

CHILDHOOD OBESITY: WHY THE FEDERAL GOVERNMENT SHOULD ENACT LEGISLATION TO MEET THE GOALS OF THE AFFORDABLE CARE ACT BY RESOLVING A GROWING ISSUE

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I. INTRODUCTION	308
A. <i>Their Eyes Were Watching a Volleyball Game</i>	308
B. <i>Growing Pains From the Culture Shift</i>	308
C. <i>Saving Us From Ourselves</i>	308
II. BACKGROUND.....	311
A. <i>Childhood Obesity Historically</i>	311
B. <i>Why It Matters</i>	313
1. Obesity is a Gateway to many more Complications	313
2. Obesity is not just a Physiological Consequence; There are Psychological Consequences as well	314
3. Obesity is a Huge Financial Burden	315
C. <i>Obesity: A Preventable Disease</i>	315
D. <i>Why a Comprehensive Policy is Necessary to Fix the Issue</i>	316
III. ANALYSIS	318
A. <i>How the ACA is Designed to Reduce the Cost of Healthcare for Americans with Respect to Solving the Childhood Obesity Problem</i>	318
B. <i>What Programs are out There to Help get Children Engaged in Physical Activity?</i>	319
C. <i>To be more effective, the ACA Should have Addressed Childhood Obesity Through America's Schools</i>	320
D. <i>Congress has the Power and Authority to make Positive Changes Pursuant to the Spending Clause</i>	323
E. <i>What are the Potential Constitutional Issues?</i>	326
1. A Challenge that Parents' Rights to Privacy are Infringed .	326
2. A Challenge it Would Violate the Commerce Clause	328
IV. CONCLUSION	330

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I. INTRODUCTION

*A. Their Eyes Were Watching a Volleyball Game*²

It was match point. All eyes were on the tall, leggy, blonde-haired girl, as she went to serve the ball. She went through the ritual; tugged on her lucky kneepads, gave one final gaze to her coach on the sidelines, and lofted the ball into the air. Like Olympic synchronized swimmers, all those eyes in the gymnasium began their ascent, following the ball. Her form was perfect; she was impressively prepared. The thought of her in this position left little doubt she would bring home the state championship. Then she blew it. She leapt to meet the ball and whiffed, falling to the ground in a melodramatic heap. The ball dribbled across the floor leaving a trail of shattered dreams. The athletic trainer raced to her side, fearing the worst. Was it a torn ACL? Dislocated elbow? “I’m so hungry!” she exclaimed. “I haven’t had enough to eat. All they feed us are vegetables and whole wheat bread.” And so begins the outcry.

B. Growing Pains From the Culture Shift

“Tonight, we are hungry, set the policy on fire, it can burn brighter than the sun,”³ say the students from Wallace County High School in Kansas.⁴ The policy the kids are referring to is the Healthy, Hunger-Free Kids Act of 2010 (HHFKA), which went into effect March 26, 2012.⁵ The legislation, championed by First Lady Michelle Obama in her efforts to end childhood obesity within a generation, “is designed to improve nutrition standards for food served in schools.”⁶

C. Saving Us From Ourselves

On June 28, 2012, the United States Supreme Court largely upheld the constitutionality of the Patient Protection and Affordable Care Act (ACA).⁷ One of the ACA’s primary goals is to reduce the overall cost of

² Part I.A. of this comment is fictional with fictitious characters. Any resemblance to real persons, living or dead, is coincidental.

³ Blk5348, *We Are Hungry*, YouTube, <http://www.youtube.com/watch?v=2IB7NDUSBOo> (last visited Aug. 12, 2014) (The students perform an arguable parody of the song “We Are Young” by the band fun. in protest over their new school lunches.); Nancy Hellmich, *Students push back on new School Lunches*, USA TODAY (Sept. 28, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012/09/25/kids-push-back-on-new-school-lunch/57842204/1>.

⁴ Hellmich, *supra* note 3.

⁵ *Id.*; Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088 (Jan. 26, 2012) (to be codified at 7 C.F.R. pts. 210 & 220).

⁶ *We Are Hungry: Students Protest School Lunch Guidelines in YouTube Video*, FOX NEWS (Sept. 26, 2012), <http://www.foxnews.com/health/2012/09/26/high-school-students-parody-new-school-lunch-guidelines-in-youtube-video/>.

⁷ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608–09 (2012).

healthcare for Americans.⁸ The ACA aims to do this, at least in part, by making certain preventive healthcare measures available at no cost to the consumer.⁹ Through obesity¹⁰ prevention tools, such as obesity counseling and menu labeling, the ACA implements preventive methods to help make healthcare affordable.¹¹ The National Prevention Council¹² stated, “[p]reventing disease and injuries is key to improving America’s health” which, in turn, is key to reducing the overall cost of healthcare for Americans.¹³ The ACA and the HHFKA are each pieces of legislation that work both directly and indirectly toward a goal of solving the obesity crisis in America.¹⁴

Obesity is a huge cause of preventable disease and the rising cost of healthcare, linked to thirty illnesses, including cancer, diabetes, and heart disease.¹⁵ What is more alarming is that “[o]besity affects more than one-third of U.S. adults”¹⁶ and is “on course to increase dramatically in every state in the country over the next 20 years[.]”¹⁷ Childhood obesity is an even bigger problem, with twelve million kids (one in five) falling into this category.¹⁸ Moreover, children who fall into the overweight or obese categories frequently become obese adults.¹⁹ With these projections, it is likely that as obesity rates rise, disease rates will rise, therefore *increasing* the cost of healthcare for Americans.²⁰ Thus, it seems logical to ask: “What’s the ACA doing to target obesity, specifically among children?”

⁸ NAT’L PREVENTION COUNCIL, NAT’L PREVENTION STRATEGY: AMERICA’S PLAN FOR BETTER HEALTH AND WELLNESS (June 2011), available at <http://www.surgeongeneral.gov/initiatives/prevention/strategy/report.pdf>.

⁹ *Preventive Health Services for Adults*, HEALTHCARE.GOV, <https://www.healthcare.gov/what-are-my-preventive-care-benefits/> (last visited Aug. 12, 2014).

¹⁰ Obesity is defined as “a condition characterized by the excessive accumulation and storage of fat in the body[.]” *Obesity*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/obesity> (last visited Aug. 12, 2014); see also *Obesity*, MAYO CLINIC, <http://www.mayoclinic.com/health/obesity/DS00314> (last visited Aug. 12, 2014).

¹¹ See 26 U.S.C.A. § 5000A (West 2013).

¹² The Affordable Care Act created The National Prevention Council in 2010. NAT’L PREVENTION COUNCIL, *supra* note 8. The National Prevention Council provides coordination and leadership at the federal level and among all executive agencies regarding prevention, wellness, and health promotion practices. See U.S. DEP’T HEALTH & HUM. SERVS., OFFICE SURGEON GEN., <http://www.surgeongeneral.gov/initiatives/prevention/about/index.html> (last visited Aug. 12, 2014).

¹³ See NAT’L PREVENTION COUNCIL, *supra* note 8.

¹⁴ 26 U.S.C.A. §5000A (West 2013); Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183.

¹⁵ JEFFREY LEVI ET AL., BENDING THE OBESITY COST CURVE: REDUCING OBESITY RATES BY FIVE PERCENT COULD LEAD TO MORE THAN \$29 BILLION IN HEALTH CARE SAVINGS IN FIVE YEARS 1 (Jan. 2012).

¹⁶ Lindsey Tanner, *Obesity Education Should be Provided to Kids and Teens*, *American Medical Association says*, HUFFINGTON POST (June 20, 2012, 3:55 PM), http://www.huffingtonpost.com/2012/06/20/obesity-education-american-medical-association-kids-teens-ama_n_1612906.html.

¹⁷ TRUST FOR AMERICA’S HEALTH, F AS IN FAT: OBESITY THREATENS AMERICA’S FUTURE (Sept. 2012) <http://healthyamericans.org/report/100/> [hereinafter F AS IN FAT].

¹⁸ Tanner, *supra* note 16.

¹⁹ NICOLETTE HEATON-HARRIS, CHILDRENS HEALTH-COMBATING OBESITY 12 (2009).

²⁰ F AS IN FAT, *supra* note 17.

