DePaul Law Review

Volume 59
Issue 2 *Winter 2010: Symposium - Rising Stars: A New Generation of Scholars Looks at Civil Justice*

Article 17

Cheeseburger in Paradise?: An Analysis of How New York State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation

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CHEESEBURGER IN PARADISE? AN ANALYSIS OF HOW *NEW YORK STATE RESTAURANT ASSOCIATION V. NEW YORK CITY BOARD OF HEALTH* MAY REFORM OUR FAST FOOD NATION

> [P]eople should know what lies behind the shiny, happy surface of every fast food transaction. They should know what really lurks between those sesame-seed buns. As the old saying goes: You are what you eat.... [T]hink about it. Then place your order. Or turn and walk out the door. It's not too late. Even in this fast food nation, you can still have it your way.[1]

INTRODUCTION

On December 5, 2006, the New York City Board of Health (Board) adopted New York City Health Code § 81.50 (Regulation 81.50), an innovative health measure mandating the disclosure of calorie content directly on restaurant menus.[2] The regulation addressed what some have termed an "obesity epidemic" in New York City,[3] and it applied to all restaurants that had already voluntarily disclosed nutritional information.[4] Despite the reliable evidence calling for government

1. ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 10, 270 (2002).

2. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F. Supp. 2d 351, 352 (S.D.N.Y. 2007). In enacting the regulation, the Board relied upon the historic and well-recognized police power of states and local bodies to establish reasonable regulations to protect public health and safety. *See* Jacobson v. Massachusetts, 197 U.S. 11, 25–27 (1905) (holding that states have authority to enact "health laws of every description" to safeguard public health).

3. *See* Department of Health and Mental Hygiene Board of Health, Notice of Adoption of a Resolution to Repeal and Reenact § 81.50 of the New York City Health Code, at 2 (proposed Jan. 22, 2008), *available at* http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50-0108.pdf (last visited July. 15, 2009) [hereinafter Notice of Adoption]. The city concluded that the regulation was necessary to combat an obesity crisis, or "epidemic," that was harming the health of Americans, and New Yorkers in particular. *Id.* The city determined that a crisis was at hand because obesity prevalence had increased by more than seventy percent in the previous decade, and obesity is a risk factor for heart disease, stroke, cancer, and diabetes—four of the five leading causes of death in New York City in 2005. *Id.* at 3.

4. *Id.* at 2. In implementing this regulation, it is important to acknowledge that the Board made two major assumptions: (1) consumers would notice the calorie information, and (2) consumers would begin eating more healthfully as a result. *Id.* at 6. The regulation, although articulated primarily as an attempt to improve the public's health, may also have the secondary effect of lowering the costs of healthcare, which are ultimately shouldered by the government. *Id.* at 3 (noting that obesity causes "enormous and preventable human suffering" and uses "more of society's resources than even the most prevalent communicable diseases"). Thus, one may spec-

oversight of nutritional disclosures in the restaurant industry,[5] the New York State Restaurant Association challenged the regulation in *New York State Restaurant Ass'n v. New York City Board of Health* (*NYSRA I*) and emerged victorious when the court declared the regulation preempted by the Nutrition Labeling and Education Act of 1990 (NLEA).[6]

On January 22, 2008, the Board adopted a modified version of Regulation 81.50.[7] Relying on studies showing that consumers generally underestimate calorie content in foods, the modified Regulation 81.50 applies not just to restaurants that voluntarily disclose nutritional information, but to all chain restaurants that sell standardized meals in fifteen or more locations nationwide.[8] To ensure proper communication with consumers, the Board mandated restaurants to post calories

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ulate that the Board was primarily interested in lowering healthcare costs, rather than concerned with public health.

5. A number of recent studies have indicated a correlation between restaurant food consumption and obesity, including one undertaken by the U.S. Food and Drug Administration (FDA) itself. *See, e.g.*, U.S. FOOD AND DRUG ADMIN., COUNTING CALORIES: REPORT OF THE WORKING GROUP ON OBESITY 21 (2004), *available at* http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm081696.htm (last visited Jan. 27, 2010) (recommending that the FDA encourage restaurants to voluntarily provide point of sale nutrition information to help consumers make healthier choices) [hereinafter COUNTING CALORIES]; Shanthy A. Bowman & Bryan T. Vinyard, *Fast Food Consumption of U.S. Adults: Impact on Energy and Nutrient Intakes and Overweight Status*, 23 J. AM. C. NUTRITION 163, 163–67 (2004) (noting a correlation between fast food consumption and overweight or obese status, and recommending nutritional disclosure at restaurants); Scot Burton et al., *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96 AM. J. PUB. HEALTH 1669, 1669 (2006) (advocating nutritional disclosure at the point of sale in restaurants); Joanne F. Guthrie et al., *Role of Foods Prepared Away from Home in the American Diet, 1977–78 Versus 1994–96: Changes and Consequences*, 34 J. NUTRITION EDUC. BEHAV. 140, 140–50 (2002) (recommending that nutrition educators consider the impact of restaurant food in American diets when implementing intervention strategies to combat obesity); Nicole Larson & Mary Story, *Menu Labeling: Does Providing Nutrition Information at the Point of Purchase Affect Consumer Behavior?*, *in* HEALTHY EATING RESEARCH 1–2 (2009), *available at* http://www.rwjf.org/files/research/20090630hermenu labeling.pdf (noting that calorie information at the point of sale results in fewer purchases of high-calorie menu items, "especially when there is a greater discrepancy between the perceived and actual nutrition content"); Mark A. Pereira et al., *Fast-Food Habits, Weight Gain, and Insulin Resistance (the CARDIA Study): 15-Year Prospective Analysis*, 365 LANCET 36, 36–42 (2005) (linking fast food consumption to weight gain).

6. Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343 (2006); *see also NYSRA I*, 509 F. Supp. 2d at 352 (discussing preemption).

7. *See* 24 R.C.N.Y § 81.50 (Supp. 2008).

8. *See* Notice of Adoption, *supra* note 3, at 10. The most common cause of weight gain is excess calories: weight control is primarily a function of the balance of the calories consumed and the calories expended on physical and metabolic activity, also known as the calories in versus calories out model). *See, e.g.*, COUNTING CALORIES, *supra* note 5, at 4. A calorie is defined as the amount of energy needed to raise one kilogram of water by one degree Celsius. *See* CONCISE OXFORD ENGLISH DICTIONARY 200 (Catherine Soanes & Angus Stevenson eds., 11th ed. 2008).

prominently and in close proximity to menu items at the point of sale.[9] Studies supporting the regulation revealed that "calories are recognized as the single most important element of nutritional information to address the obesity epidemic," and that consumption of high-calorie food increases the risk of obesity.[10]

The Restaurant Association promptly challenged the new regulation, alleging that it was preempted under the NLEA and unconstitutional under the First Amendment of the United States Constitution.[11] In *New York State Restaurant Ass'n v. New York City Board of Health (NYSRA II)*, Judge Holwell of the Southern District of New York upheld the regulation.[12] Although the Restaurant Association appealed, the United States Court of Appeals for the Second Circuit affirmed the district court's holding on February 17, 2009, in *New York State Restaurant Ass'n v. New York City Board of Health (NYSRA III)*.[13] Ultimately, by upholding Regulation 81.50, the *NYSRA II* and *III* courts provided a foundation for the enactment of similar legislation in other jurisdictions and stimulated a nationwide debate over the proper role of government in addressing America's growing obesity crisis.[14]

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9. *See* Notice of Adoption, *supra* note 3, at 10–11.

10. *Id.* at 8.

11. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), 2008 U.S. Dist. LEXIS 31451, at *1, *3 (S.D.N.Y. April. 16, 2008).

12. *Id.* at *1, *49.

13. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA III*), 556 F.3d 114, 115 (2d Cir. 2009).

14. After the district court upheld Regulation 81.50 in *NYSRA II*, the media delved into the merits of and complications associated with menu-labeling. Support for and opposition to menu-labeling seemed equally prevalent. *See, e.g.*, Susan Abram, *County Wants to Help You Count Calories*, DAILY BREEZE, Aug. 8, 2008, at A1 (discussing a proposed labeling bill in Los Angeles County); Radley Balko, *Forcing Eateries to Post Nutrition Info Shouldn't Be on Menu*, CHI. SUN TIMES, July 12, 2008, at A14 (opposing menu-labeling); Richard Berman, *Nutrition Activism Opens Restaurants up to Legal Lashes*, NATION'S RESTAURANT NEWS, June 30, 2008, at 46 (warning of the dangers of menu-labeling); Christopher Flavelle, *Super-Vise Me: It's OK to Feel Guilty About Eating Fast Food, but Is It the Government's Job?*, SLATE, July 2, 2008, http://www.slate.com/id/2194629 (opposing menu labeling); *Food Regulation in America: Menu Items*, ECONOMIST, Aug. 30, 2008, at 64 (discussing menu-labeling); Harold Goldstein & Eric Schlosser, *Putting Health on the Menu: Requiring Fast-Food and Restaurant Chains to Post Calorie Information Wouldn't Hurt Them and Could Help Us*, L.A. TIMES, Aug. 5, 2008, at A15 (advocating for menu-labeling). Although the subject has attracted considerable media attention and medical research, scholarly legal articles regarding menu-labeling are still scarce, although a few touch on the subject. *See, e.g.*, Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh In on Wellness*, 5 IND. HEALTH L. REV. 185, 189–98 (2008) (discussing *NYSRA I* and advocating for more state government intervention); Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1233–44 (examining possible nutritional disclosure models, including one similar to the Menu Education and Labeling Act); Andrea Freeman, Comment, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221, 2258 (2007) (suggesting that the government should require fast food companies to

This Note examines the issues involved in *NYSRA II* and *III* and asserts that the courts correctly upheld Regulation 81.50. Part II provides a background of the health and policy considerations involved in the *NYSRA* trilogy and then discusses the proposed federal regulations addressing menu-labeling.[15] Part III explores the decision to uphold Regulation 81.50 in *NYSRA II* and *III*.[16] Part IV analyzes the courts' reasoning in declaring Regulation 81.50 constitutional and discusses further bases for upholding the regulation that were not addressed by the courts.[17] Part V explores the policy and legal implications of upholding Regulation 81.50, including the potential for litigation, the impact on the restaurant industry, and the benefits to the public.[18] Finally, Part VI concludes by arguing that restaurant menu-labeling is an important asset in America's struggle with obesity.[19]

II. BACKGROUND

America is a paradox—a country of people simultaneously obsessed with body image and seemingly addicted to unhealthy fast food, but the problem of obesity is truly "one of health and not appearance."[20] Over the past decade, America's obesity rate has spiked dramatically.[21] This rise in obesity has spearheaded discussions among lawmakers and medical experts who regard restaurant menu-

"provide accurate nutritional labeling" on foods); Rebecca S. Fribush, Note, *Putting Calorie and Fat Counts on the Table: Should Mandatory Nutritional Disclosure Laws Apply to Restaurant Foods?*, 73 GEO. WASH. L. REV. 377, 379 (2005) (proposing federal legislation requiring that restaurants make nutritional information available to customers, but not necessarily on the menu); Sarah A. Kornblet, Comment, *Fat America: The Need for Regulation Under the Food, Drug, and Cosmetic Act*, 49 ST. LOUIS U. L.J. 209, 210 (2004) (arguing that the FDA has jurisdiction to regulate restaurants).

15. *See infra* notes 20–90 and accompanying test.

16. *See infra* notes 91–145 and accompanying text.

17. *See infra* notes 146–231 and accompanying text.

18. *See infra* notes 232–270 and accompanying text.

19. *See infra* notes 271–273 and accompanying text.

20. OFFICE OF THE SURGEON GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVS., OVERWEIGHT AND OBESITY: HEALTH CONSEQUENCES 1 (2007), *available at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_consequences.htm. This report responded to a 2001 government "call to action" that represented the government's first step in acknowledging obesity as not only a public health problem, but an "epidemic." *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 6 (2001), *available at* http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf [hereinafter CALL TO ACTION].

21. *See* Notice of Adoption, *supra* note 3, at 2–3. The obesity rate in 1974 was 14.5%, while by 2003–2004 the rate had risen to 32.2%. *Id.* at 3. The national obesity rate is now an alarming 64%. *See* Burton, *supra* note 5, at 1669.

labeling legislation as a tool to combat obesity.[22] The health risks associated with this so-called "obesity epidemic" provide the most direct incentives for promulgating Regulation 81.50 and similar legislation.[23] To provide a meaningful perspective for the debate over Regulation 81.50, the following Section discusses the history and implications of obesity in the United States.

A. The "Obesity Epidemic"—A Short History

Obesity is both a substantial health concern and a major cause of preventable death in the United States. Research has shown that sixty-four percent of American adults are overweight or obese, and that this figure shows no signs of abating.[24] The Wang Study, using statistics compiled between 1970 and 2004, predicted a troubling outcome for American society.[25] If the current trends contributing to American obesity continue, the study projected that by 2022 eighty percent of American adults will be overweight or obese, and by 2048 nearly all Americans will be overweight or obese.[26] The implications of obesity on healthcare costs in America provide a further incentive for government intervention. The Wang study determined that obes-

22. *See, e.g.*, *supra* note 5 and accompanying text.

23. *See* Notice of Adoption, *supra* note 3, at 2–3 (noting that the health conditions caused by obesity result in "enormous and preventable human suffering"); *see also* CALL TO ACTION, *supra* note 20, at 8 (noting that obesity is one of the most "burdensome" public health issues in the country). Health risks associated with obesity include heart disease, stroke, cancer, and diabetes. *See* CALL TO ACTION, *supra* note 20, at 8. The adverse psychological effects of obesity, which are most severe in children, are also of paramount concern and result from discrimination against and stigmatization of overweight or obese individuals. *Id.* at 13.

