1-1-2011

Menu-Labeling Laws: A Move from Local to National Regulation

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I. INTRODUCTION

Americans are eating out more than ever. An estimated one-third of calories consumed come from food prepared outside the home. Studies show this food tends to contain almost twice as many calories as a meal prepared at home. Consequently, regular consumption of restaurant food is associated with excessive weight gain and other health problems, such as an increased risk of type-two diabetes. The overall increased calorie intake is a key factor contributing to the alarming rise in obesity in the United States. According to a 2006 study, more than one-third of adults, totaling more than 72 million people, are considered obese. In 2006, the Food and Drug Association (FDA) commissioned a report that found obesity to be a public

* Articles Editor, Santa Clara Law Review, Volume 51; J.D. Candidate, Santa Clara University School of Law, May 2011; B.A., Economics, University of California, Berkeley, May 2006. I would like to thank the Santa Clara Law Review Board of Editors and Associates for all of their hard work and for their contributions to my comment. I would also like to thank my family and friends for their ongoing support and encouragement.


2. CAL. HEALTH & SAFETY CODE § 114094(1)(a) (West 2009).


4. Id.

5. CAL. HEALTH & SAFETY CODE § 114094 Historical and Statutory Notes § (1)(b). An adult is classified as obese if his or her body mass index—a number calculated using weight and height measurements—is thirty or higher.

health crisis. In addition, the increased rates of obesity and obesity-related health problems raise health-care costs for the entire nation.

One potential solution to this public health epidemic is to require restaurants and food facilities to disclose the nutritional information about their food in a clear and consistent manner so that customers can see this information before they order. These types of laws are generally referred to as "menu-labeling laws." The purpose of a menu-labeling law is to help consumers make informed and healthier food choices. By promoting this type of decision making by consumers, legislatures hope to reduce obesity and its related diseases. Menu-labeling laws are also enacted to reduce consumer confusion and deception. While most people reasonably believe that a salad is healthier than a steak, many would be surprised to find out that a salad at the popular restaurant Chili's contains 1270 calories, whereas the restaurant's sirloin steak contains only 540 calories. Likewise, customers may think that carrot cake is lower in calories than cheesecake, yet a single slice of carrot cake from the Cheesecake Factory has around 1550 calories, whereas the restaurant's original cheesecake contains only 710 calories. That slice of carrot cake contains an astonishing three-fourths of the daily recommended amount of calories for an average adult.

7. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 135 (2d Cir. 2009).
9. E.g., Marks, supra note 6, at 90.
10. Id.
11. Id. at 91.
12. Id.
Without readily available nutrition information disclosing the amount of calories and fat in a food item, it is difficult for consumers to compare food options and make informed decisions.\textsuperscript{16}

Every level of government has tried to enact a menu-labeling law. In 2006, New York City led the way by enacting a local menu-labeling law that regulated any restaurant that had already calculated and disclosed nutrition information somewhere other than on its menu.\textsuperscript{17} In 2008, California became the first state to introduce a menu-labeling law that regulated all restaurants with twenty or more locations.\textsuperscript{18} Finally, in 2010, Congress enacted a federal menu-labeling law as part of the lengthy and controversial Patient Protection and Affordable Care Act (PPACA).\textsuperscript{19} Of these three examples, only the New York City regulation has been the subject of extensive litigation, involving both preemption and free speech challenges.\textsuperscript{20}

The rulings in the New York cases provide a framework for how other state and federal laws will stand up to constitutional challenges. This comment explores the effects of those judicial decisions concerning the New York City law, and it analyzes how they can be applied to the California law and the menu-labeling provisions in the PPACA.\textsuperscript{21} This comment also looks at the larger implications of menu-labeling laws by reviewing the evolution of the laws and their legal and social consequences.\textsuperscript{22} Part II of this comment explains the early history of food regulation in the United States, discusses local menu-labeling laws, addresses the relevant litigation, and summarizes the new federal menu-labeling law.\textsuperscript{23} Part III explains the specific legal problems surrounding menu-labeling laws, particularly mentioning the

\textsuperscript{16} Nutrition Labeling at Fast-Food and Other Chain Restaurants, supra note 3.
\textsuperscript{17} NEW YORK CITY, N.Y., HEALTH CODE tit. 24, § 81.50(a)–(b) (2008).
\textsuperscript{18} CAL. HEALTH & SAFETY CODE § 114094 (West 2009).
\textsuperscript{20} See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 135 (2d Cir. 2009).
\textsuperscript{21} See infra Part II.D.
\textsuperscript{22} See infra Part III.
\textsuperscript{23} See infra Part II.
issues of free speech, equal protection, and preemption. Part IV analyzes potential challenges to the new federal law by evaluating arguments raised in the litigation surrounding New York City's law. Part V analyzes the issue of PPACA preempting the California state menu-labeling laws. Finally, Part VI discusses the policy implications of these state and local laws.

II. HISTORY OF FOOD REGULATION IN THE UNITED STATES

The United States has increasingly regulated the production, distribution, and content of the nation’s food. The early years of food regulation sought to make sure food was safe. Later on, regulations sought to make sure customers were informed about the content of their food—including nutritional information, such as the amount of calories in packaged food. These laws regulating packaged-food nutrition disclosures excluded food sold in restaurants, so state and local governments began enacting menu-labeling laws. New York City’s menu-labeling law was challenged in court, and it prevailed as constitutional. Now, however, section 4205 of the PPACA has amended the previous laws dealing with menu-labeling, affecting the entire landscape of regulation.

A. Early History

The federal government started regulating food heavily in the early twentieth century. The filthy conditions of America’s food products drew public attention from muckraking journalists like Upton Sinclair, who exposed the grotesque meat-packing industry in his novel, The Jungle.

24. See infra Part III.
25. See infra Part IV.
26. See infra Part V.
27. See infra Part VI.
28. See infra Part II.A.
29. See infra Part II.B.
30. See infra Part II.C.
31. See infra Part II.D.
32. See infra Part II.E.
33. Marks, supra note 6, at 90.
Public outcry over these conditions led Congress to pass the Food and Drug Act, also known as the Wiley Act, in 1906.\textsuperscript{35} The Wiley Act regulated food and drug product labeling to ensure that food products were not tainted with harmful chemicals or “putrid animal or vegetable substance,” and that the packaging of the food product was not false or misleading.\textsuperscript{36} In 1907, Congress created the Board of Food and Drug Inspection as a regulatory body to enforce the act.\textsuperscript{37} In 1927, the Board of Food and Drug Inspection became the Food and Drug Administration (FDA).\textsuperscript{38} The FDA enforced the Wiley Act, but the Act’s vague and inconsistent language drew criticism and litigation.\textsuperscript{39}

In 1938, Congress replaced the Wiley Act by passing the Federal Food Drug and Cosmetic Act (FFDCA).\textsuperscript{40} The purpose of the FFDCA was to update the Wiley Act, and to prevent the adulteration, misbranding, and false advertising of food to safeguard public health and protect the purchasing public.\textsuperscript{41} The FFDCA also mandated legally enforceable food standards and pre-market approval for all drugs.\textsuperscript{42} Although Congress has amended the FFDCA multiple times since 1938, it still remains the central foundation of FDA regulatory authority to the present day.\textsuperscript{43}

