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Lance Liebman
Columbia Law School, lliebman@law.columbia.edu

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EVALUATING CHILD CARE LEGISLATION: PROGRAM STRUCTURES AND POLITICAL CONSEQUENCES

LANCE LIEBMAN*

The American political system is not good at choosing among worthy goals and then adopting programs well designed to achieve the desired purposes. Scholars and activists continue to debate the success and failure of the last quarter century of efforts to reduce inequality and achieve other social reforms.¹ But we have no well developed methodology for evaluating proposed programs and attempting to predict their likely consequences.

This Article asks what we know about choosing legal structures for programmatic efforts that seek social change. In particular, it asks whether we can predict relationships between different ways of pursuing public ends and likely outcomes. It does so by exploring various models for additional government involvement in providing care to children with working parents. The subject is timely because many political leaders recognize that demographic changes in the labor force have made the non-working parent a rare commodity, and that these changes seem irreversible.² It seems likely that even at a time of stringency for public budgets, government will make new and expensive commitments to child care. Indeed, at this moment major initiatives are pending in Congress.³ In addition, different states—functioning, in this instance, as the social laboratories that Justice Brandeis championed—are operating child care programs

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² In 1988, both presidential candidates proposed reforms of child care; for Bush’s proposal, see N.Y. Times, July 25, 1988, § 1, at 1, col. 1; for Dukakis’ plan, see Mike Dukakis for President, Quality Day Care for America’s Children (1988) (unpublished position paper, on file at the HARV. J. ON LEGIS.).
³ See infra notes 75–89 and accompanying text.

that vary significantly in nature and approach.\textsuperscript{4} It therefore seems appropriate to view the choices among alternative programmatic structures for improving the system of child care as a case study in the attempt to predict the consequences of particular varieties of government intervention. What can we say about how the form of a new child care program will influence social ideas and arrangements in the future?

\section*{I. \textbf{The Problem Imagined and Described}}

Politicians, reformers, and social commentators all declare that there is a child care problem.\textsuperscript{5} Most call it a crisis. Frequently, they cite the same few studies and announce the discovery of the same shocking numbers. But the child care problem is in fact several problems, and much of the argument over solutions can be won by seizing control of the diagnosis.

Parents who seek a facility in which to place a three-year-old for eight hours a day,\textsuperscript{6} five days a week, in a large city, will need to pay at least $2000 per year, and quite possibly significantly more.\textsuperscript{7} The relevant cost variables are immediately apparent: rent; ratio of staff to children; skill level of staff as reflected in pay; additional services (meals, medical and dental, field trips); liability insurance, especially for abuse; and return on capital investment.

Society can provide child care only by foregoing other uses for the land, labor, and capital that high-quality child care re-


\textsuperscript{5} See, e.g., CHILDREN'S DEFENSE FUND, STATE CHILD CARE FACT BOOK 1 (1987): "\textquote{At a time when a growing number of American families desperately need child care, federal child care spending remains terribly inadequate and states, despite many responsible efforts, are unable to fill any but a fraction of the funding gaps}"; GOVERNOR'S OFFICE OF HUMAN RESOURCES, COMMONWEALTH OF MASSACHUSETTS, \textit{FINAL REPORT OF THE GOVERNOR'S DAY CARE PARTNERSHIP INITIATIVE} at ix (1987): "The changing composition of the workforce, and a concern for the well-being of children and families, creates a serious need for more day care that is safe, of high quality and affordable to working families"; 133 CONG. REC. S12,019–S12,020 (daily ed. Sept. 11, 1987) (statement of Senator Orrin Hatch): "\textquote{M}others are forced daily to make untenable choices regarding their children's welfare. . . . It is time to face reality. Our failure to do so jeopardizes the growth and development of the next generation of Americans . . . .”

\textsuperscript{6} With lunch and commuting time, an eight-hour worker needs more than eight hours of child care.

\textsuperscript{7} A \textit{WORKFORCE ISSUE}, supra note 4, at 161–63. In Boston, day care can cost as much as $7000 a year. \textit{See} Boston Globe, Feb. 23, 1989, at 31, col. 2.
Proposals to restructure the child care system must confront issues that also arise in the contexts of such "necessities" as housing, food, fuel, clothing, transportation, and medical care. Advocates of new government child care programs typically embrace one or more of the following tenets.

A. Society Should Devote More Resources to Child Care

One argument in support of certain proposed programs is that individuals do not purchase enough child care, with the result that the society as a whole obtains too little. Americans care about their children, are anxious when they leave their children and go to work, and invest resources in efforts to improve their children's opportunities. Yet it is possible to argue that the total of individual families' expenditures for child care is insufficient.

Two theories could explain a social decision to seek additional expenditures for child care. One is that good child care may have external benefits. That is, leaving children in settings that are unsafe or do not encourage the children's development may lead to tragic outcomes that society in general weighs more than the parents of those children do; or may bring consequences (lack of education, propensity for criminal conduct) that soon impose real costs on society. It strains credulity to argue that society's concern for children in general is greater than the commitment of parents to their own children, but the argument can at least be hypothetically stated.

Second, the mechanisms of social decision (politics and legislation) may value the future at a higher rate than the spending/investment decisions of individuals acting through economic markets. Politics may employ a different interest rate than economics. Given the cumulative impact of our recent political decisions (deficits, impoverished public capital investment, raids on pension funds, and so on), this argument too may be hard to make. Nevertheless, it is possible to argue that a political de-

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8 See V. Fuchs, Women's Quest for Economic Equality 5 (1988): [A]n "economic perspective" . . . means recognizing that we do not live in the Garden of Eden. In the Garden scarcity was unknown, but everywhere else human wants exceed available resources . . . . From this perspective, terms like "free daycare" or "low-cost daycare" are misleading because daycare requires labor, land, and capital that could be used to satisfy some other want; it cannot ever really be free, and good-quality care cannot be low cost. The true social cost of daycare is the value of the foregone alternatives as reflected in the resources used to produce the care.
cision about how much care should be provided to the nation's children would be a better decision than the sum of the choices of individual parents who must give up other purchases to obtain more expensive care for their children.

If the diagnosis is that government should seek to increase the aggregate resources devoted to child care, many institutional responses are justified. The range of responses includes tax credits (incentives for parents to obtain more child care with their own funds) and public provision through government-operated or government-subsidized enterprises. Also included are efforts to reduce the cost of certain factors needed for the provision of child care. The government can supply free or reduced-price space for child care centers, can provide funds for training child care professionals, and can alter tort law with the goal of reducing insurance premiums for child care facilities. The overriding purpose of these varied steps is to obtain more child care by lowering costs for one or more production factors, so that current dollars will buy more care and lower prices will lead individuals to purchase more of this good.

B. The Poor Should Be Able to Purchase More Child Care

A different justification for some government programs is that many people do not have enough income to purchase as much child care as would be good for them or for their children. A number of welfare-redistribution programs focus on satisfying particular needs with aid in kind rather than on supplying fungible dollars to poor persons. Examples include food stamps, government-paid medical care, public schools, and fuel assistance. These programs have two goals: to focus government funds on persons with low income who have special needs (e.g., only the person who is sick gets medical assistance); and to attempt to skew the poor family's consumption patterns toward the goals paternalistically sought by government (e.g., food stamps cannot be spent on cigarettes, alcoholic beverages, or imported food). Child care paid in full or part by government

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meets both these goals: it provides no assistance to childless poor families or to families that care for children at home;\textsuperscript{10} and by paying only for the purchase of child care (often only child care meeting specified standards), government encourages families to obtain that service.