The ACA attempts to lay the foundation for prevention.²¹ To do this, the Act implements preventive care services to fight childhood obesity.²² “Some of the services include regular pediatrician visits, developmental assessments, and obesity screening and counseling.”²³ Concurrently, First Lady Michelle Obama launched the *Let’s Move!* campaign, which aims to end childhood obesity within a generation.²⁴ Specifically, *Let’s Move!* intends to reach this goal by providing information to parents, getting healthier and more nutritious foods into America’s schools, and “helping children become more physically active.”²⁵ However, the First Lady’s initiative, *Let’s Move!*, is just that, an initiative. This plan is a voluntary program that gives incentives to schools to provide healthier lunches and get kids moving on the playground.²⁶ While the *Let’s Move!* initiative tries to insert a healthier way of life into the zeitgeist, the bottom line is that twenty-five million Americans have type 2 diabetes, twenty-seven million have chronic heart disease, sixty-eight million have high blood pressure,²⁷ and America cannot wait for the states to take voluntary action. Therefore, the nation requires a policy that is going to decrease childhood obesity rates, which, in turn, will decrease the nation’s vast expenditures on healthcare.

Part II of this Comment first discusses the evolution of childhood obesity in America, the consequences of childhood obesity, the prevention of the disease, and why a comprehensive policy is necessary to address it.

Part III.D of this Comment proposes a way in which the federal government could more effectively target childhood obesity by introducing legislation attaching conditions to states’ receipt of federal funds. *South Dakota v. Dole* set the precedent that Congress may legislate in this fashion on behalf of the “general welfare.”²⁸ A brief examination of *National Federation of Independent Business v. Sebelius*²⁹ will determine if the Supreme Court has recently limited this power.

Finally, Part III.E of this Comment discusses potential constitutional issues with these proposals, including potential infringements of parents’ fundamental right to privacy as well as challenges under the Commerce Clause.

²¹ WHITE HOUSE, AFFORDABLE CARE ACT: THE NEW HEALTH CARE LAW AT TWO YEARS, available at <http://www.whitehouse.gov/sites/default/files/uploads/careact.pdf> (last visited Aug. 12, 2014).

²² Krystina Mendoza, *Preventive Care and the Challenge of Childhood Obesity*, 20 ANNALS HEALTH L. ADVANCE DIRECTIVE 105, 106 (2010).

²³ *Id.* at 109.

²⁴ *Id.* at 106.

²⁵ *About Let’s Move*, LET’S MOVE!, <http://www.letsmove.gov/about> (last visited Aug. 12, 2014).

²⁶ Memorandum from U.S. Dep’t of Agric. to State Child Nutrition Dirs. (April 1, 2010), available at http://www.fns.usda.gov/tn/healthierus/hussc_incentives.pdf.

²⁷ F AS IN FAT, *supra* note 17.

²⁸ *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

²⁹ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012).

II. BACKGROUND

A. *Childhood Obesity Historically*

“[T]he United States has among the highest worldwide rates of childhood obesity, diabetes, and asthma.”³⁰ Because of the obesity epidemic, “[f]or the first time in history, American children [are at risk for] hav[ing] a shorter life span than their parents.”³¹ Things were not always this bad.³² Obesity rates have tripled in the last thirty years among children and adolescents.³³ In 1971, 4% of kids ages 6–11 were obese.³⁴ In 2004, that number skyrocketed to 18.8%.³⁵ Moreover, in the 1950s, children consumed three cups of milk for every cup of soda.³⁶ Today, children consume three cups of soda for every cup of milk.³⁷ The result: today’s children drink loads of calories and none of the nutrients.³⁸ Additionally, today’s restaurant meals are, on average, four times bigger than they were in the 1950s.³⁹ These nutritional trends are undoubtedly contributing to the nation’s rapid increase in obesity in just a few decades.⁴⁰ The rate at which obesity is increasing is so alarming that experts refer to it as an “epidemic.”⁴¹

Children’s physical activity has declined in the last thirty years as well.⁴² As a society, we have seen a gradual decrease in students walking to school, participating in gym class, and playing outdoors.⁴³ In the late 1960s,

³⁰ Leah Loeb, Comment, *Childhood Obesity: The Law’s Response to the Surgeon General’s Call to Action to Prevent and Decrease Overweight and Obesity*, 12 J. HEALTH CARE L. & POL’Y 295, 296 (2009).

³¹ Susan Levine et al., *How Obesity Harms a Child’s Body*, WASH. POST, <http://www.washingtonpost.com/wp-srv/health/childhoodobesity/obesityeffects.html> (last visited Jan. 22, 2014).

³² See Jeffrey Kluger, *How America’s Children Packed on the Pounds*, TIME (June 12, 2008), <http://www.time.com/time/magazine/article/0,9171,1813985,00.html>.

³³ *Policy Priorities: Childhood Obesity*, CHILDREN’S DEF. FUND, <http://www.childrensdefense.org/policy-priorities/childrens-health/child-nutrition/childhood-obesity.html> [hereinafter *Childhood Obesity*] (last visited Aug. 12, 2014).

³⁴ Kluger, *supra* note 32.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ The New (Ab)Normal: Portion Sizes Today vs. in the 1950s (INFOGRAPHIC), Huffington Post (May 23, 2012, 1:56 PM), http://www.huffingtonpost.com/2012/05/23/portion-sizes-infographic_n_1539804.html.

⁴⁰ See *id.* “The average adult is now 26 pounds heavier than 60 years ago.” *Id.*

⁴¹ See generally ROBERT POOL, FAT: FIGHTING THE OBESITY EPIDEMIC (2001); *Learn the Facts, LET’S MOVE!*, <http://www.letsmove.gov/learn-facts/epidemic-childhood-obesity> (last visited Aug. 12, 2014). Epidemic is defined as “affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time[.]” *Epidemic*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/epidemic> (last visited Aug. 12, 2014). Some other examples of epidemics are cholera, typhoid, anthrax, smallpox, polio, and plague. *Epidemic*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/189776/epidemic> (last visited Aug. 12, 2014).

⁴² See *Learn the Facts*, *supra* note 41.

⁴³ *Id.*

it was an everyday occurrence to see children walking to school.⁴⁴ In 1969, 48% of children ages 5–14 walked or biked to school.⁴⁵ In 2009, that number decreased to 13%.⁴⁶ Parents cite distance to school, traffic danger, adverse weather conditions, fear of crimes against children, and crime in the neighborhood as reasons for using inactive transportation.⁴⁷ Moreover, the number of students participating in daily school physical education programs has decreased.⁴⁸ Some blame economic restraints and increased significance placed on standardized tests for the deteriorating state of gym class.⁴⁹

Soda intake and bus rides are not the only things to fault for kids' growing waistlines.⁵⁰ A recent study released in *Pediatrics*⁵¹ looked at research showing that a child's media use may be linked to his or her body weight, not only because kids do not get as much exercise if they are watching TV or playing video games, but also because of other issues related to media exposure.⁵² For example, when kids are watching too much TV, they are exposed to more advertisements for junk food and they are not getting enough rest.⁵³ Lack of sleep “wreak[s] havoc on [the body's] metabolism and the endocrine system . . . [.]” which leads to weight gain.⁵⁴ The Centers for Disease Control and Prevention (CDC) lists, among other things, “[l]ack of daily, quality physical activity in all schools . . . [l]imited access to healthy affordable foods . . . [i]ncreasing portion sizes . . . [and] lack of breastfeeding support” as causes of childhood obesity.⁵⁵

Nevertheless, some video games have been developed to help kids stay active or lose weight.⁵⁶ “The trend is called exergaming”⁵⁷ Exergaming combines technology with physical activity by using interactive

⁴⁴ PEDESTRIAN & BICYCLE INFO. CTR. ET AL, SAFE ROUTES TO SCHOOL GUIDE: INTRODUCTION TO SAFE ROUTES TO SCHOOL: THE HEALTH, SAFETY AND TRANSPORTATION NEXUS 3 (Feb. 2007), http://guide.saferoutesinfo.org/pdf/SRTS-Guide_Introduction.pdf (last visited Aug. 12, 2014).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Mark Fainaru-Wada, *Critical mass Crisis: Child Obesity*, ESPN, <http://sports.espn.go.com/espn/otl/news/story?id=4015831> (last updated Mar. 29, 2009, 2:51 PM).

⁴⁹ *Id.*

⁵⁰ See Sue Hubbard, *Kids, Media and Obesity: Too much 'Screen time' can harm your Child's Health*, CHI. TRIBUNE (Sept. 30, 2013, 8:30 AM), <http://www.chicagotribune.com/health/sns-201210020000--tms--kidsdocctkd-a20121002-20121002,0,2745039.story>; see also *infra* Part II.D.

⁵¹ PEDIATRICS is the official journal of the American Academy of Pediatrics. PEDIATRICS, <http://pediatrics.aappublications.org/> (last visited Aug. 12, 2014).

⁵² Hubbard, *supra* note 50.

