Would You Like Some First Amendment Rights with That? How Mandatory Nutritional Disclosure on Restaurant Menus Violates the Freedom of Commercial Speech

by NICOLE ANDERSON*

Introduction

It is undeniable that our nation is in the midst of a fitness paradox: our national preoccupation of achieving "the elusive American ideal—to be slim, fit, and forever young"[1] exists incongruently with a nationwide obesity epidemic. According to the Centers for Disease Control and Prevention, more than one-third of adults in the United States are considered "obese."[2] The increasing prevalence of obesity, as well as the resulting health problems (such as diabetes, hypertension, heart disease, etc.), has led both local and state governments to take action against America's expanding waistline. However, instead of creating a comprehensive solution to the problem, these governments are attacking the easiest scapegoat available: the fast food industry. State legislatures have ridden in like a white knight, fashioning legislation to protect the masses from their own food choices. One popular approach is the creation of laws mandating nutritional disclosure on restaurant menus. Such laws

* J.D. Candidate 2009, University of California, Hastings College of the Law; B.A. *magna cum laude*, 2006, University of California, San Diego, Political Science and Critical Gender Studies. The author would like to thank her family, friends, and fiancé for their support and willingness to discuss constitutional law and nutrition for an entire year. She would also like to thank Professor Marsha Cohen and the *Hastings Constitutional Law Quarterly* Vol. 36 team for its help editing this note.

1. Jerome P. Kassirer & Marcia Angell, *Losing Weight—An Ill-Fated New Year's Resolution*, 338 NEW ENG. J. MED. 52, 52 (1998).

2. CYNTHIA L. OGDEN ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, NATIONAL HEALTH AND NUTRITION EXAMINATION SURVEY: OBESITY AMONG ADULTS IN THE UNITED STATES—NO STATISTICALLY SIGNIFICANT CHANGE SINCE 2003–2004 (2007).

attempt to halt the obesity epidemic in its tracks by forcing restaurants to display the calorie content and other nutritional information on their menus and on menu boards. Within the past year, fourteen states and three major cities have introduced legislation requiring nutritional disclosure in restaurants.[3]

Considering that Americans spend nearly half their food budgets on foods prepared outside their homes and consume about one-third of daily calories from outside sources—"much of it from fast food"—it is rational that many of these regulations target the fast food industry.[4] However, even the most well-intentioned regulations should be subject to boundaries. The government should not be allowed to coerce private speakers to take financial and commercial responsibility for the ideas it chooses to promote.[5] Additionally, it is important to note that academics have conflicting views regarding this catastrophic advent of obesity. Studies asserting a connection between obesity and mortality often fail to take into consideration "confounding variables" such as sedentary lifestyle and low economic status.[6] The information procured from such research is far from conclusive. One study in the *New England Journal of Medicine* concluded that data linking obesity and death, as well as the data showing the beneficial effects of weight loss, are "limited, fragmentary, and often ambiguous."[7] The authors went on to note that the causes and consequences of obesity are "not a matter of settled and undisputed truth" and that "in light of that uncertainty, we should be very skeptical of any effort to solve this matter by governmental intervention . . . ."[8]

Although well intentioned, legislation requiring nutritional disclosure on restaurant menus and menu boards violates the constitutional right to freedom of speech. The First Amendment to the United States Constitution protects "both the right to speak freely and the right to refrain from

3. States proposing such legislation include Arizona, California, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Michigan, New Jersey, New Mexico, New York, Pennsylvania, Tennessee and Vermont. Cities include Chicago, Philadelphia, and Washington, D.C. Brief for City and Council of San Francisco et al. as Amici Curiae Supporting Respondents, N.Y. State Restaurants Ass'n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351 (S.D.N.Y. 2007) (No. 07 Civ. 05710).

4. Lisa R. Young & Marion Nestle, *Portion Sizes and Obesity: Responses of Fast-Food Companies*, 28 J. PUB. HEALTH POL'Y 238, 239 (2007).

5. Christine Esperanza, Note, *Fruits, Nuts, Cigarettes, and the Right to Remain Silent*, 31 HASTINGS CONST. L.Q. 163, 178 (2003).

6. Kassirer & Angell, *supra* note 1, at 52.

7. *Id.*

8. Richard A. Epstein, *Obesity Policy Choices: What (Not) to Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361, 1366 (2005).

speaking at all."[9] Forcing mandatory disclosure of nutritional information on restaurant menus and menu boards is a noble idea; however, it is not directly related to the state's interest and is far broader than what is necessary to accomplish the state's purpose of decreasing obesity rates. California's reintroduction of nutrition disclosure legislation is not only vulnerable to being vetoed again by Governor Schwarzenegger; it is also vulnerable to also being struck down as unconstitutional under the freedom of speech standards promulgated by the California Constitution and the California courts.

This note examines the constitutionality of legislation requiring mandatory nutritional disclosure on restaurant menus and menu boards under the First Amendment's freedom of speech guarantee. Part I examines the history of nutritional disclosure. Part II analyzes the intersection of nutritional disclosure and freedom of commercial speech. Part III concludes that such regulation is unconstitutional under the First Amendment.

I. The History of Nutritional Disclosure and Governmental Attempts to Control Obesity

A. The History of Federal Legislation Regarding Nutritional Disclosure

For seventy years, the federal government has controlled the activities of food producers through the Food, Drug, and Cosmetic Act ("FD&C Act"). As originally enacted, the FD&C Act was intended to give the Food and Drug Administration ("FDA") authority to police the "adulteration" and "misbranding" of food.[10] Since its inception, the FD&C Act has been amended more than 100 times, usually to broaden the Act's jurisdiction.[11] For instance, the FDA broadened the Act's jurisdiction in 1941 by setting forth regulations requiring nutritional disclosure.[12] However, these regulations only mandated limited disclosure when a claim was made about a particular nutrient.[13] Also, in 1973, the FDA introduced nutrition labeling requirements with a uniform format for food.[14] These amendments

9. *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citing Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943)).

10. PETER BARTON HUTT ET AL., FOOD AND DRUG LAW CASES AND MATERIALS 13 (3d ed. 2007).

11. *Id.* at 14.

12. PETER BARTON HUTT, *A Brief History of FDA Regulation Relating to the Nutrient Content of Food, in* FOOD AND DRUG LAW CASES AND MATERIALS 204 (3d ed. 2007).

