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WEIGHING THE VALUE OF INFORMATION: WHY THE FEDERAL GOVERNMENT SHOULD REQUIRE NUTRITION LABELING FOR FOOD SERVED IN RESTAURANTS

ABSTRACT

Obesity has become a growing public health concern in the United States. State and local policymakers, as well as the federal government, have proposed and implemented a variety of measures to curb consumption of unhealthy food and promote healthy lifestyles. Providing nutrition information to consumers is one strategy that has been implemented, most notably in the Nutritional Labeling and Education Act of 1990. Such a strategy should again be employed to address overconsumption and over-marketing of high calorie food at restaurants, as well as to remedy the patchwork of menu labeling requirements that has been created in recent years and continues to expand. This Comment uses an interdisciplinary approach to weigh the regulatory design options available to lawmakers to address obesity, and particularly, the role consumption of restaurant food plays in contributing to obesity.

“The free market economy is predicated on the informed consumer. It is the fundamental assumption about how markets work.”

—Tom McGarity¹

“When we talk about prevention, it begins with information.”

—California State Senator Alex Padilla²

INTRODUCTION

Ashley Pelman was fourteen years old, stood four feet, ten inches, and weighed 170 pounds when she sued McDonald’s.³ She had eaten at

¹ Michael Barsa, *California’s Proposition 65 and the Limits of Information Economics*, 49 STAN. L. REV. 1223, 1226 (1997) (quoting Tom McGarity).

² Press Release, Senator Alex Padilla, California State Assembly Approves SB 120 (Padilla/Migden) Requiring Nutrition Information on Menus and Menu Boards (Sept. 11, 2007), available at http://dist20.casen.govoffice.com/index.asp?Type=B_PR&SEC=%7B5EACFA15-EA6B-41D8-9711-C030F9FAD5EE%7D&DE=%7BFD1BBB0D-1FCE-4C2B-B3EB-5BFBF19047F3%7D.

³ Jonathan Wald, *McDonald’s Obesity Suit Tossed*, CNN MONEY, Feb. 17, 2003, <http://money.cnn.com/2003/01/22/news/companies/mcdonalds/>.

McDonald's an average of three to four times a week since she was five years old.⁴ In her suit she alleged that McDonald's had a duty to disclose the risks of eating unhealthy fast food and that without such disclosure, McDonald's was misleading the public.⁵ The Court dismissed her claim, asserting that the nutritional content of food from McDonald's was common knowledge.⁶ It stated that "legal consequences should not attach to the consumption of hamburgers and other fast food fare unless consumers are unaware of the dangers of eating such food."⁷ The court assumed that common sense was all the knowledge necessary to determine that fast food posed health risks.⁸

The court's assumption that consumers are fully aware of the risks of eating restaurant food is incorrect.⁹ In fact, consumers often cannot accurately assess the nutrient content of restaurant food, and false estimates of nutrient content distort rational consumption choices.¹⁰ While tort liability is probably not the best way to address the failure of consumers like Ashley Pelman to estimate the nutrient content of their food,¹¹ as the court opinion hinted, a federally mandated nutrient disclosure law may be a sound policy alternative.¹²

This Comment asserts that Congress should adopt a uniform nutrient disclosure law for restaurants. It reaches this conclusion by analyzing the regulatory design options available to policymakers through an

⁴ Amended Verified Complaint at ¶ 15, *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (No. 02 CV 7821 (RWS)).

⁵ *Pelman v. McDonald's Corp.* (*Pelman I*), 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003). The complaint alleged deceptive advertising, marketing unhealthy food toward children, and negligence in marketing addictive food. *Id.*

⁶ *Id.* at 540–41. However, the court allowed the plaintiffs to amend their complaint. *Id.* at 543. The amended complaint alleged that McDonald's misled the plaintiffs about the nutrient quality and benefits of the food, failed to disclose that the food was less healthy than advertised, and misrepresented that it provided nutritional information in all of its stores. Ben Falit, *Fast Food Fighters Fall Flat: Plaintiffs Fail to Establish that McDonald's Should Be Liable for Obesity-Related Illnesses*, J.L. MED. & ETHICS, Winter 2003, at 725, 726. The amended complaint was also dismissed. *Pelman v. McDonald's Corp.* (*Pelman II*), No. 02 Civ. 7821(RWS), 2003 WL 22052778, at *14 (S.D.N.Y. Sept. 3, 2003), *vacated*, 396 F.3d 508 (2d Cir. 2005).

⁷ *Pelman I*, 237 F. Supp. 2d at 517.

⁸ *Id.* at 541 ("[T]he Complaint fails to allege that the McDonalds' products consumed by the plaintiffs were dangerous in any way other than that which was open and obvious to a reasonable consumer.").

⁹ See *infra* Part II.A. For a criticism of the court's assumption from a "free choice" perspective, see Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1796–98 (2004) ("We are pushed and pulled to eat and drink foods that are harming us by forces that are indifferent to our health and our freedom, and which we find incredibly difficult to see.").

¹⁰ See *infra* Part II.A.

¹¹ See *infra* Part IV.

¹² See *Pelman I*, 237 F. Supp. 2d at 516–17 (noting several federally-mandated disclosure laws that were "created in those situations where individuals are somehow unable to protect themselves").

interdisciplinary lens, borrowing from law and economics, cognitive psychology, public health, and ethics disciplines. This Comment considers competing regulatory goals such as protecting consumers, preserving and promoting individual liberty, fostering industry efficiency, and allowing for state and local innovation.

Part I outlines the legislative landscape with regard to obesity in America and provides an overview of actions taken to target the negative effects of food sold in restaurants. Part II explains the benefits of using the nutrient disclosure approach and contrasts that approach with other information-based and non-information-based approaches to combating obesity. It argues that nutrient disclosure is the best tool to promote efficient decision making, combat obesity, and advance individual liberty. Part III recommends the adoption of a federal law requiring nutrient disclosure for food served in restaurants to prevent a patchwork system of state and local disclosure requirements. Part IV addresses preemption questions by balancing the goal of uniformity with the need to preserve state and local governmental authority to address specific community health concerns. This Comment argues that states and localities should be allowed to experiment with obesity-targeting strategies that do not raise patchwork problems and to adopt programs that the federal government is unable or unsuited to implement.

I. LEGISLATIVE BACKGROUND REGARDING RESTAURANT CONTRIBUTIONS TO OBESITY

Obesity is a concern for policymakers because of its massive public health implications. Obesity raises the incidence of coronary heart disease, type 2 diabetes, various types of cancer, high blood pressure, high cholesterol, stroke, liver and gallbladder disease, sleep apnea and respiratory problems, osteoarthritis, and gynecological problems.¹³ According to National Health Accounts, aggregate medical spending due to excessive weight or obesity was \$78.5 billion in 1998.¹⁴ Almost two-thirds of American adults are overweight, which is defined as having a body mass index (BMI) between 25 and 29.9, or

¹³ NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), *OBESITY: HALTING THE EPIDEMIC BY MAKING HEALTH EASIER 2* (2009), available at <http://www.cdc.gov/NCCDPHP/publications/AAG/pdf/obesity.pdf>.

¹⁴ Div. of Nutrition, Physical Activity & Obesity, CDC, *Overweight and Obesity: Economic Consequences*, <http://www.cdc.gov/obesity/causes/economics.html> (last visited Oct. 19, 2009).

obese, which is defined as having a BMI of 30 or higher.¹⁵ Obesity rates have been on the rise for the past several decades.¹⁶ According to congressional findings, “increased caloric intake is a key factor contributing to the alarming increase in obesity in the United States.”¹⁷

In the past two decades, the number of meals prepared or eaten outside the home has increased significantly.¹⁸ According to Dr. Barry Popkin, a nutritional epidemiologist at the University of North Carolina, “[p]eople are eating more, and more often . . . [a]nd the foods that they are consuming almost always replace meals cooked in a kitchen and eaten at a table.”¹⁹ Studies show that “[c]hildren eat almost twice as many calories (770) when they eat a meal at a restaurant as they do when they eat at home (420).”²⁰ Restaurant meals are generally larger and have more calories than meals prepared at home.²¹ Thus, policymakers have recently targeted restaurants as sources of unhealthy and uninformed consumption. This Part will outline how various levels of government have taken steps to promote healthy food consumption.

A. Federal Action

The federal government demonstrated its authority to regulate food products when Congress enacted the Food, Drug, and Cosmetic Act (FDCA) in 1938.²² The Nutrition Labeling and Education Act of 1990 (NLEA) provided

¹⁵ Labeling Education and Nutrition Act of 2009, S. 558, 111th Cong. § 2 (2009) (LEAN Act); Div. of Nutrition, Physical Activity & Obesity, CDC, Overweight and Obesity: Defining Overweight and Obesity, <http://www.cdc.gov/obesity/defining.html> (last visited Oct. 19, 2009).

¹⁶ NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, *supra* note 13, at 2.

¹⁷ Menu Education and Labeling Act, H.R. 2426, 111th Cong. § 2 (2009) (MEAL Act).

¹⁸ S. 3575, 110th Cong. § 2 (2008). See Jennifer L. Pomeranz & Kelly D. Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws*, 98 AM. J. PUB. HEALTH 1578, 1578 (2008) (noting that “[c]onsumption of restaurant food has increased dramatically[,]” resulting in restaurant industry sales jumping more than \$200 billion between 1997 and 2007). The amount of time spent cooking in the kitchen has also decreased. Julia Moskin, *In Kitchen, ‘Losers’ Start from Scratch*, N.Y. TIMES, Feb. 4, 2009, at D1. In 1965, women spent an average of thirteen hours a week cooking in the kitchen. *Id.* The average is now thirty minutes a day. *Id.*

¹⁹ Moskin, *supra* note 18.

²⁰ S.F., CAL., HEALTH CODE art. 8, § 468.1, (2008), available at <http://library.municode.com/index.aspx?clientId=14136&stateId=5&stateName=California>.

²¹ See *Home-Cooking Beats Restaurants in Calories*, UPI.COM, Dec. 18, 2008, <http://www.upi.com/Health-News/2008/12/18/Home-cooking-beats-restaurants-in-calories/UPI-6548122962545/> (citing James K. Binkley, *Calorie and Gram Differences Between Meals at Fast Food and Table Service Restaurants*, 30 REV. AGRIC. ECON. 750, 750 (2008)); Pomeranz & Brownell, *supra* note 18, at 1578 (“Fast-food consumption is associated with a higher intake of calories, saturated fat, carbohydrates, and added sugars.”).

²² 21 U.S.C. §§ 301–399 (1938).

amendments to the FDCA that established a system of uniform labeling of certain food products in interstate commerce.²³ The NLEA established nutritional labeling in the “Nutrition Facts” bar on most packaged food products and regulated labeling for products with voluntary nutritional claims such as “Low Fat.”²⁴ Congressional findings indicate that about seventy-five percent of adults report using NLEA-mandated food labels on packaged food and that approximately half of people report changing their minds about buying food products because of the information provided.²⁵

1. *The MEAL Act*

In 2003, Representative Rosa DeLauro and Senator Tom Harkin introduced identical bills—the Menu Education and Labeling Act (MEAL Act) in both chambers of Congress.²⁶ The MEAL Act was also proposed in the 109th and 110th Congresses²⁷ and is currently pending in the 111th Congress.²⁸ The MEAL Act would amend the FDCA, particularly 21 U.S.C. § 343(q)(5), to extend labeling requirements to certain foods sold in restaurants.²⁹ The purpose of the MEAL Act is “to enable customers to make informed choices about the nutritional content of standard menu items in large chain restaurants.”³⁰ The MEAL Act would require establishments with twenty or more outlets nationwide to disclose the number of calories, grams of saturated fat plus trans fat, grams of carbohydrate, and milligrams of sodium contained in a standard serving of the food in a clear and conspicuous manner in a statement adjacent to the name of each standard menu item.³¹ The requirement would not apply to temporary menu items, such as specials.³² The MEAL Act would limit the exemption provided in 21 U.S.C. § 343(q)(5) for restaurants and would add two additional sections to the end, providing specifically for restaurant nutrient disclosure standards.³³ Notably, the MEAL Act would not

²³ Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-535, 104 Stat. 2353 (codified at 21 U.S.C. § 343 (2006)).

