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Childcare Market Failure

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TABLE OF CONTENTS

ARTICLES

Hoop Dreams Deferred: The WNBA, the NBA, and the Long-Standing Gender Inequity at the Game's Highest Level
N. Jeremi Duru 559

The Missing Victims of Health Care Fraud
Anthony Kyriakakis 605

Childcare Market Failure
Meredith Johnson Harbach 659

NOTE

Unfinished Business of Repealing "Don't Ask, Don't Tell": The Military's Unconstitutional Ban on Transgender Individuals
Kayla Quam 721

CHILDCARE MARKET FAILURE

Meredith Johnson Harbach*

Abstract

In the United States, family law norms and childcare policy have long reflected the view that childcare is a private, family matter. But childcare has crossed the private-public divide. In the absence of parents at home providing care, a substantial childcare market has emerged. And that market is failing. Our law, policy, and legal scholarship have yet to recognize and account for this new reality. This Article confronts the problem on its own terms, using economic analysis to diagnose our childcare crisis as a market failure, and makes the case for more active and explicit government intervention in the childcare market. Economic theory not only helps us understand why the market is failing, but also recommends specific law and policy levers—subsidies, regulation, and information—to mitigate market failure, enabling us to craft more responsive reforms. In the end, the market lens shifts our focus from what is private about caring for children to what is public about it. From this vantage point, the Article makes plain that our childcare market is too big—and too important—to fail.

I. INTRODUCTION

Care for children in the United States has crossed the private-public divide. In the absence of parents at home providing care, a sizable childcare market has developed.[1] That market is failing. Childcare quality is wide-ranging, but generally

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[1] For the purposes of this project, "childcare" is care provided to children under age six provided by someone other than parents or legal guardians. *See* NAT'L ASS'N OF CHILD CARE RES. & REFERRAL AGENCIES, CHILD CARE: LIKE THE MILITARY, IS IT TIME FOR SHARED RESPONSIBILITY? 6 (2011) [hereinafter LIKE THE MILITARY], *available at*

subpar. Parents often lack critical information about what quality care looks like, how to locate such care, and whether their children are receiving it. Childcare advocates regularly denounce the childcare "crisis," and studies compellingly demonstrate the correlation between poor-quality childcare and long-term outcomes. Our law and policy have yet to fully confront the changing nature of childcare or deliberately reevaluate what the state's role in the childcare market should be.

Existing state policies are, at best, marginally responsive to the new realities of childcare. Funding of childcare is meager, and places little, if any, emphasis on quality. Regulation of childcare varies across states, but is far from rigorous or consistent. State attempts to provide information about childcare to parents are ad hoc and incomplete. As both a theoretical and practical matter, there is a sharp disconnect between our childcare policies and our childcare realities. A fresh look at the basis for our state childcare policies, therefore, is long overdue.

The law review literature has yet to take this fresh look. Legal scholars have engaged in a sophisticated debate about the comparative value of market work versus care work for women.[2] They have analyzed and recommended enhanced protections for childcare providers.[3] They have considered the implications of economic theory for a variety of family law questions.[4] And they have debated the state's responsibility for childcare on philosophical, moral, and equitable grounds.[5]

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http://www.naccrra.org/sites/default/files/default_site_pages/2012/time_for_shared_resp_rept_final_nov28_0.pdf, *archived at* https://perma.cc/VJ6Y-QB9A.

[2] *See, e.g.*, Meredith Johnson Harbach, *Outsourcing Childcare*, 24 YALE J.L. & FEMINISM 254, 261–62 (2012).

[3] *E.g.*, Elizabeth J. Kennedy, *When the Shop Floor Is in the Living Room: Toward a Domestic Employment Relationship Theory*, 67 N.Y.U. ANN. SURV. AM. L. 643, 672–89 (2012); Glenda Labadie-Jackson, *Reflections on Domestic Work and the Feminization of Migration*, 31 CAMPBELL L. REV. 67, 82–90 (2008); Peggie R. Smith, *Caring for Paid Caregivers: Linking Quality Child Care with Improved Working Conditions*, 73 U. CIN. L. REV. 399, 402 (2004).

[4] *E.g.*, Margaret F. Brinig, *Some Concerns About Applying Economics to Family Law*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 450, 450 (Martha Albertson Fineman & Terence Dougherty eds., 2005); Ann Laquer Estin, *Can Families Be Efficient? A Feminist Appraisal*, 4 MICH. J. GENDER & L. 1, 3, 26 (1996); Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 84 (1997). There is also well-developed economic literature analyzing family relationships through the lens of efficiency. *E.g.*, GARY S. BECKER, A TREATISE ON THE FAMILY 30–31 (enlarged ed. 1991).

[5] *E.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 3–13 (2010); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 179, 182 [hereinafter Fineman, *Cracking the Foundational Myths*]; Maxine Eichner, *The Family and the Market—Redux*, 13 THEORETICAL INQ. L. 97, 100 (2012) (critiquing "marketization" of the family and state's decreased support for caretaking and human development); Barbara Bennett Woodhouse, *Individualism and Early Childhood in the U.S.: How Culture and Tradition Have Impeded Evidence-Based Reforms*, 8 J. KOREAN L. 135, 146–50 (2008); *see*

What they haven't done is examine in depth the new realities of the childcare market, and explore the implications of economic theory for that market's failings.[6]

This Article takes up that task. In the analysis that follows, I demonstrate that our childcare crisis is, in part, a market failure, and I make the case for more active and explicit government intervention in the childcare market to correct existing market imperfections. In the process, I seek to disrupt outdated notions of childcare as an exclusively private matter, and to reorient our law and policy around a more realistic focus on the public nature of both the provision and benefits of childcare today.

In Part II, I frame our understanding of existing childcare law and policy by situating them within larger privacy norms, exposing the disconnect between childcare policies and childcare realities. In Part III, I enlist economic theory to help understand the complexities of American childcare, and I explain how the market manifests multiple aspects of failure. The economic lens offers a new normative justification for state engagement with the childcare market: a more active and transparent state role in childcare justified by the state's legitimate role in acting to address market failure. In Part IV, I discuss how exploring the state's role in childcare might evolve to better address market failure in practice.

II. CHILDCARE AND THE STATE: FROM THE PRIVATE FAMILY TO THE MARKET

In the United States, childcare is a family's business. Caregiving for children, and the economic and structural supports it requires, are the responsibility of parents themselves rather than the state.[7] Extensive government involvement in childcare—as with other childrearing decisions—has long been controversial and considered antithetical to our understandings of family privacy and autonomy. Yet while these norms may have fit relatively well with childcare practices in the opening decades of the twentieth century, at the start of our new millennium this model shows significant signs of strain.

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also Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 L. & HIST. REV. 577, 577 (2010) (exploring history of feminist activists making rights-based arguments for universal childcare).

[6] Some legal scholars have remarked on the shortcomings of our childcare market, but have not engaged substantively with reform proposals and institutional design. *See, e.g.*, Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 845 (2002); Katharine B. Silbaugh, *Foreward: The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389, 1401 (2001); Joan Williams, Essay, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 832 (2002). *But see* Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 193, 199–200, 220 [hereinafter McCluskey, *Politics of Economics*] (exploring the implications of economic theory for failings in the childcare market).

[7] Fineman, *Cracking the Foundational Myths*, *supra* note 5, at 184–85.

Historically, parents (typically mothers) or other family members provided care for most young children. But American childcare has experienced a dramatic transition. As parents increasingly outsource childcare,[8] it has moved from the private home to the marketplace. What was once provided largely by parents and family members gratis has been commodified.[9] This transformation poses a challenge to our traditional understanding of the state's relationship to childcare.

In this Part, I explore the history and evolution of childcare and the state's relationship to it. I begin by exploring the state's traditional understanding of its relationship to childcare, locating this understanding within the broader context of privacy and nonintervention norms, and I explain how these norms have played out in government childcare policy debates. I next describe the evolution of childcare in America, a transformation that has rendered our childcare policy incoherent in light of the changed realities of childcare today. Finally, I test the efficacy of our existing state orientation toward childcare by assessing the current conditions of America's childcare market. This analysis suggests that our old assumptions about childcare, and the norms they relied upon, should no longer drive contemporary childcare policy.

A. *The Private Family Model of Childcare*

As any family law student knows, privacy norms and preferences for nonintervention are hegemonic in much of American family law, influencing the state role in marriage, divorce, custody, support, and child welfare decisions.[10] The intersection of privacy norms and American childcare manifests in multiple contexts.

First, childcare choices are a subset of family decisions protected by well-developed privacy doctrines that safeguard parental authority. The family privacy doctrine seeks to negotiate the boundaries between the state and family, sanctioning

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[8] Elsewhere, I have made the case that when parents rely on a series of paid, third-party collaborations to secure care for their children, they are, in essence, outsourcing childcare. Harbach, *supra* note 2, at 270; *see also* Paula England & Nancy Folbre, *Capitalism and the Erosion of Care*, *in* UNCONVENTIONAL WISDOM: ALTERNATIVE PERSPECTIVES ON THE NEW ECONOMY 29, 43 (Jeff Madrick ed., 2000) [hereinafter England & Folbre, *Capitalism*] ("A process that can be termed 'the commodification of care' is under way in virtually all countries. Clearly, this process has some good features, beyond the obvious possibilities for increases in efficiency."). Parents, like businesses, make strategic decisions about how to best organize their work and functions. They evaluate which tasks are best done in-house, and which tasks are good candidates for delegation to outside partners. Outsourcing parents hire third parties to provide care for their children, and then reintegrate that work into overall family functioning. Harbach, *supra* note 2, at 270–78.

[9] Silbaugh, *supra* note 4, at 103. This development is part of a broader trend toward outsourcing what used to be considered "family" work. Nancy Folbre & Julia A. Nelson, *For Love or Money—Or Both?*, 14 J. ECON. PERSP. 123, 129–30 (2000); Harbach, *supra* note 2, at 256–57.

[10] *See, e.g.*, DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 20–21 (3d ed. 2012).

private choices and protecting against undue or unwarranted government involvement. Stated plainly, the doctrine provides a buffer for private decisions in private spaces, and also seeks to limit public responsibility for families.[11] The right of fit parents to make decisions about the care, custody, and control of their children free from government intrusion is "perhaps the oldest of the fundamental liberty interests."[12] In practice, this "enduring American tradition"[13] affords parents wide latitude to raise children as they choose.[14] Parental prerogatives in the upbringing of children—and thus childcare—rest at the core of this right.[15]

The foundational parental authority cases were preoccupied with the state role in educating and caring for children. The primacy of parental authority assumed constitutional dimensions in a trio of cases—*Meyer v. Nebraska*,[16] *Pierce v. Society of Sisters*,[17] and *Prince v. Massachusetts*[18]—involving tensions between families and the state over the education and work of children.[19] In the cultural climate in which these cases arose, parental rights were linked to democratic values, with a concomitant distrust of state incursions into parental decision making as a form of

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[11] Of course, although the rhetoric of family privacy and parental rights might suggest the state's approach to families is strictly hands-off, in reality the state has intervened pragmatically and regularly in all manner of actual disputes among families and between families and the state. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 594–95 (2000); *see infra* notes 174–179 and accompanying text.

[12] Troxel v. Granville, 530 U.S. 57, 65–66 (2000).

[13] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[14] The scope of this authority includes choices concerning the type of care and education children receive, the religious traditions in which they will be raised, the methods of discipline, and the basic moral and cultural values parents will pass down to their children. Cornerstone Christian Schs. v. Univ. Interscholastic League, 563 F.3d 127, 136 (5th Cir. 2009). Generally, the state intervenes in these choices only when the well-being of children is threatened—when parental choices and care fall below the floor that distinguishes adequate parental care from abuse and neglect. Anne L. Alstott, *Property, Taxation, and Distributive Justice: What Does a Fair Society Owe Children—and Their Parents?*, 72 FORDHAM L. REV. 1941, 1955 (2004). An important qualification to this doctrine is that it applies primarily to intact, marital families. When children are born outside of marriage or when parents divorce, the state often is intimately involved in even the most basic parental decisions about how to raise children.

[15] *Troxel*, 530 U.S. at 65; *Yoder*, 406 U.S. at 232; Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[16] *Meyer*, 262 U.S. at 402–403 (striking down state law that prohibited school instruction in any language other than English).

[17] *Pierce*, 268 U.S. at 534–35 (striking down an Oregon statute that required parents to send children to public school).

[18] *Prince*, 321 U.S. at 173–74 (sustaining state authority to prohibit child labor).

[19] While most—if not all—of the language concerning parental authority in *Meyer*, *Pierce*, and *Prince* was dicta, by the time the Court decided *Troxel v. Granville* in 2000, the doctrine was on firm footing. *Troxel*, 530 U.S. at 65–66.

totalitarianism.[20] By fostering pluralism, the family came to be seen as a check against state attempts to standardize its citizenry.[21] One legacy of these struggles has been persistent ambivalence about the state role in childrearing and education, and a deep wariness about state takeover of children.

Second, separate spheres ideology has coded childcare as "private." In the several centuries preceding the twentieth century, the family shifted—both ideologically and geographically—from the public sphere of markets, politics, and government, to the private sphere of family ties and individual freedom, removed from state interference.[22] The trope of "separate spheres" emerged, both reflecting and reinforcing these new norms and realities. Early family liberty cases recognized the dividing line between the two spheres, and expressed special solicitude for the private sphere, a "private realm of family life which the state cannot enter."[23] Family liberty doctrine expanded over time to encompass a broader conception of "privacy" as a right with both decisional and spatial dimensions. The liberty protected by the

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[20] In the aftermath of World War I, fears of communism led to American nativism and a culture hostile to both immigrants and "Anti-American" ideas. Paula Abrams, *The Little Red Schoolhouse:* Pierce, *State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 61–63 (2003). In this setting, compulsory public education was viewed as a means of assimilating diverse children and inculcating American ideals. *Id.* at 62. In *Meyer*, for example, the State of Nebraska argued that compulsory public education would educate children such that "the sunshine of American ideals [would] permeate the life of the future citizens of the republic." *Id.* at 73 (citing Brief of Defendant in Error at 15, Meyer v. Nebraska, 262 U.S. 390 (1923)). In both *Meyer* and *Pierce*, the Court explicitly recognized this struggle and made clear which position it endorsed. In *Meyer*, the Court recounted Plato's ideal of common childrearing and Sparta's barracks for training and education of children, but then rejected the "desire of the legislature to foster a homogenous people." *Meyer*, 262 U.S. at 401–02. Similarly, the *Pierce* Court dismissed the "general power of the State to standardize its children." *Pierce*, 268 U.S. at 535. Opponents of these efforts at assimilation characterized them as tantamount to state totalitarianism, contrary to both democratic ideals and parental authority. *See* Abrams, *supra*, at 69.

[21] *See* Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 959 (1993). More contemporarily, the Court has rejected the "statist notion that governmental power should supersede parental authority in *all* cases." Parham v. J.R., 442 U.S. 584, 603 (1979).

[22] *See* Fineman, *Cracking the Foundational Myths*, *supra* note 5, at 179–80; Martha Albertson Fineman & Terence Dougherty, *Introduction to Part V: Economics and Intimacy: Gendered Economic Roles and the Regulation of Intimate Relationships*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 401, 401 [hereinafter Fineman & Dougherty, *Introduction to Part V*]; Dailey, *supra* note 21, at 963–68; Folbre & Nelson, *supra* note 9, at 123.

[23] *Prince*, 321 U.S. at 166. The economic context during which these norms developed considered private rights central, and government intervention exceptional. During the *Lochner* era, economic rights were paramount. Lochner v. New York, 198 U.S. 45, 57–58 (1905). The right to contract was considered an essential private right, and the market was the primary means of ordering society. Government intervention in these private rights was suspect as an infringement on fundamental individual liberties—unhelpful and unwelcome. *See* Dailey, *supra* note 21, at 971–72.

Fourteenth Amendment is now read to protect the most personal of decisions, those concerning family, parenthood, and intimate relationships, in the most personal of spaces—the literal and figurative "home."[24] Childcare provided by family in the home fits neatly inside these parameters.

Third, family privatization norms that police the limits of state responsibility promote a hands-off approach to childcare. American family law reflects a strong policy preference for individual and family dependency, rather than state dependency. This preference is expressed in a variety of family law contexts, from rules about property distribution and alimony to those governing child support. Generally, the system operates to steer family members toward each other for material support—and sets up default rules to secure that result—rather than looking to the state. Thus, the private family is responsible for the care of its own members, including care for children; state support is a last resort.[25]

Finally, cultural values complicate privacy-based resistance to state interaction with childcare.[26] Childcare, and the state's relationship to it, is controversial because it threatens entrenched values.[27] "Privacy" is invoked as cover for a number of other ideological goals. Policy positions act as proxies for views about working mothers,[28] family forms, and the role of the government—both state and federal[29]—in family life.[30] Our ongoing culture wars ensure that childcare is a lightning rod for controversy.[31]

Viewed against this backdrop, it's not surprising that our norms and values about childcare remain deeply resistant to—and skeptical of—state intervention. Privacy and nonintervention norms have both reflected and reinforced the idea that childcare is a private matter, involving private prerogatives, provided in the private

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[24] *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); Dailey, *supra* note 21, at 962. The evolution of the family privacy or liberty doctrine is not without its critics. Professor Dean Meyer, for example, characterizes the body of cases as a "loosely recognized constellation of 'family privacy' rights" with no "cohesive theory that might tie these rights together." Meyer, *supra* note 11, at 528.

[25] *See* Fineman, *Cracking the Foundational Myths*, *supra* note 5, at 184–85; *see also* Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3, 25 (2010) (characterizing "private" family law as a part of the social insurance system).

[26] Indeed, the issue causes such discomfort and controversy precisely *because* it rests at the nexus of private versus public responsibility for childcare. BRUCE FULLER, STANDARDIZING CHILDHOOD: THE POLITICAL AND CULTURAL STRUGGLE OVER EARLY EDUCATION 71 (2007); Harbach, *supra* note 2, at 258–62; Deborah Phillips & Edward Zigler, *The Checkered History of Federal Child Care Regulation*, 14 REV. RES. EDUC. 3 (1987).

[27] FULLER, *supra* note 26, at 71; Phillips & Zigler, *supra* note 26, at 3, 9.

[28] EDWARD ZIGLER ET AL., THE TRAGEDY OF CHILD CARE IN AMERICA 14–17 (2009).

[29] SALLY S. COHEN, CHAMPIONING CHILDCARE 251–52, 286 (2001); ZIGLER ET AL., *supra* note 28, at 54.

[30] ZIGLER ET AL., *supra* note 28, at 61; Phillips & Zigler, *supra* note 26, at 9.

[31] *See* Harbach, *supra* note 2, at 259-62; ZIGLER ET AL., *supra* note 28, at 61, 132.

home, and a matter of private responsibility.[32] These norms animated historical debates over the proper state role in childcare,[33] and continue to influence them today.[34]

Having explored how privacy norms have shaped the state's relationship to childcare, I turn now to examine how well they map onto modern American childcare. While an emphasis on privacy may historically have been consonant with

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[32] ALISON CLARKE-STEWART & VIRGINIA D. ALLHUSEN, WHAT WE KNOW ABOUT CHILDCARE 32 (2005); Abby J. Cohen, *A Brief History of Federal Financing for Child Care in the United States*, FUTURE CHILD., Summer/Fall 1996, at 26, 27, *available at* http://futureofchildren.org/futureofchildren/publications/docs/06_02_01.pdf, *archived at* http://perma.cc/Q6HF-B3MZ; Phillips & Zigler, *supra* note 26, at 3.

[33] For example, in the early twentieth century, debates over compulsory public education and child labor protections raised the specter of a "communistic effort to nationalize children." Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1066 (1992) (quoting WILLIAM D. GUTHRIE, THE CHILD LABOR AMENDMENT: ARGUMENT IN OPPOSITION TO RATIFICATION PREPARED FOR SUBMISSION TO THE LEGISLATURE OF THE STATE OF NEW YORK 36 (1934)). The 1930's White House Conference on Children reassured: "No one should get the idea that Uncle Sam is going to rock the baby to sleep." Cohen, *supra* note 32, at 27 (citation omitted). In the early 1970s, then-president Richard M. Nixon vetoed universal childcare legislation, cautioning, "for the Federal Government to plunge headlong financially into supporting child development would commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach." Veto of the Economic Opportunities Amendments of 1971, 1 PUB. PAPERS 1174, 1178 (Dec. 9, 1971), *available at* http://www.presidency.ucsb.edu/ws/?pid=3251, *archived at* http://perma.cc/P4UH-9UE9. Instead, President Nixon remarked, "My one conviction is that the Federal Government's role wherever possible should be one of assisting parents to purchase needed day care services in the private, open market." Cohen, *supra* note 32, at 32 (citation omitted). Again in 1976, opponents of the Child and Family Services Act warned that it would "Sovietize" childhood education and maintained that it "would force parents to turn over their children to government run centers—virtually making their children the wards of the State." 122 CONG. REC. 3802–03 (1976) (statement of Sen. Birch Bayh). In the 1980s and early 1990s, despite aggressive efforts pressed by a coalition of prominent childcare advocates, legislative efforts to generate increased supports for childcare were unsuccessful, based in large part on strong preferences for retaining childcare as a "family" matter, rather than one for the federal government. CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 39. Later in the 1990s, consensus grew at the federal level that the government had a role in childcare policymaking. Cohen, *supra* note 32, at 20.