It may be that proposals to finance child care, as seen in the context of economic redistribution programs, raise questions that no society likes to confront and that U.S. political institutions positively recoil from addressing. What is the majority’s view about whether poor families should be economically encouraged or discouraged to have children? Is it better if children of the poor are cared for outside their parents’ homes? Is it important that single mothers work, even if child care costs more than the parent’s short-term earnings?\textsuperscript{11}

C. Child Care Workers Should Earn Higher Salaries

Some advocates of new child care laws seek higher wages for professional employees, arguing that these workers are under-

\textsuperscript{10} It may be difficult for government to distinguish between care purchased from strangers, which should be subsidized with public funds, and care from family members, which (according to the rationale for some programs) ought not receive public money. See Miller v. Youakim, 440 U.S. 125 (1979) (Federal AFDC law requires Illinois to make payments to relatives functioning as foster parents); Bowen v. Gilliard, 107 S.Ct. 3008 (1987) (not unconstitutional to make smaller AFDC payments on behalf of child in household receiving money from absent parent).

\textsuperscript{11} Should government offer subsidized child care to a poor single parent even if the cost to taxpayers is greater than the amount the parent can earn in the time freed for work? For the argument in favor, see L. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP (1986). For the argument against, see Gramlich, The Main Themes, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN’T 346 (1986).

For further discussion of these arguments, see Sarvasy, Reagan and Low-Income Mothers: A Feminist Recasting of the Debate, in REMAKING THE WELFARE STATE: RETRENCHMENT AND SOCIAL POLICY IN AMERICA AND EUROPE 255 (M. Brown ed. 1988) [hereinafter REMAKING THE WELFARE STATE].

[From the beginning of the AFDC program in 1935 through the Family Support Act of 1988, there has been] tension between mothering and working . . . . Some progressive reformers advocated sending low-income mothers home to care for their children. Yet in tension with the ideal of government-supported, full-time mothering was the concern that mothers not be discouraged from taking low-paying, traditional women’s jobs, because somebody had to fill the demand for that type of work.

See also Law, Women, Work, Welfare and the Preservation of Patriarchy, 131 U. PA. L. REV. 1249 (1983). The Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, is based on the assumption that single mothers should work and that government should pay at least some of the costs of child care. The act requires states to set up Job Opportunities and Basic Skills Programs (JOBS) for single parents of children over three. It allows states to require participation of parents whose children are older than one. But parental participation can be required only if child care is provided, and the child care must be continued for one year after the parent finds a job and ceases to receive AFDC.
valued and undercompensated. Human services workers, who are mainly women, do not receive the economic rewards of blue collar workers, who are mainly men. In this form, the argument for greater compensation for child care workers is a specific example of the need for comparable worth legislation (or for comparable worth interpretations of Title VII). The issue of workers' pay is relevant in considering which institutional forms are best for expanded child care programs. For example, if the government lowered the age at which children may attend public schools, it is likely that professional child care workers would be called teachers, would belong to teacher unions, and would receive teachers' salaries.

Controversy over such issues arose when states expanded public schooling to include kindergarten. The 1971 congressional battle over the Comprehensive Child Development Amendments required compromises between teacher groups seeking to expand their membership to include child care providers and community and parent groups seeking to avoid what they saw as control by unresponsive professional educators and school bureaucrats. In addition, those opposing control of child care programs by the public schools sought to obtain more child care with available funds than would be available if workers received the higher salaries of teachers. Many legislative battles over child care, in Washington and in the states, have been replays of that disagreement.

Proponents of higher salaries for

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13 But see AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985) (employee's "market-rate" explanation for paying women lower wages is a good defense to a Title VII claim).
15 Is child care education or merely custody? In Los Angeles County v. Kirk, 148 Cal. 385, 387, 83 P. 250, 251 (1905), the California Supreme Court ruled that kindergarten classes for four- and five-year-olds were not part of the "system of common schools," apparently because at that age children were only playing, not learning. "It is apparent that the work contemplated by such a system [kindergarten] is purely preliminary to, and entirely different in character from the ordinary work of the common school." Senator Kennedy's Smart Start proposal would commit the United States to an educational approach to children now referred to as "pre-schoolers." See Kennedy, A Legislative Approach to Work and Family: Time for a Smart Start, 26 HARV. J. ON LEGIS. 391 (1989). If the program is educational, the First Amendment may restrict more severely its religious content and environment. See Boothby, The Establishment and Free Exercise Clauses of the First Amendment and Their Impact on National Child Care Legislation, 26 HARV. J. ON LEGIS. 549 (1989); Liekweg, Participation of Religious Providers in Federal Child Care Legislation: Unrestricted Vouchers Are a Constitutional Alternative, 26 HARV. J. ON LEGIS. 565 (1989); Whitehead, Accommodation and Equal
child care workers also contend that present compensation indicates that a low value is placed on the service and results in low professional quality.

D. The Quality of Child Care Services Should Be Higher

Goals of quality and quantity are sometimes in tension in the child care debate. While some reforms seek mainly to expand the amount of child care, others seek to impose minimum standards of quality. The strongest measure government can take is to prohibit the use of child care unless it is of some minimum quality. Building codes and housing codes declare that individuals and families can only live in premises that meet a prescribed standard of decency. The governments that enact (and sometimes enforce) housing codes usually do not provide funds with which poor individuals can obtain code-complying housing. Thus the code can be seen as a statement that persons unable to afford decent housing are not wanted in that particular municipality. Similarly, many communities set regulatory standards for paid child care but offer no funds to working parents who cannot afford child care that meets the legal standard. This results in the purchase and sale of informal and sometimes unlawful care.

E. Child Care Policies Should Promote Diversity

Because child care is consumed collectively, the diversity or homogeneity of the student body is a relevant variable. Various government child care programs can be evaluated for their impact on the economic and racial composition of pupil populations. Sometimes subsidies for the children of better-off parents are justified with the argument that the effect is to put those children in child care facilities alongside the children of poorer parents.

F. Parents Need Help in Borrowing Against Lifetime Earnings to Pay for Child Care

Child care is needed for only part of the working life of parents, usually a small part. Some proposed government interventions seek to make it easier for parents to allocate their lifetime earnings so that child care can be purchased with less financial strain. Some subsidies for care of the children of AFDC recipients are supported with the argument that the short-term inefficiency (child care may cost more than the low-wage parent's earnings in the labor force) is justified because it increases the likelihood that the parent will work later rather than receive welfare.16

G. Government Support for Child Care Will Help Women

Since mothers usually become child care providers when other arrangements are too expensive, the current system restricts employment opportunities for both married and unmarried mothers, thus perpetuating labor market inequality between men and women. It is a strong argument for government-assisted child care expenditures that in fact such subsidies increase career opportunities for women.17

H. Income Tax Treatment of Child Care Costs Should Be Altered to Make the Tax System Fairer

It is sometimes argued that a fair and efficient income tax system would allow a deduction or a credit for funds spent to obtain child care. If a parent cares for children at home, no tax is levied on the imputed value of the service.18 Putting the same point in another way, the second parent who joins the labor force only assists the family economically by the wage earned minus the cost of child care.

16 See L. Mead, supra note 11.
17 Victor Fuchs uses game theory to derive his conclusion that since "women's concern for children is, on average, greater than men's, . . . child allowances or child care subsidies help women, regardless of marital status." V. Fuchs, supra note 8, at 71.
I. Information About Child Care Is a Public Good, and Should Be Provided by Government

Government may be an efficient collector and provider of information and advice about child care. Many states operate child care information and referral programs. These are an inexpensive way for government to “do something about” the child care problem.

J. Child Care Policies Should Pursue Population Goals

Some countries have explicit population policies that are then reflected in child care programs. For example, China has sought to use economic incentives to encourage compliance with its one-child policy. Urban parents receive free child care if they have one child. If they have more than one, they must pay onerous child care fees for all their children, including the first. In the United States public discourse rarely proceeds from arguments that the government should encourage parents to have more or fewer children. However, it is sometimes argued that those opposed to abortion should favor expanded public programs to assist parents in caring for children.¹⁹

II. Program Options

Supporters of government intervention “for child care” seek various goals. Program choices should depend on the priority given to the different ends being sought.

