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Trimming the Fat: A Study of Mandatory Nutritional Disclosure Laws and Excessive Judicial Deference

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Trimming the Fat: A Study of Mandatory Nutritional Disclosure Laws and Excessive Judicial Deference

Charles R. Yates, III*

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* Candidate for J.D., Washington and Lee University School of Law 2010; B.A. Washington and Lee University 2006. Thanks to my mom for her attention to health, which got me interested in this topic, and thanks to both Mom and Dad for listening to me talk about this much more than they would have liked. Thanks also to Professor Jost and the Law Review Board (especially Ryan Decker, Mike McCarthy, and Bridget Tainer-Parkins) for their advice and critiques—this could not have come together without you.

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I. Introduction

Our nation has long struggled with the question of how much government regulation is ideal in various areas of our lives. From the founding to the present day, pitched battles have raged over whether government should, among other things, mandate minimum wages, regulate abortion, institute military drafts, or intervene to rescue the economy. With today's obesity epidemic, a new front has been opened: What steps should the government take to slim down our nation's collective waistline, and how intrusive should those steps be? Some states and cities already have decided what initial steps to take. New York City garnered national attention when it banned trans fats in restaurant food,¹ and California followed suit.² Recently, New York Governor David Paterson attempted to narrow his state's budget gap—and waistline—by imposing a "fat tax" on sugary beverages.³ Now, both New York City and California are at the forefront of another trend: Requiring restaurants to post nutritional information on their menus.⁴

1. See *New York City Passes Trans Fat Ban*, MSNBC.COM, Dec. 5, 2006, <http://www.msnbc.msn.com/id/16051436/> (last visited Mar. 22, 2010) (discussing then-recent passage of New York City plan to phase out trans fats) (on file with the Washington and Lee Law Review). For the text of the plan, see N.Y., N.Y., RULES OF THE CITY OF N.Y., TIT. 24, HEALTH CODE, § 81.08 (2006).

2. See Patrick McGreevy, *State Bans Trans Fats*, L.A. TIMES, July 26, 2008, at A1 (describing new state ban on trans fats).

3. See Sewell Chan, *A Tax on Many Soft Drinks Sets off a Spirited Debate*, N.Y. TIMES, Dec. 17, 2008, at A36 ("The Paterson administration's proposal for an 18 percent tax on sugary sodas and juice drinks . . . has already touched off a vigorous debate among New Yorkers . . ."). For another example of this trend, see Kim Severson, *Throwing the Book at Salt*, N.Y. TIMES, Jan. 28, 2009, at D1 (describing New York City's effort to cut the amount of salt in restaurant and prepackaged meals). Health Commissioner Dr. Thomas Frieden proposes voluntary cuts for now, with more to come within a decade; legislation may deal with the issue if the food industry does not cooperate. *Id.*

4. See N.Y., N.Y., RULES OF THE CITY OF N.Y., TIT. 24, HEALTH CODE, § 81.50 (repealed

At a glance, requiring the posting of nutritional information should be an uncontroversial and unalloyed good. Given that the proportion of obese Americans more than doubled between the 1970s and the early 2000s, and that more than half of New Yorkers were either overweight or obese by 2006,⁵ the city and the country at large have a clear incentive to do something to reverse the trend towards larger waistlines. Because calories are arguably the critical piece of information governing weight gain,⁶ and because Americans also consume one-third of their calories away from home (for example, at restaurants),⁷ requiring restaurants to post caloric information does not seem unreasonable. Even the noted libertarian Judge Richard Posner gives the calorie posting law a tepid endorsement.⁸ However, the restaurants affected by the regulations generally fight them in every available venue, and there is scholarship vigorously opposing these laws as well.⁹ Regardless of the eventual legal outcome in this area, the critical consideration is to gain some sort of stability and predictability—neither restaurants on the one hand nor legislators and the public on the other are served by uncertainty in this field, as restaurants will be confused as to which regulations they are legally obliged to adhere, legislators will be frustrated by an inability to know what regulations will be upheld by the

2008) (detailing plan to require disclosure of nutritional information); CAL. HEALTH & SAFETY CODE § 114094 (West Supp. 2009) (detailing California's statutory scheme to require restaurants to post nutritional information on their menu boards).

5. 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).

6. See *id.* (stating that New York contends that caloric intake is the critical information relating to weight gain).

7. *Id.*

8. See Richard A. Posner, *Compelled Disclosure of Food Characteristics*, BECKER-POSNER BLOG, July 27, 2008, http://www.becker-posner-blog.com/archives/2008/07/compelled_discl.html (last visited Mar. 22, 2010) (making the libertarian case for upholding New York's compelled disclosure of caloric information) (on file with the Washington and Lee Law Review). Posner's justification for supporting the regulation is that it may help to reduce obesity by giving information to consumers in a frightening way and that "it will yield valuable information about the effects of public interventions designed to alter life styles." *Id.*

9. See, e.g., Nicole Anderson, Note, *Would You Like Some First Amendment Rights with That? How Mandatory Nutritional Disclosure on Restaurant Menus Violates the Freedom of Commercial Speech*, 36 HASTINGS CONST. L.Q. 105, 106 (2008) (attacking mandatory disclosure of nutritional information on First Amendment grounds). Anderson argues that Regulation 81.50 is "not directly related to the state's interest and is far broader than what is necessary to accomplish the state's purpose of decreasing obesity rates." *Id.* at 107. She argues vociferously that Regulation 81.50 is unconstitutional under existing First Amendment jurisprudence. *Id.* at 117. This Note, by contrast, will argue that while Regulation 81.50 is arguably unconstitutional under existing jurisprudence, the real problem in this area is that there is currently no appropriate standard to apply.

courts, and consumers may not get the information they desire from restaurants. This Note offers some suggestions for how to achieve this needed certainty.

Part II of this Note explores both the history of these laws and regulations and some present-day efforts to curb health evils such as trans fats and sodium. Part III then discusses the grounds on which opponents fight rules such as New York City of Health Code Regulation § 81.50 (Regulation 81.50), particularly as relates to freedom of commercial speech under the First Amendment. It explores challenges to these rules both on philosophical and legal grounds, examining libertarian arguments for and against such regulations as well as Supreme Court and circuit-level opinions coming down on both sides of the issue. Part IV applies commercial free speech doctrine to Regulation 81.50 to try to determine its chances of being upheld. In particular, Part IV applies the *Central Hudson* test to such requirements, but also explains why no existing test is a comfortable fit. Part IV goes on to suggest an alternative test for this particular type of compelled disclosure. Finally, Part V explores some of the implications of the new test, and also recommends some means of compliance that would be beneficial to states, consumers, and businesses.

II. History of Nutritional Labeling Laws and Regulations

A. General History

The United States has a fairly long history of requiring some sort of labeling on food and drugs. The 1938 passage of the Federal Food, Drug, and Cosmetic Act (FDCA)¹⁰ is regarded as a watershed moment in the regulation of these items.¹¹ It required that all drugs be approved by the Food and Drug Administration (FDA) before they could be brought to market, and also created new standards for safety in the food supply.¹² Critically, for labeling purposes, the law strengthened requirements that food and drugs not be misbranded or adulterated.¹³

10. 21 U.S.C. §§ 301–399 (2006).

11. See United States Food and Drug Administration, *The 1938 Food, Drug, and Cosmetic Act*, HISTORY OF THE FDA, <http://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm054826.htm> (last visited Mar. 22, 2010) (stating that the FDCA was a critical law in regulating the quality of food and drugs) (on file with the Washington and Lee Law Review).

12. See *id.* (last visited Mar. 22, 2010) (giving history leading up to enactment of FDCA and provisions of the statute) (on file with the Washington and Lee Law Review).

13. See 21 U.S.C. § 331 (listing prohibited acts under the FDCA, including the introduction into interstate commerce of any adulterated or misbranded foods or drugs).

The next critical step in labeling laws came in 1990, with the passage of the Nutrition Labeling and Education Act of 1990 (NLEA).¹⁴ The NLEA required the FDA to deem a food intended for human consumption misbranded unless the food contained a label showing the serving size of the product, the number of calories, the amount of fat, and various other pieces of nutritional information.¹⁵ This legislation, of course, gave Americans the now-ubiquitous nutritional labels that appear on virtually every product found in refrigerators and pantries.

Since NLEA, the federal government has not taken steps to change significantly the way consumers receive nutritional information. Recently, however, cities and states have filled the void by crafting their own regulatory regimes. In 2004, eighteen restaurants in Tiburon, California, all certified that they were trans fat free.¹⁶ At around the same time, a nonprofit public advocacy group sued Kraft for having trans fats in Oreo cookies, claiming that the fats had extremely negative health consequences.¹⁷ Nationwide awareness of trans fats increased monumentally.¹⁸ Soon thereafter, state and local governments took action to combat the perceived problem. In December 2006, New York City became the first municipality in the nation to pass a ban on the use of trans fats in restaurants.¹⁹ New York, however, was merely the first of many jurisdictions to act against trans fats, as numerous cities and the State of California²⁰ have now banned their restaurants from cooking with them.²¹ Having dealt with the trans fat problem, many of those same cities and states

14. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, § 2, 104 Stat. 2353, 2353 (codified as amended at 21 U.S.C. § 343).

15. *Id.*

16. See Ban Trans Fats, THE CAMPAIGN TO BAN PARTIALLY HYDROGENATED OILS, *Project Tiburon: America's First Trans Fat-Free City!!!*, <http://www.bantransfats.com/projecttiburon.html> (last visited Mar. 22, 2010) (describing efforts of city restaurants to rid themselves of trans fats) (on file with the Washington and Lee Law Review).

17. See, e.g., Molly Selvin, *Lawyer Who Took on Oreos and McDonald's Fights on in Food War*, L.A. TIMES, Sept. 25, 2005, at C1 (discussing suit against Kraft for having trans fats in Oreos).

18. See *id.* ("The Oreos lawsuit inspired a top-10 list from David Letterman, a rant by Rush Limbaugh and a flood of nasty e-mails.").

19. See *New York City Passes Trans Fat Ban*, *supra* note 1 (describing New York ban on trans fats and noting support from Mayor Michael Bloomberg).

20. See Ban Trans Fats, THE CAMPAIGN TO BAN PARTIALLY HYDROGENATED OILS, <http://www.bantransfats.com> (last visited Mar. 22, 2010) (listing New York City, Philadelphia, and the state of California as jurisdictions that have banned trans fats) (on file with the Washington and Lee Law Review).

21. See McGreevy, *supra* note 2 (reporting that Governor Schwarzenegger had signed the trans fats ban, making California the first state in the nation to ban the use of cooking oils containing trans fats in its restaurants).

have now set about finding additional ways to help their citizens learn about health risks and combat obesity.

One example is New York Governor Paterson's recent proposal to close his state's budget deficit by imposing an 18% tax on sugary beverages.²² Although the tax, which is projected to raise \$404 million in fiscal year 2009,²³ has been pushed mainly as a measure to reduce obesity,²⁴ the beverage industry has characterized it purely as a money-raising measure.²⁵ This cynical characterization appears to have some legitimacy, as the state budget faces a \$15 billion shortfall in the next year.²⁶ Still, the *New York Times* has endorsed the governor's budget proposal,²⁷ so it may have establishment support and momentum. New York is not the only jurisdiction to have proposed such a tax.²⁸ Thus, the next frontier in health regulation may be taxes on sugary foods and beverages.

