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ABSTRACT

As the number of overweight and obese Americans rises, it becomes increasingly clear that Americans need further incentives to stimulate lasting lifestyle changes. Tax incentives focused on exercise, which have been largely unexplored to this point, are an effective response to the growing obesity problem in the United States that would largely avoid the political opposition that tax policies focused on diet have encountered. In addition, they would also provide a more palatable solution for the taxpayer beneficiaries with a relatively low impact on government revenues.

Viable tax incentives to encourage greater fitness include tax credits and sales tax breaks, or, alternatively, direct subsidies can be used to facilitate similar behavior. This Article posits that, from this menu of options, tax credits to encourage exercise stand to create the most lasting positive results. Further, it presents a proposed fitness tax credit usable by state, local, or national government bodies and demonstrates that the most effective way to garner support for a fitness-based tax credit in the United States is to couple the credit with a broader emphasis on healthier lifestyles and to emphasize its potential long-term revenue gains.

INTRODUCTION

Obesity[1] is a global epidemic, and the prevalence of this condition in the United States is especially problematic.[2] Obesity is widely considered by public health officials to be one of the foremost public health concerns, resulting in an increased risk of many serious health conditions, including hypertension, stroke, Type II diabetes, coronary heart

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[1] "Overweight" and "obese" are labels for ranges of weight greater than what is considered healthy for a given height. *See Defining Overweight and Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/defining.html (last updated June 21, 2010). This Article uses these terms interchangeably.

[2] *See Controlling the Global Obesity Epidemic*, WORLD HEALTH ORG., http://www.who.int/nutrition/topics/obesity/en/ (last visited Dec. 27, 2011) (identifying "globesity" as a worldwide epidemic); *Obesity and Overweight*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/fs311/en/index.html (last updated Mar. 2011) (noting that, worldwide, obesity has almost doubled since 1980, with over 1.5 billion overweight adults age twenty and older as of 2008); *Obesity and Overweight for Professionals: Data and Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/trends.html (last updated July 21, 2011) (finding that, in the U.S., 33.8% of U.S. adults and 17% of children and adolescents aged 2–19 are obese).

disease, certain types of cancer, and premature death.[3] For these reasons, state, local, and national government officials should consider adopting programs or enacting legislation to provide incentives for overweight or obese Americans to improve their health. Although approaches involving government incentives through tax laws are controversial, government programs designed to encourage healthier habits are gaining wider attention as effective strategies to reduce obesity.[4]

Numerous efforts to improve U.S. dietary habits and to encourage more fitness have been proposed, yet obesity rates continue to rise.[5] While a lasting solution to the problem will surely involve significant changes in diet, and several proposals have been introduced to encourage healthier eating habits through tax incentives,[6] few proposals have been introduced to encourage better exercise habits through tax incentives.[7] This Article fills that gap by proposing a new fitness tax credit as an invaluable exercise incentive—providing support for its success in the United States while acknowledging possible critiques and defending its viability in the current political climate.

Although the debate about tax incentives for dieting has not translated into long-lasting reform in the United States, the debate over tax incentives for fitness and exercise has not received nearly enough attention. Accordingly, an analysis of possible tax incentives for better fitness would provide a more thorough baseline for attacking the prevalent problems of overweight and obesity. When legislators focus their efforts on making a meaningful impact on rising obesity rates, they will then be able to choose from a menu of tax incentives that address both diet and exercise as a means of correcting the U.S. obesity problem. The precise combination of various diet and exercise incentives will be the source of further discussion, but this Article focuses on the benefits of tax incentives for fitness and proposes a new fitness tax credit, the "Americans in Shape Tax Credit" (ASTC), which can be used to create effective incentives for healthier exercise habits.

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[3] B. SHERRY ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, VITAL SIGNS: STATE-SPECIFIC OBESITY PREVALENCE AMONG ADULTS—UNITED STATES, 2009, at 1 (2010), *available at* http://www.cdc.gov/mmwr/pdf/wk/mm59e0803.pdf.

[4] *See infra* notes 60–63 and accompanying text.

[5] *See* OFF. OF THE SURGEON GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001, at 15–26 (2001), *available at* http://www.surgeongeneral.gov/library/calls/obesity/CalltoAction.pdf.pdf [hereinafter CALL TO ACTION] (responding to concerns over the mounting prevalence of obesity by issuing a national "Call to Action" to reduce the prevalence of overweight and obesity in the United States). Efforts by the government to curb U.S. dietary habits and encourage more fitness have included campaigns to promote public awareness, encourage the food industry to provide smaller portions and better labeling, and provide greater access to physical activity programs. *Id.*

[6] *See, e.g.*, Chris L. Winstanley, Comment, *A Healthy Food Tax Credit: Moving Away from the Fat Tax and Its Fault-Based Paradigm*, 86 OR. L. REV. 1151 (2007) (discussing a proposed "fat tax" on unhealthy food or ingredients).

[7] *See* Personal Health Investment Act of 2009, H.R. 2105, 111th Cong. (2009) (indicating a counterpart to Canada's Adult Fitness Tax Credit was proposed, but failed, in the United States Congress); *Line 365—Children's Fitness Amount*, CAN. REVENUE AGENCY, http://www.cra-arc.gc.ca/fitness/ (last modified Jan. 17, 2011) (indicating the Child Fitness Tax Credit is a tax incentive in Canada that allows families to claim a maximum of $500 per child in tax credits relating to the cost of a prescribed program of physical activity); ADULT FITNESS TAX CREDIT!, http://www.adultfitnesstaxcredit.ca/ (last visited Oct. 1, 2011) (noting a similar Adult Fitness Tax Credit has been proposed, but failed to pass, in Canada).

Part I of this Article describes in greater detail the obesity epidemic plaguing the United States, discusses efforts to counteract the problem, then hones in on tax-based efforts in particular. Part II discusses fitness tax credit models already in operation in Canada and weighs the results on overall obesity rates. Part III proposes the ASTC as a potential solution to the problem of obesity in the United States and compares its costs and benefits. This Part then presents the obstacles to implementation of this proposal, responds by outlining a method to garner support for this proposal among politicians and the public in the United States, and analyzes its likelihood of success. Finally, this Article concludes that the ASTC is a viable option to counteract the overweight and obesity problems faced by increasing numbers of Americans. Moreover, promoting the ASTC would be most effective if the proposal were (1) framed in terms of the cost savings that would result from a healthier U.S. population, (2) tailored to prevent abuse, and (3) equipped to counteract the U.S. race and class health disparity.

I. OBESITY AND HEALTH INCENTIVES IN THE UNITED STATES

Obesity is an epidemic that plagues Americans, and rising rates over recent decades has prompted various government-based approaches to combat the problem. Each approach has its champions and critics—and some approaches are more popular or useful than others—but tax incentives in particular serve as an often-dismissed, yet highly useful means to encourage desired behavior. As obesity rates continue to rise uncontrollably, posing dire health risks to more Americans, turning to tax policy as a potential source to mitigate the problem is a necessary endeavor.

A. America's "Growing" Problem

In the United States, 68% of adults and 31.7% of children and adolescents are currently either overweight or obese.[8] Obese individuals face an increased risk of developing many serious health conditions, ranging from hypertension and diabetes to certain types of cancer and premature death.[9] The estimated medical and social costs of obesity are just as staggering as its deleterious health effects. Direct medical costs include preventive, diagnostic, and treatment services for the range of negative health effects caused by obesity.[10] Indirect costs include "morbidity costs" (income lost from decreased productivity) and "mortality costs" (the value of future income forgone by premature death).[11] In the United States, studies estimated direct medical costs related to obesity as high as $147 billion for 2008,[12] representing 9.1% of total annual medical spending.[13]

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[8] TRUST FOR AMERICA'S HEALTH, F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE 2011 11 (2011), *available at* http://healthyamericans.org/assets/files/TFAH2011FasInFat10.pdf [hereinafter F AS IN FAT].

