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## Comments

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### A Healthy Food Tax Credit: Moving Away from the Fat Tax and Its Fault-Based Paradigm

Rates of overweight and obesity in the United States have reached epidemic proportions. Recent studies indicate that over one-third of Americans are overweight and another one-third are obese.<sup>1</sup> Obesity is a socioeconomic problem,

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<sup>1</sup> NAT’L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2006, WITH CHARTBOOK TRENDS IN THE HEALTH OF AMERICANS 38, 289 tbl.73 (2006), available at <http://www.cdc.gov/nchs/data/hus/06.pdf#073> [hereinafter CHARTBOOK TRENDS] (finding 66% of adult Americans between the ages of twenty and seventy-four were overweight and 32.1% were obese). These figures are based on Body Mass Index (“BMI”), a widely endorsed measurement system used to determine who is overweight and obese in the United States. See OFFICE OF THE SURGEON GEN., U.S. DEPT’ OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001, at 4 (2001), available at <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf> [hereinafter *Call to Action*]. BMI is a simple formula measuring weight in relation to height. *Id.* at 5. Healthy BMI levels are believed to be around twenty and twenty-five. *Id.* A person with a BMI equal to or greater than twenty-five is considered overweight; thirty and over is considered obese. *Id.* BMI may overestimate body fat in people with significant muscle mass, while underestimating body fat in people who have lower muscle mass, such as the elderly. *Id.* at 4. Despite its limitations, BMI is a

disparately affecting low-income and minority populations.<sup>2</sup> Health officials consider obesity one of the foremost public health concerns, and its economic consequences are equally troubling.<sup>3</sup> In 2001, responding to national complacency, the Surgeon General issued a national “Call to Action” to reduce the prevalence of overweight and obesity nationwide.<sup>4</sup> However, there was little response, and the rates of overweight and obesity continue to climb.<sup>5</sup>

Although most agree that a serious problem exists, the underlying cause for the marked increase in obesity remains controversial. There are two different theories: (1) “the fault-based paradigm,” in which obesity is perceived as an obese

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practical measurement and reliable indicator of total body fat content in most people. *Id.*

<sup>2</sup> See CHARTBOOK TRENDS, *supra* note 1, at 287–88, 289 tbl.73; *Call to Action*, *supra* note 1, at 11–14 (noting that higher rates of overweight and obese persons exist among minority and low-income groups); see also Adam Drewnowski & Nicole Darmon, *The Economics of Obesity: Dietary Energy Density and Energy Cost*, 82 AM. J. OF CLINICAL NUTRITION 265S, 270S (2005); Adam Drewnowski & SE Specter, *Poverty and Obesity: The Role of Energy Density and Energy Costs*, 79 AM. J. OF CLINICAL NUTRITION 6, 6–7 (2004) (“There is no question that the rates of obesity and Type 2 diabetes in the United States follow a socioeconomic gradient, such that the burden of disease falls disproportionately on people with limited resources, racial-ethnic minorities, and the poor.”).

<sup>3</sup> *Call to Action*, *supra* note 1, at XI, 9.

<sup>4</sup> *Id.* at V.

<sup>5</sup> Several authors have discussed the lack of response to the “call to action.” See Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL’Y & L. 839, 849–56 (2005) (describing the response, or lack thereof, from a range of traditional health policy institutions and their respective limitations in confronting the issue); Marlene B. Schwartz & Kelley D. Brownell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED. & ETHICS 78, 78 (2007) (explaining how in the context of childhood obesity, what is “news” is not the seriousness of the issue, but rather what actions will be undertaken). For a discussion of the resulting rising obesity rates, see Christopher J. Ruhm, *Current and Future Prevalence of Obesity and Severe Obesity in the United States* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 13181, 2007). A recent report suggests that the growth rates for obesity have slowed since 2003–04 for women, but that the numbers of obese are still growing. See Cynthia L. Ogden et al., *Obesity Among Adults in the United States—No Statistically Significant Change Since 2003–2004*, Center for Disease Control and Prevention, National Center for Health Statistics, U.S. Dep’t of Health and Human Services, Nov. 2007, at 1, available at <http://www.cdc.gov/nchs/data/databriefs/db01.pdf> (finding that, among adult males, the number of obese increased from 31.1% to 33.3%, and among adult females the prevalence increased from 33.2% to 35.3%).

individual's personal responsibility;<sup>6</sup> and (2) the "public health perspective," which views obesity as an epidemic resulting from various socioeconomic and environmental factors.<sup>7</sup>

At the federal level, politicians responding to the obesity crisis have adopted the fault-based paradigm. Despite numerous committee hearings on the subject, the congressional response has been mostly "rhetorical posturing" focused on individual responsibility rather than broader environmental policy measures.<sup>8</sup> The executive branch similarly has confined itself to underfunded educational campaigns focused on informing individuals of healthier lifestyle choices.<sup>9</sup> While these programs

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<sup>6</sup> See, e.g., Sayward Byrd, Comment, *Civil Rights and the "Twinkie" Tax: The 900-Pound Gorilla in the War on Obesity*, 65 LA. L. REV. 303, 322 (2004) (using the term "fault-based paradigm" to mean "a conduct-oriented perception of obesity"). The fault-based paradigm is not the official or sole title. Other academics use the term "personal responsibility" or "personal choices" to describe the viewpoint that places the blame on individuals for getting fat. See, e.g., Kersh & Morone, *supra* note 5, at 846–47; Schwartz & Brownell, *supra* note 5, at 79. I use the term fault-based paradigm because it succinctly captures the underlying mindset of those opposing any broad preventative intervention.

<sup>7</sup> The public health perspective is a term used by scholars to define a viewpoint that "address[es] epidemiologic questions (e.g., how many people are affected), identifi[ies] causal factors for the population, and seek[s] broad changes." Schwartz & Brownell, *supra* note 5, at 83. Others have chosen to contrast the fault-based paradigm against the "unhealthy food environment" or "fat food nation." See, e.g., Kersh & Morone, *supra* note 5, at 848. As I use the term here, the public health perspective recognizes the unhealthy food environment as a major causal factor. It also takes into account genetic factors, land-use patterns, behavioral concerns, and problems with access to affordable healthy food.

<sup>8</sup> Kersh & Morone, *supra* note 5, at 850–52, 862 (describing congressional response). Kersh notes how Democrats pushed for more expansive legislation, but that as the minority party in both the House and Senate, those efforts failed. *Id.* at 851. Other commentators view congressional action as counterproductive. See Dave Burnett, *Fast Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 366 (2007). Burnett explores Republican-backed bills commonly referred to as "Cheeseburger Bills" that would prevent future lawsuits against the fast-food industry. *Id.* at 365–66. Although the bills have yet to make it past the Senate floor, and are unlikely to in a Democratic-controlled Congress, they serve as evidence of Congress's insufficient response to the obesity crisis. *Id.* at 365. Burnett also notes how other more promising bills for combating obesity in Congress have been unsuccessful. *Id.* at 366–67.

<sup>9</sup> Kersh & Morone, *supra* note 5, at 852–53. For a list and summary of the executive branch's efforts and an explanation for why they are failing, see Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112 PENN ST. L. REV. 529, 530–51 (2007). Many of these efforts have been limited to sponsoring a multitude of websites that promote healthy diets and the benefits of exercise. According to Garcia, "[T]he emphasis on

may have some value, they rest on the fallacy that all one needs to do to combat his or her weight problem is to eat healthily and get on a treadmill.

So far the courts have been an unsuccessful venue for advocates looking for redress.<sup>10</sup> However, in contrast to Congress and the executive branch, plaintiffs have adopted the public health perspective in seeking to shift responsibility to environmental influences such as fast-food corporations.<sup>11</sup> From a public health perspective, activity at the state and local levels is also encouraging, but inconsistencies across state lines coupled with greater vulnerabilities to special interests drive antiobesity advocates to seek national policies.<sup>12</sup>

The wide range of literature on obesity offers both legal and nonlegal strategies for confronting the problem. Examples of existing and proposed antiobesity efforts include litigation against fast-food restaurants, trans-fat bans,<sup>13</sup> educational campaigns, mandatory nutrition labeling at restaurants,<sup>14</sup> the removal or reduction of unhealthy foods from schools,<sup>15</sup> changes

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weight loss, without realistic access to the tools necessary to maintain effective behavior change, has the potential to do more harm than good. By focusing primarily on individual level information-based campaigns, the federal government risks promoting unrealistic standards, wasting money on ineffective interventions, and increasing . . . stigma and discrimination." *Id.* at 530.

<sup>10</sup> See, e.g., *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 543 (S.D.N.Y. 2003) (dismissing plaintiff's claim against McDonald's in its entirety). For legal analysis of the decision in *Pelman*, see Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1207–12 (2004); Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1291–93 (2005) (explaining the various limitations of litigation against the food industry). But see Kersh & Morone, *supra* note 5, at 861–64 (concluding that the courts may be the best venue for confronting obesity due to their political insulation).

<sup>11</sup> See, e.g., *Pelman*, 237 F. Supp. 2d at 512.

<sup>12</sup> See Kersh & Morone *supra* note 5, at 853–54.

<sup>13</sup> See, e.g., Cherie Black, *King County Restaurants Told to Phase Out Trans Fats*, SEATTLE POST-INTELLIGENCER, July 7, 2007, at A1.

<sup>14</sup> McCann, *supra* note 10, at 1233–41. In fact, King County, Washington, recently negotiated an agreement with the restaurant industry that will require large chain restaurants to provide nutritional information on their menus by 2009. See Cherie Black, *County, Restaurants Strike Deal on Menus*, SEATTLE POST-INTELLIGENCER, Mar. 13, 2008, at B1.

<sup>15</sup> In 2006, Bill Clinton and the American Heart Association cut a deal with several large soft-drink and snack-food companies to discontinue sales of certain products at public and private schools. See Burnett, *supra* note 8, at 368–69.

in land-use patterns,<sup>16</sup> and taxes on unhealthy foods.<sup>17</sup> Many theories are informed by the “tobacco wars” of the 1990s, when all levels of government mounted a multilayered attack against the industry, culminating in a highly publicized \$246 billion settlement against “big tobacco.”<sup>18</sup> Although far from a perfect analogy to the current obesity crisis, the tobacco experience serves as a guide for many of the arguments both for and against government intervention.<sup>19</sup>

One such government intervention is taxation, which could be an important tool in the fight against obesity. Indeed, the Internal Revenue Code already plays a substantial role in public health. The exclusion of employer contributions to medical insurance premiums and health care<sup>20</sup> amount to the largest tax expenditures in the code, estimated at over \$100 billion annually.<sup>21</sup> On a smaller scale, individual filers are allowed to take a deduction for medical expenses.<sup>22</sup>

Federal tax policy has long played a role in proscribing unhealthy behavior. America’s first selective excise tax on whiskey originated in part due to sumptuary motives related to health.<sup>23</sup> More recently, President Bill Clinton proposed to

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<sup>16</sup> See, e.g., Graham M. Catlin, Comment, *A More Palatable Solution? Comparing the Viability of Smart Growth Statutes to Other Legislative Methods of Controlling the Obesity Epidemic*, 2007 WISC. L. REV. 1091, 1095 (recommending changes to state Smart Growth statutes in order to maximize potential health benefits).

<sup>17</sup> Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 854 (2000) (proposing small soda tax to fund health initiatives).

<sup>18</sup> See, e.g., Kersh & Morone, *supra* note 5, at 839–40, 856–61. For details on the settlement, see generally C. STEPHEN REDHEAD, CONG. RESEARCH SERV. TOBACCO MASTER SETTLEMENT AGREEMENT (1998): OVERVIEW, IMPLICATIONS BY STATES, AND CONGRESSIONAL ISSUES (1999), available at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30058.pdf>.

<sup>19</sup> Kersh & Morone, *supra* note 5, at 856. The analogy to cigarettes is imperfect because there is no parallel to the effects of secondhand smoke, nicotine is highly addictive, and the more centralized group of actors controlling the tobacco industry substantially narrows the potential tortfeasors. See Strnad, *supra* note 10, at 1292–93.

<sup>20</sup> I.R.C. §§ 105, 106 (2006).

<sup>21</sup> *Taking a Checkup on the Nation’s Health Care Tax Policy: A Prognosis: Hearing Before the Comm. on Finance*, 109th Cong. 4 (2006) (statement of Sen. Baucus from Montana).

<sup>22</sup> I.R.C. § 213(a) (2006).

<sup>23</sup> See *infra* notes 107–08 and accompanying text.

increase the federal excise tax on cigarettes substantially, in part to curb smoking.<sup>24</sup> Although his proposal ultimately failed, the federal tobacco tax has increased significantly.<sup>25</sup>

The success of the tobacco wars, at least insofar as the steady decline in smoking in the United States, has encouraged many scholars and policy makers to propose the implementation of a “sin tax” on unhealthy foods or ingredients: a so-called “fat tax.”<sup>26</sup> Congress has yet to enact a fat tax,<sup>27</sup> and many states’ fat taxes have been repealed in response to pressure from the food and beverage industry.<sup>28</sup> However, as obesity rates continue to rise, many commentators predict that some type of antiobesity legislation at the federal level is imminent,<sup>29</sup> and some scholars continue to promote a fat tax.<sup>30</sup>

This Comment argues that the imposition of a fat tax is not a viable approach to address America’s obesity crisis, primarily

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<sup>24</sup> Jane Gravelle & Dennis Zimmerman, *Cigarette Taxes to Fund Health Care Reform*, 47 NAT’L TAX J. 575 (1994) (outlining President Clinton’s 1993 federal cigarette tax proposal that would have increased the tax by 42% to nearly \$1 per pack, generating an estimated \$11 billion in annual revenue); Brenda Yelvington, *Excise Taxes in Historical Perspective*, in TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION 31, 52 (William F. Shughart II ed., 1997). For a brief history on cigarette and tobacco taxes, see Jendi B. Reiter, *Citizens or Sinners?—The Economic and Political Inequity of “Sin Taxes” on Tobacco and Alcohol Products*, 29 COLUM. J.L. & SOC. PROBS. 443, 444–51 (1996).

<sup>25</sup> See LOUIS ALAN TALLEY, CONG. RESEARCH SERV., FEDERAL EXCISE TAXES ON TOBACCO PRODUCTS: RATES AND REVENUES 1–15 (2002), available at [http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS20343\\_01102002.pdf](http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS20343_01102002.pdf).

<sup>26</sup> See E. Katherine Battle & Kelly Brownell, *Confronting a Rising Tide of Eating Disorders and Obesity: Treatment vs. Prevention and Policy*, 21 ADDICTIVE BEHAV. 755, 762 (1996) (“If one considers a food a potentially disease-causing agent such as tobacco and alcohol . . . then policy changes to encourage the intake of healthy food and decrease the intake of unhealthy foods are in order.”). Of course, public health advocates rarely use the term “fat tax.” It is unclear exactly where the moniker first arose, but today “fat tax” often is used in a pejorative sense by its detractors. See, e.g., Byrd, *supra* note 6, at 323.

