

# Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages

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## I. INTRODUCTION

A growing body of research has established an empirical link between consumption of sugary beverages and numerous health problems.<sup>1</sup> Sugary beverages, such as soda, contribute to obesity, heart disease, and type 2 diabetes.<sup>2</sup> Unsurprisingly, this empirical evidence has led scientists and researchers in the field to conclude that “a compelling case can be made for the need for reduced consumption of these beverages.”<sup>3</sup> Put simply, this research postulates that expensive and often deadly health problems related to obesity have been fueled in large part by overconsumption of sugary beverages; therefore, a strong public policy case exists for reducing the consumption of these beverages.<sup>4</sup>

Yet, while few people disagree that reduced consumption of sugary beverages is a desirable goal for American society, many people disagree about how to reduce it. Contentious debate surrounds the issue of whether the federal government should enact nationwide policies aimed at curbing sugary-beverage consumption.<sup>5</sup> More specifically, most public debate has centered on whether a federal sin tax on sugary beverages should be implemented.<sup>6</sup>

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1. Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599, 1599 (2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. The *New England Journal of Medicine* study recommends a tax on sugary beverages. For a complete definition of what constitutes a sugary beverage, see *id.* at 1599.

6. See Rachel E. Morse, Note, *Resisting the Path of Least Resistance: Why the Texas “Pole Tax” and the New Class of Modern Sin Taxes Are Bad Policy*, 29 B.C. THIRD WORLD L.J. 189 (2009) (discussing why sin taxes are bad public policy and are regressive); see also Katherine Mangu-Ward, *5 Myths We Need to Can About Soda Taxes*, WASH. POST, Sept. 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/25/AR2009092502015.html>.

Much of the media attention debating the merits of a federal sin tax on sugary beverages was in reaction to a recent study published by the *New England Journal of Medicine* (NEJM).<sup>7</sup> The NEJM study recommends the implementation of a federal sin tax on sugary beverages that aims to reduce the consumption of sugary beverages, with the overall goal of reducing obesity-related health problems.<sup>8</sup> The NEJM sin-tax proposal would impose a one-cent-per-ounce tax on certain high-sugar beverages, which would amount to roughly a 20% increase in the overall price of most sugary beverages.<sup>9</sup>

This proposed sin tax differs sharply in two ways from similar taxes already in place in approximately thirty-three states.<sup>10</sup> First, the tax is recommended at the federal level, whereas similar taxes have been state or local thus far.<sup>11</sup> Second, the amount of the proposed federal tax is much higher than most state taxes.<sup>12</sup>

Thus far, the idea of a federal sin tax on sugary beverages exists only in its most inchoate form—as a mere public policy proposal by a highly respected academic journal. Serious consideration has yet to reach either the House or Senate floor.<sup>13</sup> Most discussion and debate about the proposed sin tax has so far been media driven, with various media organizations and bloggers reporting, attacking, or supporting the idea of a sin tax on sugary beverages.<sup>14</sup> In fact, comments from President Obama’s interview with *Men’s Health Magazine* spawned a large amount of the major media discussion.<sup>15</sup> With his usual grasp of the countervailing tensions in policy formation, President Obama was quoted as saying: “Look, people’s attitude is that they don’t necessarily want Big Brother telling them what to eat or drink, and I understand that. It is true, though,

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7. See Brownell, *supra* note 1.

8. *Id.*

9. *Id.* at 1602.

10. *Id.* at 1602–64.

11. *Id.*

12. *Id.* at 1602.

13. Janet Adamy, *Soda Tax Weighed to Pay for Healthcare*, WALL ST. J., May 12, 2009, at A4. The Senate Finance Committee briefly considered a tax on soda as a means of paying for President Obama’s healthcare overhaul. N. Gregory Mankiw, *Can a Soda Tax Save Us from Ourselves?*, N.Y. TIMES, June 6, 2010, at BU4. This Comment will assume that any future federal proposal would be nearly identical to the NEJM proposal discussed *infra*.

14. See, e.g., Kelley Weiss, *Soda Tax Could Shake Up Industry*, NPR, Oct. 14, 2009, <http://www.npr.org/templates/story/story.php?storyId=113634715&ps=cprs>; Adamy, *supra* note 13; Mangu-Ward, *supra* note 6.

15. David Saltonstall, *President Obama Says “Sin Tax” on Sodas is Food for Thought, Despite Gov. Paterson’s Failed Proposal*, NEW YORK DAILY NEWS, Sept. 9, 2009, [http://www.nydailynews.com/news/politics/2009/09/08/2009-09-08\\_president\\_obama\\_says\\_sin\\_tax\\_on\\_sodas\\_is\\_food\\_for\\_thought.html#ixzz0RK477RPA](http://www.nydailynews.com/news/politics/2009/09/08/2009-09-08_president_obama_says_sin_tax_on_sodas_is_food_for_thought.html#ixzz0RK477RPA).

that if you wanted to make a big impact on people's health in this country, reducing things like soda consumption would be helpful."<sup>16</sup>

President Obama's comments cut to the heart of the matter: the public is wary of policies that attempt to influence free choice and consumption behavior. Promoting public health is the prerogative of the federal government,<sup>17</sup> however, and increased empirical correlation between sugary-beverage consumption and health problems might demand significant federal action.<sup>18</sup>

As the media attention indicates, the NEJM's proposed federal sin tax on sugary beverages is a pivotal public policy decision with far-reaching implications. The science, research, and statistics surrounding the obesity epidemic indicate that the stakes are high. If unaddressed, obesity will likely surpass many other serious health ailments as the main killer of Americans, and the main burden on the healthcare system.<sup>19</sup>

Consequently, policy-making action in the form of a federal sin tax on sugary beverages may not only be justified, but may also be necessary. On the other hand, government action aimed at influencing an individual's dietary choices cuts sharply against the notion of liberty and personal responsibility that pervades the United States. For citizens who highly value the concept of unadulterated free choice, levying a sin tax on sugary beverages seems to be the quintessential step down the slippery slope of public policy making that will lead closer and closer to the feared "nanny state," or as President Obama stated: "Big Brother telling you what you can do and can't do."<sup>20</sup>

Despite the contentious nature of a federal sin tax, strong arguments support the implementation of such a tax. This Comment argues that the proposed sin tax on sugary beverages is sound policy and Congress should implement the tax in order to combat and address the obesity epidemic because (1) consumers are subject to cognitive and informational defects that affect consumers' abilities to make the best welfare-generating decisions, and (2) sugary-beverage consumption causes healthcare-related externalities that the current price of sugary beverages do not reflect.

Part II explores in more detail the science and statistics surrounding the obesity epidemic and the proposed NEJM sin tax on sugary beverage-

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16. *Id.*

17. U.S. CONST. art. I. One enumerated power of Congress is the ability to "tax and spend for the general welfare."

18. See Brownell, *supra* note 1.

19. *Id.* at 1601-02; see also, Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L., 839, 842 (2005).

20. See Saltonstall, *supra* note 15.

es.<sup>21</sup> Part III argues that the sin tax should be implemented because consumers suffer from cognitive and information defects. Part IV discusses and articulates the externality-based justifications for imposing a sin tax on sugary beverages. Part V addresses and counters three common objections to sin taxes and paternalistic policies: that such policies decrease autonomy, are inherently regressive, and are susceptible to more invasive government regulation. Finally, Part VI offers a conclusion and re-articulates the thesis of the Comment: a federal sin tax on sugary beverages should be implemented.

## II. THE OBESITY EPIDEMIC: NATIONAL PROBLEMS COMPEL NATIONAL SOLUTIONS

In the past three decades, the proportion of American adults who are obese has more than doubled—from 15% in the mid-1970s to approximately one-third of all American adults in the current decade.<sup>22</sup> The health risks associated with obesity are numerous and deadly.<sup>23</sup> Part II of this Comment first presents a general background on the public-health crisis of obesity, illustrating why obesity is rightly referred to as an epidemic. The second section of Part II describes the proposed sin tax offered by the NEJM in more detail. This section describes how such a sin tax would work in practice, and how it differs from similar sin taxes already in place in some states.