[9] SHERRY ET AL., *supra* note 3, at 1.

[10] *Obesity and Overweight for Professionals: Economic Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/causes/economics.html (last updated Mar. 28, 2011).

[11] *Id.*

[12] Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer-and-Service-Specific Estimates*, 28 HEALTH AFFAIRS 822 (2009). The 2008 estimate represents an increase from an estimated $78.5 billion in 1998. *Id.*

[13] *Id.* at 828.

On average, an obese person incurs 42% more in medical costs than someone of normal weight, with the majority of these costs covering treatment of obesity-induced diseases.[14] One study estimates that "Medicare and Medicaid spending would be 8.5 percent and 11.8 percent lower, respectively, in the absence of obesity."[15] Given current national, state, and local budgetary constraints, the tremendous medical costs caused by obesity and borne by taxpayers are a significant cause for concern in the United States.

In recent decades, the prevalence of obesity has risen dramatically. Between the 1960s and 1970s, the rates of obesity in the United States changed relatively little; however, they have increased sharply since the 1980s—"from 13.4% in 1980 to 34.3% in 2008 among adults and from 5% to 17% among children during the same period."[16] Several 2010 studies on obesity trends found that, despite the rapid obesity growth rates of the 1980s and 1990s, the prevalence of overweight and obesity among children and adults had increased at a slightly lower rate between 2007 and 2008.[17] Nevertheless, 68% of U.S. citizens age twenty and older were still overweight or obese by 2008.[18]

Rising overweight and obesity rates are even more troubling when children are factored in and when the rates are analyzed by geographic location, socioeconomic status, and race. From 1980 to 2008, the rate of obesity among children tripled while the rate among adults doubled.[19] As state and local governments push for cuts to physical education and sports programs in public schools, fewer opportunities for children to exercise will likely exacerbate the rising prevalence of childhood obesity.[20] Studies indicate that a lack of exercise contributes to other negative social and individual consequences, such as poor school performance and low self-esteem.[21] Due to cuts to exercise programs in public schools, children from low-income families, who are already

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[14] *Id.* at 828–29.
[15] *Id.* at 829–30.
[16] U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S VISION FOR A HEALTHY AND FIT NATION 2010 (2010), *available at* http://www.surgeongeneral.gov/library/obesityvision/obesityvision2010.pdf [hereinafter VISION FOR A HEALTHY AND FIT NATION].
[17] *See* James A. White, *Fat Chance: Obesity Rate Isn't Dropping, But It Isn't Climbing*, WALL ST. J. HEALTH BLOG (Jan. 13, 2010, 5:45 PM), http://blogs.wsj.com/health/2010/01/13/fat-chance-obesity-rate-isnt-dropping-but-it-isnt-climbing/; *see also* Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults, 1999–2008*, 303 JAMA 235 (2010), *available at* http://jama.ama-assn.org/content/303/3/235.full.pdf+html; Cynthia L. Ogden et al., *Prevalence of High Body Mass Index in US Children and Adolescents, 2007–2008*, 303 JAMA 242 (2010), *available at* http://jama.ama-assn.org/content/303/3/242.full.pdf+html.
[18] Flegal et al., *supra* note 17, at 235.
[19] CTRS. FOR DISEASE CONTROL & PREVENTION, OBESITY: HALTING THE EPIDEMIC BY MAKING HEALTH EASIER 2 (2011), *available at* http://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Obesity_AAG_WEB_508.pdf.
[20] *See* Laura Sutphin, *Budget Cuts May Add to Childhood Obesity Epidemic*, INSIGHT MAG., http://insighteastorlando.com/index.php/community/budget-cuts-may-add-to-childhood-obesity-epidemic (last visited Oct. 1, 2011).
[21] *See Healthy Youth!: Student Health and Academic Achievement*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/HealthyYouth/health_and_academics/#2 (last updated Oct. 19, 2010); CTRS. FOR DISEASE CONTROL & PREVENTION, THE ASSOCIATION BETWEEN SCHOOL-BASED PHYSICAL ACTIVITY, INCLUDING PHYSICAL EDUCATION, AND ACADEMIC PERFORMANCE (2010), *available at* http://www.cdc.gov/HealthyYouth/health_and_academics/pdf/pa-pe_paper.pdf.

more likely to be obese, represent the most significant contributors to the obesity epidemic in the United States.

The results of the breakdown by race and geographic location indicate that certain minorities experience greater prevalences of obesity:

> Blacks had 51 percent higher prevalence of obesity, and Hispanics had 21 percent higher obesity prevalence compared with whites.
>
> Greater prevalences of obesity for blacks and whites were found in the South and Midwest than in the West and Northeast. Hispanics in the Northeast had lower obesity prevalence than Hispanics in the Midwest, South or West.[22]

In addition, lower income populations, and especially children from low-income families, suffer from the highest rates of obesity.[23] Although the media often focus broadly on obesity as a nationwide epidemic,[24] minorities and lower income individuals disproportionately contribute to the prevalence of obesity, and the causes of this trend merit a closer analysis before this disparity can be resolved.

Obesity results from energy imbalances caused by eating too much and exercising too little, though many other factors also contribute to the onset of obesity, including lifestyle choices, social environment, illness, and heredity.[25] "Lifestyle" factors that contribute to obesity reflect trends that surface across the United States more broadly, including the tendency to eat out frequently and increased use of transportation in place of walking.[26] Certain "social" factors, however, indicate a link connecting poverty and lower education with increased levels of obesity.[27] This connection results from higher costs of healthy foods as well as decreased access to safe recreational areas and prohibitive costs of gym memberships, which limit opportunities for physical activity for lower income individuals.[28] In addition to the alarming differences stratified by race and class, and magnified by rising childhood obesity rates, recent research indicates that obesity levels are increasing even among higher income groups[29] and that low levels of

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[22] *Obesity by Race/Ethnicity 2006–2008*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/trends.html#Race (last updated July 21, 2011).
[23] *Obesity Prevalence Among Low-Income, Preschool-Aged Children 1998–2008*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/childhood/lowincome.html#1998 (last updated Apr. 21, 2011).
[24] *See, e.g.*, Manav Tanneeru, *Obesity: A Looming National Threat?*, CNN (Mar. 24, 2006), http://articles.cnn.com/2006-03-24/health/hb.obesity.epidemic_1_obesity-three-american-adults-body-mass-index?_s=PM:HEALTH.
[25] U.S. DEP'T OF HEALTH & HUMAN SERVS., UNDERSTANDING ADULT OBESITY, WEIGHT-CONTROL INFORMATION NETWORK 3 (2008), *available at* http://win.niddk.nih.gov/publications/PDFs/understandingobesityrev.pdf [hereinafter UNDERSTANDING ADULT OBESITY].
[26] *Id.* at 3–4.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 4.

physical activity uniformly plague U.S. lifestyles—less than fifty percent of Americans attain the currently recommended sixty minutes per day of physical activity.[30]

B. *Government Incentives to Counteract Obesity*

Debates among politicians and scholars generally unfold across two theoretical views used to identify the causes of obesity: the "personal responsibility" and the "public health" perspectives.[31] Adherents to the personal responsibility view would ask whether the government should intervene in the first place, given that obesity is largely a result of personal choices.[32] There is clearly more to the problem than diet and exercise alone, such as heredity and physical and emotional problems, and even diet and exercise choices can be limited by less controllable factors, such as socioeconomic status.[33] A personal responsibility theorist would argue, therefore, that even if government intervention is desirable, it would be too difficult to distribute benefits or impose costs fairly.