[34] Contemporary critics of schools as "all-purpose social service centers" continue the refrain, worrying that "[t]he logical end point is the system of ancient Sparta, with children living in government barracks." *See* David Wagner, *The Family and the Constitution*, FIRST THINGS, http://www.firstthings.com/article/1994/08/the-family-and-the-constitution, *archived at* http://perma.cc/R7QH-ALGB (last visited Feb. 25, 2015). And it's no coincidence that recent childcare initiatives have provoked charges of an emerging "nanny state." Lindsey M. Burke & Lisa Snell, *Commentary: Beware of Childcare from the Nanny State*, SAVANNAH MORNING NEWS (Jan. 27, 2014, 12:02 AM), http://savannahnow.com/column/2014-01-27/commentary-beware-childcare-nanny-state, *archived at* http://perma.cc/5WG4-BNH3.

most childcare in the United States, it no longer squares with today's childcare realities.

B. *The Evolution of Childcare: From Insourcing to Outsourcing*

The state's historical understanding of its relationship to childcare arose during an era in which relatively few children received care outside the home and family. For much of the twentieth century, outsourced childcare remained the exception rather than the rule, and nonintervention norms were consistent with this reality.[35] State intervention in and support for childcare tended to be modest and typically came about in response to perceptions that either particular families, or the country more broadly, were in crisis.[36] In response to these crises, support ebbed and flowed rather than rising steadily.[37] But the number of children in nonparental or familial care rose precipitously alongside dramatic demographic shifts toward the end of the twentieth century, putting pressure on the state's limited historical role.[38]

The earliest childcare services were provided by "day nurseries" in the first half of the nineteenth century, primarily to care for children of working-class immigrant families in which mothers worked outside the home.[39] As day nurseries gradually expanded among working-class families in the early twentieth century,[40] "nursery schools" appeared across the United States to provide enrichment opportunities for the children of wealthier families, and social and developmental education for their mothers.[41]

Outsourced care in day nurseries and nursery schools remained limited into the early 1900s, and then rose sporadically in response to challenges at the national level.[42] During the fallout from the Great Depression in the 1930s, childcare became attractive as a means of job creation.[43] President Franklin D. Roosevelt allocated federal funds for childcare via the Work Projects Administration (WPA) in 1933, and by 1937, more than nineteen hundred day nurseries were providing childcare.[44] Those numbers declined again with the end of the WPA in 1938, and remained low until World War II.[45] During the war, the need for women's labor in war-related industries led to renewed federal funding for day nurseries, and more than 1.5 million children were in childcare by 1945.[46] But this surge, too, was short-lived,

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[35] *See* CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 27–28, 42.

[36] *See* Cohen, *supra* note 32, at 26–27.

[37] *See id.*

[38] *See* Folbre & Nelson, *supra* note 9, at 124–27, 138–39.

[39] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 27–28.

[40] The first day nursery opened in 1838; by 1898, about 175 day nurseries existed in the United States and the National Federation of Day Nurseries was created. *Id.* at 28.

[41] *Id.* at 30.

[42] *Id.* at 28–29.

[43] *Id.* at 29.

[44] *Id.*

[45] *Id.*

[46] *Id.*

and by 1950 only eighteen thousand children were in centers—approximately 1% of the enrollment five years earlier.[47] Between 1950 and 1965, childcare again dwindled to primarily serve poor families perceived to be in crisis.[48]

But past the midpoint of the twentieth century, privacy and nonintervention norms were increasingly diverging from childcare realities. By the late 1960s, day nurseries and nursery schools were converging as families increasingly grew interested in accessing childcare services.[49] Between 1965 and 1975, the number of children enrolled in licensed childcare doubled, and "enrollment in nursery schools and voluntary kindergartens increased" by almost as much.[50] The period from the 1970s to the end of the twentieth century saw these numbers expand even more exponentially. In 1977, about 4.3 million children under six received nonmaternal care for significant periods of time, and that figure jumped to 8.8 million in fewer than ten years.[51] By 1997, the exception had become the rule, with 63% of young children in regular childcare arrangements, and by the turn of the century, that number was up to 68% of children under six.[52]

Recent figures report that 34.4 million families in the United States—approximately 43% of all families—include children under eighteen-years-old.[53] Within these families, nonparental childcare is the norm for most of them.[54] The primary categories of nonfamily care are center-based childcare, "family childcare" provided in a private residence other than the child's, and care provided in the child's home.[55]

Thus, today the market provides a significant portion of care (roughly one-third) for America's young children.[56] But, as discussed above, assumptions about who cares (or who *should* care) for children, and norms about state involvement, have been sticky and resistant to change. The privacy and nonintervention norms that seemed coherent when children principally received care at home have become increasingly incoherent in the face of this changed reality. Yet no new consensus on

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[47] *Id.* at 29–30.

[48] *Id.* at 30.

[49] *See id.* at 30–31.

[50] *Id.* at 31.

[51] *Id.*

[52] *Id.*

[53] Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Characteristics of Families News Release (Apr. 25, 2014), *available at* http://www.bls.gov/news.release/famee.htm, *archived at* http://perma.cc/Q3SD-FC7H.

[54] For example, in 2011, 3.5% of children under five received care from their mothers, and 17.8% received care from their fathers. Another 33.7% received care from other relatives, and 32.9% received nonrelative care. LYNDA LAUGHLIN, U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011, at 2 tbl.1 (2013) [hereinafter CENSUS], *available at* http://www.census.gov/prod/2013pubs/p70-135.pdf, *archived at* http://perma.cc/CD4Z-HLJE. Among children under five, 38.7% had no regular care arrangement. *Id.*

[55] Child Care and Development Fund, 24 C.F.R. § 98.2 (2014) (defining "categories of care").

[56] *See* CENSUS, *supra* note 54, at 2 tbl.1.

what the state role in childcare should be—or why—has emerged to replace the now-anachronistic focus on privacy and nonintervention.

What result? Unlike many other developed, industrialized countries, as a whole the United States has made no sustained public commitment to supporting early childhood education and care. No consensus exists as to a set of priorities or principles on which to ground the state's childcare law and policies.[57] Nor is there a comprehensive system for funding, regulating, or facilitating quality childcare in the United States.[58] Instead, the general approach has been piecemeal and narrowly focused, yielding a patchwork of funding and regulatory programs from multiple and sometimes overlapping sources. And it impacts only a fraction of the families that need or use childcare.[59]

Disarray at the law and policy level is accompanied by dysfunction on the ground. I turn next to investigate the state of American childcare, and to explain how problems of quality and information have combined to yield childcare that falls well below the social optimum.

C. The Childcare Market

Existing law and policy have lagged behind the realities of American childcare. It should come as no surprise, then, that America's childcare market is "chaotic" and "poorly organized."[60] Experts and advocates regularly call attention to American childcare's profound shortcomings. They characterize it as a "problem"[61] at best, a

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[57] *See* ZIGLER ET AL., *supra* note 28, at XVI; Cohen, *supra* note 32, at 36. A growing awareness of the importance of childcare, however, is evidenced in the recent reforms to the Child Care Development Fund program. *See infra* Part IV.D.

[58] *See* CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 32.

[59] *See* Cohen, *supra* note 32, at 26; Phillips & Zigler, *supra* note 26, at 4. But to say the state approach has been ad hoc and incoherent is not to imply the state has done nothing at all. Despite its ambivalence, the state has acted pragmatically—if insufficiently—in childcare. I evaluate the sufficiency of existing state law and policy in Part IV, *infra*.

[60] Rebecca M. Blank & Cordelia W. Reimers, *Economics, Policy Analysis, and Feminism*, *in* FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN 157, 165 (Marianne A. Ferber & Julie A. Nelson eds., 2003).

[61] DAVID M. BLAU, THE CHILD CARE PROBLEM: AN ECONOMIC ANALYSIS 3 (2001). As summed up by Blau:

> Depending on whom you ask, the child care problem endangers the well-being of children, causes financial hardship and stress for families, makes it next to impossible for low-income families to work their way off welfare, causes substantial productivity losses to employers, and prevents many mothers from maintaining productive careers in the labor force.

Id.

"national scandal," a "tragedy,"[62] and the "most serious problem[] for children in our society,"[63] at worst.

Quality of care is the central concern. Although views differ as to what constitutes quality childcare,[64] for experts, the definition is straightforward and uncontroversial: quality childcare should, at a minimum, meet children's social, cognitive, physical, and emotional needs.[65] Developmental childcare is characterized as providing "safe and healthful care, developmentally appropriate stimulation, positive interactions with adults, encouragement of the child's individual emotional growth, and promotion of positive relationships with other children."[66]

The overall quality provided in today's market is low, as measured by both "process quality" (the affective, interpersonal dynamics of childcare interactions) and "structural quality" (the logistical details of childcare organization).[67] Quality varies from state to state, and family to family.[68] Parents have little information about the indicators of quality care, few resources to assist them in locating it, and difficulty monitoring care when they find it.[69] When surveying data on the quality of all childcare settings in the United States, the adjective most frequently

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[62] *See generally* ZIGLER ET AL., *supra* note 28, at XV (noting the childcare situation is a tragedy because "we have all the knowledge that is needed, yet that knowledge is not incorporated into what we know").

[63] Stuart Oskamp, The Editor's Page, 47 J. SOC. ISSUES, Summer 1991.

[64] *See id.* at 1.

[65] *Id.* at 1–2.

[66] *Id.* at 9. Dr. Edward Zigler and his colleagues view developmental care as a "pragmatic compromise" between custodial care that does nothing more than keep children safe while parents work, and comprehensive care, which works with children and parents to provide for a range of children's needs beyond standard care. *Id.* at 67.

[67] BLAU, *supra* note 61, 5–6, 125–26. Process quality and structural quality are two separate measures of quality in the child development literature. *Id.* at 125–26; CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 39–40. Process quality or qualitative features look to the dynamics of children's interactions in their childcare environments—with their caregivers, and with other children. BLAU, *supra* note 61, at 126; CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 39–40. Structural quality refers to the various specific features of a particular childcare environment, things like child-staff ratio, group size, teacher education and training, safety, staffing issues, and program administration. BLAU, *supra* note 61, at 126; CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 39–40. Child development research indicates the dynamic, process quality of care is most determinative of child outcomes. But process quality is difficult to measure. Structural features of care are more accessible barometers and thus act as proxies for process quality. BLAU, *supra* note 61, at 126–27. Accordingly, a standard measure of childcare quality is whether it meets the types of structural standards established by accreditation organizations like the National Association of Education for Young Children (NAEYC) or by state licensing authorities. *Id.* at 126.

[68] CLARKE-STEWART & ALLHUSEN, *supra* note 35, at 32.

[69] *Id.*

encountered is "mediocre."[70] While quality ranges from poor to excellent depending on setting, there is too little high-quality care in each type of childcare arrangement, and the problem appears to be intensifying.[71] And though there is tremendous variation among childcare settings, studies indicate that from a child development perspective, most of it is no better than passable.[72]

In childcare centers, most care is graded as either medium or poor, and poor care is even more characteristic for infants and toddlers than for preschoolers.[73] As troubling as these statistics are, quality is likely even lower in unlicensed family childcare homes and other settings.[74] One study of unregulated, nonrelative homes found "good" care in 3% of settings, "adequate" care in 47%, and "inadequate" care in 50%.[75] Of particular concern, because these settings are unregulated, there is no oversight for basic health and safety, no training to foster child development, and no way to monitor the overall quality of care.[76] Consequently, these settings are practically invisible to regulators, researchers, and policymakers.[77]

And problems with the childcare market aren't limited to quality. Childcare consumers—parents and families—face multiple challenges in accessing the affordable, high-quality childcare they might prefer. Studies indicate they lack important information relevant to childcare.[78] Parents frequently do not appreciate important differences between high- and low-quality care, and they have difficulty locating the level and type of care they prefer.[79] Nor are they able to monitor

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[70] BLAU, *supra* note 61, at 4–5; Naci Mocan, *Can Consumers Detect Lemons? An Empirical Analysis of Information Asymmetry in the Market for Child Care*, 20 J. POPULATION ECON. 743, 744 (2007); LIKE THE MILITARY, *supra* note 1, at 6.

[71] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 60; J. LEE KREADER ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, CHILD CARE & EARLY EDUCATION RESEARCH CONNECTIONS: INFANT AND TODDLER CHILD CARE QUALITY 5 (2005), *available at* http://www.researchconnections.org/childcare/resources/6872/pdf, *archived at* http://perma.cc/QD7S-JUXY.

[72] BLAU, *supra* note 61, at 4; CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 60–62; ELIZABETH PALLEY & COREY S. SHDAIMAH, IN OUR HANDS: THE STRUGGLE FOR U.S. CHILD CARE POLICY 128–31 (2014); ZIGLER ET AL., *supra* note 28, at 9–10.

[73] KREADER ET AL., *supra* note 71, at 4.

[74] BLAU, *supra* note 61, at 5; KREADER ET AL., *supra* note 71, at 4.

[75] KREADER ET AL., *supra* note 71, at 4.

[76] CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILDCARE 8, 11 (2012) [hereinafter PARENTS], *available at* http://www.naccrra.org/sites/default/files/default_site_pages/2012/cost_report_2012_final_081012_0.pdf, *archived at* http://perma.cc/CDX9-3VJP.

[77] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 60–61; PARENTS, *supra* note 76, at 8.

[78] Child Care and Development Fund Program, 78 Fed. Reg. 29,442, 29,443 (May 20, 2013) (to be codified at 45 C.F.R. pt. 98) (noting several studies considered in the Child Care and Development Fund rulemaking aimed, in part, at "providing parents with the transparent information they need to find [quality] care").

[79] *See* BLAU, *supra* note 61, at 7, 9.

whether, in fact, the care their children receive is generally of high quality.[80] What is more, less formal types of care such as in-home nannies, babysitters, and family childcare are less visible to families because they are not typically accessible via directories, listings, and databases.[81] These information gaps frustrate families' attempts to secure childcare of the type, quality, cost, and location they prefer. And beyond quality and information, many working families struggle to afford ever-rising childcare costs.[82]

In sum, childcare in America is foundering. Quality is generally low, and parents lack the information and resources necessary to access it. Moreover, our childcare crisis does not impact all families equally. Low-income families are especially vulnerable to the vicissitudes of the childcare market because of limitations on what they can afford. Widening income gaps between low- and high-income families are correlated with differential investments in young children's cognitive development, likely contributing to our widening, income-based achievement gap.[83]

Given the divide between theory and reality—and the problems endemic in our childcare system—how might we reassess and reimagine the state's role? We can begin by recognizing that childcare is, for many families, a service bought and sold on a market rather than provided in the home by family members.[84] Economic analysis would determine the state's role, at least in part, based on whether the market is producing satisfactory outcomes. That recognition is the impetus for the discussion that follows.

III. CHILDCARE MARKET FAILURE

As currently configured, the state's orientation toward childcare—an anachronistic model of childcare and privacy that no longer reflects the actual experiences of many American families—is incongruent with the realities of today's childcare market. Microeconomics, the study of how people make market choices

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[80] *See id.* at 9.

[81] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 59.

[82] A recent study by Child Care Aware of America, a nonprofit childcare advocacy group, reports that in more than half the states, center-based infant care costs more than tuition and fees at a public college. PARENTS, *supra* note 76, at 16, 47–47 app.6; *see also* Emily Alpert Reyes, *Report: Child Care Costs More Than College in Much of U.S.*, L.A. TIMES (Nov. 4, 2013), http://articles.latimes.com/2013/nov/04/business/la-fi-mo-childcare-costs-college-20131104, *archived at* http://perma.cc/4TFL-37JQ.

[83] *See* Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, *in* WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 91, 105 (Greg J. Duncan & Richard J. Murnane eds., 2011).

[84] BLAU, *supra* note 61, at 5.

and the effects of those choices,[85] provides insights into how the childcare market functions, and how it is (or could be) affected by law and policy.[86]

In this Part, I use economic theory to understand today's childcare market and assess its performance. I begin by explaining how market failure contributes to dysfunction in our childcare market, and then explore the implications for state intervention. I end by revisiting the theoretical basis for the state's role in childcare and propose a market-based model as one fruitful approach.

A. The Costs and Benefits of Economic Analysis

Before embarking an economic analysis of the childcare market in depth, I qualify how I am using economic analysis, and to what ends.

Many feminist scholars are critical of economic theory, some going so far as to intimate that it is "eutrophic,"[87] colonizing and overshadowing other intellectual traditions.[88] There is something distasteful in thinking about children, families, and caring more generally in market terms.[89] Feminist critics of neoclassical economic models have characterized the mixture of family, feminism, and economics as "oxymoronic"[90] and "revolt[ing]."[91] And there is deep dispute about whether a market for childcare should even exist,[92] accompanied by concerns that treating

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[85] ROBERT H. FRANK & BEN S. BERNANKE, PRINCIPLES OF MICROECONOMICS 4 (4th ed. 2008).

[86] BLAU, *supra* note 61, at 64.

[87] *See* Douglas A. Kysar, *Feminism and Eutrophic Methodologies*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 94, 101.

[88] *See, e.g.*, Blank & Reimers, *supra* note 60, at 158; Brinig, *supra* note 4, at 450; Neil H. Buchanan, *Playing with Fire: Feminist Legal Theorists and the Tools of Economics*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 61, 61, 90; Paula England & Nancy Folbre, *Contracting for Care*, *in* FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN, *supra* note 60, at 61, 62 [hereinafter England & Folbre, *Contracting*]; Martha Albertson Fineman & Terence Dougherty, *Introduction* to FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at ix, xvi, xvii [hereinafter Fineman & Dougherty, *Introduction*].

[89] *See* Kysar, *supra* note 87, at 98; Paula England & Nancy Folbre, *Who Should Pay for the Kids?*, 563 ANNALS AM. ACAD. POLITICAL & SOCIAL SCI. 194, 196 (1999) [hereinafter England & Folbre, *Who Should Pay*]; Folbre & Nelson, *supra* note 9, at 129–30; Harbach, *supra* note 2, at 276–77.

[90] Brinig, *supra* note 4, at 450.

[91] *Id.* at 458.

[92] *See* Harbach, *supra* note 2, at 259–62. Rather than staking a position on whether parents should outsource childcare, I maintain this decision is one made best by individuals and parents, rather than society or the state. *See id.* at 299. Certainly, there are aspects of family-based care that are not commensurable with market goods and services, and we must be mindful of the distinction between those aspects of care that are appropriate for outsourcing, and those that are not. Silbaugh, *supra* note 4, at 85; *see also* Folbre & Nelson, *supra* note 9, at 137; Harbach, *supra* note 2, at 276–78. Yet feminists generally are wary of facile dichotomies like "care" versus "profit," and recognize that caregiving can involve both

childcare as a commodity will "crowd out" feelings of love, altruism, and genuine care.[93]

What is more, the use of neoclassical economics as a tool to evaluate and shape public policy (especially its application to nonmarket behavior[94]) has been subject to extensive critique along a variety of axes,[95] from basic assumptions and methods[96]

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altruistic and self-interested motivations, and feminist scholars have recognized that public childcare can exist in a "rich" market in which financial exchange is only one aspect of a complex relationship among children, parents, and childcare providers. Paula England, *Separative and Soluble Selves: Dichotomous Thinking in Economics*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 32, 32–33, 48; Folbre & Nelson, *supra* note 9, at 123, 129–31. These same economists warn, however, against a shift from "rich" to "thinner" childcare markets. Folbre & Nelson, *supra* note 9, at 137.

[93] Estin, *supra* note 4, at 28; Folbre & Nelson, *supra* note 9, at 130; Silbaugh, *supra* note 4, at 84. Of course, as my colleague, Professor Erik Craft points out, the same could be said of soldiers, ministers, and physicians, but few would argue that we shouldn't pay them.

[94] Myra H. Strober, *Feminist Economics: Implications for Education*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 261, 279; Estin, *supra* note 4, at 1, 8.

[95] Fineman & Dougherty, *Introduction*, *supra* note 88, at ix, xv.