<sup>27</sup> In 1886, Congress passed a law that required expensive licensing for manufacturers, wholesalers, and retailers of oleomargarine as well as a two-cent excise tax per pound. Adam Gifford Junior, *Whiskey, Margarine, and Newspapers: A Tale of Three Taxes*, in TAXING CHOICE, *supra* note 24, at 57, 70. But this was not a sin or fat tax. Rather, pressured by dairy producers, Congress’s primary purpose for enacting the law was to inhibit an industry that posed an economic threat to butter. *Id.*

<sup>28</sup> Byrd, *supra* note 6, at 329; see also *infra* notes 143–51 and accompanying text.

<sup>29</sup> Byrd, *supra* note 6, at 326.

<sup>30</sup> See, e.g., Strnad, *supra* note 10.

because such a tax is rooted within a fault-based paradigm. A tax policy that penalizes individuals for their condition stigmatizes obesity. Moreover, a fat tax is regressive policy—that is, it places a disproportionate tax burden on low-income individuals.<sup>31</sup> Given the known correlation between poverty and obesity,<sup>32</sup> increasing the price of unhealthy foods will likely exacerbate the socioeconomic conditions that can lead to obesity in the first place.<sup>33</sup> Finally, by focusing on the individual, a fat tax risks not addressing socioeconomic and environmental causes of obesity and hence ignores solutions that could have a more lasting and beneficial impact.<sup>34</sup>

Despite the limitations of a fat tax rooted within a framework of blame, this Comment argues that the tax system can be an effective vehicle for confronting obesity. In light of the public health perspective, I propose targeting high-risk populations by creating a Healthy Food Tax Credit. This would be a tax incentive in the form of a refundable tax credit for money spent on qualifying healthy foods. In other words, “we can turn [the] stick into a carrot.”<sup>35</sup>

Part I of this Comment canvasses the obesity crisis in the United States and emphasizes the correlation between obesity and high-risk populations, including the marginalized poor and inner-city minority populations. It then contrasts the fault-based paradigm against the public health perspective, and advocates the adoption of the latter, scientific view. In Part II, I provide a

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<sup>31</sup> Byrd, *supra* note 6, at 332–33. The basic concept here is that every household spends a certain percentage of its income on food. When an excise tax is levied on an item of food, the resulting price increase will constitute a greater percentage of the low-income household’s food budget.

<sup>32</sup> See *supra* note 2 and accompanying text; see also Byrd, *supra* note 6, at 311 (“There is a definite correlation in our society between obesity and poverty.”); McCann, *supra* note 10, at 1168 (citing Mary Anne Bobinski, *Health Disparities and the Law: Wrongs in Search of a Right*, 29 AM. J.L. & MED. 363, 379 (2003)) (“[A]n inverse relationship exists between weight and socioeconomic status, as well as fitness and socioeconomic status.”).

<sup>33</sup> Wendy Collins Perdue et al., *Legal Frameworks for Preventing Chronic Disease*, 33 J.L. MED. & ETHICS 94, 96 (Special Supp. 2005) (explaining how “[t]axes to raise the cost of high-calorie foods will further reduce the ability of the poor to purchase food, and food insecurity is a contributing cause to obesity”); see also Drewnowski & Specter, *supra* note 2, at 7 (discussing the link between food insecurity and obesity).

<sup>34</sup> See Schwartz & Brownell, *supra* note 5, at 79.

<sup>35</sup> Saul Levmore, *Taxing Obesity—Or Perhaps the Opposite*, 53 CLEV. ST. L. REV. 575, 579 (2005–06).

brief history of sin taxes in America, and document the emergence of proposed and actual fat taxes. I examine one such proposal in particular, which would function as an implicit insurance premium. I conclude that this proposal fails principally because, like all fat-tax proposals, it remains rooted under the purview of individual fault. Part III describes the emerging popularity of tax credits to assist low-income Americans. In light of this trend, I set out my proposal, the Healthy Food Tax Credit (“HFTC”), and argue that it represents a preferable long-term economic and public health approach to our nation’s weight problem.

## I

### OBESITY IN THE UNITED STATES

#### A. *A Problem of Health and Economics*

The Center for Disease Control and Prevention (“CDC”) estimates that one-third of Americans are overweight and another one-third are obese.<sup>36</sup> A recent House Resolution before Congress warned that obesity-related health problems are the second-highest cause of preventable death in the United States, accounting for roughly 300,000 casualties annually.<sup>37</sup> Moreover, the number of obese and overweight children has doubled since 1980; approximately one in five children is obese.<sup>38</sup> The Surgeon General’s Call to Action emphasized how childhood obesity, which often persists into adulthood, threatens our nation’s health.<sup>39</sup>

The House bill indicated that being overweight and obese substantially increases the risk of certain diseases.<sup>40</sup> These include, “breast cancer, colon cancer, ovarian cancer, prostate cancer, cardiovascular disease, high blood pressure, high

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<sup>36</sup> CHARTBOOK TRENDS, *supra* note 1, at 287–88, 289 tbl.73 (finding that 66% of adult Americans between the ages of twenty and seventy-four were overweight (based on a BMI equal to or greater than 25), and 32.1% were obese (based on a definition of BMI over 30)). Thus, the 66% figure includes the 32% of the population who are obese.

<sup>37</sup> Medicaid Obesity Treatment Act, H.R. 426, 110th Cong. § 2(2) (2007); *see also Call to Action*, *supra* note 1, at 8.

<sup>38</sup> H.R. 426 § 2(3); *see also Call to Action*, *supra* note 1, at XIII (noting that the number of overweight children has doubled since 1980 and tripled for adolescents).

<sup>39</sup> H.R. 426 § 2; *Call to Action*, *supra* note 1, at 8.

<sup>40</sup> H.R. 426 § 2.



cholesterol, type 2 diabetes, heart disease, stroke, gallbladder disease, arthritis, sleep disturbances, and respiratory problems.”<sup>41</sup> Being overweight and obese also may have a profound impact on one’s quality of life, reducing self-esteem and the ability to socialize, and increasing the likelihood of anxiety and depression.<sup>42</sup>

Obesity affects men and women of all ages, races, and education levels nationwide.<sup>43</sup> Nevertheless, clear disparities exist based on gender, race, ethnicity, age, education, and income.<sup>44</sup> Obesity is most prevalent among Hispanic, African American, Native American, and Pacific Islander women.<sup>45</sup> Among older adult women, a recent study found that 53% of African Americans were obese, compared to 51% of Mexican Americans, and 39% of white women.<sup>46</sup> The CDC found that the obesity rates for poor and near-poor adults were 34.9% and 34.6%, respectively, compared to 30.6% for nonpoor families.<sup>47</sup> From 1999 to 2004, obesity rates were 50% higher among adolescents in poor families than in nonpoor families.<sup>48</sup> The link between poor minority populations and the prevalence of obesity is seen at a local level as well. For instance, one study found that 30% of adults in South Los Angeles (a predominantly low-income area) were obese, compared with 20.9% for Los Angeles County overall.<sup>49</sup> The disparity between wealth and health is not a novel observation, but it sheds light on key causes of the obesity crisis and should help shape solutions.

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<sup>41</sup> *Id.* § 2(8); see also *Call to Action*, *supra* note 1, at 9 tbl.1.

<sup>42</sup> Kersh & Morone, *supra* note 5, at 844.

<sup>43</sup> H.R. 426 § 2.

<sup>44</sup> *Call to Action*, *supra* note 1, at 11.

<sup>45</sup> H.R. 426 § 2(7).

<sup>46</sup> Ogden et al., *supra* note 5, at 2.

<sup>47</sup> CHARTBOOK TRENDS, *supra* note 1, at 289 tbl.73. These figures represent adult individuals between the ages of twenty and seventy-four, where “poor” includes survey participants below the federally defined poverty line, and “near poor” includes participants with incomes up to 200% of the poverty level. *Id.*

<sup>48</sup> Richard A. Miech et al., *Trends in the Association of Poverty with Overweight Among US Adolescents 1971–2004*, 295 J. AM. MED. ASS’N 2385, 2385 (2006).

<sup>49</sup> Office of Health Assessment and Epidemiology, L.A. County Dep’t of Pub. Health, *The Obesity Epidemic in Los Angeles County Adults*, L.A. HEALTH TREND, Sept. 2006, available at <http://publichealth.lacounty.gov/ha/reports/habriefs/Obesity05.pdf>.

Although obesity is a serious public health concern, it is the financial burden of the obesity crisis that motivates policymakers toward reform.<sup>50</sup> The Surgeon General estimates that obesity and related diseases cause \$117 billion in medical expenses annually,<sup>51</sup> roughly \$42 billion more than tobacco.<sup>52</sup> Taxpayers absorb almost half of the health bill, equating to roughly \$162 per filer, while employers pick up the rest of the tab, paying approximately \$9000 per employee in obesity-related expenses.<sup>53</sup> Because obesity disproportionately affects indigent and minority populations—the same populations least able to afford health care—nearly half of these expenditures are channeled through Medicare and Medicaid.<sup>54</sup> Ten years ago, Medicaid spent \$14.1 billion on obesity-related health care, while the Medicare program spent \$23.5 billion “mitigating, treating, or attempting to treat the effects of obesity.”<sup>55</sup>

The stakes are high, given the importance of public health programs in the United States.<sup>56</sup> Health officials, economists, and policymakers realize the futility of waiting for the trend to reverse itself.<sup>57</sup> Hence, the convergence of both economic and public health concerns—the same forces that drove the tobacco

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<sup>50</sup> Byrd, *supra* note 6, at 323–24; *see also* Kersh & Morone, *supra* note 5, at 844–45 (explaining how the economic costs associated with obesity, including higher taxes for health care and increased premiums for private insurance, inspire policy makers otherwise unmoved by the health alarms); McCann, *supra* note 10, at 1167–68.

<sup>51</sup> *Call to Action*, *supra* note 1, at 10. This figure, approximately 10% of all medical spending, includes \$61 billion in direct spending on medical costs and \$56 billion on indirect costs. *Id.* Indirect costs include lost productivity, lost wages, and future earnings. Kersh & Morone, *supra* note 5, at 845. According to the Surgeon General, most of these costs are attributable to type 2 diabetes, coronary heart disease, and hypertension. *Call to Action*, *supra* note 1, at 10.

<sup>52</sup> McCann, *supra* note 10, at 1167.

<sup>53</sup> *Id.* at 1167–68.

<sup>54</sup> *Id.* at 1168.

<sup>55</sup> Byrd, *supra* note 6, at 323.

<sup>56</sup> *See* Strnad, *supra* note 10, at 1324–35 (“It seems clear that continuing the Medicare program in anything like its current form will require at least one of three drastic changes: a significant reduction in benefits for future recipients; a much larger . . . tax burden on young workers; or a program of forced saving combined with delayed retirement.”).

<sup>57</sup> *See, e.g.*, Perdue et al., *supra* note 33, at 97 (“Immediate public health action is essential. The public health community cannot afford to stand idly by, nor does it have the academic luxury of waiting for yet another study or one more research project.”).

wars in the 1990s—demands some form of government intervention.<sup>58</sup> Yet determining the appropriate governmental response is controversial, in part due to the various explanations for why we have become so fat.

### *B. The Causes of Obesity*

Understanding obesity's causes is a necessary first step before addressing potential tax strategies for responding to the problem. To start, typical weight gain is simply a matter of consuming more calories than one expends.<sup>59</sup> Insufficient exercise plays a major role in increased weight: only 3% of Americans exercise more than an hour a day, and less than one in every five Americans claims to exercise more than three times a week.<sup>60</sup> With the average American working 2000 hours per year, often in less physically demanding jobs, and spending three hours a day on the internet and at least four hours daily watching television, Americans' lack of exercise should not be surprising.<sup>61</sup>

While the reduction in calories expended contributes to rising obesity rates, many believe that increased caloric intake is far more important.<sup>62</sup> Evidence suggests that calories expended have not changed significantly since 1980 (when overweight and obesity rates started to climb), while calories consumed have increased noticeably.<sup>63</sup> There have been numerous explanations for this increase; only the most widely accepted reasons are discussed here. First, since the 1960s the food industry has experienced a revolution toward mass production, accompanied by technical innovations such as “vacuum packing, improved preservatives, deep freezing, artificial flavors, and the microwave.”<sup>64</sup> These innovations enabled food producers to prepare food centrally and send it off to the consumer for rapid,

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<sup>58</sup> Kersh & Morone, *supra* note 5, at 843.

<sup>59</sup> See Byrd, *supra* note 6, at 320 (“There is no question that obesity is a matter of input and output, a linear equation as required by the law of thermodynamics wherein the differential in body fat varies proportionally with the energy expended and energy consumed.”); see also McCann *supra* note 10, at 1168.

<sup>60</sup> McCann, *supra* note 10, at 1169.

<sup>61</sup> *Id.* at 1170.

<sup>62</sup> David M. Cutler et al., *Why Have Americans Become More Obese?* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 9446, 2003).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1–2.

convenient consumption.<sup>65</sup> Second, and partly as a result, food became much cheaper to produce and buy.<sup>66</sup> The fall in food prices also is due to huge government subsidies for certain foods such as potatoes and corn.<sup>67</sup> In turn, use and consumption of these subsidized goods has risen dramatically.<sup>68</sup> As a result, a vast range of easily or already prepared healthy and unhealthy foods became widely available and very cheap.

Another uncontested cause of higher caloric intake is that people were eating more frequently throughout the day.<sup>69</sup> Thus, accompanying the rise of obesity in the United States was an unprecedented increase in snacking.<sup>70</sup> In addition to the phenomenon of snacking, people increasingly were eating food outside the home.<sup>71</sup> According to many, eating food outside the home means less consumption of wholesome ingredients and greater consumption of fast food and carry-out meals that offer large, unhealthy portions.<sup>72</sup> America's "love affair" with fast food is evident in the fact that fast-food sales have doubled to 50% of total restaurant sales since 1970.<sup>73</sup> The rise in fast-food consumption is attributed to low prices, taste, and sheer

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<sup>65</sup> *Id.* at 2.

<sup>66</sup> Cutler and his colleagues attribute much of the reduction in food costs to the time saved in not having to prepare meals. *Id.* at 13; *see also* Adam Drewnowski, *Fat and Sugar: An Economic Analysis*, 133 J. NUTRITION 838S, 838S (2003) ("The lowering of food prices through technology . . . has been most effective for foods containing added sugars and fat.").