### A. The Obesity Epidemic

Obesity is a major public health problem in present-day America. According to the Surgeon General of the United States, approximately 300,000 deaths per year are associated with obesity-related health problems.<sup>24</sup> Serious health problems result from obesity because it creates an increased risk of heart disease, high blood pressure, type 2 diabetes, arth-

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21. See Brownell, *supra* note 1.

22. CTRS. FOR DISEASE CONTROL AND PREVENTION, HEALTH, UNITED STATES, 2008 50 (2008) <http://www.cdc.gov/nchs/data/has/has08.pdf>.

23. *Id.*

24. *Overweight and Obesity: Health Consequences*, OFFICE OF THE SURGEON GEN., [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_consequences.html](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_consequences.html) (last visited June 19, 2010). A 2005 article from the Journal of the American Medical Association estimates a more conservative number of approximately 112,000 deaths associated with obesity. See Katherine M. Flegal et al., *Excess Deaths Associated with Underweight, Overweight, and Obesity*, 293 JAMA 1861, 1861 (2005). Regardless of the exact number of deaths associated with obesity, this Comment assumes that obesity is a sufficiently important public health problem to justify a nationwide policy response—a federal sin tax on sugary beverages. While determining how important a particular health concern must be to justify a national policy response is an important issue, it is a complex issue that goes beyond the scope of this Comment.

ritis, asthma, pregnancy complications, certain cancers, and depression.<sup>25</sup> Moreover, the Surgeon General warns that “[l]eft unabated, [being] overweight and obes[e] may soon cause as much preventable disease and death as cigarette smoking.”<sup>26</sup>

Not only does obesity cause personal health problems and death, but it is also estimated that obesity costs American’s \$147 billion per year.<sup>27</sup> And while experts have performed numerous studies to calculate the direct costs that obesity has on our public and private healthcare systems, the indirect costs such as production loss would most likely increase the cost of obesity on society.<sup>28</sup>

Unsurprisingly, obesity does not have one cause, it has many.<sup>29</sup> Some common causes of obesity include: watching too much television,<sup>30</sup> poor diet and unhealthy eating,<sup>31</sup> environmental factors,<sup>32</sup> and genetic predisposition.<sup>33</sup>

Yet, the challenges and problems raised by the obesity epidemic are not insurmountable. This is largely because most causes of obesity are environmental, and thus are susceptible to influence and improvement through policy-making and changes in behavior.<sup>34</sup> The Centers for Disease Control and Prevention (CDC) articulates this phenomenon by stating that “American society has become ‘obesogenic,’ characterized by environments that promote increased food intake, nonhealthful foods, and physical inactivity.”<sup>35</sup> Accordingly, changing the environments that contribute to obesity will require a combination of both personal changes

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25. See SURGEON GEN., *supra* note 24.

26. OFFICE OF THE SURGEON GEN., SURGEON GENERAL’S CALL TO ACTION TO PREVENT OVERWEIGHT AND OBESITY 2001 XIII (2001), <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

27. *Study Estimates Medical Cost of Obesity May Be as High as \$147 Billion Annually*, CTRS. FOR DISEASE CONTROL & PREVENTION (2009), <http://www.cdc.gov/media/pressrel/2009/r090727.htm>.

28. NAT’L INSTS. OF HEALTH, OVERWEIGHT AND OBESITY STATISTICS (2010), <http://win.niddk.nih.gov/publications/PDFs/stat904z.pdf>; see also David B. Allison et al., *The Direct Health Care Cost of Obesity in the United States*, 89 AM. J. PUB. HEALTH 1194, 1199 (1999).

29. David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress’s Response to the Obesity Epidemic*, 14 VA. J. SOC. POL’Y & L. 357, 360 (2007).

30. Thomas N. Robinson, *Reducing Children’s Television Viewing to Prevent Obesity*, 282 JAMA 1561, 1561 (1999).

31. See, *supra* note 29, (citing Mary K. Sedula, *Prevalence of Attempting Weight Loss and Strategies for Controlling Weight*, 282 JAMA 1353, 1357–58 (1999)).

32. Simone A. French et al., *Environmental Influences on Eating and Physical Activity*, 22 ANN. REV. PUB. HEALTH 309, 309 (2001).

33. *Genomics Resources: Obesity and Genomics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/genomics/resources/diseases/obesity/obesedit.htm> (last updated April 20, 2010).

34. See Burnett, *supra* note 29, at 361.

35. *Obesity and Overweight*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/> (last visited June 19, 2010).

in behavior on the one hand, and action by public health officials on the other. Without neglecting the important role that individuals must play in combating obesity, the primary means of affecting the various obesogenic environmental factors is through public action and policy.

The recognition that obesity is largely an environmental problem has motivated researchers, scientists, and policy makers to identify and study areas where changes of environment will most effectively influence healthier decision making. For example, as recently as July 29, 2009, the CDC issued a report titled *Recommended Community Strategies and Measurements to Prevent Obesity in the United States*.<sup>36</sup> The report outlines local strategies, among other things, to increase the availability of healthier foods and encourage physical activity in small localities, such as school districts.<sup>37</sup> Another prominent example of public efforts to fight obesity has focused on First Lady Michelle Obama's announced campaign to combat childhood obesity on a national scale.<sup>38</sup> The announced initiative is "aimed at revamping the way American children eat and play—reshaping school lunches, playgrounds and even medical checkups—with the goal of eliminating childhood obesity within a generation."<sup>39</sup> Both the CDC and Mrs. Obama's initiatives are geared toward encouraging healthier choices and behavior.

While public policy actions that aim at encouraging better and healthier choices are necessary, however, combating obesity effectively demands policies that discourage unhealthy behavior. Unsurprisingly, policies that discourage certain unhealthy behaviors, like sin taxes, are much more controversial. The following subpart generally outlines the empirical study and policy recommendations proposed by Kelly Brownell et al., in the NEJM study titled *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*.<sup>40</sup> As this Comment argues, such a proposal is sound public policy and should be implemented by Congress in order to help combat the obesity epidemic.

### *B. The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*

In the NEJM study published on October 15, 2009, a group of scientists, researchers, and doctors articulated the policy benefits of a

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36. CTRS. FOR DISEASE CONTROL & PREVENTION, *Recommended Community Strategies and Measurements to Prevent Obesity in the United States*, MORBIDITY & MORTALITY WKLY. REP. RECOMMENDATIONS & REPS., July 24, 2009, at 1, <http://www.cdc.gov/mmwr/pdf/rr/tr5807.pdf>.

37. *See id.* at 7, 14.

38. Sheryl Gay Stolberg, *Childhood Obesity Battle is Taken Up by First Lady*, N.Y. TIMES, Feb. 9, 2010, at A16.

39. *Id.*

40. Brownell, *supra* note 1.

federal tax on sugary beverages.<sup>41</sup> The NEJM proposal advocates for a one-cent-per-ounce excise tax on sugary beverages on a nationwide scale.<sup>42</sup> The NEJM study opens with the remark that “the consumption of sugar-sweetened beverages has been linked to risks for obesity, diabetes, and heart disease; therefore, a compelling case can be made for the need for reduced consumption of these beverages.”<sup>43</sup> The NEJM study substantiates its policy recommendation with various empirical studies, both national and international, linking the consumption of sugary beverages with increased weight gain.<sup>44</sup> The studies conclusively showed that individuals who consumed one or more sugary beverages per day had increased body weight.<sup>45</sup> In its concluding remarks, the NEJM study declares: “The science base linking the consumption of sugar-sweetened beverages to the risk of chronic diseases is clear.”<sup>46</sup>

The NEJM study, recognizing that some state-level taxes on sugary beverages already exist, specifically emphasizes that thirty-three states currently impose some sort of tax on sugary beverages.<sup>47</sup> But the state taxes fail to help ameliorate the obesity epidemic in two respects.<sup>48</sup> First, the existing state taxes are “too small to affect consumption”<sup>49</sup>—the taxes are too small to deter people from overconsumption. Second, the funds generated from the taxes do not go to programs connected with the

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41. *Id.* The NEJM study indicates a certain amount of sugar in a beverage would qualify it to be subject to the excise tax. At the levels that the NEJM recommends, soda would be the main beverage targeted by such a tax, but beverages such as sports drinks would also fall within the definition of a sugary beverage. Issues and problems raised by defining what constitutes a sugary beverage—issues of line drawing—are beyond the scope of this Comment. Rather, this Comment assumes that beverages with a high sugar content are sufficiently unhealthy to be the subject of a tax. Some discussion of line-drawing problems are raised and discussed in Part V.C, *infra*.