13. *Id.*

14. *Id.* at 205.

introduced nutrition labels as we know them, requiring nutrition labels for specific nutrients in a standardized format, minimum type size, and uniform placement in order to provide consumers with easy-to-understand information in a ready fashion.[15] However, these labels were not mandatory. Labels were only required for foods with either added nutrients or which made claims about nutrient content.[16] In 1990, Congress passed the Nutrition Labeling and Education Act ("NLEA").[17] NLEA gave the FDA authority to require nutritional labeling on all foods.[18] NLEA was the first statute introducing nutritional labels as they currently exist, requiring food manufacturers to state the total number of calories, calories from fat, total fat, cholesterol, sodium, carbohydrates, and sugars in a specified portion size.[19] By requiring national uniformity through federal legislation, the NLEA "effectively removed state and local government from establishing regulatory requirements relating to the nutrient content of food."[20] NLEA prohibits states from enacting similar food labeling requirements when they are not identical to the FDA requirements.[21]

Congress exempted restaurant menus from the standards, the requirements, and the health claims provisions of NLEA due to the heavy burden nutritional disclosure requirements would place on restaurants given the dynamic nature of their menus.[22] However, after a lawsuit declared such a broad exemption unlawful, the FDA limited restaurants' freedom by mandating disclosure requirements for restaurant food items which made health or nutrient claims.[23] Nutritional information for such foods must be provided by the restaurant upon request.[24] Some leading scholars propose that the FDA purposefully left the power to regulate restaurant nutrition labeling to the states. Professor Hutt, for example, concludes that because foods consumed in restaurants are exempt from the food labeling requirements of FD&C Act sections 403(q) and (r), state and

15. *Id.*

16. *Id.*

17. *Id.*

18. HUTT, *supra* note 12.

19. *See* Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353-56 (codified at 21 U.S.C. § 343(q)(1)(C)-(D) (2000)).

20. HUTT, *supra* note 12.

21. HUTT ET AL., *supra* note 10, at 1452–53.

22. Food Labeling: General Requirements for Health Claims for Food, 21 C.F.R. §§ 20, 101 (1993).

23. *See* Pub. Citizen, Inc. v. Shalala, 932 F. Supp. 13, 18 (D.D.C. 1996).

24. Food Labeling: Nutrition Labeling of Restaurant Foods, 21 C.F.R. § 101.10 (1996).

local requirements governing foods in restaurants are not subject to preemption.[25]

B. The History of Obesity in America

Many commentators assert that obesity is a recent development. However, as early as the 1950s, the American Heart Association had identified obesity as a cardiac risk factor, to be prevented through diet and exercise.[26] In 1969, the White House Conference on Food, Nutrition, and Health recommended increasing activity levels of what was already a sedentary nation.[27] Obesity prevention has been an express goal of national health policies since the 1980s, implemented through the promotion of nutrition education programs, increased physical fitness, and research on obesity prevention.[28] However, these programs proved to be all talk and little action, as physical education in schools, diet and exercise by overweight people, and counseling on obesity by physicians have all declined.[29]

Notably, prior attempts by the federal government to control obesity through mandated nutritional disclosure have failed to pass in Congress. In 2004 and 2006, federal legislation was introduced which would have mandated restaurant disclosure of nutritional information, but neither bill passed.[30] States and local governments have also attempted to step in to prevent obesity, with similar results. In early 2008, Mississippi legislators proposed a bill which would force restaurants to deny service to obese customers.[31] The bill died in committee, and the Chairman of the Mississippi House Public Health and Human Services Committee acknowledged the irrationality of such a policy, noting the "oppressi[on]"

25. *See* HUTT ET AL., *supra* note 10, at 1454. This topic is discussed more fully *infra* Part II.

26. Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 PUB. HEALTH REP. 12, 14 (2000).

27. *Id.* at 14–15.

28. *Id.* at 15.

29. *Id.* at 16.

30. *See* Menu Education and Labeling Act, H.R. 3444, 108th Cong. (2004); Menu Education and Labeling Act, H.R. 5563, 109th Cong. (2006).

31. The proposed legislation would have prohibited food establishments from serving food to any person determined to be "obese," as defined through criteria to be created by the State Department of Health. The State Department of Health would also have power to revoke the permits of restaurants failing to comply with these mandates. The legislation died in committee in early February 2008. See H.B. 282, 2008 Reg. Sess. (Miss. 2008), *available at* http://billstatus.ls.state.ms.us/documents/2008/html/HB/0200-0299/HB0282IN.htm, for the text of this proposed legislation.

implicit in a government requiring a restaurant owner to "police another human being from their own indiscretions."[32]

II. The Intersection of Nutritional Disclosure and Freedom of Commercial Speech

In 2007, New York City attempted to combat city-wide obesity by implementing a regulation requiring restaurants to post nutritional information on their menu boards and menus.[33] The regulations were limited to restaurants with more than fifteen sites which already disclosed calorie counts in some way.[34] The local restaurant industry appealed the regulation, arguing that the regulation was a narrow-sighted, questionably effective, and overly expensive means of promoting public health.[35] More importantly, it claimed that such a regulation was preempted by NLEA and therefore not within state jurisdiction.[36] In *New York State Restaurants Ass'n v. New York City Board of Health*, a federal district court agreed that the mandated nutrition disclosure requirements were preempted by NLEA.[37] Because the regulations were only imposed on restaurants that already voluntarily disclosed the nutritional content of their food, the district court held NLEA, which regulates voluntary nutritional disclosures, preempted the regulations.[38] Nevertheless, the district court provided a blueprint for how to rewrite the legislation to avoid preemption.[39] The court remarked that where there is no "voluntary" aspect and the regulations impose a blanket mandatory duty on all restaurants meeting a standard definition such as operating ten or more restaurants under the same name, state nutritional disclosure regulations would not be preempted by NLEA.[40] Notably, the court refrained from discussing the First Amendment issues at hand.[41] The court stated that because the legislation

32. *Id.*

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

34. Diane Cardwell, *City Tries Again to Require Restaurants to Post Calories*, N.Y. TIMES, Jan. 23, 2008, at B2, *available at* http://www.nytimes.com/2008/01/23/nyregion/23menu.html?r-1&scp=city%20again%20&st=cse&oref=slogin.

35. *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 354.

36. *Id.*

37. *Id.* at 363.

38. *Id.* at 353; Joseph Goldstein, *Court Rebuffs Mayor's Plan on Fast Food*, N.Y. SUN, Sept. 12, 2007, http://www.nysun.com/article/62411 (last visited Sept. 27, 2008).

39. Goldstein, *supra* note 38.

40. *See N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 363.

41. *Id.*

was preempted by NLEA,[42] there was no need to address the First Amendment issues.[43]

The New York City Board of Health amended and reintroduced the regulation in January 2008.[44] The new regulation required restaurants with more than fifteen sites nationwide to display the calorie content of foods and beverages on their menus and menu boards.[45] The Board claimed to have altered the previous regulation by strictly following the recommendation made by the district court[46] and acknowledged that information is already extensively made available to customers.[47] It also insisted that despite the plethora of information provided by restaurants on the Internet, tray liners, napkins, and brochures, customers rarely see such information when ordering food.[48] New York City Health Commissioner, Dr. Thomas R. Frieden, stated that requiring restaurants to post calorie content on their menus and menu boards will "help New Yorkers make healthier choices about what to eat; living longer, healthier lives as a result."[49] The Board further projected that the regulations could prevent 150,000 people from developing obesity over the next five years.[50] On January 31, 2008, the New York Restaurant Association filed a lawsuit challenging the regulation, which it claimed was almost identical to the regulation struck down in 2007.[51]

42. By its terms, NLEA does not preempt requirements of nutrition labeling. However, it does preempt and prohibit requirements of labeling which are not identical to requirements already in the NLEA. Mandating disclosure for restaurants that already provided nutrition information, but not for restaurants which did not provide such information violated NLEA because it created a standard different from that already promulgated in NLEA. *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 354.