<sup>67</sup> *See* Schwartz & Brownell, *supra* note 5, at 80 ("Another contributor to the toxic environment are [*sic*] government agriculture subsidies for specific crops in . . . the United States.").

<sup>68</sup> From 1977 to 1995, the consumption of potatoes rose by roughly 30%, almost entirely attributable to potato chips and French fries. Cutler et al., *supra* note 62, at 2; *see also* Schwartz & Brownell, *supra* note 5, at 80 (discussing how corn subsidies make the production of high-fructose corn syrup extremely cheap and widely used).

<sup>69</sup> Cutler et al., *supra* note 62, at 9; *see also* M. Gregg Bloche, *Obesity and the Struggle Within Ourselves*, 93 GEO. L.J. 1335, 1342 (2005) (noting men's calorie intake from snack food increased by 92% from the late 1970s to the 1990s; women's intake increased 86%).

<sup>70</sup> Cutler et al., *supra* note 62, at 17 ("Snacks are where a significant portion of the changes in food production have occurred."); *see also* Byrd, *supra* note 6, at 310 ("This caloric increase results largely from snack consumption.").

<sup>71</sup> Simone A. French, *Pricing Effects on Food Choices*, 133 J. NUTRITION 841S, 841S (2003); Schwartz & Brownell, *supra* note 5, at 79–80.

<sup>72</sup> French, *supra* note 71, at 841S; McCann, *supra* note 10, at 1171; *see also* Schwartz & Brownell, *supra* note 5, at 80 ("Clearly, the increase in eating away from home is hurting the American diet.").

<sup>73</sup> McCann, *supra* note 10, at 1171.

availability and convenience. Indeed, there are approximately 250,000 fast-food restaurants in the United States.<sup>74</sup>

### C. Framing a Response

While the causes and effects of obesity are relatively clear, the solution is less so. How the obesity crisis is framed is critical to developing solutions for confronting it.<sup>75</sup> The perception of whom or what should be held accountable for obesity is a “prime determinant of how obese individuals are received by society and what actions are considered appropriate for both treatment and prevention.”<sup>76</sup> Focusing on widely accepted, empirical data regarding the causes of obesity, rather than speculation, minimizes the risk of diverting resources away from actions that could have a greater impact on improving public health.<sup>77</sup>

As mentioned above, there are two diverging perspectives: (1) the “fault based paradigm,” where the individual is personally responsible for his or her condition (and eating habits); and (2) the “public health perspective,” which views obesity as a disease that strikes a population as a consequence of many socioeconomic and environmental factors. These views are not mutually exclusive, but “in our highly partisan political environment, political activists often seize on one and dismiss the other.”<sup>78</sup>

The fault-based paradigm blames obesity on the individual, particularly one’s alleged lack of self-control and failure to make rational dietary choices.<sup>79</sup> In terms of welfare economics, those

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<sup>74</sup> *Id.* at 1172 (citing Shanthy A. Bowman, *Effects of Fast Food Consumption on Energy Intake and Diet Quality Among Children in a National Household Survey*, 113 PEDIATRICS 112, 112 (2004)).

<sup>75</sup> Schwartz & Brownell, *supra* note 5, at 79.

<sup>76</sup> *See id.*

<sup>77</sup> *Id.*

<sup>78</sup> Kersh & Morone, *supra* note 5, at 846.

<sup>79</sup> *Id.* at 847–48 (explaining how “weak will” is the commonsense and prevailing perception of obesity). For examples of academics who are forthcoming about their view that obesity is a matter of personal responsibility, see Tomas J. Philipson & Richard A. Posner, *The Long-Run Growth in Obesity as a Function of Technological Change*, 46 PERSPECTIVES IN BIOLOGY & MED. S87, S88 (2003) (explaining that “weight . . . is the result of personal choices along such dimensions as occupation, leisure-time activity or inactivity, residence, and, of course, food intake”) and Cutler et al., *supra* note 62, at 23–30 (presenting a model of self-control problems related to obesity). *See also*, Bloche, *supra* note 69, at 1338 (“[W]e ought to treat our eating . . . habits, and girth as personal matters, for the

prone to obesity “engage in ‘hyperbolic’ time discounting as opposed to ‘standard’ . . . or linear discounting of future consequences.”<sup>80</sup> In other words, people who give in to their immediate temptations without adequately taking into account the future health repercussions are more likely to be overweight and obese. This type of behavior is deemed irrational and morally repugnant. Fat-tax proponents generally build their arguments under this fault-based perspective. Framing obesity in terms of personal fault justifies the creation of a tax that penalizes the consumer for engaging in unhealthy lifestyle choices, especially when the costs of these choices reach beyond the obese individual to other taxpayers through higher insurance premiums.

Without disputing that personal food choice and exercise habits play a significant role in the obesity trend, advocates of the public health perspective view obesity as a complex socioeconomic and environmental problem that requires big-picture analysis and long-term goals.<sup>81</sup> In this light, obesity is an epidemic, or more accurately, a chronic disease that affects the population in epidemic proportions.<sup>82</sup> Moving away from individual fault, proponents of the public health view cite factors such as the genetic predisposition to weight gain,<sup>83</sup> as well as ingrained cultural,<sup>84</sup> psychological, and behavioral patterns.<sup>85</sup>

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most part, but that law can and should make a contribution, as an ally of our longer-term will against our immediate cravings.”).

<sup>80</sup> Bloche, *supra* note 69, at 1345 (quoting Cutler et al., *supra* note 62, at 25). Bloche is not persuaded by the welfare economics theory for the obesity crisis, finding it insufficient to explain why some people are more vulnerable to obesity than others. *Id.* at 1344–45. Bloche suggests that psychodynamic and cognitive psychology better serve as the theoretical framework for explaining obesity. *Id.* at 1346–48. But, while evidence supports the impact of external forces, such as advertising, on the decisions we make, Bloche’s conclusion is clearly fault based. Tellingly, he suggests that we beef up our social cues that “recast overeating and sedentary living as unsexy and uncool.” *Id.* at 1350.

<sup>81</sup> See, e.g., Perdue et al., *supra* note 33, at 95–96 (“Obesity is a long-term problem that defies short-term solutions.”).

<sup>82</sup> *Call to Action*, *supra* note 1, at XIII.

<sup>83</sup> See, e.g., Byrd, *supra* note 6, at 321–22 (describing the link between obesity and genetics).

<sup>84</sup> For a discussion of the proffered cultural explanations for the prevalence of obesity among African American women, see *id.* at 315–20.

<sup>85</sup> See Adam Drewnowski & Nicole Darmon, *Replacing Fats and Sweets with Vegetables and Fruits—A Question of Cost*, 94 AM. J. OF PUB. HEALTH 1555, 1558 [hereafter Drewnowski & Darmon, *Replacing Fats and Sweets with Vegetables and*

Public health advocates also blame patterns of land use. For example, ex-urban sprawl results in fewer sidewalks, more driving, and hence less exercise.<sup>86</sup> Likewise, the omnipresence of the fast-food and junk-food industries, with their pervasive and manipulative advertising campaigns, alters diets.<sup>87</sup>

The public health perspective often highlights the striking correlation between poverty and obesity, emphasizing the prevalence of obesity among minorities and the working poor.<sup>88</sup> CDC surveys found that poor and near-poor populations were much less likely to exercise in their free time.<sup>89</sup> Increased street violence in inner cities may discourage outdoor activities and exercise, which in turn may lead to more sedentary indoor activities, such as watching television and surfing the internet.<sup>90</sup> Another plausible explanation is that low-income people lack the exercise options open to higher-income populations, such as gym memberships.<sup>91</sup>

In terms of food supply, many point to the dearth of grocery stores in poor neighborhoods and inner cities, in contrast to the abundance of fast-food restaurants.<sup>92</sup> Likewise, food costs in inner-city markets can be higher where limited space affects supermarket pricing; when supermarkets avoid these areas, residents are deprived of the benefits of scale pricing.<sup>93</sup> In addition, inner-city markets generally carry less healthy food options.<sup>94</sup> For example, one study in St. Louis indicated that supermarkets in low-income African American neighborhoods carried a very limited supply of fresh fruit, vegetables, and other

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*Fruits*] (“Metabolic studies have explored the neurobiology of food preference and the nature of cravings for fats and sweets.”); *see also* Bloche, *supra* note 69, at 1346–48.

<sup>86</sup> *See* Garcia, *supra* note 9, at 542 (“Suburban neighborhoods may also discourage exercise. The roads may be free of crime but they are often designed with motorists rather than pedestrians in mind.”).

<sup>87</sup> McCann, *supra* note 10, at 1172–73; Schwartz & Brownell, *supra* note 5, at 80.

<sup>88</sup> *See, e.g.*, Perdue et al., *supra* note 33, at 95–96; Byrd, *supra* note 6, at 311–15.

<sup>89</sup> CHARTBOOK TRENDS, *supra* note 1, at 36 (finding that adults with incomes over twice the poverty level were about 60% more likely to engage in regular leisure-time physical activity than low-income households).

<sup>90</sup> *See* Garcia, *supra* note 9, at 541.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; Byrd, *supra* note 6, at 332.

<sup>93</sup> Garcia, *supra* note 9, at 577.

<sup>94</sup> *Id.* at 540.

perishables in comparison to wealthier, primarily white neighborhoods.<sup>95</sup> A study in Los Angeles revealed that only 38% of grocery stores in African American neighborhoods sold skim milk, in contrast to 80% of stores in predominantly white communities.<sup>96</sup> Another related problem for poor populations living in inner cities is that residents often do not have their own vehicles and therefore rely on public transportation. Without adequate transportation to a grocery store, inner-city residents often resort to cheap and unhealthy food from local markets or fast-food chains.<sup>97</sup>

To compound the difficulty of limited access to grocery stores and healthy alternatives, diets high in fat, sugar, and grains are considerably cheaper than more “prudent” diets consisting of fruits, vegetables, whole grains, poultry, and fish.<sup>98</sup> Moreover, this cost disparity is getting worse. A study in Seattle found that the price of low-calorie foods at grocery stores increased by 19.5% from 2004 to 2006.<sup>99</sup> In contrast, the cost of calorie-rich foods remained stable and even dropped slightly.<sup>100</sup> Thus, the relatively high cost of healthy food represents a significant structural barrier to dietary change, particularly for low- and even moderate-income families. This helps to explain high rates

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<sup>95</sup> *Id.* (citing Elizabeth A. Baker et al., *The Garden of Eden: Acknowledging the Impact of Race and Class in Efforts to Decrease Obesity Rates*, 96 AM. J. PUB. HEALTH 1170, 1172 (2006)).

<sup>96</sup> Byrd, *supra* note 6, at 332 (citing Gabriel Packard, *United States: Unhealthy Food, Figures Feature in TV for Blacks-Study*, INT’L PRES. SERV., Aug. 14, 2003).

<sup>97</sup> *Id.* at 333.

<sup>98</sup> See Adam Drewnowski & Nicole Darmon, *Food Choices and Diet Costs: An Economic Analysis*, 135 J. NUTRITION 900, 900 (2005) [hereinafter Drewnowski & Darmon, *Food Choices and Diet Costs*] (noting that “[a]dded sugars and added fats are far more affordable than are the recommended ‘healthful’ diets based on lean meats, whole grains, and fresh vegetables and fruit,” and concluding that “[g]ood taste, high convenience, and the low cost of energy-dense foods, in conjunction with large portions and low satiating power, may be the principal reason for overeating and weight gain.”); Drewnowski & Darmon, *Replacing Fats and Sweets with Vegetables and Fruits*, *supra* note 85, at 1558 (“Food costs represent a barrier to dietary change, especially for low-income families.”); Drewnowski & Specter, *supra* note 2, at 10–11.

<sup>99</sup> Press Release, Justin Reedy, Univ. of Wash. Office of News and Info., Price of Lower-Calorie Foods Rising Drastically, UW Researchers Find (Dec. 4, 2007), available at <http://uwnews.org/article.asp?articleid=38352> (citing Pablo Monsivais & Adam Drewnowski, *The Rising Cost of Low-Energy-Density Foods*, 107 J. AM. DIET. ASSOC. 2071 (2007)).

<sup>100</sup> *Id.*



of obesity and diabetes among minorities and the working poor.<sup>101</sup>

In sum, socioeconomic and environmental changes over the last thirty years have played the primary role in the rising prevalence in the overweight and obese. No verifiable evidence suggests that people have become more irresponsible or blameworthy.<sup>102</sup> Moreover, problems with affordability, access, cultural preference, land use, and genetic predisposition undermine fault-based approaches that focus on individual responsibility and choice. When one has limited access or cannot afford healthier food options, the concept of “choosing” what to eat is diminished significantly. To the extent that obesity is a result of underlying social and economic barriers, effectively managing obesity demands a reassessment and restructuring of the societal and environmental factors that contribute to it.

## II

### THE FAT TAX

A fat tax, like taxes on beer, wine, whiskey, and cigarettes, is essentially a sin tax, or a selective excise tax levied on commodities that policymakers deem harmful to society or morally blameworthy.<sup>103</sup> The basic tenet of a sin tax is to deter consumption of the harmful product while generating revenues to help correct the societal ills that abuse of the product creates. In this way, a fat tax, like all sin taxes, inherently is aligned with the framework of the fault-based paradigm.<sup>104</sup> A brief history of

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<sup>101</sup> *See id.*

<sup>102</sup> Schwartz & Brownell, *supra* note 5, at 81.

<sup>103</sup> *See* BLACK'S LAW DICTIONARY 1499 (8th ed. 2004) (defining “sin tax” as “[a]n excise tax imposed on goods or activities that are considered harmful or immoral (such as cigarettes, liquor, or gambling)”).

<sup>104</sup> Many fat-tax proponents consider a fat tax to be consistent with a public health approach and advocate it as such. I do not dispute that many, if not most, of the proponents are well intentioned. It would be unfair to suggest that most fat-tax advocates intend to penalize or discriminate against individuals for being obese. Rather, for many, a fat tax is a mechanism to fund public health initiatives that counter the toxic food environment or other external influences. Regardless of the intention of fat-tax advocates, however, the effect of a fat tax that would increase the price of unhealthy food is necessarily punitive. Even if the tax were imposed on the manufacturers or sellers of unhealthy foods, the increased costs ultimately would pass to the consumer. If consumption of unhealthy food products has made people obese, then it follows that it is the obese, or soon-to-be-obese, who consume

sin taxes in the United States, however, reveals that politicians have justified the use of selective excise taxes primarily as a means to generate revenue, not to achieve social control.