A. Direct Government Provision of Child Care

Government can buy or rent space and operate child care facilities. Child care could be a service like police protection, or education in kindergarten or the first grade. In American society, the following consequences seem likely to result from following such a policy:

Employees would be protected by fourteenth amendment due process, by civil service, and by public-sector collective bargaining statutes. The likelihood of their choosing to be union members would be vastly greater than is the case for employees of for-profit or not-for-profit child care centers. Thus wages and conditions for employees would probably be substantially higher.

Government would feel pressure to operate facilities that meet at least a minimal standard. It is true that some operations of state and local government are not conducted in a fancy way (compare a public sector to a private sector law office), but government is susceptible to embarrassing publicity when unfortunate consequences occur to persons for whom it has assumed a responsibility of care. Certainly one could expect child care to include different services if government provided care directly than if individuals purchase child care using their own (even if tax-subsidized) funds.

Government would need to decide who is eligible to use the child care facilities if fewer services were provided than maximum demand. One can speculate about whether government would assign limited spaces to those most in need (recognizing that more than one definition of need is possible), to those with political connections, or to those satisfying some programmatic goal such as economic and racial integration. Provision by government

20 Rendell-Baker v. Kohn, 457 U.S. 830 (1982), held that fourteenth amendment limitations do not apply to a private social service agency receiving virtually all its funds from the state. Thus the fourteenth amendment is relevant only if government delivers the service directly.

21 Even exposes of scandalous conditions in prisons and mental hospitals support this point. Bad conditions "at home" command less attention, and do not focus attention on a public agency obliged to respond. In addition, government’s liability in tort is very different depending on whether a public agency has custody of the child. Compare DeShaney v. Winnebago County Dep’t of Social Services, 109 S.Ct. 998 (1989) (no federal constitutional duty on state to protect child from abusing father) with City of Canton v. Harris, 57 U.S.L.W. 4270 (U.S. Feb. 28, 1989) (municipal liability for mistreatment of person in custody if city failed to properly train police officers).


23 There would be some constitutional limits on this form of political patronage. See, e.g., Elrod v. Burns, 427 U.S. 347 (1976) (county sheriff who replaced non-civil-service employees with members of his own party violated First Amendment); Branti v. Finkel, 445 U.S. 507 (1980) (discharging public defenders because of their lack of membership in a particular party violated associational rights).
ernment might lead to pressure for expansion of service so that all those meeting some eligibility test could be served.

Government could charge fees. No one can ride the subway or cross a toll bridge without paying.\(^2\) Probably government would feel compelled to arrange a pricing structure that adjusted fees according to parental capacity to pay. For all parent income levels above the poorest, price-setting would be complicated and controversial.\(^2\)

If the service were supplied at no fee or if there were below-cost fees to some or all users, government would have to choose a revenue-raising device, such as general public revenues or a special tax. If, for example, employers were taxed, important issues would be raised that now arise in the context of mandatory employer-paid health insurance.\(^2\)

### B. Government Payment of Some or All the Costs

One outcome of the Great Society was the creation of a vast network of social services, funded by the federal government but supplied by private (usually non-profit) agencies.\(^2\) The gaps caused by the Reagan Administration's cutbacks in these services were filled from the then-growing coffers of state government.\(^2\) More federal and state social services money is now spent on child care than on any other service.


\(^{28}\) For the argument that states did not replace all the Reagan reductions, see M. Kimmich, America's Children, Who Cares?: Growing Needs and Declining Assistance in the Reagan Era (1985).
In 1971, President Nixon successfully vetoed the only comprehensive child care legislation Congress has ever adopted.\textsuperscript{29} Thus the United States failed to enact a right to child care or even a single national program to finance this service. But the Nixon view—that federally-funded child care would corrupt the moral fabric of the country by undermining traditional family values\textsuperscript{30}—did not prevail. Instead, those who sought financial assistance for child care and those in the business of supplying it achieved appropriations that soon grew beyond even what would have been authorized by the 1971 bill. However, the new money was spent through several programs instead of one and with no comprehensive strategy or coherent rules of entitlement.

That is the current American scheme: the federal government spends about $2.9 billion in direct child care expenditures.\textsuperscript{31} If, for example, the median expenditure per child who benefits from federal funds is $1500, then approximately 1.9 million children receive some type of federal child care support. This is less than one fifth of the 10.6 million preschool children in families with no stay-at-home parent, but if the funds went only to children in poor families, the number benefitted could be sixty percent of the 3.8 million children with no stay-at-home parent in families with incomes below $25,000.\textsuperscript{32}

Summarizing current arrangements is difficult because state programs vary widely, but some general statements can be made:

First, entitlement bears little relation to income or wealth. Many families are helped who are economically better off than some denied help. However, sliding fee scales are common, so those who are helped often pay part of the cost. Different programs have different fee formulas.

Second, selection of children (or, more likely, of parents) to receive this substantial and important benefit is often decentralized to a low level. Thus political subdivisions or even neighborhoods may have an allocation, and local rules or politics govern selection.

\textsuperscript{29} S. 2007, 92 Cong., 1st Sess. (returned without approval by President Nixon, Dec. 9, 1971).
\textsuperscript{30} See \textit{infra} note 63 and accompanying text.
\textsuperscript{31} A \textit{Workforce Issue}, \textit{supra} note 4, at 17. This is in addition to $4 billion in federal income taxes that government foregoes through the Child Care and Dependent Tax Credit. See Besharov, \textit{Fixing the Child Care Credit: Hidden Policies Lead to Regressive Policies}, 26 \textit{Harv. J. on Legis.} 505, at n.32.
\textsuperscript{32} A \textit{Workforce Issue}, \textit{supra} note 4, at 149–50.
Third, program goals reflected in child selection also vary. Racial and economic integration is sometimes pursued and sometimes not.

Is this a bad system? Discretionary authority to select recipients of such a large benefit is power. That power can be used to cement communities, to influence behavior in socially desirable ways, and to favor those in need according to criteria more sophisticated than those measurable by arbitrary rules. It can also be used to prefer those of a certain race or religion, to coerce political support, and to deter unconventional thought and action.

A separate question is whether it is acceptable to pay with public funds for a small percentage of a service needed, desired, and arguably deserved by many more.\textsuperscript{33} Would it be better to choose between subsidizing all child care and paying for none? If there is to be subsidization for some of those who would like it, ought there to be coherent and defensible rules directing the selection: national rules that all of a certain income are entitled, and that all those with a certain income should receive a given amount or percentage of subsidy?

Even in a scheme where public funds were provided for the purchase of child care to the economically neediest families, so that the program coherently pursued expenditure-targeted income redistribution, it would be necessary to consider problems that have been presented by other non-cash transfers to the poor (such as food stamps, energy assistance, and Medicaid). One common problem with non-cash transfers is that sometimes the right to payment can be turned into cash, defeating government’s attempt to limit the ways in which the money can be spent. This problem is frequently observed in literature about the food stamp program.\textsuperscript{34} Presumably it would rarely be true of child care payments because the holder of a voucher would not have an easy time transferring it to another user for cash. Using tax credits to assist parents who purchase child care poses the problem that some claim the credit without purchasing any child care.\textsuperscript{35} Recently the law was changed to require those

\textsuperscript{33} For analysis of the extent to which various programs serving children are funded at far lower levels than would be needed to serve all who are eligible, see CHILDREN’S DEFENSE FUND, CHILDREN’S DEFENSE BUDGET: FY 1989: AN ANALYSIS OF OUR NATION’S INVESTMENTS IN CHILDREN (1988).

\textsuperscript{34} See supra note 9.

