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REVISITING THE ORIGINAL “TEA PARTY”: THE HISTORICAL ROOTS OF REGULATING FOOD CONSUMPTION IN AMERICA

Alison Peck*

I. INTRODUCTION: ENTER THE “FOOD COPS”

In November 2010, Sarah Palin distributed cookies at an elementary school in Pennsylvania in response to a local debate over school nutrition guidelines.¹ In a Twitter feed, Palin called the debate an example of a “nanny state run amok.”² Palin has also criticized First Lady Michelle Obama’s “Let’s Move” campaign against childhood obesity.³ In a TV interview, Palin prepared s’mores for her family, saying, “This is in honor of Michelle Obama, who said the other day we should not have dessert.”⁴

Palin and Obama are among the more visible political players to weigh in on America’s weight, but the controversy over rising American obesity rates, associated public health costs, and potential remedies has occupied substantial legislative attention as well. As obesity-related public health costs continue to rise, many legislators have begun to introduce proposals aimed at changing consumer food choices. The forms of the proposed laws vary. Some restrict the availability of foods most associated with rising health costs (like bans on restaurants using trans fats); some penalize “undesirable” behavior (like excise taxes on soft drinks); some remove information asymmetries that may distort food consumer decision-making (like mandatory calorie disclosures on fast food menus); some intervene to protect consumers deemed most vulnerable to negative influence on food choices (like bans on sales of sugar-sweetened beverages in schools). Such laws are most often justified on the grounds of rising public health costs due to obesity and obesity-related illnesses.⁵

While these proposals vary significantly in their function, justification, and level of intrusiveness into private decision-making, all have met with vocal opposition and mixed success in city councils and state and federal legislatures.

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¹ Scott Kraus, *Pennsylvania Says Palin Crumbled Cookie Policy*, MORNING CALL (Allentown, Pa.), Nov. 11, 2010, at A1. Palin characterized the issue as a potential ban on sweets at school parties. *Id.* The Pennsylvania Board of Education said it had been weighing new school nutrition guidelines that encouraged healthier food choice, but had never proposed limiting snacks at school parties. *Id.*

² Editorial, *Palin’s Food Fight*, WALL ST. J., Dec. 27, 2010, at A16.

³ *Id.*

⁴ *Id.*

⁵ See, e.g., Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599 (2009); Joe Sanfilippo, Op-Ed., *Cutting Trans-Fat Saves Money*, PRESS & SUN-BULLETIN (Binghamton, N.Y.), Jan. 31, 2010, at B1.

Opponents to such measures often argue that food choice is “personal”—not a proper subject of law and public policy.⁶ While it is now uncontroversial that the federal government may regulate food *production*,⁷ laws aimed at regulating food *consumption* seem to many to represent a new extent of governmental intervention in the private sphere. The theme of consumer sovereignty, often framed as an appeal to an American ideal of “food independence,” is apparent in public debate today over laws that attempt to inform, shape, limit or control consumer food choices.

Contemporary opponents to food-consumption regulation often evoke the Boston Tea Party as a symbol of anti-establishment populism that successfully subverted an unpopular government regime. The name of the event has been adopted by the contemporary political movement seeking, among other things, to supplant political elites with elected officials perceived as closer and more responsive to “the people.”⁸ While not all opponents of food-consumption regulation are members of the contemporary Tea Party, representatives of the movement, such as Palin, have been among the most vocal opponents of modern initiatives aimed at the food consumer.

Rhetoric of freedom drawn from the American Revolution has been frequently invoked in public debate to support this notion of food-consumer sovereignty. For example, the Center for Consumer Freedom (“CCF”), a

⁶ Food historian James McWilliams has described receiving such a response to a lecture in south Texas advocating the environmental virtues of a vegetarian diet. James E. McWilliams, Editorial, *Belying Up To Environmentalism*, WASH. POST, Nov. 16, 2009, at A21. McWilliams recalls that the reception was, perhaps unsurprisingly, “chilly.” *Id.* The only applause occurred when an audience member commented that McWilliams’ remarks made him want to eat even more meat. *Id.* “Plus,” the audience member said, “what I eat is my business—it’s personal.” *Id.*

⁷ Every five or six years since the 1930s, Congress has passed a “Farm Bill” regulating agricultural production. See *United States Farm Bills*, NATIONAL AGRICULTURAL LAW CENTER, www.nationalaglawcenter.org/farmbills (last visited Sept. 2, 2011) (index of Farm Bill legislation, 1933-2008). While now uncontroversial, this was not a foregone constitutional conclusion. See *United States v. Butler*, 297 U.S. 1 (1936) (invalidating Agricultural Adjustment Act of 1933 as beyond scope of Congressional spending power); see generally WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995) (describing Supreme Court “switch in time” to support New Deal policies); ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL 27-84* (1958) (describing the evolution of Roosevelt’s agricultural policy and Supreme Court resistance).

⁸ See, e.g., Dick Armey & Matt Kibbe, Op-Ed, *A Tea Party Manifesto*, WALL ST. J., Aug. 17, 2010, at A19 (Tea Party members “are supporting candidates who have signed the Contract From America, a statement of policy principles generated online by hundreds of thousands of grass-roots activities.”). In part because of the decentralized nature of the movement, the goals of the Tea Party are the subject of some debate. For history and description by supporters of the Tea Party movement, see generally DICK ARMEY & MATT KIBBE, *GIVE US LIBERTY: A TEA PARTY MANIFESTO* (2010); JOHN M. O’HARA, *A NEW AMERICAN TEA PARTY: THE COUNTERREVOLUTION AGAINST BAILOUTS, HANDOUTS, RECKLESS SPENDING, AND MORE TAXES* (2010). For a more critical account, see JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010).

restaurant-industry-supported group that campaigns against food-consumer regulation, posted on its website a "Declaration of Food Independence":

On July 4, 1776, America's founding fathers signed their names to the Declaration of Independence in an effort to affirm basic liberties. But they never dreamed that anyone would someday attempt to strip the American people of the fundamental freedom to control what we eat and drink. In the spirit of throwing off the shackles of harassing powers, we offer our Declaration of Food Independence.⁹

Further borrowing from the rhetoric of the (original) Declaration, the organization colorfully spears "food cops" for, among other things, opposing the availability of cupcakes and other snack foods in schools;¹⁰ threatening a lawsuit against Kentucky Fried Chicken for using trans fats;¹¹ and advocating warnings about mercury exposure from tuna¹²:

But when a long train of abuses and usurpations, including taxes, finger-waving, and food demonization, evinces a design to reduce the freedoms of responsible adults under dietary despotism, it is their right,

⁹ *Declaration of Food Independence*, CTR. FOR CONSUMER FREEDOM (June 30, 2006), http://www.consumerfreedom.com/article_detail.cfm/a/178-declaration-of-food-independence. The CCF has been criticized for its ties to the food and restaurant industry. Carolyn E. Mayer & Amy Joyce, *The Escalating Obesity Wars*, WASH. POST, Apr. 27, 2005, at E1. According to *The Washington Post*, the CCF was founded in the mid-1990s with \$600,000 in seed money from Philip Morris USA, Inc. to oppose non-smoking laws and shifted its focus in 2001 to focus on issues in the food and beverage industry. *Id.* Documents obtained and made public in 1998 as a result of a litigation settlement showed that donors included Host Marriott Corp. and Brinker International, Inc., which owns the Chili's and Maggiano's Little Italy restaurant chains. *Id.* The Center and its executive director, Richard Berman, have not denied the Center's industry affiliation, though they defend the Center's status as a 501(c)(3) nonprofit organization. *Id.* "It's pretty obvious we're advocating from a point of view," Berman told *The Washington Post*. *Id.* He added, "But you can advocate and educate at the same time." *Id.*

¹⁰ *Cupcakes Under Siege*, CTR. FOR CONSUMER FREEDOM (Mar. 23, 2006), http://www.consumerfreedom.com/news_detail.cfm/h/2997-cupcakes-under-siege; *Declaration of Food Independence*, *supra* note 9; Ylan Q. Mui, *At Many Elementary Schools, The Party's Over*, WASH. POST, Oct. 30, 2005, at C1 (quoting a CCF analyst who called banning birthday treats at elementary schools "absolutely absurd").

¹¹ *CSPI Says: Dance for Us, Colonel Sanders!*, CTR. FOR CONSUMER FREEDOM (June 13, 2006), http://www.consumerfreedom.com/news_detail.cfm/h/3052-cspi-says-dance-for-us-colonel-sanders. A district court later dismissed a suit against the parent corporation of the Kentucky Fried Chicken chain, holding that the plaintiff failed to allege injury from consuming the food. *Hoyle v. Yum! Brands, Inc.*, 489 F.Supp.2d 24 (D.D.C. 2007). While the lawsuit was pending, the restaurant chain announced that it would stop using trans fats. See Todd Zwillich, *KFC to Fry Chicken Without Trans Fats*, WEBMD HEALTH NEWS (Oct. 30, 2006), <http://www.webmd.com/food-recipes/news/20061030/kfc-to-fry-chicken-without-trans-fats>.

¹² *Consumer Reports Rated Worst Science*, CTR. FOR CONSUMER FREEDOM (June 6, 2006), http://www.consumerfreedom.com/news_detail.cfm/h/3047-consumer-reports-rated-worst-science. Compare with Kevin McCarthy, *Q&A About Mercury in Fish*, CONSUMER RPTS. (Dec. 26, 2008, 1:52 PM), <http://blogs.consumerreports.org/health/2008/12/mercury-fish.html>.

it is their duty, to throw off such tyrants. Such has been the patient suffering of we freedom-loving Consumers, and such is now the necessity which impels us to alter our former tolerance of Food Cop abuses.¹³

The CCF's rhetoric relies on the popular notion that the right to consume food or drink without limit or influence by regulation is a fundamental freedom established by the Founding Fathers. Certainly there is a long, historical pedigree behind the notion of food independence in America. The possibility of acquiring enough fertile land to feed a family attracted many European settlers to the continent.¹⁴ The colonists' very fecundity emboldened Revolutionary leaders to fight the war against Britain, figuring that, if nothing else, America's pool of young men of fighting age would outlast that of Britain.¹⁵

But opponents of modern food-consumer regulation misapprehend Revolutionary history when they claim that the Founding Fathers "never dreamed that anyone would someday attempt to strip the American people of the fundamental freedom to control what we eat and drink."¹⁶ In fact, the very controversies that led to the Revolutionary War demonstrate that the colonists fully appreciated, and acted upon, the notion that private consumption decisions could have broad public consequences, and thus could be subject to public control. When Britain taxed colonial imports of tea, sugar and other products, the colonists responded by organizing tea boycotts. These "Associations" were based on public perception that the colonists' own consumer behavior had instigated the offensive British tax schemes of the 1760s and 1770s, and that the best response was to hurt British industry by curtailing that consumption.¹⁷ The "Associators" urged their neighbors to take individual responsibility for their consumption decisions for the good of the Colonies as a whole.¹⁸ By urging

¹³ *Declaration of Food Independence*, *supra* note 9.

¹⁴ See, JACK P. GREENE, *THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1492 TO 1800* 89 (1993). The native-born colonial American population grew rapidly in number in the colonial period. See Henry A. Gemery, *The White Population of the Colonial United States, 1607-1790*, in *A POPULATION HISTORY OF NORTH AMERICA* 143 (Michael R. Haines & Richard H. Steckel eds., 2000). Meanwhile, Americans themselves grew to an average height at least 5.9 centimeters taller than predictions based on their income would suggest. See Richard H. Steckel, *Nutritional Status in the Colonial American Economy*, 56 *WM. & MARY Q.* 31, 47-48 (1999). Colonial Americans appear to have been the tallest people in the world at that time, *id.* at 38, suggesting widespread and relatively equal access to ample food, *see id.* at 47, 50.

¹⁵ See 7 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 273 (Charles Francis Adams ed., 1852). Writing in 1780 during a low point in the Revolutionary effort, Adams estimated that 35,000 men had died, but that the overall population had increased by 750,000 during the six years of the war, thus adding 20,000 men of fighting age every year. *Id.* "Is this the case with our enemy, Great Britain? Which then can maintain the war the longest?" *Id.*

¹⁶ *Declaration of Food Independence*, *supra* note 9.

¹⁷ See *infra* notes 126-77 and accompanying text.

¹⁸ See *infra* notes 155-77 and accompanying text.

colonial Americans to think about the collective consequences of their daily beverage, colonial leaders created a rallying cry for the republican effort.¹⁹

While the non-consumption agreements were not laws, the distinction between the quasi-legal agreements and modern laws should not be overstated. The increasingly-disenfranchised colonists were not represented in British Parliament and lacked the authority to override the taxing decisions of that body.²⁰ But the colonists developed increasingly intrusive means of giving coercive effect, comparable to that of law, to their next-best measures.²¹ Non-importation and non-consumption agreements included penalties ranging from searches and seizure of goods to public shaming and ostracism of holdouts, and even violence against violators.²²

Moreover, while the boycotts were essentially consumer-driven, many were led by colonial elites who held considerable economic and political power within the colonies. Although not acting under color of law, colonial elites like George Washington and John Hancock organized Associations, drafted specific non-consumption agreements, defined penalties for failure to comply, and published those agreements to their neighbors.²³ These colonial elite consumers were, in many cases, elected mayors, councilmen, and delegates to the Continental Congress. In a few short years, many of the drafters and signatories of the non-importation agreements would, in fact, govern the newly-independent nation and states.²⁴

Palin's jab about a "nanny state run amok," like much contemporary Tea Party rhetoric, challenges the belief, exemplified by the Obamas, that behavior can and appropriately may be changed through law.²⁵ Political pundits have made the connection between America's Revolutionary history and its resistance

¹⁹ See *infra* notes 155-77 and accompanying text.

²⁰ See *infra* Part III.B.

²¹ See *infra* Part III.C.

²² See *infra* Part III.C.

²³ See *infra* notes 179-211 and accompanying text.

²⁴ See *infra* notes 198-207 and accompanying text.

²⁵ Explaining her decision to bring cookies to the school, Palin told her audience, "I wanted these kids to bring home the idea to their parents for discussion. Who should be deciding what you eat, school choice and everything else? Should it be government or should it be the parents? It should be the parents." Valerie Strauss, *Palin: Parents Should Decide What Kids Eat in School*, WASH. POST, Nov. 12, 2010, <http://voices.washingtonpost.com/answer-sheet/health-1/palin-parents-should-decide-wh.html>. Although the "Let's Move" campaign is largely aimed at raising public awareness and encouraging voluntary action, see *Learn the Facts*, LET'S MOVE!, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited Aug. 2, 2011), Mrs. Obama has supported legislation for better school nutrition and physical activity, including the Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (2010). See *Child Nutrition Reauthorization: Healthy, Hunger-Free Kids Act of 2010*, LET'S MOVE!, http://www.whitehouse.gov/sites/default/files/Child_Nutrition_Fact_Sheet_12_10_10.pdf (last visited Sept. 2, 2011) (describing Act as "a major step forward in our nation's effort to provide all children with healthy food in schools"). The Act includes new school nutrition guidelines, expands access to federally subsidized school meal programs, and introduces pilot programs for local food procurement and school gardens. *Id.*

to the First Lady's eat-your-vegetables campaign. Writing for the Washington Post's online political humor column, *ComPost*, Alexandra Petri noted,

Americans hate being told that others know best—even people we otherwise revere, such as Michelle Obama. Ever since King George asked us to tighten our belts, we've been on the defensive. And we will defend, tooth and nail, our right to life, liberty, and the pursuit of Hostess products—at least until that tooth falls out from all the sugar.²⁶

Reconsideration of consumer control measures of the pre-Revolutionary era places in historical context the modern trend toward regulating the food consumer. The non-importation and non-consumption agreements suggest that the colonists considered private consumption decisions to be fair subjects of coordinated public action where those decisions had negative public consequences. Obvious differences exist between then and now: the non-importation agreements were coordinated consumer boycotts, while current proposals are regulations backed by the police power of the sovereign. But a close examination of those non-importation agreements and their context suggests that they arose, in principle, from many of the same forces driving food-consumer regulation today. These forces include shared public costs attributable to private consumption decisions; popular rhetoric linking private choices and public costs; sponsorship of restrictions by community leaders and elites; and collectively-enforced consequences for failure to conform.

