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FOOD AND DRUG LAW JOURNAL

VOLUME 73 NUMBER 3 2018

- 361 When Markets Fail: Patents and Infectious Disease Products
Jonathan J. Darrow, Michael S. Sinha, and Aaron S. Kesselheim
- 383 Buying and Selling Prioritized Regulatory Review:
The Market for Priority Review Vouchers as Quasi-Intellectual Property
Oulu Wang
- 405 Obsolete to Useful to Obsolete Once Again: A History of Section 507
of the Food, Drug, and Cosmetic Act
George Maliha
- 432 The Regulation of Private Standards in the World Trade Organization
Michael M. Du

Student Note

- 465 Taxing Sugar-Sweetened Beverages to Combat the Costs of Obesity:
City-Level Taxes and How the Federal Government Should Complement Them
Meaghan Jerrett



GEORGETOWN LAW



Student Note

Taxing Sugar-Sweetened Beverages to Combat the Costs of Obesity: City-Level Taxes and How the Federal Government Should Complement Them

MEAGHAN JERRETT*

I. INTRODUCTION

In many parts of the world, the struggle to procure enough food for survival has been replaced with a food landscape of abundance. This shift means that many people now have more than enough access to food. Industrialized agriculture has helped alleviate hunger, but it has also led to the creation of calorie-rich but nutrient-poor foods. Coupled with an increase in sedentary lifestyles (permissible through dramatically changed workplace needs), industrialized agriculture means that society is now grappling with the fallout of overconsumption and resulting obesity. Governments are attempting to discern the most appropriate, and effective, role to play in addressing the costs of an increasingly overweight populace. State control over food choice seems dangerous and draconian, so government actors have gravitated towards less invasive methods of impacting consumption patterns in order to mitigate costs.

Taxing provides a middle path between stick and carrot; it creates a mild burden on consumption of certain items, while producing revenue that can fund desirable, and often relevant, projects and programming. Taxing sugar-sweetened beverages (SSBs) can be a precise way to address the negative consequences of obesity. Cities and municipalities are implementing taxes on SSBs locally, where taxation is feasible, appropriate, and sustainable to legal challenges. Local legislators who wish to implement taxes on SSBs can draw on the experiences of other cities in the United States that have already executed such taxes, while the federal government can shift spending to complement the policy objectives behind local SSB taxes. SSB taxes may provide a policy solution to help manage the obesity epidemic in the United States.

This article will discuss the background health problems stemming from increased obesity in the United States. It will then survey the role the sin tax has historically played as a policy solution to citizen activity that results in systemic societal costs and introduce the existing SSB taxes that have been implemented. It will examine three critiques of SSB taxes and find resolutions for them when carefully-designed taxes are

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implemented on the local level. It will conclude by turning to the appropriate role for the federal government within this context.

II. BACKGROUND ON HEALTH PROBLEMS

A. Background on Obesity: Prevalence, Causes, and Costs

For the past few decades, the prevalence of obesity and its associated health problems have been increasing in the United States.¹ The obesity trend is relatively new; as recently as 1990, only 15 percent of American adults were obese.² However, from 2011 to 2014, the obesity prevalence rate among American adults was 36.5 percent.³ Further, since the 1970s, the percentage of obese children has more than tripled so that now more than one in every five children is obese.⁴ The long-term trajectory indicates this trend will only intensify. By 2030, 50 percent of Americans are expected to be obese.⁵

An increasingly obese population has profound consequences for individual health, public health systems, and the economy. Obesity causes or is linked with many health conditions, including “heart disease, stroke, diabetes, high blood pressure, unhealthy cholesterol, asthma, sleep apnea, gallstones, kidney stones, infertility, and as many as 11 types of cancers, including leukemia, breast, and colon cancer.”⁶ One direct consequence of this rise in medical conditions is that medical costs are also climbing. In 2010, obesity increased medical costs by \$315.8 billion, up 48 percent from the 2005 cost of \$213 billion (adjusted for inflation).⁷ There are also productivity costs such as labor absenteeism and disability, transportation costs such as increased fuel consumption, and human capital costs such as lower educational attainment incurred as a consequence of obesity.⁸ These costs are borne by individuals, their families, their communities, and society at large.

¹ Obesity is defined as having a body mass index of 30 or higher. *Defining Adult Overweight and Obesity*, CTRS FOR DISEASE CONTROL & PREVENTION (June 16, 2016), <https://www.cdc.gov/obesity/adult/defining.html> [<https://perma.cc/WC26-7XC8>].

² *An Epidemic of Obesity: U.S. Obesity Trends*, HARV. T.H. CHAN SCHOOL PUB. HEALTH: NUTRITION SOURCE, <https://www.hsph.harvard.edu/nutritionsource/an-epidemic-of-obesity/> [<https://perma.cc/23JL-3Z4E>] (last visited Apr. 2, 2017).

³ Cynthia L. Ogden et al., *Prevalence of Obesity Among Adults and Youth: United States, 2011-2014*, 219 NAT'L CTR. HEALTH STAT. DATA BRIEF 1, 1 (2015).

⁴ *Childhood Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 25, 2017), <https://www.cdc.gov/healthyschools/obesity/facts.htm> [<https://perma.cc/D2HC-LC6R>].

⁵ *Obesity Trends: Tracking the Global Epidemic*, HARV. T.H. CHAN SCHOOL PUB. HEALTH: OBESITY PREVENTION SOURCE, <https://www.hsph.harvard.edu/obesity-prevention-source/obesity-trends/#ref4> [<https://perma.cc/Y8PD-KG8K>] (last visited Apr. 2, 2017).

⁶ *Obesity Consequences: The High Cost of Excess Weight*, HARV. T.H. CHAN SCHOOL PUB. HEALTH: OBESITY PREVENTION SOURCE, <https://www.hsph.harvard.edu/obesity-prevention-source/obesity-consequences/> [<https://perma.cc/VYM8-9KND>] (last visited Apr. 2, 2017).

⁷ Victoria Stilwell, *Obesity is Hurting the U.S. Economy in Surprising Ways*, BLOOMBERG BUSINESSWEEK (Mar. 5, 2015, 12:00 A.M.), <https://www.bloomberg.com/news/articles/2015-03-05/american-economy-has-a-weight-problem-as-costs-of-obesity-mount> [<https://perma.cc/26QK-KCRU>].

⁸ Ross A. Hammond & Ruth Levine, *The Economic Impact of Obesity in the United States*, 3 DIABETES, METABOLIC SYNDROME & OBESITY: TARGETS & THERAPY 285, 285 (2010).

The causes of obesity are complex, multifaceted, and include both behavior and genetics.⁹ One high-profile factor that contributes to obesity is the consumption of sugar-sweetened beverages. In adults, SSBs have been causally linked with increased risk of obesity¹⁰ and have been linked with long-term weight gain, type 2 diabetes, and cardiovascular disease.¹¹ Current literature also reflects that SSB consumption is directly associated with weight gain and obesity in children and adolescents.¹² SSB consumption leads to increased weight through “decreased satiety and incomplete compensatory reduction in energy intake at subsequent meals following consumption of liquid calories.”¹³ Studies show that when sugar or high-fructose corn syrup is consumed in liquid form, there is no comparable suppression of the intake of solid food sufficiently to maintain energy balance; the body does not recognize how much energy it has taken in when it consumes a SSB and fails to trigger accurate fullness levels.¹⁴ As a consequence, a person who consumes a SSB ends up consuming other calories at the same level they would have even if they had not consumed the beverage. Beyond inducing increased consumption and weight gain, SSBs also contribute to a high dietary glycemic load because the sugar or corn syrup that serves to sweeten these beverages are made of rapidly absorbable carbohydrates; high glycemic diets cause weight gain, glucose intolerance, and insulin resistance.¹⁵ These problems stem from the uniquely high levels of sweeteners being absorbed in liquid form through SSBs, which are the primary source of added sugars in the American diet today.¹⁶ Both the Dietary Guidelines Advisory Committee and the World Health Organization (WHO) recommend decreasing SSB consumption to mitigate these health consequences.¹⁷

B. Government Responses Internationally

Governments across the globe have implemented legal solutions to stem the tide of the substantial societal costs associated with obesity. These solutions have been met with varying degrees of success and public acceptance but do highlight the range of options available when a government attempts to use the law to mitigate obesity-related costs.

⁹ *Adult Obesity Causes and Consequences*, CTRS FOR DISEASE CONTROL & PREVENTION (Aug. 15, 2016), <https://www.cdc.gov/obesity/adult/causes.html> [<https://perma.cc/ZHW3-TL7P>].

¹⁰ F.B. Hu, *Resolved: there is sufficient evidence that decreasing sugar-sweetened beverage consumption will reduce the prevalence of obesity and obesity-related diseases*, 14 *OBESITY REVS.* 606, 612 (2013).

¹¹ Vasanti S. Malik et al., *Sugar Sweetened Beverages, Obesity, Type 2 Diabetes and Cardiovascular Disease Risk*, 121 *CIRCULATION* 1356, 1356 (2010).