*A. The Sin Tax in America*

The genesis of the sin tax in the United States is tied directly to the country's independence.<sup>105</sup> Six years of battling Britain in the Revolutionary War left the colonies in massive debt.<sup>106</sup> In 1790, with duties on imports maximized, Alexander Hamilton, then Secretary of the Treasury, proposed an excise tax on whiskey as an alternative source of income.<sup>107</sup> While paying down the Revolutionary War debt was the principal purpose of the tax, sumptuary motives also were involved. As Hamilton wrote, "the consumption of ardent spirits particularly, no doubt very much on account of their cheapness, is carried on to an extreme, which is truly to be regretted, as well in regard to the health and the morals, as to the economy of the community."<sup>108</sup>

Since it was British excise taxes on tea and other commodities that eventually gave rise to the Revolution against England, the American public hated the tax.<sup>109</sup> Indeed, the tax on distilled spirits spurred the Whiskey Rebellion of 1794, in which a group of Pennsylvanian farmers threatened revolt against the government because liquor, in their view, was "a basic medium of exchange in a largely barter economy," not a luxury item harmful to society.<sup>110</sup> The revolting farmers were suppressed easily, and the new source of revenue—coupled with a precedent of enforcement—opened the door to the imposition of similar excise taxes on snuff, sugar, horse-drawn carriages, auction sales,

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more of these foods. Thus, a fat tax mandates that the obese pay for these health initiatives and ultimately their own physical conditions.

<sup>105</sup> David J. DePippo, Comment, *I'll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 545 (2002); Yelvington, *supra* note 24, at 31, 32.

<sup>106</sup> DePippo, *supra* note 105, at 545; Yelvington, *supra* note 24, at 32.

<sup>107</sup> DePippo, *supra* note 105, at 545; Yelvington, *supra* note 24, at 32–33.

<sup>108</sup> See Yelvington, *supra* note 24, at 33 (quoting THE REPORTS OF ALEXANDER HAMILTON 34 (Jacob E. Cooke ed., 1964)).

<sup>109</sup> DePippo, *supra* note 105, at 546.

<sup>110</sup> *Id.*; Yelvington, *supra* note 24, at 34.

and salt.<sup>111</sup> Because of such taxes' widespread disfavor among the voting public, Thomas Jefferson promised repeal in his first presidential campaign.<sup>112</sup> After Jefferson took office, Congress eliminated all such taxes by 1807.<sup>113</sup>

Thereafter, a pattern emerged where the federal government implemented selective excise taxes in times of financial hardship, particularly to repay debts from war, and then repealed those taxes when the economy improved.<sup>114</sup> This trend continued until the federal government introduced the modern income tax system in 1913.<sup>115</sup>

The income tax system ensured that excise taxes on alcohol and other commodities would not be the primary source of federal revenue.<sup>116</sup> In 1915, for example, income taxes made up only 16% of federal revenues.<sup>117</sup> After that number jumped to 79% during World War I, Congress perceived that it could sustain its budget during war without relying on an excise tax.<sup>118</sup> This freed up political support for the prohibition of alcohol, which began in 1920.<sup>119</sup>

As the result of factors including the emergence of an unmanageable black market, it became apparent that "society did not fully share the values of the temperance movement."<sup>120</sup> Moreover, the Great Depression destroyed the economy.<sup>121</sup> By 1932, "income tax receipts fell to less than half of their 1930

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<sup>111</sup> DePippo, *supra* note 105, at 546; Yelvington, *supra* note 24, at 34. Unlike whiskey, some of these new levies did not fit easily under the moniker of a "luxury" item or harmful product. By "setting up an elaborate system of excise taxes whose chief purpose was to increase government revenues," Congress apparently had moved beyond Hamilton's original purpose of paying down the war debt. Yelvington, *supra* note 24, at 35.

<sup>112</sup> DePippo, *supra* note 105, at 546; Yelvington, *supra* note 24, at 35.

<sup>113</sup> DePippo, *supra* note 105, at 546; Yelvington, *supra* note 24, at 35.

<sup>114</sup> See Depippo, *supra* note 105, at 546. For a more extensive history of this pattern, see Yelvington, *supra* note 24, at 35–39.

<sup>115</sup> DePippo, *supra* note 105, at 546–47 (citing U.S. CONST. amend. XVI; Yelvington, *supra* note 24, at 40).

<sup>116</sup> *Id.* at 547 (citing Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 3–4 (1994)).

<sup>117</sup> *Id.* (citing Boudreaux & Pritchard, *supra* note 116, at 4 n.12).

<sup>118</sup> *Id.* (citing Boudreaux & Pritchard, *supra* note 116, at 4 n.12, 5).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 548.

level.”<sup>122</sup> Without a liquor tax to turn to, Congress was in dire need of another source of tax revenue.<sup>123</sup>

In response, Franklin Delano Roosevelt, realizing the revenue-generating power of alcohol, promised to repeal Prohibition and “provide . . . a proper and needed revenue.”<sup>124</sup> The platform of the 1932 Democratic Party was bold enough to declare: “If only given a chance, Americans might drink themselves into a balanced budget.”<sup>125</sup> After the repeal of Prohibition, taxes from the sale of alcohol jumped from 2% of federal revenues in 1933 to 13% in 1936.<sup>126</sup>

With the return of the alcohol tax to the federal revenue system, debate about the use and long-range goals of the tax commenced.<sup>127</sup> Many wanted to use the tax as a means of revenue maximization; others believed the tax should be used primarily as a social control device.<sup>128</sup> The conversation continues today, fueled by in-depth studies on the social and public health effects of alcohol.<sup>129</sup> The debate about the goals and propriety of a sin tax is as heated as ever and has widened to discussions of other sin taxes—most notably cigarette taxes.<sup>130</sup> But with the obesity crisis upon us, arguments both for and against fat taxes increasingly have become the focus of scholarship.

### *B. The Emergence of the Fat Tax*

Obesity was not always such a stigmatized condition. Prior to World War I, the cultural perceptions of consumption and

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (citing Boudreaux & Pritchard, *supra* note 116, at 6).

<sup>124</sup> *Id.* (quoting Yelvington, *supra* note 24, at 40).

<sup>125</sup> William F. Shughart II, *Introduction and Overview*, in *TAXING CHOICE*, *supra* note 24, at 1, 3; *see also* DePippo, *supra* note 105, at 548; Yelvington, *supra* note 24, at 40.

<sup>126</sup> DePippo, *supra* note 105, at 548 (citing Boudreaux & Pritchard, *supra* note 116, at 7).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (citing Reiter, *supra* note 24, at 448–49).

<sup>129</sup> *Id.*

<sup>130</sup> *See, e.g.*, Reiter, *supra* note 24, at 444–51; *see also* Yelvington, *supra* note 24, at 52 (explaining how President Clinton’s proposed increase in the federal excise tax on cigarettes from \$0.75 to \$1.00 per pack of cigarettes was primarily a mechanism to finance his health care reform plans, but that he also justified the increase as a means to deter young people from smoking).

weight were different.<sup>131</sup> The explosion of wealth in the late 1800s “loosened staid Victorian ideals and paved the way for an orgy of excess. Gluttony and conspicuous consumption abounded.”<sup>132</sup> In this culture, corpulence represented prosperity, affluence, and even good health. By contrast, “[t]hinness was *déclassé*”; it reflected low socioeconomic status, sickness, and frailty.<sup>133</sup> By World War I, however, social perceptions flipped.<sup>134</sup> This likely was due to domestic food conservation efforts in order to ship food to our troops abroad. Moreover, scientific developments led to a decline in the incidence of tuberculosis while lower food prices meant less malnutrition.<sup>135</sup> Some scholars try to downplay the notion that a heavier figure was less stigmatized in the past, contending that to the extent being overweight was more socially acceptable, it was only because the problem of obesity was not as rampant.<sup>136</sup>

Regardless, today obesity is one of the most intolerable physical aberrations and now more than ever is a moral issue.<sup>137</sup> It represents laziness, irrational dietary choices, and a lack of willpower.<sup>138</sup> “In a capitalist, market-driven society that has always placed a premium on self-determination and personal industry, such wanton irresponsibility merits retribution.”<sup>139</sup> From this cultural, fault-based perception of obesity, fat-tax proposals derive the label of a sin tax.

Fat taxes have been around since the 1920s.<sup>140</sup> Generally, early fat or “junk food” taxes applied to soft drinks, candy, chips,

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<sup>131</sup> Byrd, *supra* note 6, at 306.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*; see also Philipson & Posner, *supra* note 79, at S100 (“In the 19th century, thinness was a signal of malnutrition and tuberculosis, and fatness a signal of prosperity; stout men and women were therefore considered handsome, and stout women beautiful and sexy.”).

<sup>134</sup> Byrd, *supra* note 6, at 306.

<sup>135</sup> Philipson & Posner, *supra* note 79, at S100.

<sup>136</sup> DEIRDRE BARRETT, *WAISTLAND: THE (R)EVOLUTIONARY SCIENCE BEHIND OUR WEIGHT AND FITNESS CRISIS* 123 (2007).

<sup>137</sup> Byrd, *supra* note 6, at 307

<sup>138</sup> *Id.*; see also Kersh & Morone, *supra* note 5, at 846.

<sup>139</sup> Byrd, *supra* note 6, at 307.

<sup>140</sup> Jacobson & Brownell, *supra* note 17, at 855–56 tbls.1 & 2. Some scholars make a distinction between “junk food” taxes and “fat” taxes, where the former are imposed on specific retail food items, and the latter “explicitly attempt to influence behavior” and generally apply to fatty inputs such as trans fats or calorie-dense foods. See Strnad, *supra* note 10, at 1224–27.

and ice cream, and constituted a small percentage (ranging from a penny to 7.5%) of the sale price.<sup>141</sup> These taxes predated concerns about the health consequences of such foods, and, like the whiskey tax, were seen primarily as a source of substantial revenue.<sup>142</sup> Despite their revenue-generating power, many of these taxes were repealed, often in response to pressures from the food and beverage industry.<sup>143</sup> For example, in 1938, Louisiana imposed a 2.5% sales tax on bottled soft drinks and syrups, raising \$13 million annually for general funding.<sup>144</sup> The state legislature repealed the tax in 1997 due to a contract with Coca-Cola to build a bottling facility.<sup>145</sup> Similarly, in 1969, North Carolina imposed a one-penny tax on bottled soda, as well as a dollar-per-gallon tax on syrup and other drink mixes.<sup>146</sup> These taxes generated \$40 million in annual income that went to general funds.<sup>147</sup> The North Carolina legislature repealed the taxes in 1999 due to lobbying by the soft-drink bottlers association.<sup>148</sup>

In light of growing public health and economic concerns, some current advocates of fat taxes propose expanding them to fund health initiatives promoting improved diet and exercise.<sup>149</sup> As of 2000, seventeen states and two major cities imposed taxes on unhealthy foods and beverages.<sup>150</sup> Prior to 2000, six other states imposed junk food taxes that were later repealed, often due to pressures from the food and beverage industry.<sup>151</sup> In June 2006, the American Medical Association (“AMA”), the nation’s largest physicians’ group, met to discuss lobbying Congress to

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<sup>141</sup> See Byrd, *supra* note 6, at 329 (“Most state fat taxes apply to snack foods, viz., soft drinks, candy, chewing gum, potato chips, and the like.”); see also Strnad, *supra* note 10, at 1225. For a complete list of fat taxes imposed in the past, their date of enactment, amount of revenue generated, and if repealed, the date and reason for their repeal, see Jacobson & Brownell, *supra* note 17, at 855–56 tbls.1 & 2.

<sup>142</sup> Strnad, *supra* note 10, at 1225.

<sup>143</sup> Byrd, *supra* note 6, at 329.

<sup>144</sup> Jacobson & Brownell, *supra* note 17, at 856 tbl.2.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Strnad, *supra* note 10, at 1225 (citing Jacobson & Brownell, *supra* note 17, at 857).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1224.

impose a penny-per-can tax on sugar-sweetened soft drinks.<sup>152</sup> In November 2006, the AMA rejected the proposal by a two-vote margin, claiming, rather vaguely, that “the tax made a lot of people ‘uncomfortable.’”<sup>153</sup>

Proponents of fat taxes put forth several arguments. First is the traditional need to generate revenue, supported by the relative ease in which excise taxes may be administered.<sup>154</sup> A second traditional justification is the need to address negative externalities—the costs borne onto others (for example, through higher taxes or increased insurance premiums) that result from the overconsumption of unhealthy foods.<sup>155</sup> This type of rationale is typically associated with Pigouvian or “corrective” taxation.<sup>156</sup> The theory is that if consumption of a certain food has added societal costs not represented in the market price, then the government should adjust the price via a fat tax. Ideally, the size of the tax would equal the marginal damage of consuming each unit of food.<sup>157</sup> This would allow the individual to internalize the external costs associated with overeating.

A third rationale is the more modern concept of addressing internalities, that is, the costs of obesity borne by the individual herself, including costs associated with a shorter lifespan, poor health, and discrimination.<sup>158</sup> Inherent in the concept of internalities is the notion that a fat tax addresses behavioral problems such as food addiction and lack of self-control, and

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<sup>152</sup> See Kevin B. O’Reilly, *AMA to Lead Funding Study to Treat Obesity*, AMER. MED. NEWS, Dec. 4, 2006, <http://www.ama-assn.org/amednews/2006/12/04/hlsb1204.htm>.

<sup>153</sup> See Vicky McCrorie, *American Medical Association: Not So Sweet on Soda Tax Plans*, DRINKS BUS. REV., Nov. 17, 2006, [http://www.drinks-business-review.com/article\\_feature.asp?guid=61022A6B-48BC-4687-B6EC-A2C8903A7BF4](http://www.drinks-business-review.com/article_feature.asp?guid=61022A6B-48BC-4687-B6EC-A2C8903A7BF4). While the article does not indicate that the American Beverage Association influenced the vote, it emphasizes how the news came much to the pleasure of the nation’s soda producers. *Id.*

<sup>154</sup> J. Fred Giertz, *Excise Taxes*, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 111, 112 (Joseph J. Cordes et al. eds., 1999) (discussing different rationales for selective excise taxes generally).

<sup>155</sup> Strnad, *supra* note 10, at 1240.

<sup>156</sup> *Id.*; Giertz, *supra* note 154, at 112.

<sup>157</sup> Strnad, *supra* note 10, at 1240; *see also* Giertz, *supra* note 154, at 112. However, because it is difficult to measure marginal damage relative to consumption, this is often an imprecise method. *Id.*; *see also* Strnad, *supra* note 10, at 1244 (noting the complexity of devising a Pigouvian tax schedule).