[96] Many scholars are uneasy or even hostile to economic analysis and the freight that accompanies it. At a foundational level, neoclassical economic analysis defines value by the willingness-to-pay principle, which suggests that everything can be commodified and measured in money. Buchanan, *supra* note 88, at 64–66. With economic efficiency and utility as barometers of well-being, neoclassical economics may not be well suited to consider the well-being of parents, children, and families, and the trade-offs between varying categories, and also ignores other potential measures of value. *See id.*; Strober, *supra* note 94, at 264–65, 274–75. Critics also charge the foundational assumptions and analysis of neoclassical economics—rational utility maximizers interacting in a world of perfect competition, perfect access to information, and zero transactions costs—are distorting and gendered, neglecting the more relational aspects of the human experience: dependency, altruism, and care. *See, e.g.*, Buchanan, *supra* note 88, at 74; England & Folbre, *Contracting*, *supra* note 88, at 62–63; Marianne A. Ferber & Julie A. Nelson, *Introduction* to FEMINIST ECONOMICS TODAY: BEYOND ECONOMIC MAN, *supra* note 60, at 1, 1; Fineman, *Cracking the Foundational Myths*, *supra* note 5, at 182; Fineman & Dougherty, *Introduction*, *supra* note 88, at xvi; Folbre & Nelson, *supra* note 9, at 123, 131–32. Although these economic canons frequently are invoked as if they were literally true, they are in fact contested and at best an approximation of true market behavior. Buchanan, *supra* note 88, at 69–71, 74, 89; Terence Dougherty, *Economic Rhetoric, Economic Individualism, and the Law and Economics School*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 3, 12.

to normative implications.[97] Critics of this model consider it morally suspect and incompatible with socially progressive projects.[98]

Despite these limitations, a number of scholars see the potential for economic models to bring fresh analytic methods and insights to feminist and other projects.[99] Economic discourse is not only accessible and politically salient;[100] it can also be co-opted to achieve ends other than those traditionally associated with the neoclassical economic project. Feminist scholars in a variety of disciplines have deployed economic theory critically, reconceptualizing canonical economic principles to yield powerful new insights.[101] Economic analysis need not be—and in this case is not—incompatible with feminist goals.[102]

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[97] *See* Fineman & Dougherty, *Introduction*, *supra* note 88, at xv. For those skeptical of the model, the scientific veneer of neoclassical economics is especially troubling. Economist and law professor Neil Buchanan characterizes the supposed scientific rigor of neoclassical economics as "a mirage . . . miscalibrated and easily misused." Buchanan, *supra* note 88, at 62. Rather than objectively positivist, these critics claim that neoclassical economics is in fact normative, based on normative assumptions, and used to achieve normative ends. Buchanan, *supra* note 88, at 63; Dougherty, *supra* note 96, at 4; Martha Albertson Fineman & Terence Dougherty, *Introduction to Part I: Law and Economics and Neoclassical Economic Theory*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 1, 1–2; Kysar, *supra* note 87, at 95. Equally troubling are certain issues on which neoclassical economics claims to be agnostic: existing allocations of wealth, resources, and power. Within neoclassical economics, distribution is an ethical and political problem, not one of efficiency. NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM 25, 27, 51 (2d ed. 2006).

[98] *See, e.g.*, Buchanan, *supra* note 88, at 62, 87.

[99] *See* Blank & Reimers, *supra* note 60, at 158; Martha T. McCluskey, *Deconstructing the State-Market Divide: The Rhetoric of Regulation from Workers' Compensation to the World Trade Organization*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 147, 147–49, 170 [hereinafter McCluskey, *Deconstructing*]; Estin, *supra* note 4, at 10; Kysar, *supra* note 87, at 94, 99; Silbaugh, *supra* note 4, at 82, 121.

[100] *See* McCluskey, *Deconstructing*, *supra* note 99, at 170; Kysar, *supra* note 87, at 99, 100–01.

[101] *See, e.g.*, England, *supra* note 92, at 48–49; England & Folbre, *Capitalism*, *supra* note 8, at 29; England & Folbre, *Contracting*, *supra* note 88, at 62, 70–71; Fineman & Dougherty, *Introduction to Part V*, *supra* note 22, at 402; Nancy Folbre, *Valuing Care*, *in* FOR LOVE AND MONEY: CARE PROVISION IN THE UNITED STATES 92, 93, 106–07 (Nancy Folbre ed., 2012) [hereinafter Folbre, *Valuing Care*]; McCluskey, *Deconstructing*, *supra* note 99, at 170; McCluskey, *Politics of Economics*, *supra* note 6, at 199–200, 202, 215, 217, 220; Strober, *supra* note 94, at 263; England & Folbre, *Who Should Pay*, *supra* note 89, at 200, 202; Estin, *supra* note 4, at 11; Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86, 86, 89 (1994) [hereinafter Folbre, *Public Goods*]; Folbre & Nelson, *supra* note 9, at 137; Silbaugh, *supra* note 4, at 95. It is from this tradition that my project proceeds.

[102] To the contrary, I consider this project to be very much consistent with feminist goals. Most of the early economic theorizing on which I rely was put forth by feminist economic pioneers. *See infra* note 123 and accompanying text. What is more, by complicating the neoclassical ideal of a "perfect market," the analysis below leaves room

What might we gain by turning the economic lens to our childcare market? Limitations notwithstanding, the economic model is a systematic, diagnostic and prescriptive tool for law and policymaking, enabling us to examine and forecast market imperfections, and to consider and predict the effects of various policy approaches.[103] In particular, "thinking like an economist" surely brings a number of important insights to the childcare market: market actors respond to incentives,[104] opportunity costs—and thus trade-offs—exist, and investments should be made where they will be most beneficial.[105] Economics, then, brings the possibility of new perspectives and innovative solutions to childcare.[106]

But importantly, in taking on this project, I don't mean to reduce the challenges and complexities of American childcare to a simple market problem.[107] Economic analysis is not a complete answer to the challenges I describe in Part II, and distributional issues associated with income inequality are an especially pressing

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for, and in fact emphasizes, community and collective goods. *See* Brinig, *supra* note 4, at 456.

[103] Blank & Reimers, *supra* note 60, at 158–61.

[104] Although childcare offers intrinsic rewards, it is nevertheless subject to market incentives. England & Folbre, *Capitalism*, *supra* note 8, at 31.

[105] Strober, *supra* note 94, at 283.

[106] *See* Silbaugh, *supra* note 4, at 97, 109.

[107] Blank & Reimers, *supra* note 60, at 165. We intuitively understand that childcare—even when provided for monetary exchange—has both market and nonmarket components. *See* Folbre & Nelson, *supra* note 9, at 132; Silbaugh, *supra* note 4, at 94. It is also clear that our childcare system is beset by a number of challenges, only some of which the market model can speak to. *See* England & Folbre, *Capitalism*, *supra* note 8, at 30; Harbach, *supra* note 2, at 299–301. The economic model is one way of understanding our childcare dilemmas, but certainly not the only one. In particular, questions of efficiency are not and ought not be the only values at stake in childcare. BLAU, *supra* note 61, at 27, 162. Efficiency is, at most, an adjunct to other values and concerns that animate these debates: equality of opportunity, fairness, morality, dependency, and vulnerability. *See* Blank & Reimers, *supra* note 60, at 165; Buchanan, *supra* note 88, at 86; Fineman, *Cracking the Foundational Myths*, *supra* note 5, at 182–83.

concern.[108] My aim here is to mine economic theory for insights, but not to preempt other important conversations in our discourse about childcare.[109]

With these caveats in mind, I turn now to explore what economic analysis can teach us about the conditions and potential in our childcare market.

B. Diagnosing Childcare Market Failure

The touchstone for neoclassical market analysis is efficiency—a state in which all goods and services are produced and consumed at socially optimal levels, such that individual and societal well-being are maximized.[110] Adam Smith's theory of the "invisible hand" states the default, aspirational model of efficient markets: in perfectly competitive markets, self-interested behavior of buyers and sellers produce outcomes that maximize societal benefit and generate no waste.[111] In this theoretical world of perfect markets, little if any government intervention is needed.[112]

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[108] The neoclassical model assumes an initial distribution of property rights to which there will be unequal access across the population, but takes no position on the fairness of that initial distribution. Martha Albertson Fineman & Terence Dougherty, *Introduction to Part II: Feminism Confronts Neoclassical Economic Theory and Law and Economics*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 57, 57–58 [hereinafter Fineman & Dougherty, *Introduction to Part II*]; MERCURO & MEDEMA, *supra* note 97, at 25; DIANE PAULSELL, MATHEMATICA POLICY RESEARCH, THE ECONOMIC RATIONALE FOR INVESTING IN CHILDREN: A FOCUS ON CHILD CARE 29, 44, 48–49 (2001) [hereinafter INVESTING IN CHILDREN REPORT], *available at* http://www.mathematica-mpr.com/~/media/publications/PDFs/econrationale.pdf, *archived at* http://perma.cc/X3ZD-LUMY. Thus, market efficiency can coexist with stark inequality, and efficiency analysis tends to prefer the status quo. Buchanan, *supra* note 88, at 85; Dougherty, *supra* note 96, at 6; Fineman & Dougherty, *Introduction*, *supra* note 88, at ix–x; Fineman & Dougherty, *Introduction to Part II*, *supra*, at 57–58; MERCURO & MEDEMA, *supra* note 97, at 48; Kysar, *supra* note 87, at 96. Although economists are not typically comfortable making distributive arguments, the pursuit of fairness and justice via redistribution is an especially compelling justification for state involvement in the context of childcare. Government intervention in childcare can serve to advance equal opportunity for all children in our society. INVESTING IN CHILDREN REPORT, *supra* 66–68, 88; DEBORAH LOWE VANDELL & BARBARA WOLFE, INST. FOR RESEARCH ON POVERTY, CHILD CARE QUALITY: DOES IT MATTER AND DOES IT NEED TO BE IMPROVED? 81 (2000), *available at* http://www.irp.wisc.edu/publications/sr/pdfs/sr78.pdf, *archived at* http://perma.cc/C42R-Z9Q5.

[109] *See, e.g.*, Silbaugh, *supra* note 4, at 83–84, 88, 95 (discussing how both economic and emotional understandings can and should coexist).

[110] FRANK & BERNANKE, *supra* note 85, at 86.

[111] B. DOUGLAS BERNHEIM & MICHAEL D. WHINSTON, MICROECONOMICS 496, 517–18, 588 (2008); MERCURO & MEDEMA, *supra* note 97, at 21–22. These efficient outcomes are "Pareto optimal," meaning "that resources cannot be reallocated so as to make one individual better off without making [another] worse off." *Id.*; *see also* FRANK & BERNANKE, *supra* note 85, at 176 (describing this economic theory as "Pareto efficiency").

[112] Professors Mercuro and Medema outline the implications of such a perfect market:

But of course, real-world markets often fail to achieve this ideal.[113] Market failure occurs when markets are inefficient—when they do not achieve or maintain socially optimal allocative efficiency.[114] Put another way, market failure occurs when a market produces too much or too little of a good or service as compared to what would be best from a societal perspective.[115] Markets can fail because of market power disparities, external effects, and incomplete information.[116]

Although infrequently discussed in the legal literature,[117] economists and social scientists have given sustained study to the functioning and failings of the childcare market,[118] concluding that America's childcare market manifests multiple aspects of market failure.[119] Given the data surveyed in Part II, these experts have concluded the existence of externalities (or "spillovers") and information problems have caused lower than optimal demand for high quality childcare,[120] leading the market to

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> If the world were as simple as that described by the perfectly competitive market, then all we need do is to set in place the just and fair initial property rights structure and, barring problems with information, enforcement, public goods, and externalities, the market would provide us with an efficient allocation of resources . . . .

MERCURO & MEDEMA, *supra* note 97, at 51.

[113] *Id.*

[114] DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS 13–14 (2d ed. 2011); *see also* BERNHEIM & WHINSTON, *supra* note 111, at 621 (outlining the ways in which market failure can occur); FRANK & BERNANKE, *supra* note 85, at 298 (examining externalities as an example of what causes market failure); VANDELL & WOLFE, *supra* note 108, at 78 (examining market failure in the context of childcare).

[115] BLAU, *supra* note 61, at 10.

[116] *Id.* at 10–11. The theory of market failure is not without its critics. *See* Richard O. Zerbe Jr. & Howard McCurdy, *The End of Market Failure*, 23 REG. 10, 10 (2000).

[117] *But see generally* McCluskey, *Politics of Economics*, *supra* note 6, at 202 (touching on market failure in the context of childcare).

[118] As economist David Blau observes:

> As in the markets for most other goods and services, there is a wide range of quality available and higher-quality care generally has a higher price. Consumers of child care can usually find the quality of care they prefer *if* they are willing to pay the price for such care. Providers can offer high-quality care if they choose, incurring high costs but also commanding the high price that goes with such care, or they can offer lower-quality care, at lower cost, and receive a lower price.

BLAU, *supra* note 61, at 5.

[119] *Id.* at 10.

[120] Economists have located market failure in the childcare context with demand. *Id.* at 12. Blau has found that a decrease in the price of childcare leads to an increased demand for childcare *quantity*, but not *quality*. *Id.* at 83. Likewise, an increase in the mother's wage rate increases the quantity of childcare demanded, but not the quality of care demanded. *Id.* And childcare consumers appear to view quantity and quality as substitutes—quality tends to be

produce too little of it.[121] The discussion that follows considers the causes of childcare market failure in more detail.

1. Childcare Spillovers

Feminist economists and sociologists were among the first to observe the childcare market is imperfect in part because the benefits of childcare transactions are not completely captured by families and childcare providers.[122] Instead, the benefits of quality childcare spill over to society at large in a variety of ways.[123]

Spillovers result when some costs or benefits of a transaction are not reflected in the transaction itself, but are instead externalized to others.[124] In the case of positive externalities,[125] if market actors cannot capture the full value of a particular

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higher if quantity is lower. *Id.* at 14. Studies indicate that many consumers cannot or will not pay for high-quality childcare, which leads to low demand for such care. *Id.* at 7–8; Mocan, *supra* note 70, at 744. In fact, some parents could afford high-quality care rather than average care but nevertheless choose average care. BLAU, *supra* note 61, at 7–8.

By contrast, experts have determined there is little problem with the internal functioning of the childcare market in terms of supply. *See* BLAU, *supra* note 61, at 230–31. Increased demand for childcare leads to a significant enough increase in supply that large price increases are avoided. *Id.* at 14. The cost to providers of increasing childcare quality is relatively modest, such that when the price of care rises, day care centers can and do improve the quality of care they offer. *Id.* Thus, on the supply side, the childcare market appears to function well in terms of expanding quantity and quality in response to increased demand. *Id.* at 103.

[121] BLAU, *supra* note 61, at 8, 159; VANDELL & WOLFE, *supra* note 108, at 78, 83. "[T]he evidence strongly suggests that high-quality child care is not a high-priority item for many households." BLAU, *supra* note 61, at 8.

[122] One of the assumptions of a perfectly competitive, efficient market is that all costs and benefits of a transaction are captured in the transaction itself, such that the marginal individual benefits and costs of a transaction equal the marginal *social* benefits and costs of a transaction. MERCURO & MEDEMA, *supra* note 97, at 22. Yet utility maximization theory in a market economy assumes that consumers consider only private costs and benefits. *Id.* at 60.

[123] England, *supra* note 92, at 48–49; England & Folbre, *Capitalism*, *supra* note 8, at 29–32; England & Folbre, *Contracting*, *supra* note 88, at 70–71; Folbre, *Valuing Care*, *supra* note 101, at 107–08; McCluskey, *Politics of Economics*, *supra* note 6, at 202; England & Folbre, *Who Should Pay*, *supra* note 89, at 198; Folbre, *Public Goods*, *supra* note 101, at 86–88.

[124] COLE & GROSSMAN, *supra* note 114, at 18.

[125] Externalities can be both positive, generating benefits, and negative, generating costs. BERNHEIM & WHINSTON, *supra* note 111, at 754; COLE & GROSSMAN, *supra* note 114, at 19–20. Education is widely believed to create positive externalities. BERNHEIM & WHINSTON, *supra* note 111, at 759; BLAU, *supra* note 61, at 161; VANDELL & WOLFE, *supra* note 108, at 86; INVESTING IN CHILDREN REPORT, *supra* note 108, at 66. By contrast, activities that create pollution are commonly cited as creating negative externalities, because the underlying private market transactions do not fully account for the external costs created

resource, they typically are unwilling to pay a price commensurate with its overall value. Consumers won't demand or purchase as much of the resource as would be socially optimal,[126] and the market price of the resource doesn't accurately reflect its full societal benefits.[127] When these broader benefits are not accounted for in market transactions, an underallocation of resources results.[128] Private benefits diverge from public ones, and individual market transactions do not lead to efficient outcomes from a societal perspective.[129]

There is no question that high quality childcare benefits children who receive it, as well as their families. A robust body of child development literature establishes that higher quality childcare significantly affects child development, leading to improved cognitive and social outcomes for children.[130] This data confirms that

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by polluting the air or environment. *See, e.g.*, BERNHEIM & WHINSTON, *supra* note 111, at 754.

[126] McCluskey, *Politics of Economics*, *supra* note 6, at 202.

[127] *See* England & Folbre, *Capitalism*, *supra* note 8, at 31.

[128] MERCURO & MEDEMA, *supra* note 97, at 23, 61.

[129] Folbre, *Valuing Care*, *supra* note 101, at 107.

[130] Numerous studies of childcare's effects on quality of child development and behavior confirm that high quality childcare supports children's social, emotional, and cognitive development, and is especially beneficial for children raised in poverty. *See* BLAU, *supra* note 61, at 129–30, 161; Nat'l Inst. of Child Health & Human Dev. Early Child Care Research Network, *Child-Care Effect Sizes for the NICHD Study of Early Child Care and Youth Development*, AM. PSYCHOLOGIST, Feb.–Mar. 2006, at 99, 113 [hereinafter *Child-Care Effect Sizes*]; PARENTS, *supra* note 76, at 11; KREADER ET AL., *supra* note 71, at 2; VANDELL & WOLFE, *supra* note 108, at 99–100.

The National Institute of Child Health and Human Development (NICHD) Early Child Care Research Network has been the source of much burgeoning information on the long-term effects of childcare quality on child development and is considered to have produced some of the most credible evidence of childcare effects because of its longitudinal design, its inclusion of all types of childcare, and its analysis of a variety of factors external to childcare that also affect development. BLAU, *supra* note 61, at 136. This study has followed a sample of more than thirteen hundred children beginning in 1991 and monitors home and childcare environments, as well as their development. *Id.* at 134. The most recent NICHD report indicates that effects of high-quality childcare last well into the teenage years: children who received high-quality early childcare scored higher in academic and cognitive tests and were less likely to exhibit behavioral problems than were children who had lower-quality care. Even ten years after leaving childcare, quality had an impact on academic achievement, and this impact persisted not just for low-income children, but for middle-income and affluent children, as well. *See* Deborah Lowe Vandell et al., *Do Effects of Early Child Care Extend to Age 15 Years? Results from the NICHD Study of Early Child Care and Youth Development*, 81 CHILD DEV. 737, 737–55 (2010).

Much of the underlying data on the broader societal benefits associated with early childhood education and care come from two well-designed and oft-cited longitudinal studies, the Perry Preschool Study (PPS) and the Carolina Abecedarian Program (CAP). These two studies are thought to provide the "most reliable data" on the long-term societal benefits of quality childcare. Heckman, *supra* note 131, at 19. The PPS followed fifty-eight disadvantaged African American children who participated in an intensive preschool children who receive high quality childcare do markedly better than those who do not, as measured by a variety of metrics: they are less likely to require remedial education,[131] more likely to graduate from high school,[132] less likely to commit crimes,[133] less likely to be neglected or abused,[134] less likely to be unemployed,[135]

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program in Ypsilanti, Michigan, between 1962 and 1967, and followed the control and treatment groups through age forty. *HighScope Perry Preschool Study*, HIGHSCOPE, http://www.highscope.org/content.asp?contentid=219, *archived at* http://perma.cc/2VHA-E5WK (last visited Jan. 16, 2015). The CAP studied 111 disadvantaged children who participated in full-day interventions beginning at four months through eight years, and followed these children through age twenty-one. *The Abecedarian Project*, THE CAROLINA ABECEDARIAN PROJECT, http://abc.fpg.unc.edu/, *archived at* http://perma.cc/DVD2-RCE9 (last visited Jan. 16, 2015). Notably, the dramatic results of the PPS and CAP studies have not been reproduced in the Head Start program, despite the high accolades Head Start frequently receives. Some speculate that Head Start may in fact offer lower quality care in terms of teacher education and programming, for example. *See* INVESTING IN CHILDREN REPORT, *supra* note 108, at 99.