\textbf{B. The Nutrition Labeling and Education Act (NLEA)}

Eventually, advances in technology and food science allowed nutritionists to discern exactly what nutrients are in specific food products.\textsuperscript{44} In response to this technological

\begin{itemize}
\item \textsuperscript{35} Id.
\item \textsuperscript{37} FDA History Part I, supra note 34.
\item \textsuperscript{38} John P. Swann, FDA’s Origin, U.S. FOOD AND DRUG ADMINISTRATION (1998), http://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm124403.htm.
\item \textsuperscript{39} FDA History Part I, supra note 34.
\item \textsuperscript{40} Claudia L. Andre, What's in that Guacamole? How Bates and the Power of Preemption will Affect Litigation against the Food Industry, 15 GEO. MASON L. REV. 227, 230 (2007).
\item \textsuperscript{41} H.R. REP. NO. 75-2139, at 1 (1938).
\item \textsuperscript{42} FDA History Part II, U.S. FOOD AND DRUG ADMINISTRATION, http://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm054826.htm (last visited Dec. 18, 2010).
\item \textsuperscript{43} FDA History Part I, supra note 34.
\item \textsuperscript{44} Philip J. Hilts, The FDA at Work: Cutting Edge Science Promoting
development, Congress passed the Nutrition Labeling and Education Act (NLEA) in 1990, which amended the FFDCA to dictate that a food is misbranded unless its label bears accurate nutritional information. The NLEA requires nutritional labeling on all food products under FDA authority. These nutrition labels are printed on all food products, and they include information such as the list of ingredients and the total number of calories in the product. The main purpose of the NLEA is to provide consumers with scientifically-based information so they can make informed decisions about their food purchases. The NLEA also regulates health claims printed on food packages.

Specifically, section (q) of the NLEA—entitled “Nutrition information”—establishes standards and requirements for the nutrition facts panel found on most packaged food. The nutrition panel includes the total number of calories in the product, the serving size, the number of servings, and the number of calories derived from fat. Up until 2010, this requirement to disclose nutritional information did not apply to food served in restaurants.

The NLEA also mandates that the information or “claims” on these panels be accurate. Section (r)—entitled “Nutrition labels and health-related claims”—defines “claims” as statements made in the label or labeling of the food that expressly or by implication characterizes the level of any nutrient of the type required by section (q).

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47. Id. § 343(q)(1).
48. Marks, supra note 6, at 90.
49. 21 U.S.C. § 343(r).
50. Id. § 343(q).
51. Id.
52. Id. § 343(q)(1)(A)–(C).
53. Id. § 343(q)(5)(A)(i), amended by Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat 119 (2010). When Congress was first considering the NLEA, the restaurant industry successfully lobbied to be excluded from NLEA labeling requirements because, as the industry argued, it was too impractical for restaurants to comply. See Marks, supra note 6, at 90.
54. 21 U.S.C. § 343(r).
55. Id. § 343(r)(1)(A).
section covers any voluntary information a food purveyor may choose to add to its product label about the nutrient content.\textsuperscript{56} For example, a claim that the food is "low in sodium" or "high in fiber" would be regulated by this section.\textsuperscript{57} This provision, unlike section (q), applies to foods served in restaurants.\textsuperscript{58}

Overall, the NLEA helps Americans to make informed decisions about their food. Three-quarters of adults report using nutrition labels on packaged food, and using labels is associated with healthful diets.\textsuperscript{59}

\textbf{C. Local Menu-Labeling Laws}

When the NLEA was enacted in 1990, it did not extend its labeling regulations to food served in restaurants.\textsuperscript{60} To compensate, twenty-one state and local governments had enacted laws by 2009 that required disclosures of nutritional information for food served in restaurants that are similar to the NLEA requirements for packaged foods.\textsuperscript{61} Although these state- and city-wide laws vary, for the most part they all require large chain restaurants—defined generally as those with more than a certain number of locations or making a certain amount of money—to disclose the nutritional information about their standard menu items.\textsuperscript{62} The most commonly disclosed piece of nutritional information is the amount of calories contained in each dish.\textsuperscript{63}

For example, in 2006, New York City's Board of Health...
passed a regulation requiring disclosure of nutrition information on menus for restaurants that already voluntarily offered information on calorie counts somewhere other than the menus, such as on a restaurant’s website.\textsuperscript{64} If the amount of calories in a dish was publicly available as of March 2007, then the restaurant was required to post this information on its menu boards next to the listing of that food item.\textsuperscript{65} The Board of Health wanted the information to move from the restaurant’s website to its menus in order to make the information more visible to diners.\textsuperscript{66}

Following New York City’s example, Governor Schwarzenegger signed Senate bill 1420 into law in 2008, creating a statewide menu-labeling law for California.\textsuperscript{67} The law requires disclosure from all restaurants with over twenty locations.\textsuperscript{68} To give restaurants time to comply, the bill was split into two distinct phases.\textsuperscript{69} The first phase required calorie counts and additional information to be available “on or about the menu.”\textsuperscript{70} This means the restaurant can provide nutritional information in a brochure on the table, on the menu itself, on a menu insert, or on a table tent.\textsuperscript{71} The second phase of the bill required calories to be listed on menus, menu boards, and food display tags next to the standard menu items to ensure that customers can see the information before they make a purchase.\textsuperscript{72} Section (j) of this bill also expressly preempted all local laws, stating that “[n]o ordinance or regulation of a local government shall regulate the dissemination of nutritional information by a food facility.”\textsuperscript{73} Finally, the bill provided an enforcement mechanism by creating a penalty that will be imposed upon anyone who violates its terms.\textsuperscript{74} This law, like New York


\textsuperscript{65} See NEW YORK CITY, N.Y., HEALTH CODE tit. 24, § 81.50(a)–(b) (2006).

\textsuperscript{66} See N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, No. 08 Civ. 1000 (RJH), 2008 WL 1752455, at *2 (S.D.N.Y. Apr. 16, 2008).

\textsuperscript{67} CAL. HEALTH & SAFETY CODE § 114094 (West 2009).

\textsuperscript{68} Id. § 114094(a)(1).

\textsuperscript{69} See id. § 114094(b)–(c).

\textsuperscript{70} Marks, supra note 6, at 96.

\textsuperscript{71} CAL. HEALTH & SAFETY CODE § 114094(b)(2)(A) (West 2009).

\textsuperscript{72} Id. § 114094(c).

\textsuperscript{73} Id. § 114094(j).

\textsuperscript{74} Id. § 114094(k). Another issue surrounding menu-labeling laws, and
City’s law, is intended to combat obesity by allowing customers to access nutritional information before they make a purchase.\textsuperscript{75}

**D. Litigation Involving New York City’s Menu-Labeling Regulation**

There has been one major line of cases regarding local menu-labeling laws.\textsuperscript{76} In 2006, the New York State Restaurant Association (NYSRA) filed suit against the New York City Board of Health challenging the city’s menu-labeling regulation on the grounds of federal preemption and free speech.\textsuperscript{77} The federal district court found that New York

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\textsuperscript{75} Id. § 114094 (containing legislative findings that state, “Broader availability of nutrition information regarding foods served at restaurants and other food service establishments would allow customers to make more informed decisions about the food they purchase”; “Consumers should be provided with point of purchase access to nutritional information when eating out in order to make informed decisions involving their health and diet”; “It is the intent of the Legislature to provide consumers with better access to nutritional information about prepared foods sold at food facilities so that consumers can understand the nutritional value of available foods”).

\textsuperscript{76} As of the date of publication there has only been one major line of cases. This law review comment was researched and written in the Spring and Summer of 2010.