For now, though, the major trend in the war against obesity is to require restaurants to post calorie information, a trend that New York City has helped lead. The city passed Regulation § 81.50 in December, 2006,²⁹ which required all restaurants that already made public nutrition information on their food to display the amount of calories in each of their dishes on their menus.³⁰ In so

22. See Chan, *supra* note 3, at A36 (describing tax measure as an "obesity tax" on "nondiet sodas and fruit drinks containing less than 70 percent natural fruit juice").

23. *Id.*

24. See *id.* (quoting New York State Budget Director Laura L. Anglin as stating that there is "an obesity epidemic: One out of every four New Yorkers is obese, up from about 14 percent in 1995"). The article goes on to say that the state projects lowered soft drink consumption of about five percent. *Id.*

25. See *id.* (quoting a beverage industry spokesman as saying that "[t]his is purely a money grab that would be paid for by hard-working New York families"). Additionally, the beverage industry has warned that some of the 160,000 jobs supported by the New York state beverage industry could be lost as a result of the tax. *Id.*

26. See Danny Hakim & Jeremy W. Peters, *Taxes and Fees to Rise \$4 Billion in Budget Plan*, N.Y. TIMES, Dec. 15, 2008, at A1 (noting that the New York state budget deficit has grown to \$15 billion and disclosing a number of items to be taxed at higher rates in Governor Paterson's budget proposal, including sugary drinks, furs and boats).

27. See Editorial, *Gov. Paterson's Tough Budget*, N.Y. TIMES, Dec. 18, 2008, at A42 ("Governor Paterson must keep pushing his proposals in Albany. Now that he's created a good budget, the tougher job will be persuading the state's many special interests and their hand puppets in the Legislature to help rescue New York . . .").

28. See Chan, *supra* note 3, at A36 (discussing a tax on sodas and sugary drinks passed in Maine and a similar proposed, though still unpassed, measure in San Francisco).

29. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA I)*, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) (providing history of the regulation).

30. See *id.* (describing requirements imposed by the regulation).

doing, New York hoped to stop the increasing levels of obesity in the city.³¹ This initial version of the regulation was struck down by the Southern District of New York on the ground that it was preempted by federal law.³² The district court ruled that FDA regulations occupied the field of optional nutritional disclosures by restaurants,³³ thus preempting New York's original Regulation 81.50, which required disclosures only by restaurants that already made nutritional information public.³⁴ That setback, however, did not prevent New York or other jurisdictions from continuing their pursuit of a requirement for restaurants to disclose the amount of calories in their food.

B. New York's Current Regulation

In January 2008, almost immediately after the first version of Regulation 81.50³⁵ was struck down, New York City promulgated a new version of the regulation.³⁶ This new version requires restaurants with fifteen or more outlets to post calorie information on their food products on menu boards in their restaurants.³⁷ This information is to be listed in a manner so that customers can ascertain with which item the calorie count is associated.³⁸ To ensure compliance, the item's calorie information must use "a font and format that is at least as prominent, in size and appearance, as that used to post either the name or price of the menu item."³⁹ The regulation gives requirements for how to calculate calories; it also mandates that when an item has over fifty

31. *See id.* (giving details from declaration provided by head of city's health board, which cited statistics claiming that the proportion of overweight and obese New Yorkers has gone up rapidly in recent years).

32. *See id.* at 363 (granting summary judgment to New York State Restaurant Association (NYSRA) on grounds that the city regulation was preempted by federal legislation); *see also infra* Part III.B (discussing challenges to the first version of Regulation 81.50).

33. *See id.* at 362 (asserting that New York City was preempted from regulating nutrient content claims in any manner inconsistent with federal law).

34. *See id.* at 352 ("[Regulation 81.50] would require New York City Restaurants who already make the calorie content information of their menu items publicly available to post such information on their menu boards and menus.").

35. N.Y., N.Y., RULES OF THE CITY OF NEW YORK, TIT. 24, HEALTH CODE, § 81.50 (repealed 2008).

36. *See* 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) (giving factual background on new version of regulation).

37. N.Y., N.Y., RULES OF THE CITY OF NEW YORK, TIT. 24, HEALTH CODE, § 81.50(a)-(c) (2008).

38. *Id.* § 81.50(c).

39. *Id.*

calories the count should be rounded to the nearest ten; items of less than fifty calories should be rounded to the nearest five.⁴⁰ The regulation also mandates rules for food items displayed for sale with tags⁴¹ and for restaurants with drive-through windows.⁴² In addition, the regulation contains rules mandating the manner in which restaurants post calorie information on food items that have different flavors, varieties, and combinations, such as "beverages, ice cream, pizza, and doughnuts."⁴³ Finally, the regulation contains a severability clause, which states that "[i]f any provision of this section . . . is held invalid . . . , the remaining provisions or the application of the section to other persons or circumstances shall not be affected."⁴⁴ The regulation is short, but it can appear fairly complicated. Its essence, though, is as the Southern District of New York described it: "Regulation 81.50 requires certain chain restaurants . . . to post caloric content information in their menus and on their menu boards."⁴⁵

City officials have used a number of health justifications for promulgating the regulation. In *New York State Restaurant Ass'n v. New York City Board of Health (NYSRA I)*, the City stated that more than half of its resident adults were overweight or obese,⁴⁶ and that those afflicted are at higher risk for many diseases.⁴⁷ The City also asserted that calories were "the single most important piece of nutritional information related to weight gain,"⁴⁸ and that consumers' lack of information about their restaurant meals "[led them] to underestimate the caloric content of their away-from-home meals."⁴⁹ In the initial press release hailing passage of the regulation, Health Commissioner Dr. Thomas R. Frieden said the following: "Obesity and diabetes are the only major health

40. *Id.* § 81.50(c)(1).

41. *See id.* § 81.50(c)(2) ("When a food item is displayed for sale with a food item tag, such food item tag shall include the calorie content value for that food item in a font size and format at least as prominent as the font size of the name of the food item.").

42. *See id.* § 81.50(c)(3) (requiring calorie information postings on stanchions next to drive-through menus on which text must be at least as prominent as text displaying item name or price).

43. *See id.* § 81.50(c)(4)(i) (allowing restaurants to post a range of calorie values for combinations, but requiring them to post one value if only one is possible for the combination).

44. *Id.* § 81.50(e).

45. *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).

46. *See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA I)*, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) ("In New York City, more than half of adults are overweight (34.4%) or obese (21.7%).").

47. *See id.* (citing New York's contention that overweight or obese people are at higher risk for diabetes, heart disease, stroke, and cancer).

48. *Id.*

49. *Id.*

problems that are getting worse in New York City. Today, [we] passed a regulation that will help New Yorkers make healthier choices"⁵⁰ The release further asserts that people use calorie information when it is on hand, and that the regulation could thus reduce obesity numbers by 150,000 and diabetes numbers by 30,000 over the next five years.⁵¹

III. Challenges to Nutritional Labeling Laws and Regulations

A. Libertarian Arguments

Many observers oppose regulations meant to curb obesity (like New York City's) on philosophical grounds. Professor Richard Epstein, one of the nation's more prominent libertarian thinkers, is one such person.⁵² Epstein begins with the premise that "the sound background presumption *against* government intervention has not been overcome"⁵³ in the case of efforts to curb obesity. Epstein also believes that scientific evidence relating to obesity's causes and effects is inconclusive.⁵⁴ While he points out flaws in some of the measurement tools used to determine levels of obesity, such as body-mass index (BMI), he concedes that "the underlying trends [of increasing BMI levels] are ominous."⁵⁵ Still, he goes on to note that obesity is not necessarily the only cause of death for the 300,000 people that the Department of Health and Human Services claims it kills every year.⁵⁶ Epstein also makes the point that it has become easier to eat out than to eat at home as fast-food restaurants have proliferated and women have moved into the workforce.⁵⁷ After

50. Press Release, New York Dep't of Health and Mental Hygiene, *Board of Health Votes to Require Chain Restaurants to Display Calorie Information in New York City* (Jan. 22, 2008), <http://www.nyc.gov/html/doh/html/pr2008/pr008-08.shtml> (last visited Mar. 22, 2010) (on file with the Washington and Lee Law Review).

51. *See id.* ("When people have access to calorie information, they use it.")

52. *See generally* Richard A. Epstein, *What (Not) to Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361 (2005) (discussing Epstein's opposition to government efforts to curb obesity).

53. *Id.* at 1364.

54. *See id.* at 1365–66 (describing various conclusions of literature on the subject of obesity and asserting that observers could draw any number of different conclusions from reading this literature).

55. *Id.* at 1367.

56. *See id.* at 1369–70 (giving other possibilities for causes of death relating to obesity, such as obesity's being the manifestation of an underlying condition). Additionally, Epstein points out that if obesity did not cause deaths, there is no way to know when people killed by obesity would otherwise die. *Id.* at 1370.

57. *See id.* at 1371 (crediting Inas Rishad and Michael Grossman for the proposition that

discussing the various problems associated with obesity science, Epstein asserts that governments have four main options in trying to combat obesity: a fat tax (perhaps like the one proposed by Governor Paterson); systems of regulations (such as the one adopted in New York City); systems of liability for food suppliers; or education.⁵⁸ Epstein ultimately concludes that because of the allegedly shaky science and policy uncertainties, individual action is better suited to combating obesity than is government action.⁵⁹ Arguably, Epstein here contradicts one of libertarianism's tenets, namely, that the more information consumers have, the better.⁶⁰ It appears that his basic opposition to government intervention wins out over favoring access to information.

On the other hand, some of those who are usually Epstein's ideological allies support at least limited governmental intervention to combat obesity. Perhaps the most prominent of these allies is Judge Richard Posner, who acknowledges that criticism of the regulation as paternalistic and unnecessary is legitimate but also inconclusive.⁶¹ Posner says that the law would be paternalistic if obesity caused no harm to anyone other than the obese, but posits that obesity does impose negative externalities.⁶² A government informational program that reduced obesity could help to reduce these externalities, especially if aimed at children, because poor eating habits often develop at young ages.⁶³ Posner's hope for the New York regulation is that the shock of seeing calorie values posted on menu boards may scare people into eating fewer calories, thus reducing obesity rates and possibly generating greater happiness.⁶⁴ Posner is not sure of the ultimate effect of the ordinance,

much of the American increase in obesity can be blamed on the growth in the number of fast-food and full-service restaurants since 1980).

58. *See id.* at 1375–85 (giving possible policies to combat obesity and discussing pros and cons of each approach).

59. *See id.* at 1385 ("Individually, not collectively, seems the better approach. Better a bit of self-control than a ton of state initiatives. . . . [A] dose of individual self-control is the only viable option.").

60. *See* Posner, *supra* note 8 (favoring the New York regulation not necessarily because it provides greater information to consumers, but because it will provide information on the efficacy of public interventions in changing life styles).

61. *See id.* (compiling a list of objections to New York's ordinance).

62. *See id.* (asserting that the obese affect others by consuming more medical resources subsidized by the public). However, Posner also notes that obesity may decrease health care costs to the extent that the obese die at younger ages. *Id.*

63. *See id.* (positing that while the result could be lowering of obesity rates, government efforts to educate citizens about obesity have been ineffective in the past). Posner also says that children's choices to eat bad food are "not [] authentic choice[s], to which society need defer." *Id.*

64. *See id.* (discussing chain of events under which New York City's regulation could

but he favors it because "it will yield valuable information about the effects of public interventions designed to alter life styles."⁶⁵ Although he does not appear overly enthusiastic about New York's chances at fighting obesity with this regulation, Posner is much more supportive than Epstein. Scholars, therefore, do not necessarily divide on neat ideological grounds on this issue; even thinkers coming from the same general area of the ideological spectrum disagree on such measures.

