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COMMENTS

FUTURE BENEFITS? TAX POLICY, ADVERTISING, AND THE EPIDEMIC OF OBESITY IN CHILDREN

By Valere Byrd Fulwider*

INTRODUCTION

An epidemic of obesity in America is affecting our population at younger and younger ages, with consequences that will span a lifetime. Contributing significantly to this epidemic is commercial advertising of foods of minimal nutritional value directed at children. By changing the tax treatment of advertising campaign costs directed at children, the government can effectively reduce the incidence of childhood obesity.

In 2001, the Surgeon General's Call to Action to Prevent and Decrease Overweight and Obesity (Obesity Report) recognized obesity as a major health problem. The Obesity Report not only increased public awareness of obesity as a major problem facing our nation but made reduction of the prevalence of overweight and obesity a national priority. This report and other governmental data indicate that factors contributing to overweight and obesity include biological, behavioral, physical activity, and environmental factors.

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2. ERIC SCHLOSSER, FAST FOOD NATION 262 (2002).
3. OBESITY REPORT, supra note 1.
4. Id. at V.
and environmental stimuli. The Centers for Disease Control and Prevention indicate that the latter two hold the most potential for intervention strategies to reduce weight.

This Comment will focus on the epidemic of obesity as it affects children and adolescents. I will suggest that an effective way to reduce obesity in this specific population is to limit exposure to advertising of low nutritional value foods. Numerous studies have shown that children today spend an excessive amount of time watching television, and that advertising on television has a significant impact on the behavior of children and adolescents.

This Comment advocates that the most effective means of limiting children's exposure to audio-visual advertising is to change the way in which food companies that advertise and market foods with low nutritional value treat their advertising costs to children for tax purposes. Current law does not require amortization of the advertising costs, as it should, but rather allows the costs to be deducted in the immediate year incurred for tax purposes. This Comment will show that this treatment, which is effectively a tax subsidy, is inconsistent with well-settled federal tax policy. This Comment submits that given the enormous return the food industry reaps when advertising to children, tax treatment should be more consistent with current federal income tax policy. This Comment also suggests that while limiting the content of commercial television may raise substantial First Amendment problems, such a tax limitation would survive

5. CENTERS FOR DISEASE CONTROL AND PREVENTION [hereinafter CDC], National Center for Health Promotion and Disease Prevention [hereinafter NCCDPHP], FACTORS CONTRIBUTING TO OBESITY, at http://www.cdc.gov/nccdphp/dnpa/obesity/contributing_factors.htm (last updated May 12, 2003) [hereinafter FACTORS CONTRIBUTING TO OBESITY].

6. FACTORS CONTRIBUTING TO OBESITY, supra note 5.

7. Generally, 'children' are ages 6-11, 'adolescents' are ages 12-17. OBESITY REPORT, supra note 1, at 11.


9. Hymel, supra note 8, at 411.

10. Id. at 419.

constitutional scrutiny under the Commercial Speech doctrine given the four part test stated by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*

Section I of this analysis will discuss the evolution of both the epidemic of obesity in America and the role of advertising in contributing to the epidemic. Section II will explore the tax policy and legal theory surrounding current available tax deductions for marketing and advertising expenses. Section III will discuss counterarguments to an amortization requirement, including potential limitations on constitutional rights such as freedom of speech and equal protection of the law. Section IV will propose specific alterations to the current system of tax deductions for the food industry’s advertisements to children.

II. EVOLUTION OF THE EPIDEMIC OF CHILDHOOD OBESITY IN AMERICA AND THE INFLUENCE OF ADVERTISING

A. Overweight and Obesity in Children - Cause and Effect

Scientific studies indicate that about sixty-one percent of adults, and about thirteen percent of children, are overweight or obese. Children who are overweight or obese are significantly more likely to be overweight or obese adults. In less than thirty years, the prevalence of overweight or obese children and adolescents in America has more than doubled.


13. CDC / NCCDPHP, *Defining Overweight and Obesity,* at http://www.cdc.gov/nccdphp/dnpa/obesity/defining.htm (last updated July 2, 2003). A widely used scientific standard for establishing obesity is a mathematical formula known as Body Mass Index (BMI). BMI “represents weight levels associated with the lowest overall risk to health.” A person with a BMI higher than 25 is overweight or obese. A BMI of 30 or higher indicates obesity. BMI is an acceptable standard for evaluation of overweight and obesity in children. *Id.* Other means for establishing overweight or obesity, especially in children, is use of height/weight charts, such as those developed by the National Center for Health Statistics. *Obesity Report,* supra note 1, at 4.


15. *Id.* at 11, stating that
Overweight and obesity are chronic conditions and pose a complex health problem. Generally, overweight and obesity are caused by consuming too many calories and not exercising or engaging in enough physical activity, over a significant period of time. The Obesity Report terms this an energy imbalance: "The cause of energy imbalance for each individual may be due to a combination of several factors. Individual behaviors, environmental factors, and genetics all contribute to the complexity of the obesity epidemic."

The food environment in America presents consumers with numerous options for food and eating behaviors. Prepackaged and fast foods are readily available, and while some may be marketed as "low-fat," they often contain more calories than the "fatty" foods they are meant to replace. Moreover, portion sizes in restaurants have increased in both non-fast food and fast food establishments. This trend of increased portions in fast food restaurants is often termed the "supersize" phenomenon, by which one can get "more for less."

Increased portion size, especially without a corresponding increase in activity, can lead to weight gain and obesity. The most recent data (1999) estimate that 13 percent of children aged 6 to 11 years and 14 percent of adolescents aged 12 to 19 years are overweight. During the past two decades, the percentage of children who are overweight has nearly doubled (from 7 to 13 percent), and the percentage of adolescents who are overweight has almost tripled (from 5 to 14 percent).