The central argument from the "public health" perspective in favor of government intervention to counteract obesity is that governments were created in part to protect the health and welfare of their citizens.[34] This holds just as true in the United States, where the Preamble to the Constitution lays out one of the core justifications for the republican form of government established by the Founders: "to promote the general welfare" of its citizens.[35] In fact, a recent public opinion survey found that "[a]n overwhelming 81 percent of Americans believe that the government should have some role in addressing the issue" of obesity in the United States.[36]

Policies that promote government intervention nevertheless have their critics, who argue that, in a matter unavoidably laden with personal choice, such as food consumption, government intervention could be viewed as overly paternalistic.[37] But critics of government involvement as paternalistic often couch their arguments on

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[30] Barbara von Tigerstrom et al., *Using the Tax System to Promote Physical Activity: Critical Analysis of Canadian Initiatives*, AM. J. PUB. HEALTH ASS'N, Aug. 2011, at e10 (noting that "just 42% of children (aged 6–11 years), 8% of adolescents (aged 12–19 years), and 49% of adults" get the currently recommend daily amount of physical exercise).

[31] *See* Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L. 839, 848 (2005) (discussing in greater detail these theories of the cause of obesity).

[32] *See* UNDERSTANDING ADULT OBESITY, *supra* note 25, at 3, (noting that personal choices in diet and exercise habits serve as the primary cause of this disorder; indeed, an analogy to cigarette smoking, an area in which the U.S. and state governments have long intervened, has been largely distinguished because chemical additives in cigarettes that lead to addiction break the personal-choice connection); Eloisa C. Rodriguez-Dod, *It's Not a Small World After All: Regulating Obesity Globally*, 79 MISS. L.J. 697, 720–23 (2010). *See generally* John Alan Cohan, *Obesity, Public Policy, and Tort Claims Against Fast-Food Companies*, 12 WIDENER L.J. 103, 110–14 (2003) (going one step further however, litigants in court have argued that both chemicals in certain foods as well as marketing campaigns can have the same addictive effects, breaking the personal choice chain).

[33] *See supra* notes 25–28 and accompanying text.

[34] *See* Rodriguez-Dod, *supra* note 32, at 720–23.

[35] U.S. CONST. pmbl.

[36] AL QUINLAN & MISSY EGELSKY, GREENBERG QUINLAN ROSNER RESEARCH, TACKLING THE OBESITY EPIDEMIC 1 (2007), *available at* http://www.greenbergresearch.com/articles/2078/3874_Tackling%20the%20Obesity%20Epidemic.pdf.

[37] Rodriguez-Dod, *supra* note 32, at 720–23.

assumptions that overlook the importance non-choice factors, such as heredity and medical conditions, that contribute to obesity. For example, a member of the Stamford Board of Representatives in Connecticut, opposing a measure that would ban trans fats, stated that the "Government has to stay out of our lives . . . . It's about choice. If people are stupid enough to fill their diet with trans fats, they're just stupid."[38] Philosophical differences regarding the appropriateness of government intervention in the first place aside, the remainder of this subpart proceeds to canvass numerous incentives already employed to counteract obesity in the United States.

A battle against obesity can take many forms—legal and non-legal, public and private. The Centers for Disease Control (CDC) has recently posted a list of measures that can be employed by the national government, states, communities, and individuals[39] to counteract the "national epidemic" of obesity in the United States.[40] Thus far at the federal level, efforts by the Executive Branch have been mostly education-based.[41] Courts have provided another avenue for reform, largely as a result of public health movements aimed at holding fast food companies accountable for the rising prevalence of obesity.[42]

Legislative concern for obesity is not a recent trend—as early as 1991, Congress considered anti-obesity legislation to counteract rising obesity rates.[43] Legislation has also taken root in many states with individualized attempts to combat the problem.[44] Legislative efforts to indirectly improve obesity rates can take various forms, from mandatory labeling requirements to zoning limitations and tax policies.[45]

In general, legislative efforts at the state level have been met with mixed success, and while the approaches employed largely vary to address particularized needs, from incentives based on tighter labeling restrictions to varied tax policies, the CDC recently found that many states are far behind others in instituting effective reforms, indicating

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[38] *See* Stacey Stowe, *Another Blow Against Trans Fats in Foods*, N.Y. TIMES, Feb. 22, 2009, at NJ3.
[39] *See CDC Vital Signs: What Can Be Done?*, CTRS. FOR DISEASE CONTROL & PREVENTION , http://www.cdc.gov/VitalSigns/AdultObesity/WhatCanBeDone.html (last updated Aug. 3, 2010).
[40] *CDC Vital Signs: Adult Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/VitalSigns/AdultObesity/LatestFindings.html (last updated Aug. 3, 2010). Despite the numerous scientific findings supporting the widespread problem of obesity in the United States, some scholars take issue with the extent of the problem, stating that it is highly exaggerated. *See, e.g.*, PAUL CAMPOS, THE DIET MYTH: WHY AMERICA'S OBSESSION WITH WEIGHT IS HAZARDOUS TO YOUR HEALTH (2005); J. ERIC OLIVER, FAT POLITICS: THE REAL STORY BEHIND AMERICA'S OBESITY EPIDEMIC (2006). Nevertheless, obesity rates are climbing, and though the extent of the problem has been subject to convincing dispute, the U.S. government has taken notice and identified as a high priority the abatement of this problem. *See* CALL TO ACTION, *supra* note 5; VISION FOR A HEALTHY AND FIT NATION, *supra* note 16.
[41] *See* Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112 PENN ST. L. REV. 529, 530–51 (2007).
[42] *See, e.g.*, Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 543 (S.D.N.Y. 2003).
[43] *See* H.R. 82, 102d Cong. (1991) (proposing the establishment of the "United States Commission on Obesity" and finding that "[t]he number of individuals suffering from obesity is growing, threatening those who suffer from obesity with physical disabilities").
[44] *See* Benjamin Montgomery, Note, *The American Obesity Epidemic: Why the U.S. Government Must Attack the Critical Problems of Overweight and Obesity Through Legislation*, 4 J. HEALTH & BIOMED. L. 375, 375 n.3 (2008) (providing examples of state legislative measures to counteract obesity).
[45] *See* Winstanley, *supra* note 6, at 1154–55.

that more comprehensive reform is needed.[46] At the federal level, initiatives such as Michelle Obama's "Let's Move" campaign and recent legislation such as the Affordable Care Act and the Hunger-Free Kids Act of 2010 provide a promising outlook,[47] but more comprehensive efforts at the national level are needed to counteract the growing obesity epidemic in the United States. The following subpart outlines the benefits of federal tax systems in encouraging desired behavior to set the stage for tax credits that incentivize fitness as a largely unexplored but highly preferable method to counteract the problem on a national scale.

C. Tax Policy and a Fitness Focus

The federal tax system in the United States serves to advance many public policy goals besides its main function as a source for the collection of revenues.[48] The public policy shaping function of the federal tax system dates back to the founding period, when taxes were viewed as a "means for shaping the national economy, bringing foreign nations to fair commercial terms, regulating morals, and realizing . . . social reforms."[49] Flexibility is thus a principal quality of the federal tax system—it is designed to adapt to both the revenue and policy needs of a changing society. Today the United States faces the largest obesity rates in history, resulting in burdensome costs on the government and individuals, and the problem is growing without measurable end. Now is the time to institute broad-based federal reform, and federal tax policies can be harnessed to effectively meet these challenges.