24. *See* Burton, *supra* note 5, at 1669 (indicating that sixty-four percent of Americans are overweight or obese). Obesity is defined as "the condition of having an abnormally high proportion of body fat," or when body fat content exceeds thirty percent in women or twenty-five percent in men. NAT'L INSTS. OF HEALTH, NAT'L HEART, LUNG, AND BLOOD INST., CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS: THE EVIDENCE REPORT 174 (1998), *available at* http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf. "Obese" is generally defined by medical experts as having a body mass index (BMI) of equal to or higher than 30. *Id.* at xi. BMI is a common tool used in the medical field to assess obesity and is determined by dividing the body weight (in kilograms) by the height (in meters) squared. *Id.* A BMI of 30 is roughly equivalent to 30 pounds overweight. For example, a six-foot-tall person who weighs 221 pounds and a five-foot-six person who weighs 186 pounds both have a BMI of 30. *Id.* Although BMI is commonly used, it can be inaccurate for very muscular individuals or elderly individuals who have lost muscle mass. *See* CALL TO ACTION, *supra* note 20, at 4.

25. *See* Youfa Wang et al., *Will All Americans Become Overweight or Obese? Estimating the Progression and Cost of the US Obesity Epidemic*, 16 OBESITY 2323, 2329 (2008). The study used data compiled from the National Health and Nutrition Examination Survey, which is an annual national survey of Americans' height and weight based on direct physical examinations conducted in a mobile examination center. *Id.* at 2324.

26. *Id.* at 2329.

ity-related healthcare costs accounted for nearly 9.1%, or $78.5 billion, of total American medical expenditures in 1998.[27] The study also estimated that by the year 2030, healthcare costs attributed to obesity would reach between $860.7 and $956.9 billion, which would constitute one in every six dollars spent on healthcare in America.[28]

With one-third of total American calorie consumption coming from outside of the home, restaurants have been implicated in America's rising obesity rate.[29] In 2007, Americans spent 47.9% of their food budget on restaurant food.[30] New York City is no stranger to obesity, with an alarmingly high rate of one in every five adults considered obese.[31] Even more telling—and alarming—is that ninety percent of restaurants in New York City are fast food restaurants.[32] Fast food restaurants, with quick, inexpensive food, facilitate a substantial portion of out-of-the-home consumption, and as an added side effect, they pile on large portions and calories.[33] This is especially significant because forty-two percent of fast food patrons dine at fast food restaurants at least twelve times per month, and fast food consumption—by increasing calories, saturated fat, and carbohydrates—has been linked

27. *Id.* at 2323. Another report estimated costs to be $117 billion in 2000. This report considered both direct costs and indirect costs, such as lost work days, physician visits, disability pensions, and premature mortality. *See* CALL TO ACTION, *supra* note 20, at 10. Although not considered by the report, the cost of an impaired quality of life, while immeasurable, is also an important consideration.

28. Wang, *supra* note 25, at 2329.

29. *See* Burton, *supra* note 5, at 1674; *see also* Dustin A. Frazier, Note, *The Link Between Fast Food and the Obesity Epidemic*, 17 HEALTH MATRIX 291, 296 (2007) (noting that fast food consumption may be a catalyst for obesity). Increased consumption of food prepared away from home has been linked to the increasing prevalence of obesity-related diseases. *See* Burton, *supra* note 5, at 1669. People who eat in restaurants also have, on average, a higher BMI than those who prepare meals at home. *See* WORLD HEALTH ORGANIZATION, DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES 62 (2003).

30. Jennifer L. Pomeranz & Kelly D. Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws*, 98 AM. J. PUB. HEALTH 1578, 1578 (2008).

31. Notice of Adoption, *supra* note 3, at 3. The Board relied upon data obtained in the 2005 Community Health Survey in New York City. *Id.* at 14 n.6. The Community Health Survey is an annual random-digit-dial telephone survey of approximately 10,000 adults, which uses self-reported height and weight to determine the prevalence of obesity in the city. *See* Gretchen Van Wye et al., *Obesity and Diabetes in New York City, 2002 & 2004*, 5 PREVENTING CHRONIC DISEASE 1, 1 (2008), *available at* http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=2396976&blobtype=pdf (last visited Feb. 25, 2009). Because people often understate their weight and overstate their height, self-reported studies such as this one may actually understate the obesity rate. *Id.* at 6.

32. Notice of Adoption, *supra* note 3, at 4.

33. *Id.* Furthermore, the portion sizes at fast food restaurants have increased in conjunction with the rise in obesity. *See* Pomeranz, *supra* note 30, at 1578. For example, a large order of McDonald's French fries is currently three times the original 1955 serving size. *Id.*

to obesity, diabetes, and insulin resistance, among other illnesses.[34] Even a moderate weight gain of ten to twenty pounds increases a person's risk of death, and an estimated 300,000 deaths annually may be attributed to obesity.[35]

The main problem with the increase in restaurant dining is that when consumers eat out—as opposed to when they prepare meals at home—they tend to consume significantly more, and they usually underestimate the amount of calories in the foods they order.[36] Over the years, restaurants have continued to increase portion size, and price incentives for purchasing a larger portion have paved the way for overconsumption because people tend to eat more when served more.[37] Indeed, research shows that "both lean and overweight adults increase their food and energy intakes" when served larger portions.[38] Because most restaurants fail to provide easy access to complete and accurate nutritional information—or fail to provide any access at all—many consumers fail to realize that a single portion of some restaurant food can exceed a full day's worth of calories and fat.[39] Research illustrates that even professional nutritionists underestimate calorie levels in high-calorie restaurant foods by between 220 and 680 calories.[40]

Restaurant menu-labeling aims to raise consumers' awareness of the calorie content in restaurant foods. The Burton study established that consumers with no access to nutrition information generally underestimated their calorie consumption, but the addition of nutritional information on restaurant menus at the point of sale influenced them

34. *See* Pomeranz, *supra* note 30, at 1578; *see also* Barbara J. Moore, *Supersized America: Help Your Patients Regain Control of Their Weight*, 70 CLEVELAND CLINIC J. MED. 237, 237 (2003) (identifying a link between fast food and overeating).

35. *See* CALL TO ACTION, *supra* note 20, at 1, 8.

36. *See* Burton, *supra* note 5, at 1674.

37. *See* Pomeranz, *supra* note 30, at 1580. One particularly effective and recognizable example of such advertising is the McDonald's "Supersize It" marketing campaign. For an interesting and insightful, if not entirely academic, examination of fast food and McDonald's, see Morgan Spurlock's aptly titled work, *Don't Eat This Book: Fast Food and the Supersizing of America*, published in 2005.

38. Jeppe Matthiessen et al., *Size Makes a Difference*, 6 PUB. HEALTH NUTRITION 65, 65 (2002).

39. *See* Pomeranz, *supra* note 30, at 1578. Of course, the reality is that disclosure may not have an effect on some Americans who will choose to continue their unhealthy eating habits despite a newfound awareness of the food items' high calorie content. In addition, it is important to note that the disclosures alone will not overhaul American society, because many factors contribute to the increase in obesity, including lack of exercise, increasing sedentary behaviors as a result of technology, and lack of education regarding a healthy diet. *See* Moore, *supra* note 34, at 237–38. Menu-labeling is only one part of the solution, albeit a necessary one.

40. Pomeranz, *supra* note 30, at 1578.

to consume less.[41] The Burton study provides a basis for mandating nutritional disclosures in restaurants and specifically for promulgating menu-labeling laws that require disclosure at the point of sale.[42]

B. Federal Legislative Response to the Obesity Epidemic

To temper the nascent obesity crisis, federal lawmakers passed the first nutritional disclosure law in 1990, which applied to nutritional labeling on food packages.[43] But congressional efforts to regulate nutritional disclosures in restaurants have always been unsuccessful.[44] Despite previous failures, New York City's Regulation 81.50 may serve as a catalyst for future federal legislation.[45]

1. The Nutrition Labeling and Education Act of 1990 and Restaurant Nutritional Disclosure Requirements

Congress first officially addressed America's obesity problem in 1990 by promulgating the Nutrition Labeling and Education Act (NLEA), which regulated disclosure of nutritional information for store-bought items.[46] When Congress passed the NLEA, however, it offered restaurant establishments a nearly comprehensive exemption from the nutritional guidelines, largely due to an activist food lobby that "vociferously" opposed regulation.[47]

The NLEA addresses restaurant nutritional disclosures in two provisions: §343(q) and 343(r).[48] Section 343(q) deals with *mandatory* nutritional labeling and specifically exempts restaurant food from the comprehensive labeling requirements set forth for retail packaged

41. *See* Burton, *supra* note 5, at 1674. The study consisted of a survey of 241 respondents from a geographically dispersed area in a single state who responded to a mail survey. *Id.* at 1672. Although the survey size may appear admittedly insignificant, the survey is still noteworthy because it is one of few studies to even consider this issue.

42. More studies showing this correlation should be forthcoming now that calorie information has been made available at the point of sale in New York City. *See infra* notes 187, 200 and accompanying text.

43. *See* Nutrition Labeling and Education Act of 1990 (NLEA), 21 U.S.C. § 343 (2006).

44. *See, e.g.*, Menu Education and Labeling Act, H.R. 3444, 108th Cong. § 3(a) (2003).

45. *See* 24 R.C.N.Y. § 81.50 (2008 & Supp. 2008).

46. *See* 21 U.S.C. § 343(q)(5)(A)(i).

47. Fribush, *supra* note 14, at 380 (noting that the food lobby pressured the FDA to exempt restaurants from the health claims provisions of the NLEA); *see also* 21 U.S.C. § 343(q)(5)(A)(i) (stating that the provisions regulating health claims do not apply to "restaurants or establishments in which food is served for immediate human consumption"); N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F. Supp. 2d 351, 356 n.5 (S.D.N.Y. 2007) (stating that the National Restaurant Association "vociferously opposed" mandatory nutrition labeling for restaurants).

48. *See NYSRA I*, 509 F. Supp. 2d at 356–57.

foods.[49] The FDA, which is the body charged with enforcing the NLEA, made this determination partly because restaurant menu-labeling was considered "impractical" due to the difficulty and expense involved in obtaining nutritional analyses of restaurant items.[50] In order to avoid "misbranding" of food due to incorrect or misleading nutritional information, however, the FDA did require restaurants to comply with the federal guidelines for disclosure of *voluntary* nutritional content claims under §343(r).[51]

Section 343(r) only applies when a restaurant *voluntarily* chooses to make a claim, such as "lite" or "low fat," that "characterizes the level of any nutrient" in its food.[52] When a restaurant makes such a claim, it must follow the standards governed by the FDA.[53] Importantly, the FDA standards are not particularly restrictive because the FDA did not mandate the manner in which the information must be presented or the method by which the nutritional information is determined.[54] This affords restaurants a considerably higher degree of flexibility and freedom in disclosing nutritional information than packaged food purveyors receive under § 343(q) of the NLEA.[55] By structuring the NLEA in this manner, Congress left a small window of opportunity for states and localities to regulate restaurants: states could still pass laws establishing mandatory nutritional disclosure for foods that do not state a voluntary nutritional claim under §343(r).[56]

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49. *See* 21 U.S.C. § 343(q)(5)(A)(i).

50. H.R. REP. No. 101-538, at 3337 (1990). The "impractical" mandatory labeling requirements for packaged foods under § 343(q) of the Nutritional Labeling and Education Act of 1990 (NLEA) for packaged foods include the posting of serving size, calories, fats, sodium, cholesterol, and a plethora of other vitamin and nutrient information. *See* 21 U.S.C § 343(a)(1). This information can be found on the now-familiar "nutrition facts panel" located on all packaged foods. *See NYSRA I*, 509 F. Supp. 2d at 356.

51. *See* 21 U.S.C § 343(r); *see also NYSRA I*, 509 F. Supp. 2d at 356.

52. 21 U.S.C. § 343(r)(1)(A). Examples of nutrient content claims include "low sodium," "lite," or "high in oat bran." H.R. REP. No. 101-538, at 19 (1990). Claims can also include statements such as "100 calories" made on a food product label if the statement is not located on the Nutrition Facts panel of the food item. *NYSRA I*, 509 F. Supp. 2d at 360.

53. *See* 21 C.F.R. § 101.10 (2009).

54. *Id.* Because these claims are voluntary, a restaurant can make nutrition information available by any means, such as in a binder available upon request behind the counter. *See id.*

55. *See id.* While restaurants are allowed to obtain nutritional information by "any reasonable means," packaged food purveyors must use specific FDA approved nutritional analysis databases. *See id.* § 101.9(g)(8)–101.10.

56. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA III*), 556 F.3d 114, 117–18 (2d Cir. 2009) (stating that "New York City merely stepped into a sphere that Congress intentionally left open to state and local governments"); *NYSRA I*, 509 F. Supp. 2d at 358 (noting that the NLEA "shall not be construed to preempt any provision of State law" (quoting Pub. L. No. 101-535, § 6(c), 104 Stat. 2535, 2364)).