B. Legal Challenges

While philosophical debates over the efficacy of laws to combat obesity are interesting, the ultimate purpose here is to discuss the legal grounds for challenging these regulations. If regulations such as New York's are unconstitutional or otherwise illegal, philosophical debates on the subject will have little relevance in the real world. In *NYSRA I*,⁶⁶ NYSRA challenged New York's first version of Regulation 81.50 on two grounds: First, that it was preempted by federal legislation, and second, that the regulatory scheme violated its members' First Amendment right to freedom of speech.⁶⁷ The preemption claim was predicated primarily on the structure of the regulation, which required restaurants that already disclosed nutritional information to post that information on their menus in a prominent fashion.⁶⁸ While the court recognized New York City's authority to mandate the disclosure of nutrition information,⁶⁹ it ruled that Regulation 81.50 was preempted by federal law.⁷⁰

lead to a reduction in obesity).

65. *Id.*

66. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F. Supp. 2d 351, 361–63 (S.D.N.Y. 2007) (striking down first version of the Board of Health's calorie posting requirement as preempted by federal law). In *NYSRA I*, the state restaurant association challenged 81.50 on the grounds that it was preempted by NLEA and that it was a violation of the association members' free speech rights under the First Amendment. *Id.* at 352. Both the association and the city sought summary judgment on the preemption claim, which the court deemed appropriate. *Id.* at 354. The court ultimately ruled that the regulation was preempted by NLEA, and therefore reserved its decision on the First Amendment issues for a later date. *Id.* at 363.

67. *See id.* at 352 (discussing bases for NYSRA's lawsuit).

68. *Id.* at 353.

69. *See id.* at 361 ("New York City, then, would appear to be free to require restaurants to provide nutrition information.").

70. *See id.* at 363 (stating that New York City's regulation was preempted by NLEA because of its voluntary aspect). Interestingly, Judge Richard Hollowell's opinion provided something of a roadmap for New York to enact a version of Regulation 81.50 that would comply with NLEA—he indicated that a regulation requiring all restaurants to provide

In essence, the court struck down the nutrition labeling mandates because the federal law occupied the field—any time that restaurants wanted to make optional claims and disclosures about their foods, federal law applied, and state or municipal law could not be inconsistent with federal law.⁷¹ Federal law, in this case, allows restaurants that voluntarily disclose nutrition information to make that information available in a variety of ways.⁷² To the extent that Regulation 81.50 required disclosures of voluntarily disseminated nutrition information in more specific formats, it was inconsistent with federal law and, therefore, preempted.⁷³ Importantly, the court declined to rule on the First Amendment challenges brought forward by NYSRA.⁷⁴

NYSRA I, however, was not the final word on New York's attempts to mandate disclosure of nutrition information by restaurants. Instead, the city enacted a new version of Regulation 81.50, which applied not to restaurants that already voluntarily disclosed nutrition information, but rather to all restaurants with fifteen or more outlets nationally.⁷⁵ NYSRA again challenged the regulation, in another case styled as *New York State Restaurant Ass'n v. New York City Board of Health (NYSRA II)*.⁷⁶ This time, the court rejected

nutritional information would not be preempted. *Id.*

71. *See id.* at 362 ("Section 343-1(a)(5) [of NLEA], on the other hand, preempts any state regulation of nutrient content claims, including claims made by restaurants, that 'is not identical to the requirement[s] of section 403(r).'"

72. *See id.* ("Under 21 C.F.R. § 101.10, a restaurant that makes a claim is allowed to publish the nutrient amount that is the basis for the claim 'in various forms, including those provided in § 101.45 [shelf labels, signs, posters, brochures, notebooks, or leaflets] and other reasonable means.'")

73. *See id.* (stating that, as drafted, Regulation 81.50 contains obligations not contained in federal law).

74. *See id.* at 363 ("Having found the subject regulation preempted, the Court need not and does not address the parties' First Amendment arguments.").

75. *See* 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 n.1 (S.D.N.Y. Apr. 16, 2008) (describing revised version of Regulation 81.50, which critically provides that all food service establishments within the City of New York that are part of a chain containing fifteen or more locations nationwide must provide nutritional information, regardless of whether they otherwise voluntarily made the information available).

76. *See id.* at *1 (deciding that second version of New York City regulation survived both a federal preemption challenge and a First Amendment challenge). Once again, NYSRA challenged the regulation on two grounds: First, that it was preempted by federal law, and second, that it violated its members' rights to free speech under the First Amendment. *Id.* This time, the court rejected NYSRA's preemption claim, as the new version of the regulation did not deal with voluntary disclosure of nutrition information, but instead mandated disclosure of nutrition information by all restaurants of a certain size, regardless of whether they already disclosed the information. *Id.* at *5. Because the court rejected the preemption claim, it was forced to decide on NYSRA's First Amendment claims. *Id.* at *6–12. The parties and the court

NYSRA's preemption challenge, saying that the city had cured that defect by making the calorie disclosure mandatory for all restaurants of a certain type and not dependent on already disclosing nutritional information.⁷⁷ Thus, the possibility of success for the restaurants' second challenge to Regulation 81.50 rested squarely on NYSRA's ability to convince the court that a First Amendment violation had occurred.

NYSRA asserted that the regulation unconstitutionally compelled speech by its members.⁷⁸ NYSRA and the city, however, agreed that the regulation concerned only commercial speech, which is given less protection than other forms of speech; the court agreed.⁷⁹ The court stated that when information to be disclosed is factual and uncontroversial, the state needs only to demonstrate a rational relationship between the speech and its interest in preventing consumer deception.⁸⁰ Because the court imposed the low rational relationship hurdle for the city to clear, NYSRA never really had a chance to prevail on its First Amendment argument. Indeed, the court went on to conclude that the city had offered evidence that some consumers would eat fewer calories because of the information provided pursuant to the regulation, thereby lessening the rates of obesity in the city.⁸¹ The court's ultimate decision was that "Regulation 81.50 is an entirely reasonable approach to the City's goal of reducing obesity."⁸²

agreed that any speech restriction applied to commercial speech in this case, which the court asserted was due less constitutional protection than other forms of speech. *Id.* at *6. NYSRA argued specifically that the regulation violated its members' rights to be free from compelled speech. *Id.* The court, however, distinguished restrictions on commercial speech from commercial disclosure requirements; it said the New York regulation fell into the latter category. *Id.* at *7-9. When considering commercial disclosure requirements, the court noted that regulations requiring the disclosure of factual and uncontroversial commercial information "need only be 'reasonably related to the State's interest in preventing deception of consumers.'" *Id.* at *6 (citing *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001)). The court ultimately ruled that because the regulation required the disclosure of only the "factual and uncontroversial" calorie information, it was not compelled speech. *Id.* at *9. After coming to that conclusion, the court decided that there was a reasonable relationship between requiring disclosure of calorie information and the city's goal of reducing obesity. *Id.* at *12. As such, the court rejected NYSRA's First Amendment challenge to New York's regulation. *Id.* at *13.

77. *See id.* at *5 (stating that the new regulation is saved from preemption by express provisions of the NLEA).

78. *See id.* at *6 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), for the proposition that compelled speech can be unconstitutional).

79. *See id.* (collecting cases in support of proposition that commercial speech is due less protection than other forms of speech).

80. *Id.* (citing *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001)).

81. *See id.* at *12 (outlining evidence of reasonable relationship between speech compelled by regulation and reduction in obesity rates).

82. *Id.*

The district court's opinion was recently affirmed by the Second Circuit.⁸³ The panel deciding the case said the district court's decision was "compelled by this Circuit's law, which rested on our interpretation of Supreme Court precedent."⁸⁴ The Second Circuit's law, in turn, was that "rules 'mandating that commercial actors disclose commercial information' are subject to the rational basis test."⁸⁵ The court explained that *National Electrical Manufacturers Ass'n v. Sorrell*⁸⁶ controlled, thereby mandating this rational basis review.⁸⁷ The court also disposed of Second Circuit precedent more favorable to NYSRA,⁸⁸ finding that it would apply only when a state's interest was merely the satisfaction of consumer curiosity.⁸⁹ Once the court had found that the rational basis test applied, it quickly disposed of NYSRA's challenge to the disclosure law.⁹⁰

At both the district court and the circuit court levels, the standard of review chosen was fatal to NYSRA's chances of overturning New York City's regulation. Rational basis review almost always results in government regulations being upheld because the threshold under that test is so low. The pertinent question is whether the Supreme Court or other appellate courts would apply a more stringent test to New York's regulation.

C. Restrictions on Commercial Speech

Precedent indicates that future reviewing courts might apply more stringent standards in reviewing New York's regulation and other similar regulations. The district court in *NYSRA II* mentioned, but refused to apply,

83. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA III)*, 556 F.3d 114, 117–18 (2d Cir. 2009) (upholding the Southern District's rulings that Regulation 81.50 was not preempted by federal statute and that the restaurants' First Amendment rights were not violated by the regulation).

84. *Id.* at 132.

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

86. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F. 3d 104, 115–16 (2d Cir. 2001) (finding that a Vermont statute requiring labeling of products containing mercury did not violate manufacturers' free speech rights).

87. See *NYSRA III*, 556 F.3d at 132–36 (rejecting NYSRA's challenge to *Sorrell* and finding that compelled disclosure regimes are subject to rational basis review).

88. See *id.* at 134 (explaining that *International Dairy Foods Ass'n v. Amestoy*, which allowed for a heightened standard of review, was not applicable because it had been limited to its facts by *Sorrell*).

89. *Id.*

90. See *id.* at 136 ("Regulation 81.50's calorie disclosure rules are clearly reasonably related to its goal of reducing obesity.").

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,⁹¹ which it said "is used to evaluate the constitutionality of measures that restrict commercial speech."⁹² The four-prong test announced in that case "requires a court to consider (1) whether the regulated expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is more extensive than is necessary to advance that interest."⁹³ If the speech involves illegal activity or is misleading, the regulation will be upheld, but if the speech neither is misleading nor concerns illegal activity, courts must consider the other prongs of the test.⁹⁴ If the government interest asserted is not substantial, however, or if the regulation either does not directly advance the government interest or is more extensive than necessary, the regulation will be struck down.⁹⁵ Thus, if NYSRA had been able to convince the district court or the Second Circuit that Regulation 81.50 constituted a *restriction on* commercial speech, as opposed to a compelled disclosure of factual and noncontroversial information, the court would have applied a much stricter standard of review.⁹⁶ But are there any grounds to believe that any court would find the regulation to be a restriction on commercial speech, or in any other way violative of restaurants' free speech rights?

While the Southern District of New York and the Second Circuit appear to be the only courts that have adjudicated challenges to calorie posting requirements thus far, precedent on similar matters indicates that the answer to whether New York's calorie disclosure requirements violate commercial free speech law is closer than the *NYSRA II* court claimed. One of the seminal cases on commercial speech is *Virginia State Board of Pharmacy v. Virginia Citizens*

91. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (ruling that commercial speech is entitled to constitutional protections).

92. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA II)*, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *7 (S.D.N.Y. Apr. 16, 2008).

93. *Id.* at *7 n.8 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

94. See *Cent. Hudson*, 447 U.S. at 563 ("Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

95. See *id.* at 564 (stating that failure to comply with final three prongs of test will lead to government regulations being struck down).

96. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA III)*, 556 F.3d 114, 118 (2d Cir. 2009) ("[A]lthough the restaurants are protected by the Constitution when they engage in commercial speech, the First Amendment is not violated . . . [when] the law in question mandates a simple factual disclosure of caloric information and is reasonably related to New York City's goals of combating obesity.").