¹² Amélie Keller & Sophie Bucher Della Torre, *Sugar-Sweetened Beverages and Obesity among Children and Adolescents: A Review of Systematic Literature Reviews*, 11 *CHILDHOOD OBESITY* 338, 340 (2015).

¹³ Malik et al., *supra* note 11, at 1360.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 1356.

¹⁷ U.S. DEP'T OF AGRIC., *SCIENTIFIC REPORT OF THE 2015 DIETARY GUIDELINES ADVISORY COMMITTEE 20* (2015); WORLD HEALTH ORG., *GUIDELINE: SUGARS INTAKE FOR ADULTS AND CHILDREN* (2015).

In France, the government took a multi-faceted approach by banning vending machines in schools,¹⁸ limiting french fry servings in school cafeterias to once per week,¹⁹ imposing a tax on beverages with added sugar or other sweeteners (which resulted in €300 million of revenue raised in 2014 while decreasing consumption²⁰), and most recently banning free refills of SSBs.²¹ In the 2000s, Japan's Ministry of Health started a campaign to shrink the overweight population. The campaign required companies and governments to measure citizens' waistlines during annual checkups and provide nutritional guidance for people above the prescribed thresholds of 33.5 inches for men and 35.4 inches for women.²² Mexico implemented a successful one-peso-per-liter tax on SSBs which helped drive a five and a half percent decrease in SSBs purchased during its first year and a nearly 10 percent decrease in its second year.²³

International efforts to use governmental power to address obesity sometimes result in unforeseen consequences, both economically and politically. For example, in Denmark, a "fat tax" on foods containing more than 2.3 percent saturated fats increased the price of food, put Danish jobs at risk, and drove Danes to cross into Germany to stock up on cheaper food items.²⁴ In Brazil, a series of planned regulations to address dramatic obesity increases, which included marketing restrictions on children's food and at sports and cultural events, spurred intense industry lobbying to prevent implementation. As a result, the only regulation to be successfully implemented was a requirement that advertisements contain a warning about unhealthy foods and beverages.²⁵ After Mexico passed its soda tax, Coca-Cola committed to investing \$8.2 billion in Mexico through the year 2020.²⁶

With some notable exceptions (such as the trans fat ban²⁷ and regulations surrounding school food²⁸), federal action in the United States to address obesity has

¹⁸ Kimiko de Freytas-Tamura, *France Bans Free Soda Refills in Attack on Obesity*, N.Y. TIMES (Jan. 27, 2017), https://www.nytimes.com/2017/01/27/world/europe/france-soda-refill-ban.html?_r=0 [<https://perma.cc/TAJ8-EVLQ>].

¹⁹ *Id.*

²⁰ WORLD HEALTH ORG., FISCAL POLICIES FOR DIET AND PREVENTION OF NONCOMMUNICABLE DISEASES 20 (2015).

²¹ de Freytas-Tamura, *supra* note 18.

²² Norimitsu Onishi, *Japan, Seeking Trim Waists, Measures Millions*, N.Y. TIMES (June 13, 2008), <http://www.nytimes.com/2008/06/13/world/asia/13fat.html> [<https://perma.cc/5GTP-AJ72>].

²³ M. Arantxa Colchero, *In Mexico, Evidence of Sustained Consumer Response Two Years After Implementing a Sugar-Sweetened Beverage Tax*, 36 HEALTH AFF. 1, 6 (2017).

²⁴ *Denmark to Abolish Tax on High Fat Foods*, BBC NEWS (Nov. 10, 2012), <http://www.bbc.com/news/world-europe-20280863> [<https://perma.cc/6SSN-4SAY>].

²⁵ Andrew Jacobs & William Daniels, *How Big Business Got Brazil Hooked on Junk Food*, N.Y. TIMES (Sept. 16, 2017), <https://www.nytimes.com/interactive/2017/09/16/health/brazil-obesity-nestle.html> [<https://perma.cc/99YY-4G4C>].

²⁶ Nicole Perloth, *Spyware's Odd Targets: Backers of Mexico's Soda Tax*, N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/2017/02/11/technology/hack-mexico-soda-tax-advocates.html> [<https://perma.cc/78RB-3BRK>].

²⁷ Final Determination Regarding Partially Hydrogenated Oils, 80 Fed. Reg. 34,650 (June 17, 2015).

²⁸ *See, e.g., Fact Sheet: Healthy, Hunger-Free Kids Act School Meals Implementation*, DEP'T OF AGRIC. (June 1, 2017), <https://www.fns.usda.gov/pressrelease/2014/009814> [<https://perma.cc/9KP5-XQ8K>].

historically occurred through providing consumers with information about their food. This information is provided through both public education campaigns and on food labels. Labeling has dominated the Food and Drug Administration's (FDA) efforts; FDA's goal is to ensure that food products are labeled truthfully.²⁹ FDA's authority over food labels stems from the Federal Food, Drug, and Cosmetic Act and the Nutrition Labeling and Education Act.³⁰ Significantly for companies that sell SSBs, as of 2016 new nutrition labels began to provide information about added sugars. This means the sugar content of a SSB will be presented in a more high-profile manner.³¹ These labels will be fully in place by 2021.³² Providing added sugar information to consumers is aimed at arming them with the ability to more accurately discern what is in their food and beverage products. However, it does not otherwise overtly incentivize behavior in any particular direction. In contrast, taxation creates incentives beyond those inherent in increased information which is why municipalities across the United States are exploring their SSB tax options.

III: SSB TAXES IN THE UNITED STATES

A. Use of Sin Taxes in the United States

Using the tax code to incentivize or discourage behavior is a long-standing American tradition. Levying taxes upon "disfavored but nonetheless widely used products" is often touted as a way to "cure bad habits and re-distribute wealth from the self-indulgent to more worthy parties."³³ Sin taxes create a financial barrier to participating in certain activities or consuming certain goods or services, while producing revenue that can be used in a variety of ways, often mitigating the societal harm caused by those "sinful" activities or consumption. Sin taxes date back to the start of the nation, when a tax was levied on whiskey in 1791 to pay off the national debt incurred in the Revolutionary War.³⁴ The behavior-coercing intentions behind the whiskey tax were acknowledged by Alexander Hamilton, then Secretary of Treasury, when he described it as "more as a measure of social discipline than as a source of revenue."³⁵ This tax sparked the Whiskey Rebellion, an armed rebellion against the government which, although put down, eventually led to the repeal of the tax.³⁶

That whiskey tax may not have survived, but sin taxes have since been levied in the United States on an assortment of products and services that legislatures desire to curb. Examples include tobacco, alcohol, strip clubs, and gasoline, typically at levels that reduce consumption in key populations but do not prevent consumption (and revenue-

²⁹ PETER BARTON HUTT ET AL., FOOD AND DRUG LAW 4 (4th ed. 2013).

³⁰ *Id.* at 331.

³¹ 21 C.F.R. pt. 101.9 (2018).

³² *Changes to the Nutrition Facts Label*, FOOD & DRUG ADMIN. (Mar. 15, 2018), <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm385663.htm> [<https://perma.cc/GTM6-Y277>].

³³ 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. 433, 433 (1996).

³⁴ Robert Creighton, *Fat Taxes: The Newest Manifestation of the Age-Old Excise Tax*, 31 J. LEGAL MED. 123, 124 (2010).

³⁵ *Id.*

³⁶ *Id.*

generation) altogether. Tobacco taxes are “a very effective policy tool for reducing smoking participation and consumption among youth, young adults and persons of low socioeconomic status.”³⁷ Alcohol taxes reduce both general and excessive alcohol consumption, and there is evidence that this reduction is more pronounced in populations, such as young men, that have higher prevalence of excessive alcohol consumption.³⁸ The policy justification for taxing gasoline has been “to encourage alternative vehicle usage . . . to reduce the U.S. dependence on foreign oil and air pollution caused by greenhouse gases.”³⁹

There are several features of taxation that make levying taxes an attractive policy option to a legislature faced with undesirable constituent behavior. First, taxes may be perceived as less intrusive into personal liberty than many of the alternative policy levers the legislature could pull. When the federal government moved from taxing alcohol to making it outright illegal to produce or use in 1920, a thriving illegal market developed in reaction and prohibition was eventually overturned by Constitutional amendment.⁴⁰ Similarly, a New York City ban on certain sizes of sugary beverages was met with furious opposition⁴¹ and ultimately struck down in the courts.⁴²

Second, compared with consumption bans, sin taxes serve to nudge, rather than force, people to act or consume in a certain way. Nudging “is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”⁴³ Nudges often appeal to both legislators and citizens who live under those policies because they are a “relatively weak, soft, and nonintrusive type of paternalism because choices are not blocked, fenced off, or significantly burdened.”⁴⁴ By structuring the government action as a nudge rather than a prohibition with penalties attached, the state has left the option to behave or consume in a harmful manner available, but made it slightly more burdensome for individuals to choose that behavior or consumption.