2. *Other Federal Attempts to Regulate Restaurant: The MEAL Act and the LEAN Act*

Not surprisingly, Congress has been unsuccessful in passing any similar legislation that resembles Regulation 81.50 because restaurant associations and food industry lobbyists have continually opposed government initiatives to combat obesity. Until *NYSRA II*, these associations have been enormously successful in deflecting government intrusion.[57] The restaurant industry has brushed off government regulation as "wholly invasive, ineffective, unnecessary, and inappropriate," and it has catcalled interveners "Grease Police" or "Calorie Cops," never missing an opportunity to remind consumers that they live in a "Nanny State."[58] Internet websites supported by the restaurant industry, such as www.consumerfreedom.com, further exacerbate the food-cop hysteria by espousing that a potential big-government takeover necessarily follows from the implementation of nutritional labeling laws.[59] One advertising campaign, entitled *CSPI: The New Bullies*, warns consumers that "[b]ullies used to steal your lunch money. Now they scare you out of eating. Food cops at the Center for Science in the Public Interest are seeking control over everything you eat."[60]

In 2003, as an initial response to evidence that links the national obesity crisis to restaurants, members of Congress proposed the Menu Education and Labeling (MEAL) Act in order to effectively delete the restaurant industry's labeling exemption in the NLEA.[61] This amendment would have required restaurants to display nutritional information on menus. Slightly more stringent than New York City's Regulation 81.50, the MEAL Act would have also required all restaurants with at least twenty establishments nationwide to post calories,

57. Baker, *supra* note 14, at 189. According to Michele Simon, the food industry's pressure on lawmakers was so great that even in 1990, failing to exempt restaurants from the NLEA's requirement for mandatory food labeling "would have guaranteed the demise of the entire 1990 bill." MICHELE SIMON, APPETITE FOR PROFIT: HOW THE FOOD INDUSTRY UNDERMINES OUR HEALTH AND HOW TO FIGHT BACK 203–04 (2006) (Michele Simon is a public health attorney specializing in nutrition policy and food industry tactics). In response to a 2004 proposal that required menu labeling in chain restaurants in New York City (a precursor to Regulation 81.50), the restaurant lobby persuaded politicians to speak out against the bill and intimidated legislators with threats of putting opposing candidates up for election in order to kill the bill. *Id.* at 206. The food industry also donated approximately $4 million to New York State political campaigns between 1999 and 2005. *Id.* at 205.

58. Baker, *supra* note 14, at 189.

59. *See, e.g.*, Center for Consumer Freedom, CSPI: The New Bullies, http://consumerfreedom.com/advertisements_detail.cfm/ad/13.

60. *Id.*

61. Menu Education and Labeling Act, H.R. 3444, 108th Cong. § 3(a) (2003).

fat, trans fat, and sodium content on restaurant menus in a clear and conspicuous font.[62] The MEAL Act would have preempted identical state legislation, but it would not have precluded states from passing even more stringent regulations that would require restaurants to post additional nutritional information not included in the Act.[63] Unfortunately, the proposed MEAL Act was never passed.[64] Although subsequent versions of the bill were introduced in both the House and the Senate in 2004, 2006, 2008, and 2009, the bill has had a dismal success rate: it has never even emerged from committee.[65]

Another bill, known as the Labeling Education and Nutrition Act, or LEAN Act, was introduced in the Senate on September 25, 2008.[66] This bill addressed the same issues implicated in the yet unsuccessful MEAL Act.[67] The LEAN Act differed from the MEAL Act, however, in a host of ways that made it substantially more appealing to the restaurant industry, and regrettably, much less effective than the MEAL Act.[68] Unlike the MEAL Act, the LEAN Act sought to shield restaurants from liability. The Act's congressional findings declared that "public health and welfare are advanced" when restaurants are not subjected to "frivolous" litigation over nutritional disclosures. This statement seems contrived because the LEAN Act also blatantly serves the restaurant industry's interest in avoiding costs, rather than the Act's genuine concern for the public.[69] This provision was likely added in response to "frivolous" lawsuits against restaurants that had

62. *Id.* § 4(b)

63. *Id.*

64. *See* S. 2108, 108th Cong. (2004); *see also* http://www.govtrack.us/congress/bill.xpd?bill=s108-2108&tab=related (last visited Oct. 31, 2009) (showing the status of the bill as "dead").

65. *See* S. 2108, 108th Cong. (2004). This failure can most likely be attributed to relentless pressure from the restaurant industry in attempting to circumvent federal regulation. The 2009 versions of the MEAL Act—S. 2784 and H.R. 2426—are still awaiting potential internment in their respective committees.

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

67. *See id.*

68. *Id.*

69. *Id.* The former versions of the MEAL Act and New York City Regulation 81.50 contain no such declaration. *See, e.g.*, Menu Education and Labeling Act, H.R. 3444, 108th Cong. § 3(a) (2003); 24 R.C.N.Y. § 81.50 (2008 & Supp. 2008). This information once again exemplifies the restaurant industry's powerful ability to persuade government officials to support their needs and desires. *See* Mark Chediak, *Darden Spends Big on Lobbying*, ORLANDO SENTINEL, July 24, 2008 (noting the opening of a new Washington lobbying office by restaurant conglomerate Darden Restaurants, which owns Red Lobster and Olive Garden). Although labeling advocates indicate that the restaurant industry has increased its lobbying efforts against menu-labeling bills, the Darden group countered that the industry supports disclosure, but in a more "flexible" way than that articulated in the MEAL Act. *Id.*

allegedly misrepresented the nutritional content of menu items.[70] On its face, the LEAN Act purports to accomplish its goal of avoiding litigation by setting a very low bar for restaurants to obtain nutritional analyses of their foods.[71] In contrast, the NLEA, the MEAL Act, and New York City's Regulation 81.50 all require either strict laboratory analyses or other reliable testing methods for all nutritional content.[72]

The LEAN Act also differed from the MEAL Act in that it only mandated disclosure of calories.[73] Calories could be disclosed in a host of locations: on the menu board, on a sign near the menu board, or near the consumer queue prior to the point of purchase.[74] The LEAN Act also furnished restaurants with considerably more freedom as to the disclosures' size: rather than a "font equal to that of the menu item or price," the legislators stipulated a vague "clear and conspicuous" font.[75] Finally, unlike the MEAL Act, the LEAN Act would entirely preempt any other similar state or local menu-labeling regulations, such as Regulation 81.50.[76]

On September 25, 2008, the National Restaurant Association announced its support for the LEAN Act, largely contradicting both its previous stance and that of state and local restaurant associations and owners who continued to seek exemption.[77] Although the National Restaurant Association had previously argued that menu-labeling was unnecessary and would have little effect on consumers' eating preferences,[78] it now conveniently insisted that consumers should be "em-

70. *See* Complaint at 2, Jones v. DineEquity, Inc., 2008 WL 2784919 (Cal. Super. Ct. June 10, 2008) (No. 08391858) (alleging that Applebee's misrepresented the nutritional content of foods on its Weight Watchers menu).

71. Labeling Education and Nutrition Act of 2008, S. 3575, 110th Cong. § 2(9) (2008).

72. *See* 21 C.F.R. § 101.9(c)(1)(i); Menu Education and Labeling Act, H.R. 3444, 108th Cong. § 3(a); 24 R.C.N.Y. § 81.50(c). The LEAN Act allows restaurants to calculate nutritional data by consulting any source that provides a "reasonable basis" for determining nutritional data, including cookbooks or nutrient databases. Labeling Education and Nutrition Act of 2008, S. 3575, 110th Cong. § 2(9) (2008)

73. Labeling Education and Nutrition Act of 2008, S. 3575, 110th Cong. § 6 (2008)

74. *Id.*

75. *Id.*

76. *Id.* § 8.

77. *See* Press Release, National Restaurant Association, National Restaurant Association Statement About Introduction of LEAN Act in Congress (Sept. 25, 2008) [hereinafter Press Release], http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1691.

78. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), 2008 U.S. Dist. LEXIS 31451, at *43–44 (S.D.N.Y. Apr. 16, 2008). In *NYSRA II*, the Restaurant Association's expert witness, Dr. David Allison, argued that Regulation 81.50 did not advance the government interest of reducing obesity because there was no evidence that it would actually reduce obesity, stating, "[T]here is not competent and reliable evidence that providing restaurant patrons with calorie information on menu items will reduce individual or population levels of obesity." *Id.* at *45.

power[ed] . . . to make the choices that are best for them" by having access to the information.[79] This attitude likely stems from a preference for a standardized federal law that would help restaurants avoid the large overhead costs that are associated with a "patchwork of inconsistent state and local ordinances."[80]

On June 15, 2009, the Senate Health, Education, Labor, and Pensions (HELP) Committee passed a trillion-dollar comprehensive healthcare bill—the Affordable Health Choices Act—which also incorporated a menu-labeling provision.[81] The provision was the result of a bipartisan compromise that combined elements of the MEAL Act and the LEAN Act and required the posting of calories directly on a menu board.[82] The Affordable Health Choices Act was superseded on November 7, 2009 by the Affordable Health Care for America Act, which contains a replica of the menu-labeling provision in the prior Act.[83] Like the federal legislation that has already met its demise, the future of the menu-labeling provisions remains unclear. Despite the National Restaurant Association's endorsement, many local and state restaurants and organizations continue to oppose regulation. Further, the menu-labeling provision could be stricken from the bills at any time during consideration.

C. State Restaurant Nutritional Disclosure Legislation

Although federal intervention has proved futile thus far, with the promulgation of Regulation 81.50 in New York City, local legislators have finally passed the first hurdle. Regulation 81.50 has served as a catalyst for numerous other health-conscious state, county, and city legislators who have successfully taken matters into their own hands.[84] Implementing local menu-labeling legislation, however, is not without hardships due to unyielding opposition.[85]

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79. Press Release, *supra* note 77.

80. *Id.*

81. *See* Affordable Health Choices Act, S. 1679, 111th Cong. § 325 (2009). The House introduced a similar version of the Affordable Health Choices Act on July 14, 2009. *See* H.R. 3200, 111th Cong. (2009).

82. *See* Affordable Health Choices Act, S. 1679, 111th Cong. § 325 (2009); Press Release, U.S. Sen. Harkin: Prevention and Wellness Investments Included in Landmark Health Reform Bill (July 15, 2009), http://www.iowapolitics.com/index.iml?Article=164598.

83. *See* Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 2572 (2009). The Senate passed its version, the Patient Protection and Affordable Care Act, on December 24, 2009. *See* H.R. 3590, 111th Cong. § 4205 (2009).

84. *See supra* notes 57–60 and accompanying text; *see also infra* notes 85–91 and accompanying text.

85. *See* Nutrition Labeling in Chain Restaurants: State and Local Bills/ Regulations—2009–2010, http://cspinet.org/new/pdf/ml_bill_summaries_09.pdf (last visited Jan. 27, 2010).

1. *State and Local Menu-Labeling Regulations and New York City Health Code Regulation 81.50*

In 2006, New York City's Regulation 81.50 became the first restaurant menu-labeling regulation enacted in the nation, although it also became the subject of two lawsuits filed by the New York State Restaurant Association.[86] Nevertheless, as a result of New York City's success in passing Regulation 81.50, and its further success in winning *NYSRA II* and *NYSRA III*, many other states, cities, and counties have proposed and passed similar legislation.[87] On September 30, 2008, California Governor Schwarzenegger signed into law the first statewide menu-labeling law in the nation, which took effect on July 1, 2009.[88] Since 2007, King County, Washington; San Francisco City and County, California; Santa Clara County, California; and Philadelphia, Pennsylvania have also passed menu-labeling laws.[89] Laws are currently pending in the District of Columbia and other cities.[90] Seventeen state legislatures also have bills pending.[91] If Regulation 81.50 had not been upheld on both preemption and First Amendment fronts, these other laws may have lacked sufficient support to pass.

III. SUBJECT OPINION: THE *NEW YORK STATE RESTAURANT ASSOCIATION V. NEW YORK CITY BOARD OF HEALTH* TRILOGY

A. *Version 1.0 of Regulation 81.50*

The first version of Regulation 81.50 applied only to certain chain restaurants that voluntarily provided nutritional information in some form.[92] Under the NLEA, restaurants making voluntary claims must

86. *See generally* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F. Supp. 2d 351 (S.D.N.Y. 2007); N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), 2008 U.S. Dist. LEXIS 31451, at *1 (S.D.N.Y. Apr. 16, 2008); N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA III*), 556 F.3d 114 (2d Cir. 2009).

87. Nutritional Labeling in Chain Restaurants, *supra* note 85.

88. *See* CAL. HEALTH & SAFETY CODE § 114094 (West Supp. 2009).

89. *See* Nutrition Labeling in Chain Restaurants, *supra* note 85. The California state law now preempts the California county and city laws. *See* CAL. HEALTH & SAFETY CODE § 114094 (West Supp. 2009).

90. *See* Nutrition Labeling in Chain Restaurants, *supra* note 85.

91. *Id.* This number is current as of January 27, 2009.

92. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007). The court found that Regulation 81.50 was preempted by § 343-1(a)(5), the counterpart of § 343(r), which states that "no State or political subdivision of a State may directly or indirectly establish . . . any requirement respecting any [nutrient content] claim . . . that is not identical" to the federal requirements. Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343-1(a)(5) (2006).

conform to strict FDA disclosure requirements, and any state or local legislation addressing these claims is preempted by the NLEA.[93]

While recognizing the authority of states to implement *mandatory* nutritional information displays, the *NYSRA I* court found that Regulation 81.50 dealt with a *voluntary* nutrient claim, and therefore fell into the category of § 343(r) of the NLEA, under which the regulation was required to conform with FDA regulations.[94] Under the FDA regulations, restaurants making a voluntary claim may post nutrient information in any reasonable way, such as on leaflets or signs, whereas Regulation 81.50 required restaurants to post the calories specifically and only on menus.[95] The court found that the regulation directly contradicted §343(r).[96] The court reasoned that "by making its requirements contingent on a voluntary claim, Regulation 81.50 directly implicates § 343(r) and its corresponding preemption provision."[97] In dictum, the court indicated that if the regulation were worded broadly enough to apply to all restaurants, its constitutional infirmities could likely be cured.[98] Because the court ruled in favor of the Restaurant Association on the preemption claim, it did not reach the First Amendment allegations involved in *NYSRA I*.[99]

B. Version 2.0 of Regulation 81.50

In response to the *NYSRA I* court's dictum regarding preemption, the Board adopted a modified Regulation 81.50 on January 22, 2008.[100] The modified regulation impacted all restaurants with fifteen or more establishments nationwide that served standardized menu portions, rather than just those restaurants that already voluntarily provided nutritional content.[101] Akin to the defunct Regulation 81.50, the new regulation required restaurants to post calorie information for standardized menu items in close proximity to the menu item, and in a

93. *See* 21 U.S.C. § 343-1(a).

94. *NYSRA I*, 509 F. Supp. 2d at 362.