The Internal Revenue Code already plays an instrumental role in public health. Employer contributions for medical insurance premiums and healthcare costs are excludable,[50] and individual taxpayers can take deductions for medical expenses.[51] The tax code has also been used in numerous forms to more directly proscribe unhealthy behavior, often through the imposition of a "sin tax," which is a form of an excise tax imposed on a perceived harmful good or activity.[52]

As early as the close of the Revolutionary War, a federal excise tax (or "sin tax") on whiskey was imposed to attempt to pay down war debts.[53] In part, the tax was fueled by concerns with the health of U.S. citizens. In support of the tax, Alexander Hamilton stated that "the consumption of ardent spirits . . . is carried on to an extreme, which is truly to be regretted, as will in regard to the health and the morals, as to the economy of

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[46] *See* F AS IN FAT, *supra* note 8, at 45 (citing *Children's Food Environment State Indicator Report 2011*, CTRS. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/obesity/downloads/ChildrensFoodEnvironment.pdf).
[47] *See id.* at 71–74 (highlighting recent federal initiatives designed to reduce obesity).
[48] *See* Mona L. Hymel, *Consumerism, Advertising, and the Role of Tax Policy*, 20 VA. TAX REV. 347, 354–55 (2000).
[49] *Id.* at 362 (quoting SIDNEY RATNER, TAXATION AND DEMOCRACY IN AMERICA 18 (1980)).
[50] I.R.C. §§ 105, 106 (2006).
[51] *Id.* § 213(a).
[52] BLACK'S LAW DICTIONARY 1597 (9th ed. 2009) (defining a "sin tax" as "[a] tax imposed on goods or activities that are considered harmful or immoral (such as cigarettes, liquor, or gambling)").
[53] Brenda Yelvington, *Excise Taxes in Historical Perspective*, *in* TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION 31, 32–33 (William F. Shughart, II ed., 1997).

the community."[54] Today debates over the propriety of sin taxes continue among scholars and politicians as new studies analyze the social and public health effects of harmful goods such as alcohol, tobacco, and unhealthy food.[55]

A tax on unhealthy foods—a "fat tax"—can be viewed as a form of a "sin tax." Early fat taxes, sometimes called "junk food" taxes, were mainly imposed on foods such as candy and chips, but also on soft drinks, and served primarily as revenue-raising measures, predating broad-based health concerns about the consumption of unhealthy foods.[56] Fat taxes have been imposed in numerous forms since the 1920s among states and localities, usually based on a percentage of sales from junk foods or soda, but Congress has yet to adopt a national fat tax.[57] Moreover, these taxes were often repealed in response to pressure from the food and beverage industry, despite their effectiveness in raising revenue or curbing the consumption of unhealthy food.[58] Many scholars have debated the propriety of local or federal fax taxes, and most concerns center on the arbitrariness of the taxes and the regressive nature of its harsher effects on lower income populations, who already have trouble affording more expensive and healthier foods.[59] Soda taxes have recently received the most public attention, and thirty-four states currently impose sales taxes on soda, though few studies have found a strong connection between these taxes and weight loss.[60] Likely supported with this evidence of uncertainty, Congress rejected a proposal for a national soda tax during the 2009–2010 health care debate as a result of lobbying campaigns led in part by an industry-funded group, the Americans Against Food Taxes.[61]

Although attacking overweight and obesity clearly involves a dual approach (through diet and exercise), encouraging more fitness is a problem that requires added attention.[62] Diet is certainly still a problem, but widespread awareness of the benefits of better eating habits is increasingly brought to the attention of households in the United States. Advertising and labeling contain ubiquitous references to healthier food options, and healthier options are becoming more readily available—even in fast food.[63] Other national chain restaurants that are now required to post nutritional facts on their menus[64]

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[54] *Id.* at 33 (internal quotation marks omitted) (quoting THE REPORTS OF ALEXANDER HAMILTON 34 (Jacob E. Cooke ed., 1964)).
[55] *See id.* at 451–60 (discussing the ongoing debate over paternalism in tax policy); Winstanley, *supra* note 6, at 1170.
[56] *See* Winstanley, *supra* note 6, at 1171–72.
[57] *See id.* at 1156.
[58] *See id.*
[59] *See* Sayward Byrd, Comment, *Civil Rights and the "Twinkie Tax": The 900-Pound Gorilla in the War on Obesity*, 65 LA. L. REV. 303 (2004).
[60] F AS IN FAT, *supra* note 8, at 58.
[61] *Id.*
[62] *See* DEP'T OF HEALTH & HUMAN SERVS., PHYSICAL ACTIVITY AND HEALTH: A REPORT OF THE SURGEON GENERAL 5 (1996), *available at* http://www.cdc.gov/nccdphp/sgr/pdf/sgrfull.pdf (noting that it is generally accepted that physically active individuals are much more likely to have better health outcomes than non-active individuals).
[63] *See, e.g.*, *Healthy Choices and Nutritious Options for Healthy Living*, WENDY'S, http://www.wendys.com/food/nutritious-options.jsp (last visited Oct. 1, 2011) (offering a menu of "nutritious side options," including a garden salad, Caesar salad, and apple slices).
[64] Stephanie Rosenbloom, *Calorie Data to Be Posted at Most Chains*, N.Y. TIMES (Mar. 23, 2010), http://www.nytimes.com/2010/03/24/business/24menu.html.

generally make it difficult for consumers to ignore indications of caloric content when they go out to eat.[65]

Fitness has also received added commercialized attention as a result of changes in modern tastes (for example, the overwhelming popularity of television shows that emphasize healthier exercise habits, such as *The Biggest Loser* and *Heavy*) and through private and government marketing campaigns (such as Michelle Obama's "Let's Move" campaign), but as technology advances, the desire for physical activity dwindles. Modern fast-paced lifestyles in the United States have contributed to a less-routine emphasis on good exercise habits, often limiting the opportunities for many career-oriented individuals to engage in physical activity. Commensurate with the rapid development of technology, children and adolescents spend less time engaging in physical activity,[66] especially when compared with decreases in physical activity among adults.[67] This poses a grave threat to the future of the obesity problem in the United States because children spend less time engaging in physical activity and more time engaging in sedentary activities in front of a computer or television.[68]

A focus on fitness, rather than diet, is a better means of addressing the problems of overweight and obesity through government intervention because the choice to exercise is voluntary. Everyone has to eat, but everyone does not have to jog or join a gym. Accordingly, limited government involvement to the extent of encouraging fitness is not nearly as intrusive as regulations on labeling and food processing or proposed taxes on foods deemed unhealthy, which seek to encourage healthier eating habits at the expense of imposing heavily on personal choice. The use of tax incentives to attempt to control food consumption directly affects the choices individuals must make every day and thus provides the opportunity for individuals to more clearly perceive the impacts of government "paternalism."

Fitness-based tax incentives, while still "paternalistic" because they involve an attempt to influence behavior, can be calibrated to be less paternalistic than food-based alternatives. This can be achieved by offering more opportunities for individual choice, such as by providing a fitness incentive in the form of a tax benefit that provides numerous opportunities for different forms of exercise to trigger the benefit (which an individual can even choose to forgo), as opposed to an unavoidable tax cost on the consumption of certain foods.[69] Moreover, fitness-based incentives will *seem* less paternalistic and unpalatable to the general public because everyone must eat to survive,

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[65] *See* Kristin Kiesel et al., *Nutritional Labeling and Consumer Choices*, 3 ANN. REV. RESOURCE ECON. 141 (2011) (discussing further the impact of food labeling on consumer choices).

[66] *See* Andrea Cespedes, *Obesity in Children and Technology*, LIVESTRONG.COM, http://www.livestrong.com/article/46320-obesity-children-technology/ (last updated Apr. 26, 2011); *What Causes Overweight and Obesity?*, NAT'L HEART LUNG & BLOOD INSTIT., http://www.nhlbi.nih.gov/health/dci/Diseases/obe/obe_causes.html (last visited Oct. 1, 2011).