<sup>158</sup> Strnad, *supra* note 10, at 1243–44.

informational problems such as inadequate information about the harmful effects of any given food.<sup>159</sup> Pursuant to this rationale, the tax assists those who are unable to adequately assess the future risks associated with consuming the product at the time of consumption.<sup>160</sup> Fourth, a fat tax deters the undesirable activity by increasing the price of the food or ingredients such that consumers will consume less of the product and ideally shift to cheaper, healthier alternatives.<sup>161</sup> The effect of this rationale depends on the price elasticity of demand for the given food.<sup>162</sup>

In response to these arguments, critics of fat taxes frequently decry government paternalism, or “interference with people’s liberty for their own good.”<sup>163</sup> According to this view, the government has no role intervening in an area as personal as one’s diet.<sup>164</sup> Personal choice, individualism, and autonomy are core American values, and “private behavior is brusquely declared off-limits.”<sup>165</sup> As one commentator put it, “The government should stay out of the personal choices I make . . . . My eating habits or yours don’t justify the government’s involvement in the kitchen.”<sup>166</sup> The tobacco industry employed this argument, unsuccessfully, in its efforts to stave off increasing government regulation of smoking.<sup>167</sup> In both the tobacco and fat-tax contexts, whether the argument is sincere, or merely a conventional way to mask corporate interests and greed, is questionable. Regardless, a compelling argument for tobacco regulation is absent in the context of food regulation, since there is no obvious parallel to the phenomenon of secondhand smoke,

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<sup>159</sup> For a detailed analysis of the various justifications for imposing a fat tax to address internalities, see *id.* at 1244–59.

<sup>160</sup> *Id.*

<sup>161</sup> See Giertz, *supra* note 154, at 112.

<sup>162</sup> Price elasticity of demand measures how much the quantity demanded for that good will respond to a change in price. DePippo, *supra* note 105, at 558.

<sup>163</sup> Note, *The Elephant in the Room: Evolution, Behaviorialism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161, 1173 (2003) [hereinafter *Elephant in the Room*] (quoting Gerald Dworkin, *Paternalism*, in PATERNALISM 19, 22 (Rolf Sartorius ed., 1983)).

<sup>164</sup> See Kersh & Morone, *supra* note 5, at 842, 846–47.

<sup>165</sup> See *id.* at 847.

<sup>166</sup> *Id.* (quoting Russell Robert, *No Fat Tax*, ST. LOUIS POST-DISPATCH, Mar. 21, 2002, at A13).

<sup>167</sup> See *id.*



where cigarette consumption adversely impacts the health of nonsmokers.<sup>168</sup>

Critics of the fat tax have the support of the powerful lobby of the food and beverage industry. One study found that fast-food companies alone spent over \$41 million on congressional and senatorial campaigns between 1988 and 1998.<sup>169</sup> These companies also play an influential role with the Department of Agriculture and the Food and Drug Administration.<sup>170</sup> Hence, libertarian ideals coupled with industry opposition may pose the biggest obstacle to effective regulation of food.<sup>171</sup>

Yet the fat tax faces an additional obstacle, given taxpayer and legislative attention to the ever-elusive notion of equity in sound tax policy.<sup>172</sup> In tax-policy parlance, horizontal equity means that similarly situated taxpayers should be treated similarly.<sup>173</sup> In terms of an individual's income, a fat tax presents little concern because by definition it is levied per unit or on an *ad valorem* (percentage) basis.<sup>174</sup> However, taxing foods primarily consumed by one group of people while not taxing foods primarily consumed by another group violates horizontal equity.<sup>175</sup> For example, if a particular population has a strong cultural preference for a certain type of food, such as foie gras, then imposing a fat tax upon foie gras but not cow livers would violate horizontal equity arbitrarily. Similarly, given that problems of accessibility and affordability predispose many impoverished inner-city populations to consume more junk food, imposing a fat tax on junk food but not brie cheese—equally

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<sup>168</sup> See Strnad, *supra* note 10, at 1241.

<sup>169</sup> McCann, *supra* note 10, at 1195 (citing CTR. FOR PUB. INTEGRITY, SAFETY LAST: THE POLITICS OF E. COLI AND OTHER FOOD-BORNE KILLERS 2 (1998)).

<sup>170</sup> Strnad, *supra* note 10, at 1227; see also BARRETT, *supra* note 136, at 187–94 (describing the alliance between industry executives and the USDA). For an illustration of the restaurant industry's pull on the FDA and USDA in the context of food labeling requirements, see McCann, *supra* note 10, at 1186–97.

<sup>171</sup> *Elephant in the Room*, *supra* note 163, at 1173.

<sup>172</sup> See Mona L. Hymel, *Consumerism, Advertising, and the Role of Tax Policy*, 20 VA. TAX REV. 347, 359 (2000) (“Fairness in our tax system stands out as one of the most important criterion [*sic*].”).

<sup>173</sup> See DePippo, *supra* note 105, at 562.

<sup>174</sup> *Id.* (referring to excise taxes generally); see also Giertz *supra* note 154, at 111 (“Excise taxes are levied on either a unit or *ad valorem* basis.”).

<sup>175</sup> See Joel S. Newman, *Slinking Away from Twinkie Taxes*, 113 TAX NOTES 1155, 1160 (2006).

unhealthy, but consumed predominantly by wealthier individuals—also would be arbitrary and violate principles of horizontal equity.<sup>176</sup>

Fat taxes are even more problematic in terms of vertical equity, particularly given the correlation between poverty and obesity. Vertical equity is premised on the notion of a taxpayer's ability to pay.<sup>177</sup> Under this principle, low-income households should pay lower taxes than high-income households. Indeed, in the United States, which aims for a progressive income tax system, the tax burden should increase as a taxpayer's income rises.<sup>178</sup> Yet because a fat tax applies to the entire income spectrum, it consumes a larger proportion of a poor individual's spending on food. Thus, fat taxes are inherently regressive instruments. This is especially problematic in light of poor populations' smaller food budgets and lack of access to healthier alternatives.

Some argue that vertical equity concerns are irrelevant in the context of excise taxation.<sup>179</sup> This argument is premised on the concept of "pure" choice: because excise taxes traditionally are imposed on items that society deems unnecessary for survival—"luxuries" such as alcohol, cigarettes, furs, and yachts—concerns of regressivity are unwarranted.<sup>180</sup> While this might be true in the context of some luxury items, the argument is largely inapplicable to food. Everyone needs food to survive, and while people can eat a variety of foods to satisfy this need, the concept of choice or preference is weaker when one takes into account other environmental and economic constraints.<sup>181</sup>

A fat tax also violates the principle of neutrality. Neutrality means that "the tax system should minimally interfere with the allocation of resources under a free market system."<sup>182</sup> Pursuant

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<sup>176</sup> See Byrd, *supra* note 6, at 333–34 (discussing the arbitrary nature of fat taxes). Byrd notes an oft-cited example of an arbitrarily applied excise tax: a 1991 Maine statute that imposed a tax on frozen baked apple pie, but not frozen unbaked apple pie. The law also imposed a tax on blueberry muffins, but not English muffins. *Id.*; see also Newman, *supra* note 175, at 1163.

<sup>177</sup> DePippo, *supra* note 105, at 562.

<sup>178</sup> Donald Phares, *Tax Equity Analysis*, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY, *supra* note 154, at 372–73.

<sup>179</sup> DePippo, *supra* note 105, at 563.

<sup>180</sup> *Id.*

<sup>181</sup> See *supra* notes 81–101 and accompanying text.

<sup>182</sup> Hymel, *supra* note 172, at 360–61.

to this principle, a tax is most efficient when it has no impact on one's decision to purchase something.<sup>183</sup> Because a fat tax raises the price above its "free market" or optimal value, it distorts the cost of that food and causes people to buy less of the product and substitute another, ideally more healthful food.<sup>184</sup> Of course, for a fat tax advocate with sumptuary motives, this may be precisely the point. But in terms of price distortion, economists are much more concerned with the resulting inefficiency and social-welfare costs.<sup>185</sup> These costs are sometimes referred to as "deadweight" loss or "excess burden."<sup>186</sup> The deadweight loss refers to both the consumer's sacrifice in having to substitute for the higher valued good and the seller's loss in not being able to sell the product.<sup>187</sup> The significance of the deadweight loss for each sale may be minimal, but in terms of the entire national tax system the cost of deadweight loss may reach up to 5% of the Gross National Product.<sup>188</sup>

The effectiveness of a fat tax is also questionable. First, there is no evidence that a state or local government has ever earmarked fat-tax revenues specifically for public health initiatives.<sup>189</sup> Historically, funds generated by excise taxes have gone to general revenues. Absent specific funding earmarks, there is the ever-present risk that the government would divert fat-tax revenues to unrelated programs. Moreover, the different rationales for imposing a fat tax appear contradictory. As one scholar describes the paradox, "proponents attempting to sell a sin tax . . . will invariably find themselves in the precarious

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<sup>183</sup> *Id.* at 361.

<sup>184</sup> See DePippo, *supra* note 105, at 557 (discussing price distortion of an excise tax generally and the effect on consumer purchases).

<sup>185</sup> See, e.g., *id.* at 557–58; William F. Shughart II, *The Economics of the Nanny State*, in TAXING CHOICE, *supra* note 24, at 13, 16–17.

<sup>186</sup> DePippo, *supra* note 105, at 557.

<sup>187</sup> The deadweight loss does not refer to forgone government revenue. "[I]t is the value of the goods *not* produced and consumed because of the tax—the burden the tax imposes on society—which is transferred away from the market participants and lost forever, not being transferred to anyone." *Id.* For more on the social costs associated with selective excise tax, see Paula A. Gant & Robert B. Ekelund, Jr., *Excise Taxes, Social Costs, and the Consumption of Wine*, in TAXING CHOICE, *supra* note 24, at 247, 251–65.

<sup>188</sup> DePippo, *supra* note 105, at 557–58; Shughart, *supra* note 185, at 17.

<sup>189</sup> Byrd, *supra* note 6, at 328; see Jacobson & Brownell, *supra* note 17, at 854 ("No jurisdiction uses revenues to subsidize the prices of healthful foods.").

situation of arguing against themselves; first expounding upon the need to discourage the disruptive and unwanted behavior, but then not too much, as the tax must raise needed revenue.”<sup>190</sup> In other words, governments could become reliant on the revenues of a fat tax, leading to an inevitable conflict of interest if and when the deterrent value of the tax takes effect.

### C. *A Fat Tax Through Implicit Insurance Premiums*

Despite the critiques described above, scholars and politicians continue to consider fat-tax proposals seriously. This section explores one such proposal in detail. In 2005, Stanford law professor and economist Jeff Strnad advanced the idea of a “food tax” that would be imposed on individuals as an “implicit premium in an implicit insurance system.”<sup>191</sup> At risk of oversimplification, Strnad’s fat-tax approach boils down to an excise tax levied on the purchase of specific units of food, such as energy-dense nutrient-poor foods (“EDNPs”),<sup>192</sup> that increase the likelihood of acquiring a certain disease in the future. The government would use the revenues to reimburse private insurance companies for the expected or actual medical costs when diet-related diseases strike.<sup>193</sup> I examine this proposal because it provides an opportunity for an objective analysis of the challenges of implementing a state or federal fat tax.

Strnad’s proposal starts by laying out some fundamental characteristics of health care and insurance in the United States.<sup>194</sup> He asserts that even in the United States, where formal health coverage is incomplete at best, emergency medical services are not denied merely because someone is uninsured.<sup>195</sup> From this it follows that everyone has at least implicit

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<sup>190</sup> DePippo, *supra* note 105, at 560.

<sup>191</sup> Strnad, *supra* note 10, at 1236 (citations omitted).

<sup>192</sup> EDNP is a category of foods that researchers have found promotes fatness in people. *Id.* at 1314. As the name suggests, EDNP foods are both high in energy intake (calories) and tend to be deficient in healthful nutrients. *Id.* Strnad never fully commits to EDNP foods as the best choice for his food tax, but he gives it serious consideration while pointing out its various limitations. *Id.* at 1314–22.

<sup>193</sup> *See id.* at 1236. By contrast, in a publicly funded health insurance system the government would directly pay the medical expenses. *Id.*

<sup>194</sup> *Id.* at 1234.

<sup>195</sup> *Id.* at 1234–35.

catastrophic health coverage.<sup>196</sup> Our society's willingness to provide a minimum package of health care suggests a normative choice to insure individuals who would not insure themselves against health risks beyond their means. Strnad calls this choice the "treatment principle."<sup>197</sup>

Under Strnad's treatment principle, health insurance is mandatory.<sup>198</sup> The compulsory nature of the health insurance system entails that poor dietary habits that increase one's health risks impose an externality borne by other individuals in the form of higher premiums or lower benefits.<sup>199</sup> According to Strnad, this externality is created by an ex ante moral hazard.<sup>200</sup> That is, if an individual is insured against a certain health outcome, the individual lacks incentive to avoid the unhealthy habits leading to the insured event.<sup>201</sup>

Strnad's scheme aims to address this externality by imposing a food tax, presumably at the retail level, that functions as an implicit insurance premium on the individual choosing to engage in unhealthy dietary habits.<sup>202</sup> In this way, the food tax would represent a contribution to one's future medical costs tied to eating a unit of unhealthy food. The revenues from this tax would be collected by the government and then used to reimburse private insurers who pay for the medical expenses.<sup>203</sup> To determine the size of the tax, Strnad has us imagine, for example, that every case of a certain disease can be attributed to eating a certain kind of food. If we know the expected medical costs associated with that disease, and we can determine that the probability of incurring the disease depends on the level of

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<sup>196</sup> *Id.* at 1235.

<sup>197</sup> *Id.* One can question the applicability of Strnad's treatment principle to the U.S. health care system. Surely our society would not knowingly let someone suffering an acute injury die on the street. But as of now, imagining even a minimal package of implicit catastrophic coverage may be too presumptuous. Thus, Strnad's treatment principle holds more water in the other "developed" economies, where coverage is universal. Nevertheless, I will proceed with my analysis accepting the treatment principle as valid as applied to the U.S. health care system.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1235–36.

<sup>200</sup> *Id.* at 1236.

<sup>201</sup> *Id.* Strnad goes on to note, "If the expected value of that damage exceeds the avoidance costs, the failure to avoid the damage will be inefficient." *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

consumption of that particular food, then the expected cost of consuming each additional unit of that food is equivalent “to the actuarially fair premium to insure against the illness.”<sup>204</sup> This eliminates any externality created by the ex ante moral hazard because the individual choosing whether or not to consume the unit of unhealthy food will have to pay the entire expected marginal medical cost of eating it.<sup>205</sup>

Strnad is up front about various practical and normative concerns raised by his implicit premium approach.<sup>206</sup> For instance, he admits that the scheme, as initially set out, assumes that the government would have full access to information about an individual’s consumption of a particular food, as well as reliable figures that link consumption to a particular disease.<sup>207</sup> With respect to the latter, he assumes that scientific evidence exists, though perhaps underdeveloped at this time, which ties the consumption of certain foods to a greater incidence of disease.<sup>208</sup> As to the information deficit regarding individual consumption, he argues that the case for his tax actually is stronger under the more realistic scenario where both the government and insurer lack full information.<sup>209</sup> Strnad proffers that if a government had full information about individual dietary habits, then private insurers would similarly have access to this information.<sup>210</sup> If this were the case, then Strnad suggests that the government would have no reason to interfere in the insurance system: an insurance company could simply set up a contract that made claims contingent on engaging in healthy eating habits.<sup>211</sup> But because risky eating habits are not observable or readily verifiable by insurance companies, the best way to address the ex ante moral hazard is by imposing a tax on the problematic activity directly.<sup>212</sup> That only the government

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1238.