Not all who have analyzed the data find all studies to be persuasive. *See* BLAU, *supra* note 61, at 6 (concluding that several studies were reliable enough to support claims of the impact of childcare quality); *see also* Mocan, *supra* note 70, at 748 (noting that although child development literature has not provided conclusive evidence on impact of quality on development, there is strong positive association between quality and child outcomes).

[131] COMM. FOR ECON. DEV., THE ECONOMIC PROMISE OF INVESTING IN HIGH-QUALITY PRESCHOOL: USING EARLY EDUCATION TO IMPROVE ECONOMIC GROWTH AND THE FISCAL SUSTAINABILITY OF STATES AND THE NATION 20, 29 (2006) [hereinafter CED], *available at* https://www.ced.org/pdf/Economic-Promise-of-Investing-in-High-Quality-Preschool.pdf, *archived at* https://perma.cc/7B8R-EYD8; James J. Heckman, *Schools, Skills, and Synapses* 90 (Nat'l Bureau of Econ. Research, Working Paper No. 14064, 2008), *available at* http://www.nber.org/papers/w14064.pdf?new_window=1, *archived at* http://perma.cc/UKQ8-TPX2 (illustrating 15% of PPS participants enrolled in special education, compared to 34% of control group). To the extent high quality early childhood education and care improves school readiness of children, it may also lead to increased teacher satisfaction and retention, thus reducing costs related to teacher turnover, absenteeism, and substitutes. CED, *supra*, at 29.

[132] Frances A. Campbell et al., *Adult Outcomes as a Function of an Early Childhood Educational Program: An Abecedarian Project Follow-Up*, 48 DEVELOPMENTAL PSYCHOL. 1033, 1038 (2012) (finding 83% of CAPS participants graduated as opposed to 72% of nonparticipants, and participants were also more likely to graduate from college); Heckman, *supra* note 131, at 90 fig.17 (showing 66% of PPS participants graduated from high school on time, versus 45% of control group).

[133] PPS participants had significantly fewer arrests and fewer months of incarceration. David R. Katner, *Delinquency and Daycare*, 4 HARV. L. & POL'Y REV. 49, 57–58 (2010); Heckman, *supra* note 131, at 90. Additionally, an intensive program directed at low-income, primarily African American families at Syracuse University was shown to decrease the overall number, severity, and recurrence of later involvement with the juvenile justice system. Katner, *supra*, at 58.

[134] Katner, *supra* note 133, at 56–57; CED, *supra* note 131, at 22.

[135] CED, *supra* note 131, at 22 (finding PPS participants more likely to be employed at forty and had higher incomes); LAWRENCE J. SCHWEINHART ET AL., THE HIGH/SCOPE PERRY

less likely to require public assistance,[136] less likely to become teen parents,[137] and are generally healthier.[138] In short, exposure to higher-quality childcare leads to better-educated and healthier children, who grow up to be more productive and economically stable adults. And children and families eventually capture more of these benefits as they become more productive. Childcare quality is especially consequential for low-income families: for these vulnerable children, both positive and negative effects of childcare quality are magnified.[139]

Given the significance of these effects, it's not surprising that quality childcare generates broader social spillovers[140]—to neighbors, partners, future children, colleagues, employers, and all who benefit from public expenditures derived from the tax base.[141] An expanding cohort of economists have concluded that quality

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PRESCHOOL STUDY THROUGH AGE 40: SUMMARY, CONCLUSIONS, AND FREQUENTLY ASKED QUESTIONS 2 (2005), *available at* http://www.highscope.org/file/Research/PerryProject/specialsummary_rev2011_02_2.pdf, *archived at* http://perma.cc/S2T2-J332. The PPS students also performed better on other indicators of economic stability, such as home ownership, maintenance of a saving account, and financial independence. CED, *supra* note 131, at 22; SCHWEINHART ET AL., *supra*, at 2; Heckman, *supra* note 131, at 90.

136 Heckman, *supra* note 131, at 90.

137 CED, *supra* note 131, at 22 (finding CAP participants less likely to become teenage parents).

138 PPS participants at forty were less likely to use prescription and illegal drugs, and less likely to have stopped work because of health issues. CED, *supra* note 131, at 22. These health gains are associated with better access to health screening, immunization, and nutrition. *See* Clive R. Belfield, *The Promise of Early Childhood Education Intervention*, *in* THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 200, 212 (Clive R. Belfield & Henry M. Levin eds., 2007).

139 *See* CHILD CARE AWARE, PARENTS AND THE HIGH COST OF CHILD CARE: 2014 REPORT 10, 24 (2014), *available at* http://www.usa.childcareaware.org/costofcare, *archived at* http://perma.cc/6HDX-NBAN (follow "Download the Full Report" hyperlink). Increasingly divergent investments in child development by class are correlated with disparities in cognitive achievement, magnifying social inequality in ways that have *negative* spillovers. *See* Reardon, *supra* note 83, at 105.

140 *See* England, *supra* note 92, at 48–49; England & Folbre, *Contracting*, *supra* note 88, at 70; Folbre, *Valuing Care*, *supra* note 101, at 93. 107; England & Folbre, *Who Should Pay*, *supra* note 89, at 198; Folbre, *Public Goods*, *supra* note 101, at 98; Folbre & Nelson, *supra* note 9, at 137. Despite a traditional focus on *physical* externalities (e.g., pollution), economists are clear that *social* spillovers also exist in imperfect markets. England & Folbre, *Contracting*, *supra* note 88, at 70.

141 England, *supra* note 92, at 48–49; England & Folbre, *Contracting*, *supra* note 88, at 62; Folbre, *Valuing Care*, *supra* note 101, at 107; Folbre, *Public Goods*, *supra* note 101, at 86. A number of scholars go further and argue that childcare creates human capital that becomes a public good. That is, society at large can enjoy the benefits of this enhanced human capital without directly paying for it, and can also enjoy these benefits without diminishing their effects for others. *See* England, *supra* note 92, at 48–49; England & Folbre, *Who Should Pay*, *supra* note 89, at 195, 199; Folbre, *Public Goods*, *supra* note 101, at 86; INVESTING IN CHILDREN REPORT, *supra* note 108, at 7.

childcare not only enhances "social capital" in diffuse ways[142] but also generates important fiscal benefits.[143]

Growing research on human capital[144] weighs the costs and benefits of childcare investments, providing an empirical model for understanding the economic spillovers of quality care.[145] The short-term benefits of quality care are reflected in increased economic activity and development: a larger and more productive workforce[146] and increased economic activity in the childcare market.[147] Longer-term payoffs include a more sophisticated future workforce, cost savings on education,[148] crime prevention,[149] social services and public assistance,[150] and an increased tax base.[151] These long-term benefits are so significant that Nobel laureate economist James Heckman (and others) argue that investment in early childhood education and care yields significant financial returns to society,[152] increasing

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142 England & Folbre, *Contracting*, *supra* note 88, at 70; England & Folbre, *Who Should Pay*, *supra* note 89, at 200.

143 England & Folbre, *Contracting*, *supra* note 88, at 70–71; England & Folbre, *Who Should Pay*, *supra* note 89, at 200; Folbre, *Valuing Care*, *supra* note 101, at 93; Folbre & Nelson, *supra* note 9, at 137. Not surprisingly, analyses identifying positive spillovers in the childcare market mirror those concerning education in important ways. VANDELL & WOLFE, *supra* note 108, at 86.

144 "Human capital" comprises "marketable skills acquired through investments in education and training." BERNHEIM & WHINSTON, *supra* note 111, at 360. Few economists have included care in their analysis of human capital. Paula England & Nancy Folbre, *Reconceptualizing Human Capital*, *in* THE MANAGEMENT OF DURABLE RELATIONS: THEORETICAL MODELS IN EMPIRICAL STUDIES OF HOUSEHOLDS AND ORGANIZATIONS 126 (Jeroen Weesie & Werner Raub eds., 2000). Feminist economists Paula England and Nancy Folbre argue for a broadening of the usual understanding of human capital to include human "capabilities"—physical functioning, cognitive functioning, self-regulation, and caring. *Id.* at 126–28.

145 *See* Folbre, *Valuing Care*, *supra* note 101, at 107–08; *see also supra* note 130.

146 Access to childcare improves parental employment opportunities. Katner, *supra* note 133, at 62; CED, *supra* note 131, at 22.

147 BLAU, *supra* note 61, at 19; CED, *supra* note 131, at 31; LIKE THE MILITARY, *supra* note 1, at 26–27.

148 CED, *supra* note 131, at 29; SCHWEINHART ET AL., *supra* note 135, at 3.

149 Katner, *supra* note 133, at 63; SCHWEINHART ET AL., *supra* note 135, at 3; CED, *supra* note 131, at 30.

150 Belfield, *supra* note 138, at 212; CED, *supra* note 131, at 30 (noting child welfare programs cost government an estimated $17 billion per year); SCHWEINHART ET AL., *supra* note 135, at 3; Heckman, *supra* note 131, at 18 (stating that "adverse childhood life experiences are correlated with adult disease burden and medical care costs").

151 *See* CED, *supra* note 131, at 30; *see also* SCHWEINHART ET AL., *supra* note 135, at 3 ("88% . . . of savings came from crime, 4% . . . came from education savings, 7% . . . came from increased taxes . . . , and 1% . . . came from welfare savings").

152 CED, *supra* note 131, at 25; WILLIAM T. DICKENS ET AL., BROOKINGS INST., POLICY BRIEF #153: THE EFFECTS OF INVESTING IN EARLY EDUCATION ON ECONOMIC GROWTH 1 (2006) [hereinafter BROOKINGS INST., EFFECTS OF INVESTING IN EARLY EDUCATION], *available at* http://www.brookings.edu/~/media/research/files/papers/2006/4/education%20

economic growth, [153] and more than offsetting public investment in early childcare.[154] Predicted returns vary, but all are positive.[155] Heckman, for example, estimates the rate of return on quality early childhood education as exceeding 10%—higher than standard stock market returns.[156]

In sum, mounting evidence demonstrates the benefits of high-quality childcare spill over to society at large in a number of ways. Yet families consider only the private, internal benefits of childcare in determining their willingness to pay.[157] The result is market failure. The demand for quality childcare is inefficiently low from a societal perspective, leading to an underallocation of quality childcare in the market.[158]

2. *Childcare Information Problems*

Even in the absence of these spillover effects, childcare experts have identified information deficits as an additional driver of failure in the market. Parents face challenges in understanding the markers of quality care and then locating it, and agency costs make outsourced childcare difficult to monitor.[159] Gaps in information

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dickens/pb153.pdf, *archived at* http://perma.cc/HE3R-BQBF; SCHWEINHART ET AL., *supra* note 135, at 3–4; Heckman, *supra* note 131, at 21.

[153] CED, *supra* note 131, at 33.

[154] *Id.*

[155] One study found that the PPS's economic returns to the general public were $12.90 per dollar invested. SCHWEINHART ET AL., *supra* note 135, at 3. Others estimate that preschool programs targeted at disadvantaged children provide an annual return on investment of somewhere between 7 to 18%. CED, *supra* note 131, at 25. Simulated expansions of public preschool to all children similarly predict positive returns. *Id.*

[156] Heckman, *supra* note 131, at 21. As The Brookings Institution observes:

> Because most of these benefits are longer-term while the costs of mounting the programs are more immediate, the political system tends to be biased against making such investments. However, any business that operated in this way would likely fail to succeed. A similarly dim prospect may be in store for a country that fails to take advantage of such solid investment opportunities.

BROOKINGS INST., EFFECTS OF INVESTING IN EARLY EDUCATION, *supra* note 152, at 7.

[157] *See* PRESIDENT'S COUNCIL OF ECON. ADVISORS, THE ECONOMICS OF EARLY CHILDHOOD INVESTMENTS 9 (2014) [hereinafter CEA], *available at* http://www.whitehouse.gov/sites/default/files/docs/early_childhood_report1.pdf, *archived at* http://perma.cc/K7RW-EPDR; VANDELL & WOLFE, *supra* note 108, at 81; INVESTING IN CHILDREN REPORT, *supra* note 108, at 6, 89.

[158] PARENTS, *supra* note 76, at 31.

[159] England & Folbre, *Capitalism*, *supra* note 8, at 35–36, 46; Folbre & Nelson, *supra* note 9, at 136.

frustrate parents' ability to make accurate childcare decisions, impeding market efficiency.[160]

Multiple studies report that parents lack sufficient information about a variety of childcare characteristics—the advantages and attributes of high quality childcare, the indicia of childcare quality, the location and availability of care, the relative costs of care, and information on the range of care alternatives.[161] In one recent study, for example, economist Naci Mocan found that information asymmetry and adverse selection in the childcare market tend to drive down quality in America's childcare market, effectively creating a sort of "market for lemons."[162] Mocan's study found that because parents are unable to effectively evaluate quality, they are unwilling to pay a premium for increases in quality.[163] With low demand, childcare centers have no incentive to provide higher-quality care, and adverse selection leads to a market filled with lower-quality providers.[164]

Thus, social spillovers and information problems lead to significant inefficiencies in our childcare market.[165] I now move to consider the implications of market failure for government action.

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[160] *See* England & Folbre, *Contracting*, *supra* note 88, at 72. In perfectly functioning markets, all buyers and sellers are fully informed about their transactions. COLE & GROSSMAN, *supra* note 114, at 14; FRANK & BERNANKE, *supra* note 85, at 326–28; MERCURO & MEDEMA, *supra* note 97, at 66. But in real-world transactions, consumer information is often incomplete, and/or buyers and sellers have differing levels of information about the transaction ("asymmetric information"). *See* BERNHEIM & WHINSTON, *supra* note 111, at 20; COLE & GROSSMAN, *supra* note 114, at 17–18. In the context of asymmetric information, sellers typically are better informed than buyers. FRANK & BERNANKE, *supra* note 85, at 333. This asymmetric information leads to "adverse selection": because buyers are unable to identify high quality, they are unwilling to pay the prices commensurate with that quality. *Id.* at 340–41. Sellers will therefore be unable to command higher prices for higher quality, leading to a "market for lemons" that reduces the average overall quality of goods or services available. *See* BERNHEIM & WHINSTON, *supra* note 111, at 20; BLAU, *supra* note 64, at 160, 211; FRANK & BERNANKE, *supra* note 85, at 333–34; George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489–92 (1970); Mocan, *supra* note 70, at 743–44.

[161] CEA, *supra* note 157, at 9; VANDELL & WOLFE, *supra* note 108, at 78–81; INVESTING IN CHILDREN REPORT, *supra* note 108, at 6, 67, 89.

[162] *See* Mocan, *supra* note 70, at 743.

[163] *Id.* at 773.

[164] *Id.* at 773–74. A second consequence of asymmetric information is "moral hazard," when one party to a transaction can take actions that are unobservable to the trading partner. *See* BLAU, *supra* note 61, at 160. Moral hazard raises special concerns in the childcare context, where agency costs can be high, and their consequences grave. *Id.* at 160. In 2012, for example, among the many thousands of individuals determined to have caused or knowingly allowed child maltreatment, 3,511 perpetrators were identified as daycare providers. *See* U.S. DEP'T HEALTH & HUMAN SERVS., CHILD MALTREATMENT 71 (2012), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf, *archived at* http://perma.cc/L62A-X3LG.

[165] Externalities and information imperfections are the most frequently cited market failures, and those that generate the most unanimity among childcare experts. But some have

3. The State Role in Market Failure

Economic theory helps to explain the childcare crisis I identified in Part II. It also suggests a new theoretical and practical legal orientation toward childcare, reflecting the reality of the childcare market and its failures. Economics provides a more transparent and effective rationale for state intervention.

All markets manifest some degree of market failure.[166] And when markets fail, government action can enhance efficiency.[167] The goal of correcting market failure in fact served as the basis for much of the regulation of economic activity in the twentieth century, including worker safety regulations, highway speed limits, airbag requirements, and pollution emissions limitations.[168] Because markets are never perfectly efficient, legal-economic policy and change are a constant reality in modern, mixed-market economies.[169]

A finding of market failure has specific implications for state involvement: intervention to mitigate it.[170] The existence of failures in our childcare market suggests the state confront and revisit norms of family privacy and private dependency that have served to limit and muddle government involvement, and to embrace an increased public role in the childcare market to address market failure. This economic analysis of our childcare market offers a pragmatic new rationale for a more resolute state role in childcare—one that is tied to the realities of how childcare is provided today, and that acts as an antidote to the state's historically ambivalent and hands-off approach. Although government intervention in markets

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also argued that the childcare market is also an imperfect capital market in which parents face liquidity constraints. *See* VANDELL & WOLFE, *supra* note 108, at 81; INVESTING IN CHILDREN REPORT, *supra* note 108, at 34, 39–40, 89. Parents of young children have low incomes relative to their permanent adult income streams, but cannot borrow against their children's future income to finance high-quality childcare. VANDELL & WOLFE, *supra* note 108, at 81; INVESTING IN CHILDREN REPORT, *supra* note 108, at 6, 39–40. These constraints prevent parents from making the socially optimal investments in childcare. *Id.* at 39–40, 89.

[166] *See* BERNHEIM & WHINSTON, *supra* note 111, at 19.

[167] *Id.* at 611. According to economist Arthur Pigou, the essential purpose of government is to correct market failures to "control the play of economic forces in such wise [sic] as to promote economic welfare, and through that, the total welfare, of their citizens . . . ." A. C. PIGOU, THE ECONOMICS OF WELFARE 129–30 (4th ed. 1962); *see also* COLE & GROSSMAN, *supra* note 114, at 19 (discussing how the government can, and does, intervene in the market to correct failures).

[168] *See* COLE & GROSSMAN, *supra* note 114, at 19. One basic microeconomic text asserts, for example, "the need to deal with externalities is one of the most important rationales for the existence of government . . . ." FRANK & BERNANKE, *supra* note 85, at 298, 305, 408.

[169] *See* MERCURO & MEDEMA, *supra* note 97, at 51.

[170] *See* BERNHEIM & WHINSTON, *supra* note 111, at 611; COLE & GROSSMAN, *supra* note 114, at 19; FRANK & BERNANKE, *supra* note 85, at 298, 408; RICHARD O. ZERBE JR., ECONOMIC EFFICIENCY IN LAW AND ECONOMICS 165 (2001); CEA, *supra* note 157, at 29–32; INVESTING IN CHILDREN REPORT, *supra* note 108, at 32.

is by no means a panacea,[171] responding to market failure is one step by which the state can respond to childcare realities more coherently and effectively, and better leverage childcare's many societal benefits for our larger community.

C. Privacy, Redux?

Of course, existing social and legal norms consider government intervention—whether in families or markets—to be the antithesis of privacy. A confrontation between government intervention and privacy norms therefore creates the potential for significant tension. Yet in reality, the boundaries between public and private are blurry, whether in the context of the family or the market.[172] Family privacy doctrine yields to state regulation over all manner of family decisions. Likewise, free market primacy yields to other, legitimate concerns about market functioning. Thus, families and markets are both publicly and privately constituted, operating inside and outside the law.

An increased—and more coherent—state role in America's childcare need not be incompatible with privacy norms. A more nuanced understanding of these norms and their motivations enables us to articulate a role for the state that is more coherent, pragmatic, and involved, while nevertheless respecting the core values reflected by privacy concerns.

1. Family Privacy

Although the rhetoric of family privacy often suggests a monolithic state approach, in reality the state has intervened pragmatically and regularly in all manner of disputes within families and between families and the state.[173] The primacy of parental rights has never completely precluded the state's separate interest in and responsibility toward children.[174] And the realities of the late

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[171] Like markets, government policymaking is also imperfect and government interventions themselves can fail. *See* BERNHEIM & WHINSTON, *supra* note 111, at 20. Some forms of government intervention can impede optimal market performance. *Id.* at 20, 611. And experience teaches that government actions do not always seek to vindicate the social good. *Id.* at 792.

[172] Fineman & Dougherty, *Introduction*, *supra* note 88, at xiii–xiv.

[173] Meyer, *supra* note 11, at 594.

[174] The doctrine of *parens patriae* has long served as the primary rationale for regular state interventions—and often aggressive ones—in family life. This doctrine has long been recognized (and indeed continues to operate) as establishing a state right and responsibility to protect those who are incapable of protecting themselves. *See* DOUGLAS E. ABRAMS, A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI 4–6 (2003). By the early to mid-nineteenth century, American law was recognizing a substantial role for *parens patriae*, even to the point of superseding the rights of natural parents. *Id.* at 5. At the time *Meyer* and *Pierce* were decided, children's status in the law was in flux, assuming both public and private dimensions. Woodhouse, *supra* note 33, at 1068. But by then it was clear the state itself had an interest in children, one that at times justified intervention in family life and decision making. Thus, *Meyer* recognized that "the State may do much, go very far,

twentieth and early twenty-first century have exploded the notion of a radical separation between home and marketplace.[175] The boundaries between public and private are increasingly blurred, as the family once again is assuming a more prominent role in public life. It is therefore incorrect to assume that a preference for nonintervention has led to a rigid barrier between the family and state.

