



The Evolution of the Modern Snack Tax Bill: From World War I to the War Against Obesity

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**The Evolution of the Modern Snack Tax Bill:
From World War I to the War Against Obesity**

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Abstract

This paper offers a historical perspective on soft drinks and snack taxes in the United States in light of recent legislative snack tax proposals that have been introduced in at least twenty states since an obesity crisis was declared in 2002. Selective taxes on soft drinks and candy can be traced to the War Revenue Acts

during World War I and have frequently appeared, disappeared, and resurfaced at the state level during the past eighty-five years. This paper surveys the history and various forms of snack taxation in the states prior to the recent obesity epidemic, and the reasons that underlay these earlier taxes. More importantly, it examines the current resurrection of the snack tax as an obesity-related measure and analyzes its strengths and weaknesses as a tax and health policy. Finally, it offers preliminary suggestions to enhance the potential of current snack tax proposals to overcome challenges that had caused many of their predecessors to be short-lived.

I.

Introduction

As the obesity epidemic continues to rise,¹ costing the nation \$117 billion annually,² it is hardly surprising that legislators have recently indulged in creative ways to tax soft drinks and snacks. With tort lawyers currently convincing the public that junk food is like tobacco,³ a “sin” tax on junk food may actually pass as a health-promoting policy – in addition to providing a revenue boost for the state treasury. Indeed, in recent years, various forms of taxes on soft drinks, candy and other snacks – often touted as the “junk food tax,” “selective food tax,” “fat tax,” or “Twinkie tax”⁴ – have emerged in legislative bills across the nation.

¹The National Center for Health Statistics released its latest report on obesity in April 2006, which revealed record levels of obesity: 33.6% of children and teens were overweight or at risk of becoming so (up from 28.2% four years earlier), 31.1% of men were obese (up from 27.5% four years earlier), and 33% of women were obese (remaining about the same as four years earlier). Cynthia L. Ogden et al., *Prevalence of Overweight and Obesity in the United States, 1999-2004*, 295 J. AM. MED. ASS'N, 1549-55 (Apr. 5, 2006).

²CDC, PHYSICAL ACTIVITY AND GOOD NUTRITION: ESSENTIAL ELEMENTS TO PREVENT DISEASES AND OBESITY (2005), available at <http://www.cdc.gov/nccdphp/publications/aag/dnpa.htm> (last visited April 15, 2006).

³See Kate Zernike, *Lawyers Shift Focus from Big Tobacco to Big Food*, N.Y. TIMES, Apr. 9, 2004, at A15; Shelly Branch, *Is Food the Next Tobacco? As Obesity Concerns Mount, Companies Fret Their Snacks, Drinks May Take the Blame*, WALL ST. J., June 13, 2002, at B1.

⁴Throughout this paper, I will use the term “snack tax” to refer to all of these forms of taxes (including a tax only on soft drinks), unless otherwise indicated.

In 2004 and 2005, at least twenty states introduced snack and soda tax legislation.⁵

The proposed tax usually takes one of two forms: an excise tax collected from wholesalers; or alternatively, a sales tax to be applied to targeted snacks, while a sales tax would ordinarily exempt foods. Texas and Nebraska, for example, both introduced bills in 2005 proposing to extend the state sales tax to particular snack foods.⁶ To ensure the health-promoting effect of the tax, both of these proposals pledge the revenues for health-promoting programs: in Texas, revenues are to fund childhood obesity programs,⁷ while in Nebraska, they are to go to a school facilities trust fund.⁸

What is surprising is that snack taxes are anything but new, and actually have been especially unpopular and unsuccessful during the last fifteen years. As of 2000, nine states had repealed existing snack taxes – sometimes within just several years of enactment.⁹ While seventeen states continue to levy some variation of the tax – including California, which has taxed soft drinks since 1933¹⁰ – most of the existing snack taxes significantly pre-date the obesity crisis. The first soft drinks and candy tax was levied in 1917,¹¹ an era when food was scarce and calories were much more valuable.

⁵HEALTH POLICY TRACKING SERVICE, STATE ACTIONS TO PROMOTE NUTRITION, INCREASE PHYSICAL ACTIVITY AND PREVENT OBESITY: A LEGISLATIVE OVERVIEW 96 (Jun. 11, 2005), *available at* [www.rwjf.org/files/research/ July%202005%20-%20Report.pdf](http://www.rwjf.org/files/research/July%202005%20-%20Report.pdf) (last visited May 1, 2006). The following states introduced legislation: in 2004, Georgia, Indiana, Michigan, Nebraska, New Mexico, New York, Oklahoma, South Dakota, Texas and West Virginia; in 2005, Alabama, Arizona, Maryland, Michigan, Montana, Nebraska, New Mexico, New York, Texas, and Washington. *Id.*

⁶H.B. 3283, 79th Leg., Reg. Sess. (Tx. 2005); L.B. 628, 99th Leg., 1st Sess. (Neb. 2005).

⁷H.B. 3283, 79th Leg., Reg. Sess. § 2 (Tx. 2005).

⁸L.B. 628, 99th Leg., 1st Sess. § 2 (Neb. 2005).

⁹Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90(6) AM. J. PUB. HEALTH 854, 856 tbl. 2 (2000). *See infra* Part III.C.

¹⁰*See id.* The major change since Brownell and Jacobson's report in 2000 has been the District of Columbia's repeal of its sales tax on snack foods and soft drinks in 2001. District of Columbia, Office of Tax & Revenue, *District Repeals Snack Tax, Offers Sales Tax Holiday*, Jul. 6, 2001, at http://cfo.dc.gov/OTR/cwp/view,a,11,q,592399,otrNav_GID,1682.asp (on file with author).

¹¹*See infra* Part II.A.

The divergence between the circumstances surrounding the passage of the first snack taxes and the current wave of proposed snack tax legislation raises interesting questions about the policies for selective treatment of particular snacks and how they have evolved over time. More importantly, the distinctive experiences of over thirty-two states that ever passed or considered at least one form of the snack tax may provide some insight into the potential success of the current proposals.

While the snack tax is over eighty-five years old, it has never quite been a salient issue – perhaps because it existed in the shadows of other legislation, or because it was suppressed by the intense lobbying efforts of the snack foods industry – and virtually nothing has been written about the origins of this tax.¹² This article aims to fill this gap in the literature. First, it surveys the history of the snack tax and its initial adoption in various states, up until a wave of snack tax repeals in the 1990s. Next, it examines the current resurrection of the snack tax as an obesity-related measure and analyzes its strengths and weaknesses as a policy instrument. Finally, by drawing on lessons from historical experiences with the snack tax, this article explores the challenges facing current proposals and suggests potential measures that might maximize the success of current and future snack tax legislation. The historical analysis may be crucial for current and future policymakers in determining whether to pursue a snack tax, and if so, how to design one to maximize its potential and overcome the challenges that caused many of its predecessors to be short-lived.

¹²The only secondary source known to the author that describes the circumstances surrounding some of the earlier snack taxes is KELLY D. BROWNELL & KATHERINE BATTLE HORGAN, *FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS, AND WHAT WE CAN DO ABOUT IT*, 220-22 (2004) (providing an overview of the experiences of California, Maryland, Maine, and Washington during the 1990s).

II.

The Early Snack Taxes

A. Pioneer Snack Tax Collector: The Federal Government, 1917-1932

The first snack tax can be traced to the War Revenue Act of 1917, which taxed “so-called soft drinks,” and was hastily approved by a Congress desperate to raise money for World War.¹³ Title III, “War Tax on Beverages,” contained section 313, which imposed a graduated tax of \$0.05 to \$0.20 per gallon on all syrups used for manufacturing soft drinks,¹⁴ \$0.01 per gallon on “all ginger ale, root beer, sarsaparilla, pop, and other carbonated waters or beverages,”¹⁵ and an additional \$0.05 per pound on the carbonic acid gas used in the manufacture of carbonated water and other drinks.¹⁶ Soft drinks and candy were among many items Congress considered “minor luxuries.”¹⁷ A purpose of the War Revenue Acts was purportedly to “encourage thrift and economy and to prevent extravagance as well as to provide revenue.”¹⁸

Although these war-time excise taxes were often costly to collect and detested as “nuisance taxes,”¹⁹ they remained largely in place even after the war. Section 313 under the War Revenue Act became the foundation for the soft drinks excise tax, Section 628, in the Revenue Act of 1918.²⁰ When the Revenue Bill of 1918 was under consideration, the report of the House Committee on Ways and Means suggested that the tax did

¹³War Revenue Act, 40 Stat. 300, §§ 313-15 (beverages), *War Revenue Act of 1917: Hearing on H.R. 4280 Before the Senate Committee on Finance*, 65th Congress, 1st Sess. (1917) (Report No. 75) (“approves the scheme . . . by which so-called soft drinks . . . are taxed”). For a detailed background of the War Revenue Act of 1917, see Roy G. Blakey, *The War Revenue Act of 1917*, 7(4) AM. ECON. REV. 793 (1917).

¹⁴40 Stat. 300, Tit. III, § 313(a) (applying higher taxes based on excess of price over \$1.30 per gallon).

¹⁵40 Stat. 300, Tit. III, § 313(b).

¹⁶40 Stat. 300, Tit. III, § 315. It is notable that other than soft drinks, the only taxed items that could be categorized as a food were chewing gum and alcoholic beverages. *See id.*

¹⁷ALFRED D. BUEHLER, GENERAL SALES TAXATION: ITS HISTORY AND DEVELOPMENT 10-12 (1932) (citing House Committee on Ways and Means, Hearings on Internal Revenue Revision, July 26-29, 1921, at 73).