Part II of this Article reviews examples of the current regulatory trend in Boston—the location of the original Tea Party and symbol of the non-importation agreements in the national consciousness. In 2008, Boston banned trans fats in restaurants, and in 2010 proposed a prohibition on sales of sugared beverages in municipal buildings.

Part III turns to a study of the non-importation agreements, focusing especially on three issues relevant to the current debate: the rhetoric of shared social costs from private consumer decisions used to stimulate support for the boycott; the identities and government or other leadership roles of the drafters of the non-importation agreements; and the penalties outlined in the agreements and other forms of pressure exercised by the “Associators” to induce compliance by their fellow colonists.

Part IV compares the non-importation and non-consumption agreements to the next major food-and-beverage-consumption regulation in America: the 1791 whiskey excise tax and the ensuing “Whiskey Rebellion.” Alexander Hamilton's whiskey tax, and George Washington's suppression of the insurrection by protesting western farmers, provides further evidence that excise

²⁶ Alexandra Petri, *Let Us Eat S'mores! Sarah Palin, Michelle Obama, and Desserts*, WASH. POST (Dec. 21, 2010, 12:00 AM), http://voices.washingtonpost.com/compost/2010/12/let_us_eat_smores_sarah_palin.html.

taxes on undesirable consumption of food and beverages are deeply engrained in the fabric of American history.

Understanding the long history of similar policy instruments in the American legal experience would diffuse the divisive rhetoric employed by opponents, and return the full array of policy choices—excise taxes, mandated correction of informational asymmetries, prescriptive protection of vulnerable groups—to state and federal policymakers seeking ways to internalize the shared social costs of private food and beverage consumption choices.

II. MODERN INITIATIVES TO REGULATE THE FOOD CONSUMER

Proposals for government intervention in consumer food choice seek to overcome the public health effects of obesity. In a 2001 report, the Surgeon General advocated for community as well as individual responses to obesity:

Many people believe that dealing with overweight and obesity is a personal responsibility. To some degree they are right, but it is also a community responsibility. When there are no safe, accessible places for children to play or adults to walk, jog, or ride a bike, that is a community responsibility. When school lunchrooms or office cafeterias do not provide healthy and appealing food choices, that is a community responsibility. When new or expectant mothers are not educated about the benefits of breastfeeding, that is a community responsibility. When we do not require daily physical education in our schools, that is also a community responsibility. There is much that we can and should do together.²⁷

A. Obesity and Public Health Costs

According to data released by the Centers for Disease Control and Prevention in August 2010, 26.7 percent of adults in the United States are obese.²⁸ That number, based on self-reporting of height and weight, may be misleadingly low—other estimates in which height and weight were measured by researchers suggested an obesity rate of 33.9 percent.²⁹ The costs of obesity are considerable: In 2006, medical costs associated with obesity were estimated at up to \$147 billion, and obese persons' medical costs were, on average, \$1,429

²⁷ U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY (2001), *available at* <http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf>.

²⁸ *Vital Signs: State-Specific Obesity Prevalence Among Adults—United States, 2009*, MORBIDITY & MORTALITY WEEKLY REPORT, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 3, 2010), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm59e0803a1.htm?s_cid=mm59e0803a1_w.

²⁹ *Id.* (citing data from the National Health and Nutrition Examination Survey).

higher than those of persons of normal weight.³⁰ But despite government mandates to prioritize obesity as a public health issue,³¹ the prevalence of obesity is rising. In 2009, no state had met the goal of a 15 percent adult obesity rate set by the Department of Health and Human Services.³² In 2000, no state had an obesity rate at or above 30 percent; in 2009, nine states did.³³

Public health advocates and many legislators now advocate for government intervention in the sphere of consumer food choice to overcome the public health effects of obesity. In the words of one team of authors representing city and state health departments, state legislatures, and the Centers for Disease Control and Prevention, “[l]aw, a traditional and indispensable public health tool, made important contributions to all 10 ‘great public health achievements’ in the United States during the 20th century.”³⁴ Other public health advocates point out that lack of government intervention to prevent obesity does not necessarily result in government absence from this perceived “private” sphere;³⁵ numerous city, state and federal government programs may inadvertently encourage unhealthy behaviors that contribute to obesity.³⁶

Economists and public health researchers have invoked several market failures related to obesity to justify government intervention based on a narrow economic welfare understanding of the proper role of government. Often-cited examples include the negative externality of shared public health costs of poor dietary choices made by some individuals;³⁷ information deficits preventing

³⁰ *Vital Signs*, *supra* note 28 (citing Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 HEALTH AFF. 822 (2009)). Costs of obesity include direct costs such as preventive, diagnostic, and treatment services, and indirect costs such as wages lost due to illness or disability and future earnings lost due to premature death. SURGEON GENERAL’S CALL TO ACTION, *supra* note 27.

³¹ *See Vital Signs*, *supra* note 28.

³² *Id.*

³³ *Id.*

³⁴ Judith A. Monroe et al., *Legal Preparedness for Obesity Prevention and Control: A Framework for Action*, 37 J.L. MED. & ETHICS 15, 15 (2009). “Those achievements include control of infectious diseases, motor vehicle safety, and a decline in deaths attributed to coronary heart disease and stroke.” *Id.*

³⁵ *See* Lawrence O. Gostin et al., *Assessing Laws and Legal Authorities for Obesity Prevention and Control*, 37 J.L. MED. & ETHICS 28 (2009).

³⁶ For instance, the National School Breakfast Program and National School Lunch Program favor packaged foods that frequently have high amounts of sugar, high fructose corn syrup, and salt; state Medicaid flexibility programs do not adequately reimburse providers for obesity-related visits; and federal agricultural subsidies support production of corn, soybeans and oil seeds used in making unhealthy foods. *Id.* at 29.

³⁷ *See, e.g.*, Kelly Brownell & Thomas R. Frieden, *Ounces of Prevention—The Public Policy Case for Taxes on Sugared Beverages*, 360 NEW ENG. J. MED. 1805 (2009); John Cawley, *An Economic Framework for Understanding Physical Activity and Eating Behaviors*, 27 AM. J. PREV. MED. 117, 121-22 (2004); Eric A. Finkelstein et al., *Economic Causes and Consequences of Obesity*, 26 ANN. REV. PUB. HEALTH 239 (2005).

consumers from making informed dietary choices;³⁸ and bounded rationality of individuals.³⁹ Public costs associated with obesity include Medicaid and state or local government insurance claims.⁴⁰ Even in the case of private health insurance, costs may be externalized through higher insurance premiums spread among both obese and non-obese individuals.⁴¹ While pure libertarian opponents to regulation may argue that these costs should be transferred to the unhealthy individuals themselves through the elimination of public health insurance, subsidized medical care, and high-cost private insurance, many opponents to government regulation do not appear to advocate for elimination of all subsidized health care and risk-spreading insurance practices. For example, in 2009, an audience member at a South Carolina town hall meeting told Representative Bob Inglis to "keep your government hands off my Medicare."⁴²

A recent article by public health researchers identifies ten categories of legal strategies for reducing obesity in the United States.⁴³ Seven of those strategies involved changing what consumers eat:

Financial incentives to encourage healthier behaviors: State and some federal programs offer financial incentives to support healthier nutrition (and, in many cases, greater physical activity).⁴⁴ One example is California's law that offers food aid participants a bonus for every dollar of food aid spent on fruits and vegetables.⁴⁵

³⁸ See, e.g., Cawley, *supra* note 37, at 120-21; Christina A. Roberto et al., *Rationale and Evidence for Menu-Labeling Legislation*, 37 AM. J. PREV. MED. 546, 548 (2009).

³⁹ See, e.g., Cawley, *supra* note 37, at 122; David R. Just et al., *Could Behavioral Economic Help Improve Diet Quality for Nutrition Assistance Program Participants?*, ECON. RESEARCH SERV., U.S. DEP'T AGRIC. (June 2007), <http://www.ers.usda.gov/publications/err43/err43.pdf>. Bounded rationality is of particular concern for children, whom economists view as more boundedly rational because of limited capability to account for future consequences of their actions. See Cawley, *supra* note 37, at 122.

⁴⁰ For example, Joe Sanfilippo, a Broome County, New York, legislator, defended his proposed ban on trans-fats against criticism that the county should focus on "cutting county expenses instead of margarine." Sanfilippo, *supra* note 5. Sanfilippo argued that "[r]educing county expenditures is precisely what this new legislation will achieve in the long term by improving residents' health status." Sanfilippo, *supra* note 5. According to Sanfilippo, Medicaid and county health insurance claims "are the largest chunk of the county's 2010 budget, together totaling more than \$60 million." Sanfilippo, *supra* note 5.

⁴¹ See Jay Bhattacharya & Neeraj Sood, *Health Insurance, Obesity, and Its Economic Costs*, in THE ECONOMICS OF OBESITY: A REPORT ON THE WORKSHOP HELD AT USDA'S ECONOMIC RESEARCH SERVICE 21 (2004), available at <http://www.ers.usda.gov/publications/efan04004/efan04004g.pdf> (describing economic model finding that obesity costs remained externalized unless insurance allows underwriting based on weight).

⁴² Paul Krugman, Op-ed., *Health Care Realities*, N.Y. TIMES, July 31, 2009, at A23.

⁴³ James G. Hodge, Jr., et al., *Legal Themes Concerning Obesity Regulation in the United States: Theory and Practice*, 5 AUSTL. & N.Z. HEALTH POL'Y 14 (2008), available at <http://www.anzhealthpolicy.com/content/5/1/14>.

⁴⁴ *Id.* at 15.

⁴⁵ *Id.* State attempts to tailor federal food stamps to combat obesity, however, are limited. In October 2010, New York City asked the USDA for permission to bar the city's food stamp

Financial disincentives for unhealthy behaviors: The most common form of financial disincentive affecting food choice is an excise tax on less healthy foods, such as sugar-sweetened beverages.⁴⁶ In addition to discouraging consumption,⁴⁷ proceeds from excise taxes can be earmarked for public health campaigns addressing obesity.⁴⁸

Requiring improved food quality, diversity or availability: Especially focused on schools and low-income neighborhoods, initiatives include improved nutritional requirements for the National School Lunch Program and the School Breakfast Program,⁴⁹ and Pennsylvania's Fresh Food Financing Initiative, which supported building new grocery stores in underserved rural and urban areas.⁵⁰

Obesity litigation: Litigation seeking to compensate individuals for injuries from consuming unhealthy foods and beverages has generally alleged that food industry defendants engaged in deceptive business practices, failed to disclose health risks, or misled consumers through deceptive advertising.⁵¹ In the leading case of *Pelman v. McDonald's Corp.*, a federal judge in 2006 denied the restaurant's motion to dismiss the complaint, which alleged that McDonald's engaged in deceptive advertising in violation of New York business law.⁵² In October 2010, the court denied the plaintiffs' motion to certify a class of plaintiffs.⁵³ As of 2010, however, twenty-four states had statutes limiting

recipients from spending them on sugar-sweetened beverages. Anemona Hartocollis, *Plan to Ban Food Stamps for Sodas Has Hurdles*, N.Y. TIMES, Oct. 8, 2010, at A21. In 2004, the USDA denied a similar request from the state of Minnesota, citing concerns about the consistency of the program across state lines and concerns about stigmatizing recipients' capabilities to make sound choices. *Id.*

⁴⁶ Hodge et al., *supra* note 43.

⁴⁷ *Id.* Studies based on cigarette excise taxes have shown that tobacco consumption declines four percent for every ten percent increase in price. See Frank J. Chaloupka, *Macro-Social Influences: The Effects of Prices and Tobacco-Control Policies on the Demand for Tobacco Products*, 1 NICOTINE & TOBACCO RES. S77 (1999).

⁴⁸ Hodge et al., *supra* note 43. The Congressional Budget Office has estimated that a federal excise tax of \$.03 per twelve ounces of sugar-sweetened beverages would generate approximately \$24 billion in the first five years. CONG. BUDGET OFFICE, BUDGET OPTIONS, VOLUME 1: HEALTH CARE 192 (2008), available at <http://www.cbo.gov/ftpdocs/99xx/doc9925/12-18-HealthOptions.pdf>.

⁴⁹ Hodge et al., *supra* note 43; see Letter from Stanley C. Garnett, Director, Child Nutrition Division, United States Department of Agriculture, to Regional Directors, Special Nutrition Programs (Jan. 16, 2001), http://www.fns.usda.gov/cnd/lunch/_private/CompetitiveFoods/fmnv.pdf.

⁵⁰ See *Pennsylvania Fresh Food Financing Initiative*, FOOD TRUST, <http://www.thefoodtrust.org/php/programs/fffi.php> (last visited Sept. 2, 2011). For other initiatives aimed at improving access to healthy food in low-income neighborhoods, see YALE RUDD CTR. FOR FOOD POLICY & OBESITY, ACCESS TO HEALTHY FOODS IN LOW-INCOME NEIGHBORHOODS: OPPORTUNITIES FOR PUBLIC POLICY (2008), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddReportAccessToHealthyFoods2008.pdf>.

⁵¹ Hodge et al., *supra* note 43.

⁵² *Pelman ex rel. Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320 (2006).

⁵³ *Pelman v. McDonald's Corp.*, 272 F.R.D. 82 (2010).

liability for claims arising from weight gain, obesity, or other obesity-related injuries arising from long-term consumption of food.⁵⁴ Many of the state statutes carve out exceptions for violations of existing laws such as deceptive business practices acts and laws relating to labeling, misbranding, or adulteration.⁵⁵ These exceptions have led to new litigation strategies. In January 2011, for example, a lawsuit was filed against Taco Bell challenging advertising practices regarding its beef mixture.⁵⁶ The lawsuit was later dropped, and Taco Bell has stood by its seasoned beef.⁵⁷

Restrictions on access to healthy food include bans on undesirable foods like trans fats (described below, Part II.B), as well as zoning laws banning or restricting the location of fast food restaurants.⁵⁸

Regulations aimed at increasing consumer access to nutritional information include the federal menu label law, part of the Patient Protection and Affordable Care Act of 2010.⁵⁹ The law aims to eliminate information asymmetries in the market by requiring chain restaurants with twenty or more locations to post calorie counts and total daily recommended calories on menus, and to supply additional nutritional information upon customer request.⁶⁰ The federal law preempts existing menu labeling laws to the extent they are inconsistent with the federal law.⁶¹

⁵⁴ See TRUST FOR AM.'S HEALTH, SUPPLEMENT TO "F AS IN FAT: HOW OBESITY POLICIES ARE FAILING IN AMERICA, 2010": OBESITY-RELATED LEGISLATION ACTION IN STATES, UPDATE 76-78 (2010), available at <http://healthyamericans.org/reports/obesity2010/> (click on "State by State Legislation Supplement") (Arizona, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, New Hampshire, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, Wyoming).