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16. FACTORS CONTRIBUTING TO OBESITY, supra note 5.
17. Id.
18. OBESITY REPORT, supra note 1, at 2. Physical activity does not have to be strenuous, and may include work, household chores, or even leisure time activities. Physical activity has a number of health benefits, such as helping to control weight, keep bones and muscles strong and a decreased risk for diseases such as colon cancer, diabetes, and high blood pressure. See FACTORS CONTRIBUTING TO OBESITY, supra note 5.
19. FACTORS CONTRIBUTING TO OBESITY, supra note 5.
20. Id.
21. Id.
calorie expenditure, undoubtedly contributes to overweight and obesity.\(^{23}\)

Despite the fact that physical activity is vital to a healthy life, most Americans live sedentary lives.\(^{24}\) The Centers for Disease Control and Prevention (CDC) attribute this in large part to technological developments such as motor vehicles, computers, and television.\(^{25}\) As a result, the CDC suggests that “these recent lifestyle changes have reduced the overall amount of energy expended in our daily lives.”\(^{26}\) Children are not immune to this energy decline. Studies indicate that American children on average watch about twenty-five to thirty hours of television per week.\(^{27}\)

Between school, television, and homework, children are spending less time engaging in physical activity than is needed to maintain this energy balance. They are falling victim at very young ages to large portion sizes, excess consumption of prepackaged foods, and other foods with low nutritional value in combination with lack of sufficient physical activity. Recent studies show that in children ages six to eleven, the prevalence of obesity has doubled since 1979.\(^{28}\) For adolescents ages twelve to seventeen, the incidence of overweight and obesity has nearly tripled in the same time period.\(^{29}\) According to


\(^{24}\) See, e.g., OBESITY REPORT, supra note 1, at 2, stating that:

Most Americans have not been meeting Federal physical activity recommendations to accumulate at least 30 minutes of moderate physical activity most days of the week. In 1997, less that one-third of adults engaged in the recommended amount of physical activity, and 40 percent of adults engaged in no leisure-time physical activity . . . . Our society has become very sedentary.

\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) Hymel, supra note 8, at 407.


\(^{29}\) CDC / NATIONAL CENTER FOR HEALTH STATISTICS, PREVALENCE OF OVERWEIGHT AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, 1999 (Results from NHANES study), at http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overwght99.htm (last visited Oct. 4, 2002); see also OBESITY REPORT, supra note 1, at 11.
Committed to Kids, a Louisiana State University program focused on reducing childhood obesity, just an extra ten pounds can inhibit a child's movement. An extra twenty to twenty-five pounds can make exercise uncomfortable or even painful. Obesity in children can have serious adverse health effects, such as increased risk of high blood pressure, diabetes, coronary heart disease, cancer, and psychological disorders, and will likely lead to obesity in adulthood.

Since the publication of the Obesity Report, the federal government has taken specific action to promote physical activity in children and address the problem of poor nutrition. For example, President Bush kicked off his Healthier US initiative, and a bill entitled “Improved Nutrition and Physical Activity Act” (IMPACT) was submitted to the Committee on Health, Education, Labor, and Pensions. This proposed legislation focuses primarily on reducing overweight and obesity in children and adolescents.

The federal government has recognized the immense cost of obesity to America, indicating that “[t]he estimated direct and indirect annual cost of obesity in the United States is $117,000,000,000, which exceeds the cost of tobacco-related illnesses and appears to be rising dramatically.” The cost of obesity to America is increasing, and it is the children who will be paying the price with their purses and their

30. COMMITTED TO KIDS PEDIATRIC WEIGHT MANAGEMENT PROGRAM operates in conjunction with the Louisiana State University School of Medicine to study childhood obesity and implement obesity reduction programs for children. Information at http://www.committed-to-kids.com (last visited Oct. 4, 2002).


34. HEALTH CONSEQUENCES, supra note 33; see also AMERICAN OBESITY ASSOCIATION, at http://www.obesity.org/subs/childhood/ (last visited Oct. 4, 2002).


38. S. 2821.
well-being. The federal government must take action to protect them or else this trend will continue.

This Comment proposes that the government act to protect children by changing the tax treatment of advertising costs for foods of low nutritional value to children. By eliminating the tax deduction currently available under section 162 of the Federal Income Tax Code of the Internal Revenue Service (IRS), and requiring amortization of the costs instead, the food industry will have less incentive to advertise to children. Moreover, American tax dollars will no longer be effectively subsidizing the food industry’s cost of advertising directly to children. To understand why the elimination of the advertisement tax subsidy will successfully curb obesity among children, it is critical to appreciate the importance of children as a market, and this demographic’s influence on the food industry’s current selling strategies.

B. Advertising to Children is Extraordinarily Effective

Mass advertising is big business in America. Annual spending of advertising directed at children is estimated at one billion dollars. In the course of a year a child will view on average 40,000 commercials. “[C]hildren, the most vulnerable television watchers,” are encouraged to adopt patterns of consumption by advertisers hoping to inspire brand-loyalty in the viewer.

Marketers target children and adolescents because they possess significant buying power. Children, who may not be able to purchase items themselves, exert strong influence on family purchases, specifically where to go out to dinner and what to buy at the grocery store.

Television is the most influential medium because “children provide marketers a captive audience with little adult supervision. Furthermore, television is realistically the only medium currently available for serious marketing efforts directed at kids.”

40. Hymel, supra note 8, at 350.
41. Id. at 349.
42. Id. at 353.
43. Piety, supra note 11, at 409.
44. Hymel, supra note 8, at 405.
45. Id. See also SCHLOSSER, supra note 2, at 44.
46. Hymel, supra note 8, at 401.
Gortmaker, professor of Health and Social Behavior at the Harvard School of Public Health, asserts that "the fast food industry is an important force in the obesity epidemic . . . but the television and video industries play a key role by directly advertising foods to children and by encouraging sedentary behavior. The best single predictor of obesity is television viewing." 47

Linking feelings and perceptions to products is an effective mechanism for marketers, especially linkages to feelings of comfort, love, and family. 48 To persuade children to consume their company's products, market researchers put an enormous amount of effort into studying the habits and desires of children. 49 Studies indicate that children, especially younger children, do not understand that commercials are designed to sell products. 50 Often, children cannot tell the difference between commercials and actual programming. 51 Thus, children are very susceptible to advertising, especially at young ages. 52 This susceptibility allows advertisers to capture loyal purchasers for life by merely influencing or manipulating them while they are young.