¹⁸STAFF OF COMMITTEE ON WAYS AND MEANS, 65TH CONG., REPORT ON H.R. 8245, REP. NO. 350 (1921).

¹⁹*Id.*

²⁰Revenue Act of 1918, § 628, 40 Stat. 1057, 1116 (1919).

not produce enough revenues and even proposed to increase tax rates on beverages.²¹ The proposed rates were ultimately reduced by the Senate Committee of Finance, which announced the need to reduce taxes with the cessation of war.²² In 1919, Congress imposed a 5% excise tax on candy, “viewed as a luxury tax,” which gradually fell into legislative disfavor because of administrative complaints over classifying what was a “candy” for tax purposes and over the inequitable treatment of candy and certain foods that were not clearly candy but competed with it.²³

In the Revenue Act of 1921, the candy and soft drinks tax persisted: soft drink syrups were taxed at \$0.09 per gallon.²⁴ However, in the ensuing years the Republicans led a popular campaign to slash federal taxes – at least to slash regressive taxes and emphasize a more progressive income tax base – which led to the repeal of the soft drink and candy taxes, among other items, in the 1924 Revenue Act.²⁵

Not many years later, the Great Depression led to a gaping national deficit and caused Congress in 1932 to revive its wartime policy of taxing a long list of commodities and services to increase revenues. During the House Committee on Ways and Means hearings, it was testified that it would be impossible to make up the entire deficit by increasing income taxes alone, as even an increase of three times the proposed rates would still be inadequate.²⁶ Industry representatives, who were concerned that Congress may adopt a broad, national sales tax during the time, recommended excise taxes on “a broad range of articles and services of wide use, but not of first necessity.”²⁷ Interestingly, the House bill originally excluded excise taxes on any

²¹*Monroe Cider Vinegar & Fruit Co. v. Riordan*, 280 F. 624, 631 (2nd Cir. 1922) (citing H.R. 12663, 65th Congress, 2nd Sess (1918) (Report No. 767)).

²²STAFF OF COMMITTEE ON WAYS AND MEANS, 65TH CONG. 3D SESS., REPORT ON H.R. 12863, REP. NO. 617 (1918).

²³CARL SHOUP, THE FEDERAL REVENUE SYSTEM: MANUFACTURERS’ EXCISE AND SPECIAL TAXES (REP. TO THE SECRETARY OF TREASURY, SEPT. 20, 1934), available at <http://www.taxhistory.org/Civilization/Documents/Surveys/hst23738/23738-1.htm> (last visited May 1, 2006). For example, chocolate-covered or sugar-coated cakes and crackers, sweet cakes, pastry, chocolate-covered ice-cream bars, ice cream, nuts, and dried and fresh fruits were the chief source of complaint by candy representatives who appeared at the revenue hearings. According to one witness, “Here is an item that on the face of it is candy, which is chocolate and marshmallow and nuts, with a little biscuit base that takes the curse of the tax off.... *Id.*”

²⁴Revenue Act of 1921, 42 Stat. 227, §602 (1921).

²⁵See TAX HISTORY PROJECT, HISTORICAL DOCUMENT: FACING THE TAX PROBLEM : BOOK ONE, BACKGROUND 30 (Feb. 15, 1996), at <http://www.taxhistory.org/thp/thpwebsite.nsf/Web/Readings> (on file with author).

²⁶*Hearings on H.R. 10236 Before the Committee on Ways and Means*, 72d Congress, 1st Sess. (1932) (letter from Silas H. Strawn, President Chamber of Commerce of the United States of America).

²⁷*Id.*

food items; however, suggestions to tax candies and chewing gum surfaced during the hearings, to which the committee Chairman and other members appeared receptive.²⁸

In the bill forwarded to the Senate, excise taxes were provided for candy, chewing gum, soft drinks, as well as tires, furs, jewelry, automobiles, radio and phonograph equipment, refrigerators, cameras, and electricity.²⁹

Overall, the excise taxes comprised over fifteen percent of the \$1.6 billion of internal revenue collected for fiscal year 1933; soft drinks and candy were each estimated to raise nearly \$4.2 million.³⁰ During the Senate committee hearings, the candy industry argued against being classed as a “luxury business”³¹ and that the tax unfairly singled out candy while similar products – ice cream, cake, and biscuits (cookies, crackers) – were untaxed.³² With extensive testimony from the industry, the tax was reduced. The soda industry, in contrast, made no appearance at all at the hearings. Regarding the soft drinks excise tax, testimony was given almost exclusively by “cereal beverage,” or low-alcohol beer manufacturers, who essentially conceded to an excise tax but advocated an equalized tax rate among the cereal beverages and other soft drinks, which they viewed to be competing products. The perception that carbonated drinks were luxuries, and thus perhaps deserved to be taxed, was reflected by the testimony for Poland Springs. Poland Springs, which argued against a tax on its natural still water, acknowledged “[w]e are perfectly willing to pay a tax on the carbonated water for the simple reason that we feel in a way that is a luxury.”³³ Despite the vehement opposition, the beverage excise tax rates were also reduced from the original bill proposals but not eliminated until 1934.

²⁸*Hearings on H.R. 10236 Before the Committee on Ways and Means*, 72d Congress, 1st Sess. (1932) (statement of Frank A.K. Boland, American Hotel Ass’n of the United States and Canada).

²⁹CARL SHOUP, EXCISE TAXES (DEP’T TREASURY, STAFF MEMO 1934) available at <http://www.taxhistory.org/Civilization/Documents/Excise/hst8678.htm> (last visited April 15, 2006). Even while the bill was under consideration, there were strong objections to taxes on the minor “nuisance” taxes such as soft drinks and candy were because their production was distributed across many producers, making it more costly to administer. Nonetheless they were passed by a hurried Congress “with a view to taxing everything in sight.” BUEHLER, *supra* note 17, at 277.

³⁰Brian Francis, U.S. Gov’t Printing Office, *Gasoline Excise Taxes, 1933-2000*, 20(3) STAT. INCOME BULL. 140 (Dec. 22, 2001).

³¹*Hearings on H.R. 10236 Before the Senate Committee on Finance*, 72d Congress, 1st Sess. (1932) (statement of E.B. Griffenberg, Trading as Reynolds Candy Co.).

³²*Id.* (“If ice cream or cake is a necessary food, surely candy should be so classed”).

³³*Hearings on H.R. 10236 Before the Senate Committee on Finance*, 72d Congress, 1st Sess. (1932) (statement of Edward P. Ricker, Poland Springs).

The State of New York had even challenged the federal government's power to levy the soft drinks excise tax against a state under the Revenue Act of 1932.³⁴ New York, in selling bottled water from its springs, claimed immunity from the tax on the grounds that the bottling and sale of the waters by the state was an exercise of a usual, traditional and essential governmental function.³⁵ Nevertheless, in an opinion by Justice Frankfurter, the Court sided with the United States, observing that the federal government had the power to tax hard liquor produced by the state under a previous decision, and, by extension, should also be able to tax soft drinks.³⁶

The argument for taxing cheap, broadly consumed items like candy and soft drinks apparently rested on the idea that luxury could be defined not simply by price, but also by necessity.³⁷ While the Hoover Administration professed that they preferred items that people had some choice about consuming,³⁸ the regressivity of these taxes was evident and proved intolerable. Specifically, objections to three taxes, the tax on soft drinks, candy, and pleasure boats, became so strong that they were repealed for the last time in the 1934 Revenue Act.³⁹

B. Taxing Snacks through the “Sales Tax” in the States: 1930s to the 1980s

Apart from an excise tax, the primary method for taxing snacks has been to apply a general sales tax to

³⁴State of New York v. United States, 326 U.S. 572 (1946).

³⁵*Id.* at 574.

³⁶*Id.* at 575.

³⁷Tax History Project, *The Depression and Reform: FDR's Search For Tax Revision in N.Y.*, at <http://www.tax-history.org/thp/thpwebsite.nsf/Web/Reading> (on file with author).

³⁸*Id.*

³⁹SHOUP, *supra* note 23.

snack foods such as candy and soft drinks, when the general sales tax usually exempts foods. In many states that have adopted general sales taxes, candy and soft drinks had never been exempt as a food since the very beginning.

The origins of state sales taxation can also be traced to the pressures of the Great Depression that had led to the Revenue Act of 1932. Prior to the Depression, most states relied primarily on property tax for a majority of their revenue.⁴⁰ Faced with plummeting revenues and pressures to provide property tax relief to their citizens in the 1930s, state legislatures hurriedly responded by adopting the general sales tax, a novel concept at the time. The sales taxes were broadly designed to exempt necessities, such as certain enumerated foods, from taxation.⁴¹ Between 1932 and 1937, twenty-three states adopted retail sales taxes, more as an emergency measure rather than any independent desire to impose taxes on consumption.⁴² The sales tax was accepted at the time as an alternative to property tax increases, and in this respect large industrial concerns favored it.⁴³ Soft drinks and candies appears to be widely perceived as “luxuries” throughout this era, and were not exempted for this reason.⁴⁴

California, which has levied a sales tax on soda since 1933, has effectively done so because it always considered soda to be a “non-food,” thus making it subject to the 2.5% general retail sales tax enacted in 1933 that was collected as general state revenues.⁴⁵ It was less an issue of taxing soft drinks or candy, and more of an

⁴⁰For example, West Virginia, which had relied on property tax for a majority of its revenue until the Depression, responded to the Depression by passing a constitutional amendment to provide property tax relief to its citizens, which also caused a forty-six percent drop in tax revenues. ROBERT P. GOODMAN, W. VA. TAX STUDY COMMISSION, CONTINUATION OF THE SOFT DRINK TAX (1984); Scott Finn, *Food Tax Has History of Coming and Going*, SUNDAY GAZETTE-MAIL (CHARLESTON, WV), Sept.4, 2005.