43. *Id.* at 353.

44. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 2008 U.S. Dist. LEXIS 31451, at *19 (S.D.N.Y. Apr. 16, 2008) [hereinafter *New York II*], *stay denied pending appeal*, 545 F. Supp. 2d 363 (S.D.N.Y. 2008).

45. Press Release, New York City Department of Health and Mental Hygiene, Board of Health Votes to Require Chain Restaurants to Display Calorie Information in New York City (Jan. 22, 2008), *available at* http://www.nyc.gov/html/doh/html/pr2008/pr008-08.shtml.

46. *See* Cardwell, *supra* note 34.

47. *See* Press Release, New York City Department of Health and Mental Hygiene, *supra* note 45.

48. *Id.*

49. *Id.*

50. *Id.*

51. Stephanie Saul, *Conflict on the Menu*, N.Y. TIMES, Feb. 16, 2008, at C1, *available at* http://www.nytimes.com/2008/02/16/business/16obese.html?scp=1&sq=Conflict%20on%20the%20Menu&st=cse.

In April 2008, the district court reheard *New York State Restaurants Ass'n v. New York City Board of Health* ("*New York II*"),[52] but this time upheld the regulation.[53] The court found that because the new regulation was mandatory for all restaurants, it was not preempted by NLEA.[54] The court stated that the constitutionality of the regulation should be analyzed under the *Zauderer* standard, requiring only that the regulations be "reasonably related to the State's interest in preventing deception of consumers."[55] The court declared that concerns of the regulation violating freedom of speech were negligible.[56] It stated that plaintiffs could not claim that they were being compelled to speak based on the fact that nutritional information is "purely factual and uncontroversial" information, regardless of the motive behind passing the legislation.[57] Furthermore, the court concluded that the regulation was related to the state's interest in "providing consumers with more complete nutrient information concerning restaurant offerings."[58] It relied on "common sense" to conclude that if "some" consumers saw the caloric information and then chose less caloric food, this would ultimately lead to a lower incidence of obesity.[59]

The court's reliance on the *Zauderer* standard[60] was misplaced. The court's refusal to acknowledge the unavoidable inconsistency of nutritional disclosure at restaurants led it to incorrectly conclude that nutrition labeling is purely factual and uncontroversial. Restaurant food is not like packaged food. Packaged foods with traditional nutrition labels are generally made in mass quantities, with methods ensuring consistency in volume, ingredients, and size. However, even identical restaurant meals can vary greatly from cook to cook, based on inescapable factors such as preparation discrepancies. For that reason, the nutritional content of restaurant items is not inherently "factual and uncontroversial" and should not be labeled as such by the court.

The mandatory nutritional disclosure should not have been deemed constitutional even under the more lenient standard applied by the court. The court's attenuated logic blindly assumed that knowing caloric

52. *New York II*, 2008 U.S. Dist. LEXIS 31451.

53. *Id.* at *3.

54. *Id.* at *19.

55. *Id.* at *26–27 (citing Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 114–15 (2d Cir. 2001)).

56. *Id.* at *29.

57. *Id.*

58. *Id.* at *35.

59. *Id.* at *47.

60. *Id. See also Nat'l Elec. Mfrs.*, 272 F.3d at 115 (using *Zauderer* standard rather than stricter *Central Hudson* test for commercial regulation).

information at restaurants will lead to lower obesity rates. The court ignored the fact that even though individuals consume one-third of calories outside the home,[61] two-thirds of calories are consumed at home and are not broadcast on a menu board. Proponents may argue that calculating the household consumption of calories is available due to easy access on nutrition labels. But, with the frequent mixing of different ingredients to create a meal, does the average person actually know how many calories are in the dinner they sit down to eat each night?

The New York City Board of Health is not the only group of lawmakers trying to pass nutritional disclosure legislation. The State of California has also attempted to require nutritional disclosure on its restaurant menus. In 2007, the California State Senate passed Senate Bill 120 that would have forced restaurants to list the total calories, total fat, trans fat, sodium, and carbohydrate content next to each food item on their menus.[62] The bill also would have required fast-food restaurants to include total number of calories next to food items on menu boards, and was widely supported throughout the state.[63] Nonetheless, it was vetoed in October 2007 by Governor Schwarzenegger, who called the regulation inflexible and unfairly burdensome upon the restaurant industry.[64] Nearly identical regulations were re-introduced in 2008.[65] And one week later, the County of San Francisco's Board of Supervisors initiated a similar ordinance.[66]

III. Nutritional Regulations are Unconstitutional Violations of the First Amendment Freedom of Speech

Even if nutritional disclosure regulations are not vetoed or struck down for other reasons, they are not likely to survive constitutional critique. Requiring restaurants to broadcast the nutritional content of the

61. *New York II*, 2008 U.S. Dist. LEXIS 31451, at *5.

62. S.B. 120, 2007 Reg. Sess. (Cal. 2007), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0101-0150/sb_120_bill_20070122_introduced.html.

63. Polls showed that 84 percent of registered voters favored mandatory nutritional labeling. The bill was also supported by major health, consumer, senior, and labor organizations across California. Dr. Harold Goldstein & Lupe Alonzo-Diaz, Editorial, *S.B. 120: Healthy Step toward a Slimmer State*, SACRAMENTO BEE, Oct. 10, 2007, at B7, *available at* http://www.sacbee.com/110/story/423634.html.

64. S.B. 120, 2007 Reg. Sess. at 1 (Cal. 2007) (Governor Schwarzenegger's veto message), *available at* http://gov.ca.gov/pdf/press/SB%20120%20veto%20message.pdf.

65. S.B. 1420, 2008 Reg. Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_1401-1450/sb_1420_bill_20080221_introduced.html.

66. Wyatt Buchanan, *S.F. Expected Pass Law on Nutrition Disclosure*, S.F. CHRONICLE, Feb. 29, 2008, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/29/MNR9VASHU.DTL.

food they serve is akin to forcing speech, and such action violates their First Amendment right to freedom of speech. Although the court in *New York II* approved such legislation, the decision was based on an inappropriate standard, and, therefore, should not be followed by other courts that consider such regulations. Rather, the threshold issue, which *New York II* declined to consider, is the infringement the regulations impose on the First Amendment right to commercial speech.

Under the First Amendment of the United States Constitution, the government "can make no law abridging the freedom of speech."[67] The First Amendment protects commercial speech as well as private speech.[68] Speech does not lose its protected status merely because it is done for profit.[69] As applied to the States through the Fourteenth Amendment, the First Amendment provides protection for commercial speech against unwarranted governmental regulation.[70] Government regulation of commercial speech is "not intended to be narrowly limited to mere proposal of a particular commercial transaction," but also to include "false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product."[71] State laws can require commercial speech to appear in such a form or to include such additional information, warnings, and disclaimers "as are necessary to prevent its being deceptive."[72] Accordingly, speech which is false or misleading is not entitled to First Amendment protection.However, businesses have a right to withhold information that is not false or misleading. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the United States Supreme Court set forth an intermediate scrutiny standard with a four-prong test to determine whether or not regulations on commercial speech violate the First Amendment.[73] The Court specifically noted that "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy" should be reviewed with particular consideration.[74]

Applying the *Central Hudson* test, courts have found that where a state's interests are not substantial enough to justify a regulation, state

67. U.S. CONST. amend. I.

68. *See* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

69. *See* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 868 (1979).