Government intervention to address childcare market failure poses little threat to core privacy values and concerns. Rather than reaching directly into private decisions about how to care for children in private homes, state intervention to address market failure occurs only *after* childcare has crossed the private-public divide. Thus, this interaction contravenes neither the spatial or decisional aspects of parental autonomy to make decisions about raising children.[176]

First, addressing market failure does not implicate the regulation or monitoring of parental care inside the private space of the home.[177] Instead, economic remedies seek to address spillovers and information problems where they are manifest: in the *public* childcare programs that today provide much of the care for America's children.

Second, state involvement in the childcare market does not impede parents' decisional autonomy concerning their children.[178] It is a longstanding principle of

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indeed, in order to improve the quality of its citizens." Meyer v. Nebraska, 262 U.S. 390, 401 (1922). *Pierce* acknowledged the state's power to regulate schools and prescribe a civic curriculum. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925). *Prince* likewise accepted that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." Prince v. Massachusetts, 321 U.S. 158, 167 (1944). A primary tension at the time, then, was between absolute parental control over children versus the state interest in ensuring their care and protection. Woodhouse, *supra* note 33, at 1041.

[175] Between the 1960s and the end of the twentieth century, mothers entered the workforce in expanding numbers, and nonmaternal childcare rose precipitously. CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 42. The number of single mothers increased significantly in the second half of the twentieth century, most of whom needed to work to support themselves and their dependents. *Id.* at 45. A number of other cultural and demographic changes also led to an increased presence for married mothers in the labor force. *Id.* at 47–48. Consequently, the number of children in nonmaternal care has risen sharply and the country has witnessed a marked reduction in parental care provided in the family home. *Id.* at 43–44.

[176] *See supra* notes 23–24 and accompanying text.

[177] In fact, such monitoring is already well established as an exercise of the state's *parens patriae* powers in child welfare cases. *See* ABRAMS, *supra* note 174, at 6 (noting the Supreme Court recognized early on that *parens patriae* power is most beneficially exercised "for the prevention of injury to those who cannot protect themselves." (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890))).

[178] As I have argued elsewhere, a different set of laws and policies is much *more* conscriptive of family decisions in the context of insourcing or outsourcing childcare. *See* Harbach, *supra* note 2, at 285–97. My earlier exploration of the benefits of high quality care, and of parents' inability or unwillingness to access higher-quality care for their children might suggest that, rather than simply providing incentives and information to help shape parental preferences, the state might in fact *require* that all parents who choose childcare use high-quality care. INVESTING IN CHILDREN REPORT, *supra* note 108, at 52. Crossing this line,

family law that fit parents act in the best interests of their children, and absent a finding of abuse or neglect, the state defers to the decisions of parents concerning childrearing and childcare (at least in intact families).[179] Economic theory is agnostic as to the broader questions about ideal models for childrearing and the zero-sum "mommy wars."[180] A positivist economic analysis of market failure in fact takes us away from normative judgments about *who* should care for children, and instead simply evaluates how the existing market is performing and how it might be improved.[181]

Certainly, the foundational privacy values explored in Part II are significant, but for our purposes here, they should help *shape* the state role in childcare, not foreclose it. At bottom, grounding state intervention in economic theory leaves significant room for individual decision making, pluralism, and private choices in private spaces. Viewed in this light, it's clear that increased state involvement in the childcare market need not conflict with the foundational values that underlie longstanding norms of nonintervention in family life.

2. Market Privacy

Although markets may be conceived of as "public" when contrasted with the private family, they take on a different character when positioned alongside the state.[182] Much like family privacy norms, neoclassical economics sees the market as

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however, would infringe on the core foundational family liberty and privacy protections that have echoes in our childcare policy. *See* BLAU, *supra* note 61, at 215. That's not to say, however, the state could not "nudge" parents toward higher-quality care. *See* Meredith Johnson Harbach, *Nudging Parents*, 19 J. GENDER RACE & JUST. (forthcoming 2015); *see also* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 255 (2008) (suggesting that sensible "choice architecture" can successfully nudge people toward the best decision without restricting their freedom of choice). Indeed, one overarching purpose of the policy recommendations discussed below is to shape parental preferences and steer them toward higher quality care. Even further, because children's relationships with their parents are even more determinative of child outcomes than childcare, see INVESTING IN CHILDREN REPORT, *supra* note 108, at 99, policy initiatives that help develop and support high-quality care by parents and family members would also promote healthy child development and generate positive societal externalities. *Child-Care Effect Sizes*, *supra* note 130, at 114; INVESTING IN CHILDREN REPORT, *supra* note 108, at 85.

179 Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

180 *See* Harbach, *supra* note 2, at 259–61 (describing the media's preoccupation with pitting stay-at-home mothers against wage-working mothers).

181 Martha M. Ertman, *The Business of Intimacy: Bridging the Private-Private Distinction*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY, *supra* note 4, at 467, 469.

182 Fineman, *Cracking the Foundational Myths*, *supra* note 5, at 190 n.3; Fineman & Dougherty, *Introduction*, *supra* note 88 at xii–xiii (noting market characterization is "chameleonlike").

"private"—a private realm in which government intervention and regulation is suspect.[183]

One of the baseline tenets of neoclassical economics is that legal rules and regulation tend to hinder rather than enhance economic and social efficiency.[184] If the assumptions of neoclassical economics and the invisible hand held true, markets would operate efficiently and lead to socially optimal results, leaving little, if any, role for nonmarket forces.[185] But that is not the world in which we live. Economists have long acknowledged that assumptions suggesting a strictly hands-off approach to markets simply do not hold in the real world.[186] Instead, this market ideal is a benchmark against which we can compare the "messy reality" of actual markets.[187] Real-world economics recognizes that state intervention is permissible—even *desirable*—to enhance efficiency.[188]

Moreover, the economic approach to remedying market failures is one that remains, for the most part, committed to the continuing operation of a well-functioning market, in which individual market actors are able to order their preferences. Market failure remedies almost never contemplate state takeover, and we should remain attentive to the potential inefficiencies that can result when government action eclipses markets.[189] The ultimate goal is not to supplant individual choices, but rather to enhance them and enable the individual actions of buyers and sellers to yield socially optimal, efficient outcomes.

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[183] Dougherty, *supra* note 96, at 3–4; Fineman & Dougherty, *Introduction*, *supra* note 88, at xii–xiii.

[184] Fineman & Dougherty, *Introduction*, *supra* note 88, at xvi.

[185] BERNHEIM & WHINSTON, *supra* note 111, at 611; COLE & GROSSMAN, *supra* note 114, at 10 ("Efficiency, thus, becomes the economists' proxy for social welfare; the more efficient is a given allocation, the greater the welfare benefits for society.").

[186] *See* COLE & GROSSMAN, *supra* note 114, at 17–18 (discussing the strategic behavior of free riders and holdouts).

[187] Buchanan, *supra* note 88, at 68; McCluskey, *Politics of Economics*, *supra* note 6, at 199–200. Newer developments in economic theory recognize these realities in a variety of approaches: law and behavioral economics, social economics, and ecological economics. *See* Kysar, *supra* note 87, at 101–12. Many approaches to economic analysis reject the "pure" neoclassical model. *See, e.g.*, Blank & Reimers, *supra* note 60, at 158–59; England & Folbre, *Contracting*, *supra* note 88, at 63; Folbre & Nelson, *supra* note 9, at 131, 133–34, 138.

[188] That's not to say that neoclassical economists don't retain their skepticism of government intervention, however.

[189] Paula England & Nancy Folbre, *Care, Inequality, and Policy*, *in* CHILD CARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH 133, 142–43 (Francesca M. Cancian et al. eds., 2002) [hereinafter England & Folbre, *Inequality*]; McCluskey, *Deconstructing*, *supra* note 99, at 147. An important exception arises in the context of "public" or "merit" goods, in which case one potential remedy for market failure is direct and exclusive state provision of services. Providing for the national defense is a prime example. *See* BERNHEIM & WHINSTON, *supra* note 111, at 485, 787.

3. Private Dependency

The collision between government intervention and privacy norms is perhaps most direct in the context of the preferences for private dependency discussed above because, as we'll see below, economic theory prescribes state subsidies as one of the most powerful ways in which to address positive spillovers. Material, public support for childcare seems at odds with the complex system of private dependency enshrined in family law and deeply entrenched in societal norms.

Economic theory confronts this aversion to public support head on. It explains why an aversion to public support is not just unfair, but inefficient. The concept of spillovers has metaphorical as well as practical salience, reminding us that childcare is significant not only for individual children and families, but also for our communities and society at large.[190] The existence of spillovers also reinforces the moral case for increased state involvement with childcare.[191] Once we understand the significance of these social spillovers, we recognize our own incentives to engage in collective, strategic behavior—enjoying childcare's benefits without sharing in its costs.[192] From this perspective, society is free riding on childcare.[193]

At a cultural level, the economic lens has special expressive and normative significance for family privatization norms.[194] Recognizing the existence of a substantial childcare market and its failings has the potential to change the narrative about American childcare and the state's involvement with it. The market lens shifts our focus from what is *private* about raising children to what is *public*. It makes plain both the public benefits of childcare and its attendant public costs.[195] This new childcare narrative invites us to revisit our understanding of public spending on care. On the view of human capital theory, public expenditures on childcare aren't handouts; they're investments.[196]

Thus, perhaps ironically, economic analysis of our childcare market can broaden and enrich our understanding of public policies toward childcare.[197] This

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[190] Brinig, *supra* note 4, at 456.

[191] England & Folbre, *Who Should Pay*, *supra* note 89, at 195–96; Folbre, *Public Goods*, *supra* note 101, at 89.

[192] England & Folbre, *Who Should Pay*, *supra* note 89, at 202.

[193] England & Folbre, *Capitalism*, *supra* note 8, at 35; Fineman, *Cracking the Foundational Myths*, *supra* note 5, at 188; England & Forbe, *Who Should* Pay, *supra* note 89, at 195–96, 201–03; Folbre, *Public Goods*, *supra* note 101, at 86–87, 89. Understood another way, childcare is a subsidy to society in the form of addressing collective dependency that is necessary for society to endure. Fineman, *Cracking the Foundational Myths*, *supra* note 5, at 182–83. While beyond the scope of this Article, I note here that this justification for state support of caregiving implicates both paid and unpaid care. *See* Folbre, *Valuing Care*, *supra* note 101, at 92; Silbaugh, *supra* note 4, at 121.

[194] Folbre & Nelson, *supra* note 9, at 138; Silbaugh, *supra* note 4, at 85.

[195] The notion of childcare spillovers challenges "the children-as-pets approach" to children as consumption items, which individuals will create and care for if they derive utility from doing so. England & Folbre, *Who Should Pay*, *supra* note 89, at 197.

[196] *Id.* at 203.

[197] *Id.* at 204.

analysis illustrates that far from being simply a private, family concern, the way children are cared for and nurtured ought very much to be a public concern, with significant economic and moral implications for society. State involvement isn't only about enhancing efficiency;[198] it's also the right thing to do.[199]

Mindfully adopting an economic approach to the childcare market helps to overcome the incoherence and ambivalence that marks existing childcare regulation and policy. Embracing this approach not only recognizes a significant and legitimate role for government intervention in childcare markets, but also respects the primacy of diverse choices, allowing the market to reflect the individual preferences of families and childcare providers. I conclude this Article by considering how the United States might move toward a better functioning childcare market.

IV. ADDRESSING CHILDCARE MARKET FAILURE

My analysis thus far has suggested a reorientation of our childcare law and policy so as to better respond to the realities of our contemporary childcare market and its shortcomings. In this final Part, I explore the implications of economic theory for the design of state interventions.

My aim here is to begin a conversation about reconfiguring law and policy to foster a more efficient childcare market that supports and enhances socially optimal outcomes. I begin in general terms, with a theoretical exploration of economic prescriptions for spillovers and information problems. I then analyze existing childcare law and policy in light of these prescriptions. I conclude with thoughts on reform. Using revisions to the Child Care Development Fund (CCDF) program as a case study, I consider how our law and policy might evolve to respond more effectively to childcare market failure.

A. Market Failure and the State: Reimagining the State Role in Practice

One of the virtues of the economic model is that it provides not only a theoretical rationale for state intervention in markets, but also practical strategies to address specific facets of market failure.[200] In the case of the spillovers and information problems identified in Part III, demand for high-quality care will not

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[198] That's not to say that government intervention is the only—or always the best—approach to addressing market failure. In addition to government intervention, private actors and private law offer alternative or additional approaches to confronting market failure. *See* COLE & GROSSMAN, *supra* note 114, at 18–19.

[199] *See* McCluskey, *Politics of Economics*, *supra* note 6, at 215, 217 (noting state involvement would promote economic well-being); England & Folbre, *Who Should Pay*, *supra* note 89, at 204 (noting state involvement would be more equitable and more efficient).

[200] "Basic principles of welfare economics suggest that government intervention in the child care market would be warranted if the childcare market allocated resources inefficiently, feasible policies existed that could improve the allocation of resources, and the benefits of such policies exceeded their costs." BLAU, *supra* note 61, at 210.

increase unless families have better information about childcare quality, how to access it, how to monitor it, and stronger incentives to purchase it.[201]

This section explores the practical implementation of economic theory through state intervention. I begin with the threshold question of what policy focus should be the priority in shaping state intervention, and then turn to examine what types of intervention economic theory would prescribe for the predominant problems in our childcare market.

1. Revisiting Demand: Demand for What?

As I explained above, economists have identified low demand as the root of childcare market failure, because individual childcare transactions do not capture or reflect all of childcare's spillovers, and because families lack crucial information about childcare. And, as I will explore below, economics teaches that particular state interventions can help to address the market failure caused by this low demand. But demand for what? Any argument that government can and should intervene in the childcare market to affect demand must first address the threshold question of what, precisely, the focus of our childcare policies should be.[202]

The answer is not as obvious as it might seem. Childcare policy might pursue a number of goals, some of which may conflict. These goals might include: child development, facilitation of parental employment, and early intervention for disadvantaged children.[203] But policies aimed at ensuring the optimum *quantity* of hours necessary to support parental work will not necessarily—and often do not—yield the optimum *quality* of care.[204] And services directed solely at disadvantaged children—while critically important—would overlook other children who would benefit from quality improvements, and the broader benefits generated by investment in their early childhood education and care.

The economic response is that policy interventions to correct market failure should focus on the precise roots of that failure—in this case, low demand for *quality* childcare. Economists and child development researchers have established that the central failure in the childcare market relates to lower-than-optimal demand for higher *quality* care.[205] Childcare *quality* determines the future academic and social success of children that secures positive benefits not only for those children and their families, but also for society at large. It is childcare *quality* that is at the root of the childcare spillover problem. And it is information about childcare *quality*—what it

[201] *Id.*

[202] *See id.* at 125 (discussing both employment-related and child development-related programs).

[203] INVESTING IN CHILDREN REPORT, *supra* note 108, at 88.

[204] *See* BLAU, *supra* note 61, at 12, 49–50; INVESTING IN CHILDREN REPORT, *supra* note 108, at 88. Higher quality care, for example, typically requires greater investments of time and money by parents. BLAU, *supra* note 61, at 12. *But see* CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 27 (noting that functions of basic care and cognitive development have merged so that many childcare providers seek to provide both).

[205] *See* BLAU, *supra* note 61, at 12–13.

is, how to find it, and how to assure that one's child receives it—that is at the root of the information problems in our childcare market.[206]

That's not to say that other potential policy goals—parental employment and targeted interventions to assist our most disadvantaged children and families—are not worthwhile. Indeed, strong arguments for such interventions have been articulated on fairness, distributional, and social justice grounds.[207] And as I will discuss below, interventions that respond to quality-related market failure will undoubtedly reach vulnerable children and potentially influence parental employment incentives.[208] The focus of my analysis here, however, is what we can learn from economic theories of market failure, and what interventions that theory would prescribe for the state.[209]

Consistent with the well-developed economic and social science research on the childcare market and its failings, the focus of my analysis of market interventions is childcare quality.[210] With this threshold question answered, the discussion that follows considers particular interventions to address problems of spillovers and information imperfections.

2. Spillovers

Subsidies and regulation are potential remedies for the childcare market's positive externality problem. To understand the appeal of subsidies, recall that in the case of positive spillovers, consumers fail to account for all benefits generated by their consumption of a particular service, which in turn affects how much they demand and what they are willing to pay.[211] One way to address externalities is to alter consumer preferences so that their market transactions reflect not only the service's individual benefits but also its larger societal benefits.[212] In this context, the centrality of incentives in formulating legal policies that affect markets becomes apparent.[213] In the case of remedying positive externalities, the object is to induce

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[206] *See id.*

[207] *See, e.g.*, *supra* note 108 and accompanying text.

[208] Childcare subsidies that help defray a family's childcare expenses increase incentives to work outside the home, for example. BLAU, *supra* note 61, at 49.

[209] As Blau observes, employment-conditioned childcare interventions "cannot be justified by the claim that the child care market is inefficient"; it may be, "but not for the reasons associated with employment." BLAU, *supra* note 61, at 213.

[210] BLAU, *supra* note 61, at 12–13, 105, 220; *Child-Care Effect Sizes*, *supra* note 130, at 114; CEA, *supra* note 157, at 8, 16; PARENTS, *supra* note 76, at 33. Yet to answer this initial question about the normative focus of childcare policy invites another: if quality is to be the focus of our market interventions, what, exactly, is quality childcare and how do we measure it? BLAU, *supra* note 61, at 15; *see also supra* notes 64–66 and accompanying text.

[211] *See* BERNHEIM & WHINSTON, *supra* note 111, at 770 ("[I]nefficiencies arise because people fail to account for all the social costs and benefits of their actions").

[212] *Id.*

[213] *See* COLE & GROSSMAN, *supra* note 114, at 1–2; MERCURO & MEDEMA, *supra* note 97, at 43.

the consumer to act as if she will reap the internal *and* external benefits of the market transaction.

Subsidies address spillovers by providing a supplement equal to the marginal external benefit the transaction generates to society.[214] The direct provision of services, a form of subsidy, is another way to address concerns about positive external benefits.[215] The government frequently steps in to provide services itself in addition to—or in place of—the market in the case of "public" or "merit" goods.[216]

Although more frequently discussed in the context of information problems (and generally less popular with economists), quality regulations are another potential mechanism to raise the quantity of a service to socially optimal levels.[217] Specifically, to the extent childcare regulations are binding and enforced, they should drive lower-quality services out of the market, and/or induce providers to increase the quality of services they provide.[218]

3. *Information Problems*

In the case of information imperfections, state action can enhance efficiency by making information more transparent and available. Common market interventions include the imposition of minimum quality standards and regulations, and the provision of information to consumers.

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[214] BERNHEIM & WHINSTON, *supra* note 111, at 771; FRANK & BERNANKE, *supra* note 85, at 308–09.

[215] *See* BERNHEIM & WHINSTON, *supra* note 111, at 785, 789; CEA, *supra* note 157, at 11.

[216] BERNHEIM & WHINSTON, *supra* note 111, at 789; INVESTING IN CHILDREN REPORT, *supra* note 108, at 52.

[217] *See* BLAU, *supra* note 61, at 173; CEA, *supra* note 157, at 11; V. Joseph Hotz & Mo Xiao, *The Impact of Regulations on the Supply and Quality of Care in Child Care Markets* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 11873, 2005), *available at* http://www.nber.org/papers/w11873.pdf, *archived at* http://perma.cc/W6EB-UFDJ.

[218] *See* BLAU, *supra* note 61, at 181–82; Hotz & Xiao, *supra* note 217, at 7. Regulation tends to benefit those consumers with a strong preference for quality, but may disadvantage those with weaker quality preferences. BLAU, *supra* note 61, at 181. In addition, quantity controls are sometimes used to mitigate market failure caused by positive externalities. Quantity controls seek to remedy the externality problem by controlling the level of activity that produces it. *See* BERNHEIM & WHINSTON, *supra* note 111, at 769. Compulsory public education is one example of a quantity control used in conjunction with the direct provision of services. Because at least ten years of education generates socially optimal results, it is more straightforward and less expensive to require this level of education and provide it free of charge, rather than to simply provide private incentives via subsidies. *See id.* at 779–80; BLAU, *supra* note 61, at 161–62; INVESTING IN CHILDREN REPORT, *supra* note 108, at 66. Quantity controls, however, are problematic in a context like early childhood education and care because they could constrain parental choice in a setting in which there is a great diversity of preferences and about which there is considerable disagreement. *See* Harbach, *supra* note 2, at 278–82.