⁴¹See ROBERT MURRAY HAIG & CARL SHOUP, *THE SALES TAX IN THE AMERICAN STATES* 7 (1934) (observing that prior to 1929, only West Virginia had a sales tax, but by the end of 1933, fourteen states had adopted the sales tax as a result of the Depression).

⁴²Kirk J. Stark, *The Uneasy Case for Extending the Sales Tax to Services*, 30 FL. ST. U. L.R. 435, 440 (2003) (observing that the emergency nature of the sales taxes reflects the ambivalence with which they were adopted, and but for the Great Depression it is not clear that retail sales taxes would have ever emerged as a source of revenue for state and local governments).

⁴³See HAIG & SHOUP, *supra* note 41, at 124-5 (discussing the adoption of the sales tax in New York). The farmers also supported it in rural areas, where property taxes might be reduced at the expense of consumers in the large cities. *See id.*

⁴⁴See *id.* at 118 (discussing various tax proposals in New Jersey in the 1930s, including “a 2 per cent tax on various ‘luxuries,’ such as . . . soft drinks and ice cream”).

⁴⁵See Cal. State Bd. of Equalization, *History of Sales and Use Tax Rates*, available at <http://www.boe.ca.gov/sutax/taxrateshist.htm> (last visited April 15, 2006).; CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY, NUTRITION AND PHYSICAL ACTIVITY FOR CHILDREN AND ADOLESCENTS 1-2 (Jan. 18, 2002). Ohio, for example,

issue of excepting a very narrow category of “essential” foods from a general rule. Michigan, which enacted its first 3% sales tax in 1933, did not even exempt foods – it taxed everything including soft drinks and candy.⁴⁶ At the time, Michigan exempted *only* federal and state governments and sales of goods that would be resold,⁴⁷ and only in 1975 would it begin to exempt sales of food (excluding soft drinks).⁴⁸ Other states followed either California or Michigan as they adopted sales taxes. Similar sales taxes were often levied in individual municipalities as well.⁴⁹

By the 1960s, retail sales taxes gradually became a fixture in the financial structure of state and local governments. Twenty-five more states adopted a sales tax, usually with exemptions for food and other necessities.⁵⁰ For example, Texas, which adopted a 2% sales tax in 1961, provided twenty-four categories of exemptions.⁵¹ There was great disagreement over the provisions of this sales tax within the legislature, that the bill was not adopted until the final day of the special session of the 57th legislature.⁵² One of the major exemptions was for “[f]ood and food products,” which do not include soft drinks and candy.⁵³ The impetus for the sales tax bill was the staggering \$355 million deficit created by new spending programs. To this end, the legislature looked to Pennsylvania as a model for the new concept of “limited excise, sales, and use tax,” which would omit the “basic necessities of life” but still yield \$303 million. While the exclusion of soft drinks was not specifically discussed, the exclusion of alcoholic beverages is telling of what likely happened with soft drinks: faced with difficult tradeoffs and industry lobbying efforts, the Legislature deemed exemption

also deemed soft drinks a non-food and taxed it since 1936. *Issue 4 Not About Real Food; It's a Pop-Tax Repeal Gambit*, DAYTON DAILY NEWS, Nov. 1, 1994, at 8A.

⁴⁶Pub. Act No. 167 (Mich. 1933).

⁴⁷*Id.* See also MICH. DEPT. OF TREASURY, MICHIGAN'S SALES AND USE TAXES 2000, 9 (2001), available at http://www.michigan.gov/documents/MISalesandUset2000_120601_60330_7.pdf (last visited April 15, 2006).

⁴⁸MICH. DEPT. OF TREASURY, *supra* note 47, at 4. In 2000, it would exempt non-alcoholic vended beverages as well.

⁴⁹For example, by 1952, the City of Syracuse adopted Regulation 12, a two percent retail sales tax, which exempted food products but not soft drinks. See *Hoffman v. City of Syracuse*, 147 N.Y.S.2d 916, 917-18 (1956).

⁵⁰Stark, *supra* note 42, at 440.

⁵¹See H.B. 20, 57th Leg., 1st Spec. Sess. (Tx. 1961) (“Limited Sales, Excise, and Use Tax”); Institute of Public Affairs, *The Fifty-Seventh Texas Legislature: A Review of Its Work*, 49 PUBLIC AFFAIRS SERIES 9-11 (1962), available at <http://www.lrl.state.tx.us/scanned/sessionOverviews/review/57th.pdf> (last visited April 15, 2006).

⁵²Institute of Public Affairs, *supra* note 51, at 9.

⁵³Staff of the Tx. Legislative Council, *Accomplishments of the 57th Legislature* (1961), available at 10a-b

of such items like low-cost clothing was “far more essential” than the exemption of alcoholic beverages and thus included alcoholic beverages in the sales tax bill.⁵⁴ All proceeds were to be credited to the General Revenue Fund.⁵⁵

Between 1962 and 1985, Illinois, Indiana, Kentucky, New York, North Dakota, Rhode Island, and Virginia, among other states, levied their first statewide sales tax following California and Texas by excluding soft drinks, diluted fruit juices, and often candy from the exemption of food items.⁵⁶

Several states levied special excise taxes, following the federal revenue acts, instead of or in addition to applying a sales tax to soft drinks and candy. In response to the Depression, Tennessee enacted a privilege tax on soft drink bottlers in 1937 and Louisiana applied a 2.5% wholesale excise tax on soft drinks and syrups.⁵⁷ The effects of the Depression led West Virginia to continually seek new sources of revenue by creating new excise taxes over the following decades: in 1933, for alcohol; in 1947, for cigarettes, and finally in 1951, for soft drinks.⁵⁸ Missouri would adopt a \$0.003 per gallon excise tax on soft drinks in 1962, Mississippi would follow in 1969 with a 5% wholesale tax on soft drinks and artificial juices, and North Carolina also in 1969 with a \$1 per gallon wholesale excise tax on soft drink syrup or \$0.01 for each bottle of soft drink. Five more states adopted soft drink excise taxes between 1977 and 1993.⁵⁹

⁵⁴HOUSE JOURNAL, 57th Leg., 1st Spec. Sess., at 22-24 (Tx. 1961), available at <http://www.lrl.state.tx.us/scanned/specialSessions/57-1supp.pdf>.

⁵⁵Institute of Public Affairs, *supra* note 45, at 10a-10b.

⁵⁶Jacobson & Brownell, *supra* note 9, at 855 tbl.1. New Jersey levied its sales tax on candy and carbonated soft drinks; Indiana levied the sales tax on candy, gum soft drinks, bottled water, and dietary supplements; and New York levied its sales tax on candy, chewing gum, carbonated beverages, and diluted fruit juices. *Id.*

⁵⁷English Mountain Spring Water Co. v. Chumley, 2005 WL 2756072 (Tenn. Ct. App., Oct. 25, 2005) (slip copy) (describing the statutory background of the current successor soft drinks tax statute codified at Tenn. Code Ann. 67-4-402).

⁵⁸Patrick J. Chase & Robert Jay Dilger, *West Virginia's State Taxes: A Comparative Analysis*, 8(4) W. VA. PUB. AFF. REP. (1991), available at <http://www.polsci.wvu.edu/IPA/reporter.html> (last visited April 15, 2006).

⁵⁹Virginia adopted an excise tax in 1977, Rhode Island in 1984, Washington in 1989, Arkansas in 1992, and Ohio in 1993. Cal. State Board of Equalization, *Staff Legislative Bill Analysis*, S.B. 1520 (Soda Tax), Feb. 20, 2002, at 3, available at <http://www.boe.ca.gov/legdiv/sptleg/pdf/sb1520-1cwfinal.pdf> (last visited April 15, 2006); Brownell & Jacobson, *supra* note

III.

The 1990s: Era of Snack Tax Cutbacks

A. The Federal Food Stamp Program

As a foreshadow of the wave of soft drinks or candy tax repeals in the 1990s, Congress passed amendments to the Food Stamp Program in 1986 that effectively compelled each state to exempt all “foods” – as defined by the Food Stamp Act – purchased using food stamps from any state and local sales taxes.⁶⁰ For many states, this meant that candy and soft drinks would not be taxed for purchasers using food stamps, but would be taxed for all other consumers.

The Food Stamp Act of 1964, which formally initiated the national program, had allowed food stamps to purchase “all items intended for human consumption except for alcoholic beverages and imported foods.”⁶¹ Originally, the House bill would have prohibited the purchase of soft drinks, luxury foods, and luxury frozen foods.⁶² As a result of the states’ narrower food exemption with regard to their sales taxes, soft drinks and candy purchased with food stamps had been taxed. By 1985, Congress recognized that twenty states had either state or local sales taxes that are charged on food stamp purchases, purportedly reducing food stamp purchasing power by up to 6% in these states.⁶³ As the House Report noted, this was “in effect, a transfer of revenues from the federal government to state and local government at the expense of low income persons.”⁶⁴

9.