70. *See Va. Bd. of Pharmacy*, 425 U.S. at 761–62.

71. Nat'l Comm'n on Egg Nutrition v. Fed. Trade Comm'n, 570 F.2d 157, 163 (7th Cir. 1977).

72. *Va. Bd. of Pharmacy*, 425 U.S. at 772 n.24.

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

74. *Id.*

mandates requiring certain statements or disclosures violate the Constitution.[75] Additionally, when a governmental body seeks to sustain a restriction on commercial speech it must demonstrate that the harms the speech recites are real and that its restriction will in fact alleviate them to a material degree.[76]

Certain courts have claimed that these regulations are compelled commercial speech that should be governed by more lenient standards.[77] Such courts justify using the deferential standard by claiming that where there is a substantial state interest and not just consumer curiosity, deference to legislatures may be required.[78] Additionally, they acknowledge that "[r]equiring actors in the marketplace to espouse particular opinions" would likely be considered under a different standard.[79] Mandating nutritional disclosure requires restaurants to advocate not only the opinion that the United States is in an obesity epidemic, but also that eating fast food necessarily leads to obesity. Accordingly, such disclosures should be analyzed under the *Central Hudson* framework.[80]

The *Central Hudson* test has been widely criticized as creating an untenable dichotomy which leads to uncertainty and places too much discretion in the hands of judges.[81] However, *Central Hudson* remains the leading rubric for analyzing the constitutionality of compelled commercial speech.

A. NLEA-Mandated Food Labeling is Constitutional

Unlike the proposed nutritional disclosure regulations, the current nutritional labeling on packaged food imposed by NLEA is not unconstitutional. It is debatable whether the NLEA labels should be considered "speech." The court in *New York Restaurants Ass'n* explained that statements regarding the nutritional content of foods, such as the proposed calorie requirements, should be viewed differently than the

75. Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996).

76. Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999).

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

78. *Id.* at 115 n.6.

79. *Id.* at 114 n.5.

80. California, one of the leading proponents of such legislation, utilizes the *Central Hudson* analysis in determining violations of freedom of commercial speech. *See, e.g., In re* Tobacco Cases II, 41 Cal. 4th 1257, 1274 (2007); Gerawan Farming, Inc. v. Kawamura, 33 Cal. 4th 1, 22 (2004) People *ex rel.* Brown v. PuriTec, 153 Cal. App. 4th 1524, 1537 (3d. Dist 2007). Accordingly, analyzing the legislation under such the stricter *Central Hudson* standard provides the most effective analysis of determining whether such speech will be deemed constitutional.

81. *See, e.g.*, Aaron A. Goach, *Free Speech and Freer Speech*, 21 HARV. J.L. & PUB. POL'Y 623, 637 (1998).

existing NLEA claims.[82] Although the proposed disclosures were "claims" under the NLEA, the court expressly noted that the mandatory statement of nutrient amount in the familiar Nutrition Facts panel is not a "claim."[83] It could be argued that the NLEA labels should be considered compelled commercial speech under *Glickman v. Wileman Brothers*.[84] Under this standard, any regulation would be held to a higher level of scrutiny. But because of their broader purpose and limited scope, NLEA labels are constitutional under the *Central Hudson* test, even if they constitute compelled commercial speech.

First, the NLEA-imposed labeling is based on a legitimate, substantial governmental interest of promoting general health by educating consumers about nutritional content of foods.[85] The FDA has a recognized, substantial interest in protecting and promoting public health.[86] Although the new proposed menu disclosures may claim to ultimately have the same broad goal, their expressly stated interest is what they must be judged by.

Second, unlike the menu disclosure regulations, the NLEA requirements are the least invasive means of achieving their purported goal. It would be nearly impossible for individuals to determine the calories or grams of sodium in a box of crackers without the NLEA label on the side. Most companies which sell food in grocery stores do not list their nutrition facts elsewhere, and it is unlikely that people would be able to find such information on their own. It would be absurd to suggest that grocery stores maintain an accessible database containing nutritional information for all of their products. The means employed by the NLEA label is the least invasive means possible to achieve public health interest.

The proposed menu disclosures, however, stand in stark contrast to the NLEA labels. The nutrition disclosures proposed for restaurant menus are based on overly narrow concerns such as the "war against obesity" and obesity costs imposed on local governments, interests which are not sufficiently defined.[87] Moreover, the information found on the proposed

82. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 360 (S.D.N.Y. 2007).

83. *See id.* at 361.

84. Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457 (1997). The compelled speech argument would be that the NLEA-imposed labeling prevents food manufacturers from communicating any other message because it limits available space on products to advertise. However, it is questionable whether the NLEA labels are promoting political ideology. Mandatory menu nutritional disclosure does, however, constitute compelled commercial speech. *See infra* Part III.B.

85. Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims, and Health Claims, 21 C.F.R. § 101 (2003).

86. Pearson v. Shalala, 164 F.3d 650, 656 (D.C. Cir. 1999).

87. *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 353.

menu disclosures *is* generally available to the public, mooting any least invasive means argument. Most chains offer information on pamphlets or posters located in the store. Many chains have the information available online. The National Restaurant Association collaborated with the Centers for Disease Control and Prevention to create a website offering consumers free listings of the nutritional information for local restaurants.[88] There are also many privately managed internet sites dedicated to promoting public health such as shapefit.com,[89] chowbaby.com,[90] and calorieking.com[91] that provide nutritional information for foods served at many fast food and sit-down restaurants. The nutritional information for most restaurant food items is already available to the public.[92] While the NLEA labels are undoubtedly necessary in order to serve their purpose, the proposed restaurant disclosures are overly broad. The NLEA labels are therefore constitutional, while the newly proposed disclosures are not.

B. Mandatory Nutritional Disclosure on Restaurant Labels is Compelled Speech

Proponents of nutritional disclosure laws may try to claim that such laws are closer to constitutionally approved economic regulations than unconstitutional compelled speech. Compelled commercial speech has been analyzed most recently in two Supreme Court cases: *Glickman v. Wileman Brothers*[93] and *United States v. United Foods*.[94] Because *Glickman* is the stricter of the two standards, analysis of the nutrition disclosure under that scheme illustrates that even under the most stringent requirements, nutrition disclosure is commercial speech.

In *Glickman*, fruit growers, handlers, and processors brought a First Amendment compelled speech claim after they were required to contribute

88. On the website, consumers enter in a city and price range for dining and are directed to a list of local restaurants with links to the nutrition content of their menu items. *See* Healthy Dining Program, http://www.healthydiningfinder.com (last visited Mar. 4, 2008).

89. Shapefit Fast Food Calories, http://www.shapefit.com/fastfood.html (last visited Sept. 27, 2008).

90. Chowbaby Fast Food Calories and Calorie Counter, http://www.chowbaby.com/fastfood/fast_food_nutrition.asp (last visited Sept. 27, 2008).