²⁴ *Id.*

²⁵ MEAL Act, H.R. 2426, 111th Cong. § 2 (2009).

²⁶ MEAL Act, H.R. 3444, 108th Cong. (2003); MEAL Act, S. 2108, 108th Cong. (2004).

²⁷ MEAL Act, H.R. 5563, 109th Cong. (2006); MEAL Act, S. 3483, 109th Cong. (2006); MEAL Act, H.R. 3895, 110th Cong. (2007); MEAL Act, S. 2784, 110th Cong. (2008).

²⁸ H.R. 2426; MEAL Act, S. 1048, 111th Cong. (2009).

²⁹ H.R. 2426; S. 1048. Under current law, restaurants are explicitly exempted from section 343(q). *See* 21 U.S.C. § 343(q)(5) (2006).

³⁰ H.R. 2426; S. 1048.

³¹ H.R. 2426 § 3; S. 1048 § 3.

³² H.R. 2426 § 3; S. 1048 § 3.

³³ H.R. 2426; S. 1048.

preclude “a State or political subdivision of a State from requiring that a restaurant or similar retail food establishment or vending machine operator. . . provide nutrition information in addition to that required” by the federal law.³⁴ Thus the Act would establish a federal floor for nutrient disclosure while explicitly permitting states and localities to pass more stringent requirements.

2. *The LEAN Act*

An alternative federal proposal pending before Congress is the Labeling Education and Nutrition Act (LEAN Act), introduced by Senators Thomas Carper and Lisa Murkowski and Representative Jim Matheson.³⁵ The bill would require disclosure of calories on a menu board or sign (if used) or in the menu, in a menu insert, in an appendix to the menu, or in a supplemental menu.³⁶ The disclosure requirements would apply to restaurant chains that operate twenty or more establishments.³⁷ Other nutritional information, such as fat content, would have to be available at the establishment upon request.³⁸ The LEAN Act would preempt most state and local laws if (1) the state and local laws mandated different labeling standards for restaurants than were provided in the federal law and (2) the restaurants affected by the state or local laws were chains with twenty or more establishments.³⁹ The LEAN Act is supported by the restaurant industry because of its express preemption provisions.⁴⁰

B. State and Local Action

States and localities have proposed a wide variety of policies targeting obesity, many specifically aimed at restaurant food. One approach would impose calorie disclosure or nutrition labeling requirements on restaurant chains. Other strategies include restricting fast food restaurants through zoning, banning certain ingredients, and restricting the sale of certain foods to children in school. Additionally, some states and localities impose taxes on specific foods and ingredients.

³⁴ H.R. 2426 §3; S. 1048 § 3.

³⁵ LEAN Act, S. 558, 111th Cong. (2009); LEAN Act, H.R. 1398, 111th Cong. (2009).

³⁶ S. 558 § 6; H.R. 1398 § 6.

³⁷ S. 558; H.R. 1398.

³⁸ S. 558; H.R. 1398.

³⁹ S. 558 § 7; H.R. 1398 § 7.

⁴⁰ See *infra* Part III.

1. Nutrient Disclosure

In 2006, the New York City Board of Health and Mental Hygiene (N.Y. Board) adopted Regulation 81.50 detailing calorie disclosure rules for certain restaurants that voluntarily provided nutrition information to the public.⁴¹ The regulation was challenged by the New York State Restaurant Association (NYSRA), and in 2007, the federal district court determined that the NLEA preempts the local regulation.⁴² Undeterred, the N.Y. Board changed its regulation to apply more broadly, eliminating the voluntary aspect of the rejected regulation.⁴³ The NYSRA challenged the new regulation, arguing that federal law preempts local nutrition labeling standards.⁴⁴ The district court upheld the second regulation on the ground that it was mandatory, not voluntary, and therefore not preempted.⁴⁵ The Second Circuit affirmed.⁴⁶

Several California localities adopted similar labeling requirements that were ultimately enacted statewide.⁴⁷ King County, Washington, also now requires nutrient disclosure by certain restaurants.⁴⁸ Numerous state

⁴¹ N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007). Restaurants that chose to disclose nutrient information were required to comply with the rules, but restaurants that chose not to disclose nutrient information were not required to do so. *Id.*

⁴² *Id.* at 363. The court determined that NLEA preempted state laws regulating “voluntary” claims made by restaurants. *Id.*

⁴³ N.Y. CITY, HEALTH CODE § 81.50 (2008).

⁴⁴ N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *1 (S.D.N.Y. Apr. 16, 2008). The restaurant association also claimed that the law violated the First Amendment’s guarantee of free speech. *Id.* Both the district court and the court of appeals dismissed the First Amendment claim and only gave full consideration to the preemption claims. *See NYSRA II*, 2008 WL 1752455, at *13; *NYSRA I*, 509 F. Supp. 2d at 353.

⁴⁵ *NYSRA II*, 2008 WL 1752455, at *5. The preemption question turned on the interpretation of NLEA’s definition of a “claim.” *Id.* at *2. The district court held that a claim must be voluntary to fall under the federal definition and thus be subject to preemption. *Id.* Therefore, the voluntary disclosures regulated under the first version of § 81.50 were held to be claims under NLEA, but the city-mandated disclosures in the second version of the regulation were not and therefore not preempted by federal law. *NYSRA II*, 2008 WL 1752455, at *4–5.

⁴⁶ N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 137 (2d Cir. 2009).

⁴⁷ *See infra* Part III.

⁴⁸ Cherie Black, *County, Restaurants Strike Deal on Menus: Nutritional Data Required Only at Largest Chains*, SEATTLE POST-INTELLIGENCER, Mar. 13, 2008, at B1. The King County law requires food establishments with fifteen or more national locations and \$1 million in annual sales to display calorie, saturated fat, sodium, and carbohydrate information. ASS’N OF STATE AND TERRITORIAL HEALTH OFFICIALS, NUTRITION LABELING IN CHAIN RESTAURANTS: STATE AND LOCAL BILLS/REGULATIONS—2009 (2009), available at http://cspinet.org/new/pdf/ml_bill_summaries_09.pdf. The King County law only applies to items on the menu for ninety days or more. *Id.* If items are on menu boards, the calories must be posted on the board. *Id.*

legislatures have considered measures requiring nutrient content disclosure.⁴⁹ Georgia has prohibited any local action regulating the display of food nutrition information at food service establishments but has not established any state requirements.⁵⁰

2. *Bans, Zoning & Taxes*

Other methods to combat obesity by influencing food consumption habits include the use of bans, zoning, and taxes. For instance, New York City and Philadelphia have banned the use of artificial trans fat in restaurant food.⁵¹ Artificial trans fat is found in a wide variety of foods.⁵² It has been targeted because, unlike regular fats, no health benefits are derived from consuming trans fats, and consumption is directly correlated with increased risk factors for coronary heart disease.⁵³ Based on these concerns, California has mandated the elimination of trans fat in restaurants beginning in 2010, and in all baked goods by 2011.⁵⁴ Numerous state policymakers have proposed limiting the use of trans fat.⁵⁵

Other policymakers have attempted to use their zoning power and control over schools to influence consumer behavior. In Los Angeles, policymakers set a one-year moratorium on opening new fast food restaurants in a low-income area of the city laden with chain restaurants.⁵⁶ Many schools nationwide have banned the sale of soft drinks in an effort to curb childhood obesity.⁵⁷ California has implemented dietary guidelines regarding what food

⁴⁹ Nat'l Conference of State Legislatures (NCSL), *Trans Fat and Menu Labeling Legislation*, <http://www.ncsl.org/Default.aspx?TabId=14362> (last visited Dec. 31, 2009); *see also* ASS'N OF STATE AND TERRITORIAL HEALTH OFFICIALS, *supra* note 48.

⁵⁰ *Id.*

⁵¹ Esther Choi, Note, *Trans Fat Regulation: A Legislative Remedy for America's Heartache*, 17 S. CAL. INTERDISC. L.J. 507, 509 (2008).

⁵² *Id.* at 516.

⁵³ *Id.* at 521.

⁵⁴ Press Release, Office of the Governor of the State of Cal., Gov. Schwarzenegger Signs Legislation Promoting Nutrition and Healthier Options, Sept. 30, 2008, *available at* <http://gov.ca.gov/index.php?print-version/press-release/10682>.

⁵⁵ NCSL, *supra* note 49.

⁵⁶ William Saletan, *Food Apartheid: Banning Fast Food in Poor Neighborhoods*, SLATE, July 31, 2008, <http://www.slate.com/id/2196397/?from=rss>.

⁵⁷ Eric Nagourney, *Soda Ban in Schools Has Little Impact*, N.Y. TIMES, Sept. 23, 2008, at F6. *See also* Posting of Tara Parker-Pope to N.Y. Times Well Blog, *Are Schools Really to Blame for Poor Eating?*, <http://well.blogs.nytimes.com/2008/11/10/are-schools-really-to-blame-for-poor-eating/> (Nov. 10, 2008, 14:17 EST) (explaining efforts taken in schools, such as limiting soft drink sales and restricting the types of foods that can be sold to students).

can be served in schools.⁵⁸ A number of states have also proposed limiting the sale or distribution of trans fats in schools.⁵⁹ Additionally, several states have chosen to impose taxes on particular food items such as candy, soft drinks, chocolate milk, and pastries to deter consumers from purchasing what lawmakers deem unhealthy food.⁶⁰

II. THE APPEAL OF NUTRIENT DISCLOSURE

Requiring restaurants to provide on-the-spot nutrition information about their products, as several states and localities have done,⁶¹ would fill the gap left in the NLEA with regard to restaurants.⁶² This Part will demonstrate why nutrient disclosure is the most appropriate tool for the government to pursue in curbing the effect of restaurant food on obesity rates and public health generally. First, disclosure is a valuable tool to address the obesity problem because it facilitates consumer decision making and corrects inaccurate nutrient estimation that leads to overconsumption of unhealthy foods. As a consequence, mandatory disclosure could induce producers to respond to consumer demand for healthy food or smaller portions. Second, several moral and social arguments support the adoption of mandatory nutrient disclosure.

A. *Promoting Health Through Information-Based Decision Making*

Providing information to consumers would promote public health and curb obesity because proper nutrition labeling would lower information costs and allow consumers to better exercise personal preferences regarding the nutritional content of their food. Furthermore, informational approaches preserve the authority of restaurants to make rational responses to changes in demand and provide healthy menu alternatives.

⁵⁸ Sch. Nutrition Ass'n, *New California School Nutrition Standards Go into Effect* (July 3, 2007), <http://www.schoolnutrition.org/Content.aspx?id=7902>.