⁵⁵ See *id.*

⁵⁶ Bob Johnson, *Lawsuit to Taco Bell: Where's the Beef?*, BOS. GLOBE, Jan. 24, 2011, http://www.boston.com/business/articles/2011/01/24/suit_questions_beef_content_in_taco_bell_products/. The suit alleged that Taco Bell's seasoned beef included "other ingredients, including water, wheat oats, soy lecithin, maltodextrin, anti-dusting agent and modified corn starch." *Id.* The plaintiffs sought for the court to order Taco Bell to alter its advertising rather than seeking money damages. *Id.*

⁵⁷ Nathan Becker, *Taco Bell's Critic Drops Beef*, WALL ST. J., Apr. 20, 2011, at B7.

⁵⁸ Hodge et al., *supra* note 43. See also JULIA SAMIA MAIR ET AL., THE CITY PLANNER'S GUIDE TO THE OBESITY EPIDEMIC: ZONING AND FAST FOOD (2005), <http://www.publichealthlaw.net/Zoning%20City%20Planners%20Guide.pdf> (citing bans or zoning restrictions on fast food or "formula" restaurants in Concord, Mass.; Carlsbad, Calif.; Newport, R.I.; Calistoga, Calif.; Solvang, Calif.; San Francisco, Calif.; Davis, Calif.; Bainbridge Island, Wash.; Berkeley, Calif.; Westwood Village, Los Angeles, Calif.; Warner, N.H.; Detroit, Mich.; and Arden Hills, Minn.).

⁵⁹ Pub. L. No. 111-148, tit. IV, subtitle C, § 4205, 124 Stat. 573 (2010).

⁶⁰ See *id.* See also Draft Guidance for Industry: Questions and Answers Regarding Implementation of the Menu Labeling Provisions of 4205 of the Patient Protection and Affordable Care Act of 2010, 75 Fed. Reg. 52426 (Aug. 25, 2010).

⁶¹ 21 U.S.C. § 343-1(a)(4) (2006 & Supp. 2010); see also 76 Fed. Reg. 19192, 19229-30 (proposed Apr. 6, 2011) (to be codified at 21 C.F.R. pt. 11 and 101).

Control of marketing and advertising (particularly to children):

Government restrictions on advertising must be balanced against the First Amendment's protection of commercial speech.⁶² Members of the food industry have formulated voluntary standards to limit, for example, the amount of marketing of unhealthy foods to children, and the use of licensed characters to appeal to children in advertising unhealthy food; however, studies have been critical of the results of these voluntary programs.⁶³ Although the Children's Television Act limits the amount of commercials aired during children's television programming,⁶⁴ Congress in 1980 prohibited attempts by the Federal Trade Commission to regulate the advertising of sugary foods to children.⁶⁵

B. Boston Targets Trans Fats and Sugared Beverages

Regulatory efforts by the City of Boston illustrate the rhetoric of the current debate over government regulation of food consumption to reduce obesity. On March 13, 2008, the City of Boston voted to ban all trans fats in City food service establishments.⁶⁶ Boston joined the cities of New York,⁶⁷ Philadelphia,⁶⁸ and Brookline, Massachusetts,⁶⁹ and the state of California,⁷⁰ in banning trans fats. The regulation provides: "No food service establishment, vending machine, or mobile food vendor shall store, prepare, distribute, hold for service or serve any food or beverage containing artificial trans fat in the City of Boston."⁷¹ The ban applies to food served at supermarkets, grocery stores, and

⁶² See, e.g., *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

⁶³ See WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 28-33 (2010), available at http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf. The report recommended that legislation and regulation placing further restrictions on advertising to children be considered if voluntary guidelines do not improve food industry performance. *Id.* at 32.

⁶⁴ 47 U.S.C. § 303a(b) (2011).

⁶⁵ See FTC Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified at 15 U.S.C. § 57a(h) (2011)). For a discussion of changes in the law since 1980 that may affect the FTC's authority to regulate advertising to children, see Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate*, 38 J.L. MED. & ETHICS 98, 100 (2010).

⁶⁶ Regulation to Restrict Foods Containing Artificial Trans Fat in the City of Boston (2008), available at http://www.bphc.org/boardofhealth/regulations/Forms%20%20Documents/regs_transfat-Mar08.pdf [hereinafter *Boston Trans Fat Ban*].

⁶⁷ RULES OF THE CITY OF NEW YORK tit. 24, § 81.08 (2006).

⁶⁸ PHILADELPHIA, PA., CODE § 6-307 (2011).

⁶⁹ TOWN OF BROOKLINE, MASS., GENERAL BY-LAWS art. 8.28 (2010).

⁷⁰ CAL. HEALTH & SAFETY CODE § 114377 (Deering 2009).

⁷¹ *Boston Trans Fat Ban* § 2.00.

convenience stores, but does not include food or beverages in manufacturers’ original sealed packages that are required by law to have nutrition labeling.⁷² Covered establishments are also required to maintain ingredient and nutrition labels for all food products used to support inspection and enforcement of the regulation.⁷³

The ban was relatively uncontroversial.⁷⁴ Preliminary approval of the ban was passed by the Boston Public Health Commission “after little discussion” in January 2008.⁷⁵ *The Boston Globe* reported that, out of more than ninety written comments on the final ban, only three were “antagonistic.”⁷⁶ The Health Commission’s public hearing on the final ban attracted only four people.⁷⁷ The lack of opposition was attributed in large part to the fact that New York City had already prohibited trans fats in restaurants in 2006, and “in the food business, as goes New York, so goes the rest of the restaurant world.”⁷⁸ Even the earlier ban in New York City, however, met with little opposition: of 2,270 written and oral comments on the proposal, only 70 were opposed.⁷⁹ High consumer demand for trans-fat-free food and cost-effective substitutes for trans fats have led the restaurant industry to cooperate with the bans.⁸⁰

A vocal minority has opposed the bans, often relying on rhetoric of freedom, civil liberties, and the Revolutionary War. In an online forum discussing the Boston trans fat ban, one writer opposed to the ban evoked the non-importation agreements’ most famous moment: “Thank God we have a government that knows and dictates what is good for us. Soon we won’t have any personal responsibility left as government assumes it all. If the Boston Tea Party gang were around today they’d be dumping these do-gooders in the Harbor!”⁸¹ Another reader echoed the rhetoric of American founding principles:

⁷² *Id.*

⁷³ *Id.* § 3.00.

⁷⁴ See Stephen Smith & Tania deLuzuriaga, *Boston Moves Toward Trans Fats Ban*, BOS. GLOBE, Jan. 11, 2008, at B1 (“In Boston last night, restaurateurs reacted to the health commission’s move with a collective shrug.”).

⁷⁵ *Id.*

⁷⁶ Stephen Smith, *HUB Health Board to Restaurants: Hold the Trans Fat*, BOS. GLOBE, Mar. 14, 2008, at B3.

⁷⁷ *Id.*

⁷⁸ Smith & deLuzuriaga, *supra* note 74. Accord Editorial, . . . *And Trans Fat Ban*, BOS. HERALD, Jan. 12, 2008, at 12 (arguing that “[Boston] Mayor Tom Menino certainly can’t have [New York City Mayor] Michael Bloomberg one-up him like that, can he? . . . This is truly a solution in search of a problem.”).

⁷⁹ DEP’T OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.08) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE (2006), available at www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf.

⁸⁰ See Stephen Smith, *Boston Restaurants Have Succeeded in Eliminating Trans Fats: Doughnuts Are Next on the Target List*, BOS. GLOBE, Dec. 31, 2008, at B3; Paul Frumkin, *MRA’s Christie Strikes Conciliatory Note on State Trans Fat Ban But Asks for More Time*, NATION’S RESTAURANT NEWS, July 23, 2007, at 4.

⁸¹ BC, Comment to Stephen Smith, *Boston Trans Fat Ban Receives Final Approval*, BOS. GLOBE (Mar. 13, 2008) (on file with author; original no longer available).

"I wonder what they'll ban next. . . . Maybe they'll ban reading the Constitution? Or maybe personal responsibility in general? Welcome to Communist Massachusetts."⁸²

Supporters of the law (who out-numbered opponents in the online forum) challenged the notion that the ban infringed civil liberties. Some supporters cited the collective social costs of obesity-related illness:

Why should healthy people who choose to eat a balanced diet without trans fats [sic] be required to pay the costs of those who wish to be overweight and unhealthy? . . . What you eat doesn't only affect you, it affects the rest of America as well. Being an American entitles you to the pursuit [sic] of life, liberty and property. Notice fast food wasn't included in the list of American rights.⁸³

Other supporters applauded the law as an appropriate intervention to correct market failures such as information asymmetries⁸⁴ or unbalanced bargaining power between food companies and consumers.⁸⁵

In September 2010, the City of Boston went a step further in the obesity wars, proposing to ban sales of sugar-sweetened beverages in municipal buildings.⁸⁶ Pursuant to a \$12.5 million federal stimulus grant to combat obesity and tobacco, the city promised it would "decrease consumption of sugar-sweetened beverages through counter-advertising and policy change."⁸⁷ According to Boston Public Health Commissioner Barbara Ferrer, "The main

⁸² Dan, Comment to Smith, *supra* note 81 (Mar. 13, 2008) (on file with author; original no longer available).

⁸³ Amy, Comment to Smith, *supra* note 81 (July 28, 2008) (on file with author; original no longer available).

⁸⁴ See Dina, Comment to Smith, *supra* note 81 (Mar. 13, 2008) (on file with author; original no longer available).

The point of the ban is not to ban them outright, but to allow people to make the decision. Most restaurants do not and will not post their ingredients, this allows people to make an informed choice. Either buy pre-packaged foods that are labeled and can contain trans-fats or know that prepared food you order will not contain them.

Id.

⁸⁵ See Steve, Comment to Smith, *supra* note 81 (Mar. 14, 2008) (on file with author; original no longer available).

Freedom schmeedom. Stop kidding yourself. At least with politics we sort of get a say. With business-dictated diets, we get ironically no input as to what we put in our mouths. . . . [I]f 100% of these manufacturers are giving us food with this apparently unhealthy, hydrogen-enriched corn and soy oil, then we don't have any choice, and hence no freedom.

Id.

⁸⁶ Stephen Smith, *City May Curb Sales of Sugary Beverages; Health Idea Involves Municipal Buildings*, BOS. GLOBE, Sept. 20, 2010, at 1.

⁸⁷ *Id.*

goal is to make sure there are a lot of healthy options and there is a real emphasis on creating a healthy environment in municipal buildings."⁸⁸

Boston is not the first city to address the presence of sugar-sweetened beverages on municipal property. In April 2010, San Francisco Mayor Gavin Newsom issued an executive order prohibiting sales of certain non-diet sodas in vending machines on city property.⁸⁹ Some residents criticized the San Francisco order on the grounds that it interfered with private consumer decision-making.⁹⁰ As one resident remarked, "This is all about choice. There is probably nothing more personal than what you drink and eat."⁹¹ In response, a spokesperson for the mayor responded that the measure was not meant to restrict private choice, but only to limit the government's role in facilitating less-healthy choices.⁹² "It's entirely appropriate and not at all intrusive for city government to take steps to discourage the 'sale' of sugary sodas on city property. . . . People absolutely remain free to choose to drink unhealthy sugary sodas anywhere they want."⁹³

In Boston, public reaction to the trans fat ban has been mixed. Objections to the ban have ranged from fear of economic losses for struggling vendors in municipal buildings,⁹⁴ to questions about the efficacy of the measure for fighting obesity,⁹⁵ to critiques of the proposal as a misallocation of public resources.⁹⁶ Supporters have argued that the measure would be an appropriate exercise of government leadership. Bill Walczak, head of a community health center and a member of Boston's city panel, recalled that, in the 1980s, social workers at the health center smoked while counseling patients. "It would be considered bizarre to see someone smoking in a health care institution today."⁹⁷

In a *Boston Globe* online forum, reactions echoed those expressed in relation to the trans fat ban. Some readers supported the proposal as curtailing government action to support unhealthy choices⁹⁸ or internalizing externalities

⁸⁸ Donna Goodison, *Sugar Stays Safe from City at Faneuil Hall*, BOS. HERALD, Sept. 22, 2010, at 27.

⁸⁹ John Coté, *S.F. Ban on Sugary Drinks Being Felt*, S.F. CHRON., July 6, 2010, at C1.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ One Boston food court vendor noted with sarcasm, "It would be great for this economy. We're barely making it now, and that would affect the sales, of course, for everyone." Goodison, *supra* note 88.

⁹⁵ "Outright bans . . . do nothing to teach people about balance and moderation. It's overly simplistic and inaccurate to target one product or one ingredient when it comes to obesity." Smith, *supra* note 86 (quoting American Beverage Association spokesman Chris Gindlesperger).

⁹⁶ In a letter to the *Boston Globe*, one reader wrote, "As our communities continue to wrestle with economic burdens, youth violence, and homelessness, let us take comfort in the knowledge that Sprite and Pepsi will no longer harm those who visit city buildings." Elise Mott, Editorial, *Government Intervention Measured In Gulps*, BOS. GLOBE, Sep. 23, 2010, at 14.

⁹⁷ Smith, *supra* note 86.

⁹⁸ Keelak, Comment to Smith, *supra* note 86 (Sept 20, 2010, 7:34 AM), http://www.boston.com/news/local/massachusetts/articles/2010/09/20/city_may_curb_sales_of_sugary_beverages/?comments=all&plckCurrentPage=1 ("[N]o one is talking about making sugary

associated with rising health care costs.⁹⁹ Others advocated excise taxes¹⁰⁰ or higher insurance premiums,¹⁰¹ rather than bans of substances on government property, to shift health care costs from the public to those who choose to incur them.

Many opponents of the proposal in the forum objected to it as an example of excessive government intervention in private choices. "The general population is really making a mistake by allowing the government to legislate our personnal [sic] choices of what we eat or drink. We are slowly going down that slippery slope of government intervention where it does not belong."¹⁰² Some expressly referred to Revolutionary ideals, including Boston's role as a symbol of resistance to government. "[P]retty ironic that the city that basically founded our freedom is turning into the country that our Founding Fathers left and rebelled against. I bet that they're all turning over in their graves."¹⁰³ Others predicted or called for a reprise of the Revolution: "The government used to be just too big. Now it's too big, can't do what it's supposed to do, and is doing what it has no business doing. Don't start the revolution without me."¹⁰⁴ Another reader linked these objections to the contemporary Tea Party: "It seems the tea party

drinks illegal. . . . The City is just talking about removing them from City buildings so that the City does not seem to be condoning an unhealthy choice.").

⁹⁹ Fedupwithrighties, Comment to Smith, *supra* note 86 (Sept. 20, 2010, 7:34 AM), http://www.boston.com/news/local/massachusetts/articles/2010/09/20/city_may_curb_sales_of_sugary_beverages/?comments=all&plckCurrentPage=1.

You speak about freedoms. The freedom to smoke cigarettes? The freedom to make drinks that have no nutrition? The freedom to not wear seatbelts? . . . If the state didn't have to pay the bill for lung cancer, drug addiction, or diabetes, or pick up bloody remains on our highways I may agree with you.

Id.

¹⁰⁰ Insight383, Comment to Smith, *supra* note 86 (Sept. 20, 2010, 7:34 AM), http://www.boston.com/news/local/massachusetts/articles/2010/09/20/city_may_curb_sales_of_sugary_beverages/?comments=all&plckCurrentPage=1 ("How about a sin tax on all candy and soda and make the corporations who manufacture these items pay triple taxes [sic].").