\textsuperscript{77} N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 352 (S.D.N.Y. 2007). Preemption occurs when a higher level of government prevents or disallows a lower level from taking certain actions. 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, 776 (2008). The power of preemption is derived from the Supremacy Clause of the U.S. Constitution, which declares federal law to be the supreme law of the land; therefore, acts of Congress or federal agencies may preempt state or local law. See U.S. CONST. art. VI. There are three main types of preemption. The first is express preemption, occurring when a federal law expressly restricts the ability of states or localities to legislate in a particular area. Rutkow, supra, at 777. The second type is implied preemption, also known as field preemption, occurring when Congress expresses an intention to occupy a particular field or subject area to the exclusion of state or local law. Id. at 778. The third type of preemption is conflict preemption and can come in two forms. The first kind of conflict preemption occurs if laws are mutually exclusive, so that it is impossible to be in compliance with both state and federal law. Id. The second type of conflict preemption, sometimes referred to as obstacle preemption, occurs when a state or local law impedes a goal associated with a federal law. Id. at 779.
City's regulation was expressly preempted by the NLEA and thus unenforceable. The court reasoned that the voluntary aspect of the regulation caused the calorie disclosures to fall into the category of health-related "claims" in section 343(r) rather than the "required disclosures" of section 343(q) and, therefore, the law was preempted under the express preemption provision of the NLEA. As explained above, restaurants are subject to section 343(r)'s health-related claims provisions but are not subject to section 343(q)'s provisions on required disclosures. Because the regulation was found to be preempted, the district court did not address the NYSRA's First Amendment arguments.

Instead of appealing the decision, the New York City Board of Health revised the regulation to require all New York City restaurants with fifteen or more locations to display calorie content on its menus and menu boards. The NYSRA promptly filed a new suit to challenge the revised law. This time, the federal district court addressed both issues. The court held that the regulation was not preempted by the NLEA and did not infringe on the First Amendment rights of NYSRA members. The court reasoned that mandatory disclosures are not "claims" under NLEA's definitions in section 343(r) and, thus, are not preempted. Additionally, the court found no First Amendment violation because the mandatory disclosures of factual information were rationally related to the city's interest in reducing obesity.

The NYSRA appealed the district court's decision, but the Second Circuit affirmed. In determining whether the city

78. N.Y. State Rest. Ass'n, 509 F. Supp. 2d at 353.
79. Rutkow, supra note 77, at 783.
80. See supra Part II.B.
84. Id. at *5.
85. Id. at *4.
86. Id. at *11.
87. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 120 (2d
regulation was preempted under federal law, the circuit court held that the NLEA does not regulate nutrient information for restaurant food, but does regulate nutrient content claims for restaurant food.\textsuperscript{88} Therefore, if quantitative calorie disclosures are "claims" under NLEA section 343(r), they are preempted; but if they are "nutritional information" under section 343(q), they are not preempted.\textsuperscript{89}

The Second Circuit then adopted the two-criteria test proposed by the FDA’s amicus brief to determine when a statement is not preempted by the NLEA.\textsuperscript{90} First, the statement must be "of the type required by section 343(q) . . . that appears as part of the nutrition information required or permitted by . . . section 343(q)."\textsuperscript{91} Statements that include the amount of calories per serving fall into this category. Second, a state or local authority must require disclosure of the statement with regard to restaurant food as part of nutritional labeling.\textsuperscript{92} In other words, the disclosure must relate to the same information as laid out in section 343(q) and the disclosure must be mandated by law.

The rationale behind the New York decision has appeared in other menu-labeling cases.\textsuperscript{93} For example, in \textit{Shepard v. DineEquity, Inc.}, the restaurant chain Applebee’s teamed up with the weight-loss company Weight Watchers to provide nutritional information (e.g., fat, calories, and Weight Watcher POINTS) on portions of Applebee’s menu.\textsuperscript{94} Plaintiffs, patrons of the restaurant, claimed that the food items served contained a higher calorie count and up to three times the amount of fat than advertised, and alleged that defendants materially misrepresented the information on the menu.\textsuperscript{95} The Kansas district court looked at whether the state laws for false and misleading advertising were preempted by the NLEA.\textsuperscript{96} Specifically, the court determined

\textsuperscript{88} \textit{Id.} at 120.
\textsuperscript{89} \textit{Id.} at 123.
\textsuperscript{90} \textit{Id.} at 130–31.
\textsuperscript{91} \textit{Id.} at 130.
\textsuperscript{92} \textit{Id.} at 130–31.
\textsuperscript{94} \textit{Id.}
\textsuperscript{95} \textit{Id.} at *6–7.
\textsuperscript{96} \textit{Id.} at *14.
whether the defendants’ statements with regard to fat, calories, and POINTS were “nutritional information” or “nutrition levels and health-related claims” under the NLEA. The decision, again, boiled down to whether the statements were health-related claims or mere nutritional information. Ultimately, because no state or local authority required Applebee’s to disclose the information, the court held that the statements were claims rather than nutritional information. Therefore, the NLEA preempted the plaintiff’s state law claims.

In another case, Ciszewski v. Denny’s Corp., Jason Ciszewski brought a class action suit against the restaurant chain Denny’s for failing to disclose excessive sodium content in certain menu items. Specifically, Ciszewski pointed out that Denny’s “Meat Lover’s Scramble” contained a nauseating 5,600 milligrams of sodium. The Center for Disease Control and Prevention (CDC) recommends an adult consume no more than 1,500 milligrams of sodium per day. Ciszewski alleged that Denny’s knew the amounts of sodium in its dishes were excessive, and that it concealed the sodium levels because consumers would not eat the dishes otherwise. The Illinois district court dismissed the case for failure to state a claim, stating that “because Ciszewski identified no communication that was generated by Denny’s he . . . failed to plead the circumstances constituting the fraud with the particularity required by Rule 9(b).” Dismissing the case, the court noted that “[t]he fact that the legislature has chosen not to adopt legislation that would require restaurants to disclose sodium levels supports Denny’s contention that its practice does not offend public policy.” The court believed that, absent an explicit law, the restaurant had no obligation

97. Id. at *13.
98. Id.
100. Id.
103. Id.
105. Id. at *3.
to disclose the nutritional information for its items, leaving customers in the dark about the excess sodium of many menu items.

E. The Patient Protection and Affordable Care Act

On March 23, 2010 Congress passed the Patient Protection and Affordable Care Act (PPACA) that, in a small section, created a federal menu-labeling law.\textsuperscript{106} Section 4205 of the PPACA amends the NLEA’s provisions, extending nutrition labeling to restaurant food.\textsuperscript{107} This new federal law requires restaurants, or similar retail food establishments, with twenty or more locations, doing business under the same name and selling the same items, to disclose nutritional information about their standard menu items.\textsuperscript{108} Restaurants are required to post the number of calories typically found in an item next to that menu listing along with information on suggested daily calorie intake.\textsuperscript{109} The requirements do not apply to condiments, daily specials, or to any other food that is not regularly on the menu.\textsuperscript{110}

This is the first federal menu-labeling law; all previous attempts to pass similar legislation have failed. Since 2003, three major menu-labeling laws have been presented to Congress: the Menu Education and Labeling Act (MEAL),\textsuperscript{111}

\begin{footnotes}
\item 107. Id. § 4205(b).
\item 108. Id.
\item 109. Id. § 4205(b)(H)(ii).
\item 110. Id. § 4205(b).
\item 111. S. 1048, 111th Cong. (2009).
\end{footnotes}
the Healthy Lifestyle and Prevention Act (HELP),\textsuperscript{112} and the Labeling Education and Nutrition Act (LEAN).\textsuperscript{113} None of these proposed bills, however, made it past committee.\textsuperscript{114}

The PPACA menu-labeling law does not provide for a specific effective date. While signed into law in 2010, the mandatory requirements are not expected to take effect until the FDA finalizes its regulations.\textsuperscript{115} The PPACA gives the FDA one year to propose regulations for enacting the provisions.\textsuperscript{116} The regulations should flesh out the definitions of section 4205 of the PPACA, and should consider factors such as variations in serving sizes, human error, and space restrictions on menus.\textsuperscript{117} Proposals for these regulations are due by March of 2011, so they are unlikely to be enforced for a few years.\textsuperscript{118} The FDA is currently accepting comments from the public with respect to what the proposals should entail.\textsuperscript{119}

The federal act also preempts state law. The last added amendment to the NLEA states that “[n]othing in the amendments made by this section shall be construed—(1) to preempt any provision of State or local law, unless such provision establishes or continues into effect nutrient content disclosures of the type required under section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act.”\textsuperscript{120} Section 403(q)(5)(H) is the new amended section of the FFDCA that extends nutritional disclosure requirements to restaurant food.\textsuperscript{121} Thus, state or local laws that are similar to the federal law are preempted, subject to a few exceptions discussed in Part V of this comment.