Frequently, information asymmetries are equalized by the imposition of minimum quality standards, which offset consumers' information deficits.[219] The theory is that regulations increase baseline quality and therefore reduce the uncertainty consumers face as a result of unequal information.[220] To the extent problems arise because consumers are unable to adequately monitor the quality of care their children receive, regulations can mitigate this problem as well.[221]

Another approach is to engage in direct efforts to educate consumers and provide them with information to make better-informed choices.[222] The state can undertake efforts to compel sellers to provide additional information about their products and services so as to reduce information gaps. The state can also "screen" services, establishing tests or benchmarks that induce providers to reveal information about quality.[223] And information asymmetries can be addressed via "signaling," in which a seller undertakes a particular activity—such as accreditation or licensing—that should provide enhanced information on quality to potential buyers.[224]

In conclusion, economic analysis of the childcare market prescribes a policy focus on quality childcare, which is at the heart of existing market failure. And market failure theory suggests three broad categories of state intervention to ameliorate problems with the childcare market: subsidies, regulations, and the provision of information.[225] I turn now to evaluate existing childcare law and policy in light of these prescriptions.

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[219] BERNHEIM & WHINSTON, *supra* note 111, at 21-8; INVESTING IN CHILDREN REPORT, *supra* note 108, at 35.

[220] CEA, *supra* note 157, at 11.

[221] *See id.* at 16–17.

[222] *See* BLAU, *supra* note 61, at 11–12; Mocan, *supra* note 70, at 744; INVESTING IN CHILDREN REPORT, *supra* note 108, at 4, 35.

[223] BERNHEIM & WHINSTON, *supra* note 111, at 21-22.

[224] FRANK & BERNANKE, *supra* note 85, at 341; BERNHEIM & WHINSTON, *supra* note 111, at 21-8, 21-10. Product warranties and screening companies like Consumer Reports provide this service for numerous goods sold in the American marketplace. BERNHEIM & WHINSTON, *supra* note 111, at 21-28; FRANK & BERNANKE, *supra* note 85, at 341.

[225] Although the focus of this project is on the state role in childcare markets, it is worth noting that private sector actions can also help to mitigate market failure and support healthy market functioning. We might, for example, reconceptualize childcare as a cost that employers shift to parents and families. *See* McCluskey, *Politics of Economics*, *supra* note 6, at 208. Capitalizing on pro-care trends in the private sector is another option. *See* England & Folbre, *Inequality*, *supra* note 189, at 141. Finally, some economists argue for the "re-privatization" of the economic benefits of children by, say, paying a parents' dividend through social security, or a "bounty" to parents whose childrearing yields spillover benefits to society. *See* England & Folbre, *Who Should Pay*, *supra* note 89, at 203; Folbre, *Public Goods*, *supra* note 101, at 89. Yet this path would push us to view children in increasingly instrumental terms, simply one of parents' "individual investments, part of their larger portfolio." England & Folbre, *Who Should Pay*, *supra* note 89, at 203–04.

B. Existing Childcare Law and Policy

Despite the lack of a coherent vision for the state role in our childcare market, both the federal and state governments interact with today's childcare market via subsidies, regulation, and the provision of information. As is obvious from the analysis above, however, these interventions have not been sufficient to counteract the market's spillover and information problems, and may even exacerbate them. In the discussion that follows, I evaluate and critique our existing childcare law and policies based on the economic recommendations explored above.

1. Subsidies

Both the federal and state governments have subsidies in place, primarily aimed at facilitating parental employment. But as currently configured, these subsidies do little to address childcare spillovers.[226]

At the federal level, the state supports childcare via subsidies and tax benefits. Beginning with the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the Child Care and Development Fund (CCDF) program has been the primary federal mechanism for delivering childcare subsidies.[227] Since

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[226] Moving beyond the issue of quality, existing funding streams fall woefully short of reaching eligible children and families. And the United States Department of Health and Human Services recently estimated that the number of children receiving childcare assistance will fall to a fifteen-year low in 2013. Hannah Matthews, *Recent Child Care Growth to Fade, Startling Drop in Assistance Projected*, CTR. FOR LAW & SOC. POLICY (Mar. 1, 2012), http://www.clasp.org/issues/child-care-and-early-education/in-focus/recent-child-care-growth-to-fade-startling-drop-in-assistance-projected, *archived at* http://perma.cc/6EHZ-G3VQ. For example, although the Child Care and Development Fund (CCDF) funds supports services for approximately two million children each year, it is estimated that only between 15 and 17% of eligible children actually access CCDF funding. *See* CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 35–36; CHILD CARE AWARE OF AM., CHILD CARE SUBSIDY POLICY: ACCESS TO WHAT? 7 (2012) [hereinafter ACCESS TO WHAT], *available at* http://www.naccrra.org/sites/default/files/default_site_pages/2012/subsidy_white_paper-_finalsept_17.pdf, *archived at* http://perma.cc/HKF8-ACAF. Because of funding constraints, Head Start only serves 60% of eligible families. CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 34. Similarly, recent reports detail that state governments are providing subsidies to fewer families than in the past. A recent report by the National Women's Law Center shows that, for the second year in a row, child care assistance policies in a majority of states left families worse off than the year before. *See* KAREN SCHULMAN & HELEN BLANK, NAT'L WOMEN'S LAW CTR., DOWNWARD SLIDE: STATE CHILD CARE ASSISTANCE POLICIES 2012, at 1 (2012), *available at* http://www.nwlc.org/sites/default/files/pdfs/NWLC2012_State ChildCareAssistanceReport.pdf, *archived at* http://perma.cc/CZD7-MU3Q. And even though the childcare tax benefit program represents the largest public investment in childcare, like other funding streams, this benefit program is in fact quite limited. Cohen, *supra* note 32, at 36.

[227] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 35. The CCDF actually refers to two separate federal funding streams for childcare—the Child Care Development Block

its inception, CCDF funding has primarily focused on enabling low-income parents and Temporary Assistance to Needy Families (TANF) recipients to work.[228] States also provide some childcare subsidies for low-income parents.[229]

Federal and state tax benefits tied to employment also help defray the cost of childcare.[230] The federal child and dependent care tax credit allows families to reduce their overall tax liability by a percentage of their childcare costs.[231] Low-income families who do not pay federal taxes cannot access this tax credit, however.[232] Alternatively, parents may use the Dependent Care Assistance Program ("DCAP"), an employer-based fringe benefit, to take a pre-tax salary deduction for childcare expenses.[233] But the DCAP has a limited impact because employers must elect to participate in the program (and few small employers do), and employees must also take advantage of the plan.[234]

The federal and state governments also subsidize childcare via the direct provision of services. Most of the federal government's direct provision of care comes through Head Start, long considered the flagship federal childcare program.[235] This program provides a comprehensive and holistic set of supports to low-income families including education, health, nutrition, and mental health services for

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Grant and Section 418 of the Social Security Act. *See* KAREN E. LYNCH, CONG. RESEARCH SERV., RL30785, THE CHILD CARE AND DEVELOPMENT BLOCK GRANT: BACKGROUND AND FUNDING, at 1 (2014), *available at* http://ffyf.org/wp-content/uploads/2014/05/RL30785-CCDBG-1-30-14.pdf, *archived at* http://perma.cc/M7XH-989N. Since the passage of the 1996 welfare reform legislation, these two streams have been consolidated and administered under the same rules. *Id.* at 2.

[228] LYNCH, *supra* note 227, at 2.

[229] Most of this funding comes from the federal Child Care and Development Block Grant (CCDBG), Temporary Assistance to Needy Families (TANF), the Social Services Block Grant, and some state funds. *See* CHILD CARE AWARE OF AM., CHILD CARE IN AMERICA: 2012 STATE FACT SHEETS 5 (2012) [hereinafter STATE FACT SHEETS], *available at* http://www.naccrra.org/sites/default/files/default_site_pages/2012/2012nationalsummary factsheets.pdf, *archived at* http://perma.cc/W7DH-FW9P.

[230] Some states have similar tax provisions to offset childcare expenses. *See* NAT'L WOMEN'S LAW CTR., FAMILY TAX CREDITS: STATE CHILD AND DEPENDENT CARE TAX PROVISIONS, TAX YEAR 2012 (2012) [hereinafter TAX PROVISIONS], *available at* http://www.nwlc.org/sites/default/files/pdfs/childanddependentcarecreditsfactsheet.pdf, *archived at* http://perma.cc/N8BJ-HKXW.

[231] Section 21 of the Internal Revenue Code creates a limited credit equaling a percentage of the taxpayer's childcare costs *if* these costs are incurred as a consequence of employment. I.R.C. § 21(b)(2)(A)(ii) (2012). For most middle-class workers, the applicable credit percentage will be 20%. RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 726 (2d ed. 2007). Some states have similar tax provisions to offset childcare expenses. *See, e.g.*, TAX PROVISIONS, *supra* note 230.

[232] LIKE THE MILITARY, *supra* note 1, at 13.

[233] The benefit is capped at $5,000. I.R.C. § 129(a)(2)(A). It applies to both on-site childcare facilities provided by employers and to cash reimbursements of an employee's childcare expenses. SCHMALBECK & ZELENAK, *supra* note 231, at 728.

[234] SCHMALBECK & ZELENAK, *supra* note 231, at 728–29.

[235] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 33.

children and their families.[236] It has been widely lauded as successfully intervening in the lives of at-risk children, improving regular academic advancement, increasing the likelihood of strong performance on cognitive tests, and enhancing social competence.[237] Because of funding constraints, however, the program only serves an estimated 60% of eligible families,[238] and this number will likely continue to shrink.[239]

From the standpoint of quality-related spillovers, the problem with most existing subsidy programs is they are keyed to employment, not quality. Incentivizing and facilitating parental employment is their primary focus, and subsidies are largely neutral as to the quality of childcare parents select.[240] Parents who receive TANF funds must, with few exceptions, work in order to receive benefits.[241] Consequently, the CCDF program historically has focused on enabling low-income parents (most frequently mothers) to work, rather than ensuring their children receive high-quality care.[242] Tax benefits are linked to work as well.[243] But the goals of encouraging employment and facilitating high-quality care don't always dovetail. Either type of subsidy—employment based or quality based—will reduce the cost of being employed.[244] But although employment-linked subsidies increase the *quantity* of care demanded, they don't increase the *quality* of care demanded.[245]

The same programs that link subsidies to employment have been mostly silent with respect to quality. While CCDF regulations have purported to impose health and safety requirements, most of these requirements were undefined and led to

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[236] *Id.*

[237] *Id.*

[238] *Id.* at 34.

[239] *See, e.g.*, Elle Moxley, *Some Communities Could Lose Head Start Programs If Automatic Federal Cuts Kick In*, STATE IMPACT (Feb. 26, 2013, 8:44 AM), http://stateimpact.npr.org/indiana/2013/02/26/some-communities-could-lose-head-start-programs-if-automatic-federal-cuts-kick-in/, *archived at* http://perma.cc/K8ZF-432B.

[240] BLAU, *supra* note 61, at 211–12. Blau estimates that two-thirds of our existing subsidy funds require parental employment but are silent with respect to quality. *Id.* at 216. The CCDF does require a minimum quality set-aside of 4%, and many states have exceeded that set-aside. LIKE THE MILITARY, *supra* note 1, at 34; *see also* CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 36 ("Not only has the CCDF provided subsidies and vouchers that enable families to select suitable childcare, it has also provided funding for quality-enhancement efforts . . . ."). Still, this percentage is a negligible fraction of the block grant funding, and an even smaller portion of the overall childcare market. LIKE THE MILITARY, *supra* note 1, at 34.

[241] *See* Harbach, *supra* note 2, at 291–92; LIKE THE MILITARY, *supra* note 1, at 33.

[242] *See* BLAU, *supra* note 61, at 12, 158 ("[T]he reformed child care subsidy program, the Child Care and Development Fund . . . is almost exclusively employment-related . . . ."); Cohen, *supra* note 32, at 37.

[243] BLAU, *supra* note 61, at 67, 98.

[244] *Id.* at 216.

[245] *Id.* at 210.

inconsistent implementation of the CCDF program nationwide.[246] The program allows parents considerable flexibility, including the ability to use vouchers, provided the selected programs meet licensing and regulatory requirements under state law.[247] The problem, however, is that *states* determine those licensing and regulatory standards and, as we'll see below, most states exempt significant segments of the childcare sector from licensing and regulation.[248] Consequently, the CCDF has not required that all federal funds be used in licensed settings.[249] And recent research indicates only one-third of all care funded by the CCDF is "of good quality."[250] Likewise, the child and dependent care tax credit and DCAP tax programs require no licensing or regulation, meaning high quality care is neither incentivized nor monitored.[251]

An economic approach to market failure suggests that we shift the focus of childcare subsidies, keying them to quality,[252] and thereby responding to the positive spillovers of the childcare market.[253]

2. Regulation and Oversight

Child development experts are frequent critics of the United States' existing system of childcare regulation.[254] Although parents reasonably assume government regulation steps in to control for quality and safety in the childcare market,[255] the reality of government licensing and oversight is limited and uneven. Overall standards are low. Many states do not apply existing regulations to family childcare providers, and most states inspect regulated providers only infrequently.[256]

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[246] Child Care and Development Fund Program, 78 Fed. Reg. 29,442, 29,466 (May 20, 2013) (to be codified at 45 C.F.R. pt. 98).

[247] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 35.

[248] A series of political compromises surrounding the CCDF resulted in this system, in which states set regulatory standards and can exempt many forms of care from regulation altogether. *See* LIKE THE MILITARY, *supra* note 1, at 30–31.

[249] ACCESS TO WHAT, *supra* note 226, at 5.

[250] 160 CONG. REC. H7474–75 (daily ed. Sept. 15, 2014) (statement of Rep. Bobby Scott).

[251] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 36–37.

[252] *See Child-Care Effect Sizes*, *supra* note 130, at 114; PARENTS, *supra* note 76, at 8.

[253] Blau suggests that alternative policies aimed at parental employment—if that is a policy goal—might include the Earned Income Tax Credit and a tax credit for families with children. BLAU, *supra* note 61, at 67.

[254] *See, e.g.*, BLAU, *supra* note 61, at 219–20 (discussing proposals by Professors Sharon L. Kagan and Nancy E. Cohen).

[255] LIKE THE MILITARY, *supra* note 1, at 7–8.

[256] *Id.*; *see also* NAT'L ASS'N OF CHILD CARE RES. & REFERRAL AGENCIES, THE ECONOMY'S IMPACT ON PARENTS' CHOICES AND PERCEPTIONS ABOUT CHILD CARE 11 (2010), *available at* http://www.naccrra.org/sites/default/files/publications/naccrra_publications/2012/economysimpactonparentschoices.pdf, *archived at* http://perma.cc/K4NG-STVV.

There are no universal, federal standards regulating the licensing or oversight of childcare. Although the federal government made attempts to establish minimal standards for health and safety through the years,[257] by 1980 all federal standards were eliminated. Since then, the licensing and regulation of childcare centers has been left entirely to the states. Federal deregulation has had a negative impact on childcare quality—discrepancies among states in quality standards has increased, and most states have raised childcare fees, reduced services, relaxed standards and requirements, and lightened enforcement efforts.[258]

At the state level, substantial variation exists as to which categories of childcare are regulated, how it is regulated, and how rigorously regulations are enforced.[259] The consensus is that state licensing and oversight systems fall dramatically short of industry benchmarks that gauge childcare quality.[260] In general, the state approach

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[257] By 1960, the federal government required that childcare programs receiving federal funds meet at least basic health and safety requirements. CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 37. Likewise, because programs during this era had to be licensed in order to receive federal funds, states began to develop various licensing schemes. *Id.* As early as the late 1960s, however, states had already manifest significant differences in terms of their approach to licensing and regulation standards. *Id.* In 1968, the United States Office of Child Development published the Federal Interagency Day Care Requirements (FIDCR). *Id.* The level of generality embodied in the standards made them difficult to enforce, and compliance was never mandated, although noncompliance technically was grounds for losing federal funds. *Id.* at 37–38. By 1980, however, the FIDCR standards were eliminated, leaving individual states alone responsible for licensing, regulating, and monitoring childcare programs. *Id.* at 38.

[258] *Id.* at 38.

[259] BLAU, *supra* note 61, at 173–74.

[260] *See, e.g.*, STATE FACT SHEETS, *supra* note 229, at 6 ("Our conclusion after six years of studying child care regulations and oversight is that we still cannot say with confidence that America's children are protected by state licensing and oversight systems. Nor can we say that child care policies are in place to help young children learn and be ready for school."). There is no shortage of quality metrics available in the childcare context. *E.g.* NAT'L ASS'N OF CHILD CARE RES. & REFERRAL AGENCIES, WE CAN DO BETTER: NACCRRA'S RANKING OF STATE CHILD CARE CENTER REGULATIONS AND OVERSIGHT 8 (2011) [hereinafter WE CAN DO BETTER], *available at* http://www.naccrra.org/sites/default/files/default_site_pages/2011/wcdb_sum_chpts1-5.pdf, *archived at* http://perma.cc/XBD6-QFSQ; *Introduction to the NAEYC Accreditation Standards and Criteria*, NAEYC, http://www.naeyc.org/academy/primary/standardsintro, *archived at* http://perma.cc/C87P-B944 (last visited Jan. 16, 2015); *Recommended Practices for Nannies*, INT'L NANNY ASS'N, http://www.nanny.org/resources/agencies/recommended-practices-for-nannies, *archived at* http://perma.cc/2C6R-W8U2 (last visited Jan. 29, 2015). The National Association for the Education of Young Children (NAEYC), for example, has promulgated voluntary guidelines based on the expert study and advice of childcare researchers, providers, and policymakers. *Introduction to the NAEYC Accreditation Standards and Criteria*, *supra*. The NAEYC is a group of childcare researchers, providers, and policymakers that study and work to improve childcare quality. The group first established quality guidelines in 1985, and has revised them repeatedly. *See* CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 39. Childcare programs may voluntarily adopt the NAEYC standards and seek NAEYC accreditation, a signal to

has been to set a floor that aims to prevent harm to children rather than aspiring to developmentally rich childcare programs.[261] All states and the District of Columbia regulate center-based care, but overall the standards these centers must meet are inadequate when compared to standards recommended by national accreditation agencies.[262]

Even more concerning, family childcare providers, who provide care for children in private residences, are regulated inconsistently or not at all. There is great variability in what is considered family childcare among states, and many exempt certain forms of home-based arrangements from licensing requirements altogether.[263] Because informal arrangements are so widely used by American families, experts estimate that as much as 90% of the childcare provided in the United States is unregulated.[264] And family childcare is the most common form of care accessed by families with children under six whose mothers work.[265] Most nonparental care provided to children in their own homes is also exempt.[266]

Whether regulations can improve overall quality depends on how many providers they monitor, how stringent they are, and how rigorously they are enforced.[267] Little wonder, then, that existing studies suggest that regulations have

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parents that their childcare is of high quality. *Id.* Similarly, Child Care Aware (previously the National Association of Child Care Resource & Referral Agencies) has developed fifteen research-based standards for childcare licensing and oversight requirements, and has issued several reports evaluating states on meeting these benchmarks. *See* WE CAN DO BETTER, *supra*, at 8. The licensing requirements are meant to set out the minimum health, safety, and program standards for centers and family childcare that provide for unrelated children on a regular basis for a fee. *Id.* at 9. They include: staff/child ratio requirements, group size requirements, qualification requirements for center directors, qualification and training requirements for lead teachers, comprehensive background check requirements, requirements for child development programming, licensing guidelines for basic health and safety standards, and requirements to encourage parent involvement. *Id.* at 16–17. Oversight policies gauge compliance with state licensing and program requirements. *Id.* at 9. They include a requirement that all centers and family childcare homes caring for unrelated children on a regular basis be licensed; a requirement of four annual visits by licensing, health, and fire personnel; maximum ratios of program to licensing staff requirements; minimum education requirements for licensing staff; and requirements that oversight information be made available to parents. *Id.* at 17.

[261] Phillips & Zigler, *supra* note 26, at 4. Although a portion of the CCDF goes toward improving childcare quality in the states, they have broad discretion in determining how to spend block grant funds, and each state therefore crafts its own standards and oversight policies. *See* STATE FACT SHEETS, *supra* note 229, at 6; OFFICE OF CHILD CARE, CHILD CARE AND DEVELOPMENT FUND 1 (2012), *available at* http://www.acf.hhs.gov/sites/default/files/occ/ccdf_factsheet.pdf, *archived at* http://perma.cc/V3XK-NBJH.

[262] CLARKE-STEWART & ALLHUSEN, *supra* note 32, at 40.

[263] *Id.* at 40–42.

[264] *Id.* at 41.

[265] *Id.* at 42.

[266] Child Care and Development Fund (CCDF) Program, 78 Fed. Reg. 29,442, 29,472 (May 20, 2013) (to be codified at 45 C.F.R. pt. 98).