At stake here is the freedom of children from unfair manipulation for profit. As Mona Hymel observes in her article entitled Consumerism, Advertising, and the Role of Tax Policy, "Shaped by enormous amounts of advertising, contemporary children's culture does not represent children's autonomous choices nor does it preserve their innocence. Advertising to children raises serious societal concerns regarding the values transmitted by the media. Advertisers, however, are interested in selling children's products, not children's welfare." 53 Thaddeus Pope asserts that an "[i]ndividual's desires and preferences are not always reflected in the choices they [sic] make. A lack of information, maturity, or voluntariness can thwart the realization of desires." 54 Correspondingly, profits are the driving force

47. HARVARD PUBLIC HEALTH NOW, ENERGETIC PANEL OF SPEAKERS DEBATES WHY AMERICANS ARE GETTING FAT, at http://www.hsph.harvard.du.now/ (Nov. 3, 2002). This article goes on to assert that reduced television time for children is associated with lower body mass index. Id.

48. Piety, supra note 11, at 410.

49. Hymel, supra note 8, at 400.

50. Id. at 410

51. Id.

52. SCHLOSSER, supra note 2, at 262.

53. Hymel, supra note 8, at 414.

54. Thaddeus Mason Pope, Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations, 61 U. PITT. L. REV. 419, 456 (2000). When his article cited herein was published, Pope was a graduate fellow at
behind children's advertising. Commercial television has, for the most part, had free reign over the content of advertisements to children, defining its own role without consideration for the well-being of children.\textsuperscript{55} Advertisers are aware of the importance of influencing children and are motivated by the potential for winning over long-term consumers.\textsuperscript{56} One General Mills executive asserts that "[w]hen it comes to targeting kid consumers, we at General Mills follow the Proctor & Gamble model of 'cradle to grave.' We believe in getting them early and having them for life."\textsuperscript{57} Their strategies are proving effective.

The combination of children's innocence and inability to distinguish advertising from reality leads to severe manipulation of their behaviors and desires by commercial television. Studies indicate that the more children watch television, the more they specifically request brand name products at the grocery store.\textsuperscript{58} Children can recognize images of corporate logos and mascots from as young as six months old.\textsuperscript{59} Joe Camel, the longtime mascot of Camel cigarettes, has been removed from advertisements for the sake of our children's health.\textsuperscript{60} Now we must consider the same fate for Ronald McDonald.\textsuperscript{51}

Consider also the fact that children's movies today are marketed, even in pre-release, through toys and other products that are included with boxes of sugary cereal and fast food meals.\textsuperscript{62} An enormous amount of money is spent linking children's movies and television shows to commercial products including food.\textsuperscript{63} Movie and television producers encourage this manipulative behavior by the advertising

Georgetown University's Department of Philosophy and Kennedy Institute of Ethics. \textit{Id.}

\textsuperscript{55} Hymel, \textit{supra} note 8, at 402. Federal regulation of the industry is not largely effective to prevent manipulative marketing practices. \textit{See also} Hymel, \textit{infra} note 72. \textit{See also} SCHLOSSER, \textit{supra} note 2, at 46.

\textsuperscript{56} \textit{Id.} at 406.

\textsuperscript{57} \textit{Id.} \textit{See also} SCHLOSSER, \textit{supra} note 2, at 43.

\textsuperscript{58} Hymel, \textit{supra} note 8, at 412.

\textsuperscript{59} \textit{Id.} at 406.

\textsuperscript{60} Kathleen M. Paralusz, \textit{Ashes to Ashes: Why FDA Regulation of Tobacco Advertising May Mark the End of the Road for the Marlboro Man}, 24 AM. J. L. \& MED. 89, 102-3 (1998).

\textsuperscript{61} \textit{See} SCHLOSSER, \textit{supra} note 2, at 40-49.


\textsuperscript{63} Piety, \textit{supra} note 11, at 443.
industry. For example, in 1996, McDonald's signed an exclusive, ten-year global marketing contract with the Disney Corporation.\(^{64}\) McDonald's releases toys as tie-ins to most of the movies and videos released by Disney.\(^{65}\) In 2000, McDonald's contracted with the popular Public Broadcasting System (PBS) children's show "Teletubbies" for a happy-meal tie-in.\(^{66}\) Similar to McDonald's, Burger King joined forces with Nickelodeon to market toys associated with "The Rugrats" movies.\(^{67}\) Kids are thus even more motivated to consume food of low nutritional value in order to satisfy their desires to obtain the marketed products.

While Sweden\(^{68}\) and Norway have banned all television advertising targeting children under the age of twelve,\(^{69}\) and "European consumer groups are pushing for a complete ban on all television advertising directed at children,"\(^{70}\) the United States has not taken sufficient steps to protect children from this type of advertising. One explanation for the federal government's lack of action is the powerful lobby for the industry.\(^{71}\) In the late 1970s, the Federal Trade Commission (FTC) contemplated regulating advertising directed at children during

\(^{64}\) Suhr, supra note 62, at 32.

\(^{65}\) Id.

\(^{66}\) Piety, supra note 11, at 440.

\(^{67}\) Suhr, supra note 62, at 32. Burger King also has a deal to market products associated with the popular film "The Lord of the Rings." Id.

\(^{68}\) Sweden is trying to convince the European Union to adopt the stance that all advertising to children should be banned. See H. Ronald Moser & Linda Marie Horton, The Marketing And Ethical Implications Of Advertising To Children, 15 NAT'L SOC. SCI. J. (article no. 13), available at http://www.olemiss.edu/courses/mktg351/Publication.htm (last visited Sept. 3, 2003).

\(^{69}\) Piety, supra note 11, at 440.

\(^{70}\) SCHLOSSER, supra note 2, at 243.

In 1991 Sweden banned all TV advertising directed at children under the age of twelve. Restrictions on ads during children's programming have been imposed in Greece, Norway, Denmark, Austria, and the Netherlands. The eating habits of American kids are widely considered a good example of what other countries must avoid. American children now get about one-quarter of their total vegetable servings in the form of potato chips or French fries. A survey of children's advertising in the European Union (EU) found that 95 percent of the food ads there encouraged kids to eat foods high in sugar, salt, and fat. The company running the most ads aimed at children was McDonalds.

Id.