Sin taxes are a particularly attractive form of nudging because they produce revenue, sometimes in significant quantities. For example, in 2007 about \$5.1 billion was collected from excise taxes on alcohol.⁴⁵ The revenue produced from sin taxes is often allocated to address the harms that originate in the behavior or consumption being taxed. Revenue from the five-dollar-per-customer “pole tax” on strip club

³⁷ Pearl Bader et al., *Effects of Tobacco Taxation and Pricing on Smoking Behavior in High Risk Populations: A Knowledge Synthesis*, 8 INT’L J. ENVTL. RES. & PUB. HEALTH 4118, 4127 (2011).

³⁸ Randy W. Elder et al., *The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms*, 28 AM. J. PREVENTATIVE MED. 217, 223 (2010).

³⁹ Sandy Manche, *Maintaining the Highway Infrastructure as Alternative Fuel Vehicle Usage Increases*, 7 KY. J. EQUINE, AGRIC. & NAT’L. RESOURCES L. 515, 528 (2014).

⁴⁰ U.S. CONST. amend. XXI, § 1; Reiter, *supra* note 33, at 449.

⁴¹ Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg’s Soda Ban*, N.Y. TIMES (Aug. 22, 2012), <http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html> [<https://perma.cc/R7LF-X7XB>].

⁴² See N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y. City Dep’t of Health & Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014).

⁴³ RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 6 (2008).

⁴⁴ *Id.* at 5.

⁴⁵ Creighton, *supra* note 34, at 125.

patrons in Texas was earmarked to fund programs for sexual assault victims.⁴⁶ Gasoline and diesel fuel taxes produce revenue to fund the Highway Trust Fund which provides money for road and mass transit projects.⁴⁷ There is a danger that the legislature will come to depend on the revenue to such a degree that it would be reliant on the harmful behavior generating revenue to fund programs. However, allocating the revenue to one-time expenditures, rather than using it to sustain general program funds, may mitigate the effects of overreliance. Raising revenue allows legislators to address budget shortfalls and sometimes fund programs that they otherwise would not be able to afford.

B. Taxing SSBs in the United States

Taxes on SSBs first cropped up in the 1980s in response not to obesity concerns but to revenue shortfalls.⁴⁸ Prompt lobbying efforts by soft beverage companies resulted in these taxes being rolled back.⁴⁹ Industry resistance also helped derailed the opportunity for a federal SSB tax as part of the Obama Administration's healthcare overhaul in 2010.⁵⁰ Despite promising impacts (analysts determined that a one-cent-per-ounce tax would reduce consumption by 23 percent and the Congressional Budget Office estimated that \$50 billion could be raised by a smaller tax over 10 years) and the apparent support of the President (who told a reporter that a SSB tax was an "idea that we should be exploring"), the federal SSB tax was protested by a coalition of soft beverage industry members, their suppliers, and SSB mass-marketers (such as McDonald's), and as a consequence the proposal was only briefly considered by the Senate Finance Committee before being abandoned.⁵¹ More recently, Congresswoman DeLauro introduced a bill in March of 2015 to create a federal SSB tax on liquids with caloric sweeteners;⁵² it was referred to committee and has not moved as of July 2018.⁵³

Despite these failures at the federal level, taxing SSBs continues to be a part of the dialogue concerning how to address the rising costs of obesity. In 2015, the USDA Dietary Guidelines Advisory Committee voiced support for using taxation to reduce consumption of unhealthy foods and specifically called attention to the use of revenues

⁴⁶ Tex. Bus. & Com. Code § 102.052 (2009); Rachel E. Morse, *Resisting the Path of Least Resistance*, 29 B.C. THIRD WORLD L.J. 189, 190 (2009).

⁴⁷ Manche, *supra* note 39, at 515.

⁴⁸ Rogan Kersch & Brian Elbel, *Public Policy & Obesity: Overview and Update*, 5 WAKE FOREST J.L. & POL'Y 105, 112 (2015).

⁴⁹ *Id.*

⁵⁰ Tom Hamburger & Kim Geiger, *Beverage industry douses tax on soft drinks*, L.A. TIMES (Feb. 7, 2010), <http://articles.latimes.com/2010/feb/07/nation/la-na-soda-tax7-2010feb07> [<https://perma.cc/6UEC-LQE9>]; *Soda Industry Spent \$67 Million Opposing State, City Soda Taxes & Warning Labels*, CTR. FOR SCI IN THE PUB. INTEREST (Sept. 21, 2016), <https://cspinet.org/news/soda-industry-spent-67-million-opposing-state-city-soda-taxes-warning-labels-20160921> [<https://perma.cc/S9VU-9EVE>] ("[T]he industry trade association and two companies are spending upwards of \$14 million a year at the federal level, where their public health objectives include opposition to a federal soda excise tax.")

⁵¹ Hamburger & Geiger, *supra* note 50; N. Gregory Mankiw, *Can a Soda Tax Save Us From Ourselves?*, N.Y. TIMES (June 5, 2010), <https://www.nytimes.com/2010/06/06/business/06view.html> [<https://perma.cc/W2ZB-5WES>]; Brian Montopoli, *Senate Considers Federal Tax on Soda*, CBS NEWS (May 12, 2009), <https://www.cbsnews.com/news/senate-considers-federal-tax-on-soda/> [<https://perma.cc/P4CS-F3AX>].

⁵² Sugar-Sweetened Beverages Tax Act of 2015, H.R. 1687, 114th Cong. (2015).

⁵³ H.R. 1687.

from SSB taxes for nutrition education and obesity prevention programming.⁵⁴ In 2016, the WHO recommended that countries adopt SSB taxes to reduce SSB consumption and related costs.⁵⁵ The WHO used Mexico (see above) as a case study to support their recommendation that nations implement SSB taxes because they help reduce SSB consumption.⁵⁶

SSB taxes have taken root at the local level in several metropolitan areas. Both Berkeley, California and Philadelphia, Pennsylvania have passed and implemented SSB taxes.⁵⁷ These cities provide insight into how SSB taxes play out in the courts and in public perception, which is particularly important given that San Francisco, California; Albany, California; Oakland, California; Boulder, Colorado; and Seattle, Washington all passed similar SSB taxes that have recently or will soon be implemented.⁵⁸

i. Berkeley, California

Berkeley became the first city in the country to pass and implement a SSB tax, which they did through a 2014 ballot measure⁵⁹ that garnered 74.49 percent approval.⁶⁰ A combination of aggressive local organizing and donations by former New York City Mayor Michael Bloomberg⁶¹ resulted in this one-cent-per-ounce tax.⁶² The Berkeley SSB tax is levied on “both products like soda, energy drinks, and heavily presweetened tea, as well as the ‘added caloric sweeteners’ used to produce them, such as the syrup used to make fountain drinks.”⁶³

Before the ballot was voted on, a member of the “No Berkeley Beverage Tax Campaign,” which received funding from the American Beverage Association, sued on the grounds that the ballot language was “false, misleading, and illegally biased”⁶⁴

⁵⁴ U.S. DEP’T OF AGRIC., *supra* note 17, at 9.

⁵⁵ WORLD HEALTH ORG., *supra* note 20, at 19; *Spotlight on Soda*, HARV. T.H. CHAN SCHOOL PUB. HEALTH: NUTRITION REP. (Oct. 25, 2016), <https://www.hsph.harvard.edu/nutritionsource/2016/10/25/spotlight-on-soda/> [<https://perma.cc/35V3-EY59>].

⁵⁶ WORLD HEALTH ORG., TAXES ON SUGARY DRINKS: WHY DO IT? 3 (2016).

⁵⁷ BERKELEY CODE § 7.72.090 (effective Jan. 1, 2015); PHILA. CODE §§ 19-4100–19-4108.

⁵⁸ Daniel Beekman, *Seattle Will Tax Sugary Soda—but not Diet*, SEATTLE TIMES (June 5, 2017), <https://www.seattletimes.com/seattle-news/politics/seattle-city-council-says-yes-to-soda-tax/> [<https://perma.cc/M2SF-PX9D>]; Mike Esterl, *Soda Taxes Approved in Four Cities, Vote Looms in Chicago’s Cook County*, WALL ST. J. (Nov. 9, 2016), <https://www.wsj.com/articles/soda-taxes-approved-in-four-cities-vote-looms-in-chicagos-cook-county-1478698979> [<https://perma.cc/37NA-L55C>].

⁵⁹ Yasmin Anwar, *Soda tax linked to drop in sugary beverage drinking in Berkeley*, BERKELEY NEWS (Aug. 3, 2016), <http://news.berkeley.edu/2016/08/23/sodadrinking/> [<https://perma.cc/M8W7-XS6D>].

⁶⁰ Official Election Site of Alameda County, *Measure D – City of Berkeley*, ALAMEDA COUNTY GOV’T, http://www.acgov.org/rov/current_election/226/index.htm [<https://perma.cc/PXH8-GGVT>] (last visited Apr. 2, 2017).