⁵⁹ NCSL, *supra* note 49. Several of the proposals limiting trans fats would only apply to food served in schools. *Id.*

⁶⁰ Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 854 (2000).

⁶¹ *See supra* Part I.B.1.

⁶² *See supra* Part I.A. *See also* Harold Goldstein & Eric Schlosser, Op-Ed., *Putting Health on the Menu*, L.A. TIMES, Aug. 5, 2008, at A15. ("Since 1994, federal law has required nutritional labels on packaged foods. . . . Fast-food and chain restaurants have thus far managed to avoid such a legal requirement, despite the fact that almost half the money Americans spend on food is spent at restaurants.").

1. *Consumer Reaction*

Nutrient disclosure on menus would improve public health by enabling consumers to make informed on-the-spot decisions about their consumption. Consumers deciding between multiple menu items would be able to weigh the nutritional quality of each item against other factors such as taste and price and make a final decision based on personal concerns about health and wellness. As explained by Magat and Viscusi, market failure commonly occurs when individual consumers do not have full information about the risks they face and “inadequate information distorts the mix and amount of products that consumers purchase.”⁶³ Five consumer decisions could be affected by disclosure of nutrient information: (1) whether to eat at a restaurant versus preparing a meal at home, (2) whether to eat at a particular restaurant versus eating at a different restaurant, (3) whether to order a particular item versus a different item on the same menu, (4) whether to order additional items, and (5) whether to change future behavior, such as increasing exercise or reducing consumption of food outside the restaurant to offset the calories consumed. At each decision point, a consumer’s choices may be skewed by a lack of information regarding nutrient quantities, and this skewed information may lead to overconsumption.⁶⁴

a. *Overconsumption Without Labeling*

Without easily accessible nutrition information at restaurants, consumers operate with bounded rationality—that is, they “respond rationally to their own cognitive limitations, minimizing the sum of decision and error costs.”⁶⁵ When consumers lack information that is relevant to purchasing decisions, they base their decisions on assumptions about what they expect the information would be.⁶⁶ However, rational choices made with such limited information in this case can lead to overconsumption,⁶⁷ possibly at each of the five decision points described above, contributing to the obesity problem. The first four decision

⁶³ WESLEY A. MAGAT & W. KIP VISCUSI, INFORMATIONAL APPROACHES TO REGULATION 87 (1992). The distorted consumption in turn affects firms’ incentives to produce safe products. *Id.*; see also *infra* Part II.A.2 (discussing producer reaction).

⁶⁴ See MAGAT & VISCUSI, *supra* note 63, at 87 (explaining how a lack of information can inefficiently distort consumption).

⁶⁵ Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998).

⁶⁶ Lary Lawrence, *Toward a More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815, 818 (1987).

⁶⁷ *Id.*

points—(1) restaurant vs. home, (2) restaurant vs. restaurant, (3) item vs. item, and (4) more items vs. fewer items—involve consumers’ interactions with restaurants, such as where they go, what they order, and how much they order, while the last focuses on consumers’ individual behaviors that balance increased consumption now with later behaviors. Consumer studies show that the lack of labeling may contribute to overconsumption of unhealthy foods at each point.⁶⁸

First, evidence shows that consumers cannot accurately estimate nutrient levels without menu labeling.⁶⁹ Research has revealed that consumers significantly underestimate the calorie, fat, and saturated fat levels of less-healthy restaurant items.⁷⁰ According to one study, Americans underestimate the caloric content of restaurant food by approximately 55% on average.⁷¹ In another study, nine out of ten people underestimated the caloric content of certain less healthy items by an average of 600 calories, which was almost half the actual caloric content.⁷² The proliferation of large portions exacerbates this problem because larger portions lead to a larger disparity between estimated and actual caloric content.⁷³

Counter to the court’s conclusion in *Pelman I*, consumers may be aware that restaurant foods pose health risks,⁷⁴ but, for a variety of reasons, they consistently underestimate the degree to which such food may harm them because of inaccurate nutrient estimates.⁷⁵ This gap between consumers’

⁶⁸ See Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City*, 2007, 98 AM. J. PUB. HEALTH 1457, 1457–59 (2008) (explaining that consumers order lower-calorie menu items when they see calorie information at Subway restaurants prior to ordering); Scot Burton et al., *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96 AM. J. PUB. HEALTH 1669, 1669 (2006) (explaining that consumers significantly underestimate the calorie, fat, and saturated fat levels of less-healthy restaurant items); Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1176 (2004) (explaining that consumers consistently underestimate unhealthy contents of restaurant items); John Tierney, *Health Halo Can Hide the Calories*, N.Y. TIMES, Dec. 2, 2008, at D1 (explaining how a “health halo” may affect where consumers choose to eat and whether they order additional side items).

⁶⁹ See Burton et al., *supra* note 68, at 1669; McCann, *supra* note 68, at 1176.

⁷⁰ See Burton et al., *supra* note 68, at 1669 (“Survey results showed that levels of calories, fat, and saturated fat in less-healthy restaurant food items were significantly underestimated by consumers.”); McCann, *supra* note 68, at 1176 (citing studies indicating consistent calorie underestimation).

⁷¹ McCann, *supra* note 68, at 1176 (citing studies commissioned by New York University and the University of Mississippi).

⁷² Burton et al., *supra* note 68, at 1674.

⁷³ McCann, *supra* note 68, at 1176; see also Pomeranz & Brownell, *supra* note 18, at 1578 (“Increasing portion size has made calorie estimation more difficult.”).

⁷⁴ *Pelman I*, 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003).

⁷⁵ McCann, *supra* note 68, at 1176.

estimates and actual nutrient content may be related to restaurants' use of unfamiliar ingredients or preparation techniques. For example:

Sold only to the food-service market, Kraft Extra Heavy Mayonnaise is advertised to restaurant operators as providing "superior binding and cling." This awful stuff has 90 calories per tablespoon, versus 27 calories in Kraft's plenty-tasty Miracle Whip dressing and 18 calories in Hellmann's Reduced Fat Mayonnaise. People know mayo is a rich substance, but I bet no one thinks restaurants are stealthily serving a fat-crammed "extra heavy" version . . . [Kraft] even recommends Extra Heavy Mayonnaise for "prepared salads and salad dressings." That is, Kraft recommends that menu items consumers assume to be healthy alternatives instead be larded up with high amounts of fat.⁷⁶

Restaurants may also use more butter or oil and more salt than a home cook would while preparing the same dish, and many people have "very little understanding of how much fat and salt is in restaurant food . . . even on the supposedly healthy part of the menu."⁷⁷ Studies also show that meals at both fast food and table service restaurants are larger and have more calories than meals prepared at home.⁷⁸

Furthermore, labeling efforts that do not disclose calories but indicate some other healthy trait of the food, such as being trans fat-free, create what is called the "health halo" and may further distort calorie estimates.⁷⁹ One study surveyed nutritionally-informed consumers about the number of calories in a meal.⁸⁰ Half the consumers were shown pictures of the meal including two crackers prominently labeled "Trans Fat Free."⁸¹ The other half were shown pictures without the crackers.⁸² The consumers shown pictures with the crackers estimated the meal to have 176 fewer calories than did the consumers who were shown pictures without the crackers.⁸³ Although the crackers added 100 calories to the meal, "their presence skewed people's estimates in the opposite direction."⁸⁴ Another study showed that "healthy" restaurants such as

⁷⁶ Gregg Easterbrook, *Hidden Calories*, ESPN.COM, Nov. 20, 2008, <http://sports.espn.go.com/espn/print?id=3709103&type=story>.

⁷⁷ Moskin, *supra* note 18 (quoting nutritionist Cheryl Forberg).

⁷⁸ UPL.COM, *supra* note 21.

⁷⁹ Tierney, *supra* note 68.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Subway might have created a distorting “health halo” around their food.⁸⁵ The study gave people the choice between a Subway sandwich and a Big Mac, which actually had fewer calories.⁸⁶ Those participants that chose the sandwich over the Big Mac were more likely to add a large non-diet soda and cookies to the order, ending up with, on average, 56% more calories than contained in the McDonald’s meal.⁸⁷ The McDonald’s–Subway comparison study clearly demonstrates consumers’ faulty beliefs associated with where to eat and how much to order (decision points 2 and 4).⁸⁸

False estimates of nutrient content distort decision making because consumers rely on these estimates when ordering off a restaurant menu.⁸⁹ By relying on these false premises, consumers misinterpret the consequences of their consumption and thus make inefficient decisions—decisions that fail to maximize the utility of their purchases.⁹⁰ Consistent underestimation of calories in restaurant foods results in overconsumption at each of the five decision points for those having preferences for lower calorie foods.⁹¹

Second, not only do consumers make skewed estimations about calorie content, by they have some preference for lower calorie options. Consumers in a study who were provided caloric information at Subway often chose lower-calorie options than consumers without caloric information.⁹² This demonstrates that not only do consumers make skewed estimations about calorie content, but they have some preference for lower calorie options. Thus it would appear that the consumption of high-calorie menu items is due not only to a mere preference in taste, texture, and price, but also to these skewed calorie estimations.⁹³ These study results imply that if consumers had accurate

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ McCann, *supra* note 68, at 1176–77.

⁹⁰ *See id.* (“[W]hen individuals rely on false premises in purchasing fast food, they misinterpret the consequences and content of their selections, and thus fail to achieve maximum utility for their purchasing power.”).

⁹¹ *See* MAGAT & VISCUSI, *supra* note 63, at 87 (“[I]nadequate information distorts the mix and amount of products that consumers purchase . . .”). If provided with nutritional information, the consumers preferring a lower calorie lifestyle may choose to eat at restaurants less often (decision point 1), may choose restaurants with healthy menu options more often (decision point 2), may order healthier items more frequently (decision point 3), may order fewer menu items at each meal (decision point 4), and may offset the calories consumed at restaurants more often (decision point 5).

⁹² Bassett et al., *supra* note 68, at 1457–59.

⁹³ *See id.* (providing evidence that when consumers are given calorie information about menu items, they order lower calorie options than they do in the absence of the information).

information, they would make different, less consumptive choices than they do without nutrient disclosure.⁹⁴

b. Correcting the Overconsumption

The basic assumption of rational decision making is that providing information creates better decisions and “an ideal law would seek to provide consumers with enough information to make their own risk–benefit tradeoffs in the marketplace.”⁹⁵ However, scholars have pointed out limits to the theory that more information correlates with better decisions. In particular, “the information must enhance consumer decision making.”⁹⁶ Besides the economic theory and isolated studies discussed above, past experience with nutritional labeling demonstrates the effect of nutrient disclosure on consumer choice.⁹⁷ The fact that nutritional labeling helps consumers make rational choices can be illustrated by two examples: The effect of the NLEA on the salad dressing market and the value of the warning labels mandated by California’s Proposition 65.

i. Past Examples: Salad Dressing and Cereal

Before the passage of the NLEA, nutrition labels on food products sold in stores were voluntary.⁹⁸ Low-fat dressings were often labeled and higher fat dressings generally were not.⁹⁹ Some economists suggested, based on “unraveling” theory, that under a voluntary labeling system consumers would infer that nonlabeled dressings were unhealthy and would adjust their purchasing behavior accordingly. Under this theory, then, mandatory labeling would not affect consumer perception of the nutritional qualities of salad dressing.¹⁰⁰ However, when the NLEA came into effect, requiring mandatory nutrient disclosure for all dressings, sales of high-fat dressings declined significantly.¹⁰¹ Based on this evidence, it seems that consumers acquire and

⁹⁴ *Id.* This behavior goes directly to decisions made at decision point 3—what menu item to order at a given restaurant.