95. *Id.*

96. *Id.*

97. *Id.* at 363. The irony of the situation is that the Board of Health had chosen to regulate only restaurants that voluntarily posted information solely in order to ease the burden on restaurants of conducting expensive food analyses. *Id.* If the Board had not been so concerned with appeasing the less-than-gracious Restaurant Association, the Board most likely would have made the provision mandatory, and it would have been upheld in *NYSRA I*.

98. *Id.* ("[T]he majority of state or local regulations—those that simply require restaurants to provide nutrition information—therefore are not preempted.")

99. *Id.*

100. *See* Notice of Adoption, *supra* note 3, at 1.

101. *Id.* at 12; 24 R.C.N.Y. § 81.50(c) (2008).

font at least as large as that used to post the item's name or price.[102] The regulation, resembling the NLEA requirement for packaged foods, required restaurants to undertake a "verifiable analysis" of the menu items' nutritional content by using a laboratory analysis or other similar reliable testing methods.[103] Shortly after enactment, the Restaurant Association once again sought a declaration that the law was preempted by the NLEA and unconstitutional.[104]

C. *NYSRA II*

1. *Preemption Issue Recap*

The *NYSRA I* court had thoroughly analyzed the relevant portions of the NLEA—§ 343(q) and (r)—and determined that only regulations covering voluntary claims, and therefore falling under § 343(r), would be preempted. Thus, the *NYSRA II* court only needed to determine whether the newly crafted Regulation 81.50 covered voluntary claims and therefore fell under § 343(r).[105] The court acknowledged that § 343(q) regulated only mandatory nutritional information—rather than *voluntary* claims—and specifically exempted restaurants.[106] The court held that mandatory disclosures, such as "contains 100 calories," are not claims and that states may mandate these disclosures "in the absence of federal regulation."[107] Because Regulation 81.50 now applied to mandatory disclosures of nutrient information, and not to voluntary disclosures, the regulation fell under § 343(q) and was not preempted.[108]

2. *First Amendment Issue*

After determining that the NLEA did not preempt Regulation 81.50, the *NYSRA II* court discussed the merits of the Restaurant Association's First Amendment claim.[109] The first major issue was to determine the amount of protection that the restaurants' "speech" should be afforded.[110] Because the regulation required disclosure in

102. *See* Notice of Adoption, *supra* note 3, at 13. Standardized items only included those items that are listed on a menu for more than thirty days in a calendar year. *Id.* Thus, the regulation would not affect items like daily specials.

103. *Id.*

104. N.Y. State Rest. Ass'n v. N.Y. State Bd. of Health (*NYSRA II*), 2008 U.S. Dist. LEXIS 31451, at *3 (S.D.N.Y. Apr. 16, 2008).

105. *Id.* at *10.

106. *Id.* at *10–11.

107. *Id.* at *14–18.

108. *Id.* at *19.

109. *Id.* at *19–21.

110. *Id.*

connection with commercial transactions—including the selling of restaurant meals—the court determined that it fell into the realm of purely commercial speech.[111] Commercial speech is subject to far less stringent constitutional requirements than other types of speech.[112] While commercial speech receives some protection due to the public's interest in "intelligent and well informed" economic decisions and the "free flow of commercial information," the strong government interest in economic regulation has been held to, at times, supersede the interest in free speech.[113]

a. Determining the Proper Standard of Commercial Speech

Within the sphere of commercial speech, courts employ a sliding scale of protection depending upon the subcategory of commercial speech.[114] The Restaurant Association first advocated use of the most stringent standard of review, which automatically invalidates any regulation amounting to compelled commercial speech.[115] The Restaurant Association asserted that Regulation 81.50 impermissibly compelled restaurants to promote the government's "message" that calories are the only nutritional content that consumers should consider when choosing foods, and that consumers must consider calories before ordering.[116] The court rejected this argument, reasoning that calories are purely factual information that does not require endorsement of any type of viewpoint, and also that the disclosure of calories does not force food purchasers to *first* consider calories.[117] Indeed, if Regulation 81.50 fell into the category of compelled speech, many warning or information disclosure labels—including the "vast regulatory apparatus that presently seeks to promote transparent and efficient markets through labeling requirements and other forms of

111. *Id.* at *20. Commercial speech is "usually defined as speech that does no more than propose a commercial transaction." *Id.* (quoting United States v. United Foods, Inc., 533 U.S. 405, 409 (2001)).

112. *Id.* at *19–20; *see also* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113 (2d Cir. 2001) (stating that "commercial speech is subject to less stringent constitutional requirements" than other kinds of speech).

113. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982).

114. *See NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *21–23 (discussing the varying standards imposed on compelled commercial speech, commercial disclosure requirements, and commercial speech restrictions).

115. *Id.* at *27–28.

116. *Id.* at *28. An example of impermissible compelled speech is requiring students to recite the pledge of allegiance. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

117. *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *29. Indeed, consumers are free to do what they choose with the information, and some consumers may rightfully choose to disregard it entirely.

mandated disclosures"—could be rendered constitutionally suspect, a conclusion that is contrary to established law.[118]

Non-compelled speech constitutes the next step down the sliding scale, and can be subject to either an intermediate level of scrutiny, outlined in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, or mere rationality review, established in *National Electric Manufacturers Ass'n v. Sorrell*.[119] In *Central Hudson*, a utility company challenged the constitutionality of a regulation that completely banned the company's promotional advertising; the challenge led the Supreme Court to adopt an intermediate scrutiny standard for restrictions on commercial speech.[120] The *Central Hudson* standard requires that a court consider (1) whether the regulated expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation advances the governmental interest asserted; and (4) whether the regulation is more extensive than necessary to advance the interest.[121] In *NYSRA II*, the court considered whether increased scrutiny under *Central Hudson* should have provided the required analytical framework.[122] The court determined that *Central Hudson* did not apply to purely factual disclosure requirements and rejected the intermediate level of review; instead, the court determined that rationality review was most appropriate.[123]

Courts apply rationality review, the lowest step in the sliding scale of commercial speech protection, to regulations that require mere *disclosure* of factual and uncontroversial information, such as Regulation 81.50.[124] Unlike *prohibitions* or *restrictions* on commercial speech,

118. *See* Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 177 (2007) (noting that "[c]ommercial speech is protected so that citizens can receive information . . . not to insure that commercial speakers retain the autonomy to express themselves as they choose").

119. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001).

120. *See* Cent. Hudson Gas & Elec. Corp., 447 U.S. at 566.

121. *Id.* The *Central Hudson* test only applies to measures that restrict commercial speech. *Id.*

122. *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *32.

123. *Id.*

124. *Id.* The First Amendment exemption for "factual and uncontroversial information" was first discussed in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985). In *Zauderer*, the Court used a rationality standard to evaluate Ohio's disciplinary rules for attorneys, which required attorneys to disclose fee information to potential clients. *Id.* at 633. The Court held that the disciplinary rules required disclosure of purely factual and uncontroversial information and did not compel speech. *Id.* The Court noted that there was a "material difference between disclosure requirements and outright prohibitions on speech" that rendered the advertiser's interest in not providing certain factual information minimal. *Id.* at 651. The disclo-

these disclosure regulations need only be reasonably related to the state's interest in preventing the deception of consumers.[125] In determining whether to apply this rationality standard, the court turned to the seminal Second Circuit case of *National Electric Manufacturers Ass'n v. Sorrell*.[126] In *Sorrell*, the statute in question required the manufacturers of products that contained mercury to label those products and to indicate that the products containing mercury should be recycled or disposed of as hazardous waste.[127] The Second Circuit applied the more lenient rationality standard that is usually reserved for disclosures that are intended to prevent consumer confusion or deception,[128] even though the goal of the disclosure was to protect public health and the environment and to increase consumer awareness of the presence of mercury.[129] Like the mercury content in *Sorrell*, calorie content was purely a factual and uncontroversial disclosure of information that was aimed at providing consumers with accurate commercial information, and specifically, nutritional information in restaurant foods.[130] The court in *Sorrell* found that the First Amendment was satisfied because the disclosure was consistent with the First Amendment's goal of protecting the robust and free flow of information.[131] Under *Sorrell*, then, if a regulation is intertwined with increasing consumer awareness and is intended to protect public health, it can bypass the more stringent test for commercial speech outlined in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[132]

b. Applying the *Sorrell* Rationality Standard for Commercial Speech

The *NYSRA II* court reasoned that under *Sorrell*, Regulation 81.50 would be constitutional if it was reasonably related to the state's interest in protecting and better informing consumers, and ultimately, in

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sure requirements are constitutional so long as they are reasonably related to the state's interest in preventing deception of consumers. *Id.*

125. *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *21.

126. *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113 (2d Cir. 2001).

127. *Id.* In *Sorrell*, the Second Circuit considered whether to apply the lenient rationality standard articulated in *Zauderer*. *Id.* at 107–16. By using the rationality standard in this case, the court broadened the narrow standard articulated in *Zauderer* to include not only factual disclosures that are intended to prevent consumer deception but also disclosure requirements that are intended to increase consumer awareness. *Id.*

128. *See supra* note 124 for a discussion of *Zauderer* and the rationality standard.

129. *See Sorrell*, 272 F.3d at 113.

130. *NYSRA II*, 2008 LEXIS 31451, at *26.

131. *Sorrell*, 272 F.3d at 114–15.

132. *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *21.

reducing obesity.[133] The Restaurant Association argued that the regulation did not advance the goal of reducing obesity because the Board lacked conclusive evidence that showed a correlation between calorie disclosure and consumer behavior, and because no evidence showed that the regulation would actually reduce obesity.[134] The court, in response, noted numerous amicus briefs filed by prominent physicians and public health researchers, each of which indicated a link between calorie disclosure and weight loss.[135] The Restaurant Association's own expert even hesitantly noted that divulging calorie information at the point of sale might help reduce obesity.[136] The court noted, however, that rationality review does not require conclusive proof of a reduction in obesity. The court ultimately upheld the regulation as constitutional because the regulation was "inextricably intertwined with the goal[s] of increasing consumer awareness of the calorie content in restaurant meals" and reducing obesity.[137]

D. NYSRA III

After a lengthy appeal process, on February 17, 2009, the United States Court of Appeals for the Second Circuit affirmed the *NYSRA II* court's decision to uphold Regulation 81.50.[138] The court discussed the NLEA's "labyrinthine" preemption scheme at length and acknowledged that only regulations involving voluntary nutrient content claims under § 343(r) of the NLEA would be preempted.[139] The main contention involving preemption, however, revolved around whether disclosure of calories on menu boards actually constituted "claims."[140] Relying in part on the FDA's interpretation of the statute, the court ultimately found that the disclosures were merely nutritional information that did not constitute claims, and thus, were not preempted.[141]

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133. *Id.*

134. *Id.* at *44.

135. *Id.*

136. *Id.* at *45. This is an admittedly tenuous assertion; however, in *NYSRA III* the Second Circuit keenly observed that the Restaurant Association's expert never asserted that menu-labeling would not reduce obesity, but only stated that it *might* not. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA III*), 556 F.3d 114, 136 (2d Cir. 2009).

137. *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *47.

138. *NYSRA III*, 556 F.3d at 118.

139. *Id.* at 117–18, 131 (noting that the "statutory scheme . . . is a labyrinth"). This discussion of the preemption issue is cursory because preemption is not the focus of this Note. The court analyzes the preemption issue at length in *NYSRA III*, and a more thorough analysis can be found *id.* at 123–32.

140. *Id.* at 130.

141. *Id.* at 132.

When addressing the First Amendment challenge, the court substantially adopted the *NYSRA II* court's reasoning and applied the *Sorrell* rationality review.[142] The court affirmed that factual disclosure requirements that address non-deceptive speech are subject to rationality review, rather than the more strict scrutiny required for prohibitions or restrictions on speech.[143] The court further noted that to satisfy the rational basis test, the Board had no obligation to produce evidence or empirical data, even though it had actually done so.[144] In view of the plethora of evidence, the court found that the Board was able to show a reasonable relationship between the disclosure requirements and the goals of informing consumers and reducing both obesity and associated diseases.[145]

IV. ANALYSIS OF *NYSRA II* AND *III*

NYSRA II and *III* were decided correctly for several reasons. First, the NLEA does not preempt Regulation 81.50: Congress and the FDA purposefully left a gaping hole in the NLEA in order to provide states and localities the freedom to regulate restaurant nutritional disclosures in precisely the manner that New York City has chosen to do with Regulation 81.50.[146] Second, the courts correctly determined

142. *Id.* at 132–37.

143. *Id.* at 133 (indicating that while *Zauderer* held that disclosure regulations would be upheld if necessary to prevent consumer deception, it did not render all other disclosure requirements—such as those intended to increase consumer awareness—subject to heightened scrutiny). The court also noted that the First Circuit had also accepted the broader reading of *Zauderer* in *Pharmaceutical Care Management Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) ("We have found no cases limiting *Zauderer* [to potentially deceptive advertising directed to consumers].").

144. *See NYSRA III*, 556 F.3d at 118.