⁶¹ Ann Saphir, *Berkeley passes soda tax; effort may be tougher elsewhere*, REUTERS (Nov. 5, 2014), <https://www.reuters.com/article/us-usa-elections-soda/berkeley-passes-soda-tax-effort-may-be-tougher-elsewhere-idUSKBN0IP1UI20141105> [<https://perma.cc/EPA9-TMSF>].

⁶² BERKELEY CODE § 7.72 (effective Jan. 1, 2015).

⁶³ *Frequently Asked Questions (FAQ) for the Sweetened Beverage Tax of Berkeley, CA*, CITY OF BERKELEY, https://www.cityofberkeley.info/uploadedFiles/Finance/Level_3_-_General/Frequently%20Asked%20Questions%20Edited%20Version%20111015.2.pdf [<https://perma.cc/R8TK-ALQN>].

⁶⁴ Brief for Petitioner, *Johnson v. Numainville* (Cal. Super. Ct. 2014) (No. RG14736763) <http://www.berkeleyside.com/wp-content/uploads/2014/08/Petition-Writ-8-13-14.pdf>; Emilie Raguso,

but otherwise no suits have been filed in opposition to the Berkeley tax. As the oldest SSB tax in the country, Berkeley provides the first data showing what impact SSB taxes have on people in the United States. A study by Kristine Madsen at the University of California Berkeley School of Public Health found that after the tax had been implemented for four months, consumption of SSBs in Berkeley decreased by 21 percent while increasing by four percent in comparison cities.⁶⁵ Water consumption, meanwhile, increased by 63 percent in Berkeley.⁶⁶

ii. Philadelphia, Pennsylvania

In June of 2016, Philadelphia became the first large city in the United States to pass a SSB tax, which they did with a thirteen-to-four vote of the City Council.⁶⁷ The Philadelphia Beverage Tax imposes a one-and-a-half cent per ounce tax on “any non-alcoholic beverage, syrup, or other concentrate used to prepare a beverage that lists as an ingredient any form of caloric sugar-based sweetener, including, but not limited to sucrose, glucose, or high fructose corn syrup.” The tax caught national attention both because of the high expectations for revenue production and because of the often contentious atmosphere around the passage of the tax.⁶⁸ Philadelphia Mayor Kenney, who initially proposed a much larger three-cents-per-ounce tax, credits its successful passage with framing the tax as revenue-generation rather than liberty-restriction.⁶⁹ “If you want to tax something and people know where the money’s going to go, then it’s easier for them to get behind it,” the mayor stated in an interview.⁷⁰ At the time of passage, the Philadelphia tax was expected to raise about \$91 million of funding per year for “prekindergarten programs in the city; creating community schools; improving parks, recreation centers, and libraries; and offering a tax credit for businesses that sell healthy beverages.”⁷¹ The tax entered into effect on January 1, 2017 and in October of 2017 the tax brought in \$6.1 million in revenue.⁷²

Lawsuit filed over Berkeley’s ‘soda tax’ ballot, BERKELEYSIDE (Aug. 15, 2014), <http://www.berkeleyside.com/2014/08/15/lawsuit-filed-over-berkeley-soda-tax-ballot-language/> [<https://perma.cc/9DQF-7J2H>].

⁶⁵ Jennifer Falbe et al., *Impact of the Berkeley Excise Tax on Sugar-Sweetened Beverage Consumption*, 106 AM. J. PUB. HEALTH 1865, 1896 (2016).

⁶⁶ *Id.* at 1897.

⁶⁷ PHILA. CODE §§ 19-4100–19-4108; Tricia L. Nadolny, *Soda tax passes; Philadelphia first big city in nation to enact one*, PHILLY.COM (June 16, 2016), http://www.philly.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html [<https://perma.cc/Y94S-PRBD>].

⁶⁸ Nadolny, *supra* note 67.

⁶⁹ Luc Cohen, *Philadelphia passes soda tax after mayor rewrites playbook*, REUTERS (June 16, 2016), <http://www.reuters.com/article/us-beverages-philadelphia-sodatatax-idUSKCN0Z22G3> [<https://perma.cc/ZBH4-P2MJ>].

⁷⁰ *Id.*

⁷¹ Nadolny, *supra* note 67.

⁷² Alison Burdo, *October brings in lowest monthly soda tax revenue since January*, PHILA. BUS. J. (Nov. 27, 2017), <https://www.bizjournals.com/philadelphia/news/2017/11/27/pbt-soda-tax-revenue-october-monthly.html> [<https://perma.cc/5388-QFWH>].

III. SSB TAX CRITIQUES AND SOLUTIONS

The critiques leveled at SSB taxes shed light on both the causes of deep-seated public animosity towards SSB taxes and the potential undermining of such taxes through the legal system. Criticisms have been leveled at SSB taxes for being in violation of the law, for being regressive, and for having negative impacts on communities under their jurisdiction. Understanding the merits of these critiques as well as how they can be resolved provides useful fodder for legislators in other localities who are in the process of or are considering implementing a SSB tax.

A. Legal Critiques

The Philadelphia SSB tax, in addition to being the first SSB tax imposed in a major city, has brought with it the first legal challenges to the validity of a SSB tax in the United States. It is unsurprising that legal challenges were brought against the tax given private industry's history of animosity towards SSB regulation. The American Beverage Association (ABA), a trade association representing the United States non-alcoholic beverage industry,⁷³ spent more than \$4.2 million fighting passage of the Philadelphia tax.⁷⁴ They also have a history of litigating to disassemble other cities' actions on SSB consumption; although they did not file suit after the passage of Berkeley's tax, they did bring suit against the New York City Board of Health's Sugary Drink Portion Cap Rule, which prohibited the sale of sugary drinks in vessels larger than 16 fluid ounces.⁷⁵ The New York soda ban case differs substantially from the Philadelphia case (it was struck down because the Court of Appeals of New York found that the Board of Health had exceeded the scope of its regulatory authority by issuing the ban, which is not relevant for Philadelphia where the tax was passed by City Council),⁷⁶ but it does highlight the ABA's history of using the courts to challenge laws that are crafted to decrease consumption of its members' products.

The suit in Philadelphia highlights the type of legal opposition SSBs in other localities are likely to face. The suit was brought by a group of consumers, retailers, distributors, and trade associations (including the ABA) who alleged that they would be injured by the tax once implemented.⁷⁷ The Plaintiffs filed in the Philadelphia County Court of Common Pleas in the hopes of stopping the city from collecting the tax.⁷⁸ The Common Pleas Court and, subsequently, the Commonwealth Court of Pennsylvania both upheld the tax.⁷⁹ The Plaintiffs appealed to the Pennsylvania

⁷³ *About Us*, AM. BEVERAGE ASS'N, <http://www.ameribev.org/about-us/> [<https://perma.cc/G2U4-DHFD>] (last visited on Apr. 4, 2017).

⁷⁴ Allison Aubrey, *As More Cities Eye Soda Tax, Industry Vows to Fight Soda Tax in Philadelphia*, NPR (June 17, 2016), <http://www.npr.org/sections/thesalt/2016/06/17/482531399/as-more-cities-eye-soda-tax-industry-vows-to-fight-new-tax-in-philadelphia> [<https://perma.cc/9RSN-UWT4>].

⁷⁵ *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y. City Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681 (N.Y. 2014).

⁷⁶ *Id.*

⁷⁷ *Williams v. City of Phila.*, 2016 WL 7422362, at 1 (Pa. Ct. Com. Pl. 2016).

⁷⁸ *Id.*

⁷⁹ *Williams v. City of Phila.*, 164 A.3d 576 (Pa. Commw. Ct. 2017), *appeal granted in part*, 180 A.3d 365 (Pa. 2018); *Id.* at 7.

Supreme Court which upheld the tax, as well.⁸⁰ The Plaintiffs advanced arguments that the Philadelphia SSB tax conflicts with both state and federal law.⁸¹

a. Critique: SSB taxes conflict with SNAP.

The Plaintiffs claimed that the Philadelphia SSB tax conflicts with Pennsylvania's implementation of the Supplemental Nutrition Assistance Program (SNAP)⁸² because the tax causes SNAP benefits to be used to pay a city sales tax.⁸³ SNAP benefits, which are federally funded, may not be granted to a state unless it agrees not to impose sales and use taxes on SNAP purchases.⁸⁴ This requirement is designed to prevent a "transfer of revenues from the federal government to state and local governments at the expense of low income person(s) . . . Federal dollars provided for food assistance should not be diverted to other purposes."⁸⁵ When a state or local tax is in conflict with SNAP in this manner, the state may be at risk of losing its SNAP funding.⁸⁶

The claim that the Philadelphia SSB tax conflicts with SNAP should fail because SNAP requires that state and local taxes not be levied on SNAP purchases. Here, the legal incidence of taxation falls not on purchases by consumers but on distribution transactions. To determine the legal incidence of a particular tax, we must look first to the plain language of the statute and then to the legislative intent.⁸⁷ *Gurley v. Rhoden* is instructive because it addressed how to evaluate legal incidence of taxation which is dispositive in determining if any tax conflicts with this SNAP requirement, which can be applied in the context of a SSB tax.⁸⁸ The petitioner in *Gurley*, a gasoline producer, disputed the levying of a five percent Mississippi retail sales tax on the total amount that he received from his customers for gasoline.⁸⁹ This petitioner chose to incorporate two other taxes into his pump prices; he included a state gasoline excise tax (nine cents per gallon) and a federal gasoline tax (four cents per gallon) in the total price he charged his customers.⁹⁰ The petitioner argued that levying the five percent retail sales tax on the full pump price was an unconstitutional taking of his property

⁸⁰ *Williams v. City of Phila.*, 180 A.3d 356 (Pa. 2018). The Pennsylvania Supreme Court treated only a state-specific question of law (whether the SSB tax conflicted with Pennsylvania's Sterling Act). *Id.* at 7.