\(^{71}\) Piety, supra note 11, at 442.
children’s programming. This was known as the ‘Kidvid’ inquiry.\(^{72}\) The industry lobby\(^ {73}\) defeated this action by influencing the vote of the Senate Commerce Committee.\(^ {74}\) The FTC was limited to a prohibition of false advertising, rather than unfair advertising as it originally proposed.\(^ {75}\) Since the late 1970s, both the FTC and the Federal Communications Commission (FCC) have proposed efforts to regulate advertising to children during children’s programming, but advertising remains largely unregulated.\(^ {76}\) Thus, children are left exposed to the manipulative marketing techniques of all industry, and especially the food industry as argued in this Comment.

It is clear that advertising is a successful technique by which industry can mold children into active consumers of its products. Advertisers argue that commercial television does not cause undesirable behaviors,\(^ {77}\) such as over-consumption of minimally nutritional food. This contradicts advertisers’ stance that children are a vital part of their business success.\(^ {78}\) The defense that advertising does not affect individual behavior has managed to maintain some semblance of credibility because the consuming public believes that advertising only works on “everyone else.”\(^ {79}\)

The federal government is not likely to limit all types of television advertising to children in the near future. However, this Comment argues that the government should take advantage of the opportunity to restrict the food industry’s advertising to children. This restriction should be imposed because advertisements for foods of minimal nutritional value target children and are contributing to the epidemic proportions of obesity in America today.\(^ {80}\)

It is the responsibility of the government to protect children from manipulation especially when their physical health in the long term

\(^{72}\) Id.

\(^{73}\) Id. Piety notes that “according to then Senator Packwood (R-Ore.), forcing the FTC ‘to limit its investigation of advertising to ads that are ‘deceptive’ rather than simply misleading’ was a result of the ‘strong influence of the sugar, tobacco, and advertising lobbies.’” Id.

\(^{74}\) Id.

\(^{75}\) Id. at 440.

\(^{76}\) Hymel, supra note 8, at 405.

\(^{77}\) Piety, supra note 11, at 407.

\(^{78}\) Id.

\(^{79}\) Id. at 408.

\(^{80}\) See SCHLOSSER, supra note 2, at 40-49.
depends on it. Professor Pope articulates the view that it is proper for government to “interfere with an individual’s liberty for that individual’s own good only if . . . her contrary choice was not, or may not have been, substantially autonomous.” When advertising to children, “all the assumptions on which protection for truthful advertising is predicated . . . disappear. Thus, because . . . children are highly impressionable and suggestible, it would seem that concerns about indoctrinating children into . . . bad eating habits, with advertising are far from frivolous.”

The next section of this Comment examines how requiring amortization of the cost to the food industry of advertising foods of minimal nutritional value to children can curb the epidemic of childhood obesity in America.

III. TAX TREATMENT OF ADVERTISING AND MARKETING COSTS SHOULD BE CONSISTENT WITH TAX POLICY WHEN CHILDREN’S WELFARE IS AT STAKE

Public health law expert Lawrence Gostin indicates that “[t]ax incentives and disincentives are powerful tools for promoting or discouraging anything legislators deem important for the health and well-being of the population.” To address the epidemic of obesity in children, legislators should use this powerful tool to end the subsidy of advertising costs to children of foods with minimal nutritional value. While it is arguable these advertising costs should be entirely non-deductible, this Comment argues that Congress should require amortization of the cost over a period of years. Before an explanation of amortization as the preferable solution, an analysis of why advertisers should not be allowed to deduct all costs in the year incurred is necessary.

81. See generally Pope, supra note 54. Pope explains that because children are immature and are susceptible to making non-autonomous choices (not entirely free from coercion), the “soft paternalism” of government intervention may be appropriate. Id. at 464. In particular, Pope uses the example of protecting children and adolescents through the tobacco regulation by Congress in 1992, and the issuance of further regulations by the Food and Drug Administration in 1996. Id. at 466.

82. Id. at 456.

83. Piety, supra note 11, at 434.

Currently, I.R.C. section 1.162-1(a) allows “advertising and other selling expenses” to be deducted as ordinary business expenses in the year incurred. This provision permits the food industry to spend a great deal of money on developing and using marketing practices directed toward children, and then allows advertisers to deduct the advertising expenses incurred during the year. This scheme that permits the deduction of advertising costs, without limitation, encourages zealous industry marketing. The ability to deduct entirely in the year incurred, as opposed to treating the costs as capital expenditures, is extremely advantageous to the advertising industry. This tax treatment of advertising costs is contrary to generally accepted tax principles for the following reasons.

The IRC makes an important distinction between “expenses” versus “capital expenditures” with regard to a trade or business for federal income tax purposes. A cost may be defined as an “expense,” and thus may be deducted entirely in the year incurred, if the benefit of the cost does not extend beyond the taxable year. A cost is a “capital expenditure” if the benefit of the cost extends beyond the taxable year. The difference between an ordinary business expense and a capital expenditure is a timing issue. Unfortunately, it is often difficult to measure the time when the benefit of an expense incurred ceases to be beneficial.

The advertising industry claims that determining the span of the benefit of the advertising attributable to a certain cost is very difficult. The advertising industry has used this slight timing difficulty to its advantage in persuading Congress to maintain the current IRS position that almost all “marketing, selling, advertising, and distribution costs” are deductible in the year the costs are incurred. Yet it is apparent

85. I.R.C. § 162 (2002). This section provides for deductions for each ordinary and necessary business expense paid or incurred during the taxable year in carrying on any trade or business. Id.

86. Hymel, supra note 8, at 401. Hymel notes that in 1987, $750 million was spent on all types of advertising by any industry directed at children. Id.

87. MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION 124 (9th ed. 2002).


90. I.R.C. § 162. Ordinary business expenses are covered in section 162 of the I.R.C. Id. Capital expenses are covered by section 263A of the I.R.C.

91. CHIRELSTEIN, supra note 87, at 128.


from the discussion above, that at least in the case of advertising to children, there are significant future benefits, such as lasting residual effects of brand loyalty, far beyond the taxable year in which the advertising costs are incurred.