⁹⁵ Barsa, *supra* note 1, at 1226.

⁹⁶ *Id.* at 1227.

⁹⁷ Alan D. Mathios, *The Impact of Mandatory Disclosure Laws on Product Choices: An Analysis of the Salad Dressing Market*, 43 J.L. & ECON. 651, 665–667 (2000); Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 671 (1993).

⁹⁸ Mathios, *supra* note 97, at 651.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 652–53.

¹⁰¹ *Id.* at 667.

comprehend more information about nutrient content under a mandatory labeling regime than a voluntary one and decrease their consumption of unhealthy food products as a result.¹⁰²

The market for high-fiber cereal also provides a telling example of how information can change consumption habits. In 1984, the Kellogg Company, a leading marketer of breakfast cereal products, began advertising its All-Bran cereal as high in fiber and claiming that a high-fiber diet could reduce the risk of cancer. Other high-fiber cereals were soon similarly labeled.¹⁰³ Within three years, consumers had substantially increased their consumption of high-fiber cereals, and, notably, the greatest gains occurred among the least advantaged consumers.¹⁰⁴ Both the market share for high-fiber cereals and the actual sales from these cereals increased, leading to the introduction of yet more high-fiber products.¹⁰⁵ This example illustrates how the public made healthful purchasing decisions in response to information provided through accurate nutrient labeling.

ii. Contrasting Warning Labels

In an effort to provide information about health risks, a few states have proposed mandatory warning labels for certain high-fat menu items instead of requiring nutrient disclosure.¹⁰⁶ When analyzing the value of warning labels as informational tools, Viscusi laid out a clear approach: effectiveness of information should be evaluated on its ability to promote understanding of risks and rational decision making based on those risks.¹⁰⁷ Under this standard nutrient disclosure would be a more useful tool for fighting obesity than warning labels.

¹⁰² *Id.* at 674–75.

¹⁰³ J. Howard Beales, Remarks Before the Food and Drug Law Institute Conference on Qualified Health Claims, 3–4 (Jan. 14, 2004), available at <http://www.ftc.gov/speeches/beales/040114foodanddruglawinstitute.pdf>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Ctr. for Consumer Freedom, Menu Labeling Legislation: An Overview (Nov. 12, 2003), http://www.consumerfreedom.com/news_detail.cfm?headline=2215.

¹⁰⁷ Barsa, *supra* note 1, at 1227 (“When judging an informational effort, the reference point should be whether it promotes individual understanding of the risks and subsequent rational decisions with respect to them.” (quoting W. KIP VISCUSI, PRODUCT–RISK LABELING: A FEDERAL RESPONSIBILITY 3 (1993)) (internal quotation marks omitted)).

Requiring warning labels¹⁰⁸ would be a drastically less precise, and possibly biased, method of informing consumers about the health risks associated with restaurant food. Rather than aiding in decision making, warning labels can cause over-reactive behavior, as scholars have noted with regard to California's Proposition 65 warning labels.¹⁰⁹ Furthermore, warning labels fail to address any health benefits the products might offer.¹¹⁰ Imprecise warning labels "may lead consumers to substitute a higher risk product for a lower risk product that bears an alarming warning."¹¹¹ This problem is less likely to occur with nutrient disclosure because it is quantitative, not qualitative and provides better information regarding specific risks.¹¹² Nutrient disclosure treats food as both a potential risk and a potential benefit without casting judgment. For these reasons, calorie disclosures and comprehensive nutrition labels, help consumers make more informed and unbiased decisions about their food consumption.

iii. Information That Would Aid Decision Making

A large body of research indicates that more information does not always result in more efficient decisions.¹¹³ The quantity and type of information presented and the way it is presented can affect how information is interpreted and used.¹¹⁴ While providing information in some circumstances may not promote efficient decision making,¹¹⁵ numeric nutrition labeling such as

¹⁰⁸ For instance, statutes or ordinances could require a warning next to menu items containing fat or calories that may contribute to obesity or related negative health effects.

¹⁰⁹ See Sunstein, *supra* note 97, at 667 ("If people are told, for example, that a certain substance causes cancer, they may think it is far more dangerous than it is in fact. But some carcinogenic substances pose little risk."); Barsa, *supra* note 1, at 1230 ("This discrepancy between warning and actual risk undermines the purported benefits of the information economics approach and could produce severe problems. It undermines personal liberty and economic efficiency by distorting consumer decisionmaking—leading consumers to avoid products they would otherwise consume, given free choice and full information.").

¹¹⁰ See William Saletan, *Junk-Food Jihad: Should We Regulate French Fries Like Cigarettes?*, SLATE, Apr. 15, 2006, <http://www.slate.com/id/2139941/> ("Something about food—the fact that it keeps us alive, perhaps—makes its purveyors hard to hate.").

¹¹¹ Barsa, *supra* note 1, at 1231.

¹¹² See Sunstein, *supra* note 97, at 670 ("Well-tailored programs would minimize the relevant risks by putting the information in its most understandable form. Instead of labeling a substance a 'carcinogen,' a uniform system of risk regulation could give better awareness of risk levels.").

¹¹³ See MAGAT & VISCUSI, *supra* note 63, at 88 ("It is now well accepted that people have limits on the amount of information that they can process.").

¹¹⁴ *Id.* See also Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161 (2003) ("[T]he design features of both legal and organizational rules have surprisingly powerful influences on people's choices.").

¹¹⁵ See, e.g., Barsa, *supra* note 1, at 1230; MAGAT & VISCUSI, *supra* note 63, at 88; Sunstein, *supra* note 97, at 667; Sunstein & Thaler, *supra* note 114.

mandatory calorie disclosure on menus can avoid informational traps, such as those associated with imprecise warning labels.¹¹⁶ The particular requirements of the law should be determined after extensive study and with input from experts and interested parties.¹¹⁷ However, any nutrient disclosure law should require at least, and perhaps at most, the listing of calorie information on menus to balance the competing goals of comprehensibility and accessibility.

To aid consumers, the information provided must be easy to understand.¹¹⁸ Therefore, policymakers should be sure to avoid creating so much clutter on menus that consumers cannot easily process the information.¹¹⁹ Providing detailed information about all nutrients, especially on menus, may not aid in good decision making because “consumers do not have the resource or the abilities necessary to process the total amount of information which might potentially be available for making any particular choice.”¹²⁰ Given that ordering decisions are often made quickly, without time to process large amounts of information, and given that restaurants may have difficulty constructing a comprehensible menu with so much information, it may be prudent to limit the disclosure on the menu to calorie information only. More comprehensive disclosure still can be accomplished through informational pamphlets that accompany menus or are readily accessible elsewhere in the restaurant. Providing calorie information is a reasonably good proxy for disclosing nutritional content because consumption of excess calories is the root cause of weight gain.¹²¹

The information must also be accessible. As Judge Posner notes, “it would be profoundly irrational to spend all one’s time in the acquisition of

¹¹⁶ See *supra* Part II.A.1.b.ii.

¹¹⁷ When developing the “Nutrition Facts” label, the U.S. Department of Agriculture and the Food and Drug Administration asked the National Academy of Sciences to provide options for improving the label. John McCutcheon, *Nutrition Labeling Initiative*, 49 *FOOD & DRUG L.J.* 409, 409 (1994).

¹¹⁸ Peter S. Menell, *Structuring a Market-Oriented Federal Eco-Information Policy*, 54 *MD. L. REV.* 1435, 1440 (1995) (considering comprehensibility a key factor for evaluating information policies).

¹¹⁹ Under California S.B. 120, menu boards would only be required to list calories—not other nutritional information—because of space limitations. Press Release, Senator Alex Padilla, *supra* note 2.

¹²⁰ MAGAT & VISCUSI, *supra* note 63, at 88 (quoting Bettman’s review of the relevant literature in JAMES R. BETTMAN, *AN INFORMATION PROCESSING THEORY OF CONSUMER CHOICE 177* (1979)) (internal quotation marks omitted).

¹²¹ See Div. of Nutrition, Physical Activity & Obesity, Nat’l Ctr. for Chronic Disease Prevention & Health Promotion, CDC, *Overweight and Obesity: Causes and Consequences*, <http://www.cdc.gov/obesity/causes/index.html> (last visited Oct. 22, 2009) (“Overweight and obesity result from an energy imbalance. This involves eating too many calories and not getting enough physical activity.”).

information.”¹²² Because consumers will not spend a lot of time acquiring information when making decisions,¹²³ nutritional information should be disclosed on menus and menu boards instead of in behind-the-counter binders or on the restaurant website.¹²⁴ While some health-conscious consumers may seek nutritional information before making their consumption decisions, the effort involved is too burdensome for most consumers.¹²⁵ Furthermore, when information is not readily accessible through prominent displays, restaurant-goers may not know the information is available to them at all or may assume that their estimates of nutrient contents are accurate, which will lower the incentive to spend time and energy gathering additional information.¹²⁶ According to the New York City Department of Health, only five percent of consumers at McDonald’s and three percent of consumers at Starbucks use the pamphlets supplied.¹²⁷ Excluding Subway, only four percent of New York City restaurant patrons reported seeing calorie information provided in 2007, prior to the mandatory disclosure law.¹²⁸

2. *Restaurant Reaction*

Restaurants would also likely change their behavior if required to disclose nutrition information. Because nutritional information is not currently provided to restaurant consumers in a meaningful way—and nutrition is therefore less of a factor in purchases—preferences for healthy food alternatives are less important to the restaurant industry. With the adoption of a nutrient disclosure program, restaurants would likely have an incentive to change the ingredients, cooking methods, or portion sizes of some menu items to offer healthful options to consumers. The information provided by restaurants would enable consumers to weigh the nutrition information in their menu selection and better express preferences to food producers. For example, calorie disclosures could encourage restaurants to offer smaller portions.¹²⁹ Restaurants respond to consumer preferences as a natural, rational way to

¹²² Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1553 (1998).

¹²³ See George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

¹²⁴ Goldstein & Schlosser, *supra* note 62.

¹²⁵ See Stigler, *supra* note 123, at 223.

¹²⁶ Moskin, *supra* note 18.

¹²⁷ Goldstein & Schlosser, *supra* note 62 (citing a New York City Department of Health study).

¹²⁸ Bassett et al., *supra* note 68, at 1458.

¹²⁹ See Merritt Watts, *I Ate What?!*, SELF, Oct. 2008, at 140 (quoting TV producer Daria Klenert as saying, “I wish they had smaller portions” and noting that she opts for restaurants with small portions).

maximize profits.¹³⁰ Requiring nutrition information creates an incentive to compete on the basis of nutritional quality.¹³¹ Restaurants affected by the New York calorie disclosure law have had to focus on the nutritional content of their food.¹³² This promotes efficiency because restaurants that adjust to consumer demand for nutritious options should lose fewer customers and could perhaps increase profits by supplying smaller portions for the same cost or by wooing customers away from less healthy restaurants.¹³³ For instance, in reviewing the effects of the New York City calorie disclosure law, one writer noted that restaurants have reduced portion sizes and “slimmed down” menus without dropping prices or losing sales.¹³⁴

The effect of required disclosure on producers can be seen through study of California’s Proposition 65, which mandates warning labels on products containing certain levels of harmful or cancer-causing agents.¹³⁵ Proposition 65 “supplies powerful incentives for manufacturers to become informed about and possibly reduce the carcinogens and teratogens in their products.”¹³⁶ To avoid the warning label, some industries have reduced or eliminated the use of toxic chemicals, demonstrating that “scholars should not limit the debate over Proposition 65’s merits to the question of whether the warnings help consumers to make purchasing decisions.”¹³⁷ This example indicates that restaurants may, in trying to avoid categorization by consumers as an

¹³⁰ See Press Release, Cal. Rest. Ass’n, California Restaurant Association Voices Disappointment in Passage of SB 120 (Sept. 12, 2007), available at <http://www.calrest.org/go/CRA/news-events/newsroom/press-releases/cra-voices-disappointment-in-passage-of-sb-120/> (“The restaurant industry is an industry of choice and is driven by consumer demand. We have every incentive to serve our customers the food they want. As a result more and more establishments are offering healthy menu options—customers are in turn rewarding these restaurants with more business.”).