42. Brownell, *supra* note 1, at 1602.

43. *Id.* at 1599 (internal footnotes omitted).

44. See, e.g., *id.* (citing Vasanti S. Malik et al., *Intake of Sugar-Sweetened Beverages and Weight Gain: A Systematic Review*, 84 AM. J. CLINICAL NUTRITION 274 (2006); Lenny R. Vartanian et al., *Effects of Soft Drink Consumption on Nutrition and Health: A Systematic Review and Meta-Analysis*, 97 AM. J. PUB. HEALTH 667 (2007)).

45. A cursory summary of some of these findings include: “[T]he risk of becoming obese increased by 60% for every additional serving of sugar-sweetened beverages per day”; “positive associations between the intake of sugar-sweetened beverages and body weight”; “total energy intake and body weight increased when subjects were given 530 kcal of sugar-sweetened beverages per day for 3 weeks but decreased when subjects were given noncaloric sweetened beverages for the same length of time”; and “the risk of diabetes among women who consumed one or more servings of sugar-sweetened beverages per day was nearly double the risk among women who consumed less than one serving of sugar-sweetened beverages per month.” Brownell, *supra* note 1, at 1599–1600.

46. *Id.* at 1604.

47. *Id.* at 1599 (citing a mean tax rate for the state soda-taxes of 5.2%).

48. *Id.*

49. *Id.*

treatment and prevention of obesity-related health ailments.<sup>50</sup> The sin tax proposed by the NEJM would cure both these problems.

The first goal of the proposed sin tax aims at reducing the overall consumption of sugary beverages, not just raising revenue.<sup>51</sup> Any tax must be substantially high enough so that there is a clear economic advantage to not purchasing an undesirable product.<sup>52</sup> The NEJM study recommends a tax that will amount to a 15–20% increase in the overall price of an average (twenty ounces) sugary beverage.<sup>53</sup> This price increase should be sufficient to reduce consumption to healthier levels.

The second goal of the proposed tax is to directly link the revenue raised from the taxes to health-related initiatives.<sup>54</sup> The study suggests using the tax revenue to pay for healthcare programs related to the problems caused by obesity and to pay for education programs that will increase knowledge about smart and healthy food consumption.<sup>55</sup>

In sum, the NEJM proposal to levy a sin tax on sugary beverages represents an approach to combating the obesity epidemic never before undertaken at the federal level. Taxing sugary beverages at a level that should deter consumption, not just raise revenue,<sup>56</sup> is a policy approach previously associated only with the consumption of alcohol and cigarettes.<sup>57</sup> Consequently, the possible expansion of government regulation into another area of lifestyle decision making has raised many concerns and produced vehement dissenters. The levying of a federal sin tax on sugary beverages to combat obesity, however, is supported by two separate but equally compelling arguments. Part III supports the levying of a sin tax on sugary beverages by illustrating how consumers suffer from cognitive defects and information failure. In particular, consumers may have limited foresight and bounded rationality and are thus more likely

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50. *Id.*

51. *Id.* at 1604.

52. Cigarette taxes currently in place at the federal and state level exhibit the type of tax rates necessary to curb consumption of an undesirable product. *Id.*

53. *Id.* at 1602.

54. *Id.* at 1599.

55. Some proposed uses for the revenue include “support [for] childhood nutrition programs, obesity-prevention programs, or healthcare for the uninsured. . . .” *Id.* at 1603.

56. See Jeff Strnad, *Conceptualizing the “Fat Tax”: The Role of Food Taxes in Developed Countries*, 78 S. CAL. L. REV. 1221, 1225–26 (2005) (discussing the difference between small junk-food taxes that are aimed at raising revenue in contrast to higher “fat taxes” that are aimed at influencing consumer choice); see also Barak Y. Orbach, *The New Regulatory Era—An Introduction*, 51 ARIZ. L. REV. 559, 563 (2009).

57. Strnad, *supra* note 56, at 1239 (“There are parallel literatures concerning tobacco and alcohol taxes that make all of these tasks much easier. Many of the issues involving cigarette and alcohol policies are similar to the issues for food policy, and many of the policy alternatives, including taxation, are similar.”).

to make unhealthy choices about proper levels of sugary-beverage consumption.

### III. BEHAVIORAL SCIENCE JUSTIFICATIONS FOR A SIN-TAX POLICY

One of the major premises underlying the federal<sup>58</sup> implementation of sin taxes—and other general regulation<sup>59</sup>—is that individual consumers may not be perfectly rational actors.<sup>60</sup> This premise cuts against the traditional model in neoclassical economics of individual consumers as perfectly “rational actors” that maximize utility.<sup>61</sup> Doubts about the theoretical assumption that consumers are perfectly rational welfare maximizers are largely based on empirical studies which consistently show that consumers suffer from cognitive defects and information failure.<sup>62</sup> Rather than assume that every consumer will act in a perfectly rational manner, critics of the rational-actor model emphasize that regulations should imbue an “economic analysis of law that is informed by a more accurate conception of choice, one that reflects a better understanding of human behavior and its wellsprings.”<sup>63</sup>

According to the critics of the rational-actor model, most consumers are not perfectly rational actors because, among other things,<sup>64</sup> consumers suffer from a lack of perfect foresight, and are subject to bounded rationality.<sup>65</sup> When consumers suffer from such cognitive failures, it is likely that they are not making consumption choices that maximize their welfare.<sup>66</sup> In light of these failures, government regulation aimed at helping people promote their own welfare, such as a sin tax on sugary beverages, is both justified and necessary.

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58. This premise is not unique to federal regulation. See discussion *supra*, at Part II.

59. See Orbach, *supra* note 56, at 561 (discussing how the recent financial-market collapse of 2008 was caused by a deregulation mentality, and how the collapse reinvigorated the need for government regulation).

60. Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998) (discussing empirical studies supporting claims that consumers have bounded rationality, bounded self interest, and bounded will power); see also Orbach, *supra* note 56, at 566.

61. Jolls, *supra* note 60, at 1476 (discussing the foundations of standard economic principles).

62. The assertion that consumers suffer from cognitive defects and information failure is supported by “ample empirical evidence that documents patterns of behavioral biases.” Orbach, *supra* note 56, at 566; see also Jolls, *supra* note 60, at 1471. See also *infra* Part III.A.

63. Jolls, *supra* note 60, at 1473.

64. This Comment focuses on two of the better-documented cognitive deficiencies, but this discussion is nonexhaustive, as other types of cognitive failures affect consumers’ ability to function in a perfectly rational manner. See Jolls, *supra* note 60, at 1479.

65. See, e.g., Cass Sunstein & Richard Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); see also Jolls, *supra* note 60, at 1477–78 (discussing bounded rationality).

66. Sunstein, *supra* note 65, at 1168–69.

Consumers who overconsume sugary beverages, to the detriment of their own welfare, likely suffer from a lack of perfect foresight, and are subject to bounded rationality. This Part will first explore how consumers suffer from a lack of perfect foresight in their choice to overconsume sugary beverages. Next, this Part will discuss how information failure in the form of bounded rationality affects consumer choice when consuming sugary beverages. Because overconsumers of sugary beverages are likely subject to these cognitive and information failures, government intervention and regulation in the form of a sin tax should be implemented in order to help consumers maximize their health and overall welfare.

*A. Lack of Perfect Foresight and the Overconsumption of Sugary Beverages*

According to many commentators, most consumers suffer from a “lack of perfect foresight.”<sup>67</sup> This means that consumers “may not understand the connection between . . . eating unhealthful food and subsequent health outcomes at the time they initially consume.”<sup>68</sup> Put another way, consumer choice is unlikely to maximize welfare when a consumer insufficiently or entirely neglects the future effects of a present consumption choice.