91. CalorieKing Fast Food Chains and Restaurants Food Database, http://www.calorieking.com/foods/calories-in-fast-food-chains-restaurants_c-Y2lkPTIxJnBhcj0.html (last visited Sept. 27, 2008).

92. Although the websites and pamphlets cited *supra* notes 86–90 and accompanying text are mostly limited to chain restaurants, the proposed menu regulations would mostly affect these types of establishments. This is because the proposed regulations generally require restaurant chains with at least ten or fifteen locations to disclose information.

93. Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457 (1997).

94. United States v. United Foods, 533 U.S. 405 (2001).

to generic advertising expenses for fruit from their state.[95] The Supreme Court denied the growers' claim, stating that the assessments levied to pay for a collective general advertising campaign were economic regulations that did not fall under First Amendment protection.[96] The Court found three factors which distinguished *Glickman* regulations from past commercial speech claims.[97] First, the regulations did not prevent the fruit producers from communicating their own message.[98] Second, the regulations did not compel any person to engage in actual or symbolic speech.[99] Finally, the regulations did not compel producers to finance political or ideological speech.[100] Because of these factors, the Court held that the regulations should be considered economic regulations rather than compelled speech.[101]

Mandatory nutritional disclosure requirements on menus should be considered commercial speech and can be easily distinguished from the economic regulations in *Glickman*. First, the required nutritional disclosure prevents a restaurant owner from communicating her own message. The proposed California-legislation requires nutritional information, including calories, total fat, trans fat, sodium, and carbohydrate content, that would take up substantial space on menu boards and menus. Even the less invasive New York legislation, which only requires the caloric content of food, still results in a loss of valuable advertising space on menus and menu boards. By occupying space on menus, this information prevents restaurant owners from conveying other messages on the menus, such as advertisements or promotions.

Second, nutritional disclosure regulations can clearly be seen as compelling actual or symbolic speech. In *Glickman*, the regulation was not considered compelled speech because it required only financial contributions.[102] Conversely, mandated nutritional disclosures force actual speech. They require actual writing to be placed on menus and menu boards and force restaurants to financially sponsor and communicate government-mandated messages to consumers. The restaurants are not forced to simply contribute money to an anti-obesity advertising campaign; they are forced to present in-depth information at their own cost.

95. *Glickman*, 521 U.S. at 460.
96. *Id.* at 474.
97. *Id.* at 469–70.
98. *Id.* at 469.
99. *Id.*
100. *Id.* at 469–70.
101. *Id.* at 470–71.
102. *Id.* at 471.

Finally, mandatory nutritional disclosure laws force restaurants to finance political or ideological speech that is clearly against their interests and beliefs. The financial contributions at issue in *Glickman* were used to further the interests of fruit growers as a group.[103] Here, forcing restaurants to pay large sums to alter their menus and menu boards completely in order to include nutritional information requires restaurants to take action contrary to their own interests and beliefs. Obesity has recently evolved from a private matter into a political issue.[104] It has been said that "the obesity epidemic is a myth manufactured by public health officials in concert with assorted academics and special-interest lobbyists."[105] Researchers have warned of such policies, referring to them as the "tyranny of health," where people who veer from what is considered the ideal specimen are presumed to have acted in a way meriting punishment.[106] Offenders would be subjected to laws forcing conformity to "healthy behavior" under the guise that it is for the individual's own good as well as for the public good.[107] Providing nutritional information in the hopes that consumers will have dietary epiphanies before ordering is undoubtedly catering to a political health agenda. Because mandatory nutritional disclosure prevents restaurants from displaying their own messages and forces restaurants to promote politically-motivated speech against their interest, such disclosures undeniably fall within commercial speech.

C. Mandatory Nutritional Disclosure Violates the Freedom of Commercial Speech Under the *Central Hudson* Test

The constitutionality of restrictions on commercial speech is gauged under the four-part test introduced in *Central Hudson*.[108] Although the *New York II* court analyzed the regulation under the more lenient *Sorrell* standard,[109] this standard has not been universally approved for use in such situations[110] and is not likely to be given such unquestioned deference in other jurisdictions.

103. *Id.* at 475.

104. *See* Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L. 839 (2005).

105. Patrick Basham & John Luik, *Four Big, Fat Myths*, SUNDAY TELEGRAPH, Nov. 27, 2006, http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/26/nfat26.xml (last visited Sept. 27, 2008).

106. Faith T. Fitzgerald, *The Tyranny of Health*, 331 NEW ENG. J. MED. 196, 196 (1994).

107. *Id.*

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

109. *New York II*, 2008 U.S. Dist. LEXIS 31451, at *26.

110. *Sorrell* was a Second Circuit case Natl. Elect. Mfrs. Assn. v. Sorrell, 272 F.3d 104, 113 (2d Cir. 2001). In a similar commercial speech case, the Seventh Circuit held that a regulation

The First Amendment interest in commercial speech includes both the interests of the speaker and the speaker's prospective audience: consumers.[111] The speaker's interest includes conveying a chosen message to potential consumers. The consumer's interest consists of gaining information on which to base the decision of whether to purchase the product and is served by insuring that the information proffered by the speaker is not false or deceptive.[112] The first prong of the *Central Hudson* test addresses this concern and protects the interest of the audience.[113] The prong provides that in order for speech to be potentially protected by the First Amendment, it must be lawful and not misleading.[114] Both the states and the federal government may act to restrict the dissemination of speech which is determined to be "false, deceptive or misleading."[115]

Menus and menu boards are lawful representations of the goods sold at restaurants. It could be claimed that the names or descriptions of food items on menus have the potential to be misleading as to the nutritional value or actual ingredients or content of the item. Proponents of the disclosures may claim that using the words "veggie patty" is deceiving because there is no indication whether the patty is made entirely from vegetables. And consumers may unknowingly assume that the item is healthy because the word "veggie" is in its title. However, not including specific information about the contents of a veggie patty is more likely to be seen as an omission of comment about nutritional properties rather than misrepresentation. As long as restaurants do not expressly claim that the veggie patty is healthy, they do not mislead the consumer. Menus would become novels if restaurants were forced to list every single ingredient of an entrée. Courts have warned against the slippery slope dangers of similar disclosure requirements.[116] If governments could elicit disclosure for such arbitrary consumer concerns, there is no end to the types of disclosures that could be mandated. Because menu boards are not inherently misleading, it is doubtful that this health argument would be enough to substantiate a

requiring labeling of a "subjective and highly controversial nature" was unconstitutional. Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006).

111. Nat'l Comm'n on Egg Nutrition v. Fed. Trade Comm'n, 570 F.2d 157, 162 (7th Cir. 1977).

112. *Id.*

113. *Id.*

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

115. Friedman v. Rogers, 440 U.S. 1, 9–10 (1979).

116. Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 74 (2nd Cir. 1996).

claim that menus were misleading enough to negate protection under the First Amendment.[117]

The second prong of the *Central Hudson* test examines whether the asserted governmental interest is substantial.[118] Under this prong, the government not only has an obligation to identify the interest it is pursuing, but must also prove that such an interest is significant. Protection of the health, safety, and welfare of citizens has been acknowledged to be a substantial governmental interest under the *Central Hudson* analysis.[119] In *New York Restaurants Ass'n*, the asserted governmental interest was battling the "obesity epidemic" plaguing New York by causing health problems and generating enormous financial costs to society.[120] The government will have to prove that this regulation is in the interest of public health and does not just appease consumer interest or lower costs to the city.

