, and if challenged, the Courts should be inclined to uphold the exercise of this power.

B. The Proposed Law

Having outlined Congress' powers under the Commerce Clause, the structure of such a law should be examined. It is proposed that Congress should enact a law with the following provisions:

Sec. 1—All chain grocery stores selling goods received in interstate commerce or otherwise impacting interstate commerce must sell the same quality of goods in each store of the chain.

Sec. 2—All chain grocery stores selling goods received in interstate commerce or otherwise impacting interstate commerce must sell the same selection of goods in each store of the chain unless there is a bona fide business necessity that would dictate otherwise.

Sec. 3—All stores must post, in an area conspicuous to customers, a poster listing the requirements of this statute, and the contact information for reporting violations of the statute to the designated agency. Failure to post such a poster will result in a \$500 fine for each occurrence.

Sec. 4—Any person patronizing any store covered under this act shall be allowed to file a complaint with the Secretary of the Department of Agriculture asserting that the chain has not complied with the law.

257. United States v. Morrison, 529 U.S. 598, 613 (2000).

Sec. 5—Any chain violating Section 1 or Section 2 of this Act: 1) shall be fined \$1000 per violation; and 2) will be required to correct the violation by order of the Secretary.

Sec. 6—Any store failing to correct a violation after being ordered to do so must pay a fine of \$10,000 for each violation alleged. Upon the accrual of more than five violations for one individual store in a chain, the individual store's licensure to accept coupons from the Supplemental Security Income Program for Women, Infants, and Children or the Food Stamp Program may be revoked. Upon the accrual of more than 100 violations across the entire chain, no store in the chain shall be permitted to participate in the Supplemental Security Income Program for Women, Infants, and Children or the Food Stamp Program may be revoked.

Sec. 7—All funds collected under this act shall be used to fund the enforcement and operation of the Act.

a. Sections One and Two

Sections one and two explain which activities and businesses are covered by the statute. All chain stores selling goods travelling in interstate commerce would be covered under the statute. Section one would require that these stores provide the same quality of goods at all stores. Section two would require the same selection, unless there is a bona fide business necessity.

A bona fide business necessity is a concept borrowed from Title VII.²⁵⁸ In Title VII disparate impact cases, an employer can raise a business necessity defense.²⁵⁹ While the contours of that defense are far from clear,²⁶⁰ it is clear that the defense does not cover things that are merely more convenient for a business or that are taken for purely business purposes.²⁶¹ While this defense is not a perfect analog given the difference in treatment between customers and employees,²⁶² there should be some defense for stores that have tried to comply. Thus, the defense would not apply where it was merely more convenient to stop carrying

258. See 42 U.S.C.A. § 2000e, et seq. (West 2009).

259. See *id.* § 2000e-2 (k)(1)(A)(i).

260. See James O. Pearson, *What Constitutes "Business Necessity" Justifying Prima Facie Discriminatory Employment Practices under Title VII of Civil Rights Act of 1964*, 36 A.L.R. FED. 9, § 2(a) (1978) ("The courts are not so well decided . . . as to what constitutes a business necessity.").

261. See *id.* (noting that the defense does not apply to "business convenience" or things that are motivated by purely business concerns).

262. See *id.* (noting that "job-relatedness" is also required, meaning that the business necessity must be related to the job.) That will not be an issue in the present case.

an item, but it would apply where the stores can show that they stopped carrying a certain product for purely business reasons. Moreover, the defense would not apply to a refusal to carry a product based on data prior to this act under normal circumstances. Given the movement of disadvantaged customers due to current discrimination, any current sales data would be inaccurate.