[67] *See* von Tigerstrom et al., *supra* note 30, at e10.

[68] *See id.* In fact, the average American spends approximately two hours and forty-nine minutes a day watching television. Justin Lahart & Emmeline Zhao, *What Would You Do with an Extra Hour? Americans Are Spending More Time Watching TV and Sleeping as Unemployment Rises, Survey Finds*, WALL ST. J. (June 23, 2010), http://online.wsj.com/article/SB10001424052748704853404575323142078418532.html.

[69] *Cf.* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161 (2003) (defining paternalism as an attempt "to influence the choices of affected parties in a way that will make choosers better off").

but everyone does not have to exercise, at least not nearly as often as they need to eat, to survive.

These insights track with Sunstein and Thaler's concept of "libertarian paternalism," which offers a defense of paternalism as an inevitable consequence of governmental involvement and champions greater preservation of choice as a desirable feature of paternalistic policies.[70] Incentives based on fitness are also a more politically viable option because their seemingly less paternalistic alternatives can mitigate the concerns raised by those who embrace the "personal responsibility" perspective and call for limited government involvement.[71] In addition, a system of incentives or rewards, rather than penalties, is more effective in encouraging desired behavior.[72] Therefore, a fitness-based tax incentive tailored to reward desired activity, such as a fitness tax credit, is more palatable and less paternalistic than an increased tax on unhealthy foods and can also prove more effective in encouraging behavior that reduces obesity.

II. TAX INCENTIVES FOR FITNESS IN CANADA

The following Part outlines fitness tax credit models employed in Canada to set the stage for an analysis of fitness tax credits in the United States, highlighting critiques of the program as well as its successes to date.

A. Obesity in Canada

Canadian obesity rates are among the highest in the world, ranking fourth among developed nations and just behind the United States, which holds the leading spot.[73] About 62% of adults are overweight or obese in Canada; [74] in the United States, the rate is 68%.[75] As in the United States, obesity rates in Canada are rising—between 1981 and 2009, the obesity rate roughly doubled among adults.[76] Though estimates of combined overweight and obesity rates for Canadian children are unavailable, about 8% of children are obese, and rates among children are rising even faster than among adults—the prevalence of obesity among children in Canada was 2.5 times higher in 2004 than in 1979.[77] The costs to the Canadian economy attributed to obesity are staggering, representing $4.6 billion in 2008, up 19% from $3.9 billion in 2000.[78] In the United

[70] *Id.* at 1174, 1185–86.
[71] *See supra* notes 31–33 and accompanying text.
[72] When a positive attitude is linked to one's change in behavior, the probability that the desired behavior will become a social norm increases. Positive attitudes are more likely to follow an incentive/reward approach than a disincentive/penalty intervention because the former approach is more likely to be perceived as 'voluntary' and no threat to individual freedom. In fact, perceiving a threat to one's freedom can lead to behavior contrary to compliance with a mandate.
ROBERT B. BECHTEL & ARZA CHURCHMAN, HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY 531 (2002) (citations omitted).
[73] CANADIAN INSTIT. FOR HEALTH INFO., OBESITY IN CANADA 9 (2011), *available at* http://secure.cihi.ca/cihiweb/products/Obesity_in_canada_2011_en.pdf [hereinafter OBESITY IN CANADA].
[74] *Id.* at 4.
[75] *See supra* note 8 and accompanying text.
[76] OBESITY IN CANADA, *supra* note 73, at 5.
[77] *Id.* at 11.
[78] *Id.* at 2.

States, costs attributed to obesity were estimated at $147 billion in the same year.[79] Low levels of physical activity, especially among Canada's youth, represent a significant contribution to the problem.[80] In addition, obesity is more prevalent among aboriginal people and individuals of lower socioeconomic status,[81] similar to the difference in rates of obesity among lower income groups and minorities in the United States.

In sum, rates of overweight and obesity, and even the differences stratified by age, ethnicity, and socioeconomic status, are similar among Canadians and Americans. These similarities lend support to an inference that the obesity problems faced by both countries are ripe for a comparison of efforts to counteract the problems. Tellingly, the overall prevalence of obesity among Americans is still higher than in Canada, suggesting that the United States is in more dire need of improvement.

B. Fitness Tax Credit Models

In response to concerns over growing obesity rates in Canada,[82] the Parliament of Canada recently created a national tax incentive for greater fitness through the Children's Fitness Tax Credit (CFTC).[83] Started in 2007, the CFTC permits parents to reduce their tax liabilities with a nonrefundable, annual tax credit for expenses paid to register each child under sixteen (and eighteen years or younger for children eligible for a disability tax credit) in an eligible program of physical activity.[84] Regulations allow the credit for the cost of registration or membership (but not equipment or other costs) of a child in an eligible program of physical activity that must be ongoing and must include a significant amount of physical activity.[85] In its first year, approximately 1.3 million taxpayers (5.2% of eligible Canadian taxpayers) claimed the credit, and in 2008 this number increased to approximately 1.5 million (5.9%).[86]

The creditable amount, which reduces taxes owed on a dollar-for-dollar basis, is calculated by multiplying actual expenses incurred, up to a maximum of $500, by the lowest personal income tax rate. In 2010, the lowest Canadian tax rate was 15%, so the maximum CFTC (assuming expenses of at least $500) was $75 per eligible child. At these rates, the CFTC results in a total estimated annual cost of approximately $90 to $115 million in lost Canadian tax revenues.[87]

Although the benefits of this tax credit will take years to fully analyze, one Canadian study on the effectiveness of the CFTC in encouraging more physical activity

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[79] *See supra* notes 12–13 and accompanying text.
[80] OBESITY IN CANADA, *supra* note 73, at 17.
[81] *Id.* at 15, 20–21.
[82] K. KELLIE LEITCH ET AL., REPORT OF THE EXPERT PANEL FOR THE CHILDREN'S FITNESS TAX CREDIT 6–7 (2006), *available at* http://www.fin.gc.ca/activty/pubs/ctc_e.pdf ("Canada has one of the highest obesity rates in the developed world; it ranked fifth in a survey of thirty-four nations for childhood obesity. . . . Obesity costs Canada about $1.6 billion a year in direct health care costs, which represents about 2.4% of Canada's total heath care expenses." (citation omitted)).
[83] Income Tax Act, R.S.C. 1985, c. 1, § 118.03 (Can.).
[84] *Id.*; *see also Children's Fitness Tax Credit*, CAN. REVENUE AGENCY, http://www.cra-arc.gc.ca/whtsnw/fitness-eng.html (last modified Feb. 26, 2008).
[85] Statutes of Canada 2007, B. C-28, 2007, c.35, § 9400.
[86] von Tigerstrom et al., *supra* note 30, at e11.
[87] *Id.* at e12.

focused on the effects on children in lower income classes.[88] The study found that lower income families were less likely to be aware of and less likely to claim the credit.[89] However, the study also found that rates of participation in programs of physical activity were higher as a result of the CFTC among children of low-income families, suggesting that the credit "appears to be most effective for increasing [physical activity] among such children" and concluding that the CFTC "can be an effective policy instrument for encouraging [physical activity] among children."[90]

Local provinces in Canada have followed suit with their own fitness-based tax incentives. In Saskatchewan and Ontario, for example, refundable credits are available (allowing individuals to receive a refund even if they do not owe any income tax), and Saskatchewan in particular allows individuals to claim a credit for the full amount of fees paid up to $150 per eligible child, rather than a percentage.[91]

A strong movement in favor of expanding the CFTC to adults has led to a proposed Adult Fitness Tax Credit (AFTC) in Canada.[92] The proposal for the AFTC in Canada was supported by a study that shows that the lost revenue in taxes would be made up in just three years with lower healthcare costs.[93] Moreover, the study predicts that the AFTC would reduce the amount of work missed due to illnesses related to lack of physical fitness, which would then increase the amount of personal income taxes collected later on.[94]

III. A FITNESS TAX CREDIT PROPOSAL FOR THE UNITED STATES

The following Part presents this Article's proposed fitness tax credit—the ASTC, which can be adopted by local legislatures or Congress to encourage more active lifestyles—in greater detail, and then analyzes the costs and benefits of the proposed credit while weighing possible alternatives to encourage greater fitness.