The 1992 Supreme Court case *INDOPCO, Inc. v. Commissioner of Internal Revenue (INDOPCO)* lent some hope to the notion that intangible benefits exceeding the boundary of the current taxable year should be capitalized. In *INDOPCO*, a corporation incurred legal and investment banking fees and costs related to a merger offer from another company. The taxpayer argued that since these fees were not separate and distinct assets from the general merger, it should be able to deduct the total of these expenses in the current tax year, as opposed to capitalizing them. The Supreme Court decided in favor of the Commissioner of the IRS, who argued that the taxpayer must capitalize the expenses because there is a *long-term benefit* of the merger to the taxpayer. The decision indicates that there does not have to be a separate and distinct asset acquired by the taxpayer where the entirety of the transaction creates a long term benefit. The cost of such intangible assets must be capitalized over a period of years. This was an important victory for the IRS.

Based on the result of *INDOPCO* it may be inferred that advertising expenses for campaigns targeting children, which have clear future benefits, should be capitalized as opposed to deducted entirely in the year in which the cost is incurred. In Revenue Ruling 92-80, however, the IRS indicates that the *INDOPCO* decision will not affect a trade or business' ability to deduct advertising costs under section 162(a). The IRS gives no explanation for its position in this ruling. A single exception to the rule is when advertising costs go beyond normal

95. Economic Benefits attributable to certain costs may be either tangible or intangible. CHIRELSTEIN, *supra* note 87, at 128.
96. *INDOPCO*, 530 U.S. at 79.
97. *Id.* at 86.
98. *Id.* at 90.
99. *Id.* at 87.
100. Rev. Rul. 92-80, 1992-2 C.B. 57. Revenue Rulings are opinions released by the IRS "on matters of law arising in particular fact settings. Often they are based on requests by taxpayers for advice about a specific legal issue with which they are confronted." KLEIN, BANKMAN & SHAVIRO, FEDERAL INCOME TAXATION 47 (12th ed. 2000).
boundaries to provide significant future benefits. 101 This is an unclear distinction, since it provides few guidelines to corporations with significant advertising budgets.

In 1998, the U.S. Tax Court tested this revenue ruling in RJR Nabisco Inc. v. Commissioner102 and largely rejected the IRS's attempt to distinguish advertising based on long-term versus short-term benefits. The issue in RJR Nabisco was whether the taxpayer could deduct the entire expense for the graphic design on cigarette packaging in the year the cost was incurred. 103 The court refused to differentiate between advertising campaign expenditures (long term benefits) and advertising execution expenditures (short term benefits), as the IRS would have preferred.104 The court noted that, based on the longstanding positions of the Board of Tax Appeals and other precedent, it seriously doubted the validity of such a distinction.105 The court also noted that making such a distinction would be incompatible with IRC sections 1.162(a) and 20(a)(2) and with Revenue Ruling 92-80.106 Thus, the court classified all expenditures as ordinary business expenses that are immediately deductible.107

While the IRS did not appeal RJR Nabisco, it was displeased with the decision. 108 The IRS claimed that Revenue Ruling 89-23 indicated that package design costs are capital expenses, not advertising costs, and are more likely to extend beyond the taxable year in terms of benefits; therefore, the costs should be capitalized.109 The position of the IRS on tax treatment of advertising costs is far from clear. It is fair to say that its current stance is that "costs are deductible even though advertising may have some future benefit,"110 but should be capitalized if they "result in benefits which extend beyond the year in which the costs are incurred."111

101. Id. See also Cleveland Electric Illuminating Co. v. United States, 7 Cl. Ct. 220 (1975).
103. Id. at 73.
104. Id. at 83.
105. Id. at 84.
106. Id. at 84-85, referring to IRC § 162(a) and 20(a)(2), and Rev. Rul. 92-80, 1992-2 C.B. 57.
107. Id. at 85.
108. Hymel, supra note 8, at 435.
109. Hymel, supra note 8, at 435-36.
110. Id. at 436, citing Action on Decision, 1999-012 (Oct. 4, 1999).
111. Id.
Revenue Ruling 92-80 cites *Cleveland Electric Illuminating Co. v. United States* (hereinafter *Cleveland Electric*)\(^{112}\) as an example of a case where advertising and marketing costs should be capitalized because they are "directed towards obtaining future benefits significantly beyond those traditionally associated with ordinary product advertising or with institutional or goodwill advertising . . . ." \(^{113}\) In *Cleveland Electric*, the Cleveland Electric Illuminating Company incurred large expenditures for a public relations campaign in the area it intended to build a nuclear power facility.\(^{114}\) The court addressed the issue of whether the costs of this advertising campaign were capital expenditures or ordinary and necessary business expenses. In holding for the IRS, the Court relied on *Lincoln Savings & Loan*\(^{115}\) which stated "[t]he principal function of the term ‘ordinary’ in § 162(a) is to clarify the distinction, often difficult, between those expenses that are currently deductible and those that are in the nature of capital expenditures, which, if deductible at all, must be amortized over the useful life of the asset."\(^{116}\) Moreover, "this dichotomy is reinforced by § 263(a) (and see also §§ 161 and 261), which bars deductions for capital expenditures."\(^{117}\) The court agreed with the government that advertising costs were expenditures for obtaining the goodwill of the public, a cost which must be capitalized as part of the startup costs for the nuclear plant.\(^{118}\) Thus, the advertising costs of the Cleveland Electric Illuminating Company associated with the acquisition of goodwill were required to be amortized over the life of the nuclear power station, if they were deductible at all.\(^{119}\)

The IRS's reliance on the *Cleveland Electric* case in its Revenue Ruling regarding the tax treatment of advertising costs is important for two reasons. First, the holding of *Cleveland Electric* indicates that expenses for acquisition of goodwill by a company through advertising must be capitalized.\(^{120}\) Second, the exact wording of the ruling that

\(^{112}\) *Cleveland Electric*, 7 Cl. Ct. 220.


\(^{114}\) *Cleveland Electric*, 7 Cl. Ct. at 222.

\(^{115}\) Commissioner v. Lincoln Savings & Loan Ass’n., 403 U.S. 345 (1971).

\(^{116}\) *Lincoln Savings & Loan Ass’n*, 403 U.S. at 353 (quoting Commissioner v. Tellier, 383 U.S. 687, 689-690 (1966)).