⁶⁰P.L. 99-198, § 1505 (1985).

⁶¹As amended, the Food Stamp Program today defines “foods” largely as “any food or food product for home consumption except alcoholic beverages, tobacco, and hot foods or hot food products ready for immediate consumption,” with certain exceptions for hot foods served at elderly homes, shelters, etc. 7 U.S.C.A. § 2012(g) (2006).

⁶²USDA, FOOD & NUTRITION SERVICE, SHORT HISTORY OF THE FOOD STAMP PROGRAM, at <http://www.fns.usda.gov/fsp/rules/Legislation/history.htm> (on file with author).

⁶³H.R. Rep. 99-271(1) (Sept. 13, 1985).

⁶⁴*Id.*

In the Food Security Act of 1985, Congress declared that beginning in 1988, states “may not participate in the food stamp program if the Secretary determines that State or local sales taxes are collected within that State on purchases of food made with coupons issued under this Act.”⁶⁵ All the states timely responded, albeit with some resistance, by passing provisions explicitly exempting foods purchased with food stamps from the sales tax, but only “so long as [the Federal Food Stamp Act] conditions state participation in the federal food stamp program on this state providing an exemption from state and local sales taxes for purchases of food made with [federal food stamp coupons].”⁶⁶ Alabama even challenged the constitutionality of the amendment, but was unsuccessful.⁶⁷ Thus, since 1988, to the extent that certain foods were taxed – usually soft drinks and candy – low-income, food stamp recipients have been unaffected. Although the fiscal impact of this was minimal, the economic downturn of ensuing years would prompt a national tax movement,⁶⁸ as well as a backlash against expanded taxes on junk foods – which has become a favorite area for legislators to tap for a revenue boost.

B. Going Too Far: California’s Inadministrable Snack Tax

The wave of repeals of the soda and snack taxes primarily began with the interesting story of California’s novel snack tax in 1991 and its repeal in 1992.⁶⁹ Up until the 1990s, the soft drink or snack taxes had

⁶⁵P.L. 99-198, §1505 (99th Cong., 1st Sess.) (1985).

⁶⁶N.Y. Tax ch. 60 art. 28 §1115 (2006). For similar provisions, see also M.G.L.A. 64H §6 (Massachusetts); Louisiana R.S. 47:305.46 (Louisiana); I.C. §63-3622FF (Idaho); Cal. Rev. & T. Code §6373 (California), Ala. Code 1975 §40-23-4.2 (Alabama), C.G.S.A. 12-412e (Connecticut).

⁶⁷*State of Alabama v. Lyng*, 811 F.2d 567 (11th Cir. 1987) (holding that amendment to the Food Stamp Act to proscribe states that participate in the administration of the Food Stamp Program from collecting state or local sales tax on items purchased with food stamps was constitutional).

⁶⁸See Stark, *supra* note 42, at 440-41.

⁶⁹Although Jacobson and Brownell noted that one other jurisdiction, Baltimore County, Maryland, had repealed its tax in 1991, the tax was actually a “beverage container tax” that the county did not clearly have the power to levy because of a Maryland Recycling Law. See Jacobson & Brownell, *supra* note 9, at 856 tbl.2. Thus this short-lived law was repealed by the Maryland legislature within a year, and also triggered its neighboring county’s repeal of the tax soon after in order for retailers in the neighboring county to remain competitive. Steven Crane, *Teen Pot-Smoker Bill Aims at Prevention*, WASH. TIMES,

never been formally tied to any non-fiscal nutrition or health policy, much less obesity. Rather, they were a convenient source of state revenue, often part of the general sales tax scheme. As states faced mounting deficits during the late 1980s and 1990-91 recession,⁷⁰ there was even less reason to resist snack taxes as an additional source of general revenues. At the same time, the existing sales tax rates had increased significantly during the 1970s and 1980s so that Americans were often paying 5% to 8% of tax on retail goods, rather than the significantly lower rates of the 1930s.

California, desperate to close its \$14.3 billion deficit problem in 1991, pushed forth an 8.25% tax (the general sales tax rate) on a long list of “snack” foods, like cookies and chips, which were traditionally exempt from the sales tax.⁷¹ As implemented, the tax imposed a sales and use tax on candy and snack foods, where snack foods were defined as “cookies, crackers (excluding soda, graham, and arrowroot crackers), potato chips, snack cakes or pies, corn or tortilla chips, pretzels, granola snacks, popped popcorn, fabricated chips, and fabricated snacks.”⁷² Retailers received a list of thousands of taxable and non-taxable food items and the distinctions were arbitrary.⁷³ For example, popped popcorn and Milky Way bars were taxed but unpopped popcorn and Milky Way ice cream bars were left untaxed.⁷⁴

The tax was a disastrous effort. While the tax generated revenues of approximately \$200 million during the year in which the tax was in effect, snack sales dropped an estimated 10%, and the snack industries that had ballooned since the 1960s were furious. Ultimately, 60% of Californians voted to repeal the tax in 1992, with intense lobbying efforts by the California Grocers Association and the newly-organized “Don’t

Mar. 26, 1990, at B3.

⁷⁰ See Stark, *supra* note 42, at 440-41.

⁷¹ CAL. REV. & TAX CODE § 6359 (1992); A.B. 2181 (Cal. 1991).

⁷² *Id.*

⁷³ See BROWNELL & HORGAN, *supra* note 12, at 220.

⁷⁴ *Id.*

Tax Food” coalition,⁷⁵ which criticized the tax not only as confusing but regressive and discriminatory.⁷⁶ The legislature also recognized the insurmountable administrative problems.⁷⁷ Interestingly, to make up for the lost revenue, the bill sought increased taxation of cigarettes, “a discretionary product,” which would have the additional advantage of helping create a “desirable public health outcome and decreased state and local government costs for health care due to tobacco-related illnesses.”⁷⁸ In fact, one of the arguments for replacing the snack tax with a higher tobacco tax was that tobacco-related illnesses has been associated with \$7 billion in health care costs annually and thus taxing tobacco would be “more desirable.”⁷⁹

C. The Power of the Food Industry Lobby

The stories of California’s confusing tax triggered widespread lobbying efforts in states to resist new and existing taxes on snacks, including soft drinks and candy. State legislators had long treated taxes on soft drinks as an easy source of tens of millions of dollars, but by the 1990s the soft drink industry became ready to fight back.⁸⁰ With a lobbying boom throughout the 1990s,⁸¹ the other ten states that eventually eliminated their snack tax had largely capitulated under food industry pressure, regardless of whether or not

⁷⁵The food industry poured over \$2 million into the campaign for Proposition 163, the measure to repeal the snack tax. \$412,047 came from the California Grocers Association; other large donors to the campaign included Nabisco Brands, Frito-Lay Inc., Hershey Corp, Snack Food Association, and National Confectioners Association. Jerry Gillam, *California Elections; Proposition 163; Lawmakers Keeping Quiet on Repeal of Snack Tax*, L.A. TIMES, Oct. 29, 1992, at A3.

⁷⁶*Id.*

⁷⁷Assembly Committee on Revenue & Taxation, Committee Report on A.B. 2709 (May 15, 1992) (noting the practical problems confronting retailers, who receive new products on a regular basis).

⁷⁸*Id.*

⁷⁹*Id.* (citing the American Heart Association, and stating that “[t]o the extent that the tax reduces consumption, these costs will be reduced, resulting in decreased public and private health care expenditures”).

⁸⁰See Peter T. Kilborn, *Soft Drink Industry is Fighting Back Over New Taxes*, N.Y. TIMES, Mar. 24, 1993, at A12.

⁸¹See MARION NESTLE, FOOD POLITICS 99-101 (2002) (describing the growth of the food lobbying industry and the common phenomenon of the “Revolving Door” between government officials and food industry lobbyists).

the tax suffered from administrative problems.⁸²

In Ohio, an excise tax on soft drinks that was increased to \$0.01 per can in 1993 as part of a revenue-raising plan triggered the soft drink industry to engage in a successful \$8 million campaign for a constitutional amendment that repealed the tax a year later.⁸³ However, the amendment made it clear that soft drinks continued to be a “non-food” for purposes of the sales tax, which would still apply.⁸⁴ In 1997, Louisiana and Maryland both traded the repeal of their snack tax for a Coca-Cola and Frito-Lay plant, respectively; the corporations made their decision to operate their plant in the state virtually contingent on the repeal of the taxes.⁸⁵

The District of Columbia took a more interesting approach to “repealing” its confusing snack tax in 2000. In 1993, it had extended its 6% sales tax to soft drinks, candy, and particular types of snack foods, as part of a proposed \$50 million revenue package consisting of a hodgepodge of unrelated taxes to address the District’s fiscal crisis.⁸⁶ The tax seemed doomed to repeat California’s failed snack tax experience just a year earlier, as it faced massive complaints and intense lobbying by the Chocolate Manufacturers Association, Grocery Manufacturers of America, and Snack Food Association, among others.⁸⁷ In 2000, as part of its Tax Clarity Act, the District effectively repealed the confusing tax on snacks by adopting the federal definition of food eligible for food stamps to determine what was non-taxable for the purposes of its sales tax.⁸⁸

⁸²See Jacobson & Brownell, *supra* note 9, at 856 tbl. 2.