⁸¹ The claims that the Philadelphia SSB tax violates Pennsylvania law will not be addressed in this article because claims rooted in Pennsylvania law will not be relevant for other states.

⁸² Supplemental Nutrition Assistance Program, 7 U.S.C. §§ 2011–2036 (2014).

⁸³ *Williams v. City of Phila.*, 164 A.3d 576, 581 (Pa. Commw. Ct. 2017), *appeal granted in part*, 180 A.3d 365 (Pa. 2018).

⁸⁴ 7 U.S.C. § 2013(a).

⁸⁵ *Williams v. City of Phila.*, 2016 WL 7422362, at 4 (Pa. Ct. Com. Pl. 2016) (quoting H.R. Rep. 99-271(1)(1985)).

⁸⁶ "[A] State may not participate in the supplemental nutrition assistance program if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with benefits issued under this chapter." 7 U.S.C. § 2013(a).

⁸⁷ *See, e.g., Gurley v. Rhoden*, 421 U.S. 200, 205 (1975).

⁸⁸ For example, the six percent Pennsylvania Sales and Use Tax would conflict with this SNAP requirement because it is "imposed upon . . . tangible personal property purchased at retail" and "collected by the vendor from the purchaser." 72 PA. STAT. AND CONS. STAT. ANN. § 7202(a)–(b) (West 2016). This conflict has been avoided by Pennsylvania exempted purchases of SNAP products from the tax. 72 PA. STAT. AND CONS. STAT. ANN. § 7204(46) (West 2016).

⁸⁹ *Gurley*, 421 U.S. at 202–03.

⁹⁰ *Id.* at 202.

because he was a mere collector of those two embedded taxes for the state and federal governments, and he did not think his retail sales tax burden should be calculated to include that portion.⁹¹ His argument could prevail “only if the legal incidence of the excise taxes [that he is incorporating into his pump price] is not upon petitioner [who is the producer], but upon the purchaser-consumer.”⁹²

To determine the legal incidence of the excise taxes, the Court in *Gurley* looked to the plain language of the statute and the legislative intent behind it.⁹³ The Court found that the plain language of the statute clearly placed the tax upon gasoline producers, not end consumers.⁹⁴ To discern legislative intent, the Court found it dispositive that “if the producer does not pay the tax, the Government cannot collect it from his vendees”;⁹⁵ this indicated the end consumers were not whom the legislature intended to tax. The Court dismissed the fact that producers chose to pass the tax burden down the supply chain to their customers because this private actor behavior was “traditional,”⁹⁶ voluntary,⁹⁷ and did not change the incidence of taxation.

Philadelphia’s SSB tax, like the tax in *Gurley*, is intended to be levied upon distributors or dealers, but not end consumers. The plain language of the SSB tax ordinance says the responsibility to pay the tax falls on distributors, defined as “any person who supplies sugar-sweetened beverage(s) to a dealer”⁹⁸ or on the dealer if that dealer does not purchase their SSBs from a distributor.⁹⁹ The tax is triggered by the act of distribution;¹⁰⁰ each distributor files a monthly return with the Philadelphia Department of Revenue that lays out the quantity of SSBs they sold to dealers that month and the total tax they owe on that amount; and distributors submit this return, along with payment, directly to the Department.¹⁰¹ The legal incidence of taxation under the SSB tax is dispositive because it shows that the SSB tax is not in conflict with the SNAP restriction. The SNAP restriction is that the “[s]tate may not participate in [SNAP] if the Secretary determines that State or local sales taxes are collected within that State *on purchases of food made with benefits* issued under this chapter”¹⁰² (emphasis added). Here, the SSB tax occurs not upon the purchase of SSBs, but upon

⁹¹ *Id.* at 203.

⁹² *Id.* at 204.

⁹³ *Id.* at 205.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ “The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer.” *Id.* at 204.

⁹⁷ “[N]either statute required petitioner to pass the tax on to the purchaser-consumer.” *Id.*

⁹⁸ PHILA. CODE § 19-4101(2).

⁹⁹ PHILA. CODE § 19-4107; *Williams v. City of Phila.*, 164 A.3d 576, 581 (Pa. Commw. Ct. 2017), *appeal granted in part*, 180 A.3d 365 (Pa. 2018).

¹⁰⁰ PHILA. CODE § 19-4106(1)(a)(1).

¹⁰¹ SUGAR-SWEETENED BEVERAGE TAX (“SBT”) REGULATIONS, Art. V § 501 (2017), <http://www.phillybevtax.com/Content/Documents/Philadelphia-Beverage-Tax-Regulations.pdf> [<https://perma.cc/EJB7-P86X>].

¹⁰² 7 U.S.C. § 2013(a).

their distribution.¹⁰³ The plain language of the SSB tax ordinance reflects a tax levied squarely on distribution and paid by distributors and dealers, not on purchases and paid by consumers.

Legislative intent leads to the same conclusion as does the plain language of the ordinance. It can be inferred, as it was in *Gurley*, that the Philadelphia legislature did not intend end consumers to be taxed because the ordinance does not grant the Philadelphia Department of Revenue the authority to collect the tax from consumers if the distributors or dealers fail to pay.¹⁰⁴ The plain language of the ordinance and the indicators of legislative intent both support a finding that the legal incidence of tax is not on consumers and so the SSB tax does not conflict with SNAP.

The Plaintiffs suggested in their brief that the court focus on the fact that, although the SSB tax is levied upon distribution rather than purchases, the tax leads to higher prices for end consumers.¹⁰⁵ Distributors do raise prices in reaction to higher tax burdens; for example, grocery store Acme added the full cost of the SSB tax to their retail price so a pre-tax soda that cost \$1.88 now costs \$2.18.¹⁰⁶ But the Supreme Court found in *United States v. New Mexico* that a distributor's inclusion of taxes in its end price does not mean that their customers are paying those taxes.¹⁰⁷ In *Gurley* and *New Mexico*, the behavior of passing down tax burdens to one's customers is a typical and rational response to an increased tax burden, but it has no bearing on legal incidence of taxation.¹⁰⁸ Likewise, although the distributors responsible for paying the SSB tax choose to pass it along in the form of increased prices to their customers, this does not impact legal incidence of taxation because a private actor's pricing strategy does not transmogrify the tax from one levied on distributors to one levied on consumers.

If any food or beverage price increase stemming from a tax burden imposed on any player in the food chain resulted in a conflict with SNAP, SNAP would become an unworkable program. Many food items and beverages have various taxes incorporated into their end price; private actors throughout the product's supply chain manage their tax burdens by increasing prices rather than decreasing their own profit margins.¹⁰⁹ If a food item could not be SNAP-eligible if it underwent this typical and pervasive practice, SNAP recipients would have very few options on which to spend SNAP dollars.

¹⁰³PHILA. CODE § 19-4105.

¹⁰⁴Nowhere in the ordinance is the Department of Revenue granted the authority to collect the tax from consumers; in contrast, the Department of Revenue is explicitly granted the authority to collect the tax from registered distributors and, in some limited circumstances, from dealers. PHILA. CODE § 19-4105.

¹⁰⁵Reply Brief for Plaintiff-Appellants at 18, *Williams et al. v. City of Philadelphia*, No. 1452, 2016 BL 426210 (2016).

¹⁰⁶*New Philadelphia Beverage Tax Giving Shoppers Sticker Shock*, 6 ABC ACTION NEWS (Jan. 3, 2017), <http://6abc.com/news/new-philly-beverage-tax-giving-shoppers-sticker-shock/1682844/> [<https://perma.cc/D7XS-LFX5>].

¹⁰⁷In *United States v. New Mexico*, the end customer was the federal government and distributor was a contractor who incorporated state taxes into their prices. The federal government had immunity from state taxation, so their payment of the state taxes would be unlawful. However, the Court found that a contractor's choice to incorporate taxes into their prices does not equate with the end customer paying the tax; instead the end consumer is simply paying the full price which happens to reflect the tax burden borne by the contractor. *United States v. New Mexico*, 455 U.S. 720, 734–36 (1982).

¹⁰⁸*Id.*; *Gurley v. Rhoden*, 421 U.S. 200, 204 (1975).