\(^{117}\) Id.

\(^{118}\) Notably, the IRS allows expenses for *maintenance* of goodwill (rather than acquisition thereof) to be generally deductible as ordinary and necessary business expenditures. *Cleveland Electric*, 7 Cl. Ct. at 231.

\(^{119}\) *Cleveland Electric*, 7 Cl. Ct. at 233.

\(^{120}\) Id. at 235-36.
advertising "directed toward" acquisition of significant future benefits such as goodwill is very telling.\textsuperscript{121} It indicates that if advertising is even \textit{intended} to acquire goodwill over an extensive period of time then it must be capitalized, even if the ad campaign is not necessarily successful in obtaining those future benefits. The wording of Revenue Ruling 92-80 contradicts the argument of the advertising lobby for maintaining current tax deductibility for advertising expenses, namely that industry should not have to capitalize or amortize advertising expenses when the future benefits of these campaigns are uncertain.\textsuperscript{122} To require them to do so, the industry argues, would cause them to absorb large expenses over the long term that are not providing any offsetting benefits in future years.\textsuperscript{123} The wording of the Revenue Ruling, however, indicates that this argument for maintaining the status quo for tax treatment of advertising costs is weakened, as ad costs must only be intended to create future benefits to require capitalization or amortization treatment.

Companies advertising should bear the costs of campaigns directed toward children about foods of minimal nutritional value over the useful life of the campaign, rather than entirely in the year the costs are incurred. However, this Comment does \textit{not} propose that advertising costs to children be entirely non-deductible with regard to taxes. While the latter argument would perhaps \textit{in practice} be more effective in reducing the epidemic of obesity and perhaps a gamut of other social issues, there are two main reasons for the aforementioned argument.

First, Congress has been very reluctant to eliminate the tax-deductibility of advertising costs for tobacco products, despite many efforts to effect such change by the anti-tobacco lobby and a number of Congresspersons.\textsuperscript{124} If Congress is unwilling to eliminate tax-deductibility for tobacco advertising to children, then the likelihood of eliminating tax deductibility of advertising costs to children generally or even for certain types of foods is very slim. Congress is more likely to accept a milder amortization approach, as suggested in this Comment, rather than the more drastic elimination of tax-deductibility.

Second, the costs of advertising foods with low nutritional value to children should be treated as a capital expenditure because this

\textsuperscript{121} Rev. Rul. 92-80, 1992-2 C.B. 57.
\textsuperscript{122} Hymel, \textit{supra} note 8, at 420.
\textsuperscript{123} \textit{Id}.
\textsuperscript{124} Virelli, \textit{supra} note 11, at 530.
treatment is more likely to be viable under the First Amendment\textsuperscript{125} than a complete elimination of tax-deductibility.

IV. REQUIRING AMORTIZATION: ADVERTISER OPPOSITION AND IMPLICATIONS FOR COMMERCIAL SPEECH AND EQUAL PROTECTION

A. Advertisers Oppose Tax Subsidy Removal

Advertisements are designed to positively affect sales by inducing consumers to buy advertised products, thereby increasing profits for the food industry. From the discussion above, however, it is clear that advertising, especially to children, does provide significant future benefits. Allowing the advertisers to deduct their expenses for costs that produce such long term benefits is contrary to the general policy of our tax system.

As mentioned above, industry advertisers, such as the food industry, defend their position that immediate deductibility of advertising expenses is necessary because they need advertising to convey important messages to consumers about their products.\textsuperscript{126} They also claim that some advertising campaigns will not be successful, thus creating no goodwill in its targeted audience, because success or failure of the campaign cannot be predicted at the outset. The seminal issue is whether future benefits will actually exist for tax purposes.\textsuperscript{127}

Historically, for financial accounting purposes,\textsuperscript{128} the food industry has treated advertising costs as expensed entirely in the year incurred.\textsuperscript{129} This practice facilitates less complex accounting, as companies do not try to match the costs of advertising with the benefits reaped in later fiscal years.\textsuperscript{130}

It is well accepted that financial accounting treatment should not necessarily be the same as tax accounting treatment\textsuperscript{131} because the

\begin{itemize}
  \item \textsuperscript{125} As tested under the four part test in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980).
  \item \textsuperscript{126} Hymel, supra note 8, at 397.
  \item \textsuperscript{127} \textit{Id.} at 420.
  \item \textsuperscript{128} Financial accounting is here distinguished from tax accounting. Accountants for businesses generally do “not capitalize advertising costs.” \textit{Id.}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} KLEIN et al., supra note 100, at 556-57.
  \item \textsuperscript{131} CHIRELSTEIN, supra note 87, at 257-58.
\end{itemize}
goals of each type of accounting are different.\(^{132}\) Tax policy has long held that costs of trade or business that have benefits extending beyond the taxable year in which the expenses are incurred must be capitalized.\(^{133}\) Thus, the practical problems of the food industry in matching costs and benefits in later years are exaggerated and should not be taken into account for tax purposes. Requiring amortization for costs of advertising directed at children will accord with established tax policy.

**B. Requiring Amortization of Advertising Costs Related to Children Is Valid under the First Amendment**

The Supreme Court has held that advertising by industry is a form of commercial speech\(^{134}\) protected by the First Amendment of the Constitution.\(^{135}\) The Supreme Court further recognizes that commercial speech needs less protection than non-commercial or political speech, and therefore may be properly subjected to greater regulation.\(^{136}\)

A four-part test for determining the constitutionality of a government regulation affecting commercial speech is set forth by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (hereinafter *Central Hudson*).\(^{137}\) In *Central Hudson*, the Supreme Court declared unconstitutional a statute that prohibited advertising focused on increasing use of electricity.\(^{138}\) The court stated:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to

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132. *Id.*
133. *Id.* at 123.
134. *See* Bigelow v. Virginia, 421 U.S. 809 (1975), in which the Supreme Court first gave protection to commercial speech (ad for abortions). The Court said that commercial speech does have some value in the marketplace of ideas despite the fact that it has to do with goods and services. Yet in this case the Supreme Court only went so far as to say that the audience had a right to the information in the advertisement. *Id.*
135. U.S. CONST. amend. I.
136. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), decided a year after *Bigelow*, in which the Supreme Court determined that commercial speech is less vulnerable than noncommercial speech and thus could better endure government regulations.
137. *Central Hudson*, 447 U.S. at 566.
138. *Id.* at 571-572.
come within that provision, it at least must [1] concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.139

The proposal that Congress change the tax treatment of advertising to require capitalization or amortization of its costs does not offend First Amendment principles under this Central Hudson test. Each requirement of constitutionality is met.