⁸³Brian Tucker, *TV Ads Are Ridiculous; Vote No on 4*, CRAIN’S CLEVELAND BUS. NEWS, Nov. 7, 1994, at 10 (describing one of the “most well-financed and most aggravating television ads” run by soft-drink bottlers).

⁸⁴See OHIO CONST. ART. XII, § 13 (2006).

⁸⁵See Jacobson & Brownell, *supra* note 9; LA. PUB. ACT 203 (1993); *Break for Coke Plant OK’d*, TIMES-PICAYUNE, May 23, 1993, at C1. Jay Hancock, *Eat a Chip, or Have a Pretzel, the Tax is Hardest to Swallow*, BALTIMORE SUN, Dec. 25, 1995, at 13C (describing Pepsico’s suspension of a Frito-Lay plant expansion that would add more than 400 jobs since a snack tax that would tax potato chips was enacted in 1992).

⁸⁶The proposed tax legislation essentially consisted of a new business tax on professionals, increases in property taxes, a new license fee for street vendors and sales taxes on publications, snacks and toll telecommunications services. Nell Henderson, *Kelly Details Plan to Expand Tax Base*, WASH. POST, Feb. 25, 1993, at B1.

⁸⁷Michael F. Jacobson, *Snack Time*, WASH. POST (Op-Ed), Jun. 1, 2000, at A24.

⁸⁸Office of the Chief Financial Officer, *DC Ends the Snack Tax*, Jun. 1, 2001, available at

During the period between 1994 and 2001, snack taxes had virtually disappeared in state tax legislation as the food industry lobby successfully sought the repeal of taxes on snacks in at least nine states. Many of the newer taxes were repealed within just a few years of their enactment,⁸⁹ while older taxes in Louisiana, Mississippi, North Carolina, South Carolina, which emerged from the Great Depression era were also challenged and eliminated.⁹⁰

IV.

The “New” Snack Tax and Obesity

A. “Small Snack Tax to Promote Health”

Despite the seeming decline of the snack tax as of 2000, a new wave of snack tax bills have since been introduced in at least thirteen different states.⁹¹ This time, the snack tax bills across the various states share many distinctive features: virtually all propose small taxes, ranging around \$0.01 or \$0.02 per can, and most are earmarked for a childhood obesity or other health-related program fund. Interestingly, the bills virtually follow what academics such as Professor Kelly D. Brownell, director of Yale’s Center for Eating and Weight Disorders, have been promoting for years: “small taxes on soft drinks and snack foods to promote

<http://app.cfo.dc.gov/CFORUI/news/release.asp?id=5&mon=200106> (last visited April 15, 2006).

⁸⁹These include Maryland, New York, Ohio, Washington, District of Columbia. *See supra* note 9, and accompanying text.

⁹⁰*See* Jacobson & Brownell, *supra* note 9, at 856 tbl. 2 (listing dates of repeal).

⁹¹*See, e.g.*, H.B. 3283, 79th Leg., Reg. Sess. (Tx. 2005); L.B. 628, 99th Leg., 1st Sess. (Neb. 2005); L.D.505, 121st Leg., Reg. Sess. (Me. 2005); S.B. 114, 2004 Leg. Sess. (W. Va. 2004); H.B. 1215, 79th Leg. Ass., Reg. Sess. (S.D. 2004); H.B. 2116, 49th Leg., 2nd Sess. (Okla. 2004); S.B. 374, 46th Leg., 2nd Sess. (N.M. 2004); H.B. 1164, 113th Leg., 2nd Sess. (Ind. 2004); S.B. 897, 92nd Leg., Reg. Sess. (Mich. 2003); H.B. 481, 2003 Leg. Sess. (Ga. 2003); A.B. 9145, 226th Leg. Sess.. (N.Y. 2003); S.B. 5928, 58th Leg., Reg. Sess. (Wash. 2003), S.B. 1520, 2002 Leg. Sess. (Cal. 2002). *See also infra.* notes 124-25 and accompanying text.

health.”⁹²

For instance, California considered a bill in 2002 that would impose an approximately \$0.02 tax on top of the sales tax on a 12-oz soda despite its 1992 experience.⁹³ The estimated \$342 million revenues from this tax would be deposited into a newly created trust fund, the “California Child Health and Achievement Fund,” where half of the funds would be directed towards school health programs and after-school activities which some school districts now pay for with money earned through exclusive soft drink sales agreements. The other half of the revenues would help fund public health and childhood obesity prevention programs outside schools.⁹⁴ While the controversial tax did not pass, the amended bill did, which partially accomplished the original goal of the bill by directly phasing out sodas and other junk foods from K-12 campuses throughout the state.⁹⁵

In 2003, New York legislators began to deliberate a bill that would increase by 0.25% a tax on certain foods and beverages currently taxed, levy a 1% tax on foods classified as “sweets” according to the USDA’s National Nutrient Database for Standard Reference (as well as on sales and rentals of computer games and movies – sedentary activities that also contribute to obesity), and to apply the revenues to a “Childhood Obesity Prevention Program Fund” within the Department of Health.⁹⁶ The bill is linked to establishing a childhood obesity program, which was approved by the Department of Health contingent upon the availability of funds and subsequently vetoed by the Division of Budget because no revenue source had been identified.⁹⁷ Texas is similarly considering a tax based on the classification of foods from the USDA’s National Nutrient Database,

⁹²Jacobson & Brownell, *supra* note 9, at 855 (suggesting, for instance, a national soft drinks tax at the rate of one-cent per 12-oz soft drink that would generate about \$1.5 billion annually); BROWNELL & HORGAN, *supra* note 12, at 226-28.

⁹³S.B. 1520, 2002 Leg. Sess. (Cal. 2002).

⁹⁴Cal. State Board of Equalization, *supra* note 59 (providing an analysis of S.B. 1520).

⁹⁵Timothy Egan, *In Bid to Improve Nutrition, Schools Expel Soda and Chips*, N.Y. TIMES, May 20, 2002, at A1. However, local school districts have yet to figure out how to make up for the lost revenues from soft drinks companies, that were ironically used for student activities such as camping trips and sports. *Id.*

⁹⁶A.B. 9145 (pending in the Assembly of Ways and Means); Marguerite Higgins, *Food Fight: Obesity Epidemic is Providing Food for Lawyers, Advocates*, WASH. TIMES, Oct. 19, 2003, at A01.

⁹⁷See S.B. 2045, 226th Leg. Sess., N.Y. Bill Jacket, Ch. 604 (2003).

which would tax all items labeled as “sweet” or “snack” within the database.⁹⁸

In 2003, Washington proposed a sales tax on candy to create “disincentives for unhealthy behavior, including poor eating habits,”⁹⁹ Georgia proposed to expand the sales tax to vending machine foods,¹⁰⁰ and Michigan proposed to amend its sales tax law to tax soft drinks and apply those revenues to a “Healthy Schools Fund” which would create programs that encourage good health and exercise.¹⁰¹ In 2004, Indiana proposed to tax “nonnutritive beverages” (defined as soft drinks and diluted fruit juices) at a rate of \$2 per gallon of syrup or \$0.105 cents per gallon of the bottled beverage (about \$0.01 per can) that would provide for a long term care continuum fund.¹⁰² In the same year, New Mexico proposed a \$2 per gallon syrup or \$0.21 per gallon excise tax on bottled soft drinks (about \$0.02 per can) to support Medicaid,¹⁰³ as well as a 10% excise tax on all vended snacks to fund physical education programs;¹⁰⁴ South Dakota proposed to amend the definition of “food” for purposes of its sales tax to make the tax applicable to soft drinks, candy and prepared foods; Oklahoma and West Virginia both proposed to increase taxes on soft drinks for raising general revenues.

In 2005, a bill in Nebraska has been proposed for a “Junk Foods Sales Tax” on bakery items, candy, snack foods, and soft drinks to create a fund for school facilities.¹⁰⁵ Texas’ 2005 snack tax bill would fund childhood obesity prevention programs,¹⁰⁶ and as of April 2006 this bill is pending in the Ways and Means committee.¹⁰⁷

⁹⁸TX H.B. 3283.

⁹⁹S.B. 5928.

¹⁰⁰H.B. 481 (introduced on Feb. 26, 2003).

¹⁰¹S.B. 897 (introduced on Dec. 11, 2003).

¹⁰²H.B. 1164.

¹⁰³S. 374.

¹⁰⁴H.B. 563. There is also another proposal for an excise tax on wholesalers of soft drinks at \$2 per gallon of syrup or \$0.21 cents/gallon of bottled soft drink (about \$0.02 per bottle) to create the Soft Drink Medicaid Fund. S. 374, 46th Legis., 2d Sess. (N.M. 2004).

¹⁰⁵L.B. 628.

¹⁰⁶H.B. 3283.

¹⁰⁷See Texas Legislature Online, *Bill History*, at <http://www.capitol.state.tx.us> (on file with author).

B. Emerging Public Support

The wave of pending bills introduced since 2002 have been controversial, as expected in light of the history of snack taxes and the influence of the snack industry lobby. However, the changed circumstances surrounding the taxes – the “obesity epidemic” and the emerging public support for the government to avert a growing health care crisis – provide a better justification for these taxes and explain the new phase of snack tax proposals.