<sup>206</sup> *See, e.g., id.*

<sup>207</sup> *Id.*

<sup>208</sup> *See id.* at 1271.

<sup>209</sup> *Id.* at 1261, 1267.

<sup>210</sup> *Id.* at 1261.

<sup>211</sup> *Id.* at 1263.

<sup>212</sup> *Id.* at 1268. Strnad later acknowledges that insurers may be able to observe several different “biomarkers,” such as excess weight and cholesterol levels, that could provide information regarding an individual’s propensity to acquire a certain

has the plenary power to impose such a tax is integral to Strnad's implicit insurance scheme.<sup>213</sup>

Strnad also recognizes that under the premise that insurance guards against unavoidable risks, imposing a fat tax in a compulsory insurance system raises certain fairness considerations.<sup>214</sup> If everyone had the same inherent probability of contracting a disease absent risky eating habits, then charging everyone the same premium through a fat tax would not be a problem.<sup>215</sup> As this is not the case, Strnad takes into account the reality that some people are predisposed to incur a disease regardless of their eating habits. These predispositions are what Strnad refers to as "inherent" risks.<sup>216</sup> Essentially, these are behavior-independent risks that fall outside the scope of moral hazard concerns and cannot be blamed on the consumer. According to Strnad, the inherent propensity to fall victim to a particular disease may include genetic factors, fetal environment, and involuntary exposure to toxins.<sup>217</sup> To account for these inherent risks, each individual would pay an additional tax at the time of purchase equal to the average inherent risk for the entire population.<sup>218</sup>

Strnad glosses over additional inherent risks that seem fatal to his design. First, as Strnad acknowledges, his probability formula does not account for individuals who have a greater propensity to contract a particular disease for each unit of food consumed.<sup>219</sup> Unlike genetic susceptibility, which is covered as an inherent risk, "differential marginal damage" does not merit a compensating adjustment according to Strnad.<sup>220</sup> Likewise, Strnad acknowledges but quickly dismisses what he calls

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disease as well as some insight into one's dietary habits. *Id.* at 1287. However, Strnad suggests this information would be at best partial and would not allow the insurer to distinguish between risky behavior and what Strnad calls "inherent" (i.e., behavior independent) risks. *Id.*

<sup>213</sup> See *id.* at 1285 ("[T]he case for taxation becomes stronger if individual levels of consumption of X are not observable. In that case, the government's power to tax is an important tool that is not available to the private insurance system.").

<sup>214</sup> *Id.* at 1236–37.

<sup>215</sup> *Id.* at 1237.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 1237–38.

<sup>219</sup> *Id.* at 1238.

<sup>220</sup> *Id.*

“fairness arguments based on ‘preferences.’”<sup>221</sup> Strnad’s “preference” argument suggests people have certain cultural predispositions to “liking” certain unhealthy foods.<sup>222</sup> According to Strnad, a person’s predisposition toward liking a particular food should not be covered as an inherent risk.<sup>223</sup> In essence, Strnad draws his own line about what constitutes individual “free choice.”<sup>224</sup>

Strnad’s argument reflects the perception of obesity under the fault-based paradigm,<sup>225</sup> which penalizes the individual through the economic disincentive of a fat tax. The underlying problem with fat-tax models such as Strnad’s, couched in terms of culpable lifestyle preferences, is that they primarily are concerned with offsetting the short-term economic costs of obesity rather than developing preventative solutions that might have a greater long-term impact in reducing obesity and its costs. In addition, his model dismisses overwhelming scientific research that suggest the consumer’s “choice” to engage in unhealthy eating habits is not a choice or preference at all, but rather a result of socioeconomic and environmental factors. These constraints are particularly problematic for low-income populations. And while Strnad notes the connection between obesity and poverty, as well as the added burden such a tax would impose on the poor, he seems to conclude that because the poor have the most to gain from the tax, their hardship would be worth it.<sup>226</sup> If the ultimate goal is to curb obesity and its related costs, then simply offsetting the costs without addressing the underlying socioeconomic and environmental causes is not an effective approach.

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1267.

<sup>226</sup> *Id.* at 1317 (“[S]ince these [poor] individuals presently appear to have the most to gain from healthier eating, combining special assistance with a stiff energy-density-based tax might result in especially large welfare gains for them.”).



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III  
A HEALTHY FOOD TAX CREDIT

Framing America's obesity problem in an environmental or public health perspective pulls the focus away from individual fault. Examining the problem from a broader lens reveals that obesity disproportionately affects the marginalized members of society. Historically and presently, indigent and minority populations have faced poor education, inadequate health care, and limited access to, and funds for, healthy foods. The tax system should try to break down these structural barriers by offsetting the prohibitively high cost of healthy foods via a tax credit for the poor or near poor for money spent on qualifying food items. Below, a historical sketch of the federal tax system as an instrument of social welfare sets the stage for a detailed explanation of my proposal for a Healthy Food Tax Credit ("HFTC").

*A. Taxes as Instruments of Public Policy*

The federal tax system is a complex device used to accomplish a broad range of public goals beyond generating revenue.<sup>227</sup> The view of a tax system that promotes social policy dates back to the founding of our nation: "The Framers of our Constitution viewed the tax system as a 'means for shaping the national economy, bringing foreign nations to commercial terms, regulating morals, and realizing social reforms.'"<sup>228</sup> Implicit in this perception is the notion that tax policy must be flexible as society's needs change.<sup>229</sup> With forecasts calling for obesity rates to increase to 40% for men and 43% for women by 2020,<sup>230</sup>

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<sup>227</sup> CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE* 24 (1997); *see also* Hymel, *supra* note 172, at 362.

<sup>228</sup> Hymel, *supra* note 172, at 362 (quoting SIDNEY RATNER, *TAXATION AND DEMOCRACY IN AMERICA* 18 (1980)).

<sup>229</sup> *See id.* (arguing that in the context of consumerism and overconsumption generally, our tax system lags far behind modern values of conservation).

<sup>230</sup> Ruhm, *supra* note 5, at 11. Ruhm bases these estimates on data from the National Health Examination Survey, as well as the first, second, and third National Health and Nutrition Examination Surveys ("NHANES"), and the first six years of the most recent NHANES survey. *Id.* at 3. For the empirical methods used, *see id.* at 5–8. Ruhm refers to a forthcoming report that uses "larger samples, but self-report data" that predicts even greater future rates of obesity and severe obesity. *Id.* at 18. Thus, Ruhm's predictions are not the highest estimates out there.

medical costs associated with diabetes to reach \$1 trillion by 2025,<sup>231</sup> and an increasing incidence of obesity among low-income and minority populations, particularly amongst women, the time for our tax system to address obesity is now.

Traditional tools for addressing social policy have taken the form of direct expenditure programs such as the Social Security, Medicare, Temporary Assistance to Needy Families (“TANF”), and Food Stamps programs.<sup>232</sup> Together, these programs form what has been called “the visible welfare state.”<sup>233</sup> Governmental agencies responsible for these programs include the Social Security Administration and the Departments of Health and Human Services (Medicare and TANF), Labor (job training), Housing and Urban Development (subsidized housing), and Agriculture (Food Stamps and Woman Infants and Children (“WIC”).<sup>234</sup> While these programs remain in force, the structure of their spending has shifted markedly in the past two decades.<sup>235</sup>

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<sup>231</sup> McCann, *supra* note 10, at 1167–68 (citing Garret Condon, *Diabetes Epidemic Menaces the U.S.; Costs, Suffering Expected to Soar*, HARTFORD COURANT, Sept. 9, 2001, at A1). The expected surge in type 2 diabetes is important for minority populations given that incidence of the disease is 30% higher among African Americans. Byrd, *supra* note 6, at 314.

<sup>232</sup> See HOWARD, *supra* note 227, at 30; see also Alan Berube et al., *Tax Policies to Help Working Families in Cities*, Discussion Paper No. 24 at 1 (Urban-Brookings Tax Policy Center) (2005).

<sup>233</sup> HOWARD, *supra* note 227, at 30. Howard uses the term visible welfare state in contrast to “the hidden welfare state,” that is, tax expenditures designed with social policy objectives. Howard proceeds to break expenditure programs down into two distinct types: “inclusive” and “means-tested” programs. Inclusive programs, such as Social Security and Medicare, are premised on principles of social insurance and are paid out of wage contributions in proportion to past earnings. *Id.* at 33. These programs are socially accepted and have a broad base of political support. Means-tested programs, such as TANF and Food Stamps, only assist households whose income falls below a certain threshold. Benefits are paid out of general revenues and are not “earned” as with Social Security. According to Howard, this overt cash transfer makes means-tested programs politically weak. It stigmatizes recipients and, for the most part, fails to provide enough assistance to help people out of poverty. *Id.*

<sup>234</sup> See *id.* at 30. I have updated some of the examples listed by Howard to reflect current programs that have superseded older versions. For example, TANF came into existence July 1, 1997, through the Personal Responsibility and Work Opportunity and Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105, replacing the Aid to Families with Dependent Children and Job Opportunities and Basic Skills Training.

<sup>235</sup> See Berube et al., *supra* note 232, at 1.

Efforts to reduce the federal deficit led to the enactment of the Budget Enforcement Act of 1990 (“BEA”).<sup>236</sup> BEA imposed new budgetary constraints that set ceilings on discretionary spending and required a pay-as-you-go process for entitlements and taxes.<sup>237</sup> The new budgetary rules effectively stopped both new direct spending initiatives and the expansion of existing direct spending programs.<sup>238</sup>

Around the same time that Congress was scaling back direct spending on social programs, it was increasing the use of the tax code as a device to support social policy goals.<sup>239</sup> The most notable change was the significant role the tax system came to play in supporting low- and moderate-income households.<sup>240</sup> Specifically, Congress passed the Tax Reform Act of 1986,<sup>241</sup> which substantially expanded the earned income tax credit (“EITC”) beyond its initial, more modest design.<sup>242</sup> Congress expanded the EITC again in 1990 and 1993.<sup>243</sup> In 1997, Congress

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<sup>236</sup> Frank Sammartino et al., *Providing Federal Assistance for Low-Income Families Through the Tax System: A Primer* 5 (The Urban Institute, Tax Policy Center, 2002), available at <http://www.urban.org/uploadedPDF/410526.pdf> (discussing the Budget Enforcement Act (BEA) of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in scattered sections of 2 U.S.C. & 15 U.S.C. § 1022)). Of course, the enactment of the BEA only tells part of the story. A wave of sweeping welfare reform was introduced in the 1960s via President Johnson’s Welfare Reform Act of 1964. Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969–99*, 53 NAT’L TAX J., 983, 985 (2000). Johnson’s declaration of “war on poverty” set in motion various antipoverty schemes that emphasized a range of work-oriented initiatives through the tax code. *Id.* Recognizing the historical national aversion to federal handouts, these programs looked for alternatives to traditional direct spending models. *Id.* For a detailed history of the political process leading up to the tax code’s central role as a public welfare device, see generally *id.* and HOWARD, *supra* note 227, at 44–192.

<sup>237</sup> Sammartino et al., *supra* note 236, at 5; see also Berube et al., *supra* note 232, at 2.

<sup>238</sup> Sammartino et al., *supra* note 236, at 5.

<sup>239</sup> Berube et al., *supra* note 232, at 1; Sammartino et al., *supra* note 236, at 8 (noting that in 2001, families claimed \$31 billion of credits, which exceeded the total federal spending for Food Stamps (\$18 billion) and TANF (\$21 billion)).

<sup>240</sup> See Sammartino et al., *supra* note 236, at 5–8.

<sup>241</sup> Pub. L. No. 99-514, § 111, 100 Stat. 2085.

<sup>242</sup> See I.R.C § 32 (2006). The EITC or “EIC” initially was introduced as a small part of President Ford’s Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204, 89 Stat. 26. See Ventry, *supra* note 236, at 995 (explaining that “the EITC’s modest responsibilities and cost (\$1.25 billion) reflected the prevailing welfare reform consensus that carefully circumscribed its parameters”).

<sup>243</sup> Sammartino et al., *supra* note 236, at 4.

enacted the partially refundable Child Tax Credit (“CTC”).<sup>244</sup> Both credits were expanded again in 2001 pursuant to the Economic Growth and Tax Relief Reconciliation Act.<sup>245</sup>

Today nearly all new programs and proposals targeted at low- and moderate-income taxpayers are in the form of tax incentives rather than direct spending programs.<sup>246</sup> Indeed, the EITC has emerged as the largest cash transfer program for low-income families.<sup>247</sup> The Internal Revenue Service (“IRS”), not the Department of Housing and Urban Development, is responsible for the biggest program for developing affordable housing, through the Low-Income Housing Tax Credit (“LIHTC”).<sup>248</sup> In this way, the IRS has become a central player in effecting social policy, particularly for the poor and near poor. As one political scientist put it, “The size and broad scope of tax expenditures make the IRS, rather than Health and Human Services, the most comprehensive social welfare agency in the United States.”<sup>249</sup>

The widely touted success of the EITC partially explains the shift.<sup>250</sup> The EITC’s enactment in 1975 and subsequent expansions brought millions of the working poor out from below the poverty line.<sup>251</sup> In addition to its effectiveness as a policy tool, the EITC was able to draw a broad base of political support

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<sup>244</sup> *Id.* The CTC was created by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, tit. I, 111 Stat. 788 (codified as amended at I.R.C. § 24 (2006)).

<sup>245</sup> Pub. L. No. 107-16, 115 Stat. 38 (2001); Sammartino et al., *supra* note 236, at 4.

<sup>246</sup> Berube et al., *supra* note 232, at 2. For example, the EITC, CTC, and LIHTC are all relatively recent tax credits aimed specifically at benefiting the poor. Influenced by this trend, Berube and his colleagues go on to set out various federal tax credits that could improve the economic prospects of low- and middle-income working families in cities. *See generally id.* at 1–13.

<sup>247</sup> *Id.*; Sammartino et al., *supra* note 236, at 8.