⁵³ *Id.*

⁵⁴ Liz Neporent, *Lack of Sleep Linked to Childhood Obesity*, ABC NEWS (Jan. 24, 2011), <http://abcnews.go.com/Health/lack-weekend-catch-sleep-risk-childhood-obesity/story?id=12743677&page=2#.UIKKzc2aApM>.

⁵⁵ *A Growing Problem*, U.S. DEP'T HEALTH & HUM. SERVS., CTRS. DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/childhood/problem.html> (last visited Aug. 12, 2014).

⁵⁶ Wendy C. Fries, *Exercise, lose Weight with 'Exergaming'*, WEBMD, <http://www.webmd.com/parenting/features/exercise-lose-weight-with-exergaming> (last reviewed Sept. 19, 2011).

⁵⁷ *Id.*

games to promote exercise.⁵⁸ Examples of exergaming technology include the Wii Fit and Sony Play Station's Dance Dance Revolution.⁵⁹ The authors of a recent study in the journal *Obesity* found that exergaming "can help combat the pediatric obesity epidemic."⁶⁰ However, people have criticized exergaming programs as ineffective because participants can sometimes lose interest.⁶¹

Lack of exercise and the types of foods children are eating today are only partly to blame for increasing childhood obesity rates; the sheer number of meals a child eats per day also is contributing to the mounting rates.⁶² Snacking in between meals has swelled in the last three decades.⁶³ "Thirty years ago, kids ate just one snack a day, whereas now they are trending toward three snacks, resulting in an additional 200 calories a day. And one in five school-age children has up to six snacks a day."⁶⁴ Increased snacking coupled with the explosion of portion sizes means kids are taking in far more calories than they were thirty years ago when child obesity rates were much lower.⁶⁵

B. Why It Matters

1. Obesity is a Gateway to many more Complications

Obesity's consequences are legion as they are a huge cause of preventable disease and the rising cost of healthcare.⁶⁶ "With about a third of all youths overweight or worse, adverse health effects are being seen in alarming proportions."⁶⁷ Obesity is linked to multiple illnesses, including cancer, diabetes, and heart disease;⁶⁸ it can cause asthma, gallstones,⁶⁹ liver disease, sleep apnea, joint breakdown, and hormonal changes.⁷⁰ Moreover, obesity can cause brain damage in teens because of fluid pressure buildup around the brain, which also causes headaches, impaired vision, and lower

⁵⁸ Victoria A. Fogel et al., *The Effects of Exergaming on Physical Activity Among Inactive Children in a Physical Education Classroom*, 43 J. APPLIED BEHAV. ANALYSIS 591, 591 (2010).

⁵⁹ *Id.* at 594.

⁶⁰ *Video Exercise Helps Overweight, Obese Teenagers lose Weight*, GEORGETOWN UNIV. (Aug. 28, 2012), <http://www.georgetown.edu/news/video-exercise-teenager-weight-loss-study.html>.

⁶¹ Bonnie Ruberg, *The Truth About Wii Fit and Weight loss*, FORBES (Jan. 29, 2009, 6:30 PM), http://www.forbes.com/2009/01/29/video-games-wii-technology-personal-tech_0129_wii.html.

⁶² *Learn the Facts*, *supra* note 41.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ LEVI ET AL., *supra* note 15, at 1.

⁶⁷ Levine et al., *supra* note 31; *see also* Kluger, *supra* note 32.

⁶⁸ LEVI ET AL., *supra* note 15, at 1.

⁶⁹ In fact, gallstones in children were virtually unheard of until recent years. However, there has been a dramatic increase in gallbladder removal in recent years, which is likely due to the obesity epidemic. Salynn Boyles, *Gallstones in Kids, Teens Linked to Obesity*, WEBMD (Aug. 24, 2012), <http://children.webmd.com/news/20120824/gallstones-kids-teens-linked-obesity>.

⁷⁰ Levine et al., *supra* note 15.

IQs.⁷¹

Yet another consequence of childhood obesity is that “[o]verweight children are significantly more likely to become obese adults, setting them up for a lifetime of increased health risks, such as heart disease, stroke, and osteoarthritis that come from being overweight.”⁷² Experts are predicting that, if the childhood obesity trend continues, “it could cut two to five years off the lifespan of the average child in America”⁷³

2. Obesity is not just a Physiological Consequence; There are Psychological Consequences as well

Besides the physical effects, there are psychosocial consequences of childhood obesity.⁷⁴ Children dealing with obesity are frequently targets for bullies.⁷⁵ In a recent study in the journal *Pediatrics*, kids who were obese were 65% more likely to be bullied than their peers of normal weight.⁷⁶ “The psychological stress of social stigmatization can cause low self-esteem which, in turn, can hinder academic and social functioning, and persist into adulthood.”⁷⁷ Some studies even suggest that “obese children [are] more likely to be perpetrators of verbal bullying.”⁷⁸ Additionally, it has been said that children who have difficulty controlling their behavior might also have difficulty controlling their eating habits.⁷⁹ “Overweight children are also more likely to have abnormal scores on the Child Behavior Checklist (a commonly used measure of children’s behavior problems) and are twice as likely to be placed in special education and remedial classes than are children who are not overweight.”⁸⁰ New evidence suggests that obese children do not perform as well on standardized tests as their normal-weight counterparts.⁸¹ Some experts attribute lower test scores to physiological problems while other experts point to low self-esteem and bullying, which can result in torpor when faced with schoolwork.⁸²

⁷¹ *Id.*

⁷² *Childhood Obesity*, *supra* note 33.

⁷³ *Id.*

⁷⁴ See *Tips for Parents – Ideas to help Children Maintain a Healthy Weight*, U.S. DEP’T HEALTH & HUM. SERVS., CTRS. DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/healthyweight/children/index.html> (last visited Aug. 12, 2014) [Hereinafter *Tips for Parents*].

⁷⁵ Anne Harding, *Obese Kids more Vulnerable to Bullies*, CNN (May 3, 2010, 8:52 AM), <http://www.cnn.com/2010/HEALTH/05/03/obesity.bullying/index.html>.

⁷⁶ *Id.*

⁷⁷ *Health Problems and Childhood Obesity*, LET’S MOVE!, <http://www.letsmove.gov/health-problems-and-childhood-obesity> (last visited Aug. 12, 2014).

⁷⁸ Ian Janssen et al., *Associations Between Overweight and Obesity with Bullying Behaviors in School-Aged Children*, 113 *PEDIATRICS* 1187, 1192 (2004).

⁷⁹ *Tips for Parents*, *supra* note 74.

⁸⁰ Mary Story et al., *The Role of Schools in Obesity Prevention*, 16 *CHILDHOOD OBESITY* 109, 110 (2006) (footnote omitted).

⁸¹ *Overweight Children Plagued by Physical, Social Difficulties at School*, HUFFINGTON POST (Sept. 25, 2012, 4:06 PM), http://www.huffingtonpost.com/2012/09/25/overweight-children-face-n_1910361.html.

⁸² *Id.*

3. Obesity is a Huge Financial Burden

Obesity costs a lot of money.⁸³ “Annual medical costs for a child diagnosed with obesity are on average three times higher than those for a child who is not overweight or obese.”⁸⁴ Additionally, “[r]esearch shows that obese children are more than three times as likely to be hospitalized as those who are not obese.”⁸⁵ Over one-fourth of the nation’s expenditures on healthcare are obesity related.⁸⁶ To put it differently, 25% of what America spends on healthcare is related to preventable disease.⁸⁷

Obese patients getting treatment through tax-funded programs like Medicare and Medicaid exact enormous costs on taxpayers as well.⁸⁸ “Of the \$147 billion in [obesity related] direct medical costs, Medicare and Medicaid pick up the tab for \$61.8 billion.”⁸⁹

Not only does it cost money to treat obesity-related illnesses, patients missing work and potential future earnings contribute as indirect costs.⁹⁰ “Obesity-related job absenteeism costs the country around \$4.3 billion annually, lower productivity costs are estimated at \$506 per obese employee per year, and as a person’s body mass index increases, so do the number of sick days, medical claims, and health care costs.”⁹¹ Therefore, obesity’s colossal socioeconomic impact may be the most pertinent reason for a national policy designed to solve the problem.

C. Obesity: A Preventable Disease

The good news is that obesity, while an epidemic, can be overcome and prevented.⁹² To maintain a healthy weight, kids must balance the calories consumed from food and beverages with calories burned through physical activity and normal growth.⁹³ Diet and exercise recommendations are readily available from the United States Department of Agriculture (USDA) and the CDC.⁹⁴ In 2011, the USDA unveiled new nutritional

⁸³ F AS IN FAT, *supra* note 17.