Consumer Council Inc.,⁹⁷ in which the Supreme Court concluded that commercial speech can receive First Amendment protections because it can help further the goal of a fully informed citizenry.⁹⁸ Since that case, the Court has decided a number of commercial free speech cases, perhaps most prominently *Central Hudson*. Crucially, however, the district court and Second Circuit refused to apply the *Central Hudson* test, saying that it did not apply to factual commercial disclosure requirements.⁹⁹ Instead of *Central Hudson*, the courts applied *National Electrical Manufacturers' Ass'n v. Sorrell*¹⁰⁰ and *Zauderer v. Office of Disciplinary Counsel*.¹⁰¹ In *Sorrell*, the Second Circuit upheld against First Amendment challenge a Vermont statute that required manufacturers to place labels on their products warning consumers that the products contained mercury and should thus be disposed of as hazardous waste.¹⁰² The court's reasoning was that commercial speech is less protected

97. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council Inc.*, 425 U.S. 748, 762 (1976) (deciding that commercial speech merits some First Amendment protection). In that case, the plaintiff-appellees challenged a Virginia statute that branded as unprofessional any advertising of prices by pharmacists. *Id.* at 749–50. The challenge was made not by pharmacists themselves, but rather by consumers affected by the advertising ban who claimed that they would reap monetary benefits if the ban were lifted. *Id.* at 753. The crux of their claim was that "the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising." *Id.* at 754. As a preliminary matter, the Court ruled that freedom of speech attached to both the hearer and the speaker. *Id.* at 756. The government nonetheless contended that advertisement of prescription drugs could be prohibited because it was "commercial speech"—an approach that the court seemingly had endorsed previously. *Id.* at 758–59. The Court, however, rejected its previous stance, asserting that even where speech is purely in pursuit of an economic motive, it does not lack First Amendment protection. *Id.* at 762. While the Court kept its opinion fairly narrow, it did conclude that a state could not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773.

98. See *id.* at 765 ("[E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.").

99. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA II)*, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *9 (S.D.N.Y. Apr. 16, 2008) ("In any case, the Second Circuit made clear in *Sorrell* that *Central Hudson* is not applied to factual commercial disclosure requirements."); *NYSRA III*, 556 F.3d at 134 (2d Cir. 2009) (rejecting NYSRA's argument that *Central Hudson* should apply).

100. See *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 108 (2d Cir. 2001) (upholding a Vermont statute that required disclosure of mercury levels on labels of products).

101. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650–51 (1985) (upholding Ohio Bar disciplinary rules that required attorneys to disclose in advertisements that even when clients did not have to pay fees, they might still have to pay costs, on basis that the requirement was reasonably related to state interest in preventing consumer deception).

102. See *Sorrell*, 272 F.3d at 107–08 (describing the Vermont statute at issue and nature of challenge brought by plaintiffs).

than other speech, and that there is a key difference between prohibitions on speech and factual disclosure requirements.¹⁰³ Regulations mandating factual disclosures will be upheld if they bear a rational relationship to the state's interest in preventing consumer deception.¹⁰⁴ *Sorrell* was in turn based in large part on *Zauderer*, where the Supreme Court considered the constitutionality of several of Ohio's bar disciplinary rules.¹⁰⁵ While the Court upheld Ohio's requirement that attorneys disclose information related to contingent fees,¹⁰⁶ it struck down disciplinary rules that severely restricted the content of attorney advertising.¹⁰⁷ In *NYSRA II*, the district court cited *Sorrell* and *Zauderer* in a way that made NYSRA appear to be quite similarly situated to the plaintiffs in those cases.¹⁰⁸ A closer examination, however, reveals that *NYSRA II* arguably can be distinguished from *Sorrell* and *Zauderer*.

D. *Sorrell and Zauderer Versus NYSRA II*

The *NYSRA II* court may have erred in its application of *Sorrell* and *Zauderer* to Regulation 81.50; the regulations at issue in those cases can be distinguished from New York's calorie disclosure requirement, and the reasoning in both cases arguably can be distinguished too. This subpart considers the factual differences between *Sorrell* and *Zauderer* on the one hand, and *NYSRA II* on the other. It goes on to consider the application of *Amestoy* and why the Second Circuit felt the need to limit that case to its facts in *Sorrell*.

103. See *id.* at 113 (stating the court's reasoning for upholding disclosure requirements).

104. See *id.* (stating the test for constitutionality of disclosure requirements regarding purely factual and uncontroversial information).

105. See *Zauderer*, 471 U.S. at 631–32 (stating that appellant was charged with violating Bar disciplinary rules against false, fraudulent advertising; against undignified advertisements; and against recommending oneself as an attorney to a non-lawyer who has not sought advice).

106. See *id.* at 651 ("[A]ppellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.").

107. See *id.* at 644 ("The State's argument that it may apply a prophylactic rule to punish appellant . . . is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes." (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565, 569–71 (1980))).

108. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA II)*, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *6–8 (S.D.N.Y. Apr. 16, 2008) (discussing *Sorrell* and *Zauderer* and concluding that, "Regulation 81.50 passes constitutional muster as long as there is a 'rational connection' between the disclosure requirement and the City's purpose in imposing it" (citing *Nat'l Elec. Mfrs Ass'n v. Sorrell*, 272 F.3d 104, 114–15 (2d Cir. 2001))).

1. Zauderer

The *NYSRA II* court only considered the part of *Zauderer* that upheld Ohio's requirement that full information be given about contingent fees.¹⁰⁹ Thus, it considered only the part of that case that was most likely to lead to upholding the regulation.¹¹⁰ *Zauderer* is much more equivocal on the question of commercial free speech than its characterization in *NYSRA II* would lead that opinion's reader to believe.¹¹¹ The court's conclusion appears to rest on the simple proposition that because the laws and regulations discussed in *Sorrell* and *Zauderer* compelled disclosure of factual and uncontroversial information (like Regulation 81.50), a challenge to Regulation 81.50 should be analyzed under an identical framework.¹¹² Indeed, the court asserted that "both Regulation 81.50 and the Vermont statute at issue in *Sorell* attempt to . . . provid[e] consumers with 'complete and accurate commercial information.'"¹¹³ In *Zauderer*, the state of Ohio had convicted an attorney of violating its rules that mandated a disclosure that clients would be responsible for costs in contingent-fee cases, even if they did not have to pay fees if the case was lost.¹¹⁴ The Court based its ruling in part on Ohio's having "attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription [took] the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available."¹¹⁵ The difference between *Zauderer* and *NYSRA II* is readily apparent: In *Zauderer*, the state's interest was justified as a measure to prevent consumer deception.¹¹⁶ That was not the case in *NYSRA II*.

109. *See id.* at *7 (applying *Zauderer* to facts of *NYSRA II* but failing to discuss a portion of case that struck down some of Ohio's disciplinary rules).

110. *See id.* ("[T]he Court held that 'an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.'").

111. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 645 (1985) (concluding that when appellant's advertisements regarding subject of potential litigation were completely accurate, state had no constitutional interest in restricting commercial speech).

112. *See NYSRA II*, 2008 WL 1752455, at *8 ("Like the requirement that a manufacturer disclose that its products contain mercury, Regulation 81.50 compels only the disclosure of 'purely factual and uncontroversial' commercial information—the calorie content of restaurant menu items.").

113. *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 766 (1993)).

114. *Zauderer*, 471 U.S. at 650.

115. *Id.*

116. *See id.* at 651 ("[W]arning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982))).

2. Sorrell

The *NYSRA II* court may have done the same thing with *Sorrell* that it did with *Zauderer*—that is to say, it may have overlooked the factual circumstances of the case to make it more easily comparable to the situation it confronted.¹¹⁷ *Sorrell* involved the Second Circuit's upholding a Vermont statute that required companies to label their products that contained mercury so that consumers would know the products should be disposed of as hazardous waste.¹¹⁸ What the *NYSRA II* court failed to address fully is simply that there is an inherent difference between laws mandating disclosure of nutritional facts on the one hand, and the presence of mercury in products on the other.¹¹⁹ Regardless, *Sorrell* insists that prevention of consumer deception is not the only reason to compel commercial speech,¹²⁰ and also notes that analyzing compelled disclosure regimes under a higher scrutiny standard could potentially undermine a number of federal regulations that rely on the compelled disclosure of information.¹²¹ Thus, it appears that the *Sorrell* court was not as concerned with protecting free speech rights as it was with not upsetting the judicial apple cart.

3. Differentiating *Sorrell* and *Zauderer* from *NYSRA II*

To a layman, legal fees such as those at issue in *Zauderer* can be inherently confusing, especially when an advertisement arguably implies that clients will not be liable for any legal costs, when they in fact may be.¹²² Similarly, the average consumer might simply assume that there was no

117. See *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001) (describing Vermont statute that compelled companies to label products containing mercury).

118. See *id.* ("[The statute] requires manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste.").

119. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA II)*, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *6–8 (S.D.N.Y. Apr. 16, 2008) (applying *Sorrell* to the facts of the case, but not addressing differences in what was regulated by the laws at issue in that case and Regulation 81.50).

120. See *Sorrell*, 272 F.3d at 115 (asserting that reasonable-relationship rule applies to commercial disclosure statutes even when they are not intended to prevent consumer deception).

121. See *id.* at 116 (enumerating regulatory schemes that could be upset, including tobacco labeling, securities disclosures, and numerous others).

122. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985) (stating that advertisement that said clients would not be liable for legal fees, but failed to disclose they might be liable for litigation costs, was misleading).

mercury in a product he bought, so the disclosure that there is mercury in that product helps to advance the state's interest in promoting its citizens' health by preventing unwitting mercury poisonings.¹²³ When consumers buy food, however, they know that they are getting a product that contains calories. As Professor Epstein puts it, "[A] skull and crossbones would be out of place in this environment—the [food] products in question are *not* poisons . . ."¹²⁴ Unlike in the context of unwittingly purchasing a product containing mercury, or retaining a lawyer with the expectation of not paying fees only to find yourself saddled with expensive legal costs, there is nothing inherently misleading to most consumers about buying food.

4. Amestoy

Another Second Circuit case dealing with restrictions on commercial speech that came out on the opposite side of *Zauderer* and *Sorrell* is *International Dairy Foods Ass'n v. Amestoy*.¹²⁵ In *Amestoy*, the Second Circuit confronted a Vermont statute that required dairy producers to disclose the presence of recombinant Bovine Somatotropin (rBST) in their products at the point of sale.¹²⁶ The dairy producers challenged the statute on the grounds that it "(1) infringed their protected rights under the First Amendment to the Constitution and (2) violated the Constitution's Commerce Clause."¹²⁷ The court determined that "[t]he wrong done by the labeling law to the dairy manufacturers' constitutional right *not* to speak is a serious one that was not given proper weight by the district court."¹²⁸ The parties in *Amestoy* disagreed as to whether the speech at issue was commercial in nature,¹²⁹ but the court

123. See *Nat'l Elec. Mfr's Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) ("[The statute] is inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products.").

124. Epstein, *supra* note 52, at 1377.

125. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (holding that a Vermont statute requiring disclosure of hormone in dairy products was an unconstitutional restriction on commercial speech because it required manufacturers to make involuntary statements when they sold their products and because consumer concern was not a strong enough state interest to justify this compulsion).

126. See *id.* at 69–70 (describing Vermont's statutory labeling requirement for products containing the hormone, including a sign in stores and a blue dot on the product itself).

127. *Id.* at 70.

128. *Id.* at 71.