[267] BLAU, *supra* note 61, at 181.

only modest effects on both quality and cost in childcare markets.[268] The current regulatory scheme suffers from spotty applicability and enforcement.[269] Regulations also reflect the diverse quality preferences of different states.[270] And they are limited to managing structural quality features, which are proxies for, rather than indicators of, process quality.[271]

In sum as measured by these criteria, existing state regulations are destined to be ineffectual at improving quality: they apply to too few providers, their aspirations are meager, and they are poorly enforced.

3. *Information*

The information states make available to families concerning childcare quality and accessibility varies, but tends to be sporadic and incomplete.[272] Although most states have established agencies to oversee childcare licensing and regulation and provide some information online, there typically is no central method or system used to provide this information to parents and families.

In terms of locating childcare, most states provide an online search function that allows parents to search for providers by location and type.[273] But many state websites rely on links to outside resources like Child Care Aware and local resource

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[268] *See id.* 207.

[269] *See id.*; Hotz & Xiao, *supra* note 217, at 2–3.

[270] BLAU, *supra* note 61, at 210.

[271] *See id.*; Hotz & Xiao, *supra* note 217, at 2.

[272] *See* Child Care and Development Fund (CCDF) Program, 78 Fed. Reg. 29,442, 29,460–63 (May 20, 2013) (to be codified at 45 C.F.R. pt. 98).

[273] *See, e.g.*, *Information for Parents*, CAL. DEP'T OF SOC. SERVS., http://ccld.ca.gov/PG524.htm, *archived at* http://perma.cc/7JWQ-4HR3 (last visited Jan. 16, 2015); *Search for Child Care Center or Home*, TEX. DEP'T OF FAMILIES & PROTECTIVE SERVS., http://www.dfps.state.tx.us/Child_Care/Search_Texas_Child_Care/ppFacilitySearchDayCare.asp, *archived at* http://perma.cc/YGZ8-LWZT (last visited Jan. 16, 2015); *Welcome to Vermont Child Care Information Services*, VT. DEP'T FOR CHILDREN & FAMILIES, http://www.brightfutures.dcf.state.vt.us/, *archived at* http://perma.cc/95ZX-LMXU (last visited Jan. 16, 2015); *Wisconsin's Regulated Child Care Search*, WIS. DEP'T OF CHILDREN & FAMILIES, http://dcf.wisconsin.gov/childcare/licensed/search.HTM, *archived at* http://perma.cc/3NSY-VDKF (last visited Jan. 16, 2015); S.C. CHILD CARE: EARLY EDUC. & CARE, http://www.scchildcare.org/, *archived at* http://perma.cc/D362-S98P (last visited Jan. 16, 2015).

and referral organizations.[274] And some state websites are geared toward childcare providers rather than parents and families.[275]

As for information about childcare quality, some states make health and safety information for licensed providers available to parents online, but many do not.[276] A growing trend among states is the implementation of quality rating and improvement systems (QRIS), which screens providers, providing more information to parents concerning the quality of care offered in various settings and allowing them to make comparisons.[277] As of 2012, twenty-eight states were operating QRISs, fourteen were in the process of developing them, and another seven states were testing such systems.[278] A significant limitation in existing QRISs is that they are, for the most part, voluntary.[279] Thus, the number of participating childcare providers is small relative to the overall number of licensed providers in most states.[280] Only a few states require every licensed provider to participate in QRISs, and eleven tie subsidy rates to their quality rating systems.[281]

Likewise, there are a number of national and state-level voluntary accreditation organizations that allow childcare providers to signal quality. For example, the National Association for the Education of Young Children (NAEYC), the "world's largest organization working on behalf of children," works to improve early childhood education through a comprehensive accreditation system for early childhood learning programs. The accreditation process involves significant self-evaluation by the program seeking accreditation, as well as evaluation and

[274] *See, e.g.*, *Child Care Resource and Referral Agencies*, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., http://ocfs.ny.gov/main/childcare/referralagencys.asp, *archived at* http://perma.cc/87YY-5A5V (last visited Jan. 16, 2015); *Child Day Care*, VA. DEP'T OF SOC. SERVS., http://www.dss.virginia.gov/family/cc/, *archived at* http://perma.cc /R8WN-AGR5 (last visited Jan. 16, 2015); *Online Facility Compliance Search*, KAN. DEP'T OF HEALTH & ENV'T, http://www.kdheks.gov/bcclr/capp.htm, *archived at* http://perma.cc/KWM2-GSJC (last visited Jan. 15, 2015).

[275] *See, e.g.*, *Child Care Resources*, N.J. DEP'T OF CHILDREN & FAMILIES, http://www.state.nj.us/dcf/families/childcare/index.html, *archived at* http://perma.cc/GVR5 -9WUW (last visited Jan. 16, 2015); *Division of Early Childhood Development*, MD. STATE DEP'T OF EDUC., http://www.marylandpublicschools.org/MSDE/divisions/child_care/, *archived at* http://perma.cc/J4W9-QLLL (last visited Jan. 16, 2015); *Early Childhood Services in North Dakota*, N.D. DEP'T OF HUMAN SERVS., http://www.nd.gov/dhs/services/ childcare/faq/parents.html, *archived at* http://perma.cc/ZA29-X38M (last visited Jan. 15, 2015); ILL. DEP'T OF CHILDREN & FAMILY SERVS., http://www.state.il.us/dcfs/daycare/index .shtml, *archived at* http://perma.cc/BL3V-9TTX (last visited Jan. 16, 2015).

[276] *See* Shannon Rudisill, *Keeping Children Safe and Helping Families Find Quality Child Care*, FAMILY ROOM BLOG (May 16, 2013), http://www.acf.hhs.gov/blog/2013/05/ keeping-children-safe-and-helping-families-find-quality-child-care, *archived at* http://perma.cc/6PGR-CC4J.

[277] ACCESS TO WHAT, *supra* note 226, at 6–7.

[278] *Id.* at 6.

[279] *Id.*

[280] *Id.* at 7.

[281] *Id.*

observation by NAEYC assessors.[282] But only a fraction of childcare providers are nationally accredited.[283]

Thus, despite the existence of subsidies, some regulation, and the provision of information, our existing childcare law and policy are poorly calibrated to respond to market failure. I turn now to consider how we might reform childcare law and policy to better address the market's shortcomings.

C. Toward a More Efficient Childcare Market

Existing law and policy are unresponsive to the roots of childcare market failure in both theory and practice. In this section, I explore possible reforms to subsidy, regulation, and information programs that would better address our childcare market defects, and also consider larger institutional design questions.

1. Subsidies

To respond to childcare spillovers more effectively, the state would better account for childcare spillovers by overhauling and increasing subsidies for quality care.[284]

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[282] *See Overview of the Four Steps*, NAEYC, http://www.naeyc.org/academy/pursuing/fourstepoverview, *archived at* http://perma.cc/S3BW-3XF3 (last visited Jan. 16, 2015); *see also* KREADER ET AL., *supra* note 71, at 3; Hotz & Xiao, *supra* note 217, at 14–15 (describing NAEYC organization and its accreditation process).

[283] Child Care and Development Fund (CCDF) Program, 78 Fed. Reg. 29,442, 29,462 (May 20, 2013) (to be codified at 45 C.F.R. pt. 98).

[284] The form of subsidies could be refined to address demand, supply, or both. On the demand side, subsidies could take a number of forms that would act to incentivize family demand for higher quality childcare. Policy could take the form of increased tax credits, or vouchers and credit accounts that parents could use to purchase higher quality childcare. *See* BLAU, *supra* note 61, at 216 (describing existing policy proposals by economists); *Child-Care Effect Sizes*, *supra* note 130, at 114; VANDELL & WOLFE, *supra* note 108, at 87. On the supply side, state policy could fashion subsidies in a number of ways that would increase the number and continuity of qualified care providers. The state might, for example, provide subsidies directly to childcare providers, which would reduce the net price of higher quality care for families. *See* BLAU, *supra* note 61, at 64, 160; VANDELL & WOLFE, *supra* note 108, at 87; CEA, *supra* note 157, at 16. Government funds could also be used to create incentives for providers to remain in the childcare field, or provide tuition subsidies and college loan forgiveness for students who pursue academic studies in early childhood education. VANDELL & WOLFE, *supra* note 108, at 87. The state has employed similar programs in the context of anticipated shortages in other critical services, such as nursing and medical schools. *Id.* And the state might increase investment in childcare training and professional development, and in efforts to assist providers in becoming licensed and complying with regulations. *Child-Care Effect Sizes*, *supra* note 130, at 114; VANDELL & WOLFE, *supra* note 108, at 87–90; PARENTS, *supra* note 76, at 9; CEA, *supra* note 157, at 16. Supply side subsidies, however, could present the same types of inefficiencies that arise in the context of

In contrast to many existing funding streams, a revamped, market-failure approach would focus on quality rather than simply parental employment. From a market failure perspective, the crucial adjustment is that any subsidies provided, whether to families or childcare providers, should be deliberately linked to increasing the quality of childcare in the market—for example, requiring that subsidy monies be used to purchase childcare from only licensed or accredited providers. This approach would incentivize families to demand quality care, and encourage childcare providers to offer high quality care to attract consumers.[285]

And subsidies could not only be redesigned, but increased.[286] State subsidies and/or direct provision of care could be either partially or completely subsidized, depending on income.[287] A retooled subsidy program—whether partial or comprehensive—might take any number of forms.[288] Within a means-tested system, care might be completely free of charge for some families, and available based on a sliding scale tied to income for others.[289] Subsidies could be phased out altogether at higher income levels.[290] An expanded subsidy scheme could comprise a variety of care categories, including direct provision through local school districts, existing community-based programs, and a system of vouchers that would be accepted by other certified childcare providers.[291] And consistent with values of family pluralism

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public schools: low incentives to make effective use of resources, resulting in higher costs and less efficient activity. BLAU, *supra* note 61, at 219.

[285] *See, e.g.*, BLAU, *supra* note 61, at 209, 221–22; *Child-Care Effect Sizes*, *supra* note 130, at 114; VANDELL & WOLFE, *supra* note 108, at 87; PARENTS, *supra* note 76, at 9; CEA, *supra* note 157, at 11. Studies indicate that families respond to subsidies, and that they are most effective when they are provided directly to providers or are available to families as childcare payments become due. VANDELL & WOLFE, *supra* note 108, at 87. They also indicate that the supply of care would rise to meet increased demand, and that improving care would not be prohibitively expensive. *See* BLAU, *supra* note 61, at 210; CEA, *supra* note 157, at 11.

[286] The move toward universal, high-quality preschool is a promising trend in this direction, and public support is mounting. In September 2014, 70% of Americans polled said they would favor the use of federal funds to make high-quality preschool available for all American children. Jeffrey M. Jones, *In U.S., 70% Favor Federal Funds to Expand Pre-K Education*, GALLUP, http://www.gallup.com/poll/175646/favor-federal-funds-expand-pre-education.aspx?version=print, *archived at* http://perma.cc/7WE8-WXKE (last visited Mar. 3, 2015).

[287] One attraction of the subsidy approach is that it is scalable, and need not be all or nothing. Policies might be carefully focused on low-income families, yet still have a significant impact on raising the overall quality of childcare. *See* BLAU, *supra* note 61, at 232.

[288] VANDELL & WOLFE, *supra* note 108, at 93.

[289] *See, e.g.*, BLAU, *supra* note 61, at 218–19 (describing such a system within the policy recommendations of Professors Zigler and Matia Finn-Stevenson).

[290] *See, e.g.*, *id.* at 216–17 (describing Professor Barbara R. Bergmann's phase-out plan).

[291] *See* BLAU, *supra* note 61, at 221–22; VANDELL & WOLFE, *supra* note 108, at 93. Vouchers could be means tested and phased out at higher income levels. They would have value only if used to purchase childcare. BLAU, *supra* note 61, at 221–22.

and choice, subsidies would be adequate to permit parents to choose among quality options for their children.[292] At the other end of the spectrum, childcare could be provided by the government for all who desire it, free of charge.[293]

The elephant in the room is, of course, how to fund increased subsidies, especially in times of economic restraint.[294] The cost of a universal system would far exceed a system of more targeted subsidies. Advocates of this system recognize that current tax credits and subsidies would have to be eliminated to fund even a portion of a universal system.[295]

One middle ground approach might follow the Department of Defense's lead, which has a system in place to ensure universal access to quality childcare for service members.[296] All military families have access to sponsored childcare providers, which include center-based care, family childcare, school-age care, and part-day preschool.[297] The fees they pay are based on family income[298] and are matched by equal amounts of appropriated funds to enhance quality.[299] The program also provides fee assistance to families who cannot access military installation-based childcare.[300] In terms of quality oversight, installation programs must be inspected regularly,[301] and all care provided by the military or receiving military funding must meet minimum quality and safety standards.[302]

In refashioning subsidy design, we must remain attentive to two other potential downsides. First, public funding raises concerns about "crowd out"—the extent to which public services replace private ones.[303] It's true that some of the private care crowded out is likely to be parent care,[304] although some predict that a decline in the overall *quantity* of time spent on parental care may be accompanied by an increase

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[292] PARENTS, *supra* note 76, at 9; *see also* Harbach, *supra* note 2, at 281.

[293] *See, e.g.*, INVESTING IN CHILDREN REPORT, *supra* note 108, at 90 (citing the *crèche* system in France as an example).

[294] Revamped subsidy programs also would raise a number of practical challenges at the implementation level, which federal, state, and local bodies would have to work out. Implementation questions include: how to deliver vouchers or subsidies to eligible families; addressing any shortages of childcare during transition to the new system; and the relationship between a new federal subsidy approach and state and local systems. BLAU, *supra* note 61, at 228–30.

[295] *See* VANDELL & WOLFE, *supra* note 108, at 93; *see also* BLAU, *supra* note 61, at 222 (stating that the proposed system would replace the entire childcare subsidy system).

[296] *See* LIKE THE MILITARY, *supra* note 1, at 36–42.

[297] *Id.* at 40–41.

[298] *Id.* at 41.

[299] *Id.*

[300] *Id.*

[301] *Id.* at 32.

[302] *Id.* at 41–42.

[303] *See* INVESTING IN CHILDREN REPORT, *supra* note 108, at 5 n.3, 90.

[304] *See* BLAU, *supra* note 61, at 49 ("[A] child care subsidy that defrays some or all of the mother's child care expenses increases the incentive to be employed."); INVESTING IN CHILDREN REPORT, *supra* note 108, at 90. It's not clear that such crowd out would necessarily be best for children in all instances. *Id.* at 3.

in its *quality.*[305] A second challenge is that of "take up"—government funded services frequently fail to reach all eligible demographics, and may have especially low take up among some groups because of lack of information, transaction costs associated with making means determinations, or lack of supply at particular geographic locations.[306] While increased information can get at some take-up challenges, others likely will remain.

2. Regulations

Enhanced regulation of childcare would also respond to the market's quality related problems by ensuring that all providers meet baseline standards and regulating out low-quality providers.[307] In light of the dearth of federal standards, we might consider nationalizing certain baseline standards that all childcare providers must meet. For example, federal monies could be tied to regulatory provisions that define minimum levels of quality childcare and include other specific requirements, such as background checks, fingerprinting, and basic and continuing education requirements.[308] And more conscientious enforcement would positively impact quality and be a more reliable check for less-informed families.[309]

Increased regulations aren't necessarily a silver bullet, however. Economists tend to be wary of regulations that directly interfere with markets because of their potential for unintended consequences. Rather than simply incentivizing preferences, regulations require significant resource investments to enforce and impose costs on consumers and providers.[310] Consequently, they may increase costs, lower supply, and push parents toward "underground" providers—that is, unlicensed family childcare.[311] And the costs to providers and consumers may be relatively hidden.[312] Moreover, regulations raise the specter of government failure: they are implemented through a political process, vulnerable to rent seeking and corruption, and enforcement may be far from perfect.[313]

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[305] *See* England & Folbre, *Capitalism*, *supra* note 8, at 41; Harbach, *supra* note 2, at 269.

[306] INVESTING IN CHILDREN REPORT, *supra* note 108, at 90. State-sponsored, universal programs would overcome take-up problems because presumably parents would be informed, there would be no costs associated with eligibility determinations, and the care would be provided by the state. *Id.*

[307] BLAU, *supra* note 61, at 174, 179. Many child development experts urge increased regulation and inspection of childcare providers, including mandating minimum structural requirements. *See Child-Care Effect Sizes*, *supra* note 130, at 114; VANDELL & WOLFE, *supra* note 108, at 87; CEA, *supra* note 157, at 10.

[308] PARENTS, *supra* note 76, at 9.

[309] *Id.*

[310] *See* BLAU, *supra* note 61, at 173, 207, 215.

[311] *Id.* at 219; Hotz & Xiao, *supra* note 217, at 2.

[312] BLAU, *supra* note 61, at 207.

[313] Folbre & Nelson, *supra* note 9, at 137.

Economists V. Joseph Hotz and Mo Xiao recently studied the effects of state regulation on the quality and supply of childcare.[314] Their findings present a mixed picture of regulation: on one hand, state regulations increase the quality of services provided, as measured by the rate of accreditation.[315] On the other, regulations reduce the number of center-based childcare providers.[316] What is more, high-income areas experience the greatest increases in quality, while low-income areas experience the greatest reduction in providers.[317] Some of the children who are crowded out of center-based care because of higher prices move to family childcare providers, who care for more children but do not increase staffing.[318] Because family childcare is much less likely to be licensed or otherwise regulated, quality tends to be lower, leading to less optimal outcomes for those children and leading to negative societal spillovers.[319]

Thus, lawmakers must confront a series of trade-offs in considering the imposition of more exacting regulations: documented increases in quality but a reduction in center-based care, potentially pushing lower-income children into less regulated settings.[320] Consequently, subsidy and regulation reform ought not be an either/or proposition. To adequately address spillover and information problems, while offsetting the potential crowd-out effects of regulation, a mixed system of subsidies and regulations, or a system of universal access, will be necessary.[321]

3. *Information*

Perhaps the most straightforward way to ameliorate information deficits about childcare is to simply provide enhanced information to parents and families.[322] To effectively address documented problems, information provided should include the features and benefits of high-quality care, how to discern it, and where to find it.[323]

In terms of information about the features and benefits of high-quality care, states could develop expanded public information campaigns to provide this information directly to parent consumers.[324] One could imagine, for example, an information campaign designed to reach parents as they and their children reach various milestones in early childhood—for example, at birth and via regular child

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[314] Hotz & Xiao, *supra* note 217, at 1.

[315] *Id.* at 6.

[316] *Id.* at 5.

[317] *Id.*

[318] *Id.*

[319] *Id.* at 32.

[320] *Id.* at 35–36; *see also* England & Folbre, *Inequality*, *supra* note 189, at 143.

[321] CEA, *supra* note 157, at 16.

[322] *See* BLAU, *supra* note 61, at 214, 220; VANDELL & WOLFE, *supra* note 108, at 87; CEA, *supra* note 157, at 9.

[323] *See* BLAU, *supra* note 61, at 214; VANDELL & WOLFE, *supra* note 108, at 78; INVESTING IN CHILDREN REPORT, *supra* note 108, at 4, 35; CEA, *supra* note 157, at 9–10.

[324] *See* CEA, *supra* note 157, at 10.

wellness and vaccination appointments.[325] Indeed, partnering with healthcare providers who will most frequently see parents with their children during early years could be an especially fruitful collaboration.

To help parents discern the level of care provided by various programs, the state could screen childcare providers in a number of ways, all of which would be enhanced by more exacting and extensive state regulation. The universal implementation of mandatory QRISs that report quality levels for all licensed providers to parents would significantly increase the information available to them when selecting among various childcare options. At a minimum, states might require all licensed providers to report certain "structural" features of the care they provide, such as adult-child ratios, group sizes, and education and training, and make this information publicly available.[326]

States might also establish certification programs to signal quality, or subsidize private signaling through certification and accreditation of providers.[327] Accreditation could be expanded to include family day care and professional nannies/babysitters, which frequently fly under the radar of existing regulations.[328]

Finally, to assist parents with locating childcare, the state could increase investment in childcare referral agencies, which assist families in understanding, identifying, and securing quality childcare in their communities.[329] States could also encourage private employers to provide resource and referral services to assist employees in locating quality care via subsidies or tax credits.[330]

In conclusion, economic theory and scholarship on market failure provide a broad menu of reforms that would better address the quality problems that plague America's childcare markets. But as I explored above, policymakers frequently will find themselves making choices among competing goals, and weighing relative costs and benefits.[331] In addressing childcare market failure, the whole of subsidies, regulation, and information is greater than the sum of its parts. The best strategy for addressing this failure is to take an integrated approach, combining all three initiatives to capitalize on their synergies and offset their negative effects. The final institutional design question considers the level at which these strategies should be implemented—federal or state.