⁸⁴ *Childhood Obesity*, *supra* note 33.

⁸⁵ *Id.*

⁸⁶ LEVI ET AL., *supra* note 15, at 11.

⁸⁷ *Id.*

⁸⁸ See NAHEED ALI, THE OBESITY REALITY: A COMPREHENSIVE APPROACH TO A GROWING PROBLEM 194 (2012); RON HASKINS ET AL., FIGHTING OBESITY IN THE PUBLIC SCHOOLS, FUTURE OF CHILDREN 2 (2006).

⁸⁹ Laura Segal, *Obesity: Weighing down our Economy*, TRUST FOR AMERICA’S HEALTH (March 31, 2011), <http://healthyamericans.org/newsroom/news/?newsid=2192>.

⁹⁰ HASKINS ET AL., *supra* note 88, at 1–2.

⁹¹ Segal, *supra* note 89.

⁹² See generally JAN OSTMAN, ET AL., TREATING AND PREVENTING OBESITY: AN EVIDENCE BASED REVIEW (2004); *Obesity*, MAYO CLINIC, <http://www.mayoclinic.com/health/obesity/DS00314> (last visited Aug. 12, 2014).

⁹³ *Tips for Parents*, *supra* note 74.

⁹⁴ See *Dietary Guidelines for Americans*, U.S. DEP’T AGRIC., <http://www.cnpp.usda.gov/DietaryGuidelines.htm> (last visited Aug. 12, 2014); *Healthy Living*, U.S. DEP’T HEALTH & HUM. SERVS., CTRS. DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/HealthyLiving/> (last visited Aug. 12, 2014).

guidelines, replacing the traditional Food Pyramid⁹⁵ with MyPlate and a new website.⁹⁶ The website reports on what portions should look like as well as how to eat healthy on a budget.⁹⁷ Additionally, the CDC provides standards and recommendations for physical activity for youths.⁹⁸ They recommend children get sixty minutes of age-appropriate physical activity each day and educate parents on how to gauge how much and what kinds of exercise are enough.⁹⁹ The CDC also provides information to parents on how to balance calories by encouraging healthy eating habits, making favorite dishes healthier, removing calorie-rich temptations, helping kids stay active, and reducing sedentary time.¹⁰⁰ Applying this information is crucial because developing healthy habits in children will translate into healthy habits as they become adults.¹⁰¹ Educating children and parents will ensure healthy habits in the future, thereby halting the increasing rate of obesity and other preventable diseases, thereby reducing the need for treating preventable diseases, thereby reducing the overall cost of healthcare.

D. Why a Comprehensive Policy is Necessary to Fix the Issue

Even with all of the information and resources available, “[t]he obesity crisis continues to grow in the United States.”¹⁰² Consequently, a comprehensive policy must be adopted to impede the growing obesity rate.¹⁰³ The American Medical Association has provided some guidelines for what a comprehensive policy might look like.¹⁰⁴

The most evident reason for this need is that “obesity is contributing substantially to the nation’s exploding expenditures on health care.”¹⁰⁵ The ACA gives some focus to nutritional labels and obesity counseling, and the HFFKA implements nutritional standards for all foods sold in school.¹⁰⁶ Nevertheless, if weight loss and management require at least a two-pronged

⁹⁵ “In 2005 the U.S. Department of Agriculture (USDA) released a food pyramid called MyPyramid, which was designed to educate people about the 2005 *Dietary Guidelines for Americans*.” MyPyramid, FOOD PYRAMID: CARING FOR YOUR HEALTH, <http://www.foodpyramid.com/mypyramid/> (last visited Aug. 12, 2014). The USDA and the Department of Health and Human Services (HHS) jointly developed these guidelines. *Id.* “The dietary guidelines are revised every five years by both departments.” *Id.*

⁹⁶ See generally CHOOSEMYPLATE.GOV, <http://www.ChooseMyPlate.gov/> (last visited Aug. 12, 2014).

⁹⁷ *Id.*

⁹⁸ *Tips for Parents*, *supra* note 74.

⁹⁹ *How much Physical Activity do Children need?*, U.S. DEP’T HEALTH & HUM. SERVS., CTRS. DISEASE CONTROL & PREVENTION (Nov. 9, 2011), <http://www.cdc.gov/physicalactivity/everyone/guidelines/children.html>.

¹⁰⁰ *Tips for Parents*, *supra* note 74.

¹⁰¹ *Healthy Habits for Healthy Families*, AM. PSYCHOL. ASS’N, <http://www.apa.org/helpcenter/healthy.aspx> (last visited Aug. 12, 2014).

¹⁰² Loeb, *supra* note 30, at 295–96.

¹⁰³ *Id.* at 296.

¹⁰⁴ Tanner, *supra* note 16.

¹⁰⁵ RON HASKINS ET AL., *supra* note 88, at 1.

¹⁰⁶ 26 U.S.C.A. § 5000A (West 2013); Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183.

approach (healthy diet and physical activity),¹⁰⁷ where are the mandates for physical activity?

The National Association for Sport and Physical Education and the American Heart Association released their most recent Shape of the Nation Report in 2010.¹⁰⁸ The report shows that some improvements have been made in recent years in the number of states that actually require physical education for children.¹⁰⁹ However, “no progress has been made in providing daily physical education in all grades K-12.”¹¹⁰ Only five states require physical education in grades K-12 and only two states align with the nationally recommended guidelines for physical education.¹¹¹ Thirty-two states permit waivers or exemptions from students taking gym class, which is an increase from 2006.¹¹²

Perhaps in attempts to deal with mounting pressures to meet expectations, schools have diverted money needed to support physical education programs, therefore resulting in more waivers.¹¹³ The No Child Left Behind Act¹¹⁴ placed “emphasis on academic standards and testing[.]”¹¹⁵ Paradoxically, a 2010 CDC report analyzed a large body of evidence linking physical education and school-based physical activity with

¹⁰⁷ *Tips for Parents*, *supra* note 74.

¹⁰⁸ See generally NAT'L ASS'N SPORT & PHYSICAL EDUC. & AM. HEART ASS'N, SHAPE OF THE NATION REPORT: STATUS OF PHYSICAL EDUCATION IN THE USA (2010) [hereinafter Shape of the Nation]. The Shape of the Nation Report provides a current picture of physical education (PE) in the American education system. *Id.* at iii (“The purpose of [the] *Shape of the Nation Report* is to provide current information about the status of physical education in each of the 50 states and the District of Columbia in the following areas: [t]ime requirements; [e]xemptions/waivers and substitutions; [c]lass size; [s]tandards, curriculum and instruction; [s]tudent assessment and program accountability; [p]hysical education teacher certification/licensure; National Board Certification in physical education; [s]tate physical education coordinator requirements; [and] [b]ody mass index (BMI) collection.”).

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Resources - Physical Activity*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/physical-activity-resources.aspx> (last visited Aug. 12, 2014).

¹¹¹ SHAPE OF THE NATION, *supra* note 108, at 7.

¹¹² *Id.* In 2006, 27 states allowed students to substitute other activities for PE, such as interscholastic sports, marching band, and cheerleading. *Id.* Also, in 2006, 18 states provided a waiver for reasons such as religious beliefs, health issues, physical disability, and early graduation. *Id.*

¹¹³ HASKINS ET AL., *supra* note 88, at 5.

¹¹⁴ As one author explains:

The [No Child Left Behind] Act (NCLB) implements a national accountability system, which requires each school to test students in the third through twelfth grades in literacy, mathematics, and science every year. This testing is part of a system designed to statistically measure the effectiveness of each school and penalize those schools failing to make ‘Adequate Yearly Progress’ (‘AYP’). The penalties vary with the number of years the school fails to show AYP and range from additional obligations, such as developing an improvement plan, to withholding federal education funds. NCLB is premised on Congress's ability to attach conditions to the funds allocated to states under a contract theory. This power requires states and schools to adhere to every element of the Act to be eligible for federal funding.

Michael D. Barolsky, Note, High Schools are not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind, 76 GEO. WASH. L. REV. 725, 727–28 (2008) (footnotes omitted).

¹¹⁵ HASKINS ET AL., *supra* note 88, at 5.

academic performance, including cognitive skills and attitudes, academic behaviors, and academic achievement.¹¹⁶ In other words, in an effort to improve test scores, schools have cut time and funding for physical education even though students who engage in physical activity achieve higher test scores.

Indeed, childhood obesity continues to be a growing issue with innumerable consequences.¹¹⁷ The federal government only scratched the surface by instituting certain preventive healthcare measures in the ACA and by raising nutritional standards in school lunches with the HHSFKA.¹¹⁸ However, the piecemeal legislation addressing the obesity issue could be allied by a comprehensive policy to improve physical activity in America's schools, which will reduce the overall cost of healthcare for the nation.