¹⁰¹ Phonyuser, Comment to Smith, *supra* note 86 (Sept. 20, 2010, 1:33 AM), http://www.boston.com/news/local/massachusetts/articles/2010/09/20/city_may_curb_sales_of_sugary_beverages/?comments=all#readerComm ("I don't favor banning or taxing any such substances. I do favor charging overweight people more for Health Insurance. It's about time they paid for the extra cost of their diet and lifestyle.").

¹⁰² Unwind, Comment to Smith, *supra* note 86 (Sept. 20, 2010, 5:57 AM), http://www.boston.com/news/local/massachusetts/articles/2010/09/20/city_may_curb_sales_of_sugary_beverages/?comments=all#readerComm.

¹⁰³ G1797, Comment to Smith, *supra* note 86 (Sept. 20, 2010, 6:52 AM), http://www.boston.com/news/local/massachusetts/articles/2010/09/20/city_may_curb_sales_of_sugary_beverages/?comments=all#readerComm.

¹⁰⁴ Nospamsam, Comment to Smith, *supra* note 86 (Sept. 20, 2010, 7:06 AM), http://www.boston.com/news/local/massachusetts/articles/2010/09/20/city_may_curb_sales_of_sugary_beverages/?comments=all#readerComm. See also G1797, *supra* note 103 ("Good job Libs. Keep banning stuff, I look forward to the inevitable revolution that's coming.").

movement realizes we are losing of [sic] freedoms but not the Globe. Our government has systematically taken away our freedoms."¹⁰⁵

III. THE NON-CONSUMPTION AGREEMENTS: COMMUNITY, AUTHORITY, AND COERCION

Opponents of food-consumption regulation, like the Center for Consumer Freedom and several members of the Boston Globe's online forum, frequently invoke pre-Revolutionary ideals and events. These arguments are reflected more broadly by the Tea Party movement, which evokes one of the most celebrated moments in pre-Revolutionary history as a symbol of opposition to government intervention in spheres its adherents view as purely personal or private. This use of the Tea Party as a contemporary political symbol misrepresents, or at least oversimplifies, the political forces operating in the non-consumption and non-importation movement that culminated in the Tea Party and eventually led to the Revolution.

The non-importation movement began with the formation of the first non-importation agreements after the Stamp Act crisis of 1765,¹⁰⁶ continued with a new round of non-importation and, increasingly, non-consumption agreements after the Townshend Revenue Act in 1767,¹⁰⁷ and finally took on its broadest, most populist overtones after the Tea Act of 1773¹⁰⁸ and the Coercive Acts of 1774.¹⁰⁹ To be sure, the non-importation movement was populist: political power devolved from traditional elites—landowning white males—to some groups with little previous political power, such as middle-class women and white laborers. The non-importation agreements also did challenge the scope of sovereign lawmaking authority: the colonists opposed the official acts of British Parliament

¹⁰⁵ BobDin, Comment to Smith, *supra* note 86 (Sept. 20, 2010, 7:20 AM), http://www.boston.com/news/local/massachusetts/articles/2010/09/20/city_may_curb_sales_of_sugary_beverages/?comments=all#readerComm.

¹⁰⁶ See generally EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS* (1953); PETER D. G. THOMAS, *BRITISH POLITICS AND THE STAMP ACT CRISIS* (1975) [hereinafter THOMAS, *BRITISH POLITICS*]; Jane T. Merritt, *Tea Trade, Consumption, and the Republican Paradox in Prerevolutionary Philadelphia*, 128 PA. MAG. HIST. & BIOGRAPHY 117 (2004); Peter D. G. Thomas, *The Stamp Act Crisis and Its Repercussions, Including the Quartering Act Controversy*, in *THE BLACKWELL ENCYCLOPEDIA OF THE AMERICAN REVOLUTION* 95 (Jack P. Greene & J.R. Pole eds., 1991) [hereinafter BLACKWELL ENCYCLOPEDIA]; Terrence H. Witkowski, *Colonial Consumers in Revolt: Buyer Values and Behavior During the Nonimportation Movement, 1764-1776*, 16 J. CONSUMER RES. 216, 220-23 (1989).

¹⁰⁷ See generally JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX* 29 (1987); PETER D. G. THOMAS, *THE TOWNSHEND DUTIES CRISIS* (1987); Robert J. Chaffin, *The Townshend Acts Crisis, 1767-1770*, in BLACKWELL ENCYCLOPEDIA, *supra* note 106, at 126.

¹⁰⁸ See generally REID, *supra* note 107, at 31; David L. Ammerman, *The Tea Crisis and Its Consequences, Through 1775*, in BLACKWELL ENCYCLOPEDIA, *supra* note 106, at 198.

¹⁰⁹ See generally DAVID AMMERMAN, *IN THE COMMON CAUSE: AMERICAN RESPONSE TO THE COERCIVE ACTS OF 1774* (1974).

with unofficial, quasi-legal agreements by “associations” of ordinary (and some not-so-ordinary) men and women.

But the non-importation agreements and the Boston Tea Party itself cannot fairly be characterized as libertarian, individualist, or broadly anti-government, as the current Tea Party movement might suggest. Upon closer examination, the non-importation movement presents at least as many similarities as differences with modern food-consumption laws. The colonists were motivated not by individualistic but by communitarian impulses—urging curtailment of personal consumption as a strategy to relieve the community of the burden of British taxes. The “Associators,” though acting without the benefit of any sovereign police power, nevertheless gradually devised ways to coerce their neighbors into joining, and to enforce the agreements against violators. Many of the movement’s early architects and proponents—particularly in the Southern colonies—were colonial leaders and future officials of the new federal government, such as George Washington, George Mason, and John Hancock.

The food consumption context offers an opportunity to consider Americans’ earliest reactions to laws that influence food consumption choices, since the offensive British acts included taxes on products consumed at most tables in colonial America: sugar and tea. While the British taxes on food and beverages were motivated by a desire to collect revenue from the apparently-wealthy colonists rather than to reform the health or diets of colonial Americans, those laws did strike at the heart of what colonial Americans ate and drank—a matter of no small pride to the colonists, who had learned to earn a generous livelihood out of the wilderness.¹¹⁰ Then as now, limits on food consumption rankled American consumers. But colonial Americans’ reactions to those limits were far more complex, and communitarian, than contemporary objections would suggest.

A. Community: Private Choices, Public Costs

The passage of the Stamp Act on March 22, 1765, has been described by one historian as a defining moment of political disillusionment for colonial Americans, a “break in the flow of time” on the magnitude of the Kennedy assassination or the 9/11 terrorist attacks for contemporary Americans.¹¹¹ In Britain, stamp duties dated back to 1671, and the idea of imposing them on the colonies had been proposed repeatedly since 1722.¹¹² Estimates of the amount of revenue that might be raised by requiring that all legal instruments be on stamp paper or parchment distributed by the Treasury varied from £40,000 to £100,000.¹¹³ American colonists correctly perceived this first instance of

¹¹⁰ See generally JAMES E. MCWILLIAMS, *A REVOLUTION IN EATING* 279-321 (2005).

¹¹¹ T. H. BREEN, *THE MARKETPLACE OF REVOLUTION* 218 (2004).

¹¹² THOMAS, *BRITISH POLITICS*, *supra* note 106, at 69.

¹¹³ *Id.* at 70, 86-87. The scope of the Stamp Act was sweeping. The act levied taxes on “court documents (including attorneys’ licenses), ship clearances, college degrees, land deeds and land

"taxation without representation" as a display of power by Britain. Treasury Secretary Thomas Whately, who was responsible for supervising the Stamp Bill in Parliament, had written in November 1764 that the bill was motivated by the need for revenue.¹¹⁴ Just three months later, however, Whately ascribed a far more significant political motivation to the "American Stamp Act": "I give it the appellation of a great measure on account of the important point it establishes, the right of Parliament to lay an internal tax on the colonies. We wonder here that it was ever doubted."¹¹⁵

The "important point" was not lost on many colonists. John Hancock, then a young merchant in Boston, reacted to the news with dismay and a decision that forecasted the non-importation movement. To his London-based suppliers of consumer goods, he wrote:

I have come to a Serious Resolution not to send one Ship more to Sea, nor to have any kind of Connection in Business under a Stamp . . . I am Determin'd as soon as I know that they are Resolv'd to insist on this act to Sell my Stock in Trade & Shut up my Warehouse Doors & never Import another Shilling from Great Britain.¹¹⁶

Hancock was deeply serious; on his personal copy, he noted, "This Letter I propose to remain in my Letter Book as a Standing monument to posterity & my children in particular, that I by no means Consented to a Submission to this Cruel Act, & that my best Representations were not wanting in the matter."¹¹⁷

1. Why Taxation Without Representation?

Hancock was not alone in his dismay. The Stamp Act was the third in a series of such insults to the colonists by Great Britain. The Sugar Act of 1764 had reinforced restrictions on imports of foreign rum and molasses from outside British territories,¹¹⁸ and the Currency Act prohibited colonial issues of paper money.¹¹⁹ When news of the Stamp Act reached the colonies in May 1765, public protests erupted. In Boston, crowds hung effigies of a local stamp officer

grants, mortgages and leases, contracts, bonds, articles of apprenticeship and appointment to public office, liquor licenses, playing cards and dice, pamphlets, newspapers, advertisements, and almanacs." BENJAMIN L. CARP, *REBELS RISING* 11 (2007).

¹¹⁴ Letter from Thomas Whately to John Temple (Nov. 5, 1764), in JAMES BOWDOIN ET AL., *THE BOWDOIN AND TEMPLE PAPERS* 9 (6th series 1897), *quoted in* THOMAS, *BRITISH POLITICS*, *supra* note 106, at 86 ("[S]ome attention must be had to revenue, and the colonies must contribute their share . . . the stamp act seems the easiest mode of collecting a considerable sum.") (ellipsis in original).

¹¹⁵ Letter from Thomas Whately to John Temple (Feb. 9, 1765), in BOWDOIN ET AL., *supra* note 114, *quoted in* THOMAS, *BRITISH POLITICS*, *supra* note 106, at 86.

¹¹⁶ Letter from John Hancock to Barnard & Harrison (Oct. 14, 1765), in JOHN HANCOCK PAPERS (Harvard Business School, 1762-1783), *quoted in* BREEN, *supra* note 111, at 218.

¹¹⁷ *Id.*, *quoted in* BREEN, *supra* note 111, at 218-19.

¹¹⁸ See CARP, *supra* note 113, at 11; McWILLIAMS, *supra* note 110, at 286.

¹¹⁹ See CARP, *supra* note 113, at 11; Jack P. Greene & Richard M. Jellison, *The Currency Act of 1764 in Imperial-Colonial Relations, 1764-1776*, 18 WM. & MARY Q. 485, 489 (1961).

and the king's former tutor, destroyed the stamp office, and then "stamped" and burned the effigy in full view of British officials.¹²⁰ Rioting Bostonians destroyed the homes of colonial officials who supported the new trade regulations and sent reports on illegal smuggling to Britain.¹²¹ In New York, on the day the Stamp Act went into effect, crowds descended upon the pretentiously grand home of Major Thomas James, who had vowed to "cram down the Stamp Act upon them with a hundred men."¹²² To demonstrate otherwise, the tavern-going crowds of New York City took all of James' possessions out of the house and burned them, drank all of his alcohol, and "gutted the house of all its doors, window frames, and partitions."¹²³ In Charleston, crowds demanded to search the homes of the imported stamp inspector George Saxby and wealthy planter Henry Laurens.¹²⁴ While order was mostly maintained, the prospect of riots like those in Boston and New York prompted Saxby to refuse to execute his office and influenced Laurens to lead the resistance to Great Britain in the coming decade.¹²⁵

Naturally, colonists astonished at this abrupt change in treatment by their mother country sought explanations. One of the most popular explanations related to the rise of a consumer society in British North America during this period. Between 1720 and 1770, England's exports to the colonies increased by more than fifty percent, with the sharpest rise occurring between 1750 and 1770.¹²⁶ By the mid-eighteenth century, most colonists, though still self-defined by their British identity, were born in North America—a status often not highly respected in England.¹²⁷ From Massachusetts to Virginia, colonists eager to prove their civilized ways, and their allegiance to a country they had never seen, rushed to buy British imports.¹²⁸ Shopkeepers advertised a previously unheard-of range of consumer products. In 1740, one Connecticut shopkeeper sold:

. . . pepper, lace, gloves, gunpowder, flints, molasses, rum, *Watts' Psalms*, mohair, drugs, tiles, paper, garlix (a kind of cloth), pots, pans . . . cord, pails, needles, knives, indigo, logwood, earthenware, raisins, thimbles, buckles, allspice, tea, buttons, mace, combs, butter, spectacles, soap, brimstone, nails, shot, sewing silk, sugar, wire, looking glasses, tape, "Italian crape," "allam," pewter dishes, etc.¹²⁹

¹²⁰ CARP, *supra* note 113, at 41.

¹²¹ *Id.*

¹²² *Id.* at 82.

¹²³ *Id.*

¹²⁴ *Id.* at 152-53.

¹²⁵ *Id.* at 153-54.

¹²⁶ JOHN J. McCUSKER & RUSSELL R. MENARD, *THE ECONOMY OF BRITISH AMERICA, 1607-1789* at 277-94 (1985).

¹²⁷ McWILLIAMS, *supra* note 110, at 212-13.

¹²⁸ *Id.* at 213.

¹²⁹ GLENN WEAVER, JONATHAN TRUMBULL: CONNECTICUT'S MERCHANT MAGISTRATE, 1710-1785, at 18-19 (1956), *quoted in* McWILLIAMS, *supra* note 110, at 213 (ellipsis in original).

Corresponding with this "consumer revolution"¹³⁰ that made eager consumers out of formerly self-sufficient colonists, the British became embroiled in the French and Indian War, fighting France for control over North America.¹³¹ From 1754 to 1763, British officers stationed in the colonies observed the standard of living of colonial Americans. By many reports, the colonists took the opportunity to display whatever wealth they possessed to their distinguished guests. In searching for explanation for Britain's decision to tax its North American colonies, many early writers focused on the conspicuous consumption of the colonists themselves during this period.

In 1764, in a pamphlet entitled *Considerations Upon the Act of Parliament*, an anonymous writer suggested that "the gentlemen of the army and others, at present and lately residing in the maritime towns" could fairly have concluded that Americans were wealthy, since they "spend full as much [on] the luxurious British imports as prudence will countenance, and often much more."¹³² A year later, prominent Pennsylvania lawyer John Dickinson supported this view. Dickinson noted that "an opinion has been industriously propagated in *Great-Britain*, that the colonies are wallowing in wealth and luxury."¹³³ Dickinson argued that the British officers' impression was mistaken, deriving in part from the artificially-stimulated war economy, but also from an "imprudent excess of kindness" by many colonists, who "indulged themselves in many uncommon expences" to impress their British guests.¹³⁴ Reverend Ebenezer Baldwin of Danbury explained that during the last war, "the state of the colonies was much more attended to than it had been in times past," and that returning officers and soldiers conveyed back to England "a very exalted idea of the riches of this country."¹³⁵

¹³⁰ MCWILLIAMS, *supra* note 110, at 213. See also BREEN, *supra* note 111, at 73, 86 n.32. This section relies on Breen's provocative article, *Narrative of Commercial Life: Consumption, Ideology, and Community on the Eve of the American Revolution*, 50 WM. & MARY Q. 471 (1993). For more of Breen's account of the role of consumer identity in shaping the American Revolution, see BREEN, *supra* note 111.