145. *Id.* at 134. The court also indicated that the Restaurant Association had conceded that it could not prevail under the rational basis test. *Id.*

146. *See* Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343(q) (1994). The FDA also expressed its belief that Regulation 81.50 is not expressly preempted by the NLEA in an amicus brief submitted to the Second Circuit in support of the decision in *NYSRA II*. *See* Brief of the U.S. Food and Drug Administration as Amicus Curiae in Support of Affirmance at 2, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (No. 09-1892). While the FDA's opinion on this issue is not dispositive, the court can consider its views as persuasive. *Id.* The courts have afforded various degrees of deference to agency determinations. *See, e.g.*, Auer v. Robbins, 519 U.S. 452, 461–62 (1997) (holding that an agency's interpretation of its own regulations should be given deference); Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (holding that courts will uphold an agency's determination when a statute is silent or ambiguous if it is based on a "permissible construction of the statute"); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (noting that agency interpretations, in the absence of express delegation of authority, are given considerable weight depending upon the circumstances). While *Chevron* affords the greatest amount of deference to agency determinations, *Skidmore* provides varying degrees of deference depending upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronounce-

that Regulation 81.50 did not offend the First Amendment because disclosures of factual and uncontroversial information are constitutional if they are reasonably related to a legitimate state interest under the test articulated in *Sorrell*.[147] Regulation 81.50 and other like measures are a *necessary* force in forging a real solution to the "obesity epidemic."[148] *NYSRA II* has provided the impetus for enacting similar legislation around the nation.[149] The provocative issue of whether nutritional disclosures should be regulated in the restaurant industry has raised considerable debate.[150] Thus, this Part predominantly focuses the analysis of *NYSRA II* and *III* on this issue. Specifically, this Part illustrates that restaurant nutritional disclosures such as Regulation 81.50 are a necessary tool to help reduce obesity, and it demonstrates that posting calorie content of foods at the point of sale is an effective way to achieve that goal.

A. Regulation 81.50 is Constitutional Under the First Amendment

The *NYSRA II* and *III* courts correctly determined that New York City's Regulation 81.50 satisfied the First Amendment.[151] While the First Amendment protects both noncommercial and commercial speech, commercial speech is afforded less protection than speech that is not involved in facilitating a commercial transaction.[152] Regulations that require disclosure of purely factual and uncontroversial information receive even more lenient review than regulations that restrict accurate commercial speech.[153] The principal rationale for protecting

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ments, and all those factors which give it power to persuade, if lacking power to control." *See* United States v. Mead Corp., 533 U.S. 218, 219 (2001) (quoting *Skidmore*, 323 U.S. at 140). For a thorough discussion of the preemption issues involved in *NYSRA II*, see Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 785 (2008) (finding that regulations that do not concern nutritional "claims" such as Regulation 81.50 are not subject to preemption).

147. *See supra* notes 109–137 and accompanying text.

148. *See supra* notes 24–42 and accompanying text. The disclosures alone, however, will not be sufficient to effect a significant change; consumer education measures will need to be implemented as well.

149. *See* Nutrition Labeling in Chain Restaurants, *supra* note 85.

150. *See supra* note 14 and accompanying text.

151. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), 2008 U.S. Dist. LEXIS 31451, at *3–4 (S.D.N.Y. Apr. 16, 2008), *aff'd*, 556 F.3d 114 (2d Cir. 2009).

152. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

153. Although this view has not been expressly espoused by the Supreme Court, it is supported by case law in the First and Second Circuits. *See, e.g.*, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA III*), 556 F.3d 114, 134 (2d Cir. 2009) (stating that disclosure regulations impinge far less on speech than regulations that suppress speech); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310, n.8 (1st Cir. 2005) (noting that the holding in *Zauderer* is not limited to preventing deceptive advertising, but is also applied to disclosure requirements); Nat'l Elec.

commercial speech is the public's interest in "intelligent and well-informed" economic decisions and the "free flow of commercial information."[154] Regulation 81.50 furthers that goal by disseminating previously unavailable information in order to facilitate responsible decision making by consumers.[155] Furthermore, commercial speech of this kind serves an informational function as opposed to a participatory function that facilitates democratic public discourse, which deserves stringent protection.[156] The Supreme Court has traditionally upheld regulations that affect only the informational function of speech because "commercial speech is not understood as a vehicle for participation in the creation of democratic legitimacy."[157] Regulations like Regulation 81.50 that merely require disclosure of purely factual information serve the informational purpose of encouraging, rather than impeding, the free flow of information, and accordingly, they receive a more lenient rationality review under *Sorrell*.[158]

1. *Regulation 81.50 Was Properly Analyzed Under the* Sorrell *Standard*

The *NYSRA II* and *III* courts properly determined that Regulation 81.50 fell under the *Sorrell* standard for commercial speech because it

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Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–14 (2d Cir. 2001) ("Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests.") The Second Circuit in *NYSRA III* admitted that its decision to broaden the test outlined in *Zauderer* to include regulations like Regulation 81.50 rested solely upon its interpretation of Supreme Court precedent as set forth in *Zauderer*. *See NYSRA III*, 556 F.3d at 132.

154. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). In *Virginia State Board*, the Supreme Court for the first time recognized the need for First Amendment protection of commercial speech. *Id.* The Court recognized that a statutory ban on advertising of pharmacy drug prices in the interest of maintaining the professionalism of pharmacists was a paternalistic notion that undermined consumers' access to important commercial information. *Id.* at 770. The Court observed that "people will perceive their best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than close them." *Id.* As discussed at length later in this Note, an important distinction between *Virginia State Board* and *NYSRA II* is that Regulation 81.50 serves to open the channels of communication by disseminating previously unavailable information rather than restricting speech. *See infra* notes 182–188; *cf. NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *20–26.

155. *See NYSRA III*, 556 F.3d at 132.

156. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2371–72 (2000).

157. *Id.*

158. *See NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *20–26. In *Sorrell*, the Second Circuit explained that commercial disclosure requirements of "accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *Sorrell*, 272 F.3d at 113–14.

merely requires the disclosure of factual and uncontroversial information.[159] Critics of restaurant menu-labeling laws, however, continue to assert that these laws fall under the category of compelled speech because they "force" restaurant owners to adopt a message that is not their own.[160] The Restaurant Association argued that Regulation 81.50 required restaurant owners to promote the government's "message,"[161] namely, the message that patrons must consider the caloric content of food when ordering in a restaurant and that calories are the only nutritional criterion that patrons need to consider.[162] If courts were to adopt that view, menu-labeling laws would be immediately invalidated on the grounds that the government cannot force speakers to utter messages that are not their own.[163]

a. Regulation 81.50 Does Not Compel Speech

While critics argue that Regulation 81.50 sends an implicit message to consumers that fast food is unhealthy, the regulation is remarkably

159. *See NYSRA III*, 556 F.3d at 134; *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *31.

160. Typical opponents of these laws are the National Restaurant Association and its subparts, food lobbyists, and "fronts" for the food lobby, such as the Center for Consumer Freedom. *See* Richard Berman, *Nutrition Activism Opens Restaurants Up to Legal Lashes*, 42 NATION'S RESTAURANT NEWS, June 30, 2008, at 46, 56 (noting that menu labeling laws force chain restaurants to stress the calorie count of every dish). Berman relies on a typical slippery slope argument, stating that "it's not much of a leap to image a state-mandated skull-and-crossbones next to every daily special." *Id.* (referring to how the United Kingdom considered requiring dairy packaging to post cigarette-style health warnings). *Id.* Some particularly insightful books discuss the food lobby in depth. *See, e.g.*, MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 95–110 (2002) (discussing how the food industry and its advertising and lobbying efforts influences what we eat); SIMON, *supra* note 57, at 144–64 (2006).

161. The Restaurant Association also makes the false assumption that the government is sending a "message" by requiring the dissemination of calories. How calorie disclosure constitutes a government message is unclear, and from the outcome of the case the district court appears to agree with this statement. *See NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *27.

162. *Id.* at *27–28. The Restaurant Association further alleged that the Regulation (1) requires restaurants to "shout the number of calories at their customers"; (2) effectively discourages customers from buying restaurant food; and (3) "drowns out the other health messages that some restaurants had been conveying." Reply Brief for Plaintiff-Appellant at 20, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892). The Restaurant Association fails, however, to offer any evidence of how posting calories on menu boards constitutes "shouting" or what other health messages will be "drowned out" by the calorie information.

163. *See NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *32. Courts have routinely struck down regulations that purport to "compel speech." *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405, 408–09, (2007) (invalidating an assessment imposed on mushroom producers in order to fund an advertisement to promote mushroom sales, to which a producer objected); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (invaliding a requirement that students salute the flag and recite the pledge of allegiance because "compelling the flag salute and pledge transcends constitutional limitations . . . and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

distinct from previous compelled speech cases.[164] An amicus brief that was presented to the Second Circuit on behalf of the Board of Health noted,

> Health Code § 81.50 does not require [restaurants] to state an opinion or belief. It does not require them to subsidize advertisements. It does not require them to disclose controversial facts. It "does not force any NYSRA member to take a position in any ongoing debate." It does not prevent [restaurants] from announcing that they are disclosing calorie content under legal compulsion. Indeed, it does not preclude [them] from expressing whatever additional information or opinions they wish.[165]

Indeed, the number of calories in a particular food item is uncontrovertible information:[166] a calorie is nothing more than a unit for measuring energy.[167] Regulation 81.50 merely provides information to consumers in the same way that the NLEA requires packaged food purveyors to provide nutritional information on the nutrition facts panel of the foods that consumers commonly buy in the supermarket.[168] If courts were to categorize Regulation 81.50 as compelled speech, the NLEA and similar disclosure laws would also be constitutionally suspect.[169] This is an unlikely and untenable result, as a myriad of statutes would be transformed into compelled speech merely due to an underlying implicit message. As the court indicated in *NYSRA II*, "[I]t would be possible to recast any disclosure require-

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164. *See, e.g.*, Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 651–53 (7th Cir. 2006). In *Entertainment Software*, an Illinois statute required video game sellers to label certain games that it determined were "sexually explicit" with a sticker identifying the games as such. *Id.* The determination of what constitutes a "sexually explicit" game is far more subjective and controversial than a label that merely posts a purely factual statement, such as calorie content. *Id.* Calorie content is not a subjective determination.

165. Brief of Amicus Curiae Rudd Center for Food Policy & Obesity at Yale University in Support of Defendants-Appellees and Arguing for Affirmation at 5, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892).

166. *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *27–28. The court noted, "[I]t would be possible to recast any disclosure requirement as a compelled 'message' in support of the policy views that motivated the enactment of that requirement. However . . . the mandatory disclosure of 'factual and uncontroversial' information is not the same, for *First Amendment* purposes, as the compelled endorsement of a viewpoint." *Id.* at *29.

167. *See* CONCISE OXFORD ENGLISH DICTIONARY, *supra* note 8, at 200. Perhaps the NYSRA failed to understand the meaning the of word "fact," because according to the American Heritage Dictionary, a fact is "something believed to be true or real."

168. *See* Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343 (2000). In *NYSRA II*, the court made the distinction between compelled speech cases and the case at bar, noting that warning and nutritional information labels are the perfect example of constitutional mandates. *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *30 (quoting *Entm't Software Ass'n*, 469 F.3d at 651).

169. *See* Brief of Amicus Curiae Rudd Center for Food Policy & Obesity at Yale University in Support of Defendants-Appellees and Arguing for Affirmation at 6–7, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892).

ment as a compelled 'message' in support of the policy views that motivated the enactment of that requirement."[170] For instance, a statute requiring automobile manufacturers to disclose the amount of miles per gallon of a vehicle could be read as implying that consumers should choose a more fuel-efficient vehicle, although the idea of courts holding it unconstitutional on these grounds is nonsensical.[171]

Perhaps more compelling is another fact that the Restaurant Association seemed to have overlooked: Regulation 81.50 requires calorie disclosures for all foods, both those that are high in calories and those that are low in calories. Critics fail to recognize the fact that consumers will still *consume* even though they might adapt to purely factual information.[172] Indeed, regardless of what the disclosures may implicitly indicate, they do not fall into the legal category of compelled speech.[173] Regulation 81.50 is no more controversial than the label describing the amount of cotton in a shirt or the percentage of fluoride in toothpaste.[174] Thus, the court correctly determined that Regulation 81.50 requires only disclosure of factual and uncontroversial information, and therefore, the regulation should be analyzed using the framework adopted in *Sorrell*.[175]

b. Regulation 81.50 Satisfies the *Sorrell* Standard, Because It Is Reasonably Related to the State Interest in Reducing Obesity

Regulation 81.50 is constitutional under the standard set forth in *Sorrell* for disclosure requirements that help inform consumers about the products they purchase.[176] Before adopting Regulation 81.50, the

170. *NYSRA II*, 2008 U.S. Dist. LEXIS 31451, at *29. The Supreme Court has also shown a preference for disclosure over suppression of information. For example, the Court in *Bates v. State Bar of Arizona* held that the preferred solution to the problem of incomplete disclosures by commercial actors was more disclosure, not less. 433 U.S. 350, 376 (1977).

171. *See* Energy Policy and Conservation Act, 49 U.S.C. § 32908(b)(1)(A) (2006).

172. "[R]estaurant chains are panicked about the encroachment of any government regulation, however slight, since [regulation] could open the door to more oversight." *See* SIMON, *supra* note 57, at 216; *see also* Sean Gregory, *Calorie-Conscious Menus,* TIME, Jun. 29, 2009, at 45, 46 (arguing that the restaurant industry's claim that it is opposing menu-labeling due to the costs of regulatory compliance is likely a sham, and that the industry is more "concerned that consumers will be turned off by what they see").

173. *See* Goldstein & Schlosser, *supra* note 14.

174. *Id.*; *see also* Brief of Amicus Curiae Rudd Center for Food Policy & Obesity at Yale University in Support of Defendants-Appellees and Arguing for Affirmation at 6–7, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892) (chronicling an abundance of mandated disclosure requirements that have not been challenged constitutionally and that could conceivably be invalidated if the court were to strike down Regulation 81.50).

175. *See* Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).