¹⁰⁹Brief for Defendants at 50, *Williams et al. v. City of Philadelphia*, No. 1452, 2016 BL 426210 (2016).

b. Solution: Design SSB taxes to be paid by actors other than consumers.

The claim that the SSB tax conflicts with SNAP's requirement that state and local sale and use taxes not be levied on SNAP purchases should fail because the SSB tax is levied upon distributors and dealers, not end consumers, and the choice of those distributors and dealers to pass the economic burden along to customers has no bearing on legal incidence of tax. To withstand challenges on the grounds that a SSB tax conflicts with the requirements of SNAP, SSB taxes should be structured so that the incidence of taxation falls on actors other than consumers who may be purchasing their SSBs with SNAP dollars.

Legislators should structure their SSB taxes so that the ultimate responsibility for payment falls on distributors, dealers, producers, manufacturers, or other actors in the supply chain before the product reaches end consumers. The most impactful place on the supply chain to levy the tax will vary with locality, and legislators should take stock of the economic situation on the ground and existing tax burdens when determining the most appropriate place to impose the tax. Legislators should also make it clear that there is no authority to collect the tax from end consumers in the event that the actor responsible for paying the tax fails to do so. Levying the SSB tax on an actor other than the end consumer will not undermine the goal of increasing the price point for SSBs in order to decrease consumption because the actor with the responsibility to pay the tax is likely to respond rationally, as have those actors in Philadelphia, by passing the burden along to their customers.

B. Equity Critique

a. Critique: SSB taxes are regressive.

SSB taxes are frequently criticized because they are regressive. Regressive taxes are those that fall more heavily on lower-income members of the community than on higher-income members because people in lower tax brackets end up paying a greater portion of their total income on these taxes. Regressivity is a critique that a tax is unfair because increasing the cost of a \$1.00 soda to \$1.24 has a more significant impact on a person making \$12,000 per year than on a person in the middle or upper classes.¹¹⁰ Tax fairness is evaluated in terms of horizontal equity and vertical equity, and regressive taxes violate vertical equity because they are not proportional to the individual's ability to bear the tax burden. All sales taxes are somewhat regressive because they "bring into the base individuals whose income is so low that it is not even taxed"¹¹¹ because they attach to consumption, rather than income. Sin taxes are charged with "put[ting] a disproportionate burden on the poor" and "creat[ing] more problems than they solve" because of their regressive nature.¹¹²

In the case of a SSB tax, everyone who purchases a SSB ends up bearing the tax burden, regardless of current income tax levels or ability to pay. Even when the tax is levied on actors other than the end consumer, such as the corporation that makes the

¹¹⁰Bernie Sanders, Opinion, *A Soda Tax Would Hurt Philly's Low-Income Families*, PHILA. MAG. (Apr. 24, 2016), <http://www.phillymag.com/citifed/2016/04/24/bernie-sanders-soda-tax-op-ed/> [<https://perma.cc/S66S-KB2C>].

¹¹¹Reiter, *supra* note 33, at 461.

¹¹²Tex. Bus. & Com. Code § 102.052 (2009); Morse, *supra* note 46, at 190–92.

product or the distributors, the end result is to have “essentially similar effects (as if levied on the end consumer) because these costs would just be passed down to the consumer.”¹¹³ The fairness concerns about who bears the burden of a SSB tax are exacerbated by the fact that SSBs are consumed at higher levels among lower-income populations.¹¹⁴ This disproportionate consumption allocation means that SSB taxes that attach to each fluid ounce are even more regressive than a sales tax where consumption is spread equally across income levels.¹¹⁵ SSB taxes are also less than fair because they fall on all purchasers of SSBs, including people who are not at risk for obesity (for example, one who only occasionally purchases a SSB.) For those who are not at risk, the tax “simply imposes pain or distorts behavior without any offsetting gain.”¹¹⁶ The charges of regressivity and unfair burden-bearing have been lobbied against existing SSB taxes and used to prevent passage of SSB taxes in some locations.¹¹⁷

b. Solution: Use revenue generated by the SSB tax to benefit the burdened community.

One method of mitigating the negative impacts of regressivity is to direct the revenue generated by the tax back into the community that bears the higher burden of paying it. This mechanism levels the playing field by giving a benefit to those burdened most heavily by the tax which makes that burden more of a payment for a desirable benefit than simply a cost. This is a common aspect of sin taxes; for example, regressive carbon tax proposals often allocate the generated revenue largely or entirely into cash rebates for low-income households.¹¹⁸

With SSB taxes, revenue can be strategically allocated to provide cash rebates, subsidize healthier food options,¹¹⁹ or fund projects that disproportionately benefit the segment of the community that most bears the taxing burden. This approach of directing the money back whence it came has worked well in Philadelphia. When proposing the tax, Philadelphia Mayor Kenney framed it as a method of funding prekindergarten for all three- and four-year-olds in the city in order to “allow people to get their kids education and move them out of poverty into taxpaying citizens.”¹²⁰

¹¹³Reiter, *supra* note 33, at 461.

¹¹⁴N.Y. CITY DEP’T OF HEALTH & MENTAL HYGIENE, *Consumption of Sugar Sweetened Beverages (SSBs) in New York City*, EPI DATA BRIEF (May 2011), <https://www1.nyc.gov/assets/doh/downloads/pdf/epi/databrief4.pdf>, [[https://\[perma.cc/4HL8-QTYA\]](https://perma.cc/4HL8-QTYA)].

¹¹⁵Brian Galle, *Tax, Command . . . or Nudge?: Evaluating the New Regulation*, 92 TEX. L. REV. 837, 886–87 (2014).

¹¹⁶*Id.* at 886.

¹¹⁷*See generally* AM. BEVERAGE ASS’N, *Taxes on Food and Beverages are Nothing New*, AM. FOR FOOD & BEVERAGE CHOICE: SPEARHEADED BY AM. BEVERAGE ASS’N, <http://yourcartyourchoice.com/aba/advocacy/national/content.aspx?page=TruthAboutSodaTaxesAbout> [<https://perma.cc/JQ6W-CKFR>] (last visited Apr. 3, 2017); Sam Brodey, *Inside the \$7 Million Fight to Tax Soda in San Francisco*, MOTHERJONES (Oct. 8, 2014), <http://www.motherjones.com/politics/2014/10/inside-san-franciscos-7-million-soda-tax> [<https://perma.cc/RSY5-LYHL>]; *Philly Beverage Tax Hurts!*, AX BEV TAX, <http://axthebevtax.com/default.aspx> [<https://perma.cc/F8WP-YF8M>] (last visited June 1, 2018).

¹¹⁸Galle, *supra* note 115, at 890.

¹¹⁹*Id.* at 887.

¹²⁰Hari Sreenivasan, *Philadelphia Mayor Looks to Fund Pre-K with Controversial Soda Tax-by the Ounce*, PBS NEWSHOUR (May 24, 2016), <http://www.pbs.org/newshour/bb/philadelphia-mayor-looks-to-fund-pre-k-with-controversial-soda-tax-by-the-ounce/> [<https://perma.cc/AF2W-GYCQ>].

He said the purpose of the tax is revenue generation, rather than to encourage healthy choices.¹²¹ A two-cent sales tax imposed on soda and other junk food through the Healthy Dinè Nation Act implemented by the Navajo Nation Council reflects a similar approach; revenues generated from the tax fund “health and wellness programs on the reservation, like gardening and nutrition education.”¹²²

One caveat to planning to use the revenue generated by a SSB tax to fund desirable projects and programs is that if the SSB tax is successful at reducing SSB consumption, it will not produce as much revenue with which to fund those programs. The twin goals of sin taxes (curbing behavior and generating revenue) can act in conflict with each other.¹²³ There is a danger that the government will come to depend on the incoming revenue and be disincentivized to discourage consumption, lest they lose their tax base. This concern can be assuaged by using the SSB tax-generated revenue to fund short-term, discrete projects that require one-time funding rather than general funds for operational or maintenance purposes that require on-going funding. For example, if Philadelphia had allocated the SSB tax revenue to building infrastructure for their prekindergarten program (building facilities, purchasing buses, etc.), but not earmarked it for general operating costs of the schools, it would be able to better avoid myopically focusing on revenue generation to the detriment of curbing consumption. Revenue should be allocated in a temporary and single-use way, such as on infrastructure or debt reduction, so that dependence on it does not interfere with the ultimate goal of consumption reduction.

Spending the revenue on discrete and discontinuous expenditures within the local community makes the tax more politically palatable. This type of hyper-local allocation of revenue is more administrable for locally-imposed taxes than federal ones. With a local SSB tax, the revenue paid out by citizens comes directly back to their community rather than being combined with a larger federal pool which, even if allocated towards obesity-related programming, would be unlikely to return proportionately to the communities that directly paid it.