¹³¹ Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492 (1981). See also Nicole Fradette et al., *The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 ADMIN. L. REV. 605, 616 (1995) (explaining that after passage of the NLEA, companies must choose between leaving the product as is or reformulating it, and noting that industry experts believe that producers will maintain current products while developing new products that are more nutritionally appealing).

¹³² Melinda Beck, *On the Table: The Calories Lurking in Restaurant Food*, WALL ST. J., July 29, 2008, at D1 (quoting Cosi’s chief marketing officer Chris Carroll as saying, “Having to post this information in New York really focused us on paying attention as well.”).

¹³³ See Goldstein & Schlosser, *supra* note 62 (“Chains that sell good-tasting, lower-calorie foods will be rewarded; chains that don’t may see their sales decline. That’s how the free market is supposed to work.”).

¹³⁴ Kim Severson, *Calories Do Count*, N.Y. TIMES, Oct. 29, 2008, at D1.

¹³⁵ See Barsa, *supra* note 1.

¹³⁶ *Id.* at 1239.

¹³⁷ *Id.*

unhealthy restaurant, change their menus or recipes to provide healthier options.¹³⁸

It is true that even without menu labeling requirements, restaurants have attempted to market healthy alternatives to the public,¹³⁹ but often those attempts have not been successful.¹⁴⁰ However, the statement by Hardee's director of public affairs that "people are talking nutrition, but . . . buy[ing] on taste,"¹⁴¹ also may be incorrect. Even when healthy menu items are available to the public, because consumers' baseline estimates of the nutritional quality of menu items is skewed, consumers' perceive the nutritional differences between the healthier menu items and the less-healthy ones to be smaller than they actually are.¹⁴²

B. Moral and Social Arguments

In addition to the argument that providing information would improve public health by enabling consumers to exercise their preferences for healthier foods, several moral and social arguments support adopting nutrient disclosure instead of government restrictions. First, incomplete information can be an obstacle to liberty. Second, programs that restrict the availability or increase price of certain foods or ingredients are inherently paternalistic and therefore restrict liberty. Third, other approaches may increase discrimination against obese people.

1. The Lack of Information as an Obstacle to Liberty

According to Sunstein, consumers deprived of relevant information about what they consume are deprived of the ability to choose their preferred mix of risks and benefits and cannot make informed choices among possible

¹³⁸ See *id.* ("[S]ome industries have successfully avoided mandated warnings by reducing or eliminating their use of certain toxic chemicals.").

¹³⁹ See McCann, *supra* note 68, at 1204 (explaining that such items and "light menus" reflect market preferences and have been introduced to generate profits rather than in response to government mandates). From 1990 to 1997, fast food restaurants increasingly offered healthier menu choices partly in response to public demand and "pressure from health-conscious groups." *Id.*

¹⁴⁰ *Id.* at 1204–05. Taco Bell, Kentucky Fried Chicken, Pizza Hut, McDonald's, and Hardee's all have introduced or considered introducing healthy alternatives but found insufficient market demand. *Id.*

¹⁴¹ *Id.* at 1206 (citing People Talk Lean Hamburgers but Buy Fatty Patties, CHI. SUN-TIMES, Dec. 26, 1992, at 38 (quoting Maurice Bridges, Hardee's director of public affairs)).

¹⁴² See *id.* ("[W]hile a customer may obviously recognize that a low-fat salad menu item is less fattening than a double cheeseburger, the customer remains unaware of the precise fat content of that double cheeseburger.")

options.¹⁴³ “If people are unaware of the consequences of their choices, they are, to that extent, less free.”¹⁴⁴ This sentiment has been echoed in a variety of choice situations, such as entering an employment relationship,¹⁴⁵ opting to receive medical care,¹⁴⁶ and agreeing to take out a loan.¹⁴⁷ This argument has also been applied in the consumer products setting with regard to consumer promises made without full information.¹⁴⁸ Applying this notion of information-as-freedom, disclosure of nutrient contents would give consumers more freedom when making consumption choices and would expand their individual autonomy.

2. *Paternalism as an Obstacle to Liberty*

The paternalism associated with other methods of combating obesity is another reason to favor nutrient labeling.¹⁴⁹ Regulations that are not based on information disclosure can be economically irrational and paternalistic; therefore, policymakers have moved away from them.¹⁵⁰ Paternalistic measures offend notions of liberty because they diminish the role of the individual¹⁵¹ and fail to allow individuals to “opt out” of specified arrangements.¹⁵² Approaches such as ingredient bans and zoning restrictions,

¹⁴³ Sunstein, *supra* note 97, at 659. *See also* Goldstein & Schlosser, *supra* note 62 (“If we can force the oil companies to tell us what’s best for our cars, surely we can demand that the fast-food and restaurant chains tell us what we’re putting into our bodies.”).

¹⁴⁴ Sunstein, *supra* note 97, at 655.

¹⁴⁵ *See Note, Occupational Health Risks and the Worker’s Right to Know*, 90 YALE L.J. 1792, 1793 (1981) (arguing that health risks of employment should be disclosed out of respect for the autonomy of individuals in making basic life decisions).

¹⁴⁶ *See, e.g.,* Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985) (arguing that personal autonomy in medical decision making should be a legally protected right); Andrea Peterson Woolley, *Informed Consent to Immunization: The Risks and Benefits of Individual Autonomy*, 65 CAL. L. REV. 1286, 1288 (1977) (“To make an intelligent decision, the individual must be informed of the procedure’s risks and benefits.”).

¹⁴⁷ *See Note, Direct Loan Financing of Consumer Purchases*, 85 HARV. L. REV. 1409, 1429 (1972) (asserting that a duty of disclosure is appropriate in the absence of meaningful buying power because the buyer has no “real chance to protect himself against unscrupulous sellers and lenders”).

¹⁴⁸ *See* Lawrence, *supra* note 66, at 830 (“When a person does not have sufficient information he cannot knowingly choose his own destiny . . .”).

¹⁴⁹ Here, the word “paternalism” refers to the non-libertarian variety. *See* Sunstein & Thaler, *supra* note 114, at 1162 (“Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off.”).

¹⁵⁰ Beales et al., *supra* note 131.

¹⁵¹ *See* Sunstein, *supra* note 97, at 659 (explaining how restrictions “unnecessarily diminish the role of the individual decisions and choices in forming individual lives”).

¹⁵² *See* Sunstein & Thaler, *supra* note 114, at 1161 (explaining the libertarian aspect of the “libertarian paternalism” strategy and asserting that they “do not aim to defend any approach that blocks individual choices”).

which are based on controlling access or behavior instead of providing information, prevent food producers and consumers from deciding what they want to produce or consume or where they want to produce or consume it.¹⁵³ These strategies foreclose private choice and therefore disserve liberty.¹⁵⁴ Instead, interventions should be “compatible with consumer and seller incentives”¹⁵⁵ and should allow people to opt out of the specified arrangement.¹⁵⁶ Providing sufficient information for consumer protection, including nutrient disclosure, is one such intervention.¹⁵⁷ Nutrient disclosure allows people to make healthier choices based on accurate information,¹⁵⁸ while permitting them to continue to consume less healthy products if they prefer.

Liberty concerns also arise when non-information-based regulations are paternalistic toward a select group of individuals.¹⁵⁹ For instance, according to critics, the Los Angeles City Council “apparently felt that residents of [certain] neighborhoods—residents who are disproportionately African-American and Latino—cannot decide for themselves what to consume” and therefore enacted a moratorium on new fast food restaurants in those areas.¹⁶⁰ The idea that the food options of certain consumers should be restricted based on factors such as race, socioeconomic status, or weight implies that those groups need special restrictions on their liberty.¹⁶¹

¹⁵³ For example, ingredient bans may force restaurants to reformulate their recipes and change the tastes or textures of their products, or even remove items from their menus. See Choi, *supra* note 51, at 507 (“For the past fifty years, *trans* fat has been enhancing the overall taste, texture, and quality of processed food by keeping cakes moist, cookies crispy, chips crunchy, and breads soft.”) Restrictive zoning of fast food restaurants has also been criticized as too restrictive of personal liberty. See, e.g., Saletan, *supra* note 56 (“We’re not talking anymore about preaching diet and exercise, disclosing calorie counts, or restricting sodas in schools. We’re talking about banning the sale of food to adults. Treating French fries like cigarettes or liquor. I didn’t think this would happen in the United States anytime soon. I was wrong.”).

¹⁵⁴ Sunstein, *supra* note 97, at 659.

¹⁵⁵ Beales et al., *supra* note 131, at 491.

¹⁵⁶ See Sunstein & Thaler, *supra* note 114, at 1161 (explaining the libertarian aspect of the “libertarian paternalism” strategy).

¹⁵⁷ Beales et al., *supra* note 131, at 491.

¹⁵⁸ See *supra* Part II.A.

¹⁵⁹ This excludes paternalism based on status as a minor, which is generally accepted.

¹⁶⁰ John Cloud, *Top 10 Everything of 2008: Food Trends; Nanny-State Food Regulations*, TIME.COM, http://www.time.com/time/specials/2008/top10/article/0,30583,1855948_1864255_1864257,00.html.

¹⁶¹ See, e.g., Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921*, 5 LAW & HIST. REV. 249, 250–51 n.4 (1987) (listing several Supreme Court decisions in which the Court announced that “it is within the undoubted power [of Congress] to restrain some individuals from some contracts” with regard to women, while rejecting such protections for men (quoting *Frisbie v. United States*, 157 U.S. 160, 165 (1895))); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998) (“The system’s treatment of crack relative to other drugs is a kind of

Nutrient disclosure, however, protects consumers by providing them with improved decision-making capabilities¹⁶² instead of dictating their decisions. Any changes in the selection of ingredients or cooking methods as a result of calorie disclosure would be market-driven and based on consumer valuations of nutrient levels, not the result of outright bans based on a certain level of risk.¹⁶³ Meanwhile, universal nutrient disclosure would avoid problems with unequal liberty.

3. *Preventing Discrimination Based on Obesity*

Adopting nutrient disclosure instead of other anti-obesity policies, avoids restrictions that discriminate against obese people and is less likely to reinforce the perception that obese people are inferior.¹⁶⁴ Such restrictions could intrude on individual choice by banning particular ingredients or, more worrisome, by controlling behavior through diet modification or drug therapy.¹⁶⁵ Critics of government action regarding the obesity problem in America sometimes claim that a “war on obesity” would further stigmatize the obese by legitimizing negative attitudes. Likewise, promoting restrictions on obese people “could be viewed as just deserts for a deviant population.”¹⁶⁶ Additionally, policies allowing discrimination against the obese in health insurance illustrate the potential for discrimination.¹⁶⁷

However, government action in response to AIDS, a disease sometimes caused by sexual behavior, may demonstrate why nutrient disclosure can avoid the risk of stigmatization and discrimination.¹⁶⁸ Stigmatization of the obese is similar to stigmatization of homosexual men with AIDS in that discriminatory attitudes toward both are often rooted in notions of moral failure and personal

paternalism that purports to favor rather than harms black neighborhoods. But this paternalism is double-edged; it sends the message that some neighborhoods (and some groups) are subject to different standards than others.”).