176. *Id.* The Second Circuit in *Sorrell* extended the holding in *Zauderer*, although "the compelled disclosure . . . was not intended to prevent 'consumer confusion or deception' per se, but

Board determined that distorted consumer perceptions and a misleading information gap lead to unhealthy food choices.[177] In *NYSRA III*, the Board adapted its purpose to include an interest in not only promoting informed consumer decision making in order to reduce obesity and related diseases, but also, alternatively, an interest in reducing consumer confusion and deception.[178] Courts have previously held these state interests sufficient to justify regulation.[179] For instance, in promulgating the NLEA, Congress made similar findings, noting that the purpose of the Act was to "make available nutrition information that can assist consumers in selecting foods that can lead to healthier diets" and to "eliminate consumer confusion by establishing definitions for nutrient content claims."[180] As these purposes are sufficient to uphold the NLEA under the rationality standard, the same purpose should suffice to render Regulation 81.50 constitutional.[181]

Regulation 81.50 enhances consumer awareness of the calorie content in restaurant meals; in fact, it requires the dissemination of information that in some circumstances was completely unavailable to consumers.[182] It is true that some restaurants already provide nutritional information to consumers, but this information is inferior and

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rather to better inform consumers about the products they purchase." *Id.* The district court in *NYSRA II* qualified the Second Circuit's language when it applies *Sorrell*, noting that *Sorrell* demonstrated that the state's interest in preventing consumer "confusion and deception" may include an interest in remedying consumers' ignorance. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), 2008 U.S. Dist. LEXIS 31451, at *39–40 (S.D.N.Y. Apr. 16, 2008).

177. *See* Notice of Adoption, *supra* note 3, at 5. The proponents of Regulation 81.50 noted that consumers have been misled to view oversized, high-calorie portions as "normal portions," and that disparities in calorie content among similar foods are not readily apparent to consumers. *Id.* For instance, many consumers—even those who may consider themselves health-conscious—are unlikely to realize that a seemingly health-conscious small Starbuck's Green Tea Frappuccino contains a modest 370 calories, while the only slightly more expensive large version contains 650 calories. *Id.* at 6. Thus, Starbucks, like other restaurants, misleads consumers by providing them with an incentive to purchase a larger item, while the price differential for choosing a larger size does not correlate with the calorie difference. *Id.* Menu-labeling will help consumers realize how many extra calories that less than a dollar of "super-sizing" can actually pile on.

178. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA III*), 556 F.3d 114, 134 (2d Cir. 2009). The Second Circuit, however, did not address the state's interest in reducing consumer confusion and deception because it found "that laws mandating factual disclosures are subject to the rational basis test even if they address non-deceptive speech." *Id.* at 133 n.21.

179. Generally, for over one hundred years, the police power retained by states has included the power to implement regulations that affect public health. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

180. H.R. REP. NO. 101-538, at 8–10 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 3336, 3337–38.

181. Of course it is important to note that, although unarticulated, the state also has an interest in lowering the costs of healthcare, which may or may not be the actual primary motivation for the enactment of Regulation 81.50. *See supra* note 27 and accompanying text.

182. In a study of three hundred of the nation's largest chain restaurants, only fifty-four percent made "some" nutrition information available. Margo G. Wootan, *Availability of Nutrition*

inadequate when compared to point of sale disclosures because, according to studies, only about 3.1% of consumers even notice the information.[183] Critics of menu-labeling argue that restaurants should be given the freedom to disclose information in whatever manner they choose and that menu-labeling laws are evidence of "big government" impinging on consumer freedom.[184] This argument is untenable, as it does not negate the fact that Regulation 81.50 is reasonably related to the city's interest in reducing obesity, nor does it render the regulation unconstitutional.

In *NYSRA II*, the Restaurant Association argued that menu-labeling laws are unconstitutional because the Board could not conclusively prove that such laws result in an actual reduction in the obesity rate.[185] This argument also fails because under the *Sorrell* rationality standard, actual evidence of a correlation in data is unnecessary.[186] Under the *Sorrell* standard, the evidence merely needed to show that Regulation 81.50 is reasonably related to the state interest in reducing obesity and related diseases,[187] which is a decidedly low standard to meet. Furthermore, under the reasonableness standard, rather than requiring evidence that the regulation will fully ameliorate the obesity problem, lawmakers can implement programs step-by-step and defer complete elimination of a problem to future regulations.[188]

Information from Chain Restaurants in the United States, 30 AM. J. PREVENTATIVE MED. 266, 267 (2006).

183. *Id.*; *see also NYSRA III*, 556 F.3d at 135 (noting that, in the Wootan study, only 3.1% of customers reported noticing voluntarily provided calorie information).

184. *See supra* notes 57–60 and accompanying text.

185. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), 2008 U.S. Dist. LEXIS 31451, at *43–44 (S.D.N.Y. Apr. 16, 2008). Even if the correlation in the data was weak, it is still reasonable for the Board to believe that providing calorie information at the point of sale would result in a change in consumer attitudes.

186. *Id.* at *47; *see also NYSRA III*, 556 F.3d at 135 ("[T]o survive rational basis review, New York 'has no obligation to produce evidence, or empirical data to sustain . . . rationality.'").

187. *See NYSRA II*, 2008 U.S. Dist. LEXIS, at *47. The court stated that "it seems reasonable to expect that some consumers will use the information . . . to select lower calorie meals," which should lead to a lower rate of obesity. *Id.* The Restaurant Association's own expert witness, Dr. Allison, even admitted that "it is reasonable to conjecture that providing calorie information at the point of purchase in restaurants (especially in fast food restaurants) might be beneficial in reducing obesity levels." *Id.* at *45. Furthermore, the lack of evidence that indicates a correlation between menu-labeling and a reduction in obesity of which Dr. Allison complained is most likely due to the lack of availability of menu labels from which to conduct scientific studies. *Id.* at *46.

188. *See id.* at *48. Thus, Regulation 81.50 can still be reasonably related to the goal of regulating obesity even though the regulation only affects one-third of restaurant meals purchased in the city. *Id.* The Board of Health also found that changing "the trajectory of the obesity epidemic . . . requires small, permanent calorie reductions across the population." Notice of Adoption, *supra* note 3, at 7.

2. *Regulation 81.50 Is Also Constitutional Under the More Stringent* Central Hudson *Standard*

The Restaurant Association argued that *Central Hudson* should provide the analytical framework for Regulation 81.50, and that the regulation could not meet *Central Hudson*'s more stringent four-part test.[189] Because the *NYSRA II* and *III* courts found that Regulation 81.50 fell under the purview of *Sorrell*, it did not conduct an analysis under the four-factor *Central Hudson* test.[190] Even if such an inquiry were undertaken, Regulation 81.50 would survive the *Central Hudson* test.[191] The *Central Hudson* test mandates that (1) the regulated expression concern lawful activity and not be misleading; (2) the asserted governmental interest be substantial; (3) the regulation advance the governmental interest asserted; and (4) the regulation be no more extensive than necessary to advance the interest.[192]

Regulation 81.50 easily meets the first two requirements of *Central Hudson*. First, both parties agree that the regulated expression concerns lawful activity and is not misleading.[193] Second, the government interest in reducing obesity is substantial. Public health has generally been recognized as a substantial interest for the purpose of commercial speech regulation.[194] The Board has a substantial interest in pro-

189. *See NYSRA II*, 2008 U.S. Dist. LEXIS, at *31–32 ("NYSRA further argues that if Regulation 81.50 is not treated as 'compelled speech' . . . it should be analyzed under . . . *Central Hudson*, a standard considerably more demanding than the 'reasonable relationship standard'. . . ."); *see also* Reply Brief for Plaintiff-Appellant at 28, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 115 (2d Cir. 2009) (No. 08-1892) (arguing that the Board cannot prevail under *Central Hudson*, and that "[t]he Board virtually concedes that it cannot meet the standard set out in *Central Hudson*" because the Board only discussed the *Sorrell* standard).

190. *See NYSRA III*, 556 F.3d at 133 (discussing how "*Zauderer*, not *Central Hudson*, describes the relationship . . . in compelled commercial disclosure cases" (quoting Nat'l Elec. Mfrs. Ass'n v. Sorrell, 472 F.3d 104, 115 (2d. Cir. 2005))).

191. Although the Second Circuit did not discuss the application of the *Central Hudson* test, it is analyzed here because the Supreme Court has yet to recognize the broadened application of the *Zauderer* standard outlined in the *Sorrell* case. Scholars indicate that after *Zauderer* the Court restored to full force the intermediate level of protection for commercial speech and have generally applied the *Central Hudson* standard to commercial speech regulations. *See* JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 190 (2001); *see also* Nicole Anderson, *Would You Like Some First Amendment Rights with That? How Mandatory Nutritional Disclosure on Restaurant Menus Violates the Freedom of Commercial Speech*, 36 HASTINGS CONST. L.Q. 105, 115 (2008) (arguing that mandated nutritional disclosures should be analyzed under the *Central Hudson* standard).

192. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

193. *See* Reply Brief for Plaintiff-Appellant at 24, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892) (noting that "[a] menu saying 'Hamburger, $1.99' is not misleading or deceptive in any way").

194. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995) (holding that the government has a substantial interest in "promoting the health, safety, and welfare of its citizens");

tecting and promoting public health and in preventing consumer deception by ensuring that consumers have access to information related to their health, which ultimately enables the consumers to make informed decisions and to reduce their risks of adverse health conditions associated with obesity.

The regulation also satisfies the third prong of *Central Hudson.* Under this prong, "the speech restriction must directly and materially advance the asserted governmental interest."[195] The regulation advances the government interest in reducing obesity, and the Restaurant Association has seemingly conceded that research shows a correlation between menu-labeling and consumer choice.[196] The Supreme Court has found this prong satisfied even where the evidence is merely based upon "history, consensus, and 'simple common sense.'"[197] By way of analogy, the Nutrition Labeling and Education Act (NLEA), as applied to packaged foods exclusively, has been shown to influence consumer choice regarding packaged foods.[198] Common sense dictates that labels on restaurant foods should have the same effect. Recent studies have also shown a link between restaurant menu-labeling and consumer choice,[199] although the number of studies is limited due to the less than ideal number of restaurants that provide point of sale disclosures, such as the one in Regulation

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Pearson v. Shalala, 164 F.3d 650, 656 (D.C. Cir. 1999) (holding that "'there is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial'" (quoting Edenfield v. Fane, 507 U.S. 761, 769 (1993))).

195. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 555 (2001) (quoting Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999)).

196. *See infra* note 199; *see also* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), 2008 U.S. Dist. LEXIS 31451, at *40 n.12 (S.D.N.Y. Apr. 16, 2008). In its brief to the Second Circuit, however, the Restaurant Association asserted that "there is a complete absence of scientific evidence of any kind supporting the conclusion" that calorie disclosures will reduce obesity. Brief of Plaintiff, *supra* note 162, at 29.

197. *Id.* (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).

198. *See* NUTRITION LABELING HANDBOOK 487 (Ralph Shapiro ed., 1995); Jayachandran N. Variyam & John Cawley, *Nutrition Labels and Obesity* (Nat'l Bureau of Econ. Research, Working Paper No. 11956, 2006) (arguing that the information required by the NLEA has produced a decrease in body weight over a twenty year period that has generated a total monetary benefit of between $63 and $166 billion); ALAN S. LEVY & BRENDA M. DERBY, THE IMPACT OF THE NLEA ON CONSUMERS: RECENT FINDINGS FROM FDA'S FOOD LABEL AND NUTRITION TRACKING SYSTEM (1996). In a 1997 study, 61% of consumers indicated that they changed their mind about purchasing a product after consulting its food label. Joanne F. Guthrie et al., *What People Know and Do Not Know About Nutrition, in* AMERICA'S EATING HABITS: CHANGES AND CONSEQUENCES 243, 271 (Elizabeth Frazao ed., 1999).

199. *See supra* note 5 and accompanying text; *see also* Notice of Adoption, *supra* note 3, at 7 (finding that "chang[ing] the trajectory of the obesity epidemic . . . requires small, permanent calorie reductions across the population").

81.50.[200] With New York City's Regulation 81.50 now in effect, more studies should be forthcoming, and future menu-labeling laws should have little difficulty meeting the third prong of the *Central Hudson* inquiry.

Regulation 81.50 also meets the fourth prong of the *Central Hudson* test, although it is the most difficult to satisfy. Under this prong, "[t]he government is not required to employ the least restrictive means conceivable," although it must have "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."[201] The evidence demonstrates that disclosure of calorie information at the point of sale is not more extensive than necessary to advance the government's interest in reducing obesity. Imparting truthful, factual information regarding the amount of calories in restaurant foods will provide consumers with information to help them reduce their risks of obesity.[202] These disclosures would help consumers maintain healthy dietary practices.[203] The disclosures would also help prevent consumers from being misled because the information facilitates product comparisons,[204] which ultimately enables consumers to choose foods that keep them within an acceptable daily caloric range.[205]

The disclosures are sufficiently narrowly tailored because studies have shown that consumers must have access to nutritional information at the point of sale in order to have any effect on purchasing behavior.[206] Point of sale information has proven to positively impact

200. In *NYSRA II*, the district court itself noted the difficulty of conducting observational epidemiologic studies due to the lack of availability of restaurants that voluntarily disclose such information at the point of sale. *See NYSRA II*, 2008 U.S. Dist LEXIS 31451, at *46.

201. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 178 (1999) (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

202. *See supra* note 5 and accompanying text.

203. *Id.*

204. In her book *Appetite for Profit*, Michele Simon argues that fast food companies mislead consumers by "nutriwashing" their foods. *See* SIMON, *supra* note 57, at 91. "Nutriwashing" refers to fast food restaurants' ploys to convince consumers that their food is actually healthy and that they are "part of the solution" to the obesity epidemic. *Id.* at 91–92.

205. Consumer education regarding what is a healthy daily caloric range would also be necessary to bolster the public health impact of labeling laws. A good approach would be to post information on each restaurant menu indicating that 2,000 calories is the appropriate average daily calorie intake as approved by the FDA.