III. ANALYSIS

Legislation adopting nationwide physical education standards for school children is necessary to solve the growing obesity problem. Health management and preventive care is more complex than what current laws are designed to confront. However, the laws that are presently in place lay a humble foundation in the fight against childhood obesity. The federal government can enact legislation connecting these foundational laws, which will create a comprehensive strategy to conquer the obesity epidemic, resulting in a reduction in the overall cost of healthcare for Americans.

A. How the ACA is Designed to Reduce the Cost of Healthcare for Americans with Respect to Solving the Childhood Obesity Problem

The ACA aims to reach its primary goal of reducing the overall cost of healthcare for Americans by making certain preventive healthcare measures available at no cost to the consumer.¹¹⁹ The idea behind this is that employing preventive care efforts will result in early detection of risk factors for chronic illnesses, such as obesity.¹²⁰

The ACA provides preventive care services for adults and children.¹²¹ The preventive care services geared toward children include regular pediatrician visits (Well-Child Visits),¹²² developmental

¹¹⁶ U.S. DEP'T HEALTH AND HUM. SERVS., CTRS. DISEASE CONTROL & PREVENTION, THE ASSOCIATION BETWEEN SCHOOL-BASED PHYSICAL ACTIVITY, INCLUDING PHYSICAL EDUCATION, AND ACADEMIC PERFORMANCE 5 (2010).

¹¹⁷ LEVI ET AL., *supra* note 15, at 11.

¹¹⁸ *See supra* Part I.A.

¹¹⁹ *Preventive Health Services for Adults*, *supra* note 9.

¹²⁰ NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, THE POWER OF PREVENTION: CHRONIC DISEASE...THE PUBLIC HEALTH CHALLENGE OF THE 21ST CENTURY 8 (2009).

¹²¹ 26 U.S.C.A. § 5000A(a) (West 2013).

¹²² *Development Assessments: What you need to know*, BABYCENTER, http://www.babycenter.com/0_development-assessments-what-you-need-to-know_6709.bc (last visited Aug. 12, 2014).

assessments,¹²³ and obesity screening and counseling.¹²⁴ These types of measures have proven to be beneficial in disease prevention.¹²⁵ However, some professionals have been less than enthusiastic, particularly regarding obesity screening and counseling.¹²⁶ On one hand, critics of obesity counseling say patients who are receiving it “are told to eat healthier and to start exercising.”¹²⁷ These critics argue that the problem with the government funding this is that the advice is not news to most people who are battling obesity or who have children who are battling obesity, which makes the counseling a waste of taxpayers’ money.¹²⁸ On the other hand, obesity counseling can be effective if the program lasts at least three months and provides therapy about “behavior change, nutrition and physical activity.”¹²⁹

Prenatal care is another preventive service the ACA makes more accessible.¹³⁰ “Child obesity prevention should begin as early as pregnancy.”¹³¹ Medical professionals have suggested that over-nutrition in the womb “might affect lifelong risk of obesity.”¹³² Additionally, smoking while pregnant “is associated with a 500 percent greater risk of obesity at the age of five.”¹³³ Ensuring expectant mothers have access to healthcare is important because “[w]omen may be more receptive to making lifestyle changes . . . when they are pregnant to increase the likelihood of having a healthy baby.”¹³⁴

B. What Programs are out There to Help get Children Engaged in Physical Activity?

There are a number of obesity prevention programs; perhaps the most well-known is First Lady Michelle Obama’s initiative, *Let’s Move!*¹³⁵ “*Let’s Move!* is a[n] . . . initiative, launched by the First Lady [Michelle Obama], dedicated to solving the problem of obesity within a generation, so

¹²³ *Id.*

¹²⁴ Mendoza, *supra* note 22, at 109.

¹²⁵ *See id.* at 106–10.

¹²⁶ Christina Girgis, *The Problem with Obesity Counseling*, KEVINMD (March 15, 2012), <http://www.kevinmd.com/blog/2012/03/problem-obesity-counseling.html>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Judith Graham, *Preventive Services Task Force Endorses Obesity Screening, Counseling*, KAISER HEALTH NEWS (March 15, 2012, 5:10 PM), <http://capsules.kaiserhealthnews.org/index.php/2012/06/preventive-services-task-force-endorses-obesity-screening-counseling/>.

¹³⁰ *Women’s Preventive Services Guidelines: Affordable Care Act Expands Prevention Coverage for Women’s Health and well-being*, U.S. HEALTH RES. & SERVS. ADMIN., <http://www.hrsa.gov/womensguidelines/> (last visited Aug. 12, 2014).

¹³¹ Mendoza, *supra* note 22, at 109.

¹³² Cara B. Ebbeling et al., *Childhood Obesity: Public-health Crisis, Common-sense cure*, 360 THE LANCET 473, 475 (2002).

¹³³ Mendoza, *supra* note 22, at 109.

¹³⁴ *Prenatal and Early life Influences*, HARVARD SCH. OF PUB. HEALTH, <http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/prenatal-postnatal-obesity/> (last visited Aug. 12, 2014).

¹³⁵ *About Let’s Move*, *supra* note 25.

that children born today will grow up healthier”¹³⁶ *Let’s Move!*’s goal is to get kids started in a healthy lifestyle early on, mostly by “helping children become more physically active.”¹³⁷ The initiative operates largely by disseminating information to parents and schools about the importance of physical activity.¹³⁸ The First Lady’s initiative “aims to increase opportunities for kids to be physically active, both in and out of school and to create new opportunities for families to move together.”¹³⁹

MEND 7-13 is another initiative with a mission to promote healthy lifestyles among children.¹⁴⁰ Sponsored by the MEND Foundation, the program employs multiple strategies in the fight against childhood obesity.¹⁴¹ “The MEND 7-13 Program was created to help overweight and obese children improve their lifestyles and health, with the support and encouragement of their families.”¹⁴² A family-based program, the MEND 7-13 brings children and parents together for ten weeks, meeting twice a week.¹⁴³

Yet another initiative is *We Can!*¹⁴⁴ “*We Can!* (Ways to Enhance Children’s Activity & Nutrition) is a national movement designed to give parents, caregivers, and entire communities a way to help children 8 to 13 years old stay at a healthy weight.”¹⁴⁵ Sponsored by the National Heart Lung and Blood Institute, *We Can!* is largely an information base that also provides support and training to families, communities, and health professionals.¹⁴⁶

While these programs and other similar programs have a positive approach to the growing issue of childhood obesity, they may not reach far enough.¹⁴⁷ If the goal is to reduce the overall cost of healthcare for Americans while obesity is continuing to grow so rapidly, the ACA should have directly dealt with the matter by incorporating the functions of these initiatives into the Act.

C. To be more effective, the ACA Should have Addressed Childhood

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Get Active, LET’S MOVE!*, <http://www.letsmove.gov/get-active> (last visited Aug. 12, 2014).

¹⁴⁰ *A Brief History*, MEND FOUNDATION, <http://www.mendfoundation.org/aboutus/synopsis> (last visited Aug. 12, 2014).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Mind, Exercise, Nutrition...Do it!*, MEND FOUNDATION, <http://www.mendfoundation.org/programs> (last visited Aug. 12, 2014).

¹⁴⁴ *About We Can!*, NAT’L HEART, LUNG AND BLOOD INST., <http://www.nhlbi.nih.gov/health/educational/wecan/about-wecan/index.htm> (last visited Aug. 12, 2014).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Jessica Pauline Ogilvie, *Let’s Move! Can it make kids Healthier?*, L.A. TIMES (March 20, 2011), <http://articles.latimes.com/2011/mar/20/health/la-he-lets-move-assess-20110320>.

Obesity Through America's Schools

As previously discussed, weight loss and management for any individual requires at least two things.¹⁴⁸ An individual requires a healthy, balanced diet, and an appropriate amount of physical activity.¹⁴⁹ The federal government has enacted legislation to tackle the first half with regard to school-age children.¹⁵⁰ The HHFKA “authorizes funding and sets policy for USDA’s core child nutrition programs: the National School Lunch Program, the School Breakfast Program, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the Summer Food Service Program, and the Child and Adult Care Food Program.”¹⁵¹

With respect to the National School Lunch Program, the HHFKA promotes change in school lunches by “requir[ing] State agencies to certify participating school food authorities (SFAs) that are in compliance with

¹⁴⁸ *Childhood Obesity*, *supra* note 33.

¹⁴⁹ *Id.*

¹⁵⁰ Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183.