\textsuperscript{35} See Besarov, supra note 31, at 505 nn.37–38.
claiming the credit to identify the Social Security number of the payee, suggesting that the government believed that some providers did not declare child care fees as income.

Sometimes, targeted government payments may result in inefficiency since consumers may have inadequate capacity to assure quality and little incentive to restrict quantity. The first of these should not be the situation for child care; most parents will care about the quality of child care even if they are not paying for it. A harder question is whether free care for children of poor parents would cause the purchase of too much child care. Sometimes, especially where a single parent has two or more preschool children, child care costs significantly more than the parent can currently earn in the labor market (especially taking account of work expenses). Provision of child care is justified in such cases on a theory that current parental work will make long-term work more likely, on a theory that the society wants that parent working even at net cost to taxpayers, or on a theory that it is fair that the parent have the option of working.

Another problem with non-universal programs is that the program may lose broad support because only the poor benefit, and may not be ideal because it groups poor recipients together rather than integrating economic classes. These are real risks for a means-tested child care program.

C. Subsidization Through the Income Tax System

Government subsidization through tax expenditures imposes the least amount of public constraint on the nature of the ser-


37 This may be true as to nursing home conditions for residents without observant younger family members.

38 A standard observation by analysts of the American health-finance system is that consumers who are fully protected (by employer-paid insurance, by Medicaid, or by Medicare) seek and receive more care than they would purchase if they had to pay for it themselves. See, e.g., Newhouse, Manning, Morris, et al., Some Interim Results from a Controlled Trial of Cost Sharing in Health Insurance, 305 New Eng. J. of Med. 1501 (1981); Brook, Ware, Rogers, et al., Does Free Care Improve Adults' Health: Results from a Randomized Controlled Trial, 309 New Eng. J. of Med. 1426 (1983).

39 This only makes the point that it is difficult for a society to determine exactly how much child care should be consumed. This Article explores the view (widely held right now) that current markets plus the current income distribution result in the purchase of too little child care. It is entirely possible that subsidies and other government interventions could lead to results that some would consider the purchase of too much child care.

40 See L. Mead, supra note 11.
Parents choose a facility and pay the charges; government is involved only in accepting a smaller tax obligation. Government must still make some decisions: Is care by a relative covered? Will the benefit be provided if care is in a religious facility? Will the benefit be allowed if care is in an unlicensed facility? However, as is appropriate for an arrangement using the tax code, the major decisions will be financial: How many tax dollars will be forsworn for parents of what income? Will the benefit be a deduction, giving additional aid to persons in higher brackets, or a credit, thus not varying with the bracket of the taxpayer? Will it be refundable, authorizing a government payment if its effect is to reduce the parents' tax liability below zero?

**D. Licensing**

Government can seek to prevent paid child care from being used unless the program meets regulatory standards. Many jurisdictions license child care providers. It is relatively easy to make use of a licensed facility a condition for receipt of government subsidy funds. It is far more difficult to enforce a rule that a parent ought not to leave a child with an unlicensed paid provider. Certainly, government's inhibitions in enforcing this norm are similar to those that keep it from closing non-code complying housing. By new statutory provision, the federal government requires those using the child care income tax credit to identify those paid to provide care, thus assisting federal enforcement of the duty of providers to declare fees as income. It is an interesting question whether the credit should be denied for child care provided in a facility that does not meet local or state licensing requirements.

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41 See Pre-School Owners Assn. v. Dep't of Children and Family Services, 119 Ill. 2d 268, 518 N.E.2d 1018 (1988) (rejecting constitutional challenges to provisions exempting some child care arrangements from the state's regulatory requirements).

42 See, e.g., Mass. Regs. Code tit. 102, § 7.00 (1987) (Standards for the Licensure of Group Day Care Centers); id. § 8.00 (1989) (Family Day Care Homes). On regulation by states generally, see A WORKFORCE ISSUE, supra note 4, at 171-80.


44 The insurance requirement is an especially interesting licensing condition. Insurance premiums for the risk of child abuse are very high. Should government seek to prevent parents from using a facility without such insurance, even if the result is that there will be no facility certain parents can afford to use? Senator Hatch would expand support of child care by changing the tort system to make it harder to win a suit for child abuse against a child care provider. See S. 2084, at §§ 201-209.
What is the justification for a government intervention that declares minimum standards but does not provide the funds to make that standard affordable for all? The declaration of standards may inform parents of what the society believes children should have. Some who can afford the regulatory norm may obey it who would not do so if there were no rule. There are significant costs to declaring unenforced standards: underground transactions are encouraged; poor families feel inadequate; some desirable arrangements are not made; respect for government regulations diminishes. Yet it is easy to understand why government will continue to declare norms: doing so is an inexpensive way to appear to take action about a recognized problem; it responds to the periodic scandal about bad facilities or facilities where unfortunate accidents occur; provider groups press for existing programs to be better funded; parents whose children are now in day care are more effective politically than parents whose children would have spaces if funds were spread more widely.

It is of course possible to argue that minimum standards for child care should be enforced rigorously and not merely declared. Sub-minimum conditions endanger children, and certainly do not maximize children's potential. Imagine a community that succeeded in preventing children from being placed anywhere not complying with the child care code and also prevented them from being left at home alone. This community would keep a parent at home unless the family obtained adequate alternative care. Presumably, corollaries of such a policy would be adequate cash assistance to pay for child care and a rule that government would not impose work requirements on parents (as a condition of income transfer eligibility) unless it made available satisfactory child care. That is a coherent pol-

45 Several studies suggest that quality child care can have a positive effect on educationally disadvantaged children. See, e.g., L. SCHWEINHART & E. MAZUR, PREKINDERGARTEN PROGRAMS IN URBAN SCHOOLS (1987); J. LALLY, THE SYRACUSE UNIVERSITY FAMILY DEVELOPMENT RESEARCH PROGRAM: LONG-RANGE IMPACT OF AN EARLY INTERVENTION WITH LOW-INCOME CHILDREN AND THEIR FAMILIES (1987); I. LAZAR & R. DARLINGTON, LASTING EFFECTS OF EARLY EDUCATION: A REPORT FROM THE CONSORTIUM FOR LONGITUDINAL STUDIES (1982). See also Kennedy, supra note 15.

46 The Family Support Act of 1988 requires any state agency which institutes a program for job opportunities and basic skills training ("workfare") to:
(A) provide (directly or through arrangements with others) information on the types and locations of child care services reasonably accessible to participants in the program, (B) inform participants that assistance is available to help them
icy, albeit difficult to enforce. One argument against such a rule would be that parents have a liberty interest in placing their children in sub-minimum child care so that the parents can pursue work or other activities. Another argument against it would be that in American society today, such a rule would deny career opportunities disproportionately to female parents. But it is possible that society over time could create a widespread (and perhaps even a legally enforced) understanding that a consequence of becoming a parent is the responsibility to take satisfactory care of children until they reach the age at which the state provides free schooling. 47

E. Loans

Government could play a much larger role than it currently does in assisting families to manage the special short-term cash need that child care imposes. Child care is required at a time when many parents are on the upward slope of their income curve, and when they may well be “house poor.” If schooling is to be free from kindergarten to grade twelve, and subsidized in many ways (including state college systems and subsidized federal loans) for college and even graduate school, why should only pre-kindergarten education be fully charged to parents? If it is, then it is a short-term expense that many parents will seek to amortize over some longer period of parenthood. Government has made money available on easy terms to allow college expenses to be paid over the student’s worklife; it could do the same for child care expenses.