206. *See* Burton, *supra* note 5, at 1669; *see also* Notice of Adoption, *supra* note 3, at 7; Christina A. Roberto et al., *An Observational Study of Consumers' Accessing of Nutritional Information in Chain Restaurants*, 99 AM. J. PUB. HEALTH 820, 820–21 (2009) (finding that in order to be effective, nutritional information "must be displayed in a highly visible place such as on a menu board"). In a study conducted just prior to the implementation of New York's Regulation 81.50, researchers observed patrons in a selection of eight major fast food restaurants in geo-

consumer behavior in other situations.[207] Although this issue has been hotly contested, alternatives to point of sale disclosures are inferior. Thus, they do not invalidate Regulation 81.50 under *Central Hudson*,[208] which does not require the adoption of unfavorable or ineffective alternatives; it merely requires a law to be no "more extensive than . . . necessary."[209] The nutritional information already voluntarily provided by restaurants to consumers is inferior because the method of providing this information does not adequately inform the consumer prior to purchase.[210] Some restaurants provide information on placemats or napkins;[211] some post the information on brochures, table tents, or posters;[212] some have information books available behind the counter;[213] and some post the information on the Internet.[214] The problem with all of these options is that the majority of consumers fail to see the information, and the unfortunate reality is that most consumers refuse to go out of their way to find it.[215] The information is strategically disseminated with the purpose of creating the appear-

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graphically dispersed areas in Connecticut and New York. *See* Roberto et al., *supra*, at 820. Out of 4,311 patrons, only six looked at nutritional information provided in places other than the point of sale. *Id.* The number and scale of the studies that show this correlation makes for an admittedly weak result; however, more studies should be forthcoming now that more restaurants are offering access to point of sale nutritional information.

207. *See* Notice of Adoption, *supra* note 3, at 7 (noting that signs placed near elevators that encourage people to take the stairs increase stair usage by fifty-four percent).

208. *Id.*; *see also infra* notes 210–226 and accompanying text.

209. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

210. In New York City, ninety-five percent of survey respondents failed to notice nutrition information voluntarily provided by McDonald's because it was displayed in places other than at the point of sale, such as on food wrappers, brochures, placemats, or the Internet. Notice of Adoption, *supra* note 3, at 8.

211. These items cannot be helpful to consumers because most of them are not even accessible until after consumers purchase their foods. *See* Margo G. Wootan et al., *Availability of Point-of-Purchase Nutrition Information at a Fast-food Restaurant*, 43 PREV. MED. 458, 458–59 (2006).

212. *Id.*

213. In sixty-two percent of McDonald's restaurants in Washington, DC, study participants had to ask two or more employees, often including a manager, in order to obtain a copy of nutrition information. *Id.* at 459. It seems unlikely that most consumers would be so tenacious.

214. The obvious problem with posting information on the Internet is that not everyone has Internet access. Because fast food attracts a high proportion of low-income consumers, even fewer fast-food consumers have access to the Internet than the national average. Notably, nearly forty-two percent of Americans have no Internet access, and those with lower incomes have even less access. Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1192. For an interesting discussion of how the fast-food industry impacts racial minorities and low-income neighborhoods, see generally Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221 (2007).

215. Few consumers access the Internet to determine the amount of calories in a Big Mac, and the ones that do are the least likely to purchase unhealthy foods. *See* Fribush, *supra* note 14, at 385. Further, requiring consumers to go elsewhere to find nutritional information would defeat the purpose of fast food, which, as the name suggests, is to be able to obtain the food quickly. A study published in May 2009 confirmed that few consumers accessed non-point of sale calorie

ance of accessible information, without actually serving a useful purpose.[216] Furthermore, allowing restaurants to choose the manner in which they display calorie information defeats the purpose of having uniform disclosure requirements because non-uniform disclosure makes it more difficult for patrons to find the information.[217] Restaurants even undermine the Restaurant Association's claim that information in places other than at the point of sale can still be effectively communicated: they don't ask consumers, "[d]o you want to Supersize that" in a placemat or brochure, they ask them when they are purchasing the product.[218]

Common sense also provides the same result: if the purpose of the menu-labeling laws is to increase consumer awareness of the nutritional content of restaurant foods, it is logical to assume that consumers are currently unaware of the problems in their eating habits. Because research shows that most consumers do not seek out nutritional information, calorie information must be provided at the point of sale in order to have any real effect on reducing obesity.[219] Based upon this information, requiring restaurants to post calorie information at the point of sale would not be more extensive than necessary, and the regulation would still be upheld using the *Central Hudson* analysis.

B. Consumer Protection Law As an Alternative Basis for Upholding Restaurant Menu-Labeling Laws

Although not addressed by the *NYSRA II* and *III* courts, consumer protection law and policy provide a further basis for upholding Regulation 81.50 and similar legislation. Menu-labeling laws, such as Regulation 81.50, are analogous to consumer protection laws that courts have found constitutional.[220] Consumer protection law provides that

information, and that to be effective calorie disclosures must be at the point of sale. *See* Roberto, *supra* note 198, at 820.

216. *See* Michele Simon, *Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children's Health*, 39 LOY. L.A. L. REV. 169, 218 (2006).

217. *See* Notice of Adoption, *supra* note 3, at 7–8 (noting that restaurants' voluntary efforts to make calorie information available was "woefully inadequate" because only 3.1% of customers in New York City reported seeing the information).

218. Simon, *supra* note 216, at 218–19 (quoting Maine state representative Sean Faircloth, an avid supporter of menu-labeling initiatives).

219. *See supra* note 5 and accompanying text.

220. *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1601. (1968). The Truth in Lending Act is a disclosure statute that mandates uniformity in computing and explaining credit transactions so that informed consumers can compare one lender's rates with those disclosed by other lenders. *See* DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW 421 (4th ed. 2006). The U.S. Supreme Court upheld Regulation Z of the Truth in Lending Act, which implemented

the disclosure of factual and uncontroversial information will promote knowledgeable consumer decision making and prevent consumer confusion.[221] Such disclosures not only promote fair dealing and a more efficient marketplace, but they also allow for consumers to make informed decisions about their own best interests, especially in the context of consumer health and safety, as well as promote fair dealing and a more efficient commercial marketplace.[222]

From a consumer protection law perspective, restaurant menu-labeling promotes knowledgeable consumer decision making and allows consumers to make better choices in the marketplace.[223] Because restaurants are exempt from the NLEA, "unless they affirmatively champion their food's healthy nature, the NLEA compels upon them no legal obligation to reveal their dishes' relatively high fat and caloric content."[224] Without access to nutritional information, consumers may not be aware that a single meal at fast food restaurants can often contain an entire day's worth of calories.[225] Without access to nutritional information, other than choosing to forgo eating at fast food restaurants entirely, consumers will be unable to monitor the amount of calories they consume, which ultimately handicaps their ability to lose weight and to maintain a healthy weight.[226]

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the disclosure regulations set forth in the Act, in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

221. *See* Pomeranz, *supra* note 30, at 1578. This kind of disclosure is a routine regulatory practice, and includes federal laws such as those that require disclosure associated with textile products and prescription drug advertisements. *Id.* at 1579; *see, e.g.*, Textile Fiber and Identification Act, 15 U.S.C. § 70 (1958) (requiring every fiber textile product to have a tag or label containing certain information regarding the type of fibers and manufacturing information); Fair Packaging and Labeling Act, 15 U.S.C. § 1451 (2000) (requiring labels on any packaged commodity, including prescription drugs and products distributed for retail sales).

222. Brief of Amicus Curiae Rudd Center for Food Policy & Obesity at Yale University in Support of Defendants-Appellees and Arguing for Affirmation at 8–9, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892).

223. Menu-labeling laws can be analogized to federal quality control statutes such as the Magnuson-Moss Warranty Act, a federal law that standardizes disclosures and language included by sellers in consumer warranties. *See* Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 (1975). By standardizing language, the Act promotes competition by sellers in the marketplace; because consumers will be aware of which sellers offer the best warranty, sellers will be encouraged to offer better warranties. *See* WHALEY, *supra* note 220, at 214.

224. McCann, *supra* note 214, at 1188. Under the NLEA, if a restaurant makes a health claim of any kind, it must make available all nutritional information for its patrons. *See* 21 U.S.C. § 343(r) (2000).

225. For example, a Burger King Triple Whopper with Cheese, Fries, and Coke, King-Size, contains 2,200 calories. DAVID ZINCZENKO, EAT THIS NOT THAT! 8 (2008).

226. *See supra* note 5 and accompanying text. Furthermore, because patrons who dine most at fast food restaurants usually do so because the food is more affordable than purchasing more healthful foods, such as fresh fruits and vegetables, they have little choice but to keep consuming fast food. *See* Freeman, *supra* note 214, at 2258 (recognizing that low income and racial minority groups suffer "food oppression" due to low prices of fast food and marketing strategies that

Menu-labeling laws, like consumer protection laws, provide consumers with choices and with the option to make those choices before actually purchasing a meal.[227] Regulation 81.50 resembles the NLEA, which has had a conclusively positive impact on consumer decision making.[228] In 1999, the FDA approved the use of mandatory labels for meat and poultry that are treated with radiation.[229] In 2006 after studies showed that trans fats were linked to cardiovascular disease, the FDA promulgated a rule that required manufacturers to reveal the amount of trans-fatty acids in nutrition labels.[230] Food labeling for restaurant foods should be treated no differently. Akin to the consumer's right to know whether foods that they purchase are treated with radiation or whether their french fries contain trans fats, consumers have a right to know how many calories are in the foods that they purchase.[231]

V. IMPACT

This Part explores the potential impact of the *NYSRA* trilogy on public health and the restaurant industry.[232] It discusses how upholding Regulation 81.50 is likely to encourage other states, counties, localities, and even the federal government to pass similar legislation, and how this will influence public perception of the "obesity epidemic."[233] Finally, it discusses how menu-labeling will promote competition in the marketplace, correct consumer misperceptions, and hopefully provide an incentive for restaurants to offer more healthful food options for consumers.[234]

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target their communities). Freeman also alleges that fast food advertising campaigns "instill mistaken beliefs about nutrition in communities that lack the resources to counter the deception." *Id.*

227. *See, e.g.*, 24 R.C.N.Y. § 81.50(c) (2008).

228. *See* 21 U.S.C. § 343 (2000); *see also* Steve Keane, *Can a Consumer's Right to Know Survive the WTO?: The Case of Food Labeling*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 291, 298 (2006); Alan D. Mathios, *The Impact of Mandatory Disclosure Laws on Product Choices: An Analysis of the Salad Dressing Market*, 43 J.L. & ECON. 651, 665–75 (2000) (finding that the NLEA caused a decrease in sales of high-fat salad dressings).

229. *See* Irradiation of Meat Food Products, 64 Fed. Reg. 72165 (Dec. 23, 1999).

230. *See* Food Labeling; Trans-Fatty Acids in Nutrition Labeling; Consumer Research to Consider Nutrient Content and Health Claims and Possible Footnote or Disclosure Statements, 68 Fed. Reg. 41,434, 41,434 (July 11, 2003).

231. *See supra* note 204.

232. *See infra* notes 235–270 and accompanying text.

233. *See infra* notes 236–253 and accompanying text.

234. *See infra* notes 254–272 and accompanying text.

A. Promoting Public Health

NYSRA II and *III* provide a foundation upon which other states, counties, and cities can enact similar restaurant menu-labeling laws. Indeed, since Regulation 81.50 was first initiated, approximately twenty similar regulations have been proposed or passed.[235] This represents a paradigm shift in the area of obesity initiatives; where at one time, any attempt to regulate restaurants was cast down as frivolous and unnecessary, the outcome in the *NYSRA* cases offers hope to legislators who are attempting to temper the obesity crisis by informing and educating consumers.

1. *Menu-Labeling Laws Will Have an Impact on Consumer Choice and Competition in the Marketplace*

By standardizing information and language, disclosure laws provide a basis for competition in the marketplace.[236] Because all restaurants that are subject to Regulation 81.50 will be required to post the same information in the same format, consumers will have a basis for comparison shopping.[237] Even those who do not know how many calories to consume in a day can still use the calorie information for product comparisons in order to make healthier choices.[238]

This should have a positive effect on both consumers and restaurants. Menu-labeling should ultimately induce at least some consumers to make healthier choices among foods in order to stay within a daily caloric range.[239] The disclosure of nutritional information has already led to a change in consumers' purchasing attitude and food choices.[240] Although restaurant chains that comply with Regulation 81.50 in New York City insisted that the calorie information had little effect on ordering habits, the evidence to the contrary is uncontroverted.[241] Several restaurant chain employees reported a change in customers' ordering behavior, including Starbucks, T.G.I. Fridays,

235. *See* Nutrition Labeling in Chain Restaurants, *supra* note 85.

236. *See, e.g.*, Magnuson-Moss Warranty Act, 15 U.S.C. § 2302(a) (1975) (mandating the written disclosure of warranty terms in order to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products").

237. *See id.* § 2302(b)(1)(B).

238. Karen McColl, *The Fattening Truth About Restaurant Food*, BMJ, Nov. 2008, at 1198, 1198–99, *available at* http://www.cspinet.org/new/pdf/bmj-november_2008.pdf.

239. *See* Fribush, *supra* note 14, at 384.

240. *See supra* note 5 and accompanying text.

241. *See* Bret Thorn, *Mixed Messages on NYC Menu-Labeling Law*, NATION'S RESTAURANT NEWS, July 28, 2008, *available at* http://www.nrn.com/article.aspx?keyword=%20calorie%20disclosure&menu_id=1380&id=357018 (last visited July 10, 2009).