¹³¹ The French and Indian War, known in Europe as the Seven Years' War, actually lasted nine years—the first two in North America alone (the "French and Indian" part) and then spreading to Europe, the Caribbean, West Africa, India, and the Philippines. See generally FRED ANDERSON, *CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766* (2000); WILLIAM M. FOWLER JR., *EMPIRES AT WAR: THE FRENCH AND INDIAN WAR AND THE STRUGGLE FOR NORTH AMERICA, 1754-1763* (2005). The war began as a battle of control over the Upper Ohio River Valley and, in North America, eventually pitted France, Austria, Saxony, Sweden and Russia against Great Britain, Prussia and Hanover for control of colonial territory from the Atlantic to the Mississippi. *Id.*

¹³² CONSIDERATIONS UPON THE ACT OF PARLIAMENT 22 (1764), quoted in T. H. Breen, *Narrative of Commercial Life: Consumption, Ideology, and Community on the Eve of the American Revolution*, 50 WM. & MARY Q. 471, 472 (1993).

¹³³ JOHN DICKINSON, *THE LATE REGULATIONS, RESPECTING THE BRITISH COLONIES ON THE CONTINENT OF AMERICA CONSIDERED* 39-40 (1765), quoted in Breen, *supra* note 132, at 473.

¹³⁴ *Id.*

¹³⁵ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 129 (1967).

In the ensuing years, as new taxes appeared and American grievances mounted, this conclusion appeared frequently in newspapers. In 1769, when the colonists had been burdened by the Townshend Revenue Act for two years, "Incultus Americanus" reminded readers of the *New-London Gazette* that the French and Indian War had prompted extravagance by Americans to impress British visitors: "Our extravagant dress and luxury had this fatal effect . . . , that Europeans concluded we were a people abounding with wealth, and well able to furnish largely for defraying the national debt."¹³⁶ A writer in the *New Haven Post-Boy* in 1771 argued that "a large consumption of unnecessary foreign articles . . . has given us the false and deceitful appearance of riches, in buildings, at our tables, and on our bodies. Which has attracted the attention if not raised the envy of our neighbors, and perhaps had its influence in making the late grievous unconstitutional revenue acts."¹³⁷

Americans' consumption habits during the French and Indian War may have led to sour relations with Britain in other ways as well. As eager as Americans were to impress British officers, they were none too eager to share their hard-won sustenance with common British soldiers. British authorities attempted to contract with colonial governments to provide the soldiers' rations, for which a typical week consisted of four pounds of pork or seven pounds of beef, seven pounds of "biscuit bread" or flour, three pints of peas, half a pound of rice, and six ounces of butter.¹³⁸ Frequently, those provisions came from the colonies only with restrictions or not at all.¹³⁹ For a campaign against the French at Niagara and Crown Point, the British army contracted to receive rations from New York, Rhode Island, Connecticut, Virginia, and Maryland. They were disappointed: New York supplied no beef; Virginia restricted all provisions for use only for Virginians; and Maryland and Virginia delivered rations so poor that the commanding general complained, "They had promised everything and performed nothing."¹⁴⁰ British soldiers described eating meals such as bacon "which had been in store since the former war and Biscuits full of maggots, so that after endeavouring to clear them of vermin we used to wet them and toast them."¹⁴¹

Angry (and hungry) British soldiers reacted with force, robbing American farms and gardens, "often at gunpoint."¹⁴² Surveying this bitter episode in British-colonial relations, James McWilliams noted that unhappy American farmers "responded to raids by practicing the time-honored

¹³⁶ NEW LONDON GAZETTE, Jan. 20, 1769, *quoted in* Breen, *supra* note 132, at 475 (ellipsis in original).

¹³⁷ CONN. J. & NEW HAVEN POST-BOY, Oct. 11, 1771, *quoted in* Breen, *supra* note 132, at 475 (ellipsis in original).

¹³⁸ See STEPHEN BRUMWELL, REDCOATS: THE BRITISH SOLDIER AND WAR IN THE AMERICAS, 1755-1763, at 151 n.62 (2002).

¹³⁹ See HARRY M. WARD, "UNITE OR DIE": INTER-COLONY RELATIONS 1690-1763, at 76-78 (1971).

¹⁴⁰ *Id.* at 76.

¹⁴¹ BRUMWELL, *supra* note 138, at 151.

¹⁴² MCWILLIAMS, *supra* note 110, at 296.

inflammatory techniques of price gouging and bilking what they could from the government trough."¹⁴³ Colonial leaders not only charged more for food for British soldiers, but also filed receipts for goods sold to American consumers. For example, Rhode Island was compensated for a merchant's shipment of "coffee, tea, chocolate, sugar, ham, knives, forks, spoons, and plates"—items having nothing to do with the war effort, but much to do with American consumer tastes.¹⁴⁴

Were mid-eighteenth century Americans wealthy? Contemporaneous commentators dispute the fact. According to one anonymous pamphleteer, what the British observed was more nouveau riche excess than true wealth: "It is an old observation . . . that those who suddenly plunge into unexpected riches, in ostentation greatly exceed those who either derive them from their ancestors, or have gradually acquired them by the ordinary course of business."¹⁴⁵ In 1774, the Reverend Ebenezer Baldwin of Danbury, Connecticut, published a sermon directed toward rural farmers who lacked access to "information from the news papers and other pieces wrote upon the controversy."¹⁴⁶ Baldwin attributed the British impression of wealth to the colonies' unusually equal class structure: "[W]here property is so equally divided, every one will be disposed to rival his neighbor in goodness of dress, sumptuousness of furniture, &c. All our little earnings therefore went to Britain to purchase mainly the superfluities of life."¹⁴⁷ Whether truly wealthy or just displaying (or protecting) what they had, Americans soon found that their consumption habits made them a prime target for the British taxing authority.¹⁴⁸

¹⁴³ *Id.*; accord WARD, *supra* note 139, at 77 ("The lure of war profiteering was greater than patriotism.").

¹⁴⁴ McWILLIAMS, *supra* note 110, at 296.

¹⁴⁵ THE POWER AND GRANDEUR OF GREAT-BRITAIN, FOUNDED ON THE LIBERTY OF THE COLONIES, AND THE MISCHIEFS ATTENDING THE TAXING OF THEM BY ACT OF PARLIAMENT DEMONSTRATED (1768), *quoted in* BREEN, *supra* note 111, at 13.

¹⁴⁶ Ebenezer Baldwin, *An Appendix, in* SAMUEL SHERWOOD, A SERMON, CONTAINING SCRIPTURAL INSTRUCTIONS TO CIVIL RULERS (1774), *quoted in* BREEN, *supra* note 111, at 14.

¹⁴⁷ *Id.* Baldwin's observation of rough equality of means in America is borne out by auxology research, or the study of human stature. "Because family income heavily influences purchases of basic necessities such as food and medical care, stature is ultimately a function of access to resources." Steckel, *supra* note 14, at 34. Studies of the stature of colonists of both European and African descent support the notion that, in the eighteenth century, "access to resources was widespread, and equality might have been greater than at any time in our nation's past." *Id.* at 47.

¹⁴⁸ While the Stamp Act was in effect less than four months, its coming was announced to the colonies nearly two years earlier by Parliament in connection with the Sugar Act. See Edmund S. Morgan, *Colonial Ideas of Parliamentary Power 1764-1766*, 5 WM. & MARY Q. 311, 313 (1948). The American Revenue Act of 1764, better known as the Sugar Act, sought to enforce the Molasses Act of 1733. See ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789*, at 63-65 (rev. ed. 2005). In the Molasses Act, Parliament had attempted to close off colonial purchases of molasses from French, Dutch and Spanish West Indian territories through a substantial duty on that trade, but the duties were rarely collected and smuggling undermined the scheme. See Peter D. G. Thomas, *The Grenville Program, 1763-1765*, in BLACKWELL ENCYCLOPEDIA, *supra* note 106, at 107-08. The Sugar Act, fueled by pressure to raise revenue to

Misapprehending the nature of the colonists' objection to the Stamp Act, Parliament followed its repeal in short order with the Townshend Acts, which imposed "external" taxes on imported goods (including tea) rather than "internal" taxes on American goods and documents.¹⁴⁹ The Townshend Acts placed new taxes on imported tea as well as paper, paint, lead and glass. Townshend's goal was "political rather than financial"¹⁵⁰; in addition to offsetting relief of British duties on tea from the failing British East India Company, Townshend planned to use the American taxes to take over paying the salaries of colonial governors and judges—effectively insulating the colonial government from its constituents.¹⁵¹ The Townshend Acts were partially repealed in 1770, but their most offensive features remained: the revenue-generating duty on tea, the rights of customs officials to search private homes for smuggled goods, and the British payment of governors and magistrates.¹⁵² The Tea Act followed in 1773. Though geared to support the British East India Company by refunding shipping costs of tea sent directly to the colonies, the Tea Act retained the Townshend Act's three-pence-per-pound tax on tea, fueling the suspicion of the colonists.¹⁵³ The Boston Tea Party followed, and Britain responded with passage of the Coercive Acts.¹⁵⁴ The First Continental Congress, the Continental Association, and the battle of Lexington and Concord were not far behind.

2. Community and the Non-Importation Agreements

From the twenty-first century perspective, these events flow with an aura of inevitability. To the colonists of the mid-eighteenth century, however, a break

station soldiers in the colonies after the French and Indian War, halved the duties to a more realistic three pence per gallon and stepped up enforcement measures. *Id.*; MIDDLEKAUFF, *supra*.

¹⁴⁹ See Morgan, *supra* note 148, at 311. Charles Townshend said that the distinction between internal and external taxes was "ridiculous in everybody's opinion except the Americans'." *Id.* Morgan, analyzing the official resolutions, petitions, memorials, and remonstrances issued by the elected representatives of the colonies in 1764-65, denies that the Americans ever made such a distinction. Americans from the outset conceded Parliament's power to regulate trade in the colonies, but denied its power to tax the colonists. *Id.* at 315-27. The distinction between "internal" and "external" taxes, according to Morgan, originated in England and was mistakenly attributed to the Americans. *Id.* at 339-41.

¹⁵⁰ See PETER D. G. THOMAS, *THE TOWNSHEND DUTIES CRISIS: THE SECOND PHASE OF THE AMERICAN REVOLUTION, 1767-1773*, at 30 (1987).

¹⁵¹ See JOHN C. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* 255 (1943).

¹⁵² See Chaffin, *supra* note 107.

¹⁵³ See Merritt, *supra* note 106, at 141-42.

¹⁵⁴ Also called the Intolerable Acts, these punitive measures included the Boston Port Act (closing the Port of Boston until the East India Company had been repaid); the Massachusetts Government Act (granting the governor or the king the right to appoint all positions in the colonial government); the Administration of Justice Act (allowing the governor to move trials of accused royal officials to another colony or to Britain, effectively insulating officials from suit); and the Quartering Act (allowing governors to house soldiers in unoccupied buildings if colonial legislatures failed to provide housing). See AMMERMAN, *supra* note 109.

with the mother country was neither inevitable nor, to most, desirable.¹⁵⁵ Instead, colonists struggling under the burden of British taxes first sought the solution by examining their own actions. What would evolve into the non-importation movement began with calls to citizens to account for the public consequences of their private decisions—their personal consumption. As T. H. Breen has described, Americans had begun to recognize that “private enjoyments had a social price. Each purchase—no matter how justified in terms of the finances of a given household—spoke not simply of self-fulfillment but also of responsibilities to communities of local purchasers who happened to be experiencing straitened times.”¹⁵⁶

Colonial Americans reacting to the Stamp Act, the Townshend Acts, and the Tea Act faced a similar dilemma as modern Americans attempting to deal with rising public health costs: Respect personal consumption decisions as purely “private” matters and tolerate the costs shifted to society; or attempt to internalize those costs through measures that influence personal consumption decisions for the good of the community. Robert E. Shalhope has described the critical role that communitarian mandates played in the republican movement in colonial America:

Public virtue, as the essential prerequisite for good government, was all-important . . . Since furthering the public good—the exclusive purpose of republican government—required the constant sacrifice of individual interests to the greater needs of the whole, the people, conceived of as a homogenous body (especially when set against their rulers), became the great determinant of whether a republic lived or died. Thus republicanism meant maintaining public *and private* virtue,

¹⁵⁵ Most historians have noted mid-eighteenth-century Americans’ affinity for and loyalty to Great Britain. See, e.g., MCWILLIAMS, *supra* note 110, at 215-16. Arthur Lee authored what one historian called “the most important series of letters ever to appear during the pre-Revolutionary period in [Virginia]” concerning the colonies’ political relationship to England. Glenn Curtis Smith, *An Era of Non-Importation Associations, 1768-73*, 20 WM & MARY Q. 84, 85 (1940). Probably beginning in November 1767, when the Townshend Acts went into effect, Lee suggested two plans to help reestablish friendly relations between the colonists and the mother country. *Id.* at 86. His first contained six courses of action focused on the colonists’ right to representative government. *Id.* at 87. Item six advised that if “His Majesty would see to it that Parliament accepted the colonial bill of rights, the colonists were to swear undying allegiance to the throne.” *Id.* (citing Arthur Lee, *Letter IV*, VA. GAZETTE, Mar. 17, 1768). Additionally, the petitioners in Virginia’s first organized protest to the Townshend Acts maintained that they were not subject to Parliament, but were “dependent on and Subject to the Crown of Great Britain.” *Id.* at 87-88 (citing JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1766-69 at 145). In a letter to Peter Collinson, Benjamin Franklin wrote: “O let not Britain seek to oppress us, but like an affectionate parent endeavor to secure freedom to her children; they may be able one day to assist her in defending her own.” Letter from Benjamin Franklin to Peter Collinson (May 9, 1753), *quoted in* BAILYN, *supra* note 135, at 89.

¹⁵⁶ BREEN, *supra* note 111, at 206.

internal unity, social solidarity, and vigilance against the corruptions of power.¹⁵⁷

The colonists' disenfranchisement, and, by extension, the types of "measures" available to them, differed significantly from the situation of today.¹⁵⁸ But the motivation behind the colonists' call to non-importation was strikingly similar to the motivation behind modern food-consumption regulation: to eliminate externalized costs, in this case the British taxation scheme prompted by many colonists' conspicuous consumption during the French and Indian War.

If American consumption was to blame for the new British taxes, then American consumption was the natural focus of attention of colonists seeking to relieve the colonies from the burden. Writing in the newspapers, colonists appealed to one another to adopt the virtues of a temperate lifestyle with few imported British fineries, rather than watch their neighbors labor under the burden of heavy taxes. "The Americans have plentifully enjoyed the delights and comforts, as well as the necessities of life," readers of the *Newport Mercury* were told, "and it is well known that an increase of wealth and affluence paves the way to an increase of luxury, immorality and profaneness, and here kind providence interposes; and as it were, obliges them to forsake the use of one of their delights, to preserve their liberty."¹⁵⁹ The "delight" spoken of was the consumption of tea.¹⁶⁰ Another writer, "Æconomicus," describing Pennsylvania, wrote, "a temperate, industrious, religious people, with money at command for every emergency, are now become voluptuous, idle, profligate, involved in debt, and almost left without the prospect of recovery."¹⁶¹ The solution was for households to practice "industry and frugality, a disuse of foreign superfluities, and a limitation of our desires to the real necessities and comfortable conveniencies of life."¹⁶² Public accountability for private consumption decisions was linked to virtue, tax reform, and, ultimately, freedom: "We may talk and boast of liberty; but after all, the industrious and frugal only will be free."¹⁶³

Gradually, the calls for frugality began to take on more conspicuous overtones of a political strategy—if non-consumption did not harm British interests and secure the repeal of the burdensome and unjust taxes, Americans would be free to dispense with the British. "Our enemies very well know that

¹⁵⁷ Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM & MARY Q. 334, 335 (1982) (emphasis added).