Courts have previously rejected states' attempts to compel disclosure where the state interest was merely to satisfy consumer curiosity. In *International Dairy Food Ass'n v. Amestoy*, the Vermont legislature enacted a statute requiring disclosure on dairy products from cows that had been treated with specific supplemental growth hormones.[121] The International Dairy Food Association, the major trade association of the dairy industry, filed suit in response to the regulation, claiming that the regulation compelled speech in violation of the First Amendment.[122] The court held that Vermont failed the second prong of the *Central Hudson* test by failing to state a substantial governmental interest.[123] The court declared that consumer interest and right to know were inadequate governmental purposes and could not justify interfering with businesses' First Amendment right to be free from compelled speech.[124] The court commented that if it held consumer interest alone was sufficient "there [would be] no end to the information that states could require

117. Rebecca S. Fribush, *Putting Calorie and Fat Counts on the Table: Should Mandatory Nutritional Disclosure Laws Apply to Restaurant Foods?*, 73 GEO. WASH. L. REV. 377, 388 (2005).

118. *See Cent. Hudson*, 447 U.S. at 566.

119. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 484–85 (1995) (Rehnquist, J., dissenting); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 341 (1986).

120. *See* N.Y. State Rest. Ass'n v. N.Y. Bd. of Health, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007).

121. Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69–70 (2nd Cir. 1996).

122. *Id.*

123. *Id.* at 73.

124. *Id.*

manufacturers to disclose about their production methods."[125] However, the court also recognized that an indication that such "information bears on a reasonable concern for human health or safety" could justify compelled disclosure by manufacturers.[126]

Accordingly, the public's interest in nutrition or supposed right to know the calories of the food it is purchasing cannot be used as the governmental purpose behind the disclosure regulations. But, since it will likely be easy for the government to prove that nutritional information bears relation to public health, it will likely be considered a legitimate governmental purpose. To pass this prong of the *Central Hudson* test, it would be important for the government to identify a specific, cognizable health concern stemming from consumption of not just fast food, but *all* restaurant food.

Central Hudson's third prong provides another harsh challenge for nutritional disclosure. If both of the previous questions are answered in the affirmative, the court "must determine whether the regulation directly advances the governmental interest asserted."[127] This prong cannot be satisfied by unproven theories or speculations. "A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and its restriction will in fact alleviate them to a material degree."[128]

The hardest hurdle for the government to jump will be to provide convincing evidence that displaying the nutritional information of restaurant foods will actually motivate consumers to make healthier food choices than they would do without such information. The paramount issue is whether requiring nutritional disclosure of food that people already know is unhealthy changes eating habits. Eating excessive amounts of fast food may lead to obesity.[129] But, only 33 percent of Americans believe that the fast food industry is at all responsible for the obesity epidemic.[130] If the people these bills are designed to help do not consider restaurants as

125. *Id.* at 74.

126. *Id.*

127. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1979).

128. *See* Edenfield v. Fane, 507 U.S. 761, 770–71 (1993).

129. Research has shown that "fast-food consumption has strong positive associations with weight gain and insulin resistance, suggesting that fast food increases the risk of obesity and type 2 diabetes." Mark Pereira et al., *Fast-Food Habits, Weight Gain, and Insulin Resistance (the CARDIA Study): 15-year Prospective Analysis*, 365 LANCET 36, 36 (2005).

130. Lydia Saad, *Public Balks at Obesity Lawsuits*, GALLUP POLL NEWS, Jul. 21, 2003, http://www.gallup.com/poll/8869/Public-Balks-Obesity-Lawsuits.aspx (last visited Sept. 27, 2008).

contributing to their health problems, will mandating nutritional disclosure on restaurant menus actually improve both their health and food choices?

In enacting the failed New York regulations, New York City officials claimed that calories were "the single most important piece of nutritional information related to weight gain," and if citizens were informed as to the caloric content of foods they purchased they would be "likely to decrease caloric intake" and restaurants would offer food options with lower caloric values.[131] For the regulation to pass constitutional muster, the government would have to prove that requiring restaurants to disclose nutritional information about their meals directly promotes improved public health and decreases obesity rates.

This obstacle will probably be difficult to overcome. It is at best overly optimistic, and at worst naïve to assume that consumers will change their eating habits if they know the nutritional value of the food they put in their bodies. Research shows that approximately 75 percent of Americans are aware that fast food is unhealthy.[132] Other studies reveal that most fast food patrons are unlikely to alter their eating behavior even if given information on the nutritional content of meals.[133] Furthermore, even people who are aware of calories often allow themselves to splurge at restaurants, seeing restaurant dining as an event to be celebrated and not restricted.[134]

In addressing this third prong, courts have stressed the "direct" prerequisite, stating that "conditional and remote eventualities" were not considered acceptable justifications for restricting commercial speech.[135]

Requiring disclosure of nutritional information is not constitutional because it does not directly combat obesity. The science and research backing nutrition disclosure is far from conclusive.[136] Making a person

131. *See* N.Y. State Rest. Ass'n v. N.Y. Bd. of Health, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007).

132. Saad, *supra* note 130.

133. Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1175 (2004).

134. Kim Severson, *New York Gets Ready to Count Calories*, N.Y. TIMES, Dec. 13, 2006, at F14, *available at* http://travel.nytimes.com/2006/12/13/dining/13calo.html?scp=1&sq=new%20york%20gets%20ready%20to%20count%20calories&st=cse.

135. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 569 (1979).

136. Even though calorie disclosure requirements may seem like a health-promoting step, where science and research is not yet robust, such a move may be premature. *A Contrarian Take on Trans Fats*, NUTRITION PERSPECTIVES, (University of California, Davis Nutrition Department, Davis, California), Mar.–Apr. 2007, at 6, *available at* http://nutrition.ucdavis.edu/perspectives/Issues/2007/2NP%20MarApr07.pdf. Existing estimates of mortality rates caused by obesity are largely inaccurate because they were "calculated by using a method likely to produce biased estimates when the effects of obesity vary by age or other characteristics." Katherine M.

aware of the calorie content of foods he or she consumes will not combat his or her genetic predisposition to obesity.[137] Furthermore, studies show that nationwide weight gain may not be solely caused by overeating, but rather a result of human evolution.[138] If increasing waistlines are a result of biology, no amount of nutritional disclosure will change obesity rates.

Requiring nutrition disclosure at restaurants alone will not combat the obesity epidemic because eating at restaurants is not causing obesity in our society.[139] One study reported that the "[u]nintended consequences of our contemporary, post-industrial society are deeply rooted cultural, social, and economic factors that actively encourage overeating and sedentary behavior and discourage alterations in these patterns . . . ."[140] If eating at restaurants is not what is causing obesity in the United States, requiring nutritional disclosure will not directly combat the government's stated purpose.