Interestingly, the federal law has a voluntary opt-in

\begin{itemize}
  \item[112.] Rutkow, \textit{supra} note 77, at 775.
  \item[113.] S. 558, 111th Cong. (2009).
  \item[114.] For example, the MEAL act has died in Congress five times and is currently pending in the 111th Congress after being re-introduced on May 14, 2009. \textit{See} H.R. 2426, 111th Cong. (2009), \textit{available at} \url{http://www.govtrack.us/congress/bill.xpd?bill=h111-2426}.
  \item[116.] \textit{Id}.
  \item[117.] \textit{Id.} (as amended at 21 U.S.C. § 343(q)(5)(H)(x)(II)(aa)).
  \item[118.] \textit{Id.} (as amended at 21 U.S.C. § 343(q)(5)(H)(x)(I)).
  \item[119.] \textit{New Menu and Vending Machine Labeling Requirements}, U.S. FOOD AND DRUG ADMINISTRATION, \url{http://www.fda.gov/Food/LabelingNutrition/ucm217762.htm} (last visited Dec. 18, 2010).
  \item[120.] Patient Protection and Affordable Care Act § 4205(d)(1).
  \item[121.] \textit{Id.} § 4205(b).
\end{itemize}
provision for those restaurants that wish to post information but are not required to do so under the outlined law.\textsuperscript{122} If these restaurants opt-in, they would be, assumingly, immune from state and local laws, as the restaurant would be protected by the preemption provision.\textsuperscript{123}

The PPACA’s future is uncertain. Thirteen state attorneys general filed a lawsuit against the federal government just seven minutes after President Obama signed the PPACA into law.\textsuperscript{124} The bulk of their complaints revolve around the PPACA’s overhaul of the health care system and its changes to insurance.\textsuperscript{125} Many states believe that the bill infringes state sovereignty by mandating health insurance for every citizen. In the midst of this public outcry over mandated health insurance, PPACA section 4205’s menu-labeling requirement has dodged attention in the press, whether negative or positive. It is unclear if the lack of opposition to the menu-labeling provision is a tacit acceptance of this new law, or if the fights have yet to materialize because the law is awaiting specific FDA regulations.

\textsuperscript{122} Id. (as amended at 21 U.S.C. § 343(q)(5)(H)(ix))
An authorized official of any restaurant or similar retail food establishment or vending machine operator not subject to the requirements of this clause may elect to be subject to the requirements of such clause, by registering biannually the name and address of such restaurant or similar retail food establishment or vending machine operator with the Secretary, as specified by the Secretary by regulation.

\textsuperscript{123} See id.
Attorneys general from 13 states sued the federal government Tuesday, claiming the landmark health care overhaul bill is unconstitutional just seven minutes after President Obama signed it into law. . . . Florida Attorney General Bill McCollum is taking the lead and is joined by attorneys general from South Carolina, Nebraska, Texas, Michigan, Utah, Pennsylvania, Alabama, South Dakota, Idaho, Washington, Colorado, and Louisiana.

III. THE LEGAL AND SOCIAL PROBLEMS OF MENU-LABELING LAWS

There is a dispute regarding whether menu-labeling laws, like the ones enacted by New York City, California, and the federal government, are legal and efficient ways to combat the public health crisis of obesity and to promote healthy choices.126 Opponents argue that menu-labeling laws are impractical, hard to implement, and do not result in public health gains.127 Restaurants worry that the additional costs will be too burdensome,128 and large chain restaurants argue that smaller restaurants should not be exempt from the regulations.129 Legislatures and public health officials, on the other hand, argue that menu-labeling laws enable consumers to make informed decisions about their purchases,130 leading to public health benefits.131 Ultimately, Congress decided the benefits outweighed the costs, and passed section 4205 of the PPACA, thus, enacting the first nation-wide menu-labeling law.132

There are many problems associated with menu-labeling laws. Four common criticisms are that they are impractical, expensive, unfair, and inconsistent.133 First, opponents argue that they are impractical because of the difficulty of compiling all the nutritional information on menus or menu boards. Starbucks, for example, offers customers 87,000 different beverages, if you take into consideration all of the potential ways to customize drinks.134 Requiring Starbucks to have nutritional information for 87,000 different drinks seems

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126. Roberto, supra note 1, at 547.
127. Id.
128. Id.
130. Roberto, supra note 1, at 547.
131. N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 135 (2d Cir. 2009).
133. E.g., Roberto, supra note 1, at 547 ("...the restaurant industry has put forth strong opposition to menu-labeling laws, ... arguing that consumers do not want the information; the information is readily available already; the additional cost will burden restaurants; mandating such action represents intrusive government action; and the information will not be helpful.").
unreasonable. It would be overly expensive and time consuming, and it is hard to imagine how Starbucks would fit all of that information onto a menu board.\textsuperscript{135}

Second, critics argue that menu-labeling laws are too expensive. According to the California Restaurant Association "the cost to have one menu item tested in a laboratory may range from $545 to $1,500."\textsuperscript{136} If each standard menu item must be analyzed, the cost could be substantial, and could result in a reduction in the amount of items offered or a decrease in the introduction of new items. This hurts customers, because they will not have as many choices. Additional costs would also arise from printing new menus and menu boards to comply with the latest laws. Businesses would have to absorb these costs or pass them onto consumers, potentially creating undue economic hardships in an already fragile economy.

Third, critics point out that menu-labeling laws are unfair because they create unequal burdens on similar businesses. Large restaurant chains complain that smaller restaurants should not be exempt from these regulations.\textsuperscript{137} On the other hand, some small business owners who barely qualify for the regulations may worry about the costs of menu-labeling, as it would likely be harder for them to comply with the law than a large, multinational corporation with more resources.\textsuperscript{138} These types of fairness claims may come in the form of equal protection or due process challenges.\textsuperscript{139}