¹⁶² See *supra* Part II.A.1.b.

¹⁶³ See *supra* Part II.A.2.

¹⁶⁴ Cf. Katherine Mayer, Note, *An Unjust War: The Case Against the Government’s War on Obesity*, 92 GEO. L.J. 999, 1013–14 (2004) (“Any policy . . . that treats obesity as a problem that must be eliminated is likely to reinforce the perception that the obese are inferior.”).

¹⁶⁵ *Id.* at 1018.

¹⁶⁶ *Id.*

¹⁶⁷ See Jacob Sullum, *The War on Fat: Is the Size of Your Butt the Government’s Business?*, REASON, Aug./Sept. 2004, at 20, available at <http://www.reason.com/news/show/29238.html> (referencing Richard Epstein’s proposal, made at the American Enterprise Institute’s conference on obesity, suggesting that employers and insurance companies should be able to discriminate based on weight).

¹⁶⁸ See Mayer, *supra* note 164, at 1017 (comparing effective anti-AIDS policies with potential anti-obesity policies).

responsibility for the condition.¹⁶⁹ Policies regarding AIDS considered the risk for stigmatization and for that reason “did not focus on restricting behavior” that may have posed civil liberties concerns—rather “the government disseminated information to enable people to make informed decisions about their behavior.”¹⁷⁰ Nutrient disclosure at restaurants similarly uses information to help people make informed decisions about their behavior¹⁷¹ but does not restrict individual behavior or access to food—a major concern of “war on obesity” critics.

III. NATIONAL STANDARDS

A labeling law created to deal with the information shortfall at restaurants should address the problem of overconsumption without being unduly burdensome to the regulated restaurants. This Part will use several examples to demonstrate the patchwork problem, in which an industry is burdened by a variety of regulatory and enforcement schemes. The menu labeling battle in California shows the restaurant industry’s preference for national uniform standards over a patchwork of regulations. Additionally, the NLEA offers valuable precedent for creating a national standard for nutrition labeling.

A. *The Patchwork Problem and Economies of Scale*

According to the International Franchising Association, 56.3% of quick service restaurant establishments and 13.3% of table service restaurant establishments in the United States are franchises.¹⁷² The proliferation of franchises in the restaurant industry creates the need for uniform standards because it increases the likelihood that the same restaurant will operate in multiple jurisdictions.

The restaurant industry prefers a national standard instead of a patchwork of jurisdictions with different standards. According to the National Restaurant Association, the proliferation of different state and local laws mandating that

¹⁶⁹ See J. Eric Oliver & Taeku Lee, *Public Opinion and the Politics of Obesity in America*, 30 J. HEALTH POL. POL’Y & L. 923, 928–29 (2005) (explaining the root of anti-obesity sentiments); see also Mayer, *supra* note 164, at 1017 (explaining that because homosexual men were badly stigmatized, anti-AIDS policies were careful to protect civil liberties).

¹⁷⁰ Mayer, *supra* note 164, at 1017.

¹⁷¹ See *supra* Part II.A

¹⁷² INT’L FRANCHISE ASS’N, ECONOMIC IMPACT OF FRANCHISED BUSINESSES, NATIONAL OVERVIEW (2005), available at <http://www.buildingopportunity.com/download/National%20views.pdf>.

chain restaurants put nutrition information on menus has created “a growing patchwork of regulation that is not helpful to the consumer and is harmful to restaurateurs.”¹⁷³ Similarly, the Coalition for Responsible Nutrition Information, an industry group consisting of restaurants, chain food service establishments, retailer associations, the Grocery Manufacturers Association, and restaurant associations, has stated:

A handful of cities have adopted ordinances requiring disclosure of some nutrients, but the mandates on restaurants are inconsistent and confusing to consumers. Providing nutrition information on a city-by-city or state-by-state basis creates a patchwork quilt of confusing and contradictory local regulation that does not provide consumers with the detailed nutrition information they seek.¹⁷⁴

This policy position opposing state regulations should not be confused with a general anti-regulatory position as both the restaurant and grocery organizations support the LEAN Act in Congress.¹⁷⁵ Complying with different disclosure requirements can be difficult for restaurateurs and others because doing so eliminates economies of scale and requires direct costs to monitor up to fifty different regulatory systems and create menus for each system.¹⁷⁶ Indirect costs associated with such things as different products, serving sizes, or packaging in different jurisdictions also increase.¹⁷⁷

B. *The California Example*

An example from California demonstrates the preference of the restaurant industry for uniformity. In 2007, state legislators sought to provide consumers with information to help them make consumption choices,¹⁷⁸ but the bill was

¹⁷³ Nat'l Rest. Ass'n, Public Policy Issue Brief: Menu Labeling/Nutrition Information, <http://www.restaurant.org/government/issues/issue.cfm?Issue=menulabel> (last visited Sept. 11, 2009).

¹⁷⁴ Coal. for Responsible Nutrition Info., Frequently Asked Questions, <http://www.nationalnutritionstandards.com/faq.html> (last visited Sept. 11, 2009).

¹⁷⁵ Nat'l Rest. Ass'n, *supra* note 173.

¹⁷⁶ See David F. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green"*, 81 CAL. L. REV. 991, 1003 (1993) (“Smaller companies may lack the resources necessary to monitor up to fifty possible variations in green marketing regulation.”).

¹⁷⁷ See *id.* (using the food labeling costs, which “are literally incalculable” to explain the need for uniform green marketing standards (quoting Richard L. Frank, *Food Labeling—The Case for National Uniformity*, 34 FOOD DRUG COSM. L.J. 512, 512 (1979))).

¹⁷⁸ Press Release, Senator Alex Padilla, *supra* note 2. Senator Padilla, a sponsor of the bill, said, “This is a huge victory for all those who care about public health. When we talk about prevention, it begins with information. It is difficult to make good choices about what we eat without good information. This bill will provide that information. The public has a right to know.” *Id.*

staunchly opposed by the restaurant industry.¹⁷⁹ Governor Arnold Schwarzenegger vetoed the measure that would have required certain chain restaurants operating within the state to post calorie, saturated fat, trans fat, carbohydrate, and sodium quantities on menus.¹⁸⁰ The California Restaurant Association praised Governor Schwarzenegger for his veto of the law,¹⁸¹ which he said would “place burdens and costs upon some restaurant owners while imposing no burdens or costs on others” and would have “provide[d] restaurants with little flexibility for how they provide consumers with nutritional information.”¹⁸²

Within a year, both the restaurant industry and the Governor had changed their opinions of statewide menu labeling.¹⁸³ During that time, the City and County of San Francisco,¹⁸⁴ Santa Clara County,¹⁸⁵ and San Mateo County¹⁸⁶ passed their own ordinances requiring nutrient disclosure at restaurants.¹⁸⁷

¹⁷⁹ Press Release, Cal. Rest. Ass'n, *supra* note 130. According to the California Restaurant Association, the bill would have placed “an onerous and intrusive burden on restaurateurs” and would have had “no affect [sic] on obesity rates.” The Association also said, “This bill is just a legislative ‘feel good’ Band-aid that ignores the true issues behind obesity while punishing restaurants.” *Id.*

¹⁸⁰ Bill Analysis, Senate Rules Committee, S.B. 120, 2007–2008 Sess. (Cal. 2008), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0101-0150/sb_120_cfa_20080108_154841_sen_floor.html. The law would have applied to restaurants with more than fourteen outlets in the state. *Id.*

¹⁸¹ Press Release, Nat'l Rest. Ass'n, National Restaurant Association Praises Governor Schwarzenegger for Vetoing Menu Labeling Bill (Oct. 15, 2007), available at <http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1507>.

¹⁸² Veto Message, S.B. 120 (Oct. 14, 2007), available at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0101-0150/sb_120_vt_20071014.html.

¹⁸³ See *infra* notes 186–87. See also CAL. HEALTH & SAFETY CODE § 114094 (West 2008).

¹⁸⁴ S.F., CAL., HEALTH CODE art. 8, §§ 468.3–468.8 (2008), *suspended* by S.F., Cal., Ordinance No. 260–08, S.F., CAL., HEALTH CODE art. 8, § 468.9 (2008). The ordinance required the disclosure of calorie, saturated fat, carbohydrate, and sodium amounts next to or beneath each menu item. *Id.* See also Erin Allday, *S.F. Supes Require Posting of Nutrition Info*, S.F. GATE, Mar. 12, 2008, at C1 (explaining that the ordinance, which passed unanimously, defined a chain restaurant as a restaurant with twenty or more locations in California and was “aimed at curbing the fallout from Americans’ unhealthy eating habits, seen in rising rates of obesity and Type 2 diabetes”).

¹⁸⁵ SANTA CLARA COUNTY, CAL., CODE OF ORDINANCES div. A18, ch. XXII (2008), *repealed* by Santa Clara County, Cal., Ordinance NS-300.795 (requiring chain restaurants to provide basic nutrient and calorie information to consumers).

¹⁸⁶ SAN MATEO COUNTY, CAL., ORDINANCE No. 4436 adding Ch. 4.58 (Sept. 9, 2008), *repealed* by SAN MATEO COUNTY, CAL., ORDINANCE No. 4446 repealing Ch. 4.58 (Oct. 28, 2008) (repealing the ordinance after the enactment of a preemptive state law); *San Mateo County Adopts Restaurant Menu Label Law*, CBS5.COM, Aug. 13, 2008, <http://cbs5.com/food/restaurant.menu.rules.2.794226.html>.

¹⁸⁷ The California Restaurant Association filed suit against the localities, arguing that the local laws were preempted by federal statute. See *California Restaurant Association Sues over San Francisco Menu Labeling*, S.F. BUS. TIMES, July 7, 2008, <http://sanfrancisco.bizjournals.com/sanfrancisco/stories/2008/07/07/daily15.html>; Press Release, Cal. Rest. Ass'n, CRA Files Second Menu Labeling Lawsuit (July 23, 2008), available at

When a second statewide labeling law was proposed, the restaurant industry supported what it had previously opposed, preferring a statewide mandate to a patchwork of local requirements.¹⁸⁸ The law was subsequently passed by the legislature and signed into law in September 2008;¹⁸⁹ this time it was praised by Governor Schwarzenegger.¹⁹⁰ California was the first state to implement a nutrient disclosure program, and cities nationwide have followed with similar plans, while several policymakers at the state and federal levels have proposed more widespread labeling requirements.¹⁹¹

C. *The NLEA: Uniform Food Labeling Precedent*

Uniform standards have been adopted in several other information disclosure programs. For example, both the Federal Cigarette Labeling and Advertising Act of 1965, which requires warning labels on cigarette packaging, and the Telecommunications Act of 1996, which established a television ratings disclosure system, are national laws regarding the disclosure of product information.¹⁹² The most relevant statute to the restaurant labeling question is the NLEA, the nutritional labeling law for packaged food products.¹⁹³

The NLEA created a nationally uniform nutrition labeling law, establishing the “Nutrition Facts” label for packaged food sold in stores and creating standards for voluntary nutritional claims such as “Low Fat.”¹⁹⁴ In enacting the NLEA, “Congress sought to free manufacturers from . . . fifty or more different labeling requirements and from the threat of fifty different type

<http://www.calrest.org/go/cra/news-events/news/press-releases/cra-files-second-menu-labeling-lawsuit/>. See also *supra* Part I.C.