¹⁵¹ See *Healthy Hunger-Free Kids Act of 2010*, U.S. DEP’T AGRIC., FOOD & NUTRITION SERV., http://www.fns.usda.gov/cnd/Governance/Legislation/CNR_2010.htm (last visited Aug. 12, 2014).

The National School Lunch Program is a federally assisted meal program operating in public and nonprofit private schools and residential child care institutions. It provides nutritionally balanced, low-cost or free lunches to children each school day. The program was established under the National School Lunch Act, signed by President Harry Truman in 1946.

National School Lunch Program (NSLP), U.S. DEP’T AGRIC., FOOD & NUTRITION SERV., <http://www.fns.usda.gov/cnd/lunch/> (last visited Aug. 12, 2014).

The School Breakfast Program provides cash assistance to states to operate nonprofit breakfast programs in schools and residential childcare institutions. The Food and Nutrition Service administers the SBP at the Federal level. State education agencies administer the SBP at the state level, and local school food authorities operate the Program in schools.

School Breakfast Program (SBP), U.S. DEP’T AGRIC., FOOD & NUTRITION SERV., <http://www.fns.usda.gov/sbp/school-breakfast-program> (last visited Aug. 12, 2014). The Special Supplemental Nutrition Program for Women, Infants, and Children—better known as the WIC Program—serves “[t]o safeguard the health of low-income [pregnant, postpartum, and breastfeeding] women, infants, and children up to age 5 who are at nutrition risk by providing nutritious foods to supplement diets, information on healthy eating [including breastfeeding promotion and support], and referrals to health care.” *Women, Infants and Children (WIC)*, U.S. DEP’T AGRIC., FOOD & NUTRITION SERV., <http://www.fns.usda.gov/wic/about-wic-wics-mission> (last visited Aug. 12, 2014).

The Summer Food Service Program (SFSP) was established to ensure that low-income children continue to receive nutritious meals when school is not in session. Free meals, that meet Federal nutrition guidelines, are provided to all children 18 years old and under at approved SFSP sites in areas with significant concentrations of low-income children.

Summer Food Service Program, U.S. DEP’T AGRIC., FOOD & NUTRITION SERV., <http://www.summerfood.usda.gov/FAQs.htm> (last visited Aug. 12, 2014).

USDA’s Child and Adult Care Food Program plays a vital role in improving the quality of day care and making it more affordable for many low-income families. Each day, 3.3 million children receive nutritious meals and snacks through CACFP. The program also provides meals and snacks to 120,000 adults who receive care in nonresidential adult day care centers. CACFP reaches even further to provide meals to children residing in emergency shelters, and snacks and suppers to youths participating in eligible afterschool [sic] care programs.

Child and Adult Care Food Program, U.S. DEP’T AGRIC., FOOD & NUTRITION SERV., <http://www.fns.usda.gov/cnd/care/CACFP/aboutcacfp.htm> (last visited Aug. 12, 2014).

meal pattern and nutrition standard requirements as eligible to receive performance-based cash assistance for each reimbursable lunch served”¹⁵² Under the HHFKA, state agencies are to distribute monies to SFAs on a performance-based system.¹⁵³ It also authorizes state agencies to withhold that money “if the SFA is determined to be out of compliance with meal pattern or nutrition standards during a subsequent administrative review.”¹⁵⁴ The ultimate goal is to get these SFAs more money so they can provide more nutritious school lunches.¹⁵⁵

These changes have not been without controversy.¹⁵⁶ Opponents of the legislation have even referred to the HHFKA as creating a “nanny state.”¹⁵⁷ These opponents presume that all students are being put on a diet because some are overweight.¹⁵⁸ Student athletes have also complained because some of them have workouts before and after school where they are burning approximately 3,000 calories, but are limited to the 850-calorie lunch.¹⁵⁹ However, these condemnations are flawed because students are always free to bring their lunches or bring snacks to supplement.¹⁶⁰

If Congress was able to reach so far into America’s school cafeterias, it should be able to reach as far into America’s school gymnasiums. People have suggested that the federal government should institute minimum standards of physical fitness for America’s schoolchildren.¹⁶¹ “Schools are unique in their ability to promote physical activity and increase energy expenditure—and thereby help reduce childhood obesity.”¹⁶² “Physical education . . . is at the center of a comprehensive school-based physical activity program.”¹⁶³ However, there has been uncertainty about the impact of higher physical education

¹⁵² Certification of Compliance with meal Requirements for the National School Lunch Program Under the Healthy, Hunger-free Kids Act of 2010, 77 Fed. Reg. 25,024, 25,024 (Apr. 16, 2012) (to be codified at 7 C.F.R. pt. 210).

¹⁵³ *Id.*

¹⁵⁴ Certification of Compliance with meal Requirements for the National School Lunch Program Under the Healthy, Hunger-free Kids Act of 2010; Approval of Information Collection Request, 78 Fed. Reg. 39,193, 39,163 (July 1, 2013) (to be codified at 7 C.F.R. pt. 210).

¹⁵⁵ 7 C.F.R. § 210.1(a).

¹⁵⁶ Celeste Headlee, *Are Federal Calorie Limits Leaving kids Hungry?*, NPR (Oct. 2, 2012, 12:00 PM), <http://www.npr.org/2012/10/02/162154687/are-federal-calorie-limits-leaving-kids-hungry>; *We Are Hungry*, *supra* note 6.

¹⁵⁷ *School Lunch Calorie Maximums Protested by Students as House Republicans Introduce Bill to Repeal USDA Rules*, HUFFINGTON POST (Sept. 19, 2012, 10:25 AM), http://www.huffingtonpost.com/2012/09/18/house-republicans-introdu_n_1893936.html.

¹⁵⁸ *Id.*

¹⁵⁹ *Pictures Inspire School Lunch Boycott*, CNN (Sept. 28, 2012, 3:23 PM), <http://schoolsofthought.blogs.cnn.com/2012/09/28/pictures-inspire-school-lunch-boycott/>.

¹⁶⁰ *Id.*

¹⁶¹ See Alex Planes, *Where Obamacare Failed*, MOTLEY FOOL (June 27, 2012), <http://www.fool.com/investing/high-growth/2012/06/27/where-obamacare-failed.aspx>.

¹⁶² Story et al., *supra* note 80, at 118.

¹⁶³ *Id.* (footnote omitted).

requirements.¹⁶⁴ For instance, schools often fail to comply with state regulations.¹⁶⁵ “It is estimated that 26 percent of PE classes in the U.S. fail to comply with official requirements.”¹⁶⁶ PE classes have also been criticized for doing little to promote exercise by using “a ‘Roll out the balls and let them play’ approach”¹⁶⁷ This occurs when the physical education class has a general lack of structure, direction, and rigor.¹⁶⁸ Finally, there is “no guarantee that more physical activity” will help kids lose weight.¹⁶⁹ Some postulate that children will counter increased physical activity with a heightened level of caloric intake, however, the degree to which this happens is not known.¹⁷⁰ Considering the HHFKA’s function, to regulate school lunches, the last criticism may be of little concern.

D. Congress has the Power and Authority to make Positive Changes Pursuant to the Spending Clause

The federal government has the constitutional power and authority to help remedy this growing issue. Comprehensive legislation should be adopted to provide obesity education pursuant to the recently released American Medical Association’s recommendations on policy.¹⁷¹ The American Medical Association recently “agreed to support legislation that would require classes in causes, consequences and prevention of obesity for first through 12th graders.”¹⁷² “A comprehensive school physical activity program should consist of PE, health education that includes information about physical activity, recess time for elementary school students, intramural sport programs and physical activity clubs, and interscholastic sports for high school students.”¹⁷³ Effective legislation should also implement Body Mass Index screenings (BMI)¹⁷⁴ in schools.¹⁷⁵ A complete

¹⁶⁴ John Cawley et al., *The Impact of State Physical Education Requirements on Youth Physical Activity and Overweight* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 11,411, 2005).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 4 (citation omitted). Some standards and requirements may be time spent in class, student assessments in physical education, and teacher-to-student ratios. SHAPE OF THE NATION, *supra* note 108, at 58.

¹⁶⁷ Cawley et al., *supra* note 164, at 3.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Tanner, *supra* note 16. “The American Medical Association (AMA) has a formalized policy system. . . . When people refer to ‘AMA policy,’ they are usually referring to the set of normative statements the Association has developed on health care issues and the health care system.” *Developing AMA Policies*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/about-ama/our-people/house-delegates/developing-ama-policies.page> (last visited Aug. 12, 2014).

¹⁷² Tanner, *supra* note 16.