129. See *id.* at 71–72 (discussing Vermont's contention that speech was commercial in nature and plaintiffs' contention that speech was not purely commercial because it forced them to convey a message contrary to their views).

determined that it did not need to take sides to make its decision.¹³⁰ Instead, the court simply assumed that the statute compelled commercial speech and applied the *Central Hudson* test, thereby requiring the state to show a substantial interest for the statute to stand.¹³¹ The court explained that "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."¹³² Ultimately, the state failed to demonstrate that its interest in passing the legislation was substantial; the state did not claim that the law was motivated by health concerns, but asserted that it wanted to satisfy customers' curiosity.¹³³ Thus, consumers' "desire [to know about rSBT-treated products] is insufficient to permit the State of Vermont to compel the dairy manufacturers to speak against their will."¹³⁴ If there is no indication of a substantial government concern, then consumers should instead buy from manufacturers who voluntarily disclose the information they desire.¹³⁵ Thus, the court decided that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement in a commercial context."¹³⁶

5. Sorrell and Amestoy

In the *Sorrell* case, the Second Circuit failed to dispose of its earlier ruling in *Amestoy* effectively. The key component of *Amestoy* is that the court found that the *Central Hudson* test applied even to factual disclosure requirements for commercial interests.¹³⁷ This ruling flies in the face of the Second Circuit's

130. *See id.* at 72 ("[E]ven assuming that the compelled disclosure is purely commercial speech, appellants have amply demonstrated that the First Amendment is sufficiently implicated to cause irreparable harm.").

131. *See id.* at 72–73 (explaining and applying the *Central Hudson* test and finding that Vermont's justification for the statute—satisfying strong consumer curiosity—was not a substantial interest).

132. *Id.* at 73 (internal citations and quotations omitted).

133. *See id.* (explaining district court findings that Vermont's interest was not in health or safety, but merely strong consumer interest and the public's right to know).

134. *Id.* at 74.

135. *See id.* ("Absent, however, some indication that this information bears on a . . . sufficiently substantial governmental concern, the manufacturers cannot be compelled to disclose it. Instead, those consumers interested in such information should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it.").

136. *Id.* (internal citations omitted).

137. *See id.* at 71 ("If, however, as Vermont maintains, its labeling law compels appellants to engage in purely commercial speech, the statute must meet a less rigorous test." (citing *Cent.*

finding in *Sorrell*, where it determined that "[t]he Amendment is satisfied, therefore, by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose."¹³⁸ Of course, *Sorrell* was decided after *Amestoy*, so the *Sorrell* court had to dispose of *Amestoy* before making its ruling.¹³⁹ In deciding that Vermont's mercury disclosure statute should be evaluated under the *Zauderer* reasonable-relationship standard¹⁴⁰ rather than the *Central Hudson* standard, the court made the distinction that Vermont's interest in regulating mercury was substantial,¹⁴¹ while its interest in requiring disclosure of bovine hormone use was merely to satisfy consumer curiosity.¹⁴² The court made a compelling case that Vermont had a substantial interest in mercury labeling,¹⁴³ but essentially failed to address the conflict with *Amestoy*. The court's reasoning lends itself to the conclusion that, if the state has a substantial interest in compelling factual, accurate commercial speech, the *Central Hudson* test will not apply.¹⁴⁴ Because the substantiality of the state's interest is one prong of the *Central Hudson* test,¹⁴⁵ the *Sorrell* court's conclusion is inconsistent with *Central*

Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980)).

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

139. See *id.* (explaining that *Central Hudson* does not supply the correct standard of review in this case).

140. See *id.* ("We therefore find that [the challenged Vermont statute] is governed by the reasonable-relationship rule in *Zauderer*.").

141. See *id.* at 115 n.6 (distinguishing *Amestoy* on the basis that it dealt only with cases where state interest was in satisfying consumer curiosity, essentially limiting the case to its facts). The court stated:

[O]ur decision [in *Amestoy*] was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.' The disclosure statute at issue here, however, is based on Vermont's substantial interest in protecting human health and the environment from mercury poisoning. Moreover, because our decision in [*Amestoy*] was predicated on the state's inability to identify a sufficient legitimate state interest, we did not reach the proper relationship between a disclosure regulation's means and its ends, the issue we face here.

Id. (citations omitted).

142. *Id.*

143. See *id.* at 115 ("Vermont's interest in protecting human health and the environment from mercury poisoning is a legitimate and significant public goal.").

144. See *id.* at 115 n.6 (explaining rationale for applying *Zauderer* rather than *Central Hudson*); see also *supra* notes 139–42 and accompanying text (discussing more fully the court's rationale for distinguishing *Amestoy*).

145. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) ("The State must assert a substantial interest to be achieved by restrictions on commercial speech."); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996)

Hudson and *Amestoy* to the extent it says that the *Central Hudson* test does not need to be applied when there is a substantial state interest.¹⁴⁶ This is problematic because, while one of the *Central Hudson* test's prongs requires a substantial state interest,¹⁴⁷ the test ultimately requires the regulation to satisfy three more prongs. Thus, the *Sorrell* court's rationale has the potential to short-circuit the *Central Hudson* test.

6. *Sorrell* and *Amestoy* in NYSRA II

At base, both *Sorrell* and *Amestoy* involve Vermont statutes designed to improve consumer awareness.¹⁴⁸ And yet, the Second Circuit applied radically different tests to determine the validity of those statutes under the First Amendment.¹⁴⁹ This distinction was critical in *NYSRA II* because the Southern District cited *Sorrell* as authority for both its opinion in general and for its decision to ignore *Amestoy*.¹⁵⁰ While *Amestoy* does state that "mere consumer concern is not, in itself, a substantial interest,"¹⁵¹ the case does not limit itself to situations of mere consumer concern.¹⁵² Instead, the court said that "[t]hese interests [satisfying consumer curiosity] are insufficient to justify compromising

("Under *Central Hudson*, we must determine . . . whether the government's interest is substantial . . .").

146. See *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 n.6 (2d Cir. 2001) (expressing opinion that *Central Hudson* does not apply because substantial state interest is at stake).

147. See *supra* note 144 and accompanying text (explaining *Central Hudson*'s substantial-interest prong).

148. See *Sorrell*, 272 F.3d at 107 (explaining Vermont mercury-labeling statute); *Amestoy*, 92 F.3d at 69 (explaining Vermont bovine hormone-labeling statute).

149. See *supra* notes 120–36 and accompanying text (detailing tests used in *Amestoy* and *Sorrell* and the Second Circuit's rationales for applying them).

150. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA II)*, No. 08 Civ. 1000 (RJH), 2008 WL 1752455, at *9 (S.D.N.Y. Apr. 16, 2008) (citing *Sorrell* for proposition that Second Circuit had rejected *Central Hudson* in compelled disclosure cases and for rejection of *Amestoy*). The court stated:

[T]he Second Circuit made clear in *Sorrell* that *Central Hudson* is not applied to factual commercial disclosure requirements. The court in *Sorrell* also explained that the use of the *Central Hudson* test [in *Amestoy*] . . . was "expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'"

Id. (citing *Sorrell*, 272 F.3d at 113–14, 115 n.6).

151. *Int'l Dairy Farmers Ass'n v. Amestoy*, 92 F.3d 67, 73 n.1 (2d Cir. 1996).

152. See *id.* at 73 ("In our view, Vermont has failed to establish the second prong of the *Central Hudson* test, namely that its interest is substantial.").

protected constitutional rights."¹⁵³ The Second Circuit's ruling in *Amestoy* is thus in conflict with its ruling in *Sorrell*. The *Sorrell* court distinguished *Amestoy*, but the panel's rationale for doing so was shaky.¹⁵⁴ Why would the *Sorrell* court not want to apply *Central Hudson*? After all, a cursory glance at the case reveals that the statute at issue might pass the *Central Hudson* test.¹⁵⁵ While the Vermont statute clearly regulates a lawful activity and speech that is not misleading,¹⁵⁶ there is a very good chance that the government's interest is substantial, satisfying *Central Hudson*'s second prong; the Second Circuit called the state's interest "significant."¹⁵⁷ The final two prongs of the *Central Hudson* test are more subjective, and thus more susceptible to interpretation by judges; they require regulations of commercial speech to advance directly the state interest involved and to be as narrow as possible to serve the state's interest.¹⁵⁸ While the district court in *Sorrell* found that the Vermont statute failed the *Central Hudson* test,¹⁵⁹ Supreme Court precedent indicates that the district court in *Sorrell* may have applied *Central Hudson* too harshly, thus leaving open the possibility that if the Second Circuit had applied that test, it might have found that Vermont's law directly advanced the state's interest and was not too broad.¹⁶⁰ Assuming that to be the case, why did the Second Circuit feel the need to limit *Amestoy* in *Sorrell*, thereby making it much more difficult to strike down commercial disclosure requirements?

153. *Id.*

154. *See supra* notes 139–42 and accompanying text (describing Second Circuit's rationale for distinguishing *Amestoy*).

155. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) ("Vermont's interest in protecting human health and the environment from mercury poisoning is a legitimate and *significant* public goal." (emphasis added)).

156. *See id.* at 107 n.1 (laying out disclosure regulations under Vermont's mercury-labeling statute, requiring labels on, inter alia, thermometers, lamps, and batteries containing mercury); *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) (relating that test is triggered when government seeks to curb speech that is neither misleading nor related to unlawful activity).

157. *Sorrell*, 272 F.3d at 115; *see also Cent. Hudson*, 447 U.S. at 564 (stating that when regulation concerns lawful activity or speech that is not misleading, "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech").

158. *See Cent. Hudson*, 447 U.S. at 564 (announcing final two prongs of four-part test).

159. *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 72 F. Supp. 2d 449, 455 (D. Vt. 1999), *vacated*, 272 F.3d 104 (stating that Vermont's mercury-labeling law failed *Central Hudson* test because it did not directly advance the state's interest in protecting its citizens' health by reducing mercury emissions).

160. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (stating that to satisfy the fourth prong of the *Central Hudson* test, a regulation does not need to be the least restrictive means, but that there need only be a reasonable fit between means and ends).

7. *Why are Sorrell and Amestoy Different?*

The short answer may be that two different panels of judges decided the two cases. Judges Altimari, McLaughlin, and Leval decided *Amestoy*,¹⁶¹ while Chief Judge Walker and Judges Pooler and Sotomayor decided *Sorrell*.¹⁶² Whatever the reason for the different standards in the two cases, there is undoubtedly confusion within the Second Circuit about the appropriate standard to apply when the government compels commercial speech. Given this confusion, the Southern District's assertion that "the Second Circuit made clear in *Sorrell* that *Central Hudson* is not applied to factual commercial disclosure requirements"¹⁶³ may not prove to be as ironclad a statement of judicial precedent as the court believed at the time.

But the underlying question of why the panel in *Sorrell* felt compelled not to apply the *Central Hudson* test still stands. The court indicated that part of its motivation was to ensure that long-standing governmental regulatory schemes would stand. The court stated, "Finally, we note the potentially wide-ranging implications of NEMA's First Amendment complaint. Innumerable federal and state regulatory programs require the disclosure of product and other commercial information."¹⁶⁴ Some scholars have agreed, arguing that it would be folly to upset the regulatory regimes compelling commercial speech that arguably stand on Supreme Court precedent.¹⁶⁵ If concern for stability in the law is what motivated the Second Circuit in *Sorrell*, the court may have made a mistake because recent Supreme Court decisions have indicated more and more sympathy for commercial free speech protection.¹⁶⁶ If the Supreme Court trend

161. See *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69 (2d Cir. 1996).

162. See *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001).

163. *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA II)*, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *9 (S.D.N.Y. Apr. 16, 2008).