¹⁸⁸ Jim Sanders, *California to Require Restaurant Calorie Disclosure*, SACRAMENTO BEE, Oct. 1, 2008, at 17A (“The California Restaurant Association dropped its opposition and become a supporter of SB 1420 after deciding it makes sense to create a statewide standard, rather than comply with a mixture of local laws.”). The new bill raised the minimum number of franchises required to trigger the mandate, and it allowed for brochures disclosing calories, fat, carbohydrates, and sodium, rather than requiring such labeling on the menu itself, from July 2009 until January 2011, when chain restaurants must provide only calorie content on menus or menu boards. *Id.*

¹⁸⁹ Press Release, Cal. Rest. Ass’n, Governor Signs Menu Labeling Legislation Creating Statewide Standards (Sept. 30, 2008), available at <http://www.calrest.org/go/cra/news-events/newsroom/governor-signs-menu-labeling-legislation-creating-statewide-standards/?keywords=menu%20labeling>.

¹⁹⁰ Press Release, Office of the Governor of the State of Cal., *supra* note 54.

¹⁹¹ See *supra* Part I.

¹⁹² Rebecca S. Fribush, Note, *Putting Calorie and Fat Counts on the Table: Should Mandatory Nutritional Disclosure Laws Apply to Restaurant Foods?*, 73 GEO. WASH. L. REV. 377, 381–83 (2005).

¹⁹³ 21 U.S.C. § 343 (2006).

¹⁹⁴ *Id.*

lawsuits”¹⁹⁵ Congress agreed to preempt most inconsistent state labeling laws to get the support of the food industry, thus creating a uniform national standard.¹⁹⁶ The “Nutrition Facts” label has come into general acceptance across the country, and studies show frequent and substantial direct use of the NLEA labels by consumers for point-of-purchase information.¹⁹⁷

IV. PREEMPTION AND STATE AND LOCAL ROLES

A federal law mandating calorie disclosure or more comprehensive labeling on menus or menu inserts would address the information shortfall with regard to restaurant food and may have significant effects on public behavior and public health. However, states and localities should continue to address the obesity problem through means such as concurrent enforcement of labeling laws, supplemental labeling requirements, and labeling alternatives. One scholar notes:

Because there is no single cause of the obesity epidemic, solutions to the problem are unlikely to be simple or singular in nature. Absent the appearance of some *deus ex machina*, such as a broadly effective anti-weight-gain pill with few side effects, which does not appear likely, remedies to this enormous social problem are going to have come from many angles and disciplines.¹⁹⁸

Any federal law addressing obesity should keep in mind the complex nature of the obesity problem and encourage experimentation on the state and local level.¹⁹⁹ This Part will examine preemption options available to policymakers. It will first address the possibility of concurrent enforcement power. Second, it will discuss supplemental labeling requirements and the degree to which federal law should preempt those requirements. It also suggests that the federal nutrient disclosure law should not preempt state common law claims. Finally, this Part will outline additional state and local actions that may be taken to further address the obesity problem.

¹⁹⁵ Michele M. Bradley, *The States' Role in Regulating Food Labeling and Advertising: The Effect of the Nutrition Labeling and Education Act of 1990*, 49 FOOD & DRUG L.J. 649, 657 (1994).

¹⁹⁶ *Id.*

¹⁹⁷ D. I. Padberg, *Nutritional Labeling as a Policy Instrument*, 74 AM. J. AGRIC. ECON. 1208, 1209–10 (1992).

¹⁹⁸ David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 683 (2008).

¹⁹⁹ See William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007) (discussing experimentalists' goals of policy innovation and adjustment).

A. Concurrent Power

Allowing for concurrent enforcement power would give states the option to enforce a federal labeling law. Section 307 of the Food Drug and Cosmetic Act (FDCA) allows for coordination of state and federal governments to enforce the NLEA.²⁰⁰ States must give notice to the Food and Drug Administration (FDA) and wait thirty days for the FDA to initiate its own action.²⁰¹ If the FDA initiates an action and prosecutes, the state may intervene, but if the FDA settles, the state cannot initiate an action.²⁰² This system allows for cooperation between states and the federal government and may be more effective than exclusive federal enforcement since there would be enforcement opportunities at both levels.²⁰³ State enforcement has a variety of other benefits: state enforcement bodies respond more rapidly, better understand local conditions, tend to be more flexible and innovative and less bureaucratic, and have more interaction with the regulated community.²⁰⁴

States also could be given the power to adopt statutes identical to the federal one and enforce the law without the notice and coordination requirements necessary to enforce the federal law.²⁰⁵ Such a system would give states the option to become more or less involved in enforcement, and it would not create additional requirements for restaurants. Therefore, the patchwork problem would not arise, and states would maintain a role in nutrition labeling enforcement. During the passage of the NLEA, states generally supported the law because it allowed them have a role in enforcing the requirements.²⁰⁶

B. Supplemental Labeling Requirements

Because of the patchwork problem, state or local labeling laws that establish different standards for restaurants that are covered by the federal law

²⁰⁰ Craig Jordan, *Preemption and Uniform Enforcement of Food Marketing Regulations*, 49 FOOD & DRUG L.J. 401, 405–06 (1994).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1571 (1995) (noting the lack of resources for enforcement and asserting that “[s]trong state enforcement programs are invaluable within a federal system”).

²⁰⁴ *Id.*

²⁰⁵ See Jordan, *supra* note 200, at 406 (noting that under the NLEA, states that adopt parallel statutes do not have to give notice to the FDA or wait for an FDA response to bring their own action).

²⁰⁶ Bradley, *supra* note 195, at 657.

should be expressly preempted.²⁰⁷ However, states and localities should still be able to require labeling for restaurants that are not covered by federal law.

1. *Federal Floor and Ceiling*

Under the NLEA, states may adopt and enforce standards that are identical to the federal standards, but cannot require labeling that is not identical. The NLEA thus creates a national standard.²⁰⁸ However, states may petition the FDA for exemptions from preemption in response to local concerns if: (1) the requirement will not cause any food to violate any federal law, (2) the requirement will not unduly burden interstate commerce, and (3) the requirement will address a particular need not met by the federal law.²⁰⁹ Given the patchwork problem, this generally preemptive but somewhat flexible standard makes sense for restaurant nutrient disclosure laws.²¹⁰ Therefore, states should not have authority to require less stringent or more stringent restaurant nutrient disclosure measures unless the FDA gives them permission. While there are benefits to providing only a federal floor—such as maintaining the ability to experiment with different regulations²¹¹—the patchwork problem is overwhelming in this instance.

2. *Local Restaurant Menu Labeling*

It is possible that any federal law mandating nutrient disclosure would only apply to certain restaurants, such as those with a minimum number of outlets or which operate in interstate commerce.²¹² Because 56.3% of fast food

²⁰⁷ For instance, a state or local law that imposed a more rigid standard than the federal law would re-create the very patchwork problem the federal law was meant to eliminate. See Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 777–79 (2008). Express preemption is contrasted with implied preemption, under which courts conclude that the law is preempted because the federal law is meant to occupy the field (field preemption) or because the state and federal law conflict (conflict preemption). Implied conflict preemption can result when the laws are mutually exclusive such that they cannot be complied with simultaneously, or when the state or local law impedes a goal of the federal law. *Id.*

²⁰⁸ See Jordan, *supra* note 200, at 402 (listing several sections in which requirements that are not identical to the federal requirements are preempted).

²⁰⁹ Bradley, *supra* note 195, at 660.

²¹⁰ See *supra* Part III.

²¹¹ Buzbee, *supra* note 199, at 145.

²¹² See Pomeranz & Brownell, *supra* note 18, at 1579–81 (“Most of proposed menu-labeling laws require compliance based on the number of units in an establishment’s chain . . .”). Both the MEAL and LEAN Acts proposed in Congress contain a minimum outlet requirement. MEAL Act, H.R. 2426, 111th Cong. (2009); MEAL Act, S. 1048, 111th Cong. (2009); LEAN Act, S. 558, 111th Cong. (2009); LEAN Act of 2009, H.R. 1398, 111th Cong. (2009). Failure to create a jurisdictional hook could open the law to challenge under the

restaurants are franchises, fast food restaurants are more likely to satisfy the potential jurisdictional or outlet requirement than table service restaurants, of which only 13.3% are franchises.²¹³ However, meals from table service restaurants are often larger and have more calories than meals from fast food restaurants.²¹⁴ Failure to require disclosure at small chain or independent restaurants may skew consumers' predictions about the nutrient content of those meals, causing them to think that restaurants that do not provide labels are healthier.²¹⁵ For this reason, states and localities may want to impose restrictions on restaurants not covered by the federal law proposed here. Because these local laws would not conflict with federal law, supplemental labeling requirements should be permitted. Whether these supplemental laws would be politically acceptable should be left to the states and localities considering them.

C. *State Common Law Suits*

Policymakers must also consider whether creating a national standard for labeling would preempt state common law claims that consumption of restaurant food contributed to consumers' obesity. Lawmakers should be explicit about whether the requirements of the federal law preempt only positive state law or whether state tort actions are also preempted.²¹⁶

There are a variety of reasons why state common law suits attempting to link restaurant food consumption to obesity have not been successful, even without nutrient disclosure laws.²¹⁷ For example, several states have passed "Commonsense Consumption" laws, or "Cheeseburger Bills," protecting manufacturers, marketers, distributors, and sellers of food from personal injury

Commerce Clause. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 (1995) (invalidating part of the Safe and Gun Free School Zones Act that contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating part of the Violence Against Women Act that had no jurisdictional element).

²¹³ INT'L FRANCHISE ASS'N, *supra* note 172.

²¹⁴ *Home-Cooking Beats Restaurants in Calories*, *supra* note 21.

²¹⁵ See *supra* Part II.A.

²¹⁶ See David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 99–100 (2005) (arguing that the Supreme Court's decisions regarding this type of interpretation are unclear and erroneous).

²¹⁷ See, e.g., *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (dismissing a failure to warn claim brought by restaurant patrons who were minors); Bonnie Hershberger, *Supersized America: Are Lawsuits the Right Remedy?*, 4 J. FOOD L. & POL'Y 71, 86 (2008) (explaining that legal barriers to fast food lawsuits are immense). This Comment maintains that a nutrient disclosure mandate is the preferred method of addressing restaurants' contributions to obesity. See discussion of problems with imposing tort liability, *infra* notes 228–31 and accompanying text.

claims connecting consumption of certain foods to weight gain.²¹⁸ Similar federal bills were proposed in the 108th, 109th, 110th, and 111th sessions of Congress.²¹⁹ With the adoption of a mandatory disclosure law, it may be even more difficult to bring such suits because nutrient disclosure will likely fulfill any duty to warn or disclose that might otherwise arise under state common law.