The cognitive failure associated with imperfect foresight directly cuts against the theoretical “rational actor” and the accompanying presumption that “people do an excellent job making choices, or at least that they do a far better job than third parties could possibly do. . . .”<sup>69</sup> Academics like Cass Sunstein<sup>70</sup> have found that “there is little empirical support” for the presumption that people always make better choices than third parties, which is due largely in part to consumers’ inability to connect present-consumption choices with future risks.<sup>71</sup> To support this claim that an unfettered choice system does not produce the best results, Sunstein offers evidence of rising obesity rates in the United States.<sup>72</sup> Sunstein reasons that because obesity causes well-known serious health risks, “it is quite fantastic to suggest that everyone is choosing the optimal diet . . . .”<sup>73</sup> The rising rates of obesity and the known serious health risks that accompany obesity indicate that many consumers lack the ra-

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67. Strnad, *supra* note 56, at 1255.

68. *See id.*

69. Sunstein, *supra* note 65, at 1167.

70. Cass Sunstein is the Karl N. Llewellyn Service Professor of Jurisprudence at the University of Chicago Law School and Department of Political Science.

71. Sunstein, *supra* note 65, at 1167.

72. *Id.*

73. *Id.* at 1167–68.

tionality to connect present consumption choices with the future effects of those choices.<sup>74</sup>

Moreover, other risk-associated consumption behaviors, such as heavy drinking and smoking, collectively produce over 500,000 premature deaths each year.<sup>75</sup> These statistics offer further proof that many Americans are not making choices that are completely in their best interests when it comes to deciding how much alcohol to drink or whether to smoke cigarettes. Evidence of such serious health-related harm is likely one of the reasons that cigarettes and alcohol consumption are historically subject to a paternalistic sin tax. As Sunstein puts it, “In these circumstances, people’s choices cannot reasonably be thought, in all domains, to be the best means of promoting their well-being.”<sup>76</sup>

Much of the literature surrounding imperfect foresight and its effect on consumers involves studies done on cigarette smokers. These studies indicate that “[h]eavy smokers appear to understand the general risks for all smokers, but do not personalize these risks.”<sup>77</sup> Additionally, smoking research illustrates how the “short-run benefits of smoking a few cigarettes will appear to outweigh any costs.”<sup>78</sup> Again, these observations illustrate how consumers can act irrationally when they make present dietary choices without considering future impacts on health.

The proposed sin tax on sugary beverages is a governmental policy that would help reduce the effects of imperfect foresight. Sin taxes of a sufficient magnitude, such as the proposed tax in the NEJM,<sup>79</sup> force the consumer to immediately pay more for consuming an unhealthy product. The increased price gives the consumer an economic reason, in addition to a health-related reason, to reduce or even eliminate present consumption levels. Basic economic principles suggest that a higher price would decrease consumption because the consumer immediately pays more for the pleasure of consuming the product. Moreover, when it comes to price increases of food, consumers are generally price sensitive; consumers respond more readily to increases in food prices.<sup>80</sup> This information indicates that while consumers may have limited foresight when it comes

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74. *Id.* at 1168.

75. *Id.*

76. *Id.*

77. Strnad, *supra* note 56, at 1256.

78. *Id.*

79. *See supra* Part II.

80. *See generally* Tatiana Andreyeva et al., *The Impact of Food Prices on Consumption: A Systematic Review of Research on Price Elasticity of Demand for Food*, 100 AM. J. PUB. HEALTH 216 (2009); Lisa M. Powell & Frank J. Chaloupka, *Food Prices and Obesity: Evidence and Policy Implications for Taxes and Subsidies*, 87 MILBANK Q. 229 (2009).

to long-term health-related decisions, consumers will lower their consumption in order to adjust to higher prices of a good.<sup>81</sup>

Perhaps most importantly, reducing the effects of imperfect foresight vis-à-vis a sin tax should have the ultimate effect of increasing individual and aggregate welfare. This increase is largely because “[t]axes on items with short-run benefits and long-run costs tell our current selves to take into account the welfare of our future selves.”<sup>82</sup> From a policy perspective, increasing the general welfare is a paramount duty of the government and should continue to be the prerogative of the government through policies such as sin taxes.

The obesity epidemic and the growing evidentiary correlation between sugary-beverage consumption and obesity indicate that American consumers lack perfect foresight in regard to the decision of how many sugary beverages to consume. Because consumers, in choosing to overconsume sugary beverages, are likely not acting in their future best interest, policies that attempt to influence consumer choice in order to reduce sugary-beverage consumption, such as taxing at a high enough level to curb consumption, are a legitimate and even necessary response to this societal problem. Moreover, given effectiveness of sin taxes in deterring the overconsumption of products like tobacco,<sup>83</sup> it can be expected that a similar tax on sugary beverages will also reduce consumption to healthier levels.

### *B. Consumers Have Bounded Rationality*

When making choices about what and how much to consume, consumers rely on a combination of information, preference, experience, and other personal factors in making optimal choices—consumer choice is an inherently subjective activity. These consumption choices may not be optimal, however, because many American consumers are subject to what academics refer to as “bounded rationality.”<sup>84</sup> Bounded rationality refers to the “obvious fact that human cognitive abilities are not infinite. We have limited computational skills and seriously flawed memories.”<sup>85</sup> In the context of choosing an optimal diet, a consumer may suffer from bounded rationality because “it may be too costly or difficult to unravel the relationship between various eating patterns and disease.”<sup>86</sup> Without

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81. *See supra* note 80.

82. Mankiw, *supra* note 13.

83. Strnad, *supra* note 56, at 1245–47.

84. Jolls, *supra* note 60, at 1477–78.

85. *Id.* at 1477.

86. Strnad, *supra* note 56, at 1254.

full information about the health consequences of food, “individuals will be unable to choose an optimal diet.”<sup>87</sup>

Even though the availability of information about foods is increasing,<sup>88</sup> “processing all of this information is costly.”<sup>89</sup> People must put time and energy into researching or finding a diet, or avoiding certain food choices.<sup>90</sup> For many people, it is too inconvenient or too costly to spend time and energy processing the nutritional information, even when the information is easily accessible.<sup>91</sup> Consumers who are subject to bounded rationality ignore information that might otherwise influence better consumption decisions. As a result, consumers who lack this information may not choose an optimal diet.<sup>92</sup>

Yet, while consumers’ bounded rationality limits the effectiveness of increased information, “consumers do respond strongly to food prices.”<sup>93</sup> Seemingly, consumers respond to price more immediately than they respond to nutritional information.<sup>94</sup> These studies indicate that assumptions of consumer rationality are often dubious—except when it comes to price increases of basic necessities like food and drink.<sup>95</sup> Accordingly, even though consumers are subject to bounded rationality and cannot efficiently or effectively process all the information available to make the best welfare-generating decisions, consumers do respond to price increases whether or not they process a product’s nutritional information correctly.

The informational failure associated with bounded rationality provides strong support for implementing a sin tax on sugary beverages. Regardless of how much information a consumer must process, empirical evidence indicates that price is the one factor that consumers seem to readily process and understand.<sup>96</sup> For whatever reason, most consumers

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87. *Id.*

88. Orbach, *supra* note 56, at 563.

89. Strnad, *supra* note 56, at 1254.

90. *See id.*

91. *See id.* The fact that bounded-rationality studies suggest that information policies, such as requiring calorie data, may not be completely effective does not mean they should be abandoned. Advocating for a sin tax on soda is not an exclusive approach to reducing obesity, and such a policy should be made in conjunction with other policies aimed at consumer education. Combating the obesity epidemic involves a multifaceted policy approach. *See supra* Part II.A.

92. *Id.*

93. *See supra* note 80.

94. Strnad, *supra* note 56, at 1254 (citing MARION NESTLE, FOOD POLITICS, Univ. of Cal. Berkeley (2002)).

95. Strnad, *supra* note 56, at 1254, 1321 (citing MARION NESTLE, FOOD POLITICS, Univ. of Cal. Berkeley (2002); Simone A. French, *Pricing Effects on Food Choice*, 133 J. NUTRITION 841S (2003)).