¹⁵⁸ See *infra* Parts III.B and III.C.

¹⁵⁹ NEWPORT MERCURY, Dec. 13, 1773, quoted in Edmund S. Morgan, *The Puritan Ethic and the American Revolution*, 24 WM & MARY Q. 3, 9 (1967).

¹⁶⁰ Morgan, *supra* note 159, at 9.

¹⁶¹ BOS. EVENING-POST, Nov. 9, 1767, quoted in BREEN, *supra* note 111, at 208.

¹⁶² *Id.* at 209. Accord Shalhope, *supra* note 157, at 335 ("A people practicing frugality, industry, temperance, and simplicity were sound republican stock, while those who wallowed in luxury were corrupt and would corrupt others.").

¹⁶³ NEWPORT MERCURY, Feb. 28, 1774, quoted in Morgan, *supra* note 159, at 10.

dominion and property are closely connected; and that to impoverish us, is the surest way to enslave us. Therefore, if we mean still to be free, let us unanimously lay aside foreign superfluities, and encourage our own manufacture. SAVE YOUR MONEY AND YOU WILL SAVE YOUR COUNTRY!"¹⁶⁴

Writers advocating the non-importation and non-consumption agreements expressly linked their neighbors' private consumption decisions—whether or not to purchase the taxed British items—to the individual's responsibility to the collective good. On August 10, 1770, Talbot County, Maryland's Committee of Inspection and other inhabitants resolved to cut off all trade with New York for violating the non-importation agreement. The Talbot County committee "RESOLVED, That the Non-importation Agreement is a Measure well calculated to prevent Luxury, to promote Industry, and to procure a Redress of American Grievances," and "RESOLVED, That to pursue and to promote the Happiness of the Community, *by making our own private Interest give Way to the public Advantage*, is noble and honourable, and the Duty of every Friend and Lover of his Country."¹⁶⁵ In 1774, "A WOMAN" urged the colonists to reconsider whether their daily cup of tea was a merely private choice: "in the present case the use of tea is considered not as a *private* but as a *public* evil . . . we are not to consider it merely as the herb tea, or what has an ill-tendency as to health, but as it is made a handle to introduce a variety of public grievances and oppressions amongst us."¹⁶⁶ Frequently, writers urged their readers to produce colonial "manufacture" such as cloth made from locally-produced wool rather than finer imported British fabrics. "Every Man who will take Pains to cultivate the Cost of Homespun may easily convince himself that his private Interest, as well as the Publick, will be promoted by it."¹⁶⁷

The shared social cost of failing to curtail consumption, writers warned, would be devastating. In 1770, a writer called "Nestor" reminded "the Farmer, the Merchant, the Tradesman and Mechanic" in Philadelphia that "neither are the Sufferings of Individuals to be put in Competition with the general Safety."¹⁶⁸ Instead, "persevere; every Thing that is near and dear to you is at Stake."¹⁶⁹ The costs of the readers' failures would be borne not only by the present but by future generations: "[T]he least Retreat therefore would intail such Infamy upon your

¹⁶⁴ BOS. EVENING-POST, Nov. 16, 1767, *quoted in* Morgan, *supra* note 159, at 10.

¹⁶⁵ PA. GAZETTE, Aug. 23, 1770 (emphasis added) (accessed through Accessible Archives database).

¹⁶⁶ MASS. SPY, Jan. 6, 1774, *quoted in* T. H. Breen, "Baubles of Britain": *The American and Consumer Revolutions of the Eighteenth Century*, PAST & PRESENT, May 1988, at 73, 98 (emphasis in original). This argument was familiar to readers of the paper: In December 1773, a writer urged that "the use of Tea is a political evil in this country." MASS. SPY, Dec. 23, 1773, *quoted in* Breen, "Baubles of Britain," *supra*, at 99.

¹⁶⁷ BOS. GAZETTE, Jan. 11, 1768, *quoted in* Breen, *supra* note 166, at 91.

¹⁶⁸ PA. GAZETTE, July 12, 1770 (accessed through Accessible Archives database).

¹⁶⁹ *Id.*

Country, as would require many Generations of Vigilance and Integrity to wipe away.”¹⁷⁰

When opponents of contemporary food-consumer legislation claim that the founding fathers “never dreamed that anyone would someday attempt to strip the American people of the fundamental freedom to control what we eat and drink,” they gloss over this history of America’s founding. While privacy and liberty have always been core American values, the non-importation and non-consumption agreements suggest that Americans have always viewed the right to private consumption choices as contingent upon the duty to act for the good of society. Then, as now, some individuals complained that their consumption decisions were private and should not be subjected to pressure to serve public ends.¹⁷¹ Then, as now, merchants seeking to earn a living invoked their constitutional right to trade in a free market.¹⁷² Both of these concerns—free market and personal privacy—were overridden by the majority of colonists, who saw changes in private consumption behavior as necessary for the good of the whole. The result was the formation of non-importation and non-consumption agreements, from Boston to Philadelphia to Charleston, in response to the Stamp Act, the Townshend Acts and the Tea Act. This call to conform private consumption for the collective good was, in the view of some historians, an indispensable element in the formation of a coherent “We the People” who could declare their fundamental rights in the first place.¹⁷³

The objectives of the colonists, of course, differed in important respects from those of contemporary food regulation advocates. Contemporary advocates seek to internalize shared economic costs arising primarily from public provision of health care and other benefits for obesity-related illnesses. The costs the colonists sought to reduce, by contrast, were both economic and political. Initially, the colonists felt the British taxes primarily as a contributing force to the economic depression of the 1760s, which had led to colonial indebtedness, currency drain, limitations on exports to foreign markets, and increasing bankruptcies.¹⁷⁴ One historian called the depression “the single most significant

¹⁷⁰ *Id.*

¹⁷¹ See *infra* note 213 and accompanying text.

¹⁷² See *infra* notes 214-17 and accompanying text.

¹⁷³ See, e.g., BREEN, *supra* note 111, at 200. In Breen’s view:

The argument is most definitely not that the language of liberty and rights failed to resonate across traditional boundaries of class and geography. It obviously did so. But such rhetoric was not a sufficient cause of revolution. Without a foundation of widespread trust—a bond linking distant strangers and tested repeatedly through rituals of consumer sacrifice—the principled declarations that dominate our own memory of national independence would not have been able to sustain broad structures of political resistance or have produced a meaningful sense of common purpose.

Id.

¹⁷⁴ *Id.* at 204-06.

factor" in shaping the colonists' reaction to the British tax scheme.¹⁷⁵ In Virginia, non-importation advocates like George Washington privately encouraged association as a tool to allow planters a way out of debt without losing face, while publicly emphasizing the more respectable motive of putting political pressure on Parliament.¹⁷⁶ Increasingly, though, the Revolutionary movement became less about economic hardship exacerbated by British regulatory policy and more about the colonists' political dependence.¹⁷⁷ Nevertheless, the non-consumption Associators resembled the contemporary advocates of food-consumption regulation in a striking respect: The Associators consciously overrode resistance, premised on the values of personal choice and market freedom, to advocate for curtailed private consumption to benefit the public good.

B. Authority

The populist and voluntary nature of the non-importation and non-consumption agreements makes the Boston Tea Party a useful symbol in contemporary politics. Unlike contemporary food-consumption regulation (like the Healthy, Hunger-Free Kids Act¹⁷⁸), the non-importation and non-consumption movements that led to the Boston Tea Party were not laws. They were agreements formed by men and women, many of whom held no public

¹⁷⁵ ANDERSON, *supra* note 131, at 588.

¹⁷⁶ WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES & THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA* 89-90 (1999). Holton noted, "There was nothing unusual or sinister in the associators' decision to emphasize their political motives and downplay economics, but it has unfortunately led historians that rely upon their public writings to do the same thing." *Id.* at 90.

¹⁷⁷ CHARLES M. ANDREWS, *THE BOSTON MERCHANTS AND THE NON-IMPORTATION MOVEMENT* (1917), *reprinted in* 19 *COLONIAL SOC'Y OF MASS., THE PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS* 259 (1892-1924) ("The non-importation movement began as a merchant's device wherewith to obtain a redress of trade grievances; it ended as an instrument in the hands of political agitators and radicals for the enforcement of their claims of constitutional liberty and freedom."). The decade-long delay between the Stamp Act and the start of the Revolution has been attributed not only to the colonists' lack of means for political mobilization in 1765, *see* BREEN, *supra* note 111, at 220, but also in part to their shared political identity with Britain, *id.*, and, more fundamentally, to their love of English culture and consumer goods, MCWILLIAMS, *supra* note 110, at 211. As McWilliams has pointedly observed, the Revolution appears more inevitable in hindsight than it would have in 1765:

The Stamp Act, George III, the Boston Tea Party, the Boston Massacre, Tom Paine, Lexington and Concord, and the heroic rise of the flawless founding fathers seem so inevitable in their emergence, so poetic in their advocacy of liberty and justice, so loyally wedded to the rhetoric of equality, that it comes as a shock for many contemporary Americans to learn that during the three decades preceding the American Revolution, the colonies fell in love first and foremost with all things English.

Id. at 211.

¹⁷⁸ *See supra* note 25.

office, no prestigious social position, and no sovereign power of enforcement. Thus, the Boston Tea Party conveniently symbolizes the power of "the People" to effect sweeping political change.

Certainly, most historians agree that the non-importation and non-consumption agreements created a level of populist political engagement previously unknown in the colonies, an engagement that made the Revolution possible. And that revolution succeeded in unseating the former rulers in Great Britain from their erstwhile position of authority in America. But while the parallels between the original event and the goals of the Tea Party are clear, the significance of those parallels as a political analogy fades when placed in historical and political context.

The colonists' fundamental problem, of course, was that they were in a different position than contemporary Americans: They lacked representation in the Parliament that chose to tax them. Their governors were appointed and, after the Townshend Acts, paid by Great Britain. Even the colonies' elected assemblies had limited power to protest the imperial actions: When the Virginia House of Burgesses refused to abandon their position that Parliament lacked the power to tax them, the body was dissolved by the new English governor.¹⁷⁹ As Thomas Doerflinger has explained:

Although the stated aim of nonimportation was to exert pressure for the repeal of particular measures, its actual reach was far wider. It was in fact a tentative declaration of American economic independence, and its enforcement by local communities gave rise to some of the earliest extralegal Revolutionary governments in the colonies.¹⁸⁰

The quasi-legal nature of the non-consumption and non-importation agreements was more inevitable than philosophical: The colonists, while ostensibly British citizens, had no representation in the British government. By necessity, groups of colonists without elected office assembled, drafted association agreements, and developed mechanisms to enforce them against their neighbors.

This quasi-legal context did create the opportunity for far greater participation by traditionally disenfranchised people such as women and landless laborers. Even within this populist movement, however, the eventual success of the non-importation and non-consumption agreements in reshaping American federal political authority depended on the organized and influential support of American colonial elites. Benjamin Franklin, testifying before British Parliament in 1771, may have been the first to (cunningly) suggest to the British authorities

¹⁷⁹ See JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1766-1769, at 215-18, cited in Smith, *supra* note 155, at 92.

¹⁸⁰ Thomas M. Doerflinger, *Philadelphia Merchants and the Logic of Moderation, 1760-1775*, 40 WM. & MARY Q. 197, 213-214 (1983).

the potential power of the growing consumer boycott in the colonies.¹⁸¹ When Franklin was asked whether English cloth was a necessity to Americans, Franklin answered, "No, by no means absolutely necessary; with industry and good management, they may very well supply themselves with all they want."¹⁸² Confronted with the connection between the Stamp Act and economically-devastating American resourcefulness, Franklin was asked to speculate about the consequences if the Stamp Act was not repealed. He replied, "A total loss of the respect and affection the people of America bear to this country and of all the commerce that depends on that respect and affection."¹⁸³

Other leaders of Revolutionary America also publicly advanced the non-importation cause. In an often-quoted phrase, Samuel Adams, writing to the Virginian Arthur Lee, said that colonial survival depended on America freeing herself from "the Baubles of Britain."¹⁸⁴ Adams responded to the colonial representatives' increasing disenfranchisement by helping to organize the committees of correspondence system, enabling communication between the colonies.¹⁸⁵ After Bostonians entered into a non-importation agreement established to protest the Townshend Acts, John Hancock chaired a committee of merchants to communicate with merchants and traders of neighboring towns to encourage their concurrence.¹⁸⁶

In the Southern colonies, the support of elites was particularly important.¹⁸⁷ Unlike Northern merchants, who were generally from respected local families and were closely tied to the communities in which they lived, Southern merchants were generally employed by Scottish or English merchant houses.¹⁸⁸ Because these merchants were less sensitive to pressure from citizen "Associations," wealthy Southern planters had to take the lead in drafting non-importation agreements, and use their influence with merchants to encourage compliance.¹⁸⁹

¹⁸¹ See BREEN, *supra* note 111, at 197-98.

¹⁸² *Id.* at 198 (quoting THE PAPERS OF BENJAMIN FRANKLIN 127 (Leonard W. Labaree ed., 1959)).

¹⁸³ *Id.*

¹⁸⁴ Letter from Samuel Adams to Arthur Lee (Oct. 31, 1771), in THE WRITINGS OF SAMUEL ADAMS 267 (Harry Alonzo Cushing ed., 1906). The phrase has enjoyed a popular career as a quotation among historians. See Breen, *supra* note 166; Witkowski, *supra* note 106, at 222; Morgan, *supra* note 159, at 10.

¹⁸⁵ See RICHARD D. BROWN, REVOLUTIONARY POLITICS IN MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS, 1772-1774, at 44-57 (1970).

¹⁸⁶ ANDREWS, *supra* note 177, at 202.

¹⁸⁷ BREEN, *supra* note 111, at 246. A historian of colonial Virginia described the top-down character of different phases of the non-importation movement in the colony: Initially, "[t]he 1769 nonimportation association did not reach very far below the gentry class." HOLTON, *supra* note 176, at 79. After a recession struck the Chesapeake region, the idea gained broader support, but leadership still came from planters: "In the summer of 1774, gentlemen drafted a nonimportation plan designed to pressure Parliament to repeal the Coercive Acts and at the same time reduce the Virginians' debts." *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

The first move to organize against imports and consumption in Maryland, Virginia and South Carolina occurred in 1769, during the crisis following the Townshend Acts.¹⁹⁰ George Washington was one of the first to recognize that the British duties offered colonists a convenient excuse (and a needed discipline) to reduce their overconsumption.¹⁹¹ The problem, Washington wrote to George Mason in April 1769, was that any individual, acting alone to reduce consumption, would be perceived as less successful than his neighbors. An individual thus perceived would suffer "embarrassment" and loss of credit-worthiness within the community.¹⁹² Touting the non-consumption pacts as a remedy to the bind of overconsumption on the one hand and potential loss of reputation on the other, Washington wrote to Mason, "[a] scheme of this Sort will contribute more effectually than any other I can devise to immerge the Country from the distress it at present labours under."¹⁹³ Such agreements would give overextended Southern planters "a pretext to live within bounds."¹⁹⁴

The first Virginia non-importation agreement was about as close to an official legal text as the increasingly disenfranchised colonists could produce. On May 17, 1769, when the English governor disbanded the House of Burgesses for supporting other rebellious colonies, the members proceeded immediately to the Williamsburg home of Anthony Hay. At the Hay home, the members considered a non-importation agreement—most likely drafted by George Mason¹⁹⁵ and read to the group by George Washington.¹⁹⁶ The members, two from each county in Virginia, signed "the non-Importation resolutions of the Association at Williamsburg," refusing to import British goods and taxed items, and urging frugality.¹⁹⁷

By 1774, the colonists chose delegates to the First Continental Congress, which passed the non-importation and non-consumption agreement that put the nail in the coffin of trans-Atlantic trade.¹⁹⁸ The list of leaders who enacted the Continental Association reads like a who's who of colonial elites, including the names of some of the first elected and appointed officials of the nascent United

¹⁹⁰ *Id.* at 245.