Fourth, opponents are concerned that these laws will not guarantee that nutritional information is actually measured in a consistent and accurate fashion.\textsuperscript{140} Currently, there are no national standards specifying where restaurants should send their food to be analyzed. Different laboratories with

\begin{itemize}
  \item \textsuperscript{135} Marks, \emph{supra} note 6, at 96.
  \item \textsuperscript{136} \textit{Stop Menu Labeling and Future Food Lawsuits: No on SB 120}, CALIFORNIA RESTAURANT ASSOCIATION, http://www.calrest.org/go/CRA/index.cfm?LinkServID=27B8F785-CE5A-B827-087561734BAD7E30&showMeta=0 (last visited Dec. 18, 2010) (stating that the cost to have one menu item analyzed by a nutritionist may range from $50 to $200 or more depending on the complexity of the item and the nutritionists personal fee).
  \item \textsuperscript{137} Jargon, \emph{supra} note 129.
  \item \textsuperscript{138} \textit{Id}.
  \item \textsuperscript{139} \textit{See infra} Part IV.B.
  \item \textsuperscript{140} Jargon, \emph{supra} note 129.
\end{itemize}
different standards may lead to different results with respect to nutritional content for the same food product. This opens the door to the possibility of labeling inconsistencies, or even inaccuracies, undermining the goals of menu-labeling laws. Inconsistency could also lead to the unequal enforcement of menu-labeling laws and could cause disputes as to what the appropriate punishment for breaking the law should be.141

The federal menu-labeling law has yet to go into effect,142 and it is possible that restaurants or consumers may challenge it. Claimants could possibly challenge the law for violating the free speech and equal protection provisions of the Constitution.143 It is important to restaurants and consumers to know whether the new law will hold up to these types of challenges. Additionally, the federal law may preempt the California and New York City menu-labeling laws. Federal preemption in this area of law creates problems for lower jurisdictions that wish to implement harsher, or more lenient, regulations.

It is unclear whether the national government ought to deal with menu-labeling laws and whether the PPACA’s provisions, or California’s state provisions, could even withstand judicial scrutiny. Both the underlying problem of obesity in America and the means of regulating big chain restaurants appear to be national issues. Yet, traditionally, health and safety regulations have been left to the states.144 Some state and local governments may not wish to implement menu-labeling laws, reflecting their citizens’ views that the laws are unnecessary. Creating a federal law that mandates menu-labeling laws may interfere with state sovereignty. Analyzing the PPACA sheds light on what authority, if any, states have to regulate nutrition disclosures. Before discussing the state or policy issues, however, it is important to first decide if the section 4205 of the PPACA will withstand challenges in court.

141. Id.
143. See infra Part IV.A.
144. See U.S. CONST. amend. X; e.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding a state law compelling vaccinations as a lawful extension of a state's police power to regulate public health and safety).
IV. ANALYSIS OF CONSTITUTIONAL CHALLENGES TO THE NEW FEDERAL MENU-LABELING LAW

Section 4205 of the PPACA is the federal menu-labeling law provision, and this specific provision may face constitutional challenges. Some restaurants may claim that the federal law violates their right to free speech, similar to the NYSRA's claims in the New York City litigation. Other restaurants may claim a violation of the Equal Protection Clause. A review of past cases, including the litigation in New York, suggests that the federal law will withstand both of these constitutional challenges.

A. The First Amendment Issue

Restaurant owners may bring claims that the new federal disclosure requirements violate their right to free speech under the First Amendment of the U.S. Constitution. Arguably, menu-labeling laws compel restaurant owners to engage in a certain type of speech by requiring certain information on their menus. Restaurants may disagree with putting this information on their private menu boards, and they may disapprove with the message the information implies.

This type of speech is most likely categorized as commercial speech, as it is "expression related solely to the economic interests of the speaker and its audience." The speech associated with the sale of food is also economic in nature. The First Amendment protects both commercial and noncommercial speech, but in Central Hudson Gas and
Electric Corp. v. Public Service Commission the Supreme Court declared that less protection is accorded to commercial speech than to other forms of expression.151

Generally, commercial speech is examined by the courts under the Central Hudson test.152 To determine if a regulation violates a plaintiff's right to commercial speech, the Central Hudson test considers (1) whether the regulated expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and, (4) whether the regulation is more extensive than is necessary to advance that interest.153

The district court decision in the second NYSRA case, however, advanced a test with a lower level of scrutiny than the Central Hudson test.154 Affirming the decision, the Second Circuit stated that a “rational-basis” test was appropriate when looking at whether menu-labeling laws infringed upon a restaurant's right to commercial speech.155 Instead of going through the four prongs of the Central Hudson test, the court looked to see whether the law was rationally related to a legitimate government interest.156 This lower standard is derived from the Supreme Court decision in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, a case that dealt with disclosing fee arrangements in attorney advertisements.157 The Second Circuit read Zauderer to say that “there are material differences between [purely factual and uncontroversial] disclosure requirements and outright prohibitions of speech.”158 In fact, Zauderer held that in the context of commercial speech, compelled disclosure requirements of purely factual information are constitutional.159 Zauderer concluded that “an advertiser's rights are adequately

152. Id. at 566.
153. Id.
154. See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 132 (2d Cir. 2009).
155. Id.
156. Id. at 134.
158. Id. at 650.
159. Id. at 651.
protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.\footnote{Id.}

The PPACA's factual disclosure requirements should likewise be held constitutional. Applying \textit{Zauderer} to New York City's menu-labeling law, the Second Circuit stated that "the First Amendment does not bar the City from compelling such under-inclusive factual disclosures . . . where . . . the city's decision to focus its attention on calorie amounts is rational."\footnote{N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 134 (2d Cir. 2009).} Section 4205 of the PPACA contains a similar purpose and comparable means to the New York City law.\footnote{See Patient Protection and Affordable Care Act, Pub. L. 111-148, \S 4205(b), 124 Stat. 119, 573–76 (2010) (to be codified as amended at 21 U.S.C. \S 343) (stating that "[i]f the Secretary determines that a nutrient, other than a nutrient required under subclause (ii)(III), should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices, the Secretary may require, by regulation, disclosure of such nutrient in the written form required under subclause (ii)(III)").} If New York City's law is reasonably related to the goal of reducing obesity, so too is the federal law. Additionally, under the Supreme Court's reasoning in \textit{Zauderer}, compelled disclosure requirements of purely factual information are constitutional.\footnote{\textit{Zauderer}, 471 U.S. at 651.} Nutritional information is purely factual; menu-labeling laws simply mandate that this purely factual nutritional information be disclosed in a clear and consistent manner.\footnote{See Patient Protection and Affordable Care Act, Pub. L. 111-148, \S 4205(b), 124 Stat. 119, 573–76 (2010) (to be codified as amended at 21 U.S.C. \S 343).} These disclosure requirements should therefore be viewed as a reasonable limitation on restaurants' rights to commercial speech.

\textbf{B. The Equal Protection Issue}

Restaurants may also argue that the federal menu-labeling law inappropriately discriminates against large chain restaurants, thus violating the Equal Protection Clause of the U.S. Constitution.\footnote{U.S. CONST. amend. XIV, \S 1.} The Equal Protection Clause provides that no state shall "deny to any person within its
jurisdiction the equal protection of the laws.\textsuperscript{166} Through the
document of reverse incorporation, the Supreme Court has
found that the Equal Protection Clause of the Fourteenth
Amendment may apply to the federal government through
the Due Process Clause of the Fifth Amendment.\textsuperscript{167}
Therefore, despite the fact that PPACA is a federal law, it
may still be subject to equal protection challenges because
"discrimination may be so unjustifiable as to be violative of
due process."\textsuperscript{168}

Restaurants argue that menu-labeling laws are unfairly
applied by exclusively being directed at chain restaurants
with an arbitrary number of locations.\textsuperscript{169} Section 4205 of the
PPACA specifies that it only applies to restaurants with
twenty or more locations.\textsuperscript{170} And as the CEO of Domino's
Pizza notes, "[w]hat doesn't make sense is the notion that if
you operate 20 units, it's more important to provide nutrition
information to consumers than if you own less than 20."\textsuperscript{171}
Large restaurant chains also argue that certain chains are
more profitable with fewer locations, so they too should be
subject to regulations.\textsuperscript{172} Since obtaining nutrition
information for each menu item and updating the
 corresponding menu listing is expensive, chain restaurants
see the law as an unfair burden on them, while other types of
restaurants—those with less than twenty stores—are not
subject to the same burdens.