96. *See supra* note 80.

do not act irrationally when it comes to a good's price.<sup>97</sup> Consumers who may not be able to rationally process the optimal amount of sugary beverages to include in a particular diet will nonetheless take into account a price increase, and an increase in price would likely lead to deterred consumption.<sup>98</sup> In light of this fact, a sin tax to deter consumption of an unhealthy product, like sugary beverages, is an effective manner in which the government can help the consumer make healthier consumption choices.

#### IV. EXTERNALITIES: ACCOUNTING FOR THE TRUE COSTS OF OBESITY

In addition to the welfare-based and paternalistic justifications for levying a federal sin tax on sugary beverages discussed in Part III, a sin tax on sugary beverages is also justified by currently unaccounted-for externalities: obesity-related healthcare costs.<sup>99</sup> Although Arthur Cecil Pigou did not coin the term, "externalities" are generally associated with his writings and ideas.<sup>100</sup> Pigou argued that government regulation became more justified, and even necessary, when there was a "divergence between social and private net product."<sup>101</sup> When this divergence exists, it is the government's job to reduce the divergence, usually in the form of a tax.<sup>102</sup>

In more general and modern terms, an externality is defined as a cost associated with an economic behavior that is not internalized<sup>103</sup> by the actor: a cost that the actor does not have to pay for when engaging in that particular behavior.<sup>104</sup> As a result, "the individual who engages in such activities will be relieved of some of the future costs."<sup>105</sup> In the context of healthcare insurance, there is a reciprocal effect when some consumers do not have to pay the future costs of an activity, which means that "other individuals will have to pay higher premiums or will

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97. See *supra* note 80.

98. See *supra* note 80.

99. Brownell, *supra* note 1, at 1601–02.

100. See Orbach, *supra* note 56, at 568 (discussing ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* 183–203 (4th ed. 1932)).

101. See *id.*

102. See *id.*; see also Strnad, *supra* note 56, at 1240 (noting how a classic rationale for taxation is associated with Pigou: addressing externalities); David Leonhardt, *Sodas a Tempting Tax Target*, N.Y. TIMES, May 20, 2009, at B1. Leonhardt discusses the proposed tax on soda in economic terms: "Pigovian taxes have the double advantage of discouraging costly activities and helping to cover the costs that remain. Tobacco taxes have become the shining example." *Id.*

103. Unhealthy consumption creates both internal and external costs. In economic terms, internal costs are those felt or considered by the consumer, such as reduced health. On the other hand, the external cost of consumption is often, as in this case, financial, such as medical treatments and care covered by insurance. See Strnad, *supra* note 56, at 1240–41.

104. *Id.*

105. *Id.* at 1235.

have lower benefits . . . .”<sup>106</sup> In order to reduce or eliminate the external costs of an activity, the government may need to tax that activity at a level that will better reflect the activity’s true costs.<sup>107</sup>

Because of the growing body of evidence linking sugary-beverage overconsumption to obesity, it is likely that such consumption creates externalities;<sup>108</sup> the overconsumption of sugary beverages generates obesity-related healthcare costs that the consumer does not internalize when choosing to engage in that consumption activity. As already noted in Part II, it is estimated that the cost of obesity on the healthcare system is roughly \$147 billion per year.<sup>109</sup> Public health programs, for instance Medicaid and Medicare, currently pay for half of these obesity-related health problems,<sup>110</sup> which means that taxpayers already bear a significant portion of the U.S. healthcare costs associated with obesity. Though obesity-related health problems are caused by many factors,<sup>111</sup> the empirical correlation discussed in the NEJM study<sup>112</sup> indicates that sugary-beverage consumption is an activity that contributes to many obesity-related health problems. Consequently, the consumption of sugary beverages, which has been shown to lead to obesity-related disease, creates external costs borne by society as a whole: costs that individual sugary-beverage consumers do not bear.

In light of the externalities associated with sugary-beverage consumption and obesity, government regulation in the form of a sin tax is a legitimate and proper response. In economic terms, the consumption of sugary beverages creates a social cost—obesity-related healthcare—that is not a component of a good’s price.<sup>113</sup> As one commentator has put it, “[I]ndividuals acting in their own self-interest . . . will not effectively address the problem [of obesity] because they do not internalize some of the major costs or benefits of action or nonaction.”<sup>114</sup> Implementing a

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106. *Id.* at 1236. For more discussion of sin taxes as a component of the health insurance system, see generally Strnad, *supra* note 56. Strnad argues for the implementation of “fat taxes” on unhealthy foods as a component of a health insurance system. *Id.*

107. For more discussion on formulating the rate of taxation for a particular activity, see Strnad, *supra* note 56, at 1240. Strnad discusses a way in which to find the optimal rate of taxation for any given activity that creates externalities. *Id.* This Comment uses the rate suggested in the NEJM and discussed *supra* at Part I. The issues involved in finding an optimal rate of taxation for such a complex issue as unhealthy consumption are beyond the scope of this Comment.

108. Brownell, *supra* note 1, at 1601–02.

109. Brownell, *supra* note 1, at 1602 (citing statistics from the Ctrs. for Disease Control & Prevention, *supra* note 23).

110. Brownell, *supra* note 1, at 1602.

111. See *supra* Part II.

112. See *supra* Part II.

113. Strnad, *supra* note 56, at 1240.

114. Mark A. Hall, *The Scope and Limits of Public Health*, 46 PERSP. IN BIOLOGY & MED. S199, S204 (2003).

tax on the externality-generating activity is one way to make a good's true cost reflective in its price.<sup>115</sup> Taxes increase a good's price, forcing consumers to pay an amount that better reflects the true cost of that activity.<sup>116</sup>

The externalities of sugary-beverage consumption should be addressed by implementing a sin tax on sugary beverages because such a tax will reduce and help to eliminate some of the externalities incurred as a result of unhealthy consumption choices. Moreover, the revenue raised from these taxes will, and should, be used to pay for the healthcare costs associated with obesity-related health problems.<sup>117</sup> Professor Jeff Strnad has discussed in detail how food taxes on unhealthy food are best viewed as "implicit premiums" because the taxes are used to pay for the healthcare costs incurred.<sup>118</sup> Regardless of how such taxes are framed, a sin tax on soda is needed to address the externalities associated with unhealthy levels of consumption.

The use of sin taxes to address externalities in consumer consumption is not a unique or new public policy approach.<sup>119</sup> Taxation of unhealthy products such as cigarettes and alcohol already exist at the federal level.<sup>120</sup> Historically, federal taxes on tobacco and alcohol were implemented as early as 1862.<sup>121</sup> While the initial rationale for such taxation was to raise revenue, modern reasons for the taxation of alcohol and cigarettes has shifted.<sup>122</sup> Similar to the proposed tax on sugary beverages, the taxation of alcohol and cigarettes is often justified on the grounds that consumption of these unhealthy products creates externalities unaccounted for in the untaxed price of a good.<sup>123</sup> Like sugary beverages, the

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115. Strnad, *supra* note 56, at 1233.

116. *See supra* note 106.

117. The NEJM soda-tax proposal suggests using some of the revenue for educational programs and some of the revenue for obesity-related healthcare. Brownell, *supra* note 1, at 1603. Not all past sin taxes have such a nexus between the "thing being taxed and the use to which the tax dollars are put . . ." Morse, *supra* note 6, at 202. The proposed federal sin tax on sugary beverages argued for in this Comment suggests that any revenue raised by the sin tax should be used for obesity-related health and education programs.

118. Strnad, *supra* note 56, at 1236. Strnad comprehensively describes what a system of food taxes would look like as well as analyzes the rationale for addressing unhealthy consumption as a component of a tax system. He concludes that "the best case for a food tax is as a component of a health insurance system." *Id.* at 1234.

119. "Many of the externality issues that exist with respect to food consumption are similar to the issues that stem from smoking." *Id.* at 1240.

120. *See* Orbach, *supra* note 56.

121. Jendi B. Reiter, Note, *Citizens or Sinners? The Economic and Political Inequity of Sin Taxes on Alcohol and Tobacco Products*, 29 COLUM. J. L. SOC. PROBS. 443, 447 (1996).