¹⁹¹ HOLTON, *supra* note 176, at 85.

¹⁹² Letter from George Washington to George Mason (Apr. 5, 1769), in THE PAPERS OF GEORGE MASON, 1725-1792, at 97-98 (Robert A. Rutland ed., 1970), *cited in* HOLTON, *supra* note 176, at 85.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 79.

¹⁹⁵ See ANDREWS, *supra* note 177, at 215; HOLTON, *supra* note 176, at 86 n.20; BRUCE A. RAGSDALE, A PLANTERS' REPUBLIC 73-78 (1996); Smith, *supra* note 155, at 92 (citing 1 KATE MASON ROWLAND, THE LIFE OF GEORGE MASON, 1725-1792, at 137 (1892)). Holton notes that the editor of Mason's papers, Robert A. Rutland, says that Mason was not the author, but Holton sees Mason's ideas in two of the drafts' principles: a threat of non-exportation (principally of tobacco) and "an open-ended promise to boycott any times that might be taxed in the future." HOLTON, *supra* note 176, at 86 n.20.

¹⁹⁶ See Smith, *supra* note 155, at 92.

¹⁹⁷ *Id.* at 92-93.

¹⁹⁸ See HOLTON, *supra* note 176, at 102; Witkowski, *supra* note 106, at 220-23.

States.¹⁹⁹ From Virginia, George Washington, the nation's first president,²⁰⁰ and Richard Henry Lee, one of the first presidents *pro tempore* of the U.S. Senate;²⁰¹ from New York, John Jay, the first chief justice of the U.S. Supreme Court;²⁰² from Massachusetts, John Adams, the nation's second president,²⁰³ and John Hancock, the first and third governor of Massachusetts;²⁰⁴ from Maryland, Samuel Chase, one of the first associate justices of the Supreme Court²⁰⁵ (and, in an early political skirmish between Federalists and Jeffersonian Republicans in the new United States, the only justice ever to be impeached (and acquitted)²⁰⁶); and from Connecticut, Silas Deane, the country's first foreign diplomat.²⁰⁷

The Continental Association was sweeping, boycotting nearly all consumer items from Britain.²⁰⁸ Unlike earlier agreements entered into in the towns and colonies, its effect was impressive: In New York, imports plummeted from £437,000 in 1774 to an astonishingly low £1,228 in 1775.²⁰⁹ Similarly, in Maryland and Virginia, the value of European imports dropped from £690,000 in 1774 to a mere £2,000 sterling in 1775.²¹⁰ While the recession that began two years earlier had left many colonists unable to afford British imports in any event,²¹¹ the coordination of colonial impulses toward non-consumption and non-importation by leaders at the First Continental Congress sealed the fate of trans-Atlantic trade and set the stage for the Revolution.

¹⁹⁹ See THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1774, at 214, 217-18 (Edmund Burke ed., 1775) [hereinafter ANNUAL REGISTER 1774].

²⁰⁰ *Id.* at 218; see generally RON CHERNOW, WASHINGTON: A LIFE (2010).

²⁰¹ ANNUAL REGISTER 1774, *supra* note 199, at 218; see generally KENT J. MCGAUGHY, RICHARD HENRY LEE OF VIRGINIA: A PORTRAIT OF AN AMERICAN REVOLUTIONARY (2004).

²⁰² ANNUAL REGISTER 1774, *supra* note 199, at 218; see generally GEORGE PELLEW, JOHN JAY (1972).

²⁰³ ANNUAL REGISTER 1774, *supra* note 199, at 218; see generally DAVID MCCULLOUGH, JOHN ADAMS (2001).

²⁰⁴ ANNUAL REGISTER 1774, *supra* note 199, at 218; see generally PAUL D. BRANDES, JOHN HANCOCK'S LIFE AND SPEECHES: A PERSONALIZED VISION OF THE AMERICAN REVOLUTION, 1763-1793 (1996).

²⁰⁵ ANNUAL REGISTER 1774, *supra* note 199, at 218; see generally JAMES HAW, STORMY PATRIOT: THE LIFE OF SAMUEL CHASE (1980).

²⁰⁶ See Jerry W. Knudson, *The Jeffersonian Assault on the Federalist Judiciary, 1802-1805: Political Forces and Press Reaction*, 14 AM. J. LEGAL HIST. 55, 60, 65-68 (1970).

²⁰⁷ ANNUAL REGISTER 1774, *supra* note 199, at 218; see generally GEORGE L. CLARK, SILAS DEANE: A CONNECTICUT LEADER IN THE AMERICAN REVOLUTION (1913).

²⁰⁸ See ANNUAL REGISTER 1774, *supra* note 199, at 214-18. The Continental Association pledged not to import "any goods, wares, or merchandize whatsoever" from Great Britain, Ireland, or anyplace re-exporting British or Irish goods. *Id.* at 214-15. The non-importation agreement extended also to "East-India tea from any part of the world; nor any molasses, syrups, paneles [sic], coffee, or piemento, from the British plantations, or from Dominica, nor wines from Madeira, or the western islands; nor foreign indigo." *Id.* at 215. The non-importation agreement was supported by a pledge of non-consumption of the listed items, and by the threat of a non-exportation plan should the colonists' grievances not be redressed. *Id.*

²⁰⁹ Witkowski, *supra* note 106, at 221.

²¹⁰ HOLTON, *supra* note 176, at 102.

²¹¹ *Id.*

C. Coercion

Attendant with the quasi-legal status of the non-importation and non-consumption agreements was the lack of a formal enforcement regime. But while those agreements were not backed by the police power like current food-consumption laws, eighteenth-century Americans found ingenious means to give their quasi-legal agreements coercive effect roughly equivalent to official laws.

Enforcement was achieved through means such as publication of lists of signatories and non-signatories; community searches and seizures of goods imported contrary to agreement; and ostracism or even, in some cases, violence against violators. Enforcement measures became more sophisticated over the three peak phases of non-importation agreements.²¹² Strategies evolved from putting public pressure on merchants to refuse British imports, to boycotting merchants who refused to comply, to entreaties of community-wide agreement, and public shaming or other punishment of individuals found in violation. After 1770, dressing in British fabrics, setting one's table with British china, or—with most populist reach—simply drinking tea were offenses that would not go unpunished.

These coercive mechanisms to enforce the non-importation and non-consumption agreements were necessary to overcome both those who opposed the measures on principle and (probably more common) those who would have liked to free-ride on their neighbors while quietly enjoying their favorite warming afternoon beverage. First, the principled objections: In the mid-eighteenth century, the public movement that would lead to the non-importation agreements was anathema to the way many colonists perceived their rights and liberties—much as the food-consumption laws are to some modern Americans. In 1764, a writer in the *Boston Gazette* asked,

whether it be consistent with that Honour which every English Householder claims as his Right, to oblige him to expose the private Economy of his Family, to the View of the World?—Has it not always been justly deem'd Impertinent for one Man to busy himself with the Family Concerns of Another? Would it not be an intolerable Insult for him to demand of his Neighbour an Account of his private Conduct & Family Expenses?²¹³

Several years later, as the non-importation movement grew in response to the Townshend Acts, merchants in Charleston protested the actions of the local non-importation association as a violation of their constitutional rights as Englishmen. In 1769, a prosperous merchant named William Drayton claimed that the local non-importation association “hath *violated* the first Principles of

²¹² See Witkowski, *supra* note 106, at 220-21.

²¹³ BOS. GAZETTE, July 16, 1754, *quoted in* BREEN, *supra* note 111, at 207.

Liberty. Its Members act in a *despotic* and *unjust* Manner . . . for they have assumed a Power unknown to the Constitution."²¹⁴ Another Charleston merchant, William Wragg, claimed that the July 1769 non-importation agreement in Charleston was an illegal restraint of trade that could not restrict his right, as a non-subscriber, to trade openly in a free market.²¹⁵ Eighteenth-century merchants also invoked principles of trickle-down economics. One merchant argued in 1767 that the non-importation agreements would "involve a very great number of honest and industrious mechanics in want and misery, and their misfortune and want will spread to the next class, which is the day labourers and of great utility to the public."²¹⁶ The hardship, the merchant argued, would eventually spread to mariners and farmers.²¹⁷

The answer, it was widely thought in the early days of the controversy, would be found in the free market. British and colonial governors in this period urged the King and Parliament to encourage an increase in American wealth, that they might better afford more and more imported English goods. Thomas Fitch, governor of Connecticut, wrote in 1764, "In the Colonies there is a Vent for and a Consumption of almost all Sorts of *British Manufactures* . . . whereby the Revenue of the Crown and Wealth of the Nation are much increased, at the Expense of the Colonies."²¹⁸ But with the passage of the Stamp Act in 1765, Americans recognized that this logic had failed to impress Parliament. A different solution was required—one that would put pressure on the British economy by encouraging frugality in the colonies.²¹⁹

Second, there was the problem of the free-riders. With the repeal of the Stamp Act, Americans generally believed the crisis to be averted, and historical studies show that they resumed buying British imports with as much gusto as ever.²²⁰ The Townshend Acts of 1767, however, dampened the colonists' enthusiasm. This time, it was clear that a successful non-importation strategy could not depend on the good graces of the merchants, whose livelihoods depended on encouraging consumption.²²¹ In this phase, the non-importation agreements took on a more populist cast. Instead of expecting "virtue" to be

²¹⁴ S.C. GAZETTE, Sept. 21, 1769, *quoted in* BREEN, *supra* note 111, at 274 (emphasis and ellipsis in original).

²¹⁵ S.C. GAZETTE, Nov. 16, 1769, *quoted in* BREEN, *supra* note 111, at 274.

²¹⁶ BOS. EVENING-Post, Oct. 12, 1767, *quoted in* BREEN, *supra* note 111, at 227.

²¹⁷ *Id.*

²¹⁸ THOMAS FITCH, REASONS WHY THE BRITISH COLONIES IN AMERICA, SHOULD NOT BE CHARTED WITH INTERNAL TAXES 21-22 (1764), *quoted in* BREEN, *supra* note 111, at 206 (emphasis and ellipsis in original).

²¹⁹ BREEN, *supra* note 111, at 224.

²²⁰ See Witkowski, *supra* note 106, at 223. Witkowski cites data suggesting that, "once the immediate crisis had passed, Americans resumed their free-spending ways." *Id.* For example, from 1771-74, between movements spurred by the Townshend Crisis on the one end and the Tea Acts on the other, the value of imports into the colonies was forty-seven percent greater than it had been a decade earlier. *Id.*

²²¹ See BREEN, *supra* note 111, at 227; Merritt, *supra* note 106, at 132-37.

provided for them by the lack of available consumer imports, American men and women realized that a successful strategy would depend on widespread public commitment to the non-importation principles, and effective enforcement against violators.²²² Those efforts were redoubled in 1770, when the Townshend Act repeal left the tea duty in place, and in 1773, when Parliament reaffirmed the tea duty.

The first non-importation and non-consumption agreement to request the subscription of ordinary men and women appears to have originated in a Boston town meeting on October 28, 1767.²²³ The city government drafted a document declaring that the subscribers would encourage the manufacture and use of goods from within the colonies and would not purchase any items imported from Great Britain.²²⁴ Appealing first to "individuals and householders," and later to "Persons of all Ranks," the Boston selectmen distributed the document for signature throughout Boston.²²⁵ This movement signaled an important shift in the movement, from non-importation by merchants to non-consumption by ordinary men and women.²²⁶

After the Townshend Acts made tea a suspect item, the call to public participation in the boycotts extended to nearly every household in the colonies, irrespective of wealth or station. While tea-drinking was nearly unheard of in the colonies (and England) in 1700, by 1770 it was cheap enough to be enjoyed even by most laborers.²²⁷ Some estimates placed American tea consumption as high as a cup per day for each colonist.²²⁸ When the non-importation agreements (putting pressure on merchants) began to include non-consumption agreements (putting pressure on consumers), most colonists faced a personal conflict. As one historian of colonial tea consumption has observed, "the consuming public's demand for tea sometimes outpaced its political activism."²²⁹ Despite participating in shop boycotts, tarring and feathering non-complying merchants, rioting, and burning importers in effigy, colonial consumers continued to buy tea.²³⁰ Indeed, during the Revolutionary War, no less than nine riots took place over tea—but rather than protesting its continuing sale and consumption, the crowds of consumers were angry over its price and scarcity.²³¹

Ultimately, the non-importation and non-consumption agreements would have a profound effect on trade with Britain, but the impacts were not immediate. In 1769, Arthur Lee of Virginia wrote to his brother that the non-importation

²²² See BREEN, *supra* note 111, at 227; Merritt, *supra* note 106, at 132-37.

²²³ BREEN, *supra* note 111, at 267.

²²⁴ *Id.* at 267-68.

²²⁵ *Id.*

²²⁶ *Id.* at 309.

²²⁷ HOLTON, *supra* note 176, at 81; see also Merritt, *supra* note 106, at 125-27.

²²⁸ Merritt, *supra* note 106, at 126.

²²⁹ *Id.* at 139.

²³⁰ *Id.* at 139-40, 144-45.

²³¹ See *id.* at 145 n.105; Barbara Clark Smith, *Food Rioters and the American Revolution*, 51 WM. & MARY Q. 3, 35-36 (1994).

agreements were a failure, as imports in 1769 were higher than ever before.²³² In Maryland and Virginia, colonists in 1770-71 imported sixty percent more English goods than they had in 1768-69.²³³ But overall trade statistics show gradual but noticeable shifts in consumption during the three waves of non-importation²³⁴: In the first wave of non-importation (the Stamp Act era), colonists reduced British imports by £600,000; the value of imported sterling silver products, for example, fell from £4,700 in 1760 and 1761 to £949 in 1766.²³⁵ During the second wave (in response to the Townshend Acts), Philadelphia's import trade was reduced from £441,000 in 1768 to £134,800 in 1770.²³⁶ In the Chesapeake region, American-British trade fell by forty-seven percent in 1773 from its 1771-1772 levels.²³⁷ But the dramatic results the colonists hoped for did not occur until colonists mobilized in response to the Tea Act and, especially, the Coercive Acts that punished Boston for the Tea Party. The Continental Congress that met in 1774 proposed a ban on nearly all imports, and the colonists, collectively, complied.²³⁸ Trans-Atlantic trade crumbled.

As Arthur Lee had lamented, widespread subscription to the agreements did not, by itself, achieve the goals of non-importation and non-consumption.²³⁹ The first agreement to include penalties for non-compliance was New York's non-importation agreement of Aug. 27, 1768.²⁴⁰ Following Boston's lead in response to the Townshend Acts, the New York association resolved that violators were to be treated as "enemies to this country."²⁴¹ In addition to any social penalties such designation entailed, the association agreed to in rem enforcement as well: Goods sent contrary to the agreement would be "lodged in some public warehouse" until the Acts were repealed.²⁴²

Such in rem actions became common coercive measures used to enforce the non-importation aspects of the agreements. On July 5, 1770, the attendants of the meeting at Cape Fear resolved to adhere to the non-importation agreement and cut off commerce with Rhode Island for violation.²⁴³ The "North Carolina Sons of Liberty" described a system of inspection, seizure and storage of goods, as well as publication of violators, resolving not to purchase any goods from

²³² Smith, *supra* note 155, at 95 (citing Letter from Arthur Lee to Richard Henry Lee (Nov. 15, 1769), in RICHARD HENRY LEE, LIFE OF ARTHUR LEE 198 (1829)).