164. *Sorrell*, 272 F.3d at 116. The court continued, stating: "To hold that the Vermont statute is insufficiently related to the state's interest in reducing mercury pollution would expose these long-established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required." *Id.*

165. See, e.g., Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 557 (2006) (arguing that recent Supreme Court decisions on commercial speech evidence a lack of thought on the Supreme Court's part on the upheaval and displacements that could occur within regulatory schemes because of change from past decisions).

166. See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 415–16 (2001) (stating that governmental scheme to force mushroom producers to pay into common fund for advertising could not survive First Amendment scrutiny because mushroom growers were forced to subsidize a message with which they did not agree). Post argues that *United Foods* indicates a dangerous shift toward decreasing government's ability to restrict commercial speech. Post, *supra* note 165, at 557.

really is toward allowing more freedom of commercial speech,¹⁶⁷ the Second Circuit's attempt to provide some sort of stability in the law would be a losing battle. If that is the case, the Second Circuit accomplished very little by distinguishing *Amestoy* when it decided *Sorrell*. Additionally, as argued later in this Note, more searching scrutiny might not result in critical existing regulations being overturned so much as it would lead to the fine-tuning of new regulations.¹⁶⁸

If overlooking *Amestoy* was a mistake, it does not necessarily follow that the *Sorrell* court should have struck down Vermont's mercury disclosure statute.¹⁶⁹ If the *Sorrell* court had not distinguished *Amestoy*, and had instead kept the *Central Hudson* test for compelled commercial speech in the Second Circuit, the Southern District might have applied a very different analytical framework in *NYSRA II*. What would happen if another court applied the *Central Hudson* analysis to Regulation 81.50 or to some similar disclosure requirement? Part IV studies that question.

E. Zauderer and Central Hudson: Imperfect Fits for Regulation 81.50

Before moving to an analysis of New York's disclosure regime under the *Central Hudson* test, it is important to note that neither *Zauderer* nor *Central Hudson* provides a fully appropriate analytical framework. Although the Southern District of New York may have erred in applying the *Zauderer* standard to Regulation 81.50, it does not necessarily follow that it should have applied the *Central Hudson* analysis. Both analytical frameworks are uncomfortable fits for the factual situation facing NYSRA. *Zauderer* allowed the state to require "that [advertisers] include in [their] advertising purely factual and uncontroversial information about the terms under which [their] services will be available."¹⁷⁰ It went on to state that "appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."¹⁷¹ At that point, the *NYSRA II*

167. See Post, *supra* note 165, at 557 (arguing that *United Foods* represents a dangerous step toward allowing more freedom of commercial speech than had previously been the case).

168. See *infra* Part IV.D (arguing that carefully crafted regulations would survive stricter scrutiny); see also *supra* note 160 and accompanying text (stating that the statute at issue in *Sorrell* might survive the *Central Hudson* test).

169. See *supra* note 160 and accompanying text (arguing that although Second Circuit declined to apply the *Central Hudson* test in *Sorrell*, the statute at issue might have survived the *Central Hudson* inquiry).

170. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

171. *Id.*

court's contention that *Zauderer* supplied the applicable standard for review looks justified.¹⁷² A further examination of *Zauderer*, however, shows the Southern District's application to be more problematic. The Court's reasoning rested, in part, on the fact that disclosures might be used to "dissipate the possibility of consumer confusion or deception."¹⁷³ Additionally, the Court explicitly stated that some disclosure requirements might offend the First Amendment if unduly burdensome,¹⁷⁴ and held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's *interest in preventing deception of consumers*."¹⁷⁵ The New York City Department of Health and Mental Hygiene did not promulgate Regulation 81.50 to prevent consumer deception, but instead did so to help raise awareness of calories and lower obesity levels.¹⁷⁶ Because New York City's purpose in promulgating Regulation 81.50 was not to prevent consumer deception, it fits uncomfortably within *Zauderer*'s framework.

Similarly, Regulation 81.50 fits imperfectly within *Central Hudson*. That decision was based, in part, on the Court's belief that "[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."¹⁷⁷ Given this foundation, *Central Hudson* is also an uncomfortable analytical framework for Regulation 81.50 because, rather than restricting the flow of information, the regulation *seeks to insure a fuller flow of information to society*.¹⁷⁸ In the past, the Supreme Court has rationalized protecting commercial speech on the basis that society has an interest in full and free flow of information, which is a key component of what

172. See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), No. 08 Civ 1000(RJH), 2008 WL 1752455, at *6 (S.D.N.Y. Apr. 16, 2008) (citing *Zauderer* for applicable standard of review in commercial disclosure cases).

173. *Zauderer*, 471 U.S. at 651.

174. See *id.* ("We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.")

175. *Id.* (emphasis added).

176. See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) (citing "obesity epidemic" as New York's reason for passing Regulation 81.50).

177. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–62 (1980); see also *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976) ("Generalizing, society also may have a strong interest in the free flow of commercial information.")

178. See *NYSRA I*, 509 F. Supp. 2d at 353–54 (outlining Regulation 81.50's various provisions designed to give more information to the public).

Regulation 81.50 seeks to accomplish.¹⁷⁹ Because this free flow of information rationale has been a key component of past cases protective of commercial free speech, it is understandable that the *NYSRA II* court refused to apply *Central Hudson*.¹⁸⁰ As explained above, however, the court's decision to apply *Zauderer* was also flawed.¹⁸¹ Thus, the court was left with a choice between two standards, neither of which was perfectly on point. Given the reasoning and facts behind *Zauderer* and *Central Hudson*, the court should have chosen to apply the latter, if only because the government should have to show why it should be allowed to burden First Amendment rights.¹⁸² This reasonable relationship standard of review is simply not a high enough bar to force government to demonstrate why it should be allowed to force speech, and as such it should be viewed with suspicion and used sparingly.¹⁸³ The contention that *Central Hudson* should apply is buttressed by *Amestoy*, which is still good law despite its rough treatment in *Sorrell*.¹⁸⁴

IV. Applying *Central Hudson* to Regulation 81.50

If the Second Circuit panel in *Sorrell* was wrong, and the four-pronged *Central Hudson* analysis should be applied to Regulation 81.50, what is the likely result? The regulation at issue in *Central Hudson* was an order of the New York Public Service Commission that commanded utilities to cease advertising that promoted the use of electricity.¹⁸⁵ The Commission issued the order because of a fuel shortage that led to fears of insufficient electricity

179. See *Va. State Bd. of Pharmacy*, 425 U.S. at 764–65 ("Generalizing, society also may have a strong interest in the free flow of commercial information. . . . [E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking . . . , we could not say that the free flow of information does not serve that goal.").

180. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA II)*, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *6 (S.D.N.Y. Apr. 16, 2008) (explaining court's decision not to apply *Central Hudson*, including citation to *Virginia State Board of Pharmacy*).

181. See *supra* notes 109–16 and accompanying text (explaining why *Zauderer* framework is ill-suited to legally analyze Regulation § 81.50).

182. See Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993) ("Commercial speech, as speech, should presumptively enter the debate with full First Amendment protection.").

183. See *id.* (arguing that, in the advertising context, the case for even intermediate review—as opposed to strict scrutiny—is tenuous).

184. See *supra* notes 125–36 and accompanying text (explaining why *Sorrell* is applicable law in the commercial free speech context).

185. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 558–60 (1980) (describing Public Service Commission's order).

supplies, then continued the order after the crisis had passed, saying that promoting electricity use ran counter to the official national policy of conservation.¹⁸⁶ The Court acknowledged that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression,"¹⁸⁷ but still struck down the order, rationalizing its decision on the grounds that the consumer should have the greatest possible amount of information.¹⁸⁸ The Court's four-prong test for the acceptability of restrictions on commercial speech¹⁸⁹ allows restrictions if the speech is misleading or concerns illegal activity.¹⁹⁰ Assuming that the speech is neither misleading nor encourages illegal activity, the state must have a substantial interest to be advanced by restricting the speech.¹⁹¹ The restriction must also directly advance the state's interest,¹⁹² and cannot be overbroad.¹⁹³ Since the Supreme Court decided *Central Hudson* in 1980, both it and numerous circuits have had the chance to apply its framework to various fact patterns. In general, the misleading nature and legality of speech are not at issue in commercial free speech cases.¹⁹⁴ Thus, the most common disputes in commercial free speech cases are over whether restrictions directly advance the state's interests and whether they are overbroad.¹⁹⁵

186. See *id.* at 559 (describing Commission's findings on fuel supplies and process that led to continued effectiveness of order).

187. *Id.* at 562–63.

188. See *id.* at 561–62 ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.").

189. See *supra* notes 93–95 and accompanying text (recounting four-part test of *Central Hudson*).

190. See *Cent. Hudson*, 447 U.S. at 564 (1980) ("If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed.").

191. See *id.* ("The State must assert a substantial interest to be achieved by restrictions on commercial speech.").

192. See *id.* ("[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").

193. See *id.* ("[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.").

194. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (explaining that the government had conceded that First Amendment rights were at stake and that manufacturers had conceded substantiality of government's interest in preventing tobacco use by minors); see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 368 (2002) (stating that, in a case involving drug advertising, neither illegality of speech nor substantiality of government's interest were at issue).

195. See, e.g., *Lorillard Tobacco*, 533 U.S. at 533 ("Only the last two steps of *Central Hudson*'s four-part analysis are at issue here."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–05 (1996) (scrutinizing Rhode Island's price advertising ban on alcohol not on basis of illegality of speech or substantiality of state interest in temperance, but instead on final two

A. Past Applications of Central Hudson

Government actors have had a good deal of trouble with the final two prongs of the *Central Hudson* test.¹⁹⁶ Indeed, since *Central Hudson*, the Supreme Court has decided: (i) that a state ban on alcohol price advertising neither "significantly advance[d] the State's interest in promoting temperance"¹⁹⁷ nor "satisf[ie]d the requirement that [the State's] restriction on speech be no more extensive than necessary";¹⁹⁸ (ii) that a ban on tobacco advertising within 1,000 feet of schools and playgrounds designed to curb youth smoking "[did] not satisfy the fourth step of the *Central Hudson* analysis";¹⁹⁹ and (iii) that FDA rules restricting advertising for compounded drugs were more extensive than needed to serve its substantial interest in drug safety, even assuming the restrictions directly advanced the interest.²⁰⁰ The D.C. Circuit has headed down a similar path, ruling recently that the FDA did not directly advance its interests in consumer health or tailor the means to the ends when the FDA refused to allow disclosure provisions as an alternative to complete suppression of health claims on vitamins and health supplements.²⁰¹ Given this history, could Regulation 81.50 pass the direct advancement and narrow tailoring prongs of the *Central Hudson* test?

prongs of *Central Hudson*).

196. See *Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 569 (1980) (deciding that regulation on utility's advertising partly failed direct advancement prong and completely failed extensiveness prong); *Lorillard Tobacco*, 533 U.S. at 566 (invalidating part of Massachusetts' tobacco advertising regulation both because it did not directly advance state interest and was not a reasonable fit for goal of decreasing youth smoking); *44 Liquormart*, 517 U.S. at 505 (striking down Rhode Island alcohol price advertising ban because it would not significantly advance state's interest in temperance).

197. *44 Liquormart*, 517 U.S. at 505.

198. *Id.* at 507.

199. *Lorillard Tobacco*, 533 U.S. at 561.

200. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) ("[T]he FDAMA's prohibition on advertising compounded drugs might indeed directly advance[e] the Government's interests. . . . [H]owever, the Government has failed to demonstrate that the speech restrictions are not more extensive than is necessary to serve [those] interest[s]." (citations and quotations omitted)).

201. See *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) ("We think that the government's regulatory approach encounters difficulty with both [the third and fourth *Central Hudson*] factors.").

B. Applying Central Hudson to Regulation 81.50

The question is a close one. Tackling the prongs in order, perhaps the best statement of the "direct advancement" prong of the test comes from the Supreme Court, which says the test is only met when "the speech restriction directly and materially advanc[es] the governmental interest. . . . [A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."²⁰² The harm cited by New York City in passing Regulation 81.50 is the city-wide obesity trend, which the regulation hopes to combat by giving consumers more health information so that they will choose healthier eating options.²⁰³ On its face, the claim that the regulation directly advances the goal of reducing obesity is entirely reasonable. In reality, though, accepting that claim requires acceptance of a number of assumptions.²⁰⁴ Accepting New York's rationale requires accepting that consumers would see and pay attention to calorie information if provided, that consumers would change their ordering behaviors if they had the calorie information, and that consumers would eat enough fewer calories to impact their weight.²⁰⁵ In previous commercial speech cases, courts have not looked kindly on government regulation that purported to advance directly a government interest, but that in fact required several inferences to show that the regulation advanced the interest.²⁰⁶ Thus, if New York's regulation were evaluated under *Central Hudson*, precedent indicates that it would run afoul of the third prong requiring that the state's regulatory scheme directly advance the city's substantial interest in preventing obesity.

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

203. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA II*), No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *1–2 (S.D.N.Y. Apr. 16, 2008) (reciting health statistics related to obesity and foundation for New York City's contention that more nutrition information will lead to healthier eating choices and reduced obesity).

204. *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (*NYSRA I*), 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) (giving New York's rationale for the regulation, including that calories are the single most important factor in obesity and that few customers see the information in the form currently provided).

205. *See* Epstein, *supra* note 52, at 1372 (discussing difficulty of isolating causes of weight gain).

206. *See* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 569 (1980) ("The link between the advertising prohibition and appellant's rate structure is, at most, tenuous."); *see also* *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) ("[W]e cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.").

Regulation 81.50 would similarly run into significant trouble with the fourth prong of *Central Hudson*'s test, which asks "whether [the regulation] is not more extensive than is necessary to serve [the government's] interest."²⁰⁷ The Supreme Court has made clear that this does not mean that governmental bodies must choose the least restrictive means possible, but instead that there must be a reasonable fit between means and ends.²⁰⁸ While this somewhat ambiguous standard gives courts room to maneuver, the Supreme Court has applied it fairly restrictively, striking down a Massachusetts restriction on tobacco advertising within 1,000 feet of schools and playgrounds because "[t]he uniformly broad sweep of the geographical limitation demonstrate[d] a lack of tailoring."²⁰⁹ The Court similarly struck down a Rhode Island prohibition on advertisement of liquor prices because "[t]he State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance."²¹⁰ With rulings like these giving force to *Central Hudson*'s fourth prong, Regulation 81.50 runs into serious trouble. While New York City amply demonstrated that current efforts to fight obesity are failing,²¹¹ it has failed to address NYSRA's objection that "Regulation 81.50 requires restaurants to post caloric content on menu boards, the most valued space in the restaurant."²¹² This argument implies that NYSRA believed that New York City could have chosen less restrictive means to accomplish its goals, an argument it would win if precedent is any guide. As argued in Parts IV.D.2 and V of this Note, there are several alternative regulatory arrangements that could serve New York's interest in informing consumers and preventing obesity as well as forcing restaurants to post calorie information on their menu boards without similarly running afoul of First Amendment protections.

207. *Cent. Hudson*, 447 U.S. at 566.

208. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) ("We have made it clear that the least restrictive means is not the standard; instead, the case law requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective." (citations and quotations omitted)).

209. *Id.* at 563.

210. *44 Liquormart*, 517 U.S. at 507.

211. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA I)*, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) (describing increase in obesity and related diseases and linking this increase in part to poor disclosure by restaurants and low levels of awareness amongst consumers).

212. *Id.* at 354 (quotations omitted).

C. A New Test? Finding a Middle Way Between Zauderer and Central Hudson

Before coming to a conclusion, it is important to note once again that the *Central Hudson* analysis is not perfectly tailored for government regulations like New York's Regulation 81.50.²¹³ While *Central Hudson* appears to be a better fit than *Zauderer*, it is aimed at regulations that suppress commercial speech, not at regulations that compel disclosure.²¹⁴ The Supreme Court in the past has allowed more discretion to governmental bodies when they compel disclosures,²¹⁵ which seems appropriate given the effects on society if the government's power to compel disclosure were significantly curtailed.²¹⁶ However, there is a clear trend within the Supreme Court to apply more rigorous tests in commercial speech cases generally.²¹⁷ Because of the aforementioned trend to require a more searching inquiry when government restricts commercial speech, it stands to reason that the Court would also require a higher level of scrutiny for commercial disclosure requirements, especially because there is little difference in the levels of scrutiny given these types of speech in the individual context.²¹⁸ Given these cross-currents, the

213. See *supra* notes 177–79 and accompanying text (discussing uncomfortable fit between *Central Hudson* and Regulation 81.50).

214. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 567 (1980) ("Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment.").

215. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[A]ppellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.").

216. See *Post*, *supra* note 165, at 562–63 ("To tamper with *Zauderer's* understanding of compelled commercial speech is thus to trouble the foundations of pervasive and well-established regulatory regimes that presently govern American markets and protect American consumers.").

217. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) ("Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases."). The Court goes on to cite cases in which no less than five current members of the court call for revisiting *Central Hudson*, usually in favor of applying strict scrutiny. *Id.*

218. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943))). The proposition that commercial disclosure requirements are entitled to a higher level of scrutiny than reasonable relationship was directly contradicted in *Zauderer*, 471 U.S. at 651 ("But the interests at stake in this case are not of the same order as those discussed in *Wooley* . . ."). However, given the Court's gradually increasing levels of scrutiny for suppression of commercial speech, it might be willing to reexamine its rationale from *Zauderer*.

Court might be receptive to fashioning a test for certain compelled disclosure regimes that fits into the ambiguous area between *Zauderer*, *Central Hudson*, and the Court's possibly emerging strict scrutiny standard for commercial speech suppression. But what would such a test look like? The options run the gamut from the permissive reasonable relationship standard found in *Zauderer*²¹⁹ to the strict scrutiny standard advocated by Justice Thomas for restrictions on commercial speech.²²⁰ Because the Court may still want to maintain a lower threshold for compelled commercial disclosure than for repression of commercial speech, the best approach probably comes from taking elements from multiple tests. Given the advocacy by some Supreme Court justices for applying strict scrutiny to suppression of commercial speech,²²¹ there is reason to believe that the Supreme Court might be willing to apply some of the principles governing regular speech to commercial speech. In dealing with coerced speech by individuals, the Supreme Court has said that the state may not require an individual to disseminate an ideological message to the public by forcing him to display it on his private property.²²² The Court also has struck down under strict scrutiny a state law requiring passenger vehicles to display the state motto, deciding that the state's interest in the requirement was not compelling.²²³ Of course, in *Zauderer* and its progeny, the Court has made clear that compelled disclosure in the commercial context does not merit the same protections as compelled speech by individuals, or even suppression of commercial speech.²²⁴ So, despite movement toward protecting commercial speech, the Supreme Court does seem unlikely to apply full strict scrutiny to commercial disclosure requirements. Thus, the question becomes,

219. See *Zauderer*, 471 U.S. at 651 (adopting the reasonable relationship test for compelled disclosure regimes, thereby requiring only a reasonable relationship between the statute and the state's interest in preventing consumer deception).

220. See *Lorillard Tobacco*, 533 U.S. at 572 (Thomas, J., concurring) ("I would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment.").

221. See *supra* notes 217–18 and accompanying text (describing sentiment amongst some Supreme Court justices for applying strict scrutiny to commercial speech suppression).

222. See *Wooley*, 430 U.S. at 713 ("We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property We hold that the State may not do so.").

223. See *id.* at 715–17 (stating that the Court had to determine whether the state had compelling interest in requiring display of motto on license plates and determining that it did not).

224. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985) ("Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech.").

what *would* the Court be willing to do that would help to alleviate the confusion generated by the current *Central Hudson/Zauderer* muddle?

Given the values that the Supreme Court has tried to protect in its commercial speech cases, the best solution is a hybrid of strict scrutiny and the *Central Hudson* test. First, the test would only apply where the speech at issue concerned legal and nondeceptive activity. Once that threshold is passed, the first prong would require a state to establish a compelling interest for enacting the regulation, and the second prong would require that the regulation directly advance the state's interest and that no less restrictive regulation would serve the state's interest; recall that this part of the *Central Hudson* standard emphatically departs from the strict scrutiny narrow tailoring inquiry.²²⁵ The second prong of the test would additionally be supplemented by the requirement that courts study regulators' evidence supporting their compelled disclosure regimes before drawing their conclusions, thereby allowing states to show direct advancement where none is evident on the regulation's face. The first prong of the test, requiring the state to have a compelling interest for enacting the regulation, has been suggested in the speech suppression context by Justice Thomas.²²⁶ For truly important governmental objectives, this approach would allow regulation, but it would preserve the important value of the right not to speak if the government were not advancing a compelling goal.²²⁷ While this approach might lessen the amount of regulation government is allowed to undertake, the more likely result would be better-considered policy and a fully developed basis for passing laws.²²⁸ Indeed, even when a lower standard has been required, government units have often developed full records to justify their regulations.²²⁹ Ideally, requiring states to have a compelling purpose for regulating speech would eliminate regulation where "the sound background presumption *against* government intervention has not

225. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (stating that the standard here is a reasonable fit between the legislature's ends and means, not the least restrictive means standard from strict scrutiny).

226. See *id.* at 572 (Thomas, J., concurring) ("I continue to believe that . . . strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'").

227. See *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (implying that compelling state interests will pass through First Amendment analysis unscathed).

228. See, e.g., *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) (stating New York's case for Regulation 81.50, resting mainly on costs of obesity).

229. See *id.* (stating the City's position that Regulation 81.50 would result in consumers having more knowledge about what they eat, which would eventually lead to lower levels of obesity).

been overcome,"²³⁰ while allowing regulation when the state has demonstrated a true need.

Once the compelling interest prong of the test has been established, this test would borrow from *Central Hudson* and require that the regulation "directly advance[] the governmental interest asserted"²³¹ and be "no[] more extensive than is necessary to serve that interest."²³² Admittedly, taking this prong into account, the proposed test would be more stringent than *Central Hudson*, and only slightly less demanding than strict scrutiny. This rigor, however, is justified by the Supreme Court's increasing protection of commercial speech²³³ and by the fact that it maintains the lesser level of protection given to commercial actors when they are compelled to give disclosures (as opposed to when their speech is suppressed). Indeed, the Court has made clear that regulators do not have to choose the narrowest means possible, but merely a reasonable fit.²³⁴ The desired outcome of this part of the test would be to give regulators some flexibility in how they create commercial disclosure requirements—they would not have to choose the narrowest means possible to promote their interests, but only would have to choose a means that did not have an obviously better-fitting alternative. This flexibility would be supplemented by the understanding that courts would study regulators' evidence of direct advancement, as suggested in *Central Hudson*.²³⁵ Again, the goal here would be to allow legislators to regulate, while not allowing them to simply compel commercial speakers to disclose any information they saw fit without substantial justification. What this would hopefully accomplish is the most efficient regulation possible—giving the most information to consumers at the lowest possible cost to business. When regulators can simply impose costs on businesses at will, they have little incentive to think of lower-cost

230. Epstein, *supra* note 52, at 1364.

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

232. *Id.*

233. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (collecting cases to show that Justices Thomas, Scalia, Kennedy, Ginsburg, and Stevens have all variously called for applying strict scrutiny in commercial speech suppression cases).