Furthermore, menu disclosure will not directly combat obesity because even if people are notified of the calories in what they eat they will not likely consume fewer calories. Menu disclosure would fail to directly combat obesity due to the various ways a food item's calories can be manipulated by condiments and other variations.[141] Additionally, studies

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Flegal et al., *Methods of Calculating Deaths Attributable to Obesity*, 160 AM. J. EPIDEMIOLOGY 331, 337 (2004).

137. Researchers have largely abandoned the overly simplistic approach that weight is solely determined by excessive amounts of calories ingested exceeding calories burned. Kassirer & Angell, *supra* note 1, at 53. Studies show that genetics play a significant role in determining a person's weight and environment alone has no significant impact. *See* AJ Stunkard et al., *An Adoption Study of Human Obesity*, 314 NEW ENG. J. MED. 193 (1986). *See also* AJ Stunkard et al., *A Twin Study of Human Obesity*, 256 JAMA 51 (1986); R. Arlen Price & Irving I. Gottesman, *Body Fat in Identical Twins Reared Apart: Roles for Genes and Environment*, 21 BEHAVIOR GENETICS 1 (1991).

138. One study noted that "the technological revolution of the 20th century has led to weight gain becoming unavoidable for the majority of the population, because our bodies and biological make-up are out of step with our surroundings." Jennifer Hill, *Obesity a Result of Modern Life*, REUTERS, Oct. 17, 2004, *available at* http://www.reuters.com/article/healthNews/idUSL1634028620071017. The study further commented that "[w]eight gain does not result from people's actions—such as overindulgence or laziness—alone . . . ." *Id.*

139. Multiple elements of modern living contribute to rising obesity rates and "only change across many elements of our society will help us tackle obesity." *Id.*

140. *See* Nestle & Jacobson, *supra* note 26, at 18.

141. The choice of toppings placed on a hamburger can change the total calorie count up to 40 percent. Patrick Bashim & John Luik, *Nutrition Labeling on Menu Boards and Menus: A Recipe for Failure* 2–3 (Wash. Legal Found. Working Paper Series, Paper No. 154, 2007), *available at* http://www.data-yard.net/107/basham_luik_wp.pdf. Even under the proposed legislation, calories of condiments such as mayonnaise, cheese, and ketchup would not likely be included in the item's listing, but rather placed in a separate "condiment" section of the menu. However, given that most consumers would not think to add calories for condiments they add to their meals, they would most likely be misled into thinking their order was less caloric than it

show that offering lower-calorie foods at fast food restaurants does not necessarily lead to a reduction in total calories or obesity rates.[142] Even if nutrition disclosure allows consumers to discern "healthy" menu items, there will be no impact on obesity rates if consumers still choose to overindulge in side dishes. Regulations that fail to decrease obesity fail the third prong of *Central Hudson* and are unconstitutional.

Nutritional disclosures cannot combat obesity if the primary consumers are unable to alter their choices. Most people who consume fast food earn little money and have no option but to consume the least expensive sources of calories possible.[143] Because they cannot afford to eat elsewhere, making nutritional content available will not prevent them from eating high calorie food, and therefore, will not decrease obesity rates.

Lastly, nutrition disclosures at restaurants are not a sufficiently effective obesity deterrent. America's growing waistline has been attributed to a number of other causes besides food consumed at restaurants.[144] Schools are promoting obesity by providing children with unhealthy foods in vending machines, creating policies that allow for frequent snacking and providing fundraising and rewards revolving around junk food.[145] Because obesity is caused by multiple factors, requiring nutritional disclosure will not make a significant enough dent in the obesity epidemic to justify the First Amendment violation it mandates.

The fourth prong of the *Central Hudson* test will likely be the most difficult for nutritional disclosure laws. This prong requires that the regulation be no more extensive than necessary to serve the purported

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truly was. Because the separation of condiments from the nutritional value of primary food items will impair the consumer's ability to accurately judge the calorie content of their meals, forcing disclosure will not achieve the government's stated goal of increasing nutrition knowledge and combating obesity.

142. When consumers think main dishes are healthy, it leads them "to unknowingly choose side dishes containing more calories and therefore enhance the chances of overeating because of undetected increases in calorie intake." Pierre Chandon & Brian Wansink, *The Biasing Health Halos of Fast-Food Restaurant Health Claims: Lower Calorie Estimates and Higher Side-Dish Consumption Intentions*, 34 J. CONSUMER RES. 301, 311 (2007).

143. *See generally* Jason P. Block et al., *Fast Food, Race/Ethnicity, and Income: A Geographic Analysis*, 27 AM. J. PREVENTIVE MED. 211 (2004).

144. Multiple unaddressed factors cause rising obesity rates, including soft drinks in schools, marketing of unhealthy foods to children, and the lack of access to healthy foods in poor communities. Nanci Hellmich, *Restaurants as Obesity Cops Doesn't Sit Well*, USA TODAY, Feb. 5, 2008, *available at* http://www.usatoday.com/news/health/2008-02-05-obesity-restaurant-law_n.htm?loc=interstitialskip.

145. Martha Y. Kubik et al., *Schoolwide Food Practices Are Associated With Body Mass Index in Middle School Students*, 159 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1111, 1111–14 (2005).

governmental interest.[146] In order to be valid, a proponent must show that the costs and benefits associated with the burden on speech were "carefully calculated."[147] In order to fulfill this requirement, the proponents of the nutritional disclosure laws will have to prove that the regulation is as restrained as possible to achieve the promotion of public health.

In *Central Hudson*, the Court struck down the proposed regulation on advertising electronic devices as more extensive than necessary, stating that such a broad step was too extreme to justify the governmental purpose of promoting energy conservation.[148] The Court conceded the nobility and viability of the state's interest of promoting energy conservation, calling it an "imperative national goal."[149] However, the Court ruled that absent a showing that more limited speech regulation would be ineffective, the complete suppression of Central Hudson's advertising could not be approved.[150]

Likewise, improving public health and reducing cost imposed on states by obesity are also important national goals. There may be a serious health epidemic sweeping our nation, and it may be the role of local and statewide governments to implement change. In order to do so, however, those governments will first have to show that more limited regulations would be ineffective. Some scholars claim that mandatory menu labeling is too far reaching because there are other less-imposing means of allowing customers access to nutritional information about the food they are eating.[151] Legislators must recognize the mandate from the Court to take into consideration the extreme financial burden accompanying nutrition disclosure requirements on menus and menu boards. Research has shown that "provid[ing] the nutritional analysis run[s] from $50 to $100 to analyze an item for calories only, and between $220 and $650 for a full nutritional analysis. . . . Altogether, these costs represent a substantial burden to the affected chains."[152] Another report suggests that printing costs for new restaurant menus for an average chain restaurant would likely run at least

146. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1979).

147. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993) (citing Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989)).

148. *Cent. Hudson*, 447 U.S. at 570.

149. *Id.* at 571.

150. *Id.*

151. Fribush, *supra* note 117, at 389.

152. Paul Bachman & David G. Tuerck, *The Costs and Benefits of Implementing Proposed Legislation to Curb Obesity in Maine*, BHI Policy Study (Beacon Hill Inst. for Pub. Policy Research), Mar. 2005, at 11.