²³³ HOLTON, *supra* note 176, at 91.

²³⁴ See Witkowski, *supra* note 106, at 220.

²³⁵ *Id.* at 221.

²³⁶ *Id.*

²³⁷ HOLTON, *supra* note 176, at 100.

²³⁸ See *supra* notes 208-10 and accompanying text.

²³⁹ Smith, *supra* note 155, at 95.

²⁴⁰ ANDREWS, *supra* note 177, at 206-07.

²⁴¹ N.Y. GAZETTE, WKLY. POST BOY, Sept. 12, 1768, reprinted in ANDREWS, *supra* note 177, at 207; BOS. GAZETTE supp., Sept. 19, 1768, reprinted in ANDREWS, *supra* note 177, at 207.

²⁴² *Id.*

²⁴³ THE CAPE-FEAR MERCURY, July 11, 1770, reprinted in THE PENNSYLVANIA GAZETTE, Aug. 9, 1770 (accessed through Accessible Archives database).

anyone who imported goods “contrary to the Spirit and Intention of the said Agreement, unless such Goods be immediately reshipped to the Place they were imported from, or stored, under the Inspection and Direction of the Committee.”²⁴⁴ They further resolved that:

the Members of the Committee for the several Counties in the Wilmington District, and particularly those for the Towns of Wilmington and Brunswick, do carefully inspect all Importations of Goods, and if any shall be imported contrary to the true Intent and Meaning of the said Non-importation Agreement, that they give public Notice thereof in the Cape Fear Mercury, with the Names of such Importers or Purchasers.²⁴⁵

In the absence of the power to arrest or jail violators, proponents of the non-importation agreements also shamed, ostracized, boycotted and threatened merchants into issuing public apologies, with the effect of publicizing the cause among the population as a whole.²⁴⁶ Such pressure included threats or actual perpetration of violence. Tarring and feathering, a custom imported to the colonies through the maritime folkways in the mid-eighteenth century, became a popular means of enforcing the non-importation agreements against customs officials and merchant importers.²⁴⁷ On May 21, 1770, in Boston, tidesman Owen Richards was tarred, feathered, and carted through town for informing against “a Connecticut Sloop which was Seized,” apparently for smuggling duty-free tea.²⁴⁸ Other sources say Richards had refused a bribe.²⁴⁹ In another example, after the Tea Act permitted American merchants to obtain commissions for direct imports of East India Company tea without the British middleman, colonists who supported non-importation threatened merchants who obtained such commissions. In Philadelphia, a group calling themselves the “Committee for Tarring and Feathering” threatened Delaware River pilots assisting such merchants with “[a] halter around your neck, ten gallons of liquid tar scattered on your pate, with the feathers of a dozen wild geese laid over that to enliven your appearance.”²⁵⁰ In Boston, a mob seized a merchant caught selling British goods and put him “into a cart, with some tar in a barrel, and a bag of feathers.”²⁵¹ Seeing that the merchant was deathly afraid, the mob agreed to let him go in

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See BREEN, *supra* note 111, at 257-63.

²⁴⁷ See Benjamin H. Irvin, *Tar, Feathers, and the Enemies of American Liberties, 1768-1776*, 76 NEW ENG. Q. 197, 199-202 (2003).

²⁴⁸ PA. GAZETTE, May 31, 1770 (accessed through Accessible Archives database).

²⁴⁹ See CARP, *supra* note 113, at 53.

²⁵⁰ Merritt, *supra* note 106, at 143.

²⁵¹ BREEN, *supra* note 111, at 263. Cf. Irvin, *supra* note 247, at 231 (providing a record of the incident).

exchange for a promise that he leave town and never return.²⁵² The merchant quickly agreed.²⁵³

Over time, the "Associators"²⁵⁴ continued to develop more sophisticated (and more punitive) enforcement mechanisms against individual consumers as well as merchants. Enforcement efforts focused on individual violators or non-signatories; many of the agreements ordered the ostracism of transgressors and holdouts. For example, the Newcastle County, Delaware, non-importation agreement in 1769, which was probably copied from an earlier Philadelphia agreement,²⁵⁵ stated that any violator "shall have his name published in the public news-papers as a betrayer of the civil and religious rights of Americans" and would "be for ever after deemed *infamous* and *an enemy* to this country."²⁵⁶ On May 17, 1770, in Boston, ten families who refused to sign a no-tea-drinking agreement were advertised in the *Essex Gazette*, which noted a resolution that anyone continuing to drink tea would be recorded in the clerk's office and "publicly advertised."²⁵⁷

The enforcement measures extended to entreaties that true patriots inform against their neighbors who failed to curtail their private consumption. At a meeting in Hartford on September 15, 1774, the "committees of correspondence" of the represented counties planned to investigate, report and shun anyone violating the agreement.²⁵⁸ The committees "desired to make diligent enquiry after the persons who have ordered goods as aforesaid, and inform the next county and colony meeting of what they shall discover, that their names may be published, their conduct exposed, and their persons avoided."²⁵⁹

This extension from boycott to social ostracism extended to merchants as well during the second and third phases of the agreements. In July 1770, a resident of Philadelphia wrote to a friend in New York, asking that true "Sons of Liberty" in New York identify those who had broken the non-importation agreement.²⁶⁰

²⁵² BREEN, *supra* note 111, at 263.

²⁵³ *Id.*

²⁵⁴ The word was used by some signatories to the agreements to signal their identity with the political cause. See, e.g., Letter from Martha Jacqueline to John Norton (Aug. 14, 1769), in JOHN NORTON AND SONS, MERCHANTS OF LONDON AND VIRGINIA: BEING THE PAPERS FROM THEIR COUNTING-HOUSE FOR THE YEARS 1750 TO 1795 (Frances Norton Mason ed., 1937), cited in HOLTON, *supra* note 176, at 77-79. Martha Jacqueline became an "Associator" to save Virginians from "our own Extravagances." *Id.* at 79.

²⁵⁵ ANDREWS, *supra* note 177, at 211.

²⁵⁶ S.C. GAZETTE, Oct. 12, 1769, quoted in ANDREWS, *supra* note 177, at 212 (emphases in original).

²⁵⁷ PA. GAZETTE, May 31, 1770 (accessed through Accessible Archives database).

²⁵⁸ PA. GAZETTE, Oct. 12, 1774 (letter from New London of Sept. 29, 1774) (accessed through Accessible Archives database).

²⁵⁹ *Id.*

²⁶⁰ PA. GAZETTE, Aug. 2, 1770 (letter of July 26, 1770) (accessed through Accessible Archives database).

Words cannot describe with what surprize and contempt we heard of the treacherous Conduct of the New York Importers; Slaves they deserve to be, and Slaves I could wish them to be, if it were possible, without involving the Innocent and Unborn—I hope the true born Sons of Liberty (of whom I am persuaded you have many amongst you) will favour the World with the Names of the Ringleaders of so detestable a Faction, that if any of them should be hardy enough to venture abroad, either to this City (which I will promise them they will not find a very agreeable Place) or elsewhere, they may be treated as they ought to be;—Do not you think it would be well, if, like Cain of old, they had each a Mark set on them? Suppose it was—to indicate the Disposition of their grovelling Souls.²⁶¹

The strategies developed by the colonists to implement the non-importation and non-consumption agreements did not give those agreements the force of law, because the colonists lacked any sovereign police power, held with increasing hostility by Britain. But the disenfranchised colonists came as close as they could to replicating that effect: The increasingly coercive mechanisms of outing and ostracizing free riders, seizing and holding offending goods, and even using violence against offenders gradually served to raise the cost of non-compliance. Only as those mechanisms became more universal and more coercive did the associations become more prevalent in colonial society and more effective in drawing British attention to the colonists' grievances. Colonial representative bodies—such as the disbanded Virginia House of Burgesses and the First Continental Congress—signed and circulated non-importation and non-consumption agreements. While those agreements could not, under British rule, be “law,” it seems likely that the colonists *would* have given their agreements the force of law if they had had the constitutional power to do so.

IV. EPILOGUE: 1791 WHISKEY EXCISE TAX—AN AMERICAN IDEA

As soon as the Founding Fathers were free to set up a government of their own, one of their first official acts was to tax an item of personal consumption that many Americans viewed as carrying excessive public costs: whiskey. Alexander Hamilton, the first Secretary of the Treasury, proposed the tax as a means to pay the debt incurred by the nation under the Articles of Confederation, which conveyed no power to tax, and by the states individually.²⁶² Though it failed to pass Congress in 1790, it passed a year later.²⁶³ And though the tax was paid by distillers, Hamilton reasoned that it was actually a tax on the consumer; distillers would merely pass on the tax to their customers.²⁶⁴

²⁶¹ *Id.*

²⁶² See WILLIAM HOGELAND, *THE WHISKEY REBELLION* 58-64 (2006); THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION* 95-105 (1986).

²⁶³ SLAUGHTER, *supra* note 262, at 95, 105.

²⁶⁴ HOGELAND, *supra* note 262, at 68.

Although Hamilton's goal was to secure the federal Treasury, he found useful allies in groups who opposed the consumption of whiskey because of its social and health effects. A writer in a Philadelphia newspaper speculated that, if women were allowed to vote, the tax would pass by a wide majority.²⁶⁵ The respected Philadelphia College of Physicians also gave Hamilton their public endorsement of the tax. In the collective professional opinion of the members of the College, "a great proportion of the most obstinate, painful, and mortal disorders which affect the human body are produced by distilled spirits."²⁶⁶ They urged government intervention to protect citizens from widespread harm as great as any plague or pestilence.²⁶⁷

Then, as now, opponents characterized the tax as government overreaching into the private realm, and cast their opposition in hyperbolic terms. If doctors could tell Congress to tax whiskey, they argued, soon "they might petition Congress to pass a law interdicting the use of ketchup because some ignorant persons had been poisoned by eating mushrooms."²⁶⁸ Then, as now, opponents compared the law to the British Stamp Act, Townshend Acts and Tea Act, and criticized supporters of the whiskey excise tax as traitors to the ideals of the Revolution.²⁶⁹ But friends of the measure denied that the tax bore constitutional similarity to the earlier British measures. One supporter, writing in the *General Advertiser*, stated, "It may be justly observed that there exists some difference in bearing a burden imposed by a government in which we had no participation, and in paying a tax laid by our immediate representatives, and for the support of a government of our own choice."²⁷⁰

The whiskey excise tax was highly controversial in application, of course. Distillers in the western regions paid the tax as a flat fee, calculated by presuming operation at full capacity and taxing by projected volume—often an unrealistic assumption.²⁷¹ Small farmer-distillers in western Pennsylvania objected that the tax thus had a disparate impact on them as compared to eastern merchants, who distilled large volumes and paid by the gallon of actual production.²⁷² When federal officials came to collect the tax, farmers in the counties around Pittsburgh revolted. As the protest mounted, President Washington sent a committee to negotiate a truce with the rebels, while

²⁶⁵ SLAUGHTER, *supra* note 262, at 100.

²⁶⁶ *The Memorial of the College of Physicians of the City of Philadelphia*, GAZETTE U.S., Jan. 1, 1791, *quoted in* SLAUGHTER, *supra* note 262, at 100.

²⁶⁷ *Id.*

²⁶⁸ 2 JOSEPH GALES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (1834), *quoted in* SLAUGHTER, *supra* note 262, at 100-01.

²⁶⁹ See SLAUGHTER, *supra* note 262, at 103.

²⁷⁰ GAZETTE U.S., Jan. 29, 1791, *quoted in* SLAUGHTER, *supra* note 262, at 103.

²⁷¹ See HOGELAND, *supra* note 262, at 69; SLAUGHTER, *supra* note 262, at 148-49.

²⁷² See HOGELAND, *supra* note 262, at 69-70. For further economic commentary on the effects of the tax, see Jacob E. Cooke, *The Whiskey Insurrection: A Re-evaluation*, 30 PA. HIST. 316, 329-334 (1963).

simultaneously drafting a militia of nearly 13,000 men.²⁷³ The rebel group collapsed before the militia reached the western counties and no rebel militia was assembled to confront the federal troops.²⁷⁴ Several suspects and witnesses were arrested; two were convicted of treason but later pardoned by Washington.²⁷⁵ The Whiskey Rebellion squarely posed the constitutional question that had simmered since the end of the Revolutionary War: Under the notion of “collective sovereignty,” did the people remain the rulers of society, with the right to resist even laws passed by their own elected representatives? Or did “collective sovereignty” mean the more limited right to elect a government but not to override its laws? The nature of “collective sovereignty” remained in some dispute during the early years of the nation’s history, with Jeffersonian Republicans arguing for a more populist conception than that espoused by Washington’s Federalists.²⁷⁶ Historians generally agree that the question was resolved in favor of the authority of the new federal government.²⁷⁷ Washington’s response to the rebellion was generally well-received by the public, and discouraged further rebellions in response to unpopular laws.²⁷⁸

The Whiskey Rebellion and the federal response to it demonstrate that most of the Founding Fathers believed from the outset that the sovereign had the authority to place excise taxes on consumer food and drink items. Even more importantly, these Federalists believed that the right of “the People” to collective sovereignty did not include the right to defy the validly enacted laws of a legitimately elected government. Contrary to contemporary political rhetoric, laws that impact or influence individual food and beverage consumption choices on the grounds of internalizing externalities were far from novel, unimagined, or “un-American” in the philosophies of the framers of the Constitution.

V. CONCLUSION

The idea that a society may regulate individual consumption choices in the name of the collective good was expressed as early as the pre-Revolutionary non-consumption and non-importation agreements. Although those agreements were quasi-legal instruments organized and enforced by the colonists outside of formal legislative bodies, their purpose was equivalent: to force accountability

²⁷³ SLAUGHTER, *supra* note 262, at 197-99.

²⁷⁴ *Id.* at 217.

²⁷⁵ HOGELAND, *supra* note 262, at 238.

²⁷⁶ See CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 153-89 (2008). Jill Lepore has observed that Thomas Jefferson’s famous statement in support of rebellion—“The Tree of Liberty must be refreshed from time to time with the blood of patriots and tyrants”—has been popular not only with modern Tea Party members, but also with 1990s militia members, including Timothy McVeigh. LEPORE, *supra* note 8, at 22.

²⁷⁷ See LEPORE, *supra* note 8, at 22-23 (“[A]side from Jefferson, whose enthusiasm for revolution did not survive Robespierre, most everyone else came down in favor of order.”).

²⁷⁸ See STANLEY M. ELKINS & ERIC L. MCKITTRICK, THE AGE OF FEDERALISM 481-84 (1995).

for private consumption decisions that had shared social costs. The significance of the quasi-legal character of the Associations should not be overestimated. As soon as the colonists had formed a representative government and had the right to indicate policy preferences through voting, the government did immediately pass laws taxing private beverage consumption. Political resistance to such laws in the name of "the People" was forcibly rejected, with widespread public support.

Opponents of contemporary proposals to shape private food and beverage consumption choices may reasonably challenge the wisdom or expediency of such policies. Since even before the founding, such measures have met with public controversy. The efficacy of each tool can and should be debated, but that debate should continue without the heated—and historically inaccurate—accusations that such tools are unprecedented, anti-democratic, or un-American.