¹⁷³ Story et al., *supra* note 80, at 118.

¹⁷⁴ “Body Mass Index (BMI) is a number calculated from a person’s weight and height. BMI provides a reliable indicator of body fatness for most people and is used to screen for weight categories that may lead to health problems.” *Healthy Weight - it’s not a Diet, it’s a Lifestyle!*, U.S. DEP’T HEALTH & HUM. SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/healthyweight/assessing/bmi/> (last visited Aug. 12, 2014).

physical education policy together with obesity education and BMI screenings in America's schools would serve as a comprehensive triumvirate in the fight against childhood obesity.

Congress could enact legislation to adopt a nation-wide obesity and physical education policy to complement what the ACA and HFFKA aim to do. It is by now well established that the federal government can attempt to remedy traditional state issues by enacting legislation for the general welfare by virtue of Congress' spending power.¹⁷⁶ *South Dakota v. Dole* fashioned a four-part framework.¹⁷⁷

First, legislation must be in pursuit of the general welfare.¹⁷⁸ The general welfare requirement is not a "high hurdle" and has been said to be "lower than a speed bump."¹⁷⁹ Adopting a nation-wide, comprehensive obesity education policy would be for the general welfare of the United States. Since this requirement is not a "high hurdle," presumably, protecting the lives of children and reducing the overall cost of healthcare for Americans would pass constitutional muster without much objection.¹⁸⁰

The second part requires Congress to make the conditions for receipt of the federal funding unambiguous.¹⁸¹ The idea behind this requirement is that it gives the states an opportunity to "exercise their choice knowingly."¹⁸² Here, Congress must provide a clear statement in the text of a statute so the states may clearly understand the terms to which they are agreeing.¹⁸³ The Supreme Court has described Spending Clause legislation as "much in the nature of a contract."¹⁸⁴ Congress could model physical education and obesity education legislation after the HFFKA. The law should require state agencies to certify participating physical education authorities that comply with physical education, obesity education, and BMI screening standard requirements as eligible to receive performance-based cash assistance for perhaps each student participating.¹⁸⁵ The state agencies

¹⁷⁵ Denise Cohen, Note, *Childhood Obesity: Balancing the Nation's Interest with a Parent's Constitutional Right to Privacy*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 357, 373 (2012). Twenty states have already passed legislation to require BMI Screenings in schools. *Id.*

¹⁷⁶ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601 (2012).

¹⁷⁷ *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987); 1 TREATISE ON CONST. L. § 5.7(a)(ii)(2) (Ronald D. Rotunda & John E. Nowak eds., 5th ed. 2013).

¹⁷⁸ *Dole*, 483 U.S. at 207.

¹⁷⁹ TREATISE ON CONST. L., *supra* note 177, at § 5.7(a)(ii)(2).

¹⁸⁰ In *South Dakota v. Dole*, the law effortlessly passed the test's first part because the goal was to reduce the number of drunk driving related deaths. A similar argument could be made in this instance because the goal is to reduce the number of obesity related deaths. *Dole*, 483 U.S. at 208–09.

¹⁸¹ *Id.* at 207; TREATISE ON CONST. L., *supra* note 177, at § 5.7(a)(ii)(2).

¹⁸² *Dole*, 483 U.S. at 207 (citation omitted).

¹⁸³ *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (citation omitted).

¹⁸⁴ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (quoting *Barnes*, 536 U.S. at 186).

¹⁸⁵ See generally Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183; see MELODY C. BARNES, WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY: ONE YEAR PROGRESS REPORT 3 (Feb. 2011).

would then distribute monies to physical education authorities on a performance-based system.¹⁸⁶ State agencies would also withhold that money if the physical education authorities were determined to be out of compliance with the physical education, obesity education, and BMI screening standards during administrative review.¹⁸⁷

The third requirement is that the “conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’”¹⁸⁸ The Court’s use of a double negative in articulating this requirement may suggest that this hurdle is not particularly high either.¹⁸⁹ There is an obvious relatedness between the need to solve the issue of childhood obesity and the general goal of the ACA to reduce the overall cost of healthcare for Americans. Considering the overwhelming evidence of the problems that ensue from obesity, it would not be a particularly “high hurdle” for Congress to jump.¹⁹⁰

Finally, the fourth requirement is that there must be no constitutional provisions that “provide an independent bar to the conditional grant of federal funds.”¹⁹¹ This may seem like an obvious requirement, as Congress’ ability to legislate does not extend past the Constitution, no matter how hard it may try.¹⁹² Nevertheless, the issue was raised in *South Dakota v. Dole* because the state argued that these conditions violated the Twenty-First Amendment.¹⁹³ The Court determined that Congress’ spending “power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”¹⁹⁴ Using the *South Dakota v. Dole* framework, a nation-wide, comprehensive physical education and obesity education policy could be adopted. The fourth requirement is that there must be no constitutional provisions that provide “an ‘independent constitutional bar’ to the conditional grant of federal funds.”¹⁹⁵ Considering the legislation that has already been adopted (ACA, HRFKA, and No Child Left Behind), it is doubtful that there are constitutional restrictions. However, despite meeting all the requirements under the Spending Clause, there are potential issues that concerned states and citizens might raise.

¹⁸⁶ Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183.

¹⁸⁷ See generally *id.*

¹⁸⁸ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

¹⁸⁹ TREATISE ON CONST. L., supra note 177, at § 5.7(a)(ii)(2).

¹⁹⁰ *Id.*

¹⁹¹ *Dole*, 483 U.S. at 208 (citing *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269–70 (1985)).

¹⁹² “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 421 (1819).

¹⁹³ *Dole*, 483 U.S. at 208.

¹⁹⁴ *Id.* at 210.

¹⁹⁵ *Id.* at 209 (quoting *Lawrence Cnty.*, 469 U.S. at 269–70).

National Federation of Independent Business v. Sebelius in fact creates clearer guidelines for Congress when enacting legislation pursuant to the Spending Clause.¹⁹⁶ The Court dissected parts of the ACA's Spending Clause legislation "to ensure that Congress [was] not using financial inducements to exert a 'power akin to undue influence.'"¹⁹⁷ In an attempt to expand Medicaid coverage, Congress exceeded its Spending Clause authority.¹⁹⁸ Congress was "coercing the States to adopt the changes it want[ed] by threatening to withhold all of a State's Medicaid grants, unless the State accept[ed] the new expanded funding and complie[d] with the conditions that [came] with it."¹⁹⁹ The Supreme Court found that it was unconstitutional for Congress to threaten to withhold existing Medicaid funding, referring to this condition as a "gun to the head."²⁰⁰ The Court held that when "such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."²⁰¹ Unsurprisingly, it would be at odds with the contract theory of the Spending Clause²⁰² to allow Congress to withhold funds that states have already come to rely on. To be clear, a comprehensive physical education policy modeled after the HHFKA would not be a "gun to the head" because Congress could not withhold funds that states have already come to rely on.

E. What are the Potential Constitutional Issues?

1. A Challenge that Parents' Rights to Privacy are Infringed

Students' parents and legal guardians might feel that the government is overreaching. The Supreme Court has acknowledged rights relating to familial relationships as falling under the fundamental right to privacy.²⁰³ In *Meyer v. Nebraska*, "the Court held unconstitutional a state law that prohibited Nebraska schools from teaching German."²⁰⁴ The Court struck down the law because of its interference with parents' ability to raise their children as they choose.²⁰⁵ This ruling was reaffirmed only two years

¹⁹⁶ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601–07 (2012).

¹⁹⁷ *Id.* at 2602 (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

¹⁹⁸ *See id.* at 2607–09.

¹⁹⁹ *Id.* at 2601.

²⁰⁰ *Id.* at 2604–05.; *see also* Brian P. Kane, *Everyone was Right and Everyone was Wrong: The Subtle Echoes of the Supreme Court's Healthcare Reform Decision*, 55 *ADVOCATE (IDAHO)* 54, 56 (Aug. 2012). "[T]he federal government cannot loop its purse strings around the necks of states to throttle them into compliance." *Id.*

²⁰¹ *Sebelius*, 132 S. Ct. at 2604.

²⁰² "The strong contract theory begins with the notion that 'legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'" Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 *DUKE L.J.* 345, 385 (2008) (footnote omitted).

²⁰³ Cohen, *supra* note 175, at 374.

²⁰⁴ *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923)).