234. *See id.* at 556 (requiring only "a means narrowly tailored to achieve the desired objective").

235. *See Cent. Hudson*, 447 U.S. at 569 (refuting state's argument that advertising by electrical utility led to inequitable rates). The Court stated, "The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative." *Id.* This language at least leaves the door cracked open for the state to provide evidence that its regulation does in fact directly advance its interest, even where it does not appear to do so on its face.

alternatives. On the other hand, if regulators have no way of forcing disclosure from businesses, practices deleterious to public health and societal well-being could go on unchecked. The key is to find a middle ground, and this proposed standard is one possible way to find that ground.

D. Applying Proposed Test to Real-World Regulations

1. Regulation 81.50

This Note's proposed test would require governments to justify their regulations under a two-pronged analysis. The first prong would require governments to have compelling reasons for enacting their compelled disclosure regimes, and the second prong would require that the regulations directly advance the governmental interest and that the government's interest would not be as well served by a more limited restriction on free speech.²³⁶ How would Regulation 81.50 fare under this test? Given that this Note has already argued that the regulation would fail the *Central Hudson* test,²³⁷ it also would obviously fail the tougher new standard. However, while this Note argued that the regulation failed the second prong of the test, in that it did not directly advance the state's interest and was not sufficiently narrowly tailored,²³⁸ there is a good argument that it advances the compelling state interest of protecting consumer health.²³⁹ Thus, although Regulation 81.50 ultimately fails this proposed test, it at least has a good chance of passing its first prong, meaning that it would have a chance to be acceptable under the second prong if it were more carefully crafted. California has adopted a statute similar to Regulation 81.50, but which has temporary provisions that, if applied permanently, would pass the proposed test.

236. See *supra* notes 223–29 and accompanying text (explaining reasons for proposing two-pronged test and providing precedents to support the test).

237. See *supra* Part IV.B (arguing that Regulation 81.50 would fail final two prongs of the *Central Hudson* test).

238. See *supra* notes 201–12 and accompanying text (arguing that Regulation § 81.50 fails the second prong of proposed test).

239. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001) (Thomas, J., concurring) (assuming for the sake of argument that there is a compelling state interest in preventing children from smoking).

2. California Law

In late 2008, the state of California passed a law intended to require restaurants to disclose nutritional information to their customers on the premises.²⁴⁰ The law's permanent provisions are quite similar to Regulation 81.50, requiring restaurants with twenty or more outlets in the state to provide nutritional information on their menus and menu boards by January 1, 2011.²⁴¹ Because of its similarity to Regulation 81.50, this part of California's Health and Safety Code would be struck down under this Note's proposed framework. However, the statute sets up a grace period until January 1, 2011, allowing restaurants to disclose their regulations in places other than their menu boards.²⁴² If the legislature had adopted the grace period provisions as the main corpus of the statute, the regulatory scheme might well satisfy this Note's proposed test. First, assume once again that ensuring citizens' continued good health is a compelling state interest.²⁴³ Then, test this provision against the requirement that compelled disclosure laws directly advance the state's interest. Here, the California rules would run into the same difficulty as Regulation 81.50, namely that it takes several logical leaps to find that it directly advances the state's interest.²⁴⁴ However, suppose that California could document through numerous health studies that its code provision directly advanced its goal of improving citizens' health. The regulation could then pass through the first part of the proposed test unscathed. Then, the state would have to show that it could not have advanced its interest through a regulation less burdensome on free speech. This is where the temporary part of California's regulatory scheme is vastly superior to New York's. Because it allows restaurants numerous options to disclose nutrition information,²⁴⁵ the California code provision probably could not accomplish its goals any less

240. See CAL. HEALTH & SAFETY CODE § 114094(b)(1) (West Supp. 2009) ("[E]very food facility shall either disclose nutritional information as required by paragraph (2), or comply with subdivision (c) during this period of time.").

241. *Id.* § 114094(c)(1)–(4).

242. See *id.* § 114094(b)(2)(A) (allowing restaurants to comply with disclosure requirements of the code by disclosing nutritional values on any of the following: a brochure available on every table; next to items on a menu; an index on the menu listing all items; an insert in the menu; or putting a table tent on each table).

243. See *supra* note 239 and accompanying text (presenting the case that citizens' health is a compelling state interest).

244. See *supra* notes 203–06 and accompanying text (explaining that, in the past, courts have been hesitant to uphold regulations under *Central Hudson's* direct advancement third prong when getting to this advancement requires acceptance of several assumptions).

245. See CAL. HEALTH & SAFETY CODE § 114094(b)(2)(A) (giving restaurants a number of options for disclosing nutrition information).

restrictively. Indeed, California seems to have given restaurants the flexibility to disclose nutrition information in nearly any practical way, so long as the disclosure takes place on the restaurant premises.²⁴⁶ If the state could show, as seems probable, that disclosure on the restaurant premises is the only way to advance the state's interest,²⁴⁷ it would probably not fall afoul of *Central Hudson's* warning that "[i]n the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising."²⁴⁸ This is so because the state appears to have allowed restaurants to choose their own regulatory regimes from the broadest possible array of choices, thus mooted any argument that the regulation is too extensive. Thus, if California were to excise the part of its statute requiring menu board disclosure starting in January 2011, its statute would pass this Note's proposed test.

V. Conclusion

While the wisdom of nutritional labeling laws may be uncertain, the far more damaging uncertainty is in the case law over nutritional labeling in restaurants. While the Southern District of New York and the Second Circuit have ruled in New York City's favor on the issue, those courts' imprimaturs are far from final. While it is possible the Supreme Court could rule on the issue, judicial resolution could take years. Hopefully, if the Supreme Court ever rules on a statute requiring disclosure of information in the commercial context, it would adopt a test similar to the one urged in this Note. Again, this test allows governments some flexibility in regulation, while also insuring that governments do not infringe, without very good reason, the private actors' right to refrain from speaking. Improving health and reducing obesity are good, even compelling, reasons for government to force private actors to speak, but the government should have the burden to show that its regulations actually advance those goals in the manner least burdensome on free speech rights. If the government showed that it had tried a number of less burdensome solutions, all of which had failed, perhaps courts would then be more sympathetic in their

246. *Id.*

247. See *N.Y. State Rest. Ass'n v. N.Y. Bd. of Health (NYSRA I)*, 509 F. Supp. 2d 351, 354 (S.D.N.Y. 2007) (recounting restaurants' argument that Regulation 81.50 runs afoul of the First Amendment because it forces them to give up space on their menu boards). Because the temporary version of the California statute does not require menu board disclosure, it would not be subject to the same argument.

248. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 571 (1980).

application of the test proposed in this Note. After all, the failure of less burdensome regulations might constitute prima facie evidence that less restrictive regulations simply do not work.

Unless and until the Supreme Court takes a stand on compelled disclosure laws in this context, both lawmaking bodies and restaurants will be unsure what their rights and responsibilities are. One possible solution, of course, would be for restaurants or lawmakers to capitulate—restaurants could stop challenging regulations or lawmakers could stop promulgating them. Given the unlikelihood of that course, what are some possible solutions? Clearly, there should be some middle ground where both legislatures and restaurants could be satisfied that their interests were being met—but where is that middle ground?

One possible solution is to enact regulatory schemes to which restaurants will not object. The California regime comes to mind as an example; unless restaurants genuinely do not want to share nutritional information, they should have little objection to being given a choice of several relatively unobtrusive options for providing that information. Another possible solution would be to require restaurants to post nutritional information online. While part of New York City's rationale for Regulation 81.50 is that its citizens often ignore information on the Internet,²⁴⁹ perhaps states and restaurants could solve that problem by agreeing on some sort of central repository for nutritional information from restaurants. Because most if not all restaurants post this information online anyway,²⁵⁰ they should have little objection to putting the information in a new type of internet forum. Perhaps this goal could be

249. See Press Release, *supra* note 50 ("Many chain restaurants already post calorie information on the Internet, in brochures, or on food wrappers or tray liners. Customers rarely see this information when they're ordering food, and without it, people greatly underestimate how many calories are in a meal.").

250. See *id.* (asserting that some chain restaurants already make efforts to make calorie information available to their customers); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA II)*, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *2 (S.D.N.Y. Apr. 16, 2008) ("[A] number of fast food restaurants already provide a complete nutritional breakdown of their menu items in brochures, on posters, or online."). For examples of restaurants that already post nutritional information online, see the following: Official Subway Restaurants Nutrition Information, Subway, *Nutritional Information*, <http://www.subway.com/applications/NutritionInfo/index.aspx> (follow "Printer-Friendly Nutrition Info" hyperlink) (last visited Mar. 22, 2010) (on file with the Washington and Lee Law Review); McDonald's, Nutrition Info, <http://nutrition.mcdonalds.com/nutritionexchange/nutritionexchange.do> (last visited Mar. 22, 2010) (on file with the Washington and Lee Law Review); Chipotle, Chipotle Nutrition, <http://www.chipotle.com/ChipotleNutrition.pdf> (last visited Mar. 22, 2010) (on file with the Washington and Lee Law Review); Wendy's, *Nutrition Facts & Topics for Healthy Eating*, <http://www.wendys.com/food/NutritionLanding.jsp> (last visited Mar. 22, 2010) (on file with the Washington and Lee Law Review). These are just a few examples of the many restaurants that post nutritional information online.

achieved by federal legislation that explicitly preempts efforts like New York's, thus settling the issue once and for all. On the other hand, if states insist on having the information available physically in restaurants, the state could pass a law like the rump California statute discussed in Part IV.D.2, *supra*, requiring restaurants to make nutrition information available somewhere on their premises—not necessarily on their menus. This would give the restaurants considerable flexibility and address one of their key concerns, that the current nutritional laws mandate use of valuable space on their menu boards,²⁵¹ while also ensuring that the state's goal of complete and accurate information for customers is met. The hope would be that by passing considerably less heavy-handed legislation and allowing flexibility, the state would lessen the restaurants' desire to see laws concerning nutritional disclosure overturned while maintaining the ability to protect citizens' health.

Regardless of possible statutory solutions, the key in this area is to find a workable legal standard that protects restaurants' ability not to speak and allows lawmakers to regulate in the interest of citizens' health. The test proposed in this Note is merely a starting point, and presumes that the Supreme Court is serious about giving greater protection to commercial speech. Even if the Court does not go down the road of submitting restrictions of commercial speech to strict scrutiny, however, it could still apply a higher standard of scrutiny to compelled disclosure regimes than is currently the case. After all, truly important government programs do not need deferential treatment because they should withstand higher levels of scrutiny, and programs that advance less important interests should not be given deference. Even if the Court got serious about applying the rational basis test only to disclosures meant to prevent consumer deception, that would be a start.

251. See *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA I)*, 509 F. Supp. 2d 351, 354 (S.D.N.Y. 2007) ("Regulation 81.50 requires restaurants to post caloric content on menu boards, the most valued space in the restaurant. . . . [T]he regulation will make menu boards confusing and are [sic] likely to adversely impact restaurants to which the regulation applies." (internal citations and quotations omitted)).