$25,000, and, due to promotional items and menu changes, this would likely have to be done multiple times a year.[153]

In response to these costs, which could likely prove insurmountable for a number of restaurants, scholars suggest that, instead, restaurants should only be required to make the information easily *accessible* through readily available fliers and pamphlets.[154] State and local health organizations have supported such an approach, stating that the food industry could aid in the battle against obesity by providing nutritional information at the point of purchase.[155] This system would still promote national health, but would be far less costly to restaurants.[156]

Another effective alternative would be to require symbols identifying healthful foods on menus. Restaurants could place an icon next to foods which fell within certain "healthy" guidelines. Since any health or nutrition claims made on menus are subject to FDA standards, the parameters of such "healthy" foods would have to be within FDA guidelines. Small symbols would not be as burdensome as nutritional information because they would not take up as much space and would not require extra research to determine multiple different types of nutritional information. Symbols could be as inexpensive as stickers placed on a menu. Placing symbols indicating healthy, low-fat foods would satisfy the government's interest in increasing nutritional knowledge without placing excessive burdens on the restaurant industry.

Nevertheless, governments attempting to implement regulations on nutritional disclosure may have still have hope. In *Central Hudson*, the Court left open a window of opportunity for states, stating that if states could claim that their regulation was in response to an emergency situation, an overly restrictive regulation might be found justifiable.[157] State governments might claim that the obesity epidemic has become so all-encompassing as to justify declaring an emergency situation for public health. This option may be most viable in states where the cost of obesity is particularly high, due to excessive obesity rates and a low percentage of citizens with health insurance.[158] Studies show that being obese increases

153. Deborah Turcotte, *Bill to Require Nutritional Data on Menus Killed*, BANGOR DAILY NEWS, Nov. 7, 2003, at B4.

154. Fribush, *supra* note 117, at 391.

155. NAT'L ALLIANCE FOR NUTRITION AND ACTIVITY, FROM WALLET TO WAISTLINE: THE HIDDEN COSTS OF SUPERSIZING 1 (June 2002), http://www.cspinet.org/w2w.pdf.

156. *Id.*

157. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 572 (1979).

158. Two such examples are West Virginia and Mississippi. According to the Center for Disease Control, these states have two of the highest rates of obesity in the United States. CTR.

an individual's annual medical expenses by 37 percent.[159] States and taxpayers absorb much of the added medical expenses of obese patients through Medicare and Medicaid.[160]

Conclusion

The fact that something is not specifically prohibited should not necessarily mean that it can be made mandatory just because it is found to be in the "public interest."[161] Although mandating nutritional disclosure on restaurant menus seems like a popular remedy for the so-called obesity epidemic, it is paternalistic and constitutes an infringement of long-protected First Amendment rights.

These regulations should be deemed unconstitutional under the *Central Hudson* test. Menus declining to disclose nutrition information are clearly lawful, non-misleading speech.[162] The interests purported by the governments proposing such legislation are narrow (cost to local government) and questionable (battling obesity). Nor is consumer curiosity toward nutritional content of food a sufficient governmental interest to justify infringement on First Amendment rights. The proponents of disclosure legislation will have to narrow their interests to interests promoted in passage of NLEA, public health, safety, and welfare in order to pass the second *Central Hudson* prong. The nutritional disclosure regulations are also unsuccessful in the third prong, failing to show that they directly advance asserted governmental interests. Whether disclosing nutritional information will actually alter or effect consumer eating habits is uncertain. Science which is so disputed should not be allowed to dictate

FOR DISEASE CONTROL, U.S. OBESITY TRENDS 1985–2006, http://www.cdc.gov/nccdphp/dnpa/obesity/trend/maps (last visited Sept. 27, 2008). These states also have particularly high percentages of residents without health insurance. On average, between 2003 and 2005, 17.3 percent of Mississippians and 16.9 percent of West Virginians did not have health insurance. U.S. CENSUS BUREAU, CURRENT POPULATION SURV., 2004 TO 2006 ANN. SOC. AND ECON. SUPPLEMENTS, *available at* http://www.census.gov/hhes/www/hlthins/ hlthin05/hi05t10.pdf. It may be possible for the governments in these states to declare that the cost of obesity forced onto the states has led to an emergency situation.

159. Jennifer Neisner et al., *Background Paper on the Prevention and Treatment of Overweight and Obesity* 5 (Kaiser Permanente Care Mgmt. Inst. And Inst. For Health Policy, Prepared for the Roundtable: "Prevention and Treatment of Overweight and Obesity: Toward a Roadmap for Advocacy and Action," 2003), *available at* http://www.kpihp.org/publications/docs/obesity_background.pdf.

160. McCann, *supra* note 133, at 1168.

161. H. Thomas Austern, *Philosophy of Regulation: A Reply to Mr. Hutt*, 28 FOOD DRUG COSM. L.J. 189, 191 (1973).

162. Fribush, *supra* note 117, at 388.

public policy at the expense of innocent businesses.[163] Furthermore, because the cause of obesity is unsure, and most studies are plagued with confounding factors, mandating nutritional disclosure at restaurants may not combat obesity even if consumers do attempt to alter their eating habits based on such information. Lastly, the disclosure regulations are unconstitutional because they are not a narrowly tailored means of achieving the proposed governmental interest. Having nutrition information available to consumers through pamphlets at the counter or identifying healthful menu items could achieve the same governmental interest without imposing costly burdens on restaurants.

It has been said that "the crux of the current debate on obesity is how to assign responsibility for the great harm it causes."[164] Even if obesity were to be addressed as a community problem, it would not be resolved by requiring restaurants to put up caloric content on their menus and menu boards. There are many other factors which cause obesity; and if these are left unattended, obesity rates will continue to increase regardless of whether restaurants put calories on their menus. Former Surgeon General David Satcher illustrated the widespread causes of obesity as follows:

> When there are no safe places for children to play, or for adults to walk, jog, or ride a bike, that's a community responsibility. When school lunchrooms or workplace cafeterias don't offer healthy and appealing food choices, that is a community responsibility. When new or expectant parents are not educated about the benefits of breast-feeding, that's a community responsibility. And when we don't require daily physical education in our schools, that is also a community responsibility.[165]

It is time for our society to take community responsibility for the so-called obesity epidemic we have created instead of denying rights to the latest scapegoat for our bodily dissatisfaction: restaurants and fast-food establishments.

163. Dr. David B. Allison, President of the Obesity Society, has suggested that proposed nutritional disclosure regulations would actually harm more than help, "by adding to the forbidden-fruit allure of high-calorie foods or by sending patrons away hungry enough that they will later gorge themselves even more." Saul, *supra* note 51.

164. Samuel J. Romero, Comment, *Obesity Liability: A Super-sized Problem or a Small Fry in the Inevitable Development of Product Liability?*, 7 CHAP. L. REV. 239, 241 (2004).

165. Press Release, Office of the Surgeon General, U.S. Dep't of Health & Human Servs., Surgeon General Launches Effort to Develop Action Plan to Combat Overweight, Obesity (Jan. 8, 2001), *available at* http://www.surgeongeneral.gov/news/pressreleases/pr_obesity.pdf.

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