In the mid-1990s, even though there was considerable media attention to the increasing obesity rates, very few perceived obesity as among America’s most important health problems.¹⁰⁸ In 1994, in a New York Times op-ed, Professor Kelly D. Brownell¹⁰⁹ first introduced to the American public the novel concept of taxing unhealthy, high-calorie or high-fat foods.¹¹⁰ Polls in 2001 not only showed persistently low concern about obesity (compared to other health issues), but also reluctance to support broad snack taxes.¹¹¹

In early 2002, it was as if the national obesity epidemic had suddenly grabbed the attention of the American public. There was a dramatic shift in the public opinion polls: by mid-2002, 24% of Americans thought obesity was the one of the two or three most important health problems, while only 9% in 2001 did.¹¹²

By 2003, public opinion polls showed that 41% of Americans would support a tax on food that is used to

¹⁰⁸ See Mark Schlesinger, *Editor’s Note: Weighting for Godot*, 30(5) J. HEALTH POL. POL’Y & L. 785, 785-86 (2005). In the academic arena, the obesity epidemic was also slow to catch on, as a LexisNexis search finds only forty-eight articles in 1998 that contained both the term *obesity* and the term *epidemic* in major print publications, whereas in 2004 there were over 700. J. Eric Oliver & Taeku Lee, *Public Opinion and the Politics of Obesity in America*, 30(5) J. HEALTH POL. POL’Y & L. 923, 924 (2005).

¹⁰⁹ See *supra* note 92 and accompanying text.

¹¹⁰ Kelly D. Brownell, *Get Slim With Higher Taxes*, N.Y. TIMES, Dec. 15, 1994, at A29.

¹¹¹ Oliver & Lee, *supra* note 108, at 936.

¹¹² Robert J. Blendon et al., *The Continuing Legacy of September 11 For Americans’ Health Priorities*, Health Affairs (Web Exclusive) 269, 273 (2003) (based on the Harvard School of Public Health/Robert Wood Johnson Foundation/International Communications Research polls).

subsidize healthy foods.¹¹³ As of 2004, public support appeared to increase to 54%,¹¹⁴ suggesting a rising trend in support for small food taxes after all. A California survey in 2004 indicated that as many as 62% of Californians support a special tax on soft drinks and food advertising to fund anti-obesity efforts.¹¹⁵ Anecdotal evidence from the media have also reflected growing public interest and support in taxing non-nutritive foods.¹¹⁶ As one example of the numerous opinion columns in the media since 2002, a New York Times editorial in January 2006 argued for a small tax on junk foods as part of a comprehensive plan that includes banning unhealthy snacks from public schools and other initiatives to curb obesity and lack of exercise.¹¹⁷

At the very least, the media and the polls reflect a public that is becoming ready to act on the more narrow problem of childhood obesity, open-minded about the tools needed to fight it, and “receptive to government leading the way.”¹¹⁸ For example, 76% of those surveyed in a public opinion poll sponsored by The Harvard Forums on Health would support measures to reduce childhood obesity even if it meant higher taxes.¹¹⁹

In fact, 40% of respondents said they were willing to pay up to \$100 a year in additional taxes if funds

¹¹³Kelly D. Brownell, *The Chronicling of Obesity: Growing Awareness of its Social, Economic, and Political Contexts*, 30(5) J. HEALTH POL., POL'Y & L. 955, 957 (2005) (citing the 2003 Harvard Forum, the 2003 Kaiser poll, and the 2004 ABC/time poll). Poll results can be accessed at www.kff.org/kaiserpolls/obesity.cfm (Kaiser Family Foundation/San Jose Mercury News); www.phsi.harvard.edu/health_reform/harvard_forum_release.pdf (Harvard Forum on Health); www.themarinco.com/PublicContent/poll/obesity.pdf (Harris Interactive) (last visited April 17, 2006).

¹¹⁴See *id.* (based on the Harris interactive poll).

¹¹⁵*Survey: More than Half of Californians Support Fat Taxes, Menu Labeling*, OBESITY POLICY REPORT, Apr. 4, 2004, at www.obesitypolicyreport.com/eJournals (on file with author) (citing a new survey funded by The California Endowment).

¹¹⁶For example, numerous magazines or newspaper often published editorials or letters from readers supporting snack taxes. See John Riegert, *Aren't Soft Drinks Just as "Sinful"?*, PITTSBURG POST-GAZETTE, Dec. 5, 2002, at A14 (Editorial); Dolores J. Hubert, *Soak the Rich – But Just a Little*, THE OREGONIAN, Mar. 16, 2003, at F3 (Commentary) (proposing an “education tax” on all snack foods and soft drinks); *The inequity, idiocy of further taxing cigarettes*, THE PLAIN DEALER (Cleveland, Ohio), at B8 (Letters to the Editor) (supporting a \$0.01 tax on soft drink to generate revenue, noting that the fast food industry is “becoming a real health hazard.”); Roselyn Hiers, *Tax Soft Drinks*, SUN-SENTINEL, Oct. 2002, at 16A (Editorial) (arguing for a \$0.01 or \$0.02 tax on soft drinks to help finance education).

¹¹⁷Nicholas D. Kristof, *Take a Hike*, N.Y. TIMES, Jan. 31, 2006, at A21.

¹¹⁸See Harvard Forums on Health, *Public Split on Government Role in Addressing Adult Obesity; Childhood Obesity is a Different Story*, Jun. 11, 2003, available at www.phsi.harvard.edu/health_reform/harvard_forum_release.pdf (last visited April 17, 2006) (quoting David Blumenthal, MD, director of the Harvard Interfaculty Program on Health Systems Improvement, and reporting that more than 90% of those surveyed supported efforts to educate parents in the fight against childhood obesity).

¹¹⁹*Id.*

were being used to curb obesity rates in children.¹²⁰ In the California-specific survey, there appeared to be more support for a tax on soft drinks compared to other regulatory alternatives such as bans on television advertising and barring food and beverage companies from advertising products at public schools.¹²¹

Public support to fight obesity – specifically, childhood obesity – is distinctively a very recent phenomenon that only began to emerge in 2003. As the public gained awareness of the need for drastically increased spending on nutrition and exercise programs, discourse on potential sources of funding became inevitable. The snack tax seemed particularly apt: given the recent developments in research on the enormous personal and societal costs of obesity and the links between obesity and unhealthy foods,¹²² it seemed rational to encourage reduction in the consumption of these foods through a tax. The vastly changed circumstances by mid-2002 likely explains the surge of renewed interest in the snack tax, despite the wave of snack tax repeals during the preceding decade. While most of the existing snack taxes as of the late 1990s predated the obesity epidemic, advocates now propose implementing smaller versions of snack taxes to fund public health initiatives targeted towards improving nutrition and increasing physical activity.¹²³

Nevertheless, while numerous related snack and soft drink legislation have been introduced, sometimes multiple bills in one state – these bills proved to be a tough sell. According to the Health Policy Tracking Service, seventeen related bills were introduced in 2005 but twelve had died with adjournment.¹²⁴ The other

¹²⁰*Id.*

¹²¹*Survey: More than Half of Californians Support Fat Taxes, Menu Labeling, supra* note 115.

¹²²*See, e.g.,* Cara B. Ebbeling et al., *Effects of Decreasing Sugar-Sweetened Beverage Consumption on Body Weight in Adolescents: A Randomized, Controlled Pilot Study*, 117(3) *Pediatrics* 673 (2006); California Center for Public Health Policy, *Soda Consumption Puts Children at Risk for Obesity, Diabetes, Osteoporosis, and Cavities*, Fact Sheet (citing media and journals to demonstrate soda's direct negative impact on health). The link between obesity and soft drinks and snacks has been extremely controversial, with the beverage and snack food industry sponsoring significant research to refute the connection. Derrick Z. Jackson, *Fairy Tale About Soft Drink Nutrition Won't Sell*, Dec. 1, 2004 (describing soda lobbyists, such as the American Bev Ass'n, that have attacked every scientific study); Allison Field et al., *Snack food intake does not predict weight change among children and adolescents*. 10 *INT'L J. OBESITY* 1210-16 (Oct. 2004); 2005 Canadian Medical Assoc Journal study).

¹²³*See* Strnad, at 1225 (describing the envisioned initiatives, which would counter the “toxic environment” largely through informational campaigns and health education programs to offset the cumulative impact of advertising and promotion of unhealthy foods).

¹²⁴HEALTH POLICY TRACKING SERVICE, *supra* note 5, at 96 (listing the following bills as “died with adjournment”: H.B. 135 (Al.), H.B. 2649 (Ariz.), H.B. 307 (Md.), S.B. 332 (Mont.), L.B. 628 (Nev.), H.B. 675 (N.M.), S.B. 283 (N.M.), H.B. 1105 (Tx.), H.B. 3324 (Tx.), H.B. 10987 (Wash.), S.B. 5778 (Wash.), S.B. 5973 (Wash.)).

five continue to be pending in committees.¹²⁵

V. Policy and Prognosis

A. Underlying Policy Rationales

The pending snack tax proposals can be analyzed at least at two levels: as tax policy and as health policy. While many of the policy arguments are complex and involve extensive economic, political, sociological and public health analyses that must be examined through other literature and further research, this Part aims to provide an overview of the different rationales that underlie the snack tax and the basic arguments of proponents and opponents of the taxes.