First, the Supreme Court in Central Hudson stated that "the government may ban forms of communication more likely to deceive the public than inform it."140 Thus, as subsequent case law since Central Hudson has demonstrated, misleading advertising is not as protected as truthful advertising.141 This proposal focuses on a tax amendment that will cause a reduction in advertisements to children of food products that are not advantageous to their health. Such ads for foods of low nutritional value are often misleading to viewers who lack maturity and understanding, viewers who are the target audience for the ads.142 Because these ads are frequently misleading, they fall under the category of commercial speech that can be regulated by the Central Hudson test.143

Second, the government does have a substantial interest in making tax treatment of advertising consistent with current tax policy and especially in protecting the "health, safety and welfare of citizens," especially of children who do not have the maturity to make decisions about their health and well-being.144 In addition, the government has a

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140. Virelli, supra note 11, at 550 (citing In re R.M.J., 455 U.S. 191, 217 (1982), which held that "professional advertisements by attorneys can be misleading and therefore may be regulated under the Central Hudson test").
141. FARBER ET AL., supra note 139, at 640 (quoting Central Hudson).
142. See SCHLOSSER, supra note 44; see Hymel, supra note 43.
143. Central Hudson, 447 U.S. at 562.
144. U.S. CONST. art I, § 8, stating, "The Congress shall have Power To lay and collect Taxes . . . [to] provide for the common Defence and general Welfare of the United States." See also Gostin, supra note 84, at 276 (stating that "[c]losely connected to the power to tax, the spending power [of the U.S. Constitution] has two related purposes. First, it authorizes expenditures expressly for the public's health, safety, and well-being"
substantial interest in ensuring that the marketing practices of commercial advertisers are not unfair or misleading.

Third, this proposal materially advances the substantial interest of the government in protecting the health and welfare of children. The proposal protects children and adolescents from misleading or unfair marketing practices of advertisers for products that have been shown to be detrimental to children's health.1 Children's health will be improved by requiring amortization of advertising costs over a long period of time rather than allowing companies to immediately deduct advertising expenses in the year incurred. Such forced amortization of costs for advertising campaigns targeting children will provide a strong economic incentive for food companies to focus their advertising elsewhere and perhaps even to improve the nutritional content of products advertised.

Moreover, the proposal to change tax treatment of advertising costs materially advances the government's interest because it leaves open alternative channels for industry to focus its advertising.146 It will raise the cost of advertising to children (thus decreasing the number of ads directed at children), but high consumer demand for most food products that have low nutritional value - for example, much of fast food - will not make each individual advertisement less effective. The alternative (more costly) channels open to commercial advertisers are not "prohibitively more expensive, not markedly more inconvenient, and not significantly less effective as a means of broadcasting the message."147

Fourth, such a change in tax treatment of advertising costs of campaigns focused on children is no more restrictive than necessary. Companies can still advertise to children, but it will be more costly. Moreover, it is a way to signal disapproval of the unfair and misleading marketing practices focused on children without completely removing tax deductibility of costs or banning advertising to children completely. This proposal is a mere restriction, not a total ban. There is a

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1. See Posadas de P.R. Ass'n v. Tourism Co. of P.R., 478 U.S. 328, 341-343 (1986). The interests of health, safety and welfare were found to satisfy the second prong of the Central Hudson test in this case.

145. SCHLOSSER, supra note 2, at 262.

146. See Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989) (holding that "a regulation of the time, place, or manner of protected speech must be narrowly tailored . . . but that it need not be the least restrictive or least intrusive method of doing so").

reasonable fit between the asserted government interest and the means proposed to achieve those ends.

While it is likely that this change in tax treatment will pass muster under the Central Hudson test, Supreme Court precedent deals almost exclusively with taxation of non-commercial speech.\textsuperscript{148} It has heard only one case centering on the constitutionality of taxing commercial speech.\textsuperscript{149} Most likely, the tax change proposed in this Comment is not an unconstitutional content-based restriction on speech.\textsuperscript{150} Rather, it is a permissible allocation of funds (differential tax treatment) to certain means of advertising as opposed to others.\textsuperscript{151} The Court would likely review the taxation of commercial speech in a manner deferential to the government.

\textit{C. Requiring Amortization of Advertising Costs to Children is Valid under the Fifth Amendment}

This proposed tax treatment of advertising to children does not violate the Fifth Amendment’s equal protection clause.\textsuperscript{152} While the proposed change in law does suggest differential treatment of the food industry, this differential treatment is justifiable. Courts would likely review such tax treatment with minimal scrutiny as no fundamental interests or indicia of “suspectness” are implicated.\textsuperscript{153} To satisfy this minimal scrutiny test, the government must be able to show that the differential treatment of food industry advertisers, as opposed to other advertisers to children, is justifiable.\textsuperscript{154} The discussion above clearly indicates that protection of children’s health and welfare is a legitimate governmental objective. The differential treatment of food industry advertisers of minimally nutritious foods is rationally related to the objective of reducing the national epidemic of childhood obesity. There is a rational relationship because there is a close fit between the

\begin{itemize}
\item \textsuperscript{148} Virelli, \textit{supra} note 11, at 544.
\item \textsuperscript{149} \textit{See generally} Grosjean v. Am. Press Co, 297 U.S. 233 (1936) (finding that a two percent tax on newspaper advertisements violated the First Amendment freedom of press because it limited the circulation of the newspaper).
\item \textsuperscript{150} Whether a restriction on speech is unconstitutional or not may depend on whether the restriction is content based or not. \textit{See} WILLIAM A. KAPLIN, THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 172 (1992).
\item \textsuperscript{151} U.S. CONST. art I, § 8. \textit{See also} Virelli, \textit{supra} note 11, at 564.
\item \textsuperscript{152} US CONST. amend V. Equal Protection of the laws is implied in the Due Process Clause of the Fifth Amendment. \textit{See} KAPLIN, \textit{supra} note 150, at 147.
\item \textsuperscript{153} KAPLIN, \textit{supra} note 150, at 150.
\item \textsuperscript{154} \textit{Id.} at 148.
\end{itemize}
means (ending the tax subsidy for advertising to children) and the ends (reducing negative consumption patterns) of this proposal. As such, the proposed change in regulation should pass the test of equal protection.