A. Americans in Shape Tax Credit

Based on the CFTC adopted in Canada, the United States Congress should strongly consider a similar but broader ASTC. The operation of the ASTC could be very similar, if not almost identical, to the structure of the CFTC. With the goal of reducing the prevalence of childhood obesity in particular in mind, an ASTC targeted to children could exactly mirror the CFTC. Ideally, however, a broader tax credit should be made available to anyone—adults or children. This would counteract the problem of increasing obesity rates on a much wider scale and further encourage families to engage in fitness activities together, a goal that could be coupled with Michelle Obama's "Let's Move" campaign to

[88] JOHN C. SPENCE ET AL., BMC PUBLIC HEALTH, UPTAKE AND EFFECTIVENESS OF THE CHILDREN'S FITNESS TAX CREDIT IN CANADA: THE RICH GET RICHER (2010), *available at* http://www.biomedcentral.com/content/pdf/1471-2458-10-356.pdf.
[89] *Id.* at 5.
[90] *Id.* at 4.
[91] von Tigerstrom et al., *supra* note 30, at e12.
[92] ADULTFITNESSTAXCREDIT.CA, http://www.adultfitnesstaxcredit.ca/index.asp (last visited Apr. 13, 2012).
[93] CTR. FOR SPATIAL ECON., ECONOMIC BENEFITS OF AN ADULT FITNESS TAX CREDIT 1 (2007), *available at* http://www.adultfitnesstaxcredit.ca/launch/Economic%20Benefits%20of%20an%20AFTC(Eng).pdf.
[94] *Id.* at 1–2.

gain significant popular appeal and avoid the lack of effective marketing that likely contributed to low rates of awareness among lower income Canadians.

In operation, the ASTC could provide a credit tied to a maximum of $1000 in expenses for a taxpayer, the taxpayer's spouse, and each of the taxpayer's dependents.[95] Borrowing from the Canadian example, a U.S. counterpart could effectively limit the creditable amount to the actual expenses (up to $1000) multiplied instead by a uniform rate of 35% for every eligible individual, rather than the minimum tax rate applicable to an individual, as is used for the calculation of the CFTC. The 35% rate used to calculate the creditable amount would apply to every individual regardless of the individual's tax bracket.[96] At a tax rate of 35%, this would provide a maximum credit of $350 per eligible individual. The ideal ASTC, however, should instead provide a refundable credit for a full amount of fees incurred up to $500, rather than being tied to an applicable tax rate percentage limitation. This refundable credit, similar to the credit offered in Saskatchewan,[97] would be of greater benefit to low-income taxpayers who would otherwise be unable to pay upfront membership fees or sports equipment costs. Finally, the ideal ASTC should cover more costs and activities, and appeal to a greater audience than the CFTC by applying to "non-organized" activities, including gym memberships, exercise classes, and personal sporting equipment purchases.

B. Costs, Benefits, and Alternatives

Although incentives for widespread fitness would likely lower healthcare costs, this justification for short-term revenue loss is more relevant in Canada, where the government provides a publicly funded healthcare system and would, therefore, benefit directly from the resulting healthcare savings.[98] However, as previously stated, the benefits of greater physical health result in direct and indirect cost savings. To support a proposed equivalent to the AFTC in the United States, it would be important to focus on the long-term effects of indirect cost savings, which would offset the lost revenue from providing this type of credit to U.S. taxpayers.

The indirect effect of prolonging life and increasing the productivity of U.S. workers would be much higher taxable income over the long term, and this trade-off would ideally make up for the lost revenue from this added credit. The problem with relying on these indirect costs, however, is that they may take longer to materialize into actual increases in taxable income, whereas the Canadian government more immediately saves money on its healthcare outlays. Even so, estimates of the high immediate costs of obesity on Medicaid and Medicare, along with studies indicating that increased exercise

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[95] The CFTC currently provides a maximum credit of $500, but legislators in Canada have indicated that they intend to push for an increase to $1000 per eligible child. *See* Meagan Fitzpatrick, *A Fitness Tax Credit with a Catch or Two, No Pun Intended*, CBC NEWS (Apr. 4, 2011, 5:07 PM), http://www.cbc.ca/news/politics/canadavotes2011/realitycheck/2011/04/a-fitness-tax-credit-with-a-catch-or-two-no-pun-intended.html.

[96] A rate of 35% applied to every eligible individual would prevent disparities in creditable amounts tied to eligible taxpayers' tax rates, providing a simpler and more equitable alternative to the creditable amount offered through the CFTC in Canada.

[97] *See supra* note 91 and accompanying text.

[98] *See Public Service Benefit Plans—Overview*, TREASURY BOARD OF CAN., http://www.tbs-sct.gc.ca/hr-rh/bp-rasp/benefits-avantages/overview-apercu-eng.asp (last modified Aug. 25, 2010).

has immediate beneficial effects on health,[99] indicate that short-term significant revenue gains could very likely result from the adoption of this program in the United States.

The ASTC might be considered a progressive tax policy simply because more dependents may be claimed on the tax returns of lower income individuals. On the other hand, a concern with the CFTC is that it disproportionately benefits wealthier families because lower income families cannot afford the registration fees to begin with or do not qualify for the minimum income levels necessary for the nonrefundable credit to create a benefit.[100] The most effective way to address this is to instead allow the credit to be refundable, as proposed in the previous subpart. This would alleviate the problem of upfront affordability because it would allow filers with no amounts owed in taxes to benefit from the credit and would also result in an increased maximum benefit sufficient to cover the costs of more expensive exercise options.

An alternative to a tax credit could involve direct government spending programs to encourage and facilitate more physical fitness. First Lady Michelle Obama, through her "Let's Move" campaign, has outlined several suggestions to encourage communities to counteract obesity through healthier eating habits and more physical activity.[101] These efforts are mainly targeted to children and encourage them to engage in more exercise by providing enhanced opportunities for physical activity with safer sidewalks and greater opportunities to play outdoors.[102] Congress, or even state legislatures, could respond by providing direct outlays for community fitness centers. But without the widespread incentives that a tax benefit could provide, these guidelines will likely fail to create the same incentives that the CFTC has created in Canada for increased physical activity among children. Moreover, direct outlays for fitness centers do not ensure that more people will use them. Instead, a tax credit that aligns a tangible monetary benefit to the desired shift in exercise habits would provide a better solution.

Another alternative is to institute broader sales tax measures to promote greater levels of physical activity.[103] Sales tax measures could be framed in both positive and negative tax-incentive contexts: taxes could be raised on goods and services associated with sedentary behavior, or sales taxes could be lowered for certain goods and services associated with physical fitness. Raising taxes on goods and services related to sedentary behavior, such as home entertainment equipment, would be overinclusive, imposing unnecessarily higher costs on leisure activity and making this incentive largely unwelcome and almost utterly infeasible.[104] Tax breaks limited to goods or services

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[99] *How Fast Does Exercise Work to Improve Your Health?*, TESH.COM, http://www.tesh.com/ittrium/visit/A1x97x1y1xa5x1x76y1x2425x1x9by1x242ax1y5x1f88dx5x1 (last visited Feb. 12, 2012).