1. Initial Rationale: Soft Drink and Candy as “Luxury Goods”

As described above, the early taxes on soft drinks and candy that emerged out of World War I and the Great Depression were partly the result of interest group politics, and partly because of its classification as a luxury good – there was no link to any health policies at the time. Even though consumption taxes were not the preferred method of taxation, the special circumstances of a war and economic depression had pressed

¹²⁵*Id.* (including H.B. 4912 (Mich.), H.B. 4913 (Mich.), S.B. 587 (Mich.), S.B. 588 (Mich.), H.B. 5665 (N.Y.)).

governments to search for new sources of revenue rather than increasing existing property and income taxes. Specifically, the early state snack taxes were the result of the Depression, which caused both income tax revenues to plummet and made it necessary for legislators to provide property tax relief to its citizens under severe economic hardships. A consumption tax that exempted only the basic necessities seemed to be the preferred alternative for the states during periods when corporations and individuals needed tax relief, while having a minimal effect on the low-income families just struggling to survive on the basic necessities. The industrial sector, faced with the choice between increased property tax or corporate income tax rates or targeted consumption taxes, favored the latter.

Given a general sales tax, conceptually applying this sales tax to snack foods despite a general exemption of foods from the tax is arguably consistent with the policy underlying the exemption of foods, to the extent that snack foods are not essential for survival and poor families would not have to carry a tax burden by easily avoiding the taxed goods. In other words, snack foods could be characterized just as other retail goods that are consumed on a regular basis and subject to the general sales tax. At least before the obesity epidemic, there was no other explanation for an additional excise tax on snack foods except that history and politics had identified the tax on soft drinks and candy as a favored, “quick fix” to the deficit.

2. The Tax is “Unfair” and “Regressive”

The relative weakness of the rationales for selective taxes on soft drinks and candy began to surface in the 1990s, especially as legislators sought to expand the tax to a broader and less well-defined category of “snacks.” Often having to draw arbitrary lines between what is and is not a “snack,” these taxes were criti-

cized as difficult to administer, arbitrary, and confusing to consumers and retailers,¹²⁶ as well as unfair,¹²⁷ and regressive¹²⁸ The major problem with the conceptual justification that snacks were not necessities and only basic necessities should be exempt from a general sales tax, is the practical impossibility of distinguishing items that are basic necessities. The earlier snack taxes, which focused exclusively on soft drinks, chewing gum, and candy, essentially reflected the government's decision that at least these three categories of foods were not essential.

From a policy perspective, this was an underinclusive rule that effectively singled out soft drink, chewing gum, and candy manufacturers when there were countless other foods that would never be considered a basic necessity. This has become more true in recent times with the explosive growth of the processed food and snack foods industry. The tax was also criticized as regressive because these foods are widely consumed by lower-income households, a substantial number of which do not qualify for the Food Stamp Program and are thus subject to the tax.¹²⁹ Far from being a luxury, soft drinks, candy and other so-called junk foods are often part of the routine diet of poorer families because they provide the cheapest form of calories.¹³⁰ Nevertheless, legislators have favored these taxes because they were efficient – they produced a significant source of revenues precisely because the taxed products were widely consumed, and at minimal administrative costs.

¹²⁶Sayward Byrd, *Civil Rights and the "Twinkie" Tax: The 900-Pound Gorilla in the War On Obesity*, 65 LA. L. REV. 303, 333 (2004)

¹²⁷Nanci Hellmich, *Obesity is the Target*, USA TODAY, May 8, 2003, at 1D (citing representatives of the Snack Food Association and the National Soft Drink Association, who oppose the taxes on grounds that it was "unfair to single out our products.").

¹²⁸*Id.*

¹²⁹Some have argued that the poor tend to consume more snacks. See GREG CRITSER, *FAT LAND: HOW AMERICANS BECAME THE FATTEST PEOPLE IN THE World* 41 (2003).

¹³⁰See David M. Cutler et al., *Why Have Americans Become More Obese?*, NBER Working Paper No. 9446, Jan. 2003, available at <http://www.nber.org/papers/w9446> (last visited May 1, 2006).

3. The Tax is Not Cost-Effective

As legislators sought to expand the tax to include other “snacks” in the 1990s, the overwhelming administrative difficulties of that tax gave the food industry a strong policy argument to use during its successful lobbying for the repeal of snack taxes across the nation. While a broad tax on snack foods would address the “unfairness” argument, it was impossible to draw the line between what would and would not be taxable. Conceptually, it is relatively easy to envision a tax on “snacks,” “junk food,” or “fat,” but such a tax would become an administrative nightmare without clear guidance for retailers and consumers – especially when more than 10,000 new processed food products are introduced into the market every year.¹³¹

The most successful excise taxes – tobacco and liquor – were not only levied on clearly-defined products, but on only a small number of taxpayers in order to minimize administrative costs.¹³² Before the repeal of D.C.’s snack tax, a key argument of the lobbyists was that the tax was almost impossible to collect without sophisticated technology and thus was especially burdensome for small neighborhood retailers.¹³³

4. A New Rationale: Snack Foods Lead to Obesity

While the snack tax confronted serious challenges as a tax policy, the announcement of the obesity epidemic suddenly gave the 85-year old tax on soft drinks, candies, and other snacks – fortuitously fat- or calorie-laden products – a new foundation as a public health policy. Public health academics have recently begun

¹³¹ERIC SCHLOSSER, *FAST FOOD NATION* 124 (2001).

¹³²MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 14 (2005).

¹³³Grocery Manufacturers Association, *GMA: D.C. Should Repeal Selective Food Taxes*, Apr. 26, 1999, at <http://www.gmabrands.com/news/docs/NewsRelease.cfm?DocID=235> (on file with author) (describing the GMA’s testimony before the D.C. Council’s Finance Committee).

to consider the snack tax as a potential part of a comprehensive solution to the obesity crisis.¹³⁴ As a tax on tobacco is justified on public health grounds, a tax on junk food could be similarly justified. Proponents argue that the tax may lead consumers to pause, even if briefly, to consider the consequences of their junk food purchases and perhaps turn to more healthy alternatives.¹³⁵ In addition, revenue from these taxes could be used to subsidize more healthful foods and fund public-awareness campaigns. For example, a national \$0.01 per 12-ounce soft drink would generate \$1.5 billion annually; potential taxes of \$0.01 per pound on candy and chips would generate an additional \$70 million and \$54 million, respectively.¹³⁶

However, even if there could be a bright line drawn to distinguish junk foods, this would be inconsistent with the general notion that there are no “good” or “bad” foods. The notion that particular foods (e.g. fat-laden foods) are bad is outdated and simplistic. Instead, the modern trend has been to avoid classifying foods into “good” or “bad” and to recognize that balance and moderation is the key to obesity prevention.¹³⁷

5. “Our Pants Size is None of the Government’s Business”

Viewed as a response to obesity, the snack tax must now be evaluated with regard to the more difficult and broader policy question of the appropriate scope of the government’s role in addressing obesity. While the public has begun to become more respectful to greater government intervention, especially with respect to obesity in children and adolescents, many are concerned that a snack tax would reflect governmental

¹³⁴See Schlesinger, *supra* note 108. The special issue of the Journal of Health Politics, Policy and Law in October 2005, which was devoted to different perspectives of the obesity policy debate, contained numerous references to the use of a snack tax as proposed by Professor Kelly Brownell. See generally 30(5) J. HEALTH POL. POL’Y & L (2005).

¹³⁵Suzanne Leigh, ‘Twinkie Tax’ Worth a Try in Fight Against Obesity, USA Today Dec. 2, 2004, at 13A

¹³⁶*Id.*

¹³⁷J.A. Milner, *Functional Foods and Health Promotion*, 129(Supp.) J. NUTRITION. SC. 1395 (1999) (emphasizing the need to educate the public that there are no “good” or “bad” foods, only good or bad diets).

influence over individual food choices and thus too much of an invasion into the private sphere.¹³⁸ There is also concern that consumers may feel patronized, and perceive the tax as a means to induce weight loss.

Many of the recent snack tax proposals that are presented as health-promoting policies have been deemed “ridiculous,”¹³⁹ and “preposterous by people who believe that our pants size is none of the government’s business.”¹⁴⁰ Additionally, the snack tax as a health policy has raised questions of inequity because it effectively penalizes those who consume in moderation or exercise sufficiently.¹⁴¹

B. Challenges to Current Proposals, and Some Recommendations

While the new legislative proposals for snack taxes may have relatively stronger political appeal today as part of a comprehensive solution to the obesity crisis, they also face new challenges in addition to many of the unresolved problems of earlier snack taxes, precisely because they are characterized as a health policy. However, with the modern developments of the USDA National Nutrient Database as well as cheaper, advanced technologies that lower the administrative costs of the tax, well-designed snack taxes may have much greater potential today and in the future.

The primary challenge for pending bills that seek to extend the tax beyond the realm of soft drinks, diluted juice, and candy, has been the practical difficulty of the classification of foods into “snacks.” One potentially

¹³⁸See, e.g., Christie Raniszewski Herrera, *Some Fat Lies*, WASH. TIMES, July 5, 2005 (calling the politicians who advocate government intervention to fight obesity “nanny-state politicians” and rejecting “taxpayer-funded, government-imposed behavior modification”).

¹³⁹Lori Montgomery, *Maryland Legislators Far Apart on Budget*, WASH. POST, Mar. 27, 2004, at B1 (quoting Senator David R. Brinkley regarding the Maryland’s proposed \$16 million snack tax program).

¹⁴⁰Suzanne Leigh, *‘Twinkie Tax’ Worth a Try in Fight Against Obesity*, USA TODAY, Dec. 2, 2004, at 13A (characterizing the opinion of opponents to the recently proposed snack tax in New York).