F. Government Planning

Government can undertake to pursue coordination and coherence in a web of child care systems which currently has major gaps and overlaps. It can also undertake to assemble

select appropriate child care services, and (C) on request, provide assistance to participants in obtaining child care services. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, § 201 (amending § 402(a)(19) of the Social Security Act).

information for parents who must make choices about care of their children.\textsuperscript{48}

\section*{G. Government Attempts to Increase Supply}

Government makes some programmatic interventions in the child care system with the goal of expanding supply. Government sometimes supports the training of child care personnel. Sometimes it gives real estate tax or zoning advantages to developers who include child care facilities in their projects, presumably at less return than the alternative rental value of the space.\textsuperscript{49} The specific consequences of these public efforts are hard to gauge. How much child care benefit is obtained for each dollar of expended or forgone government funds? And if more child care is supplied, who gets it? These interventions may expand service, but the added spaces may be used by persons like those who obtain care in an unregulated market. Supply-expanding efforts are probably sensible only if government has decided that all increases in child care are desirable, no matter who the users are; or if government sees disadvantages to interventions that implicate the public sector more directly; or if government seeks to encourage particular care arrangements closely related to the particular expansions of supply that are encouraged. Examples of the last point include training teachers who will use some favored educational method or giving real estate tax benefits for on-site care (sensible only if a decision has been made that on-site care should be preferred to other locations).

\section*{H. Mandates on Employers or Landlords}

Government can tell someone else to pay for child care. One candidate is employers. Some fringe benefits are mandated.\textsuperscript{50}


\textsuperscript{49} See Note, Child Care Linkage: Addressing Child Care Needs Through Land Use Planning, 26 HARV. J. ON LEGIS. 591 (1989).

\textsuperscript{50} For example, employers are required by federal law to pay taxes that establish worker participation in the Social Security system (retirement, disability, and Medicare benefits). See 42 U.S.C. §§ 401–433 (1982). Every state requires participation in a
Health insurance is usually not required, but conditions are imposed when an employer chooses (often influenced by the tax advantages) to provide this benefit. Government could say that employers must provide child care at the worksite, or must pay for some or all of it wherever it is obtained.

The issue of whether employee compensation should be based on contribution or need is an old subject, sometimes addressed with the concept of the social wage. One way to explore the issue in the child care context is to ask whether wages should be higher by a set amount for parents of children between birth and age five. (This seems much like a children’s allowance, but only for workers and charged to employers.) The program would be more focused if, for example, it required payments only to parents who use paid child care and obtain it from a licensed provider. How is this different from requiring employers to pay health expenses? It is only different if the need for child care is more predictable and controllable than the need for medical services, thus increasing fears of employer discrimination among job applicants. Such discrimination in employment can be made unlawful more easily than it can be prevented. Stated another way, workers are mobile and the need for child care

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51 See Hawaii Prepaid Health Care Act, HAW. REV. STAT. ANN. §§ 393-1 to -51 (1988). The Hawaiian law was held to be preempted by ERISA, the federal law regulating fringe benefits, in Standard Oil Co. of California v. Agsalud, 442 F. Supp. 695 (N.D. Calif. 1977), aff’d, 633 F.2d 760 (9th Cir. 1980), aff’d, 454 U.S. 801 (1981), and then Congress gave the Hawaiian program a special exemption from ERISA, 29 U.S.C. § 1144(b)(6) (1982). Washington and Massachusetts have also enacted legislation establishing compulsory benefits. See WASH. REV. CODE ANN. ch. 48.41 (1989); MASS. GEN. LAWS ANN. Ch. 118F (West 1989).

52 See, e.g., Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) (federal law does not preempt a Massachusetts requirement that health insurance programs provide specific minimum mental health benefits).

53 It has been argued that employer expenditures on child care lead to higher profits. See, e.g., J. Fernández, Child Care and Corporate Productivity: Resolving Family/Work Conflicts (1986). It is more difficult to argue that government would do a better job than business of evaluating the effect of child care on business profitability.

54 On “the notion of a social wage as an alternative and supplement to a market wage,” see Brown, Remaking the Welfare State: A Comparative Perspective, in REMAKING THE WELFARE STATE, supra note 11, at 25 n.5. See also Liebman, supra note 26, at 86 n.112, and works cited therein.

55 Liebman, supra note 26, at 84–89.
can be predicted and planned. Thus it may seem wrong to charge such a large expense to the company that employs a parent during the child-care years. (Similar arguments are relevant to decisions about pregnancy costs, including parental leave.) On the other hand, the sense that the parent's job creates the need for child care is stronger than the feeling of employer responsibility for non-work caused illness.\footnote{On employer response to the fact that some women must balance careers with parental responsibilities, see Schwartz, \textit{Management Women and the New Facts of Life}, \textit{Harv. Bus. Rev.} Jan.-Feb. 1989, at 65.}

There are also various insurance alternatives. The company pays a percentage of its payroll as a fee, and the insurance company pays child care costs when individual workers consume the service.\footnote{Employer-financed insurance of nursing home care is now under discussion at many companies.} (Is this a better arrangement than providing capital so that the parents can borrow the money, buy the service, and repay the loan over an extended period?)

Finally, a long-term alteration of our system to one in which employers provide or pay for child care would be another major step toward employer involvement in the lives of workers, reversing a twentieth-century development that emphasizes liberty and independence.\footnote{Liebman, \textit{supra} note 26, at 59 n.2.} The price of employer responsibility for so many of the important and intimate aspects of employee life would be high. And, as compared to seeing child care as a responsibility of government, employer obligation would separate workers according to their employers (as happens vis-à-vis medical care), thus preserving hierarchies of entitlement and discriminations of service quality.\footnote{See V. Fuchs, \textit{supra} note 8, at 136-37, discussing the inefficiency and inequity of imposing child care costs on business according to the number of employees who are parents.}

A different approach is real estate “linkage”: awarding zoning permission for new office buildings only to projects that contain child care facilities.\footnote{See Note, \textit{supra} note 49.} These programs expand the supply of child care by spending funds that are public in the sense that society ultimately pays (the space could contain offices or the building could be smaller and impose less congestion on the city) and in the additional sense that if government is selling development rights, it could tax the developer for housing or parks or education or income support for the poor instead of for child care. They are not public funds, or not fungible public funds, to the
extent that arbitrary constitutional restrictions might allow this imposition to be put on a developer but disallow other taxes.

In any event, the goal is more child care. This device for expanding expenditure on child care also has predictable consequences. "Linkage" programs prefer child care at the office-site, child care facilities populated with children of co-workers, child care in expensive space, and an expansion in child care that benefits an arbitrarily selected subset of all those who would prefer an employer payment toward the care of their children.

III. PENDING PROPOSALS: PREDICTING THEIR CONSEQUENCES

A. The 1971 Comprehensive Child Development Program

The modern context for federal child care legislation was set in 1971 when both houses of Congress adopted the Comprehensive Child Development Amendments to the Economic Opportunity Act. The Nixon Administration, through its Secretary of Health, Education, and Welfare, Elliot Richardson, had participated in drafting this bill, but by the time it reached the President's desk, the political environment was dominated by conservative reaction to the Nixon-Kissinger opening to China. Mr. Nixon needed to make a conservative gesture, which he did by vetoing S. 2007, his veto message accusing the bill of "family weakening implications," and saying it would be "a long leap into the dark for the United States Government and the American people." Mr. Nixon characterized the bill as "the most radical piece of legislation to emerge from the Ninety-second Congress." Instead of committing "the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach," Mr. Nixon called for programs "consciously designed to cement the

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61 After Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), it is uncertain whether San Francisco's program requiring office developers either to include a child care facility or to pay into a city-wide child care fund is constitutional. See Note, supra note 49, at 625-30 nn.149-76.

family in its rightful position as the keystone of our civilization.\textsuperscript{63}

Substantively, the Comprehensive Child Development bill was in most ways the parent of the 1988 and 1989 versions of the Act for Better Child Care. It rejected expanding public school education to provide for younger children.\textsuperscript{64} Rather, the federal law would have blessed, in somewhat imprecise language, new community institutions generally modelled on the successful Mississippi Head Start program.\textsuperscript{65} Local disputes over control of federal child care funds would have been resolved by the Secretary of HEW, under his authority to designate "prime sponsors."\textsuperscript{66} of which there might have been 40,000.\textsuperscript{67} The bill also would have mandated state standard-setting, coordinating, and regulatory functions.