122. *Id.*

123. Strnad, *supra* note 56, at 1242.

externalities of tobacco and alcohol consumption reflect the increased healthcare costs of using unhealthy products.<sup>124</sup>

While opponents of a sin tax on sugary beverages are quick to point out the differences between cigarette consumption and sugary-beverage consumption,<sup>125</sup> such as the addictive nature of cigarettes and the effects of secondhand smoke on nonsmokers, the externalities on the public healthcare system from unhealthy consumption are quite similar. For example, healthcare and lost productivity costs from cigarette consumption in the U.S. are estimated at \$193 billion per year.<sup>126</sup> Smoking is attributed to 443,000 premature deaths annually.<sup>127</sup> Likewise, healthcare costs from obesity-related diseases cost an estimated \$147 billion per year and are associated with 300,000 premature deaths per year.<sup>128</sup> Given these similarities in the external costs of consumption, it is unsurprising that similar policy responses, such as sin taxes, should be used to address and reduce the external costs of sugary-beverage consumption.

To further illustrate the external costs of unhealthy consumption, consider the example that one commentator, M. Todd Henderson, discusses in arguing for “nanny” type regulation of unhealthy consumption in a private firm.<sup>129</sup> Henderson depicts a smoker and a nonsmoker who both work at a private firm. In this scenario, “[t]he nonsmoker wants the firm to take steps to reduce the incidence of smoking or charge the smoker the costs he imposes on the firm, since otherwise the nonsmoker pays for them.”<sup>130</sup> This is exactly the type of situation “where third parties bear some costs of others’ behavior.”<sup>131</sup> Additionally, this microeconomics example is easily extrapolated to the macro level, where “the current healthcare model puts most of the costs on third parties, namely firms and the government . . . .”<sup>132</sup> This observation about the aggregate and societal costs of unhealthy consumption becomes even more relevant in light of recent healthcare reforms.<sup>133</sup> While little research exists at the

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124. *Id.*

125. Mangu-Ward, *supra* note 6.

126. Ctrs. For Disease Control & Prevention, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*, MORBIDITY & MORTALITY WKLY. REP. RECOMMENDATIONS & REPS., Nov. 14, 2008, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>.

127. *Id.*

128. Brownell, *supra* note 1, at 1602.

129. M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1518 (2009).

130. *Id.*

131. *Id.*

132. *Id.*

133. President Obama signed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, into law on March 23, 2010, and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, into law on March 20, 2010.

moment, the passage of the Affordable Care Act in late March 2010 has already precipitated commentary about how compulsory health insurance and the inability to refuse patients for pre-existing conditions will further spread the costs of serious illness across society.<sup>134</sup> Given the increasing inevitability of externalities related to public health, “we should expect each of these types of organizations (governments and firms) to provide nannyism to reduce these costs.”<sup>135</sup>

The external costs of unhealthy consumption justify and necessitate government policy making aimed at curbing unhealthy dietary choices. The growing body of science and research indicate that sugary-beverage consumption and obesity are clearly linked. Thus, the externalities of unhealthy consumption impose costs on society: costs that justify government regulation in the form of a sin tax.

#### V. OBJECTIONS TO THE PROPOSED SIN TAX ON SUGARY BEVERAGES

The possible implementation of a federal sin tax on sugary beverages raises several objections. As already noted, government regulation and policy making in the realm of lifestyle and consumption choices is not a new development.<sup>136</sup> The regulation of drugs, alcohol, and cigarettes has occurred since the inception of the country, and continues to this day.<sup>137</sup> Sin taxes are also not a new means of government regulation and intervention into the lifestyle choices of citizens, given that alcohol and cigarettes have been the subject of sin taxes for many years.<sup>138</sup> Consequently, the sin tax’s use as a means of implementing public policy, whether to raise revenue, deter unhealthy behavior, or both, is not a radical, extreme, or even unexpected expansion of governmental regulation.

While a strong policy-making precedent exists for the use of sin taxes to address public health issues, however, policy making in the realm of lifestyle choices has raised vehement opposition.<sup>139</sup> Derogative generalities such as the “nanny state,” “big brother,” and “food police” are some of the characterizations used by citizens who oppose govern-

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134. David Leonhardt, *In Health Bill, Obama Attacks Wealth Inequality*, N.Y. TIMES, March 23, 2010, at A1. In analyzing the new healthcare bill, Leonhardt notes that “healthy families will be picking up most of the bill—and their insurance will be somewhat more expensive than it otherwise would have been.” *Id.*

135. Henderson, *supra* note 129. “Nannyism” is a pejorative moniker for paternalistic regulations such as sin taxes.

136. Morse, *supra* note 6, at 191; *see also* David J. DePippo, *I’ll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity Please*, 36 U. RICH. L. REV. 543, 544 (2002).

137. Morse, *supra* note 6, at 191.

138. *Id.*

139. *See, e.g.*, Jacob Sullum, *The Anti-Pleasure Principle: The “Food Police” and the Pseudoscience of Self-Denial*, REASON.COM (July 2009), <http://reason.com/archives/2003/07/01/the-anti-pleasure-principle>; *see also* Magnu-Ward, *supra* note 6.

ment regulation in the form of a sin tax on sugary beverages.<sup>140</sup> This Part of the Comment will discuss three central objections to implementing a federal sin tax on sugary beverages.<sup>141</sup> First, paternalistic policies such as sin taxes infringe on liberty and autonomy values. Second, empirical evidence shows that sin taxes are generally regressive and are thus unfair because the poor pay a disproportionate amount of their income in sin taxes than upper-income brackets. Last, opponents of a sin tax on sugary beverages contend that taxing sugary beverages embarks upon a march down the slippery slope of intrusive policy making that will eventually lead to government taxation and regulation of anything viewed as unhealthy. After considering each argument, this Comment will re-articulate why a sin tax on sugary beverages should nonetheless be implemented.

#### *A. Sugary-Beverage Taxes Infringe on Autonomy Values*

Paternalistic policies, like sin taxes, are often opposed because these policies infringe on autonomy values like freedom of choice.<sup>142</sup> This argument supposes that the values of liberty and autonomy should take precedence in policy-making decisions over other values, such as increased public health and general welfare, and any increase in paternalistic policy making involves a reciprocal decrease in autonomy.<sup>143</sup>

Autonomy values are important for two main reasons. First, respect for autonomy in policy making is a powerful concern because liberty, autonomy, and free choice are deeply embedded principles in the American consciousness.<sup>144</sup> The value of liberty from government intervention was articulated by nineteenth-century philosopher John Stuart Mill. Mill argued that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>145</sup> This principle of liberty from government

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140. Sullum, *supra* note 139.

141. Other objections to a proposed sin tax exist, but because these objections focus on and challenge the science behind the NEJM recommendation, they are beyond the scope of this Comment. For example, a beverage-industry-funded consumer-advocacy group, the Center for Consumer Freedom, opposes a sugary-beverage sin tax because they contend that “there is no unique link between soda and obesity.” Mark Bittman, *Soda: A Sin We Sip Instead of Smoke?* N.Y. TIMES, Feb. 12, 2010, at WK1. Rather than focus on the potentially dubious scientific contentions of a beverage-industry-funded consumer-advocacy group, this Comment evaluates the political and legal implications of a potential sin tax on soda, and assumes the scientific legitimacy of the NEJM assertions.

142. Mario J. Rizzo & Douglas Glen Whitman, *Little Brother is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 687 (2009).

143. *Id.* (characterizing the policy tradeoff as one between autonomy and welfare). Other proponents of liberty values contend that autonomy and free choice are the best means of promoting welfare. See Reiter, *supra* note 121, at 456–57.

144. See generally THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

145. JOHN STUART MILL, ON LIBERTY, 68–69 (Penguin 1974) (1869).

intervention pervades to this day, and the historical, cultural, and traditional respect for autonomy is one of the rationales for opposing paternalistic policies like sin taxes.