[100] *Canada's Fitness Tax Credit Aids Wealthy*, UPI.COM (Aug. 6, 2010, 10:02 PM), http://www.upi.com/Health_News/2010/08/06/Canadas-fitness-tax-credit-aids-wealthy/UPI-82771281146534/.

[101] *See Let's Move Cities & Towns*, LET'S MOVE, http://www.letsmove.gov/officials-step-1.php (last visited Feb. 12, 2012).

[102] *See Active Communities*, LET'S MOVE, http://www.letsmove.gov/activecommunities.php (last visited Feb. 12, 2012).

[103] Sales tax-based measures to encourage greater fitness have been instituted at local government levels with limited success in Canada. *See* Retail Sales Tax Act, R.S.O. 1990 R-31 (Can.).

[104] *See* Michael Pratt et al., *Economic Interventions to Promote Physical Activity: Application of the SLOTH Model*, 27 AM. J. PREVENTIVE MED. 136, 142 (2004) (proposing "economic intervention" strategies

associated with physical activity, such as certain sporting equipment,[105] gym memberships, or recreational programs, on the other hand, could provide a more controllable measure to encourage better exercise habits in the United States. However, these tax breaks would fall short of providing income-level adjustments to prevent lower income taxpayers from receiving fewer benefits.

Possibly the weightiest matter that needs to be addressed in considering this proposal is whether the ASTC should be enacted at local levels, or instead on a national scale through a change to the Internal Revenue Code. Due to the evidence that shows that certain states have much higher rates of overweight and obese residents,[106] and because prior health reform efforts have focused on encouraging greater levels of fitness state-by-state,[107] this tax incentive could feasibly be reserved to states as a testing ground for this proposal or similar alternatives. In fact, efforts to impose "fat taxes" on unhealthy foods and ingredients have been tested by a majority of states, further demonstrating that state legislatures could be the proper platform to test alternative tax incentive proposals for exercise.[108]

At least in the beginning stages, passing fitness tax incentives will be easiest at the state or local level as the experience with localized attempts to institute "fat taxes" have confirmed. However, because the ASTC is an incentive, rather than a penalty (like the proposed "fat tax"), and because the goal of healthier Americans transcends state borders and geographic boundaries, the ASTC will provide the greatest benefits at the national level in the form of a change to the Internal Revenue Code. Instituting the ASTC or a fitness tax credit equivalent at the national level could lead to concerns that states with healthier populations would then be subsidizing states with higher prevalences of obesity, but this concern could be mitigated by testing these programs at local and state levels. As support for fitness tax credits builds, such credits could gain enough momentum to make their way into the Internal Revenue Code following localized success and continued evidence of a rising nationwide obesity epidemic.

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that can effectively reduce the widespread problem of physical inactivity in the United States and identifying advances in household technologies, including home entertainment, as a factor in lowered physical activity rates).

[105] Tax breaks on sporting equipment still present the risk of being overinclusive and would need to be applied more narrowly than to equipment mainly used by individuals for purposes other than exercise. Tennis shoes and bicycles, for example, may be overinclusive in this sense because too often these are purchased for non-exercise use and transportation. However, even these examples of sporting equipment can be narrowed for the purposes of a tax break through, for example, breaks only for racing bicycles or running shoes. Better examples of sporting equipment that could benefit from a tax break to encourage greater fitness, with less overinclusiveness, might include dumbbells, treadmills, or stationary bicycles, which are not as likely to be used for non-exercise purposes. *See id.* (suggesting an "income-based tax rebate for purchase of home exercise equipment or programs").

[106] *County-Specific Diabetes and Obesity Prevalence*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/trends.html#County (last updated Feb. 27, 2012).

[107] In 2000, the U.S. Department of Health and Human Services issued *Healthy People 2010* with the goal of encouraging each state to bring obesity rates down to 15%. *See Obesity Statistics*, OBESITY SOC'Y, http://www.obesity.org/resources-for/obesity-statistics.htm (last visited Feb. 5, 2012).

[108] *See* F AS IN FAT, *supra* note 8, at 58 (noting that "34 states and Washington, D.C. now impose sales taxes on soda"); Winstanley, *supra* note 6, at 1172–73.

C. Viability of the Fitness Tax Credit in the United States

Concerns with distributive fairness raised by this Article's tax credit proposal are most pronounced when one considers the Canadian equivalent of the proposed ASTC, which resulted in disproportionate benefits to wealthier taxpayers. Arguably, lower income taxpayers should benefit most from a tax incentive for greater physical fitness because healthy food is already much more expensive.[109] One would guess, from the basic structure of a CFTC equivalent applied to everyone (adults and children), that those who would benefit most would consist mainly of middle-income taxpayers. This localization of benefits likely would result because lower income taxpayers would have more trouble coming up with the registration fees in the first place and because the cap of $1000 likely will not significantly encourage wealthier individuals to participate in more sustained physical activities. Indeed, at higher income levels, it arguably subsidizes already prevalent behavior.

To counter these concerns, the ASTC could contain a phaseout similar to the Earned Income Tax Credit (EITC).[110] The ideal phaseout amount would start at a taxable income of $55,000, which is the amount where studies of the Canadian tax credit equivalent demonstrated that disparities in household income began to create disproportionate benefits for claimants of the CFTC.[111] However, this may violate the basic purpose of the tax, which is to encourage more individuals (ideally, everyone) to exercise more frequently—a goal that transcends socioeconomic or any other classification. The ultimate goal of this tax incentive is to decrease obesity among the entire population. However, as discussed earlier, certain ethnicities and lower income groups suffer from a much higher prevalence of obesity.[112] Therefore, a credit that is favorable to lower income taxpayers, who are more likely to be obese, may sufficiently address the problem and still result in distributive fairness.

Another point of contention will be the precise activities covered by the ASTC. The CFTC is intentionally broad in its acceptance of "prescribed program[s] of physical activity."[113] These include programs that last at least eight weeks and involve "physical activity that contributes to cardio-respiratory endurance, plus one or more of: muscular strength, muscular endurance, flexibility, or balance."[114] Interestingly, the Canadian counterpart to the proposed ASTC contains hints that even the CFTC was not immune to special interests: the Canadian tax regulations allow horseback riding to be included as a

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[109] Pablo Monsivais & Adam Drewnowski, *The Rising Cost of Low-Energy-Density Foods*, 107 J. AM. DIETETIC ASS'N 2071, 2071 (2007) ("The sharp price increase for the low-energy-density [healthier] foods suggests that economic factors may pose a barrier to the adoption of more healthful diets . . . .").
[110] *See* I.R.C. § 32 (2006).
[111] JOHN C. SPENCE ET AL., BMC PUB. HEALTH, UPTAKE AND EFFECTIVENESS OF THE CHILDREN'S FITNESS TAX CREDIT IN CANADA: THE RICH GET RICHER (2010), *available at* http://www.biomedcentral.com/content/pdf/1471-2458-10-356.pdf.
[112] *See supra* notes 22–24 and accompanying text.
[113] *Eligibility*, CAN. REVENUE AGENCY, http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/ddctns/lns360-390/365/lgblty-eng.html (last updated Jan. 5, 2011).
[114] *Information for Organizations Providing Prescribed Programs of Physical Activity*, CAN. REVENUE AGENCY, http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/ddctns/lns360-390/365/rgnztns-eng.html (last modified Mar. 15, 2011) [hereinafter *Information for Organizations*].

physical activity that qualifies for the CFTC.[115] The ASTC, if it is to be applied broadly to children and adults, will need to be tailored to address physical activities that both groups likely engage in. Therefore, the terms of the ASTC should elaborate on the types of programs that would merit the tax benefit.