The bill would not have established a right to subsidized child care for any particular child or family.\textsuperscript{68} Rather, it would have made a legislative declaration of the appropriateness of public

\textsuperscript{63} President's Message to the Senate Returning S. 2007 Without His Approval, \textsc{7 WEEKLY COMP. PRES. DOCs.} 1634-36 (Dec. 9, 1971). The story of the 1971 veto is told in G. Steiner, \textsc{The Children's Cause} 113-16 (1976). For a less rhetorical statement of the arguments made in the Nixon veto message, see N. Gilbert, \textit{supra} note 22, at 98:

Critics of day-care services that facilitate the trend toward two career families are skeptical about the economic benefits that result after the costs of day care, work-related expenses, taxes, and the loss of leisure time are subtracted from the wife's earnings. As for the social consequences, they take a dim view of the notion that the less time working parents spend with their children somehow invests the experience with a "higher quality." There is also concern that as the use of day-care centers increases, a large measure of the traditional responsibility for socialization in the decisive years of early childhood will shift from the family to agencies of the state or private sector. Finally, and most important, day-care adversaries fear that by reducing the degree of social and economic interdependence among family members, day-care provisions would also scrape away at some of the basic adhesion of family life.

\textsuperscript{64} This was the period of battles over "community control" in such contexts as school decentralization and the Model Cities Program. \textit{See}, e.g., C. Haar, \textsc{Between the Idea and the Reality: A Study in the Origin, Fate, and Legacy of the Model Cities Program} (1975); D. Ravitch, \textsc{The Great School Wars, New York City 1805-1973: A History of the Public Schools As Battlefield of Social Change} (1974); Liebman, \textsc{Social Intervention in a Democracy}, 34 PUB. INT. 14 (1974). This issue was alive as late as 1980, when supporters of Head Start successfully opposed transfer of the program to the new U.S. Department of Education. Marian Wright Edelman is quoted to this effect in Tompkins, \textsc{Profiles: A Sense of Urgency, New Yorker}, March 27, 1989, at 48, 68-69.

\textsuperscript{65} On the birth and life of the Head Start program, see Miller, \textsc{Head Start: A Moving Target, 5 YALE L. & POL'Y REV.} 332 (1987).

\textsuperscript{66} S. 2007, at § 513(a).

\textsuperscript{67} G. Steiner, \textit{supra} note 63, at 111.

\textsuperscript{68} Specified percentages of the total appropriation were to go to the children of migrant farmers and Native American children. S. 2007, at §§ 503(b)(1)(A)-(B).
funding for this purpose, while providing funds for between five and ten percent of all those declared to be legitimate recipients. The bill would only have authorized expenditure of $2 billion per year, and the assumption was that early-year appropriations would be substantially smaller. There was a budget "crisis" then, as there has always been. Estimates of legitimate need were then (as now) uncertain, but $20 billion in 1971 dollars might have been a median estimate. Some states would have supplemented the federal expenditures.

The Comprehensive Child Development bill died when the Nixon veto was not overridden. Thus, the U.S. never enacted comprehensive child care legislation, instead appropriating funds through various programmatic structures that operated very much as the 1971 law would have. Before long, federal appropriations for this purpose were in the vicinity of $2 billion, the number used in 1971 that has become the talismanic figure in 1988 and 1989. Much child care was subsidized through provisions of the Social Security Act, which were then folded into the Social Services Block Grant in the first Reagan budget. It is uncertain how much of the federal block grant money goes to child care, but one estimate is that there is about $726 million that does so. State programs vary, as do state financial commitments, but there is a program in every state, the care is obtained from appropriate (meaning licensed) providers, and local bureaucratic rules and political tussles select recipients from among those eligible.

Meanwhile, an entirely separate approach—tax credits—now provides $4 billion more in federal financial assistance for child care. The Child and Dependent Care Tax Credit awards a thirty percent non-refundable credit to families with incomes under $10,000. This credit declines on a sliding scale to twenty percent for families with incomes above $28,000. The distributional consequences of these provisions are discussed by Douglas Be-

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71 A WORKFORCE ISSUE, supra note 4, at 31.

By Mr. Besharov's calculation, this provision benefits 9.6 million families at an average of $419. Only thirteen percent of the foregone federal taxes go to families with incomes below $15,000, and about half go to families with incomes above the national median. In addition, more and more employers are permitting Dependent Care Services Tax Credits (popularly known as Flexible Spending Accounts), which are opportunities for families to pay for child care with pre-tax income. Overwhelmingly, this tax opportunity is used by well-off families.

B. The Act for Better Child Care Services

The contemporary child of the 1971 Comprehensive Child Development bill is the Act for Better Child Care (known as the "ABC" bill), supported in 1988 and 1989 by a broad coalition with Senator Christopher Dodd (D-Conn.) as the named leader. Governor Dukakis supported the ABC bill in his 1988 presidential campaign.

The 1989 version of ABC would authorize Congress to appropriate up to $2.5 billion per year for all the purposes identified in the act. Specified percentages of the total appropriated funds would be set aside for territories and Indian tribes. The remainder would be allocated among the states according to a complicated formula taking account of the state's number of children and number of poor children. The state would then create an agency to administer the funds provided to it. States would be required to meet minimum national quality standards. A committee named pursuant to the statute would establish the minimum national standards, including staff-child ratios for children of various ages. The Secretary of Health and Human

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73 Besharov, supra note 31, at 505; see also Robins, Federal Support for Child Care: Current Policies and a Proposed New System, 11(2) Focus 1 (1988); Wolfman, supra note 18.
76 S. 5, at § 4(a).
77 S. 5, at § 5(a).
78 S. 5, at § 5(b).
79 S. 5, at § 7(c)(3)(C).
80 S. 5, at § 18.
Services (HHS) would be allowed to strengthen but not to weaken the standards recommended to him. Most of the state’s money would be used to provide child care for children in families with no more than 100% of the state’s median income.\textsuperscript{81} The state would use a sliding scale to allocate its subsidies, thus giving more to the poorest families.\textsuperscript{82} It would do its subsidization by direct subsidy to qualified provider institutions or by assigning child care certificates to families or by a combination of the two approaches.

The ABC bill declares priorities among applicant families that might well be in conflict: on the one hand, “priority to children . . . with very low income,” and on the other hand, priority to child care providers which “to the maximum extent feasible, provide child care services to a reasonable mix of children . . . from different socio-economic backgrounds.”\textsuperscript{83} The bill seeks to encourage higher salaries for child care workers: “exceptionally low salaries . . . adversely affect the quality of child care services by making it difficult to retain qualified staff.”\textsuperscript{84} States must make sure that care is provided for hours and days adequate to full-time workers.\textsuperscript{85} They must also allocate some of their funds to provide care for parents who work nontraditional hours (such as nights and weekends),\textsuperscript{86} and to make child care available for children with handicaps.\textsuperscript{87}

Thus this proposed legislation would be a step toward expanding the state and federal role as standard-setter and information-coordinator; would require greater enforcement of licensing requirements than is done presently; would put additional government authority behind the appropriateness of child care in high quality (therefore expensive) settings; and would declare millions of families to be eligible for government financial help toward child care costs, while authorizing only enough federal money to provide the necessary assistance to a small percentage of those eligible. Finally, the bill would provide little guidance

\textsuperscript{81} In the 1988 version of ABC the upper limit was 115% of the state median income. In Massachusetts the figure would have been $44,941. See Besharov, supra note 31, at 505, n.56.
\textsuperscript{82} S. 5, at § 7(c)(10).
\textsuperscript{83} S. 5, at § 7(c)(9).
\textsuperscript{84} S. 5, at § 2(a)(13).
\textsuperscript{85} S. 5, at § 7(c)(3)(N).
\textsuperscript{86} Id.
\textsuperscript{87} S. 5, at § 7(c)(3)(J).
about who should be selected to receive government financial assistance from among the many who would be eligible.