Cosi, and Jamba Juice.[242] At T.G.I. Fridays, once calories were displayed on the menu, even customers who had been ordering the same item for years started ordering lower calorie items.[243] One consumer study in New York City indicated that consumers at restaurants with posted calorie information consumed an average of fifty two fewer calories per week.[244] The U.C. Berkeley Center for Weight and Health has also calculated that menu-labeling in California could reduce a person's caloric intake by 9,000 calories annually.[245] According to a study conducted by Technomic, a food-industry consultancy, eighty two percent of New Yorkers said that the newly available menu information changed their ordering habits, and seventy one percent said that they ordered lower-calorie items as a result.[246] Thus, at least some educated consumers will choose healthier products, hopefully leaving restaurants with a dilemma: adapt by changing menus or lose business.[247] This will promote competition in the marketplace and should "induc[e] more socially responsible behavior in the fast food industry" by providing an incentive for restaurants to offer healthier, less calorie-dense foods.[248]

This effect has been recently documented in the aftermath of trans fat bans. Even though most states do not restrict trans fats, many restaurants and food manufacturers independently chose to remove or reduce the amount of trans fats in their foods in anticipation of a federal law that would impose mandatory trans fat labeling.[249] Restaurant menu-labeling should have a similar effect. In fact, many restaurants have already made changes in response to Regulation 81.50. Starbucks responded by "chang[ing] its 'default' milk from whole milk to reduced-fat milk," Dunkin' Donuts has introduced a new lower-calorie product line, and McDonald's has reduced the size

242. *Id.*

243. *Id.*

244. Cal. Ctr. for Pub. Health Advocacy, *Analysis Suggests Menu-Labeling Could Help Average California Adult Avoid over 2 Pounds of Weight Gain a Year*, OBESITY FITNESS & WELLNESS WEEK, Aug. 30, 2008, *available at* http://www.travelindustrywire.com/pdf/dyn/34076.pdf (last visited Nov. 1, 2009). Admittedly, however, fifty-two calories per week is a paltry amount.

245. *Id.*

246. *See* Gregory, *supra* note 172.

247. *See* Fribush, *supra* note 14, at 384.

248. Bonnie Hershberger, *Supersized America: Are Lawsuits the Right Remedy?*, 4 J. FOOD L. & POL'Y 71, 85 (2008).

249. *Id.* at 84–85; *see also* Notice of Adoption, *supra* note 3, at 7. Most likely, these restaurants chose to remove trans fats to improve their image to attract health-conscious consumers in the wake of intense media attention to the trans fat issue. Similarly, while restaurants may not have any interest in improving public health, they may voluntarily comply with nutritional disclosure requirements for the same reason.

of one portion of french fries.[250] Restaurants have now conceded that consumer demand—as a reflection of changing attitudes due to the new disclosures—is the primary inducement in their decisions to reduce calories and modify menus accordingly.[251]

Educational procedures have also been implemented as a response to labeling laws. Shortly after Regulation 81.50 went into effect, New York city unveiled an advertising campaign in the city's subways to better educate consumers in conjunction with the nutritional disclosures; placards in the subways instructed consumers to limit calorie intake to 2,000 calories per day.[252] In preparation for a menu-labeling law about to take effect in King County, Washington, the Washington Restaurant Association implemented a program that helps train kitchen staff to modify existing recipes and add new healthy recipes to menus.[253]

2. *Menu-Labeling Laws Will Correct Consumer Misinformation*

Opponents of obesity-related legislation have consistently stressed "personal accountability" as an excuse for diverting responsibility for the obesity crisis from the government to the individuals themselves.[254] But while personal accountability should be recognized as an integral part of a healthy life—because the decision to follow healthy guidelines is ultimately in the hands of the individual—it

250. *Food Regulation in America: Menu Items*, ECONOMIST, Aug. 30, 2008, at 64; *see also* Gregory, *supra* note 172 (reporting that certain chains in New York City have responded to the mandated disclosures by reducing the calorie count of certain items).

251. *See* Kim Severson, *Calories Do Count*, N.Y. TIMES, Oct. 29, 2008, at D9 (noting that for some restaurants, "having their menus exposed . . . forced some caloric housecleaning"); *see also* Notice of Adoption, *supra* note 3, at 7 (noting that after Starbucks began providing calorie information, it also began reducing portion sizes to reduce calorie content).

252. Nation's Restaurant News: Foodservice Blogs, http://nrnfoodserviceblog.blogspot.com/2008/10/nycs-new-anti-obesity-message-to.html (Oct. 10, 2008, 2:43 EST). Campaigns like this are absolutely necessary in order to give effect to the new laws; without knowing what a healthy caloric intake is, consumers will have little context for applying this valuable information. *See* American Heart Association, Position Statement on Menu Labeling, http://www.americanheart.org/downloadable/heart/1223922075937Menu%20Labeling%20Position%20Statement-final%2010-08.pdf (discussing the need for consumer education in conjunction with menu-labeling).

253. *See Washington Restaurants Selected for National Nutritional Program Test Market*, RESTAURANT NEWS RESOURCE, Nov. 26, 2008, http://www.restaurantnewsresource.com/pdf/dyn/35939.pdf (last visited Nov. 1, 2009).

254. *See* Frazier, *supra* note 29, at 309 (indicating that "[r]esponsibility for obesity-related health problems will continue to be placed on obese individuals until society recognizes that obesity might need to be a treated disease and not just as a self-inflicted problem"); Richard A. Epstein, *What (Not) to Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361, 1385 (2005) (offering an appealing mantra for personal accountability advocates: "Better a bit of self-control than a ton of state initiatives"). The tobacco industry also used this argument to defend itself against litigation. *See* Brooke Courtney, *Is Obesity Really the Next Tobacco? Lessons Learned From Tobacco for Obesity Litigation*, 15 ANNALS HEALTH. L. 61, 85 (2006).

should not suffice as a reason for the government to avoid providing information. The blame-shifting involved in the personal accountability argument became most pronounced after two teenage girls sued McDonald's for contributing to their obesity and related health problems in the illustrious case *Pelman v. McDonald's Corp.*[255] While the plaintiffs put the blame on McDonald's, the media, like personal accountability advocates, put the blame on the plaintiffs. Personal accountability advocates would argue that the blame is entirely on the individual for choosing unhealthy foods. As a result, many states passed so-called "Cheeseburger Bills" or "Common-Sense Consumption Acts" that limit the liability of restaurants and food manufacturers from claims arising out of plaintiffs' obesity.[256] Although some public health advocates initially embraced litigation as a remedy, these "McLawsuits" have been largely ineffective in addressing the problem and have perpetuated the notions that obesity is self-inflicted, and that as such, government intervention would be paternalistic.[257]

Menu-labeling laws may help remedy the public's perception of obesity and correct the misinformation that initially led consumers to use litigation as a weapon against the restaurant industry.[258] The personal accountability argument fails to acknowledge that many consumers lack access to education regarding nutrition and the adverse effects of obesity, and that advertisers often take advantage of this education gap.[259] While consumers may often believe that they are eating healthy foods, based upon their limited knowledge of nutrition and the often misleading marketing of supposedly healthy food prod-

255. Pelman v. McDonald's Corp., 396 F.3d 508 (2d. Cir. 2004). In *Pelman*, the plaintiffs alleged that McDonald's caused their obesity and related health problems and that McDonald's misrepresented its food as nutritious and failed to disclose its ingredients' harmful potential. *Id.* at 510.

256. *See* Jack Malley & Georgia Wainger, *The Proposed and Enacted "Cheeseburger Bills" Limiting Obesity Lawsuits*, 24 PROD. LIAB.: L. & STRATEGY, Nov. 2005, at 1, 8.

257. *See* Frazier, *supra* note 29, at 309 (noting that "fast food plaintiffs will continue to have dismal success in pursuing claims . . . because the claims lack public support"); *see also* 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, 371 (2007) (noting that the federal "Cheeseburger Bill" helps protect the fast-food industry, and that the House debate demonstrated that both Republicans and Democrats display a "disturbing underappreciation of the seriousness" of the obesity epidemic).

258. *See* Burnett, *supra* note 257, at 401 ("The argument for personal responsibility also overlooks the fact that not everyone is a fully-informed and rational consumer.").

259. Product sellers often take advantage of consumers by "advertising a family-friendly environment and generating positive associations that may cause consumers to devalue their perceptions of the risks arising from unhealthy diets." Note, *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161, 1168 (2003).

ucts, they are in fact still eating poorly.[260] Many consumers would be surprised to know that a cheeseburger and a large order of fries at McDonald's actually contains fewer calories than a blueberry muffin and a large Mocha Frappuccino at Starbucks.[261] Menu-labeling laws should help to correct consumers' misconceptions, and as a result, fewer consumers will be manipulated by advertising techniques that offer to super-size portions for a small additional price.[262]

B. Menu-Labeling Laws Will Not Bankrupt the Fast-Food Industry

Menu-labeling laws will force the restaurant industry to adapt; "the goal is not to put fast-food companies out of business, but move them to offer healthier alternatives and give consumers important product information."[263] Consumer demand for smaller portions should help ease the costs of implementing new menus because while smaller portions cost less for restaurants to produce, the prices have remained fixed.[264] Furthermore, the cost of conducting menu analyses is no longer as burdensome as it once was, with many low-cost software programs now available to help restaurants calculate nutritional information.[265] Indeed, requiring restaurants to disclose nutritional information should actually insulate them from liability rather than spur litigation.[266] Because consumers will be aware of the calorie content of foods, "McLawsuits" like *Pelman v. McDonald's* will be eliminated unless a restaurant has actually mislabeled its foods.

Mislabeling, however, could become a new hot topic for industrious litigators. A Seattle law firm has already filed lawsuits against two

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260. *See supra* note 177 and accompanying text; *see also* Frazier, *supra* note 29, at 295–96 (noting that the "deceptive 'puffery'" inherent in fast food marketing influences lifestyle choices); Matthew Walker, *Low-Fat Foods or Big Fat Lies?: The Role of Deceptive Marketing in Obesity Lawsuits*, 22 GA. ST. U. L. REV. 689, 690 (2006) (discussing lawsuits resulting from deceptive marketing of supposedly healthy fast food products).

261. *See* Goldstein & Scholsser, *supra* note 14, at A15.

262. *See* Fribush, *supra* note 14, at 384.

263. Marguerite Higgins, *Fast Food Next on the Menu for Lawyers*, WASH. TIMES, June 23, 2003, at A1 (quoting Professor John Banzhaf, a George Washington University law professor who has pursued both the tobacco and fast-food industries through litigation).

264. *See* Severson, *supra* note 251, at D9.

265. *See* Karon Warren, *Reading the Fine Print*, QSR MAG., Nov. 2008, *available at* http://www.qsrmagazine.com/articles/tools/121/menu-labeling-1.phtml (last visited July 10, 2009) (discussing new technologies, such as digital menu boards for displaying information and software tools for calculating calorie contents, that have been developed specifically to ease the costs of compliance with menu-labeling laws).

266. Professor Banzhaf commented that "people can reasonably be expected to exercise personal responsibility only if the manufacturers of products provide meaningful disclosure and adequate warnings." Judith Weinraub, *The Blame Game: Is It Our Fault We Like Bad Fats?*, WASH. POST, Dec. 10, 2003, at F4.

major restaurant chains for misrepresenting the nutritional content of menu items, and studies show that restaurant dishes can have calorie content discrepancies of up to 350 calories.[267] While Regulation 81.50 does allow restaurants to post disclaimers alluding to possible variations in calorie content based upon "serving size, quantity of ingredients, or special ordering," it provides no specified procedural safeguards.[268] To alleviate this effect, lawmakers should amend the labeling laws to add a bona fide error rule fashioned after the rule that is set forth in the Truth-in-Lending Act (TILA).[269] Such a rule would insulate restaurants from liability due to minor inaccuracies so long as the restaurant proved (1) that the error was unintentional, and (2) that it maintained procedures to minimize the risk of error.[270] While many restaurants serve pre-made and pre-portioned products, disparities in caloric values could result from a number of factors, including preparation method, mistakes in measuring, and the addition of certain toppings or sauces. Allowing for a moderate amount of variation between the posted caloric values and the actual product would thus be especially appropriate. With such a provision in place, restaurants could be largely insulated from liability for unintentional mislabeling, while consumers would still gain the benefit of the disclosures.

VI. CONCLUSION

Eric Schlosser's book, *Fast Food Nation*, opens with an anecdote: "Hundreds of millions of people buy fast food every day without giving it much thought. . . . They just grab their tray off the counter, find a table, take a seat, unwrap the paper, and dig in. The whole experience is transitory and soon forgotten."[271] *New York State Restaurant Ass'n v. New York City Board of Health* has taken the reality depicted in *Fast Food Nation* and turned it upside down. Restaurant patrons

267. Richard Berman, *Nutrition Activism Opens Restaurants Up to Legal Lashes*, NATION'S RESTAURANT NEWS, June 30, 2008, *available at* http://www.nrn.com/article.aspx?coll_id=&keyword=%20activisim&id=356198 (last visited Nov. 1, 2009).

268. Notice of Adoption, *supra* note 3, at 14.

269. *See* Truth in Lending Act (TILA), 15 U.S.C. § 1640(c) (1968).

270. *Id.* While TILA covers a laundry list of potential errors due to clerical, calculation, and computer mistakes, courts have strictly construed the second portion of the provision, requiring creditors to provide evidence of the maintenance of "procedures reasonably adapted to avoid such errors." *See, e.g.*, Mirabal v. Gen. Motors Acceptance Corp., 537 F.2d 871, 878 (7th Cir. 1976) (holding that creditors must not only design procedures to provide correct disclosures, but also must implement preventative mechanisms for catching the errors). Similarly, if such a rule were in place, restaurants would not only have to design programs that instruct employees how to properly prepare meals in order to conform to the calorie profiles, but they would also have to implement oversight procedures in order to ensure that the preparations are conducted properly.

271. *See* Schlosser, *supra* note 1, at 10.

with access to laws like Regulation 81.50 will no longer be susceptible to manipulative advertising by restaurant companies. Patrons will no longer be able to buy fast food without giving it some consideration, and this will have a far-reaching effect not only on obesity but on our culture in general. By finally assuming some responsibility for remedying America's obesity crisis, menu-labeling laws should ultimately have a widespread positive effect.[272] Menu-labeling could, and hopefully will, make a reality out of Eric Schlosser's utopian depiction at the end of *Fast Food Nation*: "People can be fed without being fattened or deceived. This new century may bring an impatience with conformity, a refusal to be kept in the dark, less greed, more compassion, less speed, more common sense . . . ."[273]

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272. This effect will be most widespread in conjunction with the adoption of consumer education regarding healthy eating and lifestyle changes, including more frequent exercise.

273. Schlosser, *supra* note 1, at 288.

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