It is conceivable, however, that in some cases it might be appropriate for consumers to sue restaurants under state common law; therefore, federal law mandating nutrient disclosure should not preempt such suits. There are several risks associated with preempting state common law claims. Federal preemption of these remedies may eliminate the corrective justice role of courts.²²⁰ Consumers have direct redressability through litigation and can be compensated for individual injuries.²²¹ Second, litigation may establish optimal disclosure requirements for restaurants to follow, whereas a labeling law would impose minimum requirements that may not be enough to fully protect consumers.²²² For example, while the NLEA establishes rules for use of advertising claims such as “Low Fat,”²²³ a court may find that compliance with the law was not enough to protect consumers in all cases.²²⁴ Common law liability may be particularly appropriate where a food company “knew advertisements for high calorie ‘low fat’ or ‘low carb’ foods would be understood by customers as assuring their usefulness as part of a weight reduction diet” and failed to protect consumers despite this knowledge.²²⁵ Because statutes regulating industry often balance public health concerns with the desire to promote innovation or control cost, it is difficult to ensure that those statutes impose an adequate margin of safety in all circumstances.²²⁶

²¹⁸ Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 404 (2008). Twenty-three states have enacted such laws. *Id.*

²¹⁹ *E.g.*, Commonsense Consumption Act, H.R. 812, 111th Cong. (2009).

²²⁰ THOMAS O. MCGARITY, *THE PREEMPTION WAR* 33 (2008).

²²¹ *Id.*

²²² *See id.* (“Without the incentive provided by common law rules, private entities will be guided only by the incentives provided by the regulatory laws.”); Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry*, 56 DUKE L.J. 1403, 1418 (2007) (“[A]gencies sometimes impose only minimum requirements, not optimal ones, and when that is the case, tort law could be more accurate in reflecting the socially desired course of action.”).

²²³ 21 U.S.C. § 343 (2006).

²²⁴ MCGARITY, *supra* note 220, at 36–37 (“[J]uries should be allowed to conclude that the defendant should have taken additional measures to protect potential plaintiffs.”).

²²⁵ *See* Richard A. Daynard et al., *Private Enforcement: Litigation as a Tool to Prevent Obesity*, 25 J. PUB. HEALTH POL’Y 408, 409 (2004).

²²⁶ Vladeck, *supra* note 216, at 130.

State tort law can therefore provide a mechanism to impose that margin of safety and ensure more complete consumer protection.²²⁷

Despite the benefits of allowing state common law claims, there are several problems with relying on a tort scheme to address the role restaurant food plays in obesity. First, most restaurant food is not inherently dangerous or harmful.²²⁸ Moderate consumption of fast food does not create the dangers associated with overconsumption, and by burning excess calories, consumers can avoid the negative health consequences of being overweight. Second, if the problem is a lack of information, establishing a direct system for providing such information is preferable to the slow definition of rights and duties through extensive litigation.²²⁹ Third, litigation could raise negative attitudes toward the obese by portraying obese people as opportunistic.²³⁰ Providing information about restaurant food through nutrient disclosure also fits neatly into the *Pelman* court's list of appropriate areas to be regulated—packaged food, alcoholic beverages, and controlled substances—while it would be out of place with litigation addressing post-hoc harms, such as that involving asbestos, diet pills, and breast implants.²³¹ For these reasons, a mandatory nutrient disclosure law is the most appropriate tool for requiring nutrient disclosure and fighting obesity, but the federal disclosure law should not foreclose the opportunity for consumers to bring state common law claims. State legislatures should decide if it is wise to allow such suits, and if so, state courts should have discretion to entertain consumer arguments.

²²⁷ *Id.*

²²⁸ See Daynard et al., *supra* note 225, at 408 (“Unlike tobacco, which is harmful when consumed in any quantity, food is necessary for life.”).

²²⁹ Courts could establish duties other than the duty to disclose, thereby mandating a remedy that is not based on providing consumers with appropriate information. Beales et al., *supra* note 131, at 513 (“[W]here inefficient outcomes are the result of inadequate consumer information, information remedies will usually be the preferable solution.”). While courts may eventually arrive at an appropriate disclosure rule, extensive litigation would be required to establish clearly defined rights and duties. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 120 (1999) (explaining that when the scope of rights are unclear, litigation rates will be high, especially at the appellate level, until precedents defining rights and duties are created). *But see* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 364 (1984) (“[U]nder a well-functioning negligence rule, defendants should in principle generally have been induced to take due care; injured parties should recognize this and thus not bring suit.”). There are a variety of possible duties that courts may choose to establish. Is there a duty to warn that foods are unhealthy? To warn that foods that are perceived as healthy are not? To protect children from unhealthy foods? See, e.g., Caroline Fabend Bartlett, Comment, *You Are What You Serve: Are School Districts Liable for Serving Unhealthy Food and Beverages to Students?*, 34 SETON HALL L. REV. 1053 (2004) (arguing that school districts have a duty to maintain a healthful environment).

²³⁰ Hershberger, *supra* note 217, at 90.

²³¹ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

D. Adopting Alternatives to Labeling

States and localities can implement, and have implemented, local initiatives and therefore do not present the patchwork problems that necessitate federal intervention. These initiatives include community planning, such as zoning, and targeted sales restrictions, such as restrictions on the sale of unhealthy snacks in schools. Other states and localities have banned particular ingredients such as artificial trans fats in restaurants. In addition, many states and localities tax food items and ingredients that diminish public health. These efforts do not interfere with other state or federal programs and can be tailored to specific community needs.²³²

While many of these strategies have potential pitfalls²³³ and should be adopted only after careful balancing of potential costs and benefits, there is still value in permitting states and localities to develop different regulatory strategies to address specific community concerns.²³⁴ Small-scale experimentation with different approaches to combat obesity may generate valuable data for policymakers at all levels of government.²³⁵ Allowing state and local experimentation with other strategies may offset the loss of regulatory benefits due to the preemption of local labeling requirements.²³⁶ Because the obesity problem is so multifaceted, the effectiveness of different strategies will vary. For instance, studies have shown that banning sodas in schools has little effect on soda consumption.²³⁷ States and localities should continue to try such new strategies that address specific concerns of their communities but do not interfere with federal programs.

²³² See Gorovitz et al., *Preemption or Prevention? Lessons from Efforts to Control Firearms, Alcohol, and Tobacco*, 19 J. PUB. HEALTH POL'Y 36, 37–38 (1998) (explaining that arguments for preemption “ignore the wide variation in demographic, socioeconomic and other factors which lead to variations in risk across communities” and asserting that “local governments need additional authority to address additional risks that are relevant in their own communities”).

²³³ See *supra* Part II.B.

²³⁴ See Gorovitz et al., *supra* note 232, at 40 (explaining that “[b]eyond the areas of advertising and labeling . . . local governments have retained considerable authority to regulate the sale and use of cigarettes,” and noting that this authority has resulted in successful smoking ordinances and youth access restrictions).

²³⁵ See Buzbee, *supra* note 199, at 153 (outlining experimentalist literature).

²³⁶ William W. Buzbee, *Introduction*, in PREEMPTION CHOICE 1, 3 (William W. Buzbee ed., 2009) (“[S]trong assertions of preemption can threaten to freeze the law or lead to neglect of changing discoveries about an underlying social ill.”); see also Buzbee, *supra* note 199, at 155 (“Unitary federal-choice ceiling preemption looks like a total disaster when examined in light . . . of experimentalist literature . . .”).

²³⁷ See, e.g., Nagourney, *supra* note 57 (citing a study showing that soda bans in school have little effect on soda consumption of students); Parker-Pope, *supra* note 57 (citing an article in the *Journal of Nutrition Education and Behavior* that studied soda consumption by students in Maine and found no meaningful differences in overall soft drink consumption).

1. *Community Planning and Targeted Sales Restrictions*

Community planning, which is undoubtedly within the domain of state and local governments, could be a valuable tool to combat obesity.²³⁸ For example, zoning has been used to ban fast food restaurants in certain areas.²³⁹ Localities can also use community planning and incentives to promote grocery stores that would make healthy food choices more accessible, to encourage health practitioners to operate in underserved areas, or to preserve public space for parks and sidewalks to encourage physical activity.²⁴⁰ Initiatives based on this local power should be preserved and encouraged,²⁴¹ and valuable information regarding successes and failures of community experiments should be shared.²⁴²

2. *Ingredient Bans and Taxation of Ingredients*

An ingredient ban, such as a ban on artificial trans fats, is another tool that can be used by states and localities concerned about the health effects of certain foods.²⁴³ While some risk of a patchwork problem exists where certain states impose the ban and others do not, the burden is much smaller than that imposed under a patchwork of labeling regimes because there is only one potential restriction with which to comply instead of an entire regulatory regime with many components. Furthermore, because trans fats are quickly disappearing from food products through voluntary reformulation²⁴⁴ and legislatures are aggressively banning artificial trans fats in schools and restaurants,²⁴⁵ it is possible that in the near future most food will be virtually trans fat free.

²³⁸ See Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh In on Wellness*, 5 IND. HEALTH L. REV. 185, 187, 193–98 (2008) (“[C]ommunity design efforts may be the states’ strongest suit in making a difference in our state of wellness.”).

²³⁹ *Id.* at 195.

²⁴⁰ *Id.* at 194–96 (outlining efforts taken in states such as New Jersey, Pennsylvania, and New Mexico).

²⁴¹ See Breighanne Aileen Fisher, Comment, *Community-Based Efforts at Reducing America’s Childhood Obesity Epidemic: Federal Lawmakers Must Weigh In*, 55 DEPAUL L. REV. 711, 738–39 (2006).

²⁴² Buzbee, *supra* note 199.

²⁴³ See *supra* Part I.B.

²⁴⁴ See Choi, *supra* note 51, at 507 (“Beginning in 2003, major food companies voluntarily undertook significant steps to remove *trans* fat as an ingredient in their food products [I]n recent years food companies have been actively exploring ways to squeeze *trans* fat out of their products.”).

²⁴⁵ Nat’l Conference of State Legislatures, *supra* note 49.

Additionally, states and localities should be free to experiment with taxation of certain food products or ingredients,²⁴⁶ as research shows that such taxation reduces consumption of the targeted products.²⁴⁷ Furthermore, taxation does not create the patchwork problems associated with labeling laws.

CONCLUSION

The federal government should adopt a law mandating nutrient disclosure on menus or in inserts presented with menus. At the very least, the disclosure should include caloric content of regular menu items at restaurants engaged in interstate commerce. The exact requirements regarding the format of disclosure, scope of covered nutrients, and applicability of the requirements to small, intrastate restaurants should be determined through consultation with experts and cooperation with states and localities.

There are, of course, risks and costs associated with a labeling program. For instance, restaurants could substitute ingredients with fewer calories but in doing so might expose the public to different risks, such as possible risks from artificial sweeteners or artificial fats. However, it is better to provide information, monitor the effects of the disclosure, and, if need be, to require further disclosure of certain potentially harmful ingredients than to allow members of the public to remain in the dark about the food they eat.

Additionally, critics may note that some data on menu labels would not be entirely accurate because of custom ordering, imprecise measuring in kitchens, and the use of fresh foods.²⁴⁸ However, as long as the federal law requires only a reasonable range of accuracy for the nutrient data of a product based on normal preparation, restaurants can escape falling victim to unreasonable lawsuits or enforcement actions. Nutrient disclosure won't end the obesity problem, but giving people power over their consumption is a good place to start.

DEVON E. WINKLES*

²⁴⁶ See *supra* Part I.B.

²⁴⁷ Jacobson & Brownell, *supra* note 60.

²⁴⁸ McCann, *supra* note 68, at 1193.

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