**C. Republican Alternatives**

In 1988, several Republican legislators took major initiatives on behalf of child care legislation. In September 1988, at the height of the presidential campaign, Vice President Bush combined the approaches supported by Senator Hatch (R-Utah), Senator Quayle (R-Ind.), and Congressman Tauke (R-Iowa) (along with Republican initiatives on such topics as funds for schools where the Pledge of Allegiance is recited and programs to attack youth gangs) into the American Family Act. Although not fully rendered into legislative language and only partially repeated in President Bush's 1989 budget proposals, the Republican campaign proposal can be described as a relatively coherent alternative to the Democratic approach.

Campaigning for President, Mr. Bush supported an additional refundable tax credit of $400 per dependent below age six for children in families that include at least one worker and have less than $20,000 in income, phased out at $20 per $1000 and so providing no relief to children in families with income above $40,000. He also favored federal funds for child care certificates, but only for children in the poorest families and with little emphasis on requirement that eligible centers meet licensing requirements and no ban on participation by religious facilities. Mr. Bush also endorsed federal funds for loans to encourage creation of new child care centers, and some federal tax assistance for establishment of on-site and near-site facilities by businesses.88

The plan put forward by Mr. Bush after he became President was somewhat different. For each child under the age of four, families would receive an income tax credit equal to fourteen percent of wages, with a maximum of $1000 per child. In the first year (1990), families with $13,000 or less in income would

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88 Senator Hatch's bill, S. 2084, 100th Cong., 2d Sess., 134 Cong. Rec. S1,423 (daily ed. Feb. 25, 1988), would have provided federal tax benefits both for businesses providing child care and for family child care providers, with steps to encourage the latter to comply with local licensing standards. It would also have "reformed" state tort law to reduce the vulnerabilities of child care providers to suits alleging abuse. Senator Hatch re-introduced his bill in 1989. S. 692, 101st Cong., 1st Sess., 135 Cong. Rec. S3,251 (daily ed. Apr. 4, 1989).
benefit. By 1994, families earning up to $20,000 would qualify, but only those below $15,000 would get the maximum benefit.\textsuperscript{59}

D. Comparing the Democratic and Republican Approaches

The 1988 and 1989 Democratic and Republican approaches offer very different directions as legislative initiatives for addressing child care needs.

\textit{How much government regulation should there be?} Every Democratic proposal includes a high degree of standard-setting. The 1989 ABC bill, for example, would mandate a process of standard-setting at the federal level (over which the Secretary of HHS would have limited influence), with states permitted to declare stricter standards. The scope of national minimum standards for child care centers would “reflect the median standards for all States.” For all child care, national standards could not be “less or more rigorous than the least or most rigorous standard that exists in any of the States.”\textsuperscript{90} Most Republican proposals would provide funds (through tax benefits) for any child care arrangement made by parents, or would provide (where certificates or vouchers are used) far less in the way of governmental—and nothing in the way of federal—standards. (Indeed, the 1989 Bush proposal would give tax benefits to low income families that used no paid child care at all.) The Democratic proposals would attempt to put the legitimacy of the federal government behind certain models of child care—certain definitions, certain levels of staffing, and certain minimum physical standards for facilities. Some proposals would also encourage or require substantially increased enforcement efforts to shut non-complying facilities.

\textit{How much redistribution should there be?} All Republican proposals are heavily focused on the poorest families. Many of the Democratic proposals would allow available funds to benefit substantially more than half the population. It would be difficult to estimate the net distributional consequences of such proposals without predicting whether better-off or less-well-off families would manage to obtain the limited certificates for which funds


\textsuperscript{90} S. 5, at § 18.
would be appropriated. One can certainly predict that all approaches like that in the ABC bill would reward those who can succeed in complicated, local scrambles for a desirable resource, and that these are unlikely to be the neediest families.91 For example, under the Older Americans Act, age alone—not economic need—establishes eligibility for services. Regulations require that low-income and minority elderly be served at least in proportion to their numbers. A GAO study92 showed that Area Agencies on Aging had difficulty meeting this requirement.93 Neil Gilbert's conclusion is that there has been in a number of social welfare programs a "drift toward universalism," as middle class claimants have managed to obtain a substantial share of limited benefits.94

Will government funds assist parents who place their children in facilities operated by religious organizations? The Democratic approach, by financing child care centers directly and supplying certificates usable only at qualifying facilities, walks head on into the religious issue. About one-third of child care today is provided by religious organizations.95 The ABC bill thus had to ban expenditures which members of Congress predicted would not be permitted by the Supreme Court. It also had to forbid expenditures so entangled with religion that the bill would lose the support of public education groups concerned to prevent any precedent for public aid to religious schools. Finding language that all elements of the

91 Neil Gilbert provides "axioms" that explain why the poor do not get their share of discretionary benefits:

Less troublesome clients will be served before more troublesome ones.
Those who can pay will be served before those who cannot.
Higher status clients will be served before lower status clients.

Middle-class clients will obtain more knowledge about social service resources to meet their needs than lower-class clients.
When both middle-class and lower-class clients know where resources are available to meet their needs, the middle-class clients will be more effective in getting at the head of the line.

N. GILBERT, supra note 22, at 70.
93 N. GILBERT, supra note 22, at 56.
94 Id. at 47-66. See also Liebman, supra note 64, at 23-24.
95 See Whitehead, supra note 15, at 573.
necessary coalition could support—language acceptable to the American Civil Liberties Union, the National Education Association, and the United States Catholic Conference, for example—proved impossible in 1988, torpedoing the bill. In contrast, all Republican proposals seek ways to assist families using religious facilities, either with tax credits available no matter what the facility's sponsor or with "vouchers"96 cashable at religious as well as non-religious facilities.97

Are there any benefits for parents who stay at home? Republican, but not Democratic, rhetoric offers special solace to "traditional families," meaning families in which fathers work and mothers remain at home. Some Republican proposals, including the Bush 1989 plan, give the same tax benefit to a family whether or not it obtains paid child care. A related issue is whether a particular proposal assists a single-parent family in which the parent is not working (and thus receives AFDC benefits). The Bush refundable tax credit requires that there be a working parent, and thus assists the single parent only when he or she seeks training or obtains a job. All child care proposals must now be coordinated with the Family Support Act of 1988 ("Welfare Reform"),98 which requires AFDC recipients being provided with child care to work or be trained, and that states begin (over several years) to provide the child care that would allow job training and work requirements to be enforced.99

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96 Apparently, debates over school vouchers and housing vouchers give this word a meaning that emphasizes wide consumer choice, whereas use of the word "certificate" suggests more control by the issuer of the purposes for which the currency can be spent. On the voucher movement, see N. GILBERT, supra note 22, at 32–40.


99 See id. §§ 201, 301–302 (1988). For an alternative vision, see Sarvasy, supra note 11, at 269:

I derive my conception of a feminist revaluing of nurturing and caretaking work in part from the lost feminist potential of the mothers' pension concept [AFDC]. A key aspect of this feminist potential was the assumption that the mother should be viewed as equivalent to the civil servant or the soldier and therefore entitled to public compensation . . . . [T]he concern is to revalue a social contribution that both men and women can make and for which they
Who has how much discretion in selecting recipients from among those who can seek the benefit? Democratic alternatives cast a wide net of eligibility; but because they supply funds only for a portion of those eligible, these alternatives include procedures for delegating the authority to select beneficiaries. Most of the Republican proposals focus their benefits on the poorest families.