²⁰⁵ *Id.* at 360.

later in *Pierce v. Society of Sisters* when the Court held “an Oregon law prohibiting private and parochial school education . . . was an arbitrary interference with a parent’s decision about child-rearing.”²⁰⁶ In these cases, the Court called it a “liberty” interest that was being infringed; however, it later evolved into what we now know as the fundamental right to privacy.²⁰⁷

Legislation requiring students to participate in physical activity, obesity education, and BMI screenings could lead concerned parents to challenge the law by arguing that the government is interfering with their fundamental right to privacy. The Supreme Court would apply strict scrutiny under a substantive due process analysis.²⁰⁸ To survive strict scrutiny, the government must have a compelling interest and the means must be narrowly tailored to achieve that interest.²⁰⁹ If an obesity education policy were to be challenged, the government would argue that its compelling interest is to protect the lives of children.²¹⁰ The tremendous weight of evidence of the complications that stem from childhood obesity ought to be enough to satisfy an inquiry into whether the government has a compelling interest. Buttressing this evidence is the fact that “[s]everal state courts have interpreted the definition of neglect to include morbid childhood obesity.”²¹¹ “The statutory inclusion of childhood morbid obesity within the definition of neglect is an effective means of demonstrating when [the government] may constitutionally interfere with a parent’s right to raise his or her child.”²¹²

In addition to being a compelling interest, the law must be narrowly tailored.²¹³ To be narrowly tailored, the government would have to demonstrate “a close relationship” between the law and the problem it is

²⁰⁶ *Id.* at 374–75 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925)).

²⁰⁷ *Id.* at 374 (footnote omitted); *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring).

²⁰⁸ See Cohen, *supra* note 175, at 377. The Supreme Court

has long recognized that the [due-process clause of the fourth amendment] contains a substantive element as well. It is through the due process clause of the fourteenth amendment that most of the Bill of Rights have been incorporated and made applicable to the states. The Court accomplished this incorporation by finding that such rights as freedom of expression and religion are substantive values included within the word ‘liberty.’ It is also through substantive due process that non-explicit rights, found to have their source in the liberty clause of the fourteenth amendment, have been designated by the Court as ‘fundamental’ and afforded extraordinary protection.

Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 313–314 (1991) (footnotes omitted).

²⁰⁹ *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (citations omitted).

²¹⁰ *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (holding that a parent’s right to make parenting decisions is not absolute and can be interfered with by the State in the interest of the child); see also Cohen, *supra* note 175, at 378.

²¹¹ Cohen, *supra* note 175, at 380 (footnote omitted).

²¹² *Id.* at 380–81.

²¹³ 3 TREATISE ON CONST. L. § 18.3(a)(iii) (Ronald D. Rotunda & John E. Nowak eds., 5th ed. 2013).

trying to solve.²¹⁴ Upon examining whether a law is narrowly tailored, the Court may inquire into whether it unnecessarily infringes on parents' ability to raise their children how they want to. To avoid raising this issue, legislation may want to include exemptions or the ability for parents to opt out of the programs, but that is beyond the scope of this Comment.

Because the government has a compelling interest in protecting the lives of children and because legislation could be drafted that would be narrowly tailored to serve the government's compelling interest, a comprehensive obesity education and physical education policy could likely overcome a constitutional challenge that the government has infringed on parents' fundamental right to privacy.

2. A Challenge it Would Violate the Commerce Clause

Concerned citizens may attempt to challenge Congress' actions as an unlawful exercise of its power under the Commerce Clause. "In 1995, the Court examined the extent of congressional power to regulate single state non-commercial activities."²¹⁵ In *United States v. Lopez*, the Court struck down Congress' attempt to make carrying a gun near any school unlawful.²¹⁶ *Lopez* laid out the proper framework for analyzing whether Congress' actions are lawful under its commerce power.²¹⁷

First, *Lopez* recognized that Congress may regulate "three broad categories of activit[ies]" pursuant to the commerce power: channels of interstate commerce; instrumentalities of interstate commerce; and activities having a "*substantial relation*" to interstate commerce.²¹⁸ Second, the *Lopez* Court found that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity would be sustained."²¹⁹ Third, there must be an express jurisdictional element to limit the law's reach.²²⁰ In other words, a statement within the statute that Congress was enacting the legislation pursuant to its authority under the Commerce Clause would "lend support to the argument that [the statute] is sufficiently tied to interstate commerce"²²¹ Finally, there must be "express congressional findings regarding the effects" of the issue Congress is attempting to regulate upon interstate commerce.²²² A "but-for causal chain" between the issue Congress is trying to regulate and its effect on interstate commerce will not

²¹⁴ *Id.*

²¹⁵ TREATISE ON CONST. L., *supra* note 177, at § 4.9(d).

²¹⁶ *Id.*; *United States v. Lopez*, 514 U.S. 549, 602 (1995).

²¹⁷ *United States v. Morrison*, 529 U.S. 598, 609 (2000).

²¹⁸ *Lopez*, 514 U.S. at 558 (citation omitted).

²¹⁹ *Id.* at 560.

²²⁰ *Id.* at 567.

²²¹ *Morrison*, 529 U.S. at 613.

²²² *Lopez*, 514 U.S. at 562.

do.²²³ While proponents of the legislation at issue in *Lopez* argued that this was a lawful exercise of Congress' power under the Commerce Clause, the link between the action of carrying a gun near a school and Congress' ability to regulate commerce among the states was far too attenuated, and they were not able to convince the Court.²²⁴

The Court reaffirmed and clarified the *Lopez* test five years later in *United States v. Morrison*, after Congress passed the Violence Against Women Act (VAWA).²²⁵ The VAWA included a civil remedy for victims of violence that the Court struck down because it was not a regulation of activity that substantially affected interstate commerce.²²⁶ Although the Court applied the *Lopez* test, it clarified that where the Court upheld "federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question [was] some sort of economic endeavor."²²⁷

Legislation requiring students to participate in physical activity, obesity education, and BMI screenings could perhaps be challenged as an unconstitutional exercise of Congress' commerce power. The Supreme Court would apply the *Lopez* test.²²⁸ The government would have to argue that this is a lawful exercise of its commerce power as regulation of an activity affecting interstate commerce.²²⁹ Since the Court will sustain legislation regulating activities that substantially affect interstate commerce, the government will have to show the link between children's sedentary behavior and the rising cost of healthcare.²³⁰ When drafting the legislation, Congress must include a jurisdictional element that it is enacting the law pursuant to its commerce power.²³¹ The jurisdictional hook will lend support to a presumption that Congress may lawfully regulate such an area.²³² The tremendous weight of evidence of the complications that stem from childhood obesity would also fulfill Congress' need to demonstrate express findings on the effects the activity has on regulating interstate commerce.²³³

The caveat comes with the *Morrison* clarification that "the activity in question [was] some sort of economic endeavor."²³⁴ While it seemingly would not be difficult to establish a link between the regulated activity and

²²³ *Morrison*, 529 U.S. at 615–17.

²²⁴ *Id.* at 612.

²²⁵ *Id.* at 605.

²²⁶ *Id.* at 601–02.

²²⁷ *Id.* at 611 (citing *Lopez*, 514 U.S. at 559–60).

²²⁸ *See id.* at 609–11.

²²⁹ *Id.* at 612. (citing *Lopez*, 514 U.S. at 562–63).

²³⁰ *Id.* at 610 (citing *Lopez*, 514 U.S. at 560).

²³¹ *Id.* at 611–12 (citing *Lopez*, 514 U.S. at 562).

²³² *Id.*

²³³ *Id.* at 608 (citing *Lopez*, 514 U.S. at 556–57).

²³⁴ *Id.* at 611 (citing *Lopez*, 514 U.S. at 559–60).

its affect on interstate commerce, it may stretch the Court's imagination to call physical education, obesity education, and BMI screenings in America's schools "economic endeavors." Since the costs of obesity include treatment of obesity related illnesses, patients missing work, and the interference with potential future earnings, it may be possible to label preventive measures as "economic endeavors."²³⁵

Even though legislation requiring students to participate in physical education and obesity education could likely survive the *Lopez* test, it is not abundantly clear if such regulation could survive a more defined version of the test under *Morrison*. This is perhaps even more reason for Congress to exercise its power pursuant to the Spending Clause.

IV. CONCLUSION

America has one of the highest childhood obesity rates in the world and it is still on the rise. While there are several contributing factors, it cannot be disputed that, generally, children in the United States do not get the necessary physical activity to prevent and combat this disease. The federal government has already demonstrated its desire and power to enact legislation to progress the nation's physical well-being, but there is still more that can be done. Therefore, the federal government should adopt a comprehensive physical education policy that would serve to connect and strengthen the overall effects of the fragmented legislation aimed at fighting this disease. Anything to the contrary would be a detriment to our children's future.

²³⁵ HASKINS ET AL., *supra* note 88, at 1-2.