<sup>248</sup> I.R.C. § 42 (2006); Berube et al., *supra* note 232, at 2.

<sup>249</sup> HOWARD, *supra* note 227, at 30. The term “tax expenditures” is sometimes used synonymously with tax incentives or tax subsidies. The use of “tax expenditures” recognizes that provisions are often substitutes for direct spending programs with similar objectives. Sammartino et al., *supra* note 236, at 5–6.

<sup>250</sup> Berube et al., *supra* note 232, at 2; *see also* HOWARD, *supra* note 227, at 64 (noting how the EITC “has been hailed in recent years as the policy equivalent of penicillin”).

<sup>251</sup> One study found that the EITC had lifted as many as 4.6 million people above poverty, including 2.4 million children. *See* Sammartino et al., *supra* note 236, at 34 (citing to ROBERT GREENSTEIN & ISAAC SHAPIRO, CTR. ON BUDGET & POLICY PRIORITIES, NEW RESEARCH FINDINGS ON THE EFFECTS OF THE EARNED INCOME TAX CREDIT (1998)).

from both Democrats and Republicans.<sup>252</sup> In contrast to direct spending programs for similar social objectives, the EITC was an “open-ended” tax expense not tied to any particular goods or services. This freedom enabled policymakers to defend the program on a wide variety of grounds.<sup>253</sup>

Likewise, the popularity of most tax incentives can be credited to their wide base of political endorsement.<sup>254</sup> As political scientist Christopher Howard asserts:

Tax expenditures can be defended politically on at least four distinct grounds: as aid to some needy category of citizens; as a subsidy to third-party providers in the private sector, who furnish most of the goods and services underwritten by the tax code; as tax reductions; and as alternatives to traditional government<sup>255</sup> programs (i.e., direct expenditures and regulation).

Because of their diversity of support, tax expenditures have the unique ability to escape the public and political scrutiny associated with direct spending initiatives. Thus, even when tax expenditures may be economically the same as direct spending programs for similar objectives, they appear to decrease the size of government.<sup>256</sup> As a consequence, “tax expenditures [are] less sensitive to major changes in the economy [and] . . . political leadership, and they are . . . better suited to ‘hard times.’”<sup>257</sup>

Even though the tax code’s role in assisting poor or near-poor individuals and families has expanded significantly in the past decades, tax expenditures still overwhelmingly favor the wealthy and reduce the overall progressivity of the income tax system.<sup>258</sup>

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<sup>252</sup> See HOWARD, *supra* note 227, at 142.

<sup>253</sup> *Id.* at 141.

<sup>254</sup> *Id.* at 11.

<sup>255</sup> *Id.*

<sup>256</sup> Sammartino et al., *supra* note 236, at 4 (explaining the popularity of tax incentives to support social policy).

<sup>257</sup> HOWARD, *supra* note 227, at 37–38. Howard is by no means praising the way in which tax expenditures slip through the political process. To the contrary, he seeks to raise awareness of the scope and size of the hidden welfare state. Others have countered Howard’s perception of tax expenditures as “the result of surreptitious and undemocratic policymaking” by arguing that the view “is more true of the tax policy making process 30 or 40 years ago.” Ventry, *supra* note 236, at 983 n.1. Rather, “politicians understand perfectly well the distributive features of tax programs.” *Id.*

<sup>258</sup> HOWARD, *supra* note 227, at 8–9 (“Tax expenditures . . . flow overwhelmingly to citizens with above-average incomes.”) Howard noted, “To the extent that tax

Indeed, most benefits in the tax code are subsidies for businesses and employers or exclusions for employees. High-income households are more likely to benefit from these expenditures because wealthier individuals tend to work for employers that offer more tax-qualified benefits.<sup>259</sup> Moreover, even if low-income workers receive benefits, the exclusions are disproportionately more valuable for high-income taxpayers because of the progressive tax-rate schedule.<sup>260</sup>

Similarly, deductions tend to benefit the upper echelon of society.<sup>261</sup> This is because low-income filers often save more money by taking the standard deduction rather than itemizing their expenditures.<sup>262</sup> Hence, itemized deductions are of little benefit for the poor. Rather, “deductions tend to provide an “upside-down subsidy,”<sup>263</sup> since, in a progressive tax system where tax rates increase with income, deductions are biggest for those in the highest tax bracket (up to thirty-five cents per dollar).<sup>264</sup> In contrast, lower-income individuals who choose to itemize fall into lower tax brackets (0%, 10%, or 15%).<sup>265</sup> Thus,

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expenses are targeted, it is the rich who benefit and not the poor.” *Id.* at 34; see Berube et al., *supra* note 232, at 3 (“[C]urrent tax institutions and rules are not designed to assist low-income and moderate-income households.”); John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 30 (2002) (noting how several tax expenditures “disproportionately benefit high-income and wealthy taxpayers and reduce the overall progressivity of the income tax”). For instance, home ownership subsidies, such as the deduction for qualified-resident interest and property taxes, substantially benefit the wealthy. Steinkamp, *supra*, at 32–33 (citing to I.R.C. § 163(h)(2)(D) (home mortgage interest deduction) and § 461 (property tax)). In 2000, the Joint Committee on Taxation found that the federal government spent \$60.615 billion on the home mortgage deduction. Of the savings, 93% went to households with incomes of \$50,000 or more; nearly 60% went to households with incomes equal to or greater than \$100,000. *Id.* at 36. As mentioned above, one of the largest tax expenditures in the code is for employer-provided health benefits. See *supra* notes 20–21 and accompanying text; see also I.R.C. § 106 (2006). Employer-based subsidies, including § 106 and retirement account subsidies, amounted to \$198.3 billion in 2001. Steinkamp, *supra*, at 36. For a detailed analysis of various ways in which the modern day income tax system predominantly benefits the wealthy, see *id.* at 26–70.

<sup>259</sup> Steinkamp, *supra* note 258, at 55.

<sup>260</sup> *Id.*

<sup>261</sup> Berube et al., *supra* note 232, at 3.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> See *id.*

the same deduction is worth very little to a low-income filer and consequently provides minimal incentive.<sup>266</sup>

Even subsidies such as the LIHTC that are targeted at producers of goods and services for low-income households have several inherent flaws.<sup>267</sup> One concern is that a private company's motivation to maximize profits may cause it to channel significant tax savings away from the low-income consumer.<sup>268</sup> In addition, these types of programs are only available to taxable entities.<sup>269</sup> Thus, governments and nonprofit organizations cannot take advantage of the tax savings directly.<sup>270</sup>

In contrast, tax credits are a more promising incentive for assisting the poor. Unlike deductions or exclusions, tax credits work as a dollar-per-dollar offset of one's tax liability; they do not increase with one's income.<sup>271</sup> Therefore, credits may provide substantial financial incentives in a manner consistent with a progressive tax system.

The key is whether credits are refundable or nonrefundable.<sup>272</sup> A nonrefundable credit only provides tax relief up to the amount of an individual's tax liability. For the 40% of households with zero tax liability,<sup>273</sup> a nonrefundable credit has no impact. On the other hand, a refundable credit is paid in full by the government even when the credit exceeds tax liability.<sup>274</sup> Thus, a refundable credit reaches households at the lowest end of the income spectrum. Currently the only fully refundable credit targeted specifically at the poor is the EITC.<sup>275</sup> In sum, there is room for greater equity and redistribution of wealth in the tax code, which predominantly favors high-income taxpayers.

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<sup>266</sup> See *id.*

<sup>267</sup> See Berube et al., *supra* note 232, at 3.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* Berube notes that the efficiency of the LIHTC, "measured by the net equity invested per credit dollar expended," has been increasing. *Id.* at n.8 (citing Jean Cummings & Denise DiPasquale, *The Low-Income Housing Tax Credit: An Analysis of the First Ten Years*, 10 HOUSING POLICY DEBATE 251–307 (1999)).

<sup>271</sup> Berube et al., *supra* note 232, at 3.

<sup>272</sup> *Id.*; see also Sammartino et al., *supra* note 236, at 14.

<sup>273</sup> Berube et al., *supra* note 232, at 4.

<sup>274</sup> See *id.* at 3–4.

<sup>275</sup> The CTC is only partially refundable. I.R.C. § 24 (2006).

*B. Using a Carrot to Fight Obesity: The Healthy Food Tax Credit*

The Healthy Food Tax Credit (“HFTC”) would function as a fully refundable tax credit for money spent on healthy foods, rather than a deduction, exclusion, or a subsidy for producers. As described above, tax credits have been the most successful tool when the aim of the policy is to reach low-income households. Approaching the obesity problem from a public health perspective, the HFTC is designed to offset the prohibitively high costs of healthy foodstuffs for the segment of society with the greatest prevalence of obesity: poor, marginalized communities. The HFTC would increase the consumption of healthy foods and inspire other key players, such as local governments, community organizations, schools, parents, and public and private institutions, to get involved with similar preventative strategies.<sup>276</sup> In concert, these efforts could lead to a long-term decline in obesity and related illnesses and costs. Although the HFTC would share many characteristics with current tax credits targeted at low-income populations, such as the EITC, CTC, and LIHTC, it would differ in important respects from these credits as well. Below I describe the differences and similarities in the six central components of my proposal: (1) its role as a means-tested cash transfer; (2) the modified work requirement; (3) the size of the program; (4) qualifying food items; (5) administrative concerns; and (6) estimated costs.

First, similar to the EITC, the HFTC would be available only to filers below a certain income level. Additional research could identify exactly where the income level should be drawn to provide the most effective results with respect to obesity rates. For the sake of convenience, the HFTC could follow the EITC’s structure and phase out at a specified income level depending on one’s filing status.<sup>277</sup> Phasing-out the credit as a household’s income goes up would keep the costs of the credit manageable.<sup>278</sup>

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<sup>276</sup> Effective strategies may include more educational campaigns directed at K–12 schools and parents with children. Other more dramatic efforts may call for changes in patterns of land use and a shift away from treatment-oriented health care. Perdue et al., *supra* note 33, at 96.

<sup>277</sup> To be eligible for the credit in tax year 2007, a taxpayer had to have an adjusted gross income (“AGI”) less than \$37,783, or, if married and filing jointly (“MFJ”) and with two or more qualifying children, an AGI less than \$39,783. A



However, depending on how rapidly the credit phases out, this mechanism also can lead to higher implicit marginal tax rates, which in turn can have adverse work and saving incentives.<sup>279</sup> By limiting benefits once a low-income family reaches a certain adjusted gross income level, a tax credit can cost the household more money if it earns too much. In this regard, synchronizing the HFTC's phase-out mechanisms with other credits would be important in order to avoid adding to such a disincentive. One approach is to implement a larger phase-out range across the board.<sup>280</sup> Alternatively, the HFTC could phase-in as earnings increase, which would have the opposite effect by reducing work disincentives.<sup>281</sup>

Second, in light of the trend of tax incentive programs that assist low-income households to impose a work requirement,<sup>282</sup> a HFTC work requirement might be necessary to appease the national aversion to federal handouts. For example, the EITC is limited to families with earnings. Similarly, refundable CTCs only "phase-in" after the filer's income exceeds \$10,000.<sup>283</sup> Even federal welfare programs such as TANF now require most beneficiaries to work after two years of receiving benefits.<sup>284</sup> However, if the objective is to provide income assistance to poor families, it makes little sense to limit the proposed credit to families with earned income, thereby disqualifying the families most in need, particularly in light of the link between financial

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taxpayer with one child had to earn less than \$33,241 (\$35,241 MFJ); a taxpayer with no qualifying children had to earn less than \$12,590 (\$14,590 MFJ). See Internal Revenue Service, EITC Thresholds and Tax Law Updates, <http://www.irs.gov/individuals/article/0,,id=150513,00.html> (last visited Apr. 22, 2008).

<sup>278</sup> See Jonathan Barry Forman, *Beyond President Bush's Child Tax Credit Proposal: Towards a Comprehensive System of Tax Credits to Help Low-Income Families with Children*, 38 EMORY L.J. 661, 683–84 (describing how a phase-out would be necessary to keep his proposed expansion of the CTC manageable with respect to cost).

<sup>279</sup> See Sammartino et al., *supra* note 236, at 11.

<sup>280</sup> Forman, *supra* note 278, at 683–84.

<sup>281</sup> Sammartino et al., *supra* note 236, at 11.

<sup>282</sup> See *id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

stress and harmful eating habits.<sup>285</sup> As with TANF, a compromise solution could make the credit available to unemployed individuals for only a limited time.

Third, because the HFTC's intention is to offset the prohibitively high cost of healthy foods, the credit could be modest in size. For example, a \$500 per household annual credit would provide roughly \$10 weekly for qualifying food items. The amount could be indexed for inflation to ensure that the credit does not erode over time. Consistent with the broadly held view that families with more children have greater needs, the credit should increase depending on the number of adults and dependent children in the household.<sup>286</sup> Increasing benefits for low-income families with children is essential for confronting and preventing obesity in the long term, since obesity often persists into adulthood. Moreover, many believe children retain the eating habits they learn from their parents.<sup>287</sup>

Fourth, determining what food items qualify for the HFTC should be relatively easy. Although "health" and "healthy food" are subjective terms, scientific research shows that certain foods are more nutritious than others.<sup>288</sup> In addition, there is a clear cost disparity between processed foods and fresh foods. Processed foods high in added sugar, sodium, and fats cost less than fresh produce, low-fat dairy products, and lean meats.<sup>289</sup> Ample evidence supports the positive health impact of consuming such foods, especially fresh produce.<sup>290</sup> Thus, the

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<sup>285</sup> As mentioned above, many scholars studying obesity note that harmful eating habits can be linked to financial stress. See, e.g., Perdue et al., *supra* note 33, at 96 (noting that food insecurity is a contributing cause of obesity).

<sup>286</sup> Sammartino et al., *supra* note 236, at 12 n.5.

<sup>287</sup> See, e.g., McCann, *supra* note 10, at 1185 (explaining how "food preferences of adults are predominantly shaped by their eating habits as children").

<sup>288</sup> See, e.g., Drewnowski & Darmon, *Replacing Fats and Sweets with Fruits and Vegetables*, *supra* note 85, at 1555 (noting for instance, that "[a] 'prudent' dietary pattern characterized by high intake of vegetables, fruits, whole grains, poultry and fish has been associated with a lower risk of coronary heart disease and with better health status overall"). Drewnowski then contrasts these foods with the "consumption of sugar-sweetened beverages, corn syrup, potatoes, and refined grains," which have been linked to an increased risk of heart disease and diabetes. *Id.*

<sup>289</sup> See *supra* note 98 and accompanying text.

<sup>290</sup> *Id.* Even Professor Strnad, while cautious to endorse any health initiative that focuses on specific nutrients, recognizes that the "consistent positive evidence with respect to fruit and vegetable consumption might" call for a subsidy on these goods.