Second, policy makers should respect autonomy values above other values because autonomy is central to human dignity and the moral belief that humans are “ends in themselves.”<sup>146</sup> Indeed, there seems to be a human-dignity interest in allowing individuals to make their own lifestyle choices free from government intervention.<sup>147</sup> Respecting individual actors as autonomous moral agents means letting individuals form their own conception of welfare and happiness.<sup>148</sup> When the government attempts to change an individual’s conception of what is “good,” like implementing sin taxes on lifestyle choices, the government is not respecting that individual as an autonomous moral agent.<sup>149</sup> Thus, policies that infringe on liberty do not respect humans as autonomous moral agents—humans as “ends in themselves”—and therefore, these policies should not be implemented.

While these autonomy-based arguments should not be discarded, they are insufficient to overcome the many reasons in favor of implementing a sin tax on sugary beverages. At its heart, the debate over whether to use a sin tax on sugary beverages involves weighing competing policy concerns. Autonomy is a deeply embedded American value that should be weighed and respected when making public-policy decisions; but, it is only one value among many that policy makers must consider and evaluate. The decision whether to implement a sin tax on sugary beverages involves a policy trade-off between autonomy on the one hand, and the possibility of increased welfare (public health) and fairness on the other. Because a sin tax on sugary beverages will increase welfare and fairness, while only minimally encroaching on autonomy, it is a policy that should be implemented.

First, a sin tax on sugary beverages will increase the overall welfare of consumers because it will help reduce unhealthy consumption, which will in turn help to lower obesity-related health problems. As the research promulgated by the NEJM<sup>150</sup> shows, reducing consumption of

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146. Reiter, *supra* note 121, at 456–57. Reiter discusses moral philosophy and the generally accepted ethical principle known as the “golden rule,” as well as Immanuel Kant’s “categorical imperative.” Both ethical positions argue that “people should be treated as ends in themselves.” *Id.*; see also IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Indianapolis, Bobbs-Merrill 1969) (1785).

147. See generally Donald VanDeVeer, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE 107 (1986).

148. *Id.*

149. *Id.*

150. Brownell, *supra* note 1.

sugary beverages will likely lead to increased health and thus increased welfare.<sup>151</sup> The sin tax provides a disincentive to engage in unhealthy and expensive consumption choices. Furthermore, the well-documented cognitive and informational failures that plague consumers indicate that uninfluenced consumption choices may not produce the best welfare-generating results.<sup>152</sup> Left uninfluenced by the economic and health incentives of a sugary-beverage tax, less than perfectly rational consumers will undoubtedly continue to engage in levels of consumption that will continue to cause obesity-related health problems. Although a sin tax will partially infringe on principles of autonomy, this infringement is minimal compared to the potential increase in health and welfare.

Second, a sin tax on sugary beverages will increase fairness. A sin tax on sugary beverages will address the externalities of obesity-related healthcare, which increases fairness by better allocating the previously unaccounted costs of overconsumption.<sup>153</sup> Like autonomy, fairness, especially in matters of tax policy, is a deeply embedded principle in the American and human consciousness.<sup>154</sup>

A sin tax on sugary beverages will increase fairness because sugary-beverage consumption contributes to obesity-related healthcare costs: costs that impose externalities on the public healthcare system.<sup>155</sup> A sugary-beverage tax will increase the costs of unhealthy consumption, which forces consumers to pay for the true costs of unhealthy consumption, rather than impose those costs on third parties. In turn, the revenue generated by sin taxes can be used to pay for the currently unaccounted costs of obesity-related healthcare. Because sugary-beverage consumption generates externalities and imposes costs on third parties, policies that address these external costs are justified on fairness grounds.

Lastly, while policies such as sin taxes theoretically impinge upon autonomy interests, in reality sin taxes infringe very little on autonomy and liberty. Rather than banning a product or activity outright, sin-tax policies merely provide economic and health-related incentives not to consume an unhealthy product; the final choice whether to consume or

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151. The author recognizes the complexity of truly determining individual welfare—centuries of philosophers have dedicated years of study debating issues of happiness and welfare—nonetheless, the author assumes that increased health is generally recognized as an indicator of overall welfare, a notion that few dispute.

152. See *supra* Part III.

153. See *supra* Part IV.

154. See Morse, *supra* note 6, at 195. Morse discusses how an ideal tax system will be efficient, easy to administer, and fair, both horizontally and vertically. *Id.* Additionally, Morse discusses how unfair taxation played a role in the American Revolution and the formation of the United States Constitution. *Id.* Morse uses the policy of fairness to attack sin taxes as regressive, and thus, unfair forms of taxation. *Id.* at 195, 208.

155. See *supra* Part IV.

not still remains unabridged. Sin taxes do not impede the autonomous functioning of adults, but instead help coax and cajole those autonomous adults into healthier decision making.

In sum, autonomy-based reasons for opposing a sin tax on sugary beverages are unpersuasive. When the benefits of the tax—increased welfare and fairness—are weighed against the minimal infringement on autonomy values, it is apparent that principles of autonomy provide very little reason for opposing the sin tax.

### *B. A Sugary-Beverage Sin Tax Would Be Regressive*

Another argument against sin taxes is that they are inherently regressive and thus unfair to poorer demographics.<sup>156</sup> Similar to a flat sales tax, which implements the percentage of tax for using a product no matter what the consumer's income, sin taxes force lower-income consumers to pay the same tax for using a sin-taxed product as a person in a higher income bracket.<sup>157</sup> This results in a wealthy person paying a much smaller percentage of his or her overall income to consume an unhealthy product as a poorer person.<sup>158</sup> This type of tax system produces inequity because it cuts against the “whole system of progressive taxation and [wealth] redistribution” that undergirds our system of taxation.<sup>159</sup> For example, “smokers from the working-class spend more of their income on cigarettes than smokers who are professionals.”<sup>160</sup>

Though sin taxes may be regressive and thus somewhat inequitable, leaving the externalities of obesity-related healthcare unaddressed raises similar fairness concerns.<sup>161</sup> Sin taxes may impose unfair tax burdens on the poor, but when properly used,<sup>162</sup> those taxes will help pay for the healthcare costs related to unhealthy consumption, which also disproportionately affect the poor.<sup>163</sup> Because sugary-beverage consumption generates externalities, leaving unhealthy consumption untaxed may be viewed as equally unfair to those taxpayers supporting public healthcare.

Additionally, the proposed sin tax should have the effect of reducing the consumption of sugary beverages, which reduces the regressive

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156. See Reiter, *supra* note 121, at 461; see also Morse *supra* note 6, at 208.

157. Morse, *supra* note 6, at 208.

158. *Id.* at 208–09.

159. Reiter, *supra* note 121, at 463.

160. *Id.*

161. See *supra* Part IV; see also *supra* Part V.A.

162. Proper use means using the revenue from sin taxes to pay for obesity-related healthcare costs and obesity-related education programs. The NEJM proposed sin tax would use the revenue for such programs. Brownell, *supra* note 1.

163. Brownell, *supra* note 1, at 1603. In the context of cigarette taxation, “[T]he poor face a disproportionate burden of smoking-related illnesses . . .” *Id.*

nature of the tax by steering consumers to healthier, untaxed beverages because empirical studies indicate that poorer populations are more sensitive to price changes.<sup>164</sup> The NEJM study addresses the regressive nature of sugary-beverage taxation by noting that “[t]he sugar-sweetened beverages are not necessary for survival, and an alternative (i.e., water) is available at little or no cost; hence, a tax that shifted intake from sugar-sweetened beverages to water would benefit the poor both by improving health and by lowering expenditures on beverages.”<sup>165</sup> In other words, the main goal of the sin tax on sugary beverages is to deter unhealthy consumption of sugary beverages, which will ideally result in both increased health and less expenditure on the taxed product. Thus, sin-tax policies often have the result of reducing for some, and eliminating for others, the chosen behavior that leads to the claim of unfair taxation.