The proposed defense would cover situations where, for instance, a retailer has carried a particular product for at least six months with little or no movement of the product. When it comes to store inventory, more flexibility should be granted. It would be unreasonable to ask a store to carry an item that is not selling. However, it is not unreasonable to ask a store to attempt to carry a product and actually give the customers an opportunity to purchase the product in their own neighborhood.

b. Section Three

Sections three would require stores to post notification of the law in their stores. This notification is critical, as the proposed law would create a significant change in the rights of consumers. Therefore, they must be made aware of their new rights. It is surely not onerous to ask stores to place a poster where the customers can view it.

c. Sections Four, Five, and Six

Sections four, five, and six create a method for the filing and resolution of complaints. Section four would allow the customers to file complaints with the Department of Agriculture, the agency responsible for ensuring compliance with the law. The law therefore, by its terms, would not directly create a private right of action in the courts. Section five outlines the remedy for such violations. First, the store must pay a fine. Additionally, the store must correct the violation, presumably by either stocking the missing items or stocking items of a higher quality. These requirements are very minor and designed to provide as little intrusion into the day to day store operations as possible. Finally, section six would require that recalcitrant stores pay an even higher fine, and may lose certification to participate in federal benefits programs. This section is important because providing stiff penalties for non-compliance will send a strong message to the stores and encourage them to comply.

d. Section Seven

Section seven is a unique provision. Fines will be collected from the program. Hopefully, by using the fines to support the program, the program will create a built-in stream of income, which will reduce the number of expenditures.

C. Critiquing the Act

There are many benefits to the proposed act. First, the act directly relies on the commerce clause, which should help it overcome constitutional challenges.²⁶³ Also, by relying on the commerce clause, there is no need to prove intentional discrimination or state action.²⁶⁴ Under this act, the activity could be reached regardless of the mental state. Second, the fact that there is no private right of action in the statute should ensure that the new legislation will not create a deluge of new litigation.

Third, unlike current laws concerned with equality in federal programs, this proposal does not limit the complainants to a particular race or other protected class. Thus, under the proposed Act, any person of any race could file a complaint, even if he or she is not a member of the race “most” affected by the store discrimination. This change is significant because discriminatory intent against a particular group—or even discriminatory effect on such a group—might be difficult to prove even on seemingly compelling facts. Additionally, the problem of grocery store discrimination, while primarily affecting persons of color, potentially has a much broader reach.²⁶⁵ Thus, the law needs a remedy with a similarly broad scope.

Fourth, in another significant departure from current law, a complainant under the act need not be a recipient of federal benefits. There are a number of working poor that may be constrained to shop at these

263. See *Morrison*, 529 U.S. at 613 (“Like the Gun-Free School Zones Act at issue in *Lopez*, § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’ power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that § 13981 is sufficiently tied to interstate commerce, Congress elected to cast § 13981’s remedy over a wider, and more purely intrastate, body of violent crime.”)

264. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 245 (1964) (affirming constitutionality of Civil Rights Act passed under the Commerce power although applied to a private entity); *Katzenbach v. McClung*, 379 U.S. 294, 296–297 (1964) (same). See also Anne Carey Juliano, *The More You Spend, The More You Save: Can the Spending Clause Save the Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1146 (2001) (“Claims of disparate impact against private parties are within Congress’ Commerce Clause powers.”), cited in John Arthur Laufer, Note, *Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1650 n. 163 (2002).

265. See *supra* notes 160 & 222 and accompanying texts.

stores, and as stated, they may be ineligible for Food Stamp assistance.²⁶⁶ The fact that these persons are not federal aid recipients should not prevent them from challenging an injustice they face in their daily lives.

In sum, the Act would create a broad class of complainants. In theory, a member of a non-protected class who happens to shop in a grocery store in the neighborhood in which he works (but does not live) could file a complaint against this store under the Act. Rather than a detriment, this is indeed one of the better features of this act as it is entirely plausible that those that living in neighborhoods with better stores will have a superior basis for determining whether a particular store is deficient in its offerings. In addition to its other benefits, by enlarging the class of complainants, this law greatly expands the ability of the law to reach a problem that is too often ignored.

Despite the exciting changes a new act will bring, there are potential drawbacks that must be considered. Some critics might allege that the act goes too far in several respects. First, some might note that creating a new law is a drastic solution. However, as previously explained, this problem is not reached under current law. Perhaps critics might state that it would be simpler to amend the current laws, such as Title II of the Civil Rights Act, to address this problem rather than writing a new law. There is some merit to this argument. However, by starting fresh, prior interpretations of older laws can be avoided. Moreover, this law has a very specific purpose that would not be reached even if retail stores were included in the public accommodations statute. This is a problem that requires its own solution.