¹⁴¹Richard Epstein, *Let the Shoemaker Stick to His Last: A Defense of the “Old” Public Health* 46 (3 Supp.) PERSPECTIVES IN BIOLOGY & MED. S138-59 (2003).

important development in the states is to rely on the federal government’s classification of foods. States could, like D.C., adopt the federal food definition as applied to the Food Stamp Program, and simply tax only what would be taxed for food stamp purchasers.¹⁴² The federal government may play a role in increasing state funds for obesity prevention by amending its definition of “food” under the Federal Food Stamp Program. Alternatively, states may rely directly on the USDA’s National Nutrient Database for Standard Reference as the authority for food classification into “food groups” and tax those foods listed within a certain group, such as “Snacks” or “Sweets.” To the extent that the USDA database is comprehensive, up-to-date, and simple to navigate, an expanded snacks tax may be able to outlive its failed predecessors in California and D.C.

A key factor that ultimately led to the repeal of a broader “snacks” tax in California and D.C. was the overwhelming administrative burden of the tax on retailers. In D.C., lobbyists argued that the tax is almost impossible to collect without sophisticated scanning devices.¹⁴³ If a relatively simple method for retailers to track and report the taxable food sales could be developed, an expanded snack tax would become a much more attractive tax policy. Since there is already a system for retailers to collect the state sales taxes levied on the many non-food items normally found at convenience stores and supermarkets, the challenge may be alleviated if manufacturers labeled the foods with their USDA-determined food group classification. Regardless of their economic merits, many excise taxes persist because they meet the “test” of raising large amounts at low administrative costs.¹⁴⁴

¹⁴²Soft drinks and candy, which has been widely agreed to be “non-nutritive” foods, could legitimately be excluded from the Food Stamp Program, as the Program’s fundamental goal is “to promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households.” 7 U.S.C.A. § 2011 (2006).

¹⁴³Grocery Manufacturers Association, *supra* note 133 (describing the GMA’s testimony before the D.C. Council’s Finance Committee).

¹⁴⁴*See* GRAETZ & SCHENK, *supra* note 132, at 14.

More importantly however, the current snack tax bills are most vulnerable because of the strength of the food industry lobby. Most of the existing snack taxes were enacted before the soft drink industry actively participated in lobbying efforts. Since the early 1990s, the various snack food industries have increased their lobbying activities and often joined together to create extremely powerful coalitions.¹⁴⁵ Any proposals to tax snacks today and in the future will inevitably be challenged by these industries, which have demonstrated a willingness to devote significant resources to fight such a tax in any state.¹⁴⁶ Understandably, they are worried about the slippery slope, especially given the industry's experience with the soft drinks and candy tax in the past: a successful snack tax in one state may quickly incite the interests of legislators in others, and it would be significantly easier for legislators to increase these tax rates in the future whenever a quick fix to the deficit is needed. Both excise taxes and the sales tax, even if small, are threatening for the industries. Small excise taxes, which are usually collected at the wholesale stage and unlikely to be shifted to the consumers, are unfair because they effectively provide the state with an additional share of the industry profits after corporate taxes and other business taxes have been paid, and they are not likely to be opposed by consumer groups because of the low visibility of the tax. On the other hand, sales taxes have higher visibility, but if the theory is correct, may cause the consumer to pause and reconsider the product based on its unhealthful qualities.¹⁴⁷

One potential step to mitigating the snack food industry's lobbying efforts is to design the new snack tax to at least correspond somewhat with the food's relative risk to obesity. The clearest example would be to levy a tax on the soft drinks that are laden with sugar, but to exempt diet sodas and other beverages that meet certain technical threshold requirements. The soft drinks industry's antagonism towards excise taxes

¹⁴⁵NESTLE, *supra* note 82; *see also FPA and GM Announce Plans to Merge*, 4 OBESITY POL'Y REP. 17, Apr. 27, 2006 (announcing merger of Food Products Association and the Grocery Manufacturer's Association, which represent nearly 300 member companies from every sector of the food, beverage and consumer products industry).

¹⁴⁶*See supra* note 83 and accompanying text.

¹⁴⁷*See supra* note 135 and accompanying text.

is understandable as almost all the current excise tax proposals would tax any kind of soft drink beverage, without distinguishing diet sodas.¹⁴⁸ Since the soft drink manufacturer today produces a variety of sugar-laden and sugar-free drinks today, it is relatively agnostic as to which beverages people are drinking as long as they are selling them.¹⁴⁹ A tax on the relatively unhealthy beverage would produce an incentive for soft drink manufacturers to innovate, emphasizing diet, or nontaxable beverages, as well as devote relatively greater marketing efforts for these products. This would be successful from a health policy standpoint as it triggers producer-induced changes to the so-called “toxic food environment.”

If carefully designed, a snack tax is likely to succeed especially if its administrative challenges are addressed. A small excise tax on soft drinks and other clearly-defined snack foods, with clear exceptions for healthier or “diet” forms of the food, may receive less opposition from the food industry and thus may be more politically feasible. The administrative difficulties do not seem insurmountable, especially in light of the efficiency of the tax and the seeming public support for it in conjunction with the obesity crisis. Further development of technological capabilities to ease the collection of the tax and improvements to the USDA National Nutrient Database are likely to make the tax more cost-effective.

States that have experienced failed snack taxes, such as California and D.C., may find it substantially more difficult to pass the tax bills despite the new health-based rationale. Many of the failed taxes of the 1990s that received extensive publicity as a result of the food industry lobbying efforts are still relatively recent in the memories of legislators and citizens, and new snack tax proposals will certainly continue to be associated

¹⁴⁸ See, e.g., H.B. 1164, 113th Leg., 2nd Sess. (Ind. 2004); the only exception was the California 2002 bill, S.B. 1520, 2002 Leg. Sess. (Cal. 2002).

¹⁴⁹ Joe Nocera, *Food Makers And Critics Break Bread*, Mar. 25, 2006, N.Y. TIMES, at C1 (based on an interview with Professor Kelly D. Brownell regarding his meeting with PepsiCo).

with the earlier taxes. This will be especially true as some of the current snack tax proposals continue to follow the old model of taxation without any health-related purpose.¹⁵⁰

The amalgam of different forms of the tax on snacks across different states and each state's different use of the revenues of the tax is likely to cause confusion as to whether the tax actually serves some public health purpose or whether the obesity epidemic and a health rationale is only a guise for states to reach into a historically convenient and stable source of revenue.

VI. Conclusions

The historical selective taxation of soft drinks and candy and the current health-based proposals to tax these items and other snack foods is a fascinating fortuity, with carbonated drinks and candies evolving from luxuries to near-sins because of the present obesity crisis. While many of the early snack taxes remain, the initial rationales underlying these policies are both forgotten and obsolete. In light of the recent interest in resurrecting the snack tax as part of the war on obesity, it is useful to reexamine those rationales and recognize that they are largely inapplicable to the present day. New, independent justifications must be articulated, and must outweigh the pitfalls that caused earlier forms of the tax to be short-lived.

This article has attempted to offer a broad, historical perspective of the desirability and ramifications for the current snack tax bills; the desirability and success of the snack tax must be analyzed also from economic, political, sociological and public health perspectives in conjunction with alternative policy instruments. One important issue to consider, for example, is whether it would be cost-effective to engage in a political battle

¹⁵⁰ See, e.g., S.B. 114, 2004 Leg. Sess. (W. Va. 2004) (proposing an excise tax of \$2/gallon of syrup or \$0.21 per gallon bottled soft drinks on wholesalers, where revenues are to be deposited into the general state treasury).

against the powerful snack food industry, if there could be an alternative approach that would redirect the industry's lobbying efforts and resources towards helping the public fight obesity.¹⁵¹

The snack tax is a rational response to the politically challenging situation of having to fund valuable programs during lean fiscal periods. However, unlike the war against tobacco, in which the government and the industry's goals were inevitably diametric, the current war against obesity is not meant to destroy the snack food industry – instead, the snack food industry may play a crucial role in helping the public fight obesity, and may even find it in its best interests to do so.

In 2003, John Banzhaf, informal advisor to the plaintiffs in the famous McDonald's lawsuit¹⁵² and law professor at George Washington University, predicted that within the next three to five years, states would be experimenting with snack taxes.¹⁵³ While Professor Banzhaf may be correct, given the current wave of legislative proposals, state legislators should be cautious to understand the underlying rationale of the current bills and of existing or repealed snack taxes in its other states. Each state is unique, and the ultimate cost-benefit analysis and success of a snack tax is not only related to alternative solutions, but is crucially tied to the state's historical experiences with the snack tax, the public's sense of the state's current fiscal needs, the extent of the snack food industry's presence, as well as the salience of the obesity epidemic in the state.

¹⁵¹In addition to the extensive resources allocated to direct lobbying, the soft drink and snack foods industry has had to continually devote significant resources to produce research to refute developing research linking their products to obesity and used primarily to substantiate the rationale for snack taxes. If the threat of snack taxes were set aside, for example, researchers on both sides of the inconclusive controversy may engage in other productive research.

¹⁵²*Pelman v. McDonald*, 37 F.Supp.2d 512 (S.D.N.Y. 2003).

¹⁵³*Now What? Banzhaf's Anti-Obesity Movement's Next Battles*, OBESITY POLICY REPORT, Sept. 1, 2003, at www.obesitypolicyreport.com/eJournals (on file with author).