Under Supreme Court precedent, to withstand an equal
protection challenge, the legislation must be rationally
related to a legitimate government interest.\textsuperscript{173} The Court

\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{See} Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that the
segregation of children in public education because of race is not reasonably
related to any proper governmental objective, and thus such segregation in the
District of Columbia, even if each group were provided with equal physical
facilities, is a burden constituting an arbitrary deprivation of their liberty in violation of the Due Process Clause of the Fifth Amendment to the U.S.
Constitution).
\textsuperscript{168} \textit{Id.} at 499.
\textsuperscript{169} Rutkow, supra note 77, at 786.
\textsuperscript{170} Patient Protection and Affordable Care Act, Pub. L. 111-148, § 4205(b),
343(q)(5)(H)(i)).
\textsuperscript{171} Jargon, supra note 129.
\textsuperscript{172} \textit{See} id.
\textsuperscript{173} Vacco v. Quill, 521 U.S. 793, 807 (1997) (disagreeing with respondents'
claim that the distinction between refusing lifesaving medical treatment and
explained that “[i]f a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, [it] will uphold [it] so long as it bears a rational relation to some legitimate end.”

Courts will likely hold that preventing obesity and promoting public health are legitimate government ends. Menu-labeling laws are also rationally related to the government’s interest in promoting health because they enable consumers to make informed and, therefore, more healthy decisions. Moreover, it is in the government’s interest to target chain restaurants, because the meals served at those restaurants have been proven obesogenic, so their unique status warrants different treatment. With the passage of this new law, it seems that Congress is treating food facilities fairly according to their relative influence on public health.

The narrow approach of section 4205 of the PPACA is justified. The CEO of Domino’s Pizza may be right in that it would be beneficial to consumers to have more restaurants disclose nutritional information; however, this need for more information does not render the targeted approach of the federal legislation unconstitutional. For example, the Supreme Court has stated that “[l]egislatures may implement their program step by step, . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.” Reducing and preventing obesity can be achieved in many different ways, and providing nutritional information in restaurants that generally provide

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174. Id. at 799.
176. Id.
177. Obesogenic is a recent medical term that is an adjective describing factors relating to or contributing to obesity. WORLD WIDE WORDS, http://www.worldwidewords.org/turnsofphrase/tp-obe1.htm (last visited Dec. 18, 2010).
178. Pomeranz, supra note 175, at 1582.
179. Id.
180. New Orleans v. Dukes, 427 US 297, 304 (1976) (finding a municipal ordinance, requiring vendors in New Orleans’s French Quarter to have been in operation for at least eight years to be licensed, rationally furthered the purpose of preserving the appearance and customs valued by the French Quarter’s residents and the attractiveness to tourists, and was thus valid).
unhealthy, high-calorie food, is one legitimate step that the legislature can take to achieve this end. Moreover, if it appears that the law is underinclusive, Congress is free to amend the PPACA to specify a minimum profit level earned to qualify restaurants for regulation instead of relying on the number of restaurant locations.

Applying the analysis from the NYSRA cases, it is clear that the PPACA should withstand any free speech or equal protection challenges. The forthcoming specific regulations from the FDA outlining the PPACA’s menu-labeling provisions may give rise to additional litigation, but we will have to wait and see what those regulations are to analyze them properly.

V. PREEMPTION IMPLICATIONS ON CALIFORNIA STATE LAW AND NEW YORK CITY LAW

It is important for restaurants and consumers to know whether state and local menu-labeling laws will be enforceable in the wake of the PPACA, and whether the PPACA left any areas of nutrition disclosure for the states to regulate.181 Before the PPACA, the New York City cases created a framework for determining whether a menu-labeling law can survive a preemption challenge.182 The Second Circuit adopted the FDA’s two-criteria test to determine when a statement is not preempted by the NLEA.183 First, the statement must be “of the type required by section 343(q) . . . that appears as part of the nutrition information required or permitted by . . . section 343(q).”184 Second, a state or local authority must require that the statement concerning the restaurant food be disclosed as part of a nutritional labeling.185

The PPACA changes the previous FDA two-part test by

181. E.g., CALIFORNIA RESTAURANT ASSOCIATION, http://www.calrest.org/go/CRA/news-events/newsroom/update-menu-labeling-in-california/ (last visited Dec. 18, 2010). Currently California restaurants are unclear as to whether they should be complying with the state law.

182. This framework would apply if other courts chose to follow the Second Circuit’s reasoning.

183. N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 131 (2d Cir. 2009).

184. Id. at 130.

185. Id. at 130–31.
creating an express preemption provision in the NLEA.\textsuperscript{186} The PPACA contains a "national uniformity" provision that preempts state or local menu-labeling laws that are not identical to the federal law.\textsuperscript{187} The provision amends the NLEA, 21 U.S.C. section 343-1(a)(4), to read:

(a) Except as provided in subsection (b) of this section, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—

\ldots

(4) any requirement for nutrition labeling of food that is not identical to the requirement of section 343(q) of this title, except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutritional information requirements under section 403(q)(5)(H)(ix) of this title.\textsuperscript{186}

This section specifically carves out an exception for businesses with less than twenty locations.\textsuperscript{189} Under this amended version of the law, state or local laws that regulate restaurants with less than twenty locations would not be preempted by the NLEA, unless those restaurants voluntarily choose to comply with the federal law.\textsuperscript{190}

Next, section 4205(d) of the PPACA contains a Rules of Construction portion, which reinforces the exception explained above—Part (1) clarifies that nothing in the new amendments is intended to preempt state or local law unless those laws effect nutrient content disclosures "of the type required under section 403(q)(5)(H) of the FFDCA" and are

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\textsuperscript{187} Id.


\textsuperscript{189} Id.

\textsuperscript{190} Id.
\end{flushleft}
expressly preempted under subsection (a)(4). Thus, even local menu-labeling laws that are similar to the federal law will not be preempted other than under subsection (a)(4)—an explicit exception for regulations that target restaurants with less than twenty locations.

California’s menu-labeling law does not fall into this exception and is thus preempted. It is expressly preempted under subsection (a)(4) because it regulates restaurants “with at least 19 other locations.” California’s law also establishes nutrient content disclosures “of the type required under section 403(q)(5)(H)” by requiring each standard food item to have the calories listed next to the menu item in a manner extremely similar to the way the PPACA requires calories listings. But California’s choice to limit its regulations to restaurants with at least twenty locations is the sole reason it is preempted by the new federal law.

New York City’s Regulation 81.50, however, is not preempted because it falls into the exception described in subsection (a)(4). New York City’s law only applies to restaurants with at least fifteen locations. Thus, restaurant chains with fifteen to nineteen locations are subject to New York City’s Regulation 81.50, whereas those with twenty or more locations will be preempted by and subject to the PPACA.

Part (2) of the Rules of Construction creates an additional exception, allowing states and localities to regulate safety warnings on restaurant food. The FDA will be charged

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191. Id. at § 4205(d)(1).
197. Id. § 4502(d)(2) (to be codified as amended at 21 U.S.C. § 343) (stating “Nothing in the amendments made by this section shall be construed . . . to
with the role of producing regulations to clarify this section.198 It is unclear, for instance, what differentiates a safety warning from a nutrition disclosure. If certain types of food are known to cause obesity or high blood pressure, is a mandated disclosure of these correlations a safety warning? States may try and test the boundaries of this exception if they wish to impose stricter disclosure requirements than the federal law mandates.