To broaden the scope of activities covered by the CFTC in Canada, the ASTC should apply to gym memberships and sports leagues to encourage community-based and routine forms of exercise. But some adults exercise on their own or with groups of friends in cycling or running groups, for instance. To address this issue, the credit could be extended to cover costs incurred for organized races, such as 5Ks. Under the ASTC, an adult would be eligible for the credit if, for example, she entered into at least five organized races in the taxable year. This could solve the problem for individuals who do not attend a gym or participate in other organized sports. For those unable to engage in other forms of organized sports or official recreational activities (such as races), the credit can alternatively be extended to cover purchases of certain qualifying physical exercise equipment, such as bicycles. This allows the ASTC to resemble a sales tax measure while granting flexibility to individuals who do not participate in organized activities. Further, the nature of the benefit as provided in the form of a refundable credit still allows for an immediate benefit for low-income taxpayers. Although broadening the scope of activities covered by any proposed fitness tax credit raises concerns about possible abuse of available tax benefits, experimentation at local levels could counteract these concerns by providing testing grounds for new alternatives. The experiences in scope gathered from these localized fitness tax credit variations could also help to ensure that the activities and costs covered translate into lasting lifestyle changes, greater physical activity, and healthier individuals before a national approach is crafted based on models with proven success at local levels.

The demise of the proposed "fat taxes" rested largely on sustained opposition by special-interest lobbyists representing the foods and consumer goods that would inevitably be negatively affected by imposing these taxes.[116] This concern is certainly reasonable, given that higher taxes on foods will create ripple effects throughout the economy, raising food prices and disproportionately impacting lower income groups.[117] The ASTC, however, does not raise these concerns because fitness involves more voluntary choices than food consumption (mainly because individuals have the choice whether to exercise in the first place, but the same is not as true for food consumption), so government intervention does not pose the same threats to the economy as does a penalty in the form of a "fat tax." Whereas a fat tax would redistribute spending from unhealthy foods to healthy foods, the ASTC would actually generate increased spending without cannibalizing other industries. Moreover, it is more likely that special interest

[115] *Id.*

[116] *See* F AS IN FAT, *supra* note 8, at 58; Winstanley, *supra* note 6, at 1172–73; *About Us*, AMERICANS AGAINST FOOD TAXES, http://www.nofoodtaxes.com/about/ (last visited Feb. 7, 2012) (listing several large corporations as "coalition members," including Yum! Brands, Inc. and The Coca-Cola Company, and quoting various politicians' media statements in opposition to food taxes).

[117] Although lower income groups stand to benefit most from better diets—based on the evidence of the health disparity stratified by class—for very low-income groups, the costs of necessities would rise and create a negative effect. *See supra* notes 22–24 and accompanying text.

groups oriented toward fitness will strongly support this tax, providing the widespread appeal that could help to garner support for the proposal.

Another concern is how this would apply to ill or disabled individuals. The CFTC provides that certain activities for disabled children qualify for the CFTC.[118] A similar provision should be adopted as part of the ASTC to allow the credit for disabled or unhealthy individuals who engage in some prescribed forms of physical activity.

Ultimately, this proposal could be combined with the goals of Michelle Obama's "Let's Move" campaign to garner widespread appeal and support. Indeed, the CFTC has been publicized in Canada through a government-sponsored promotional plan that includes a website that encourages physical activity and healthy eating.[119] Because the "Let's Move" campaign is aimed at minimizing the growing and serious problem of obesity in America by providing incentives for families and communities to work together to promote healthier lifestyles, the ASTC is an ideal platform to further these goals. Those who already lead healthy lifestyles will have even greater incentive to maintain these lifestyles as they get older, when strong dedication to physical fitness tends to wane. Those who do not will have a neutral financial incentive to develop healthier habits. Although critics of the ASTC might equate this with the paternalistic and intrusive idea of a "fat tax," the operation of this incentive in the form of a credit largely avoids that concern.

The extent of the research concluded on the CFTC's effectiveness thus far has only analyzed theoretical limitations in its structure[120] as well as popular awareness and initial class-based dissemination of the benefit from the credit.[121] Therefore, greater empirical analysis will be necessary to more conclusively demonstrate that the long-term cost savings in health care will offset the immediate revenue losses from this tax incentive. Nonetheless, there are ways to limit the reach of the ASTC, such as by offering a phaseout.[122] A tax incentive sold with strong empirical support for increased life expectancy,[123] and with an emphasis on how this would translate into increased time working and earning taxable income, could drive widespread public support for the ASTC as an effective remedy to address the overwhelming need to encourage Americans to be healthier.

Proposing the ASTC in the current political environment, filled largely with poorly calculated, impulsive budgetary concerns, would be especially difficult both at the local and national levels, given that it would result in short-term revenue deficits. However, the longer term revenue gains from increased working days, the savings in Medicare and

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[118] *Information for Organizations*, *supra* note 114. The disability tax credit is granted for activities that "result in movement and in an observable use of energy in a recreational context." *Id.*

[119] *Government Response to the Seventh Report of the Standing Committee on Health*, PARLIAMENT OF CAN., http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3067091&Language=E&Mode=1 (last visited Oct. 1, 2011).

[120] *See* von Tigerstrom et al., *supra* note 30.

[121] SPENCE ET AL., *supra* note 111.

[122] *See supra* notes 110–11.

[123] *See* Duck-chul Lee, M*ortality Trends in the General Population: The Importance of Cardiorespiratory Fitness*, 24 J. PSYCHOPHARMACOLOGY 27, 33 (2010); *see also* Duck-chul Lee, *Long-Term Effects of Changes in Cardiorespiratory Fitness and Body Mass Index on All-Cause and Cardiovascular Disease Mortality in Men: The Aerobics Center Longitudinal Study*, 124 CIRCULATION 2483, 2487–89 (2011).

Medicaid costs, and the turnaround in rising obesity rates, should each be viewed as worthwhile benefits to this proposal. Even those concerned with increasing the current deficit could conceivably support a tax incentive in the form of a credit that would ultimately create sustainable revenue gains, especially given longer term projections of revenue neutrality. Admittedly, some might be opposed to the measure as a result of the credit's refundable nature, likely in a fashion similar to views of the EITC as "welfare" in the form of a tax benefit, due to its potential abuse and possible complexity in operation.[124] The most effective counter to this view is the presentation of forceful evidence revealing the disparity already evident among low income and minority groups as they experience a greater prevalence of obesity, increased difficulty getting healthier foods, and, most significantly, continued barriers preventing low-cost access to viable avenues for physical activity.

Some opposition may also be found among critics who could point to the results of the CFTC's application in Canada, which led to disproportionate benefits to higher income taxpayers. Though this remains a concern due to the ease of access to opportunities of physical activity experienced by higher income groups, the increased cap, along with the refundable nature of the credit, largely avoids this concern. Moreover, the ultimate social benefit of significantly increasing the nation's well-being justifies the work it would take to establish an ASTC in tandem with a scheme of short-term revenue neutrality. Indeed, the ASTC could be packaged (and used as a bargaining chip) with other policies that raise tax revenues, but only over the short term. As Canada's experience demonstrates, the benefits to be expected in wider physical fitness participation will result in increased revenues over time, and this protracted assistance sweetens the idealistic benefit that would result from this tailored encouragement of healthier habits.

CONCLUSION

As rates of overweight and obesity continue to rise in the United States, lawmakers can no longer ignore the costs borne by the public in terms of increased Medicare and Medicaid expenses. A deeper understanding of the obesity epidemic in the United States further reveals the appalling concentration of the problem among lower income groups and minorities, most notably among children. Lawmakers facing fiscal and societal pressure to respond to these concerns in a reasonable manner should strongly consider the proposed Americans in Shape Tax Credit to combat these concerns and create long-term benefits both fiscally and physically for the future of the United States.

[124] *See generally* Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).