V. FIVE STEPS TO HEALTHIER CHILDREN: PROPOSED METHODOLOGY FOR REQUIRING AMORTIZATION OF ADVERTISING TO CHILDREN OF FOODS WITH MINIMAL NUTRITIONAL VALUE

There are a number of ways in which this proposal could be effected by Congress. The following proposal sets out the fundamentals of one of many potential legislative schemes to regulate the tax treatment of the cost of advertising of minimally nutritious foods to children. This suggested methodology is by no means exclusive of other means of achieving the same result.

Congress needs to do five things to turn this proposal into law. First, Congress should raise awareness of the problem of overweight and obesity and the connection to misleading advertising campaigns on television. The problem of misleading advertising and the significant effect it has on children should be brought to the forefront of the American consciousness. Such action will build support for a change in tax law that will better allocate American tax dollars.

Second, Congress needs to convene a multidisciplinary task force to determine a standard for foods of low or minimal nutritional value, and what “advertising to children” includes. This congressional direction will provide appropriate authority to this task force to complete its mission. This panel should include health professionals, nutritionists, child psychologists, regulatory experts from the FTC and other appropriate federal agencies, and members of the advertising industry. The panel’s definition of low or minimal nutritional value food may be based on fat or sugar content, or some other minimum standard of nutritional value. This definition should be periodically reviewed as nutritional standards may change. However, some measure of constancy in this definition is required to give the

155. U.S. CONST. amend. V. Equal Protection of the laws is implied in the Due Process Clause of the Fifth Amendment. Id. See KAPLIN, supra note 150, at 151.
156. Hymel, supra note 8, at 444.
157. For example, Congress could amend the Federal Food, Drug and Cosmetic Act (see Title 21 of the USC) to include regulation of the quality of food that may be advertised to children, or provide a direct mandate to the FTC.
advertising industry adequate notice so they may comply with the standard.

In order to establish the scope of what is included in "advertising to children," the panel may wish to look to international standards such as those in place in parts of the European Union.158 The panel may base its decision about what constitutes "advertising to children" by focusing on standards such as those of child psychology in conjunction with more concrete considerations, such as the time of day or night at which the advertisement is aired.

Third, Congress should incorporate by reference the panel’s definition of a minimally nutritious food in section 162 of the IRC.159 This amendment should require that the cost of advertising these foods to children should be amortized over a period of years. This period of years is a subject for further debate, as it is difficult to determine the useful life of a certain advertising campaign targeting children.160 An amortization period of fifteen years may be appropriate since acquisition of goodwill is currently amortized over that period of time.161

Fourth, monitoring and enforcement mechanisms must be developed and consistent. For example, a set of self-reporting requirements could be developed by which the industry reveals the nutritional contents of the food advertised. These reports could be reviewed and enforced by the FTC or by a branch of the Food and Drug Administration (FDA) of the Department of Health and Human Services. Fines could be set for disregard of the set standards in advertising. These enforcement mechanisms are vital to the success of these tax changes in reducing misleading marketing practices to children.

Fifth, Congress should use any revenue derived from these changes to fund public service announcements about making healthy dietary choices. This will counteract the negative influences of advertising to children and combat over-consumption.162

This change in the tax law, however achieved, will better serve the policies and interests of the United States. It will draw boundaries between fair and unfair advertising of foods of low or minimal nutritional value that affect the livelihood of America’s children.

158. Moser et al., supra note 68. See also SCHLOSSER, supra note 2, at 243.
160. Hymel, supra note 8, at 420.
162. Hymel, supra note 8, at 444.
CONCLUSION

This Comment has shown that advertising to children provides future benefits reaching far beyond what may be termed “traditional bounds.” These future benefits provide profits to the food industry that, according to tax policy, should be matched against the costs of that advertising in years beyond that in which the costs were incurred. Changing tax law to require amortization of advertising expenses to children, rather than immediate deduction in the year incurred, will make advertising to children less profitable for industry. The food industry will thus have less incentive to advertise to children. Decreases in advertising, in turn, should lead to a reduction in the incidence of overweight and obesity in children, because they are not exposed to a barrage of manipulative campaigns inducing them to over consume foods that are not healthful.

America should no longer allow commercial advertisers to self-regulate and turn a profit at the expense of the well being of children. While it may be easier for accounting purposes to allow companies to continue immediate deduction of the costs of advertising to children, it is clear that advertising to children creates incredible future benefits for industry.

This tax treatment of costs of advertising to children is viable under the First Amendment and does not violate the food industry’s Fifth Amendment right to equal protection of the law. As discussed above, the proposed change in tax law should satisfy the four-part test of Central Hudson in order to qualify as an acceptable limitation on commercial speech. Specifically, the proposed change does not violate food industry’s First Amendment rights because (1) the advertising at issue is misleading; (2) the governmental interest in protecting the health of children is substantial; (3) the proposed change in tax law directly advances the government’s interest in protecting children; and (4) the proposed change is not more extensive than necessary to achieve the objective of protecting children. The food industry’s Fifth Amendment equal protection right is not violated because as discussed above, the means of the proposed objective justify the ends.

The proposed change in law enables children to make more autonomous and voluntary choices about the foods they choose to

164. KLEIN et al, supra note 100, at 556-57.
165. Hymel, supra note 8, at 449.
consume. The food industry can still advertise to children under this changed tax law, but it will provide an incentive for them to focus their resources elsewhere. This action would be a legislative condemnation of industry’s manipulative advertising practices toward children. Reducing the epidemic of obesity in children in America is vital to the future economic and social well-being of our society. Changing the tax law structure as suggested in this Comment will be a great step toward protecting the future of American children.

166. Pope, supra note 54, at 456-457.