C. *Economic Critique*

a. *Critique: SSB taxes financially harm citizens and industry.*

SSBs can be perceived as negatively impacting the finances of the people living in the taxed region because there are consequences to driving up the cost of SSBs. In Philadelphia, the tax went into effect in January of 2017 and in February of 2017 Pepsi announced it would lay off 80 to 100 employees at three distribution centers that service the city.¹²⁴ PepsiCo, Inc. spokesman Dave DeCecco placed blame for the layoffs squarely on the SSB tax, telling a reporter that “[u]nfortunately, after careful consideration of the economic realities created by the recently enacted beverage tax, we have been forced to give notice that we intend to eliminate 80 to 100 positions,

¹²¹*Id.*

¹²²Eliza Barclay, *Navajos Fight Their Food Desert with Junk Food and Soda Taxes*, NPR (Apr. 2, 2015), <http://www.npr.org/sections/thesalt/2015/04/01/396607690/navajos-fight-their-food-desert-with-junk-food-and-soda-taxes> [<https://perma.cc/9RY7-U5E3>].

¹²³Morse, *supra* note 46, at 203.

¹²⁴Julia Terruso, *Pepsi to lay off 80 to 100, blames soda tax*, PHILLY.COM (Mar. 1, 2017), <http://www.philly.com/philly/news/politics/Pepsi-announces-80-100-layoffs-blames-soda-tax.html> [<https://perma.cc/ANJ7-52HQ>].

including frontline and supervisory roles.”¹²⁵ A Canada Dry bottler has said that sales are down 45 percent since the tax was implemented and that it laid off about 30 employees.¹²⁶ Costs for university students may also rise; Temple University announced that it would need to raise board rates because of tax-induced increased costs, although it did back down from this claim when the Philadelphia Mayor’s office questioned their numbers.¹²⁷

b. Solutions: Allow the market to adapt or shift the tax rate to lessen economic consequences.

These financial ramifications may be an inevitable reaction to the tax. However, they may naturally subside as consumer preferences shift into new product areas in which industry can invest; alternatively, a lesser tax may be more appropriate to avoid triggering layoffs.

Time will possibly cure this problem as the beverage market shifts and is shaped by SSB taxes. As soda consumption decreases nationwide, consumption of alternative beverages like bottled waters and seltzers has increased.¹²⁸ In 2016, Americans drank more bottled water than sodas for the first time in decades.¹²⁹ The beverage industry has begun to respond to this trend, and the specific products that are and are not covered by SSB taxes can influence how they do so. The Philadelphia tax covers not just soda, but also energy drinks, juice that is less than 50 percent fruits or vegetables, sports drinks, and sweetened tea and coffee drinks.¹³⁰ If SSB taxes are broad enough to ensure that customers transitioning away from SSBs move to less harmful beverage options that will not cause the same problems as do SSBs, the taxes will reshape the beverage market to emphasize unsweetened tea and coffee beverages, seltzers, and other flavored but unsweetened drinks. The SSB industry has already begun to pivot towards producing more of these alternative beverages, and broadly-crafted SSB taxes are positioned to hasten that process.

Alternatively, the tax in Philadelphia may simply be too large. Economists have not yet determined the optimal rate at which to tax SSBs,¹³¹ but the Berkeley SSB tax that

¹²⁵*Id.*

¹²⁶*Soda Tax Fight in Philly Could Spread Nationwide*, ASBURY PARK PRESS (Mar. 26, 2017) <http://www.app.com/story/money/business/2017/03/26/soda-tax-philadelphia/99347258/> [<https://perma.cc/G3H8-FHKL>].

¹²⁷Tricia L. Nadolny & Julia Terruso, *Caught in the Crossfire as the Soda Tax War Rages on*, PHILLY.COM (Mar. 24, 2017), <http://www.philly.com/philly/news/politics/Months-after-passage-soda-tax-battle-rages-on.html> [<https://perma.cc/7S2H-9BR6>].

¹²⁸Margo Sanger-Katz, *The Decline of ‘Big Soda,’* N.Y. TIMES MAG. (Oct. 2, 2015), <https://www.nytimes.com/2015/10/04/upshot/soda-industry-struggles-as-consumer-tastes-change.html> [<https://perma.cc/76WM-CLA3>].

¹²⁹Kate Taylor, *Bottled water just surpassed a major milestone—thanks to the ‘marketing trick of the century’*, BUSINESS INSIDER (Mar. 9, 2017), <https://www.businessinsider.com/americans-drink-more-bottled-water-than-soda-2017-3>.

¹³⁰*The Soda Tax: Will Your Favorite Beverage Cost More?*, PHILLY.COM (June 16, 2016), <http://www.philly.com/philly/infographics/383217911.html> [<https://perma.cc/PBY5-3MTU>].

¹³¹*Do Sin Taxes Really Change Consumer Behavior?*, KNOWLEDGE@WHARTON (Feb. 10, 2017), <http://knowledge.wharton.upenn.edu/article/do-sin-taxes-really-change-consumer-behavior/> [<https://perma.cc/E9XG-2KTF>] (“We still need more evidence to know the optimal size of these taxes.”); see generally Benjamin B. Lockwood & Dmitry Taubinsky, *Regressive Sin Taxes*, (Nat’l Bureau of Econ.

has not led to any industry layoffs is one-cent-per-ounce, compared to one-and-a-half-cents-per-ounce in Philadelphia.¹³² The varied impact on industry stemming from different tax rates is another reason to tax SSBs at the local level. Different cities and municipalities can serve as pilot programs for taxing at different rates; as the full impact of the tax rate becomes clear, it will become easier to discern the optimal tax rate for SSBs and adjust accordingly.

IV. FEDERAL ACTION TO REDUCE SSB CONSUMPTION AS A METHOD FOR MITIGATING THE COSTS OF OBESITY

SSB taxes can serve as a potent policy lever to address obesity-related costs by decreasing SSB consumption while funding programs that combat other causes and consequences of obesity. SSB taxes are most palatable to the population when implemented on a local level because they can be designed to fit into (rather than contrast with) the local tax regime, the positive impact of decreased obesity costs and funded programming are most visible on the local level, and cities and states can serve as laboratories of democracy to identify the optimal tax rate for SSB taxes. Implementing a SSB tax federally could result in a disconnect between the experience of being taxed and the positive expenditures stemming from that revenue, potentially double tax burdens depending on the structure of the federal tax compared with existing local taxes, and probably a large resistance movement by the ABA and other industry groups.

However, there is still a crucial role for the federal government to play to avoid the federal undermining of local anti-obesity efforts like SSB taxes. Some action has already been taken. For example, the FDA recently revised the requirements for the Nutrition Facts Panel to reflect the amount of added sugars in products.¹³³ The federal government can expand on this type of increased disclosure with the introduction of warning labels and public information campaigns. However, there are two specific ways the federal government could act that would complement the public health objectives behind SSB taxes without creating new federal powers or program and without running into potential First Amendment claims that frequently plague changes to food labels. The federal government should (1) decrease the subsidization of corn and (2) regulate SNAP so that those federal dollars are not spent on SSBs.

A. Congress should rein in excessive corn subsidies.

First, the federal government is currently funding the increasing levels of obesity in the United States. The federal government heavily subsidizes the sugar industry (to the tune of \$2 billion annually¹³⁴) and the corn industry, which is the most heavily subsidized crop in the country.¹³⁵ Crop subsidies occur through the Farm Bill and

Research, Working Paper No. 23085), <http://www.nber.org/papers/w23085> [<https://perma.cc/U9ZR-8GQH>].

¹³²Soda Tax Fight in Philly Could Spread Nationwide, *supra* note 126.

¹³³21 C.F.R. § 101.9(e)(6)(iii) (2018).

¹³⁴Rachel Williams, *How Growing Legislation Geared Towards Restricting America's Growing Waistline is Restricting Consumer Choice*, 22 U. MIAMI BUS. L. REV. 145, 167 (2014).

¹³⁵Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1792 (2004).

dramatically impact our food system. By making cheap corn so readily available, federal subsidies have ensured that cheap soda becomes a part of everyday American life because high fructose corn syrup is the primary sweetener in SSBs.¹³⁶ This means that “[w]hile local, state, and federal governments are spending millions in efforts to get consumers to reduce their consumption of unhealthy products such as soda, government health efforts are in direct conflict with federal subsidies being given to the very farmers whose livelihoods depend on soda consumption.”¹³⁷ These contradictory actions mean that “while one hand of the federal government is campaigning against the epidemic of obesity, the other hand is actually subsidizing it, by writing farmers a check for every bushel of corn they can grow.”¹³⁸ This waste of resources stands out as a counter-productive aspect of our farm subsidy system that should change.

B. The USDA should grant flexibility requests from states and cities to prevent SNAP assistance from being spent on SSBs.

Second, federal dollars are being spent directly on SSBs through the Supplemental Nutrition Assistance Program (SNAP), which undermines both the goals of SNAP and the policy objectives behind local SSB taxes. The goal of SNAP is to “[t]o alleviate . . . hunger and malnutrition” that stems from “the limited food purchasing power of low-income households.”¹³⁹ This \$74 billion program is funded by the federal government and administered by the states.¹⁴⁰ Despite the clear objective behind the program, the top individual item being purchased with SNAP dollars is soda.¹⁴¹ The “sweetened beverage” category accounts for 9.3 percent of SNAP household expenditures,¹⁴² which amounts to massive federal spending on SSBs.