Second, critics may complain that this proposal creates new costs and new administrative burdens. This criticism is valid to the extent that it recognizes that ensuring compliance under the act would require some governmental inspection and involvement, and that such involvement will come at a cost. However, the issue of healthy food is so important that the time should be invested in making this connection. The cost of this bill is surely less than the cost of increased obesity. Moreover, the Act is partially self-sustaining because the fines are used to support enforcement. While the fines will likely not be enough to pay for the entire program—and hopefully, if the act achieves its intended purpose, there should be very little fine money available—it should help in this regard. Similarly, the bureaucracy concern is easily dismissed. There is already an existing structure within the Department of Agriculture that should be able to handle this. Granted, additional personal and processes will need to be employed, but no new agencies will be created—merely a slight realignment within the agency.

266. See *supra* notes 205 & 206; MSNMoney.com, Study: Working Poor Can't Afford Basics, <http://articles.moneycentral.msn.com/savinganddebt/advice/studysaysworkingpoorcannotaffordbasics.aspx> (last visited May 1, 2009).

Third, some may find it problematic that under the Act, the stores would be forced to carry certain items. This is true. While skeptics might be comfortable with requiring the stores to even out their quality, requiring stores to carry certain products in all stores may raise more concerns because the stores are, after all, businesses and not charitable organizations. This concern is valid, but it is addressed through the inclusion of the business necessity defense. If the business can demonstrate that there is no reason to carry a certain item (i.e., carrying Kosher items in a neighborhood with no Jewish residents), or that the item has not sold well once it was carried, there will be no liability under the act. Moreover, requiring the store to make a product available is not terribly onerous when the act does not say that the item must be carried in equal amounts. Therefore, a store can tailor its inventory supply to meet the demand of a particular neighborhood. Finally, the act is limited to essential food items such as bread, meat and meat substitutes, snacks, special dietary items (dietetic and low-salt foods), fruits, and vegetables. Therefore, a chain would still be free to offer a variety of items in its stores within the other categories.

Fourth, there may be concerns about how effective the monitoring system proposed by the Act will be. The act relies on the reports of customers to ensure compliance. This method may seem less than ideal because customers are busy people and may not want to take the time to file a complaint. Moreover, it assumes that customers have knowledge of what other stores in the chain are carrying. While these are valid concerns, the alternative would be a very costly system of government monitoring and compliance. That design would not only increase the cost of implementing the act, it would also require additional bureaucracy to create and maintain the compliance system. Moreover, while shoppers are imperfect, ultimately, it is in their own self-interest to assist in the monitoring process, as they are the ones that will be most affected. Ultimately, then, they are excellent candidates.

Fifth, it may be argued that the word "quality" is too broadly defined. A shopper may object to a minor flaw in a product. This can be easily solved by educating shoppers as to the types of discrepancies that are actionable. The posters could be a great help in this regard. They could show pictures of items that are violations and items that are not, so shoppers can visually see the difference. The posters might also use terms such as "substantial difference" so the shoppers will know that a trivial difference will not matter. Agency regulations could be helpful in delineating the contours of this issue.

Finally, critics may note that even a law such as this would be insufficient to stem the rising tide of obesity and ill health. Well-worn clichés involving horses and water may be used to make points about the fallacy of attempting to encourage better habits through coercion. However, another cliché involving chickens and eggs may be equally

helpful. Just as we can't know whether chickens or eggs came first, we won't truly know whether this problem can't be solved until we at least make a good faith effort to do so.

CONCLUSION

In summary, while fast food has long been a focus of the obesity debate, grocery stores deserve more attention than they are currently receiving for their role in contributing to the obesity epidemic. The discussion herein and the proffered proposal make an effort to shift the conversation in this direction. While this proposal may not cure every ill, our society must begin somewhere. When the stakes are this high for each individual and our nation as a whole, even a minor effect is worth the effort.