*C. Slippery Slope: Taxing Sugary Beverages Will Lead to More Invasive Government Regulation*

Opponents of a sin tax on sugary beverages also raise a concern that taxing sugary beverages will lead to similar taxation of other products only marginally or speculatively linked to obesity.<sup>166</sup> This argument is often referred to as the slippery-slope argument. A slippery-slope argument is an argument “suggesting that a proposed policy or course of action that might appear desirable now, when taken in isolation, is in fact undesirable (or less desirable) because it increases the likelihood of undesirable policies being adopted in the future.”<sup>167</sup> Critics of the sin tax on sugary beverages fear that expanding government regulation into other areas of lifestyle choices will open the proverbial floodgates of any and all lifestyle regulation. Once it becomes acceptable to specially regulate sugary beverages, there seems to be little in the way stopping policy makers from regulating other unhealthy foods and products, for instance fast food, junk food, cream-based pastas, and numerous other unhealthy choices available to consumers.<sup>168</sup> Fear of expanded government

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164. Brownell, *supra* note 1 (citing Powell, *supra* note 80).

165. *Id.* at 1603.

166. See Morse, *supra* note 6, at 193–94 (noting that “commentators have long voiced concern about an eventual slide down a slippery slope into legislative abuse of the sin tax tool.”); see also Rizzo & Whitman, *supra* note 142.

167. Douglas Glen Whitman & Mario J. Rizzo, *Paternalistic Slopes*, 2 N.Y.U. J. L. LIBR. 411, 412 (2007).

168. Robert P. Murphy, *Soda and the Sin Tax*, MISES DAILY, March 29th, 2006, <http://mises.org/daily/2095>. Murphy notes that: “[L]ibertarians and conservatives would object to government interference with tobacco and alcohol by asking, ‘What next? Will the government start taxing fatty foods and put warning labels on fettuccine alfredo?’ I can honestly remember that the proponents of the ‘serious’ regulations dismissed this particularly slippery slope argument as absolutely absurd, that nobody would ever advocate a tax on fatty foods.” *Id.*

regulation into everyday lifestyle choices is based on simple chain of logic: because sugary beverages are sufficiently unhealthy to tax as a “sinful” behavior, any product viewed as a similarly unhealthy product can be the subject of government regulation and tax.<sup>169</sup>

Opposition to a sin tax may be due to the fact that the consumption of sugary beverages seems to differ quite drastically from other sin-taxed items, such as cigarettes.<sup>170</sup> Perhaps the most obvious differentiating characteristics are that cigarettes have highly addictive properties and secondhand environmental effects. These differences seem to justify government regulation: higher taxation to deter consumption. In contrast, the addictive nature of sugary beverages is less obvious, or at least presently undocumented.<sup>171</sup> And sugary-beverage consumption generates no secondhand environmental effects. Put another way, a somewhat clear line existed when only cigarettes were subject to a sin tax,<sup>172</sup> and allowing the taxation of sugary beverages blurs that line. This assertion, that no clear line can be drawn between presently desirable policies and future undesirable policies, is a common theme of slippery-slope arguments, which often pose the (rhetorical) question: “If we do allow the practice or policy under consideration, then where would we draw the line?”<sup>173</sup> In other words, slippery-slope arguments are an assertion that “we can draw no rationally defensible line between the practice or policy under consideration and some clearly objectionable one.”<sup>174</sup>

Although the slippery-slope argument raises possible concerns of government overencroachment, it is an unpersuasive and distracting reason to oppose a sin tax on sugary beverages.<sup>175</sup> As an initial matter, the unpersuasiveness of the slippery-slope argument is demonstrated by the nature of the democratic process. Slippery-slope reasoning in the political context is unpersuasive because it mischaracterizes the policy-making

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169. The question of how much empirical evidence is sufficient to justify regulation is a question integral to the decision to tax sugary beverages, but is a question beyond the scope of this Comment. This Comment assumes that the science and policy recommendation in the NEJM, Brownell, *supra* note 1, is sound and that this science is sufficient to levy a tax on sugary beverages.

170. Morse, *supra* note 6, at 193–94 (noting that “[w]hile sin taxes have increased over time, they have been generally limited to tobacco and alcohol. Recently, a new class of sin taxes has appeared that reaches deeper into popular culture than ever before. . .”).

171. Bittman, *supra* note 141.

172. Murphy, *supra* note 168.

173. Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1470 (1999).

174. *Id.*

175. Slippery-slope arguments are also logically fallacious: “The slippery slope has even been classified as a fallacy in many introductory logic texts.” Whitman & Rizzo, *supra* note 167, at 413–14. This classification is because a slippery-slope argument “immediately crumbles in the face of any logical or reasonable distinction between the (presumably good) policy under consideration and the (presumably bad) policy to which it will allegedly lead.” *Id.* at 414.

process as one based largely on precedent. In a democratic society, every new policy must be rigorously debated and adequately supported in order to become the law of the land. This process necessarily eschews slippery-slope reasoning because the democratic vetting process ensures that there are real, legitimate, and popularly supported reasons for implementing a policy—as opposed to reasons that are merely precedential. To clear this democratic hurdle, a new policy must do much more than show that similar laws have already been passed and similar precedent has been set.

American history provides poignant examples of how the federal lawmaking process operates independent of slippery-slope reasoning and influence, further illustrating why slippery-slope arguments are an unpersuasive reason to oppose a sin tax on sugary beverages. Perhaps the most salient example is the prohibition movement in the early twentieth century. The Eighteenth Amendment, which made the sale of alcoholic beverages illegal in the United States, was repealed by the Twenty-First Amendment after it was determined to be extremely unpopular and unworkable in practice.<sup>176</sup> The example of prohibition illustrates the limited value that lawmakers place or should place on similar policy precedent: past legislation is no reason to implement future legislation, and each policy decision must be evaluated on its own merits. Slippery-slope reasoning is faulty and unpersuasive in the policy context because (1) it places too much weight on the value of policy precedent; and (2) it fails to account for an active public that is constantly evaluating and testing current policies.

Furthermore, as the above critique implies, the invocation of the slippery-slope argument is often a tangential distraction that inhibits true debate about the merits of the policy under consideration. Inhibition of debate arises because slippery-slope arguments are based largely on fear and exaggeration. The heart of the sin-tax debate is not whether future, potentially more invasive policies will be risked by adopting a sin tax on sugary beverages. The sin-tax debate—one that still must pass through a democratically elected Congress—is about the value of personal responsibility and autonomy on the one hand, and increasing fairness and the welfare of citizens on the other. It is also about whether the government can increase individual welfare more efficiently than individuals themselves. There are empirical and theoretical arguments on each side of this debate, but there is no room for fear-mongering about how sin-tax

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176. See generally MICHAEL A. LERNER, *DRY MANHATTAN: PROHIBITION IN NEW YORK CITY* (Harvard Univ. Press 2007).

policy will automatically lead to other and more expansive sin-tax policies.

## VI. CONCLUSION

The proposed federal sin tax on sugary beverages made by the NEJM has many benefits. It will provide an economic incentive for individuals to make better, healthier choices in the products they consume, and it will help address and improve some of the cognitive deficiencies inherent in human decision making. The tax will increase the overall health of society by lowering the amount of unhealthy consumption. Moreover, the tax will increase the fairness of the public health insurance system by considering currently unaccounted-for externalities in consumption. Furthermore, the revenues from the tax will be used to pay for programs directly associated with the tax. Such programs include subsidizing healthier food, funding nutritional educational programs, and paying for the healthcare associated with obesity-related ailments. Thus, there are many benefits to such a tax.

But while the sin tax on sugary beverages has many benefits, some citizens are concerned that these policies are an unprecedented encroachment into personal autonomy that should not be imposed. Proponents of this view believe that autonomy should be a paramount policy concern and personal choice should be respected even if it results in unhealthy consumption choices. While these policy concerns are legitimate, they are blind to the epidemic of obesity that America is facing. Respecting personal choice as an end in itself will merely enforce the status quo of widespread obesity-related health problems—a status quo that will both kill and bankrupt America. Problems of this magnitude require large-scale action that only the federal government can mobilize.

More importantly, while the proposed federal sin tax on sugary beverages provides a major starting point in addressing the obesity-related health problems America is facing, it is not an ending point, and it is certainly not a panacea. America's response to the obesity epidemic requires more than a sin tax on sugary beverages, and it requires more than just government-imposed policy. An effective response must include educational programs, private sector reform, and increased individual responsibility.