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[325] *See* BLAU, *supra* note 61, at 221.

[326] VANDELL & WOLFE, *supra* note 108, at 70, 74, 87.

[327] BLAU, *supra* note 61, at 220–21; VANDELL & WOLFE, *supra* note 108, at 70, 74, 87.

[328] BLAU, *supra* note 61, at 221.

[329] Child Care Aware is one such organization. Child Care Aware of America describes itself as the "nation's leading voice for child care." *About Us*, CHILD CARE AWARE OF AM., http://childcareaware.org/about-us, *archived at* http://perma.cc/D63A-PGW2 (last visited Jan. 16, 2015). Child Care Aware of America also advocates for childcare policies that positively impact children and families. *See id.*

[330] VANDELL & WOLFE, *supra* note 108, at 90.

[331] MERCURO & MEDEMA, *supra* note 97, at 51.

4. Meta-Level Institutional Design: Federalism Questions

Policy design questions concerning subsidies, regulation, and information raise important issues concerning the locus of childcare law and policymaking: individual states versus the federal government. Some are wary of too much control at the federal level,[332] while others advocate a nationalized approach to childcare regulations.[333] Indeed, federalism debates have long been one source of the ambivalence and inaction manifest in political debates around childcare.[334]

On one hand, locating primary control at the federal level could yield significant benefits. A federal commitment to increasing childcare quality would serve a strong expressive function in emphasizing the importance of childcare quality, not only for children and their families but also for society as a whole.[335] National standards would help overcome many of the problems caused by the varying and overall low threshold regulatory standards currently in place at the state level.[336] And because significant federal funds have been—and will continue to be—devoted to childcare subsidies, affording federal authorities increased control would help ensure those funds are being used appropriately.[337]

On the other hand, states are well suited to experiment with a variety of approaches to policy design, and excessive control at the federal level could hinder innovation, competition, and choice.[338] Regulatory oversight at the federal level, especially over such a localized[339] and fragmented market, likely would be unwieldy and more expensive than oversight at the state level.[340] Other objections tap into larger debates about the role of the federal government in family life.[341]

A middle way might be to tie federal monies to baseline federal requirements concerning the licensing and regulation of childcare providers in all states, thereby federalizing basic childcare standards across the country, but without completely nationalizing all childcare regulation. Congress has taken this approach in multiple

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[332] *See, e.g.*, BLAU, *supra* note 61, at 215; INVESTING IN CHILDREN REPORT, *supra* note 108, at 4 (discussing economics Professor Anne Witte's proposition that federally funded childcare programs are inefficient and inequitable).

[333] *See, e.g.*, PARENTS, *supra* note 76, at 9.

[334] *See supra* notes 26–31 and accompanying text.

[335] Phillips & Zigler, *supra* note 26, at 5.

[336] *Id.*

[337] *Id.*

[338] Eloise Pasachoff, *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 PENN ST. L. REV. 349, 361–62 (2006); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 265 (2005) (arguing the economic benefits of federalism are choice, competition, and innovation).

[339] Hotz & Xiao, *supra* note 217, at 11.

[340] BLAU, *supra* note 61, at 215.

[341] Phillips & Zigler, *supra* note 26, at 6. A focus on localism and concerns about federal overreach have long been featured prominently in family law and policy debates. *See* Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 182–83 (2009).

contexts in which child well-being has been of concern, mandating a floor of standards and requirements that all states must meet, but leaving states ample room to experiment with different approaches above that floor. Child support is a good example: Congress has mandated that all states have child support guidelines in place, but states are free to develop specific details of those guidelines.[342] The menu explored above is expansive enough to present federal and state governments with an array of possible permutations, and flexible enough to allow for experimentation, competition, and choice at the local, state, and federal levels.

Although mostly overshadowed by more contentious political issues, recent congressional reforms to the CCDF provide a case study in responding to childcare market failure, illustrating one approach to refining childcare law and policy. In the discussion that follows, I evaluate the reforms' potential to improve our childcare market.

D. Case Study: The Child Care and Development Block Grant Act of 2014

This Article suggests that to counteract spillover and information problems, childcare law and policy should incorporate a complementary system of enhanced subsidies, regulation, and information, all tied to childcare quality. Congress recently has taken important steps in this direction with the reauthorization of the CCDF program.

On November 19, 2014, President Barack Obama signed the Child Care and Development Block Grant Act of 2014 (the "2014 Act") into law.[343] Congressional sponsors sought to "renew, improve, and strengthen" the 2014 Act's predecessor, the Child Care and Development Block Grant of 1990.[344] In contrast to earlier legislation, which did not mention quality of care in its purposes,[345] the 2014 Act emphasizes what the Senate Committee on Health, Education, Labor, and Pensions has characterized as a "renewed focus on the quality of care."[346] Noting the CCDF program had historically been understood primarily as a work support program for

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[342] *See, e.g.*, Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645; Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343; Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305; Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

[343] Child Care and Development Block Grant Act of 2014, Pub. L. No. 113-186, 128 Stat. 1971; *Major Actions: S. 1086 – 113th Congress (2013–14)*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/senate-bill/1086/actions, *archived at* https://perma.cc/EH79-UVFJ (last visited Mar. 5, 2015) [hereinafter *Major Actions*]. States must develop revised CCDF plans in consultation with the State Advisory Council on Early Childhood Education and Care and implement revisions within three years. *See* 42 U.S.C. § 9858c (2014).

[344] S. REP. NO. 113-138, at 1 (2014).

[345] Child Care and Development Block Grant Act of 1990, 42 U.S.C. § 9858 (1994).

[346] S. REP. NO. 113-138, at 5.

low income women, the committee stressed the need to "orient the program as one that is equally, if not more, committed to the healthy physical, cognitive, social, and emotional development of children . . . ."[347] Likewise, the Obama administration's priorities for reauthorization focused on improving quality.[348]

The CCDF reauthorization represents a pivotal opportunity to increase the emphasis on childcare quality, and indeed, the committee meant for the reauthorization to set a base level of quality expectations.[349] Consistent with this renewed focus, among the 2014 Act's purposes is assisting states in "improving the overall quality of child care services" and improving "child care and development of participating children,"[350] with a special emphasis on expanding quality care for infants and toddlers.[351]

Although not framed explicitly as market reform, the 2014 Act sets out a number of quality-based subsidy, regulatory, and information enhancements that should augment the performance of the childcare market. The 2014 Act also reflects congressional consideration of institutional design questions relating to federalism and parental choice.[352] I consider each of these aspects of the new law below.

1. Subsidies

As discussed above, subsidies can serve as an important antidote to market spillover and information problems. The 2014 Act's purposes and provisions serve an instrumental and expressive function in redirecting the focus of childcare subsidies toward quality, taking important, if limited, first steps in linking subsidies to childcare quality. Though it does not condition the use of CCDF funds on a particular level or category of quality care, the 2014 Act nevertheless includes a variety of quality-related strings attached to the receipt of CCDF support.

Most specifically, the 2014 Act provides a number of opportunities for states to key compensation rates to the quality of care provided. These opportunities include higher compensation rates to incentivize and shore up the provision of quality care to underserved children, infants and toddlers, children with disabilities, and children receiving care during nontraditional hours.[353] States must also conduct reliable surveys of market rates for local childcare and describe how they will set rates, explicitly taking into account the cost to provide higher quality care.[354] And states may prescribe different rates based on, among other things, a determination that different rates would better enable parents to choose high-quality care to fit their

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[347] *Id.* at 12.

[348] *Id.* at 4.

[349] *Id.* at 12–13.

[350] 42 U.S.C. § 9857 (2014).

[351] S. REP. NO. 113-138, at 13. Infants and toddlers constitute almost a third of the children receiving CCDF funded childcare. *Id.*

[352] *Id.* at 11–12, 14.

[353] 42 U.S.C § 9858c(c)(2)(M); S. REP. NO. 113-138, at 18, 20.

[354] 42 U.S.C. § 9858c(c)(4).

family's needs.[355] The 2014 Act also requires states to spend increasing percentages of CCDF funding to enhance childcare quality.[356] And recognizing the importance of market forces, the 2014 Act directs states to facilitate public-private partnerships so as to increase the supply and quality of childcare statewide.[357]

The Senate Committee also recognized that childcare quality depends on the caliber of the childcare workforce.[358] Consequently, the 2014 Act requires states to implement training and professional development requirements for CCDF providers that promote healthy childhood development.[359] They must also develop and implement strategies to provide technical business assistance to all childcare providers to expand, supply, and improve quality.[360]

Thus, in contrast to its predecessor, the new law specifically links funding to a variety of activities relating to childcare quality, and builds in accountability for state agencies to ensure they are working toward improving quality care and its supply. It does not, however, mandate that federal monies be used only to provide care of a particular quality.

2. *Regulation and Oversight*

To better respond to market failure, childcare regulations should be more exacting, apply to more providers, and be more rigorously enforced. Consistent with this insight, the Senate Committee determined the 1990 Act's requirements were insufficient to ensure the basic health and safety of children.[361] The 2014 Act adds new requirements concerning licensing, health and safety training, monitoring, and criminal background checks.

First, states must certify they have in place a system of effective childcare licensing, and must provide a detailed description of their requirements and how they are enforced.[362] If CCDF funds are paid to license-exempt providers (who

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[355] *Id.* § 9858c(c)(4)(C)(ii)(IV).

[356] *Id.* § 9858e. These quality set-asides must be devoted to at least one of the following activities: supporting the training and professional development of childcare workers; improving development or implementation of early learning and developmental guidelines; developing, implementing, or enhancing a tiered quality rating system for childcare providers; improving quality and supply of infant and toddler care; establishing or expanding a statewide system of childcare resource and referral services; facilitating compliance with state regulatory requirements; evaluating and assessing the quality and effectiveness of childcare programs and services offered; supporting childcare providers in voluntary accreditation; supporting state or local efforts to develop or adopt high-quality program standards; or other activities designed to improve quality of care. *Id.* § 9858e(b).

[357] *Id.* § 9858c(c)(2)(P).

[358] S. REP. NO. 113-138, at 13.

[359] 42 U.S.C. § 9858c.

[360] *Id.*

[361] S. REP. NO. 113-138, at 6 (stating that the "current form is inadequate to ensure the basic health and safety of children").

[362] 42 U.S.C. § 9858c.

provide care for almost one in five CCDF children),[363] states must further explain why such exemptions do not endanger children's health, safety, or development.[364]

Second, states must develop and implement a number of additional state-wide requirements and policies, including enforced health and safety requirements for all CCDF providers, [365] childcare disaster plans, [366] and early learning and developmental guidelines for children ages birth to kindergarten.[367]

Third, within two years of the statute's enactment, states must have enforcement policies and practices in effect for the regulation and licensing of CCDF providers. For licensed providers, qualified state inspectors must perform at least one prelicensure inspection for health, safety, and fire prevention, and at least one unannounced inspection for compliance with all health, safety, fire, and state licensing standards per year.[368] The same inspectors must also perform an annual inspection of exempt providers for compliance with health, safety, and fire standards.[369]

Fourth and finally, an important enhancement in the 2014 Act is the imposition of mandatory, comprehensive criminal background checks for childcare providers and their employees. The 2014 Act requires all childcare providers licensed, regulated, or registered under state law, or receiving CCDF funds, to conduct criminal background checks on employed or prospective childcare staff members.[370] These childcare providers cannot hire or employ individuals who refuse to consent to background checks, knowingly make false statements, are registered sex offenders, have been convicted of a violent felony or drug-related offense within the last five years, or have been convicted of a violent misdemeanor against a child.[371]

While an important first step, these reforms are nevertheless limited. Although all states must have effective childcare licensing in place, the 2014 Act does not require licensing of family childcare providers, one of the most prominent sectors of the childcare market, and one of the most frequently unregulated. Further, although the 2014 Act requires all CCDF providers comply with baseline health and safety

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[363] S. REP. NO. 113-138, at 16.

[364] 42 U.S.C. § 9858c. They must also provide information on the child-to-provider ratio standards for CCDF providers, and the secretary of the Department of Health and Human Services may offer guidance on appropriate ratios. *Id.*

[365] *Id.* Health and safety topics must include: preventing and controlling infectious diseases, preventing sudden infant death syndrome and safe sleeping practices, preventing and responding to allergic reactions, building and premises safety, preventing shaken baby syndrome and head trauma, emergency preparedness, handling and storing hazardous materials, safe transportation, first aid and CPR, and minimum health and safety training appropriate to providers. *Id.*

[366] *Id.*

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] *Id.* § 9858f. The background check requirement does not apply to care providers who are related to the children to whom they provide care. *Id.*

[371] *Id.*

requirements, it does not require states move beyond this basic "floor" of safety to the kinds of enhanced structural requirements that are correlated with childcare quality. Moreover, to the extent these requirements apply only to CCDF providers, they would reach only slightly more than 20%[372] of the estimated 2.3 million childcare providers in the United States.[373]

3. *Information*

To offset information problems, market-based reforms would include more transparent and educational information about childcare. Congress intended the 2014 Act to encourage states to provide information to facilitate informed childcare choices, and included a number of specific requirements designed to enhance consumer information.[374]

First, states must provide consumers with information on the availability and quality of childcare.[375] Second, states must publish licensing and inspection data, including monitoring and inspection reports and instances of death, serious injuries, and substantiated child abuse that occur in childcare settings each year.[376] Third, states may use CCDF funds to augment the level of information provided to families.[377] Finally, at the national level, the 2014 Act requires the Department of Health and Human Services (HHS) to operate a high-quality and accessible toll-free hotline and website to publicize childcare information and assist families in locating safe, quality care, with a range of options, that best suits family needs. The HHS

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[372] Child Care and Development Fund (CCDF) Program, 78 Fed. Reg. 29,442, 29,442 (May 20, 2013) (to be codified at 45 C.F.R. pt. 98) (estimating 500,000 providers participating in CCDF Program).

[373] *Id.* at 29,477 (estimating total number of paid childcare providers in the United States).

[374] 42 U.S.C. § 9858.

[375] Under the 2014 Act, states must certify that they provide information to CCDF families and the broader public, including: information about provider availability; information about provider quality, including any available QRIS ratings; a state website describing processes for investigating, licensing, and monitoring providers; available assistance to purchase childcare; additional means of securing childcare assistance; research and best practices in child development; and state policies on children's behavioral health. *Id.* § 9858c.

[376] *Id.* And states must make this information available in a user-friendly, accessible format, organized by provider. *Id.*

[377] The Act permits the use of CCDF funds to establish or support a system of childcare resources and referral organizations to provide parents with consumer education about the full range of childcare options available, to work directly with CCDF families in making choices that are appropriate for their children and are of high quality, to collect data and provide information regarding the supply of and demand for childcare in particular communities, and to establish public-private partnerships to increase childcare quality and supply. *Id.* Among the quality set-aside options that states may pursue are the development of QRIS systems and support for voluntary provider accreditation efforts. *Id.*

must also provide references to local resource and referral organizations, state information about childcare subsidy programs, and other financial supports.[378]

4. Federalism

As explored above, childcare law and policy design raises difficult line-drawing questions concerning the state-federal balance of power. In a reflection of these concerns, the Senate Committee stressed the new legislation was designed to preserve state flexibility;[379] indeed, the goal of allowing maximum state flexibility is the first explicit purpose of the 2014 Act.[380]

In a subsection entitled "No Federal Control," the 2014 Act stipulates that the federal government cannot mandate, direct, control, or condition a state's early learning and development guidelines.[381] And although states are required to use a percentage of CCDF monies for quality set-asides, rather than mandating particular activities, the 2014 Act provides states with an expansive menu of quality-enhancing options, requiring only that they spend set-asides on at least one of these activities.[382] Indeed, as to quality set-asides, the 2014 Act is explicit that this requirement does not authorize the HHS secretary to mandate specific state childcare quality activities.[383] And above the floor of inspections put in place by the 2014 Act, states are free to determine what level of frequency and intensity of monitoring is most appropriate for children in their communities.[384] Notably, the 2014 Act contains no specific process or structural quality requirements, nor does it mandate the licensing of particular categories of care. That discretion—and thus the ability to exempt large segments of the childcare market from regulation—remains solely with the states.

5. Parental Choice

Consistent with the market-based analysis in part III, the 2014 Act makes clear the legislation is not designed to supplant family childcare choices. To the contrary, the purposes of the 2014 Act include promoting parents' choice and empowering them to make their own decisions as to the childcare best suited to their family's needs,[385] and parental choice remains a "guiding principle of the program."[386]

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378 *Id.* § 9858g.

379 S. REP. NO. 113-138, at 1 (2014).

380 42 U.S.C. § 9858.

381 *Id.* § 9858c.

382 *Id.*

383 *Id.*

384 S. REP. NO. 113-138, at 7.

385 42 U.S.C. § 9858; S. REP. NO. 113-138, at 11.

386 S. REP. NO. 113-138, at 12; *see also* 160 CONG. REC. 7477 (daily ed. Sept. 15, 2014) (statement of Rep. Ted Rokita) ("I know that parents, not the Federal Government, are best positioned to choose child care providers, and this legislation ensures parents will have power over Federal bureaucracies, which are no substitute for a family.").

In conclusion, the 2014 Act, the most significant refinement to the CCDF program since its reorganization as part of the 1996 welfare reform law,[387] marks a significant improvement for childcare law and policy. It represents an important step toward integrated reform combining subsidies, regulation, and information—all focused on quality—that would enhance the functioning of the childcare market. The law might also serve as a useful template for broader reform at the national and state levels. One of the most positive aspects of the legislation is its lack of controversy.[388] In contrast to earlier legislative efforts, there were no invocations of the family privacy rhetoric that stymied earlier attempts at federal childcare policy reform.

Still, the 2014 Act is also notable for what it doesn't do: require federal funds be paid only to licensed and/or monitored providers, reform the tax-based subsidy system, create a system of universal access, mandate oversight of currently unlicensed childcare providers, or strengthen regulation beyond a floor of health and safety. These issues remain for legislators—both state and federal—to take up and consider.

V. CONCLUSION

Childcare matters. At the individual level, childcare impacts children's social and cognitive development, and predicts a range of better or worse outcomes for children depending on the quality of early childcare they receive. These outcomes have broader spillover effects, including on our workforce, tax base, and criminal justice system. And newer economic literature expands childcare's reach even

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[387] *See* LYNCH, *supra* note 227, at 2 (describing the childcare reforms of 1996).

[388] *See* 160 CONG. REC. 7475 (daily ed. Sept. 15, 2014) (statement of Rep. George Miller) ("We . . . recognize a growing national bipartisan consensus about the value of children being placed in high-quality, safe environments during their early learning years."); *see also* Allie Bidwell, *Child Care Grant Program to Sail Through Senate*, U.S. NEWS & WORLD REPORT (Nov. 17, 2014, 5:13 PM), http://www.usnews.com/news/articles/2014/11/17/federal-child-care-and-development-block-grant-program-to-pass-senate, *archived at* http://perma.cc/C8QK-TQFG. The Senate bill was heralded as a significant bipartisan victory and original Senate version out of committee passed by a vote of 96–2. *See Major Actions*, *supra* note 343. An amended version passed the House of Representatives by unanimous consent. *See* Press Release, Senator Barbara A. Mikulski, Mikulski Calls on Senate to Pass Her Bipartisan Bill to Help American Families Access Safe, Affordable and Quality Child Care (Nov. 12, 2014), *available at* http://www.mikulski.senate.gov/newsroom/press-releases/mikulski-calls-on-senate-to-pass-her-bipartisan-bill-to-help-american-families-access-safe-affordable-and-quality-child-care, *archived at* http://perma.cc/JCW2-X3KE. The House version ultimately passed the Senate by a vote of 88–1. *See* Press Release, Senator Barbara A. Mikulski, Mikulski Heralds Senate Passage of Her Bipartisan Bill to Help American Families Access Safe, Affordable, Quality Child Care that Gets Kids Ready for School (Nov. 17, 2014), *available at* http://www.mikulski.senate.gov/newsroom/press-releases/mikulski-heralds-senate-passage-of-her-bipartisan-bill-to-help-american-families-access-safe-affordable-quality-child-care-that-gets-kids-ready-for-school, *archived at* http://perma.cc/UC3F-3DV4.

further to demonstrate that it is an important economic investment and key to economic development in our communities.

By uncovering the public aspects of childcare and childcare markets, this project demonstrates that government aversion to a more prominent role in childcare is both unrealistic and anomalous. Our law and policy must come to terms with the realities of today's childcare market. In the real world, markets are imperfect. The childcare market that has emerged to fill gaps in parental and family-based care is no exception. In the case of market failure, we must overcome our aversion to government intervention—whether in markets, generally, or families specifically—and recognize that government has an important and legitimate role to play. Our childcare market is too big—and too important—to fail.