E. Creating the Future Politics of Child Care

Hardest to analyze, what is the effect of the two approaches on the future politics of the issue? There has lately been substantial commentary on the political difference between inclusive and targeted benefit programs. Social Security is "inefficient," in that it returns a great deal of money to the same people from whom the money is taken in taxes. But it is also politically popular, as government officials have learned when they considered cuts. On the other hand, it is often said that programs only for the poor become poor programs. They certainly lack a constituency with political power. Also, inclusive programs build an identity of citizenship, a sense of belonging, a—may one use the term—"republican" spirit.


101 In conventional American discourse, "Social Security" includes old age, survivors, and disability income transfers, and Medicare's payment of hospital bills for the elderly.

102 On Social Security's political success—if such it is—in redistributing from better-off to less-well-off see N. Gilbert, supra note 22, at 76–78; A. Munnell, The Future of Social Security (1977); M. Ozawa, Income Redistribution and Social Security, 50 SOC. SERV. REV. 209 (1976).

103 See, e.g., R. Kuttner, supra note 100, at 40–41:

To win broad popular support, social programs must be of high quality and must serve the middle class as well as the poor. . . . [C]learly, there are equity gains simply in having the poor and the nonpoor treated in the same hospitals, educated in the same school system, and subjected to the same rules when income supports may be necessary.

. . . [M]ost forms of means testing, though administratively efficient, are politically doomed. Income-support programs narrowly targeted to the poor are notoriously unpopular politically, as well as destructive of social citizen-
But it is incorrect to see only the two choices of inclusive programs (Social Security) and programs targeted on the poor (AFDC, Food Stamps, and Medicaid). A third category is programs with broad eligibility but limited appropriations. The poor may not be effective at competing with the middle class for benefits. And the existence of the underfunded program may not lead to expansion of appropriations because those who care the most manage to obtain benefits.

The Democratic Party’s approach to child care in 1988 and 1989 relies heavily on regulation. The proposed ABC bill would place the national government on the side of child care of a certain definition and minimum quality. Child care that is below these standards would be dispreferred, perhaps banned, and at least ineligible for subsidy. One likely consequence of this bill is the formation of a more coherent provider community. It is far easier to imagine effective participation by “owners” of for-profit and not-for-profit centers, and by their professional staff, than by grandmothers, unlicensed down-the-street providers, or even at-home caretaker parents.104

Second, the ABC bill defines a very large percentage of all parents of young children as income-eligible for at least some government financial assistance toward the expenses of child care. When one imagines the median-or-above family as eligible, the argument for subsidy cannot be redistribution. Rather, the argument must be that all taxpayers should pay for those who now need child care, or that the government should mandate family income-shifting toward the years when child care is needed. If enacted, this bill would thus legitimate child care as a public good, which government should at least partially finance.105 Even though a small percentage of middle-income family. Means-tested programs tend to be stigmatizing, invasive, and shabby around the edges, especially when times are hard and the fiscal mood is testy. . . . [T]he recipients of middle-class social entitlements are treated as citizens, while welfare clients are presumed chiselers until proven otherwise.

104 See Piven & Cloward, Popular Power and the Welfare State, in REMAKING THE WELFARE STATE, supra note 11, at 91 (citing L. Salamon, Foundation News 17, 27 (July-August, 1984)): “There are now 17.3 million employees of social welfare agencies at the federal, state, and local levels and in the nonprofit sector; of these, some 6.5 million work in nonprofit agencies. In all, their numbers are equal to union membership in this country . . . .” On the development of social services providers as an effective lobbying group, see Smith & Stone, The Unexpected Consequences of Privatization, in REMAKING THE WELFARE STATE, supra note 11, at 244–47.

105 Modern advocates of universal programs borrow many of their arguments from Professor Richard Titmuss of the London School of Economics. See, e.g., R. Titmuss, COMMITMENT TO WELFARE (1968). For the Titmuss arguments in the American child
ilies would receive benefits at the appropriation levels likely in early years, the fact that some families at each particular income level receive benefits would make more families ask for such benefits, and ought to make it more likely that appropriations would be expanded in the future. 106

Third, since government would be authorizing services for many, but appropriating funds for only a few, the program itself would—to an even greater extent than now—become part of the local political process, and would encourage families to participate in community affairs (church affairs, local politics, ethnic organizations) by holding out the program's benefits as a possible reward. Bringing participants to these institutions, therefore, might make their voices louder in the future.

The political consequences of enactment of a child care law of the sort favored in 1988-89 by Republicans are very different. These proposals would transfer funds to families through the tax system, according to substantially non-discretionary criteria of income and family status. Families would get the benefit whether or not they used child care; and if they used child care, whether or not the care met government standards. Thus government would be playing an allegedly more neutral role in the

care context, see, e.g., Weir, Orloff & Skocpol, The Future of Social Policy in the United States: Political Constraints and Possibilities, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES, supra note 9, at 444:

[High on the list of new policies must be adequate, publicly encouraged child care provision to help mothers and fathers who work . . . . [T]he aim of proponents must be to maximize the range of potential recipients and, when possible, to provide assistance in ways that are not at odds with dominant cultural values or with the capacities of the U.S. federal state structure. Universal programs would minimize the over-identification of public social programs with blacks alone, an identification that has bedeviled public intervention since the Great Society. By building broad clienteles, new universal measures could also avoid the political vulnerability of social programs that targeted just the poor.


Democratic Congresses . . . sought to include more working-class and middle-class families as beneficiaries of social welfare programs. The reasons why were rather obvious: A program with a mixed clientele, one that straddled social classes, was more likely to survive during a time of inflation and increasing budgetary pressures than one with a narrow clientele . . . . The most explicit instance of the Democratic party strategy occurred in connection with the child care program proposed in 1971 . . . . Nixon ultimately vetoed the program, though not because he was concerned about the state of the American family, as he said at the time.

Works such as M. Derthick, supra note 27, and G. Steiner, supra note 63, cast doubt on the likelihood that an inclusive child care program would achieve broad political support while providing substantial benefits to poor families.
selection of types of care and in parental decisions about whether both parents should work. The benefit per family would be smaller, so the willingness to change behavior to adapt to this program would be less. No certified subgroup of validated providers would be created, so it is likely that the provider community would remain diverse and poorly organized. There would be no validation of community organizations as the ones in control of this benefit, so no incentive for community cohesion. Religious providers, at least some of which would probably be constitutionally barred from giving service in return for the federal certificates to be used under the ABC bill, would gain under the Republican alternatives.

But surely the chief political significance of the Bush-Quayle-Hatch-Tauke proposals for increased federal spending on child care would be that only families of quite low incomes would benefit; and thus (1) general regulatory standards would not be promulgated, and provider interests would have less incentive to enter the debate, (2) the coalition of present and potential beneficiaries would be small and weak, and (3) the program would legitimate child care as an appropriate subject of public expenditure only for families of low income. The significant official statement would be that most families ought to take care of this need on their own.

F. Compromise

In early 1989, Senators Dodd and Hatch formed an alliance, each becoming a co-sponsor of the other’s child care bill. These bills, which seem to point in such different directions, may ultimately be joined in a single law which would have the federal government do all the things sought by both approaches. That would be a strange animal, half donkey and half elephant. It would do the regulatory work of ABC; would subsidize some slots (though vastly fewer than the demand); and would grant a small tax credit to poor working parents. Enacting a law of that sort would add a degree of legitimacy to each approach. Essen-

107 The total price tag would be $4.5 billion. See Boston Globe, Feb. 26, 1989, § 1 at 12, col. 1.
ially, it would put off to a future day the question of whether the United States is to act systematically on the subject of child care, and if so for which of the many possible reasons now given in public discussion and according to which of the many possible institutional forms. So far, our political process has—on this subject as on so many—been unable to choose.