The contradictions behind the stated goal of SNAP and its actual use to purchase SSBs has been a source of consternation among public health advocates¹⁴³ and was flagged as a potential area for reform in advance of the 2014 Farm Bill.¹⁴⁴ Cities, states, and health groups have long called for the freedom to restrict the purchase of soda with

¹³⁶*Id.* at 1793–94.

¹³⁷Williams, *supra* note 135, at 167.

¹³⁸Michael Pollan, *The (Agri)Cultural Contradictions of Obesity*, N.Y. TIMES MAG. (Oct. 12, 2003), <http://www.nytimes.com/2003/10/12/magazine/the-way-we-live-now-10-12-03-the-agri-cultural-contradictions-of-obesity.html> [<https://perma.cc/52PZ-C45C>].

¹³⁹7 U.S.C. § 2011.

¹⁴⁰Anahad O’Connor, *In the Shopping Cart of a Food Stamp Household: Lots of Soda*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/well/eat/food-stamp-snap-soda.html> [<https://perma.cc/E8K5-NCKP>].

¹⁴¹U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERVS., FOODS TYPICALLY PURCHASED BY SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) HOUSEHOLDS (2016), at 2 <https://fns-prod.azureedge.net/sites/default/files/ops/SNAPFoodsTypicallyPurchased-Summary.pdf> [<https://perma.cc/JA59-CEZX>] (Sweetened Beverages ranked second for categories SNAP dollars are spent on, after the combined Meat, Poultry, and Seafood category).

¹⁴²U.S. DEP’T OF AGRIC., *supra* note 142.

¹⁴³Marion Nestle, *Some thoughts on not using food stamps for sodas*, FOOD POL. (Apr. 16, 2011), <http://www.foodpolitics.com/2011/04/some-thoughts-on-not-using-food-stamps-for-sodas/> [<https://perma.cc/5L3X-9866>]; O’Connor, *supra* note 140.

¹⁴⁴RALPH M. CHITE, CONG. RESEARCH SERV., R42357, PREVIEWING THE NEXT FARM BILL 34 (2012), <https://fas.org/sgp/crs/misc/R42357.pdf> [<https://perma.cc/A6JG-RNCG>].

SNAP dollars.¹⁴⁵ Eight states and New York City have requested yet been denied flexibility in administering the program. They have failed to counter the lobbying funds spent by the ABA to oppose the states' proposals.¹⁴⁶

New York City's proposal for flexibility in administering SNAP was rejected by the USDA in 2011.¹⁴⁷ The City had proposed "to exclude sweetened beverages containing more than 10 calories per cup, excluding fruit juice without added sugar, milk products, and milk substitutes" from being SNAP-eligible.¹⁴⁸ The USDA's reasons for denying the request focused on administrability concerns and data gaps, none of which are compelling in light of the nature of pilot programs and past flexibility grants.¹⁴⁹

First, USDA claimed it could not approve New York City's proposal because it was "concerned that the scale and scope of the proposed project is too large and complex."¹⁵⁰ This concern contradicts USDA's history of granting states flexibility on a myriad of other topics, such as determining who is eligible for SNAP, imposing time limits or work requirements on select recipients, disqualification and sanction policies, and basic operations.¹⁵¹ USDA makes flexibility grants specifically so that states can address local circumstances that may be unique to their population¹⁵² and to run demonstration projects.¹⁵³ Like other grants of flexibility to run demonstration projects, a small-scale pilot in one city provides an ideal opportunity to test the impact of restricting SNAP SSB purchases on the health of a community.

Second, USDA claimed it could not approve New York City's proposal because implementation would be challenging for retailers.¹⁵⁴ This concern would also be mitigated by running a one-city pilot program; implementation strategies can be evaluated and adapted based on what works well and what does not. Past regulations of SNAP purchases indicate retailers will be able to manage. For example, SNAP dollars currently cannot be spent on many items typically purchased while buying

¹⁴⁵O'Connor, *supra* note 141.

¹⁴⁶*Id.*

¹⁴⁷U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERVS., LETTER ON NEW YORK CITY FLEXIBILITY REQUEST (Aug. 19, 2011).

¹⁴⁸Anne Barnhill, *Impact and Ethics of Excluding Sweetened Beverages from the SNAP Program*, 101 AM. J. PUB. HEALTH 2037, 2038 (2011).

¹⁴⁹U.S. DEP'T AGRIC., *supra* note 148. USDA lists several reasons for denying NYC's request that are easily addressed. For example, USDA claims the proposal "lacks a clear and practical means to determine project eligibility." *Id.* To solve this problem, NYC can simply borrow the definition of SSBs from the Philadelphia SSB tax to isolate the SSBs linked with negative health consequences. Another reason listed by USDA is that at the time it received NYC's request for flexibility, it was in the midst of implementing a pilot program to increase fruit and vegetable consumption in Massachusetts. *Id.* As that pilot program concluded in 2013, that should no longer serve as a barrier to approving NYC's request. See U.S. DEP'T OF AGRIC., EVALUATION OF THE HEALTHY INCENTIVES PILOT (HIP) FINAL REPORT – SUMMARY (Sept. 2014), <https://fns-prod.azureedge.net/sites/default/files/ops/HIP-Final-Summary.pdf> [<https://perma.cc/YVZ2-W7LQ>] (hereinafter HIP).

¹⁵⁰U.S. DEP'T AGRIC., *supra* note 148.

¹⁵¹*Past, Present, and Future of SNAP: Examining State Options Before the H. Comm on Agric.*, 114th Cong. (2016) (statement of Stacey Dean, Vice President for Food Assistance Policy, Center on Budget and Policy Priorities).

¹⁵²*Id.*

¹⁵³Barnhill, *supra* note 149, at 2038.

¹⁵⁴U.S. DEP'T AGRIC., *supra* note 148.

groceries, such as alcohol and hot food.¹⁵⁵ Retailers' successful track record implementing existing restrictions indicates they will be similarly capable of implementing SSB restrictions.

Third, USDA claimed it could not approve New York City's proposal because there is not yet evidence that this restriction on SNAP spending will have a meaningful effect on obesity and health.¹⁵⁶ USDA is correct, but this is true merely because a pilot has not yet been implemented and so there has not yet been an opportunity to gauge impact. By granting NYC's request to run such a pilot, USDA has the opportunity to capture comprehensive data on the impact of such a restriction, much as it did with the Healthy Incentives Initiative in Massachusetts.¹⁵⁷

A fourth rationale for not limiting SNAP purchases of SSBs, not put forth in USDA's response to NYC but advanced in earlier agency positions¹⁵⁸ and by the anti-hunger advocacy community, is that limiting SNAP purchases of SSBs would be overly paternalistic and would cause stigmatization of SNAP recipients.¹⁵⁹ Although these concerns have merit, they do not justify continuing to spend SNAP money in a manner that contradicts the ultimate goal of the SNAP program. SNAP is intended to ensure adequate nutrition and alleviate hunger; SSBs address neither of these goals because they neither improve nutrition nor satiate.¹⁶⁰ SNAP assistance levels are pegged at a level sufficiently high enough to fund nutritionally-adequate diets, so allocating any of that assistance to products that do not do so means recipients are not able to attain a nutritionally-adequate diet.¹⁶¹

Making these two changes to federal spending would align it with the global policy objectives of the cities passing SSB taxes.

V. CONCLUSION

Given the increased number of SSB taxes that have been voted on and that are set to roll out over the coming months, SSB taxes will likely become a fixture among the tools legislators use to combat the rising costs of obesity. Focusing on the critiques and methods of resolution is a valuable step for legislators if they are considering enacting a SSB tax in their locality. SSB taxes are appropriate at the local level because the public can more easily connect with the revenue stream expenditures and the tax can be better crafted to fit with, rather than contrast with, the existing tax regime. However, there is also a role for the federal government to play in aligning federal spending with these policy objectives.

¹⁵⁵U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., *Supplemental Nutrition Assistance Program: Eligible Food Items*, <https://www.fns.usda.gov/snap/eligible-food-items> [<https://perma.cc/6GN2-JG9G>] (last visited June 3, 2017).

¹⁵⁶U.S. DEP'T AGRIC., *supra* note 147.

¹⁵⁷HIP, *supra* note 150.

¹⁵⁸U.S. DEP'T OF AGRIC., *IMPLICATIONS OF RESTRICTING THE USE OF FOOD STAMP BENEFITS—SUMMARY* (2007).

¹⁵⁹Rebecca L. Goldberg, *No Such Thing As A Free Lunch: Paternalism, Poverty, and Food Justice*, 24 STAN. L. & POL'Y REV. 35, 60–61 (2013).

¹⁶⁰Barnhill, *supra* note 149, at 2038.

¹⁶¹*Id.*