HFTC could apply to purchases of fruits and vegetables, low-fat dairy products, and lean meats. Determining exactly which foods would qualify for the credit is beyond the scope of this Comment, and probably beyond the faculties of the IRS.

Regarding which governmental department should evaluate HFTC-worthy foods, I rely on the insight of psychologist Deidre Barrett. She asserts that most of our country's nutritional policy is set by the U.S. Department of Agriculture ("USDA").<sup>291</sup> However, according to Barrett, the USDA's main objective is not to promote health in America, but "to promote agricultural products." Indeed, the board in charge of the nutritional guidelines is packed with food-company executives.<sup>292</sup> Subsidies for farmers overwhelmingly go toward unhealthy foods such as white flour, butter, and corn to produce corn syrup.<sup>293</sup> In this way, "Putting the USDA in charge of dietary advice is in some respects like putting the fox in charge of the henhouse."<sup>294</sup> Barrett concludes that the appropriate department for nutritional advice is the Department of Health and Human Services ("DHHS"), whose committee members are not tied directly to food companies.<sup>295</sup> Following this logic, the DHHS would be a proper and qualified agency to evaluate HFTC-worthy foods.

Fifth, as a tax credit targeted at the cost of healthy foods, the HFTC would have a unique administration, unlike the EITC and CTC, which are general tax provisions.<sup>296</sup> HFTC claims would resemble something closer to claims for the Dependent Care Credit<sup>297</sup> or reports for itemized deductions such as medical

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Strnad, *supra* note 10, at 1310. He is understandably concerned that any major change in food policy could have unintended, adverse consequences. *Id.* at 1309. Hence, he focuses on food patterns rather than food components. However, there is no reason why a subsidy for healthy products would not induce healthy food patterns.

<sup>291</sup> BARRETT, *supra* note 136, at 187.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* (quoting former Senator Patrick Fitzgerald, a veteran of the Senate Agricultural Committee).

<sup>295</sup> *Id.* at 193–94.

<sup>296</sup> See Sammartino et al., *supra* note 236, at 16–17 (contrasting general tax provisions such as the CTC and EITC to "targeted provisions" that apply only to specific taxpayer activities such as spending money on childcare).

<sup>297</sup> I.R.C. § 21 (2006).

expenses<sup>298</sup> or charitable contributions.<sup>299</sup> Because the HFTC would be tied to specific consumer expenditures on particular healthy foods, the credit would require the filer to substantiate his or her spending on qualifying food items. The most obvious way to accomplish this is by furnishing receipts of purchase.

The use of purchase receipts increases the administrative burden on the IRS and makes filing more complex for the individual. In addition, the combination of a refundable credit and the use of receipts likely would invite fraud and reporting errors.<sup>300</sup> While fraud and error rates are inevitable in any cash transfer program, the incentive to cheat is greater when the credit is refundable. As a result, food vendors and grocery stores would need to play an integral role in the substantiation of qualifying expenses. Fortunately, most grocery stores, particularly chains, already have much of the necessary infrastructure and technology in place. Large grocers like Kroger engage in sophisticated consumer-data mining in connection with their membership loyalty cards to optimize marketing programs.<sup>301</sup> Records of all members' purchases provide vendors an excellent means to validate consumers' purchases as well as to mitigate concerns of fraud and reporting errors.

The substantiation requirement would increase the administrative costs of the HFTC program. Still, the cost of administrating tax incentives is much lower than for direct expenditures with similar policy goals. One study found that administrative costs for the USDA's Food Stamps program amounted to approximately \$4 billion in 1998, nearly 19% of the program's benefits.<sup>302</sup> By contrast, the entire budget for the IRS in 1998 was \$7.3 billion, which covered collecting taxes from 122

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<sup>298</sup> *Id.* § 213.

<sup>299</sup> *Id.* § 170.

<sup>300</sup> For example, a recent study on EITC compliance found approximately 30% in reporting errors. Sammartino et al., *supra* note 236, at 47 (noting that the largest errors related to family status and qualifying children). The report did not account for errors due to taxpayers' failure to file. *Id.* at 47–48.

<sup>301</sup> See Alexander Eule, *Thriving in Wal-Mart's World*, BARRONS, Jan. 7, 2008, at 26.

<sup>302</sup> Sammartino et al., *supra* note 236, at 47 (“Because tax benefits for low-income families generally entail less scrutiny than benefit programs, they tend to be less costly to administer.”).

million individual taxpayers and 5 million corporations.<sup>303</sup> Even with the increased costs of enforcing low-income tax benefit programs, the cost of administering programs such as the EITC are minimal compared to Food Stamps.<sup>304</sup> In addition, information about the HFTC easily could accompany ongoing outreach efforts to teach taxpayers and preparers how to file for the EITC.<sup>305</sup>

Limiting receipt of the credit to a lump-sum payment at the end of the year also would reduce the administrative complexity of the HFTC. Thus, unlike the EITC, the HFTC might not include an option to receive payment in advance. While advance payments can provide much needed support to low-income families, few families elect to take a payment.<sup>306</sup> In addition, much of the administrative costs of direct spending programs such as Food Stamps are attributable to their bi-weekly or monthly distributions.

Finally, estimating the costs of the HFTC depends on multiple factors. These include the rate of participation, the exact size and scope of the credit, administrative costs, and direct and indirect effects on other programs and institutions, in both the public and private sectors. With so many variables, putting an accurate price tag on the HFTC is not possible. Nevertheless, given the general design of the HFTC and available information about current refundable tax credits, in particular the EITC, we can draw certain conclusions.

The EITC is currently the only fully refundable tax credit designed to assist low-income families.<sup>307</sup> For households with qualifying children, a recent study found that participation is over 80%.<sup>308</sup> Interestingly, however, participation among

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<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *See id.* (discussing the efforts to teach taxpayers and tax preparers about the requirements for eligibility).

<sup>306</sup> *Id.* at 15. Sammartino believes many families do not take the advance payment because they are unaware of the option, they fear overestimating the credit (and having a large tax debt at the end of the year), or they do not want their employers overly involved in their finances. *Id.*

<sup>307</sup> There is however, a narrowly tailored, fully refundable credit for health insurance payments for displaced workers. *See* Berube et al., *supra* note 232, at 4.

<sup>308</sup> Leonard E. Burman & Deborah Kobes, *Analysis of GAO Study of EITC Eligibility and Participation*, URB. INST., Jan. 18, 2002, at 1, available at <http://www.urban.org/UploadedPDF/410435.pdf>.

childless families was less than 45%.<sup>309</sup> The Government Accountability Office (“GAO”) attributes this lack of participation to the fact that the average eligible taxpayer not claiming the credit was entitled to only \$150, a small incentive.<sup>310</sup> Also, childless people with low incomes may not have access to the kinds of support services, such as TANF, available to families with children. Thus, they simply may not be aware of their eligibility.<sup>311</sup> Still, commentators emphasize that eligible filers claim the bulk of available credits and conclude that Congress has hit its target for the most part.<sup>312</sup>

Because the HFTC is designed as a fully refundable credit, high participation among families currently claiming the EITC would be likely. Moreover, if the HFTC was worth around \$500 per eligible filer, then it would be a significantly larger incentive than the \$150 refund available to individual, childless EITC recipients. High HFTC participation would translate into high program costs. However, the eventual expenditure would be far less than what the government currently spends treating obesity-related illnesses. If the tax credit had a positive health impact, then its price would be offset by subsequent savings in government health care.<sup>313</sup> That leads us to the billion-dollar question: will the HFTC reduce obesity?

### C. *The Potential Impact on Consumption and Obesity*

The HFTC’s short-term impact on health might not be obvious, but its long-term benefits for health and financial savings could be profound. Given tax incentives’ well-known impact on consumption,<sup>314</sup> the HFTC undoubtedly would

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<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 2–3. In 2007, the maximum credit available for taxpayers without children was \$428. See Internal Revenue Service, EITC Thresholds and Tax Law Updates, <http://www.irs.gov/individuals/article/0,,id=150513,00.html> (last visited Apr. 22, 2008).

<sup>311</sup> Burman & Kobes, *supra* note 308, at 3.

<sup>312</sup> *Id.*

<sup>313</sup> See Byrd, *supra* note 6, at 324 (“Any program that effectively reduces obesity will also reduce the costs of obesity.”).

<sup>314</sup> See Hymel, *supra* note 172, at 446–47 (explaining how changes in the tax code influence taxpayer behavior and that many tax reforms have had a substantial impact on the targeted activity). There have been several small-scale empirical studies which further support the contention that a reduction in price would increase the consumption of healthful foods. See French, *supra* note 71, at 842S.

increase the consumption of qualifying healthy foods. The difficult question is whether the HFTC would slow or reduce the obesity trend. To the extent that consumption of unhealthy, high-fat foods and unbalanced diets contribute to the prevalence of obesity, one would expect that increased consumption of healthier foods would have a positive impact. The credit also would provide a direct way of educating consumers about healthy eating.

However, obesity is not a consequence of diet alone. And the reimbursement of money spent on healthy food would not necessarily result in recipients consuming less unhealthy products. It could even encourage overconsumption. Federal direct spending programs such as the National School Lunch Program (“NLSP”) and other food-assistance programs have been criticized as “fattening the poor.”<sup>315</sup> But any analogy to the NLSP, Food Stamps, or WIC in this respect is without merit. Unlike the others, the HFTC only provides a refund for healthy items, which would exclude, for example, sugary cereals, soft drinks, and many frozen dinners. Unlike the HFTC, the other programs permit recipients to purchase all but a few products at a grocery store, excluding items such as alcohol or tobacco.<sup>316</sup>

One of the most important features of creating a new provision in the tax code is that it creates awareness and sends a powerful message that the government not only recognizes a social problem, but is willing to take action to address that problem.<sup>317</sup> If the government demonstrates through its tax

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One experiment in Minnesota reduced the price of lower fat snacks in vending machines at schools and job sites, resulting in a substantial increase in the purchase of the lower-price healthful snacks. *Id.* A second study reduced the price of fresh fruits and vegetables (baby carrots) sold at cafeterias in secondary schools. *Id.* at 843S. The price reduction resulted in a four-fold increase in the consumption of fresh fruits and a two-fold increase in the consumption of baby carrots. *Id.*

<sup>315</sup> Drewnowski & Specter, *supra* note 2, at 6 (citations omitted).

<sup>316</sup> Although these programs are taking steps to make these programs healthier, they have been criticized for not doing enough. *See, e.g., Government's Food Basket Penny Foolish*, DAYTON DAILY NEWS, Aug. 18, 2006, at A18 (noting the USDA took steps to make healthier foods available for the WIC program but substantially trimmed the budget for fresh fruit and vegetables).

<sup>317</sup> *See* Hymel, *supra* note 172, at 448 (“Recognition of a problem by the federal government sends a powerful message.”). While Hymel advocates for a change to the tax treatment of advertising expenses in order to decrease consumption generally, the point is equally applicable here, if the government were to support significant preventative efforts to combat obesity.

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policy that it supports the prevention of obesity, then even if the effect of the policy itself is minimal, the action has the potential to create a ripple that produces substantial results. In sum, a change in federal tax policy can provide the much-needed momentum to involve all stakeholders, including states, local communities, and the private sector, in combating obesity.

#### CONCLUSION

Recognizing the inherent problems associated with a fat tax, this Comment argues that the federal tax system nevertheless could prove an effective vehicle for confronting the obesity problem. My proposal does not presume to be an end-all remedy or a “magical silver bullet” for obesity, but rather a starting point. Obesity is a complex disease that requires comprehensive and long-term solutions. By shifting the framework away from individual fault, the HFTC would accomplish much more than simply offsetting the higher price of healthy foods. By enacting something akin to the HFTC, the government would send the powerful message that it is concerned with obesity from a public health perspective and is willing to take action against countervailing environmental factors. The tax credit could propel other public and private actors to take similar preventative steps against obesity.

Perhaps most importantly, the HFTC should be more effective than a fat tax. In contrast to actual and proposed fat taxes, a refundable credit would provide a significant financial incentive to purchase healthier food. Moreover, even if recipients of the credit continued to eat unhealthy foods and merely complimented their diets with healthier alternatives, there could be direct and incidental health benefits. First, a credit that encourages people to eat more fruits and vegetables will create awareness and educate consumers of the benefits of a healthy diet. Second, the increased demand for healthy food items would cause healthier options to become more widely available, especially in low-income neighborhoods with less access to such goods. Third, a tax credit would not be subject to inconsistent rationales associated with a fat tax. The government could not become dependent on fat-tax revenues generated by the sale of unhealthy foods to fund its own health initiatives. Finally, the government has a poor track record of



earmarking funds for specific health initiatives. The HFTC would bypass this problem by putting cash in the hands of those who need it most.

Because the HFTC would not directly increase the cost of consuming unhealthy foods, it also should receive less industry opposition. To the extent that the food, beverage, and restaurant industries attack the credit because it would lower demand for their unhealthy products, opposition could be countered by farmers and businesses that grow, distribute, and sell the qualifying food items. Increased demand should also encourage more business to market healthy foods.

A tax credit is also less invasive and more narrowly tailored than fat taxes. Unlike a fat tax that mandates a higher price for everyone—even the “disciplined” individuals who choose to indulge sparingly—the HFTC would lower the price of healthy food for the individuals and households that spend a significantly higher percentage of their income on eating. In this way, it would not distort the market price in a broad sense, nor would it dictate eating habits for the entire population. In addition, the optional nature of the HFTC for eligible recipients should alleviate concerns about paternalism and market efficiency. Moreover, such concerns are less significant when one takes into account the farming subsidies, predatory advertising campaigns, and omnipresence of fast-food restaurants that distort market behavior from the start.<sup>318</sup> Finally, because receipt and use of the proposed credit would be less visible in comparison to welfare checks and food stamps, it might further destigmatize obesity.

In terms of equity, the HFTC is superior to a fat tax. Because the HFTC would provide cash assistance to low-income households, it would satisfy principles of vertical equity and be consistent with the ideals of a progressive tax system. By changing punishment into incentive, the government could communicate that it is not blaming overweight or obese individuals. Recognition that obesity is at least in part a result of

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<sup>318</sup> See *supra* notes 64–74 and accompanying text; see also, *Elephant in the Room*, *supra* note 163, at 1175 (“[P]references that consumers exhibit are not ‘true’ preferences, but are instead the products of commercial and social pressures to some uncertain extent. Accordingly, the proclivity to engage in unhealthy activity is not an expression of self-identity, but rather the result of private-sector advertising imposing external pressure on individual autonomy.”).

the unhealthy food environment that disproportionately affects marginalized members of society would increase awareness of the problem without increasing the stigma associated with obesity.