Part (3) of the Rules of Construction, however, may severely limit the power of either Part (1) or (2)'s exceptions. Part (3) states that the PPACA's amendments to the NLEA only apply to restaurants or food facilities with over twenty locations—except for the restaurants that comply with the voluntary provisions in section 403(q)(5)(H)(ix).199 To voluntarily comply, any restaurant not fitting the initial requirements of the menu-labeling law simply needs to register with the FDA biannually.200 The PPACA specifies that the FDA cannot make this registration process difficult because "nothing in this subclause shall be construed to authorize the Secretary to require an application, review, or licensing process for any entity to register with the Secretary."201

Thus, if California did revise its menu-labeling law either to apply only to restaurants with less than twenty locations, or to regulate only safety warnings on restaurant food, the state may have difficulty enforcing these laws. The targeted restaurant could always start voluntarily complying with the federal regulation in order to avoid compliance with the state law.202 Once a restaurant voluntarily complies with the federal law, subsection (a)(4) preempts state law, keeping the state legislation from being applied to that restaurant.203 Thus, voluntary compliance potentially undermines the federal statute's state and local law exceptions.

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198. Id. § 4502(b) (to be codified as amended at 21 U.S.C. § 343(q)(5)(H)(x)).
199. Id. § 4205(d)(3).
200. Id. § 4205(b) (to be codified at 21 U.S.C. § 403(q)(5)(H)(ix)(I)).
202. Id. § 4205(b) (to be codified at 21 U.S.C. § 403(q)(5)(H)(ix)(I)).
203. Id. § 4205(c) (to be codified at 21 U.S.C. § 343-1(a)(4)).
VI. THE FUTURE OF MENU-LABELING LAWS

The PPACA legislation should survive judicial scrutiny for the reasons discussed above.204 The Second Circuit's decision to uphold the New York City menu-labeling regulation indicates that similar constitutional claims against section 4205 of the PPACA will likely fail.205 That court found that there is a legitimate government interest in requiring restaurants to provide their customers with nutritional information and that this mandate does not unduly infringe on the right of a restaurant to engage in commercial speech.206 The actual effectiveness of California Health and Safety Code section 114094, or other similar state and local menu-labeling laws, however, is in question because of federal preemption.

The PPACA will likely preempt most state and local menu-labeling laws. Generally, preemption can help to promote national public health objectives by ensuring that one uniform law is applied throughout the country.207 Preemption can be harmful, however, when it prevents local governments from tackling local problems or from instituting new policies to deal with these problems.208

As discussed above, the amended NLEA prevents states and local governments from enacting or enforcing similar menu-labeling laws, but it does not infringe upon states and localities power to make additional laws that affect restaurants with less than twenty locations.209 This distinction makes some sense. Food facilities with less than twenty locations are more likely to be local, rather than national chains.210 Permitting states to regulate these types

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204. See supra Part IV.
205. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 117-118 (2d Cir. 2009) (holding that the New York City menu-labeling law did not violate the First Amendment and that Congress specifically left open the option for states to regulate calorie information).
206. Id. at 137.
207. Rutkow, supra note 77, at 773.
208. Andre, supra note 40, at 252.
of restaurants allows states to regulate local businesses and to tackle local problems.\textsuperscript{211} In order to maintain state power, however, the voluntary provision should be removed or clarified in the federal menu-labeling law so that state laws will still have a bite to go with their bark.

Public health concerns necessitate some form of menu-labeling laws. Disclosing the amount of calories per item, and other nutrition information, at the point-of-purchase in restaurants is a way to educate consumers and address the problems of unhealthy diets and obesity.\textsuperscript{212} According to one study, nine out of ten people, including nutritionists, underestimate the calorie content of certain food items by an average of 600 calories.\textsuperscript{213} Consumers are often mistaken about which items are low-calorie, and are not always able to spot the 1270-calorie salads.\textsuperscript{214} Disclosing calorie information to consumers is likely to affect consumers' purchasing behavior, much like the way the introduction of nutrition labels on packaged food affected purchasing decisions.\textsuperscript{215} Just as nutrition information on packaged food has shown to increase healthy food choices, so too may adding nutritional information to food served in restaurants.\textsuperscript{216}

The potential benefits of menu-labeling laws outweigh the potential harms to restaurants. First, as discussed above, the PPACA's menu-labeling law should withstand free speech and equal protection challenges, indicating that the law does not infringe restaurants' freedom, and that the law is fair.\textsuperscript{217} Second, as menu-labeling laws only require nutrition

\footnotesize{(stating that Domino's has "more than 8,600 stores in over 55 markets around the world").

\textsuperscript{211} Andre, \textit{supra} note 40, at 253 (arguing that "[a]llowing states to set their own limits on consumer protection acts accords states their status as sovereign entities and permits states to individually determine a manufacturer's responsibility to its citizens").

\textsuperscript{212} Pomeranz, \textit{supra} note 175, at 1578.

\textsuperscript{213} Burton S. Creyer et al., \textit{Attacking the Obesity Epidemic: the Potential Health Benefits of Providing Nutritional Information in Restaurants}, 96 \textit{Am. J. PUB. HEALTH} 1669, 1674 (2006).


\textsuperscript{215} \textit{Nutrition Labeling at Fast-Food and Other Chain Restaurants, supra} note 3.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{See supra} Part IV.
information for standard menu items,\textsuperscript{218} the burden and costs of generating this nutritional information and creating new menus with this information is slight. Starbucks, for example, would not have to compile information for all 87,000 possible drinks served.\textsuperscript{219} Starbucks would only be required to list the number of calories contained in the standard menu items as they are usually prepared and offered for sale.\textsuperscript{220} Moreover, many chain restaurants, including Starbucks, already analyze the nutritional content of the items they serve, so the cost of revealing this information by updating menu boards is minimal.\textsuperscript{221} Thus, the law should not create an undue financial burden on restaurants.

Third, although the exact amount of each ingredient in a restaurant meal is often known with less precision than packaged food, the consistency of menu items at chain restaurants ensures that the information is likely to be accurate. To ensure the regulations are realistic, the FDA can provide regulatory provisions that protect restaurants that reasonably attempt to estimate the nutritional information for their menu items, even if the estimates may, in fact, be slightly inaccurate.\textsuperscript{222} Even mere estimates of calorie counts would be useful, because they will help customers gain a general understanding of particular foods that are high in fat or calories. One study showed that eighty-three percent of Americans want restaurants to

\textsuperscript{218} Patient Protection and Affordable Care Act, Pub. L. 111-148, § 4205(b), 124 Stat. 119, 573–76 (2010) (to be codified as amended at 21 U.S.C. § 343(q)(5)(H)(ii)(I)(aa)) (stating that the restaurant shall disclose in a clear and conspicuous manner—“(I)(aa) in a nutrient content disclosure statement adjacent to the name of the standard menu item, so as to be clearly associated with the standard menu item, on the menu listing the item for sale, the number of calories contained in the standard menu item, as usually prepared and offered for sale”).

\textsuperscript{219} See id. § 4205(b) (to be codified as amended at 21 U.S.C. § 343(q)(5)(H)(v)) (stating that “[t]he Secretary shall establish by regulation standards for determining and disclosing the nutrient content for standard menu items that come in different flavors, varieties, or combinations, but which are listed as a single menu item, such as soft drinks, ice cream, pizza, doughnuts, or children’s combination meals, through means determined by the Secretary, including ranges, averages, or other methods”).

\textsuperscript{220} Id. § 4205(b) (to be codified as amended at 21 U.S.C. § 343(q)(5)(H)(ii)(I)(aa)).

\textsuperscript{221} Roberto, supra note 1, at 547.

\textsuperscript{222} See § 4205(b) (to be codified as amended at 21 U.S.C. § 343(q)(5)(H)(iv)) (noting that restaurants need only provide a reasonable means of determining nutritional information for each dish).
provide calorie and nutrition information, indicating that there is a public demand for this type of information. 223

Fourth, menu-labeling laws also benefit the public because they pressure restaurants to improve the nutritional content of their menu items. 224 Policymakers hope that by exposing the 1270-calorie salads and 1560-calorie carrot cakes, consumer choice and market forces will encourage restaurants to make healthier options available to consumers. 225 This argument has historical support from the aftermath of the NLEA. 226 Following the adoption of the NLEA, the average fat content and the average share of calories from fat per-serving significantly decreased for a number of products between 1991 and 1995. 227 Similarly, following a FDA mandate to list trans fat content on packaged food labels, many producers reduced the amount of trans fat used in their products. 228 Revealing the nutritional content of food thus puts pressure on producers to provide healthier products.

Finally, this national menu-labeling law benefits restaurants because it only requires restaurants to disclose minimal nutritional information. 229 National restaurant chains do not need to worry about complying with more demanding local laws and can create one national menu that conforms with the federal law. Limiting nutrition disclosure to amount of calories per item should be adequate for public health benefits, and if it is not, Congress can always amend the national standards to require the disclosure of more categories of nutrition information. Even with such an expansion, restaurant chains benefit from only having to comply with only one set of requirements throughout the country.

Opponents of the federal law argue that laws relating to

223. Nutrition Labeling at Fast-Food and Other Chain Restaurants, supra note 3.
224. Roberto, supra note 1, at 549.
225. Id. at 548.
226. See id. at 549.
227. Id.
228. Id.
public health should be left primarily to the states under the authority of the Tenth Amendment of the U.S. Constitution. The Tenth Amendment recognizes the states' power "to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people." Yet the public-health objectives of menu-labeling laws are national in scale. Obesity is a national problem. Most menu-labeling laws purport to be about combating the national rise in rates of obesity. For example, California's law uses data from the CDC to explain the problem of obesity in America. Nothing about California's claims regarding obesity, however, are unique to California.

One national standard that regulates all chain restaurants is the best way to achieve the goals of improving the health of all Americans. The PPACA menu-labeling laws target chain restaurants that have over twenty locations. These restaurants are likely to be national chains that, like Subway, Starbucks, and Chili's, typically operate in more than one state. It would be unfair to these large chains to force them to comply with different state and local regulations. Only local chains should be subjected to local regulations.

Without a national standard, states and local governments will likely institute their own menu-labeling laws. In the New York City litigation, the Second Circuit

230. U.S. CONST. amend. X (providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").
231. Rutkow, supra note 77, at 777.
232. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 134 (2d Cir. 2009).
233. CAL. HEALTH & SAFETY CODE § 114094 Historical and Statutory Notes § (1)(b).
234. Id. § 114094. The legislative findings of section 114094 state that "two-thirds of American adults are overweight or obese," not just Californians. Id. at Historical and Statutory Notes § 1(b) (emphasis added).
236. E.g., Company Profile, STARBUCKS, http://assets.starbucks.com/assets/company-profile-feb10.pdf (stating that there are over 16,000 Starbucks locations across the nation and globe) (last visited Dec. 18, 2010).
warned that its decision "might result in NYSRA's members being subject to multiple, inconsistent local regulations . . . [but] this is the result of the choice that Congress made to permit localities to mandate restaurants to disclose nutritional information about the food they serve."238 With passage of the PPACA, Congress has again decided to permit localities to enact menu-labeling laws in certain situations.239 Local governments, like the state of California, may add additional menu-labeling requirements as long as these laws target restaurants that have less than twenty locations.240 Ideally, these would be restaurants that are locally operated and not national chains.

Creating a federal standard is consistent with the intent of the NLEA. Congress originally decided to exclude restaurants from the NLEA labeling requirements primarily because it feared that applying NLEA to restaurants would be too impractical.241 This absence of federal regulation left a void that states attempted to fill because they saw the need for menu-labeling in restaurants.242 As more and more chain restaurants have had their menus tested for nutrition information, however, it has become less impractical to require them to disclose this information to customers in a clear and consistent manner.243 Menu-labeling is also consistent with the federal government's history of requiring producers' to disclose product information.244 Clothing products, cleaning products, and prescription drugs all contain disclosures that inform consumers of important information, such as where the products were made and what materials the products contain.245

238. N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 130 (2d Cir. 2009).
239. See § 4205(c) (to be codified as amended at 21 U.S.C. § 343-1(a)(4)).
240. Id.
241. Marks, supra note 6, at 90.
242. Id.
243. Roberto, supra note 1, at 547.
244. Id.
245. Id.
VII. CONCLUSION

Information about the nutritional content of restaurant food is vital to improving public health and combating the obesity epidemic in America. Menu-labeling laws empower customers with the necessary information to facilitate healthier choices when purchasing food at restaurants. Congress recently amended the NLEA to create a federal menu-labeling law that requires chain restaurants to disclose nutritional information on their menus.\(^{246}\) This law is similar to a New York City regulation that has been heavily litigated. The New York City cases provide guidance when considering whether the federal law will withstand constitutional challenges. As this comment determines, section 4205 of the PPACA should withstand any free speech or equal protection challenge.\(^{247}\)

California's statewide labeling law, on the other hand, may not withstand judicial scrutiny because of the express preemption clause in section 4205 of the PPACA. Currently, California regulators are planning on enforcing the first phase of the state law, and are providing a six-month rollout of the second phase of the law to wait until firm federal regulations are set in place.\(^{248}\) The regulators are anticipating that California's law will be preempted by the PPACA, but are bound to uphold existing state law unless told otherwise by an appellate court.\(^{249}\) Yet, as this comment discusses, the national uniformity clause of the PPACA is clear—it preempts any similar state or local law that tries and regulates restaurants with more than twenty locations that sell the same food.

The FDA therefore has an important task in setting out section 4205's regulations. The FDA will need to explain the extent of the exception for states to regulate smaller chains. Also, Congress, or the FDA, may need to clarify and explain the limits of the opt-in provision for smaller restaurant


\(^{247}\) See discussion supra Part IV.


\(^{249}\) Id.
chains. These exceptions make the extent to which states are still allowed to regulate nutritional disclosures by restaurants unclear.

Despite a few drawbacks, national standards, as opposed to individual state or local standards, are likely better for menu-labeling laws. As nearly all chain restaurants with over twenty locations have facilities all over the country, it is most efficient to have one national standard for disclosing nutritional information. A single standard should reduce the compliance costs to restaurants because they will only have one set of standards to comply with. It should also standardize how nutrition information is measured, creating consistency throughout different restaurant chains and different regions. Smaller, regional chains may still be subjected to local regulations due to the PPACA’s explicit refusal to preempt laws that target chains with less than twenty locations. This allows local governments to retain some power over food regulation and local standards. Local restaurants are also given the choice to comply with state standards or opt-in to the national standard. Congress, therefore, created a compromise in the PPACA in order to maintain some state power over menu-labeling.

Menu-labeling laws alone will not solve the problem of obesity in the United States, but they may provide a step in the right direction. Providing nutrition information to the general public will help inform people with respect to what they are eating and will put pressure on restaurants to provide healthier options.