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NORTH CAROLINA LAW REVIEW

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Volume 101 | Number 5

Article 7

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6-1-2023

## Education as Childcare

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### Recommended Citation

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## EDUCATION AS CHILDCARE\*

CAITLIN MILLAT\*\* & MELISSA MURRAY\*\*\*

*American parents have their feet in two camps: one, the vast, state-sponsored project of education, and another, the highly privatized world of childcare. Much has been made of the fact that there are few public supports for families and childcare. But what often goes unstated is that the provision of public education effectively serves as a significant “care” subsidy. To be sure, most are loath to frame public education in this way, but as the recent COVID-19 pandemic lays bare, in fact, the provision of public education does serve as critical childcare scaffolding for families, enabling workplace participation and productivity. The crisis of caregiving that resulted when families lost access to in-person education—for many their sole state subsidy for the provision of care—revealed the ways in which education and childcare are necessary bedfellows.*

*Although education and childcare, two sides of the childrearing coin, share deep roots in American society, they have, since the early twentieth century, been disaggregated. Though education and childcare occupy separate spheres, the pandemic has challenged us to reevaluate the ways in which education and care interact both with one another and with the state. Drawing on a history in which education and childcare were understood as unified, this Article considers how these two core aspects of childrearing might again be brought together as part of a system of public provision for families. More particularly, it suggests that the time is right to reconsider not only the role of education and childcare vis-à-vis the state, but also the ways in which education and childcare comprise dual parts of a spectrum of care.*

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### INTRODUCTION

In the span of just two years, the COVID-19 pandemic radically reshaped significant portions of American life. Of course, most of this transformation had a pronounced negative impact. Millions of Americans faced economic hardship, food or housing insecurities, or job losses, while others lost loved ones or experienced their own significant health events. And in addition to feeling more isolated than ever, Americans have experienced declining mental health alongside a loss of trust in the government and their fellow citizens to act in service of the collective good.<sup>1</sup>

But importantly, some positive changes emerged as institutions refashioned themselves in the pandemic’s wake. For example, some policies introduced as part of pandemic recovery packages, such as the child tax credit, significantly improved American lives, even above pre-pandemic levels.<sup>2</sup> In many private businesses, employers adopted flexible work arrangements, telework and remote options, and additional support for mental and physical health.<sup>3</sup> Some of these entitlements are likely to survive the pandemic era to

1. Patrick van Kessel, Chris Baronavski, Alissa Scheller & Aaron Smith, *In Their Own Words, Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), <https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-covid-19-pandemic/> [https://perma.cc/9FHP-4MDE].

2. See Anna North, *It’s a Terrifying Time To Have Kids in America. It Doesn’t Have To Be This Way*, VOX (June 9, 2022, 7:00 AM), <https://www.vox.com/the-goods/2022/6/9/23159624/kids-covid-pandemic-formula-anxiety-2022> [https://perma.cc/RAR8-YUMG].

3. Susan Lund, Anu Madgavkar, James Manyika, Sven Smit, Kweilin Ellingrud & Olivia Robinson, *The Future of Work After COVID-19*, MCKINSEY & CO. (Feb. 18, 2021), <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19> [https://perma.cc/CH7A-67WC].

become a regular part of the workplace landscape.<sup>4</sup> And at both local and national levels, aid groups banded together to share resources, build community, and advocate for structural change.<sup>5</sup> In this way, the pandemic, though incredibly disruptive, has also served as a powerful catalyst for change and reimagining long-held beliefs, allegiances, and structures.

In the spirit of reimagination, this Article argues for rethinking the relationship between the family and the state, and specifically, the relationship between education and childcare. As the Article explains, for American children, and by extension, their parents, the bulk of childhood is divided between two spaces: home and school. Home is the site of childcare, which is provided by the family. School is the site of education, which is provided by the state.

For years, responsibility for caregiving or childrearing has rested with the family, with the state taking little interest in this core function, beyond intervening when it is not being performed or is being performed poorly. To the extent the state is involved in the development of children from childhood to adulthood, it has been in the provision of education—specifically the provision of public schooling.<sup>6</sup>

But this sharp division between childrearing and education—home and school—is a relatively recent phenomenon. For much of American history, childrearing and education were not disaggregated, but rather were understood as a unified whole to be undertaken by the family. That is, in addition to the provision of care, families also were responsible for educating children for the duties of adult citizenship. Indeed, education was understood to be part and parcel of *childrearing*.

Over time, however, this shifted. At the turn of the century, as the ranks of immigrants swelled, public education came to be understood as a potent tool for nation-building and cultural assimilation.<sup>7</sup> Accordingly, education was disaggregated from childrearing and responsibility for providing education was reassigned from the family to the state. While once inseparable, education and childcare are now siloed, with education a core function of the state, and childcare the private charge of the family.

Today, however, particularly post-pandemic, both public education and childcare are critically important and seriously under threat. Public education

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4. See Andrea Alexander, Aaron De Smet, Meredith Langstaff & Dan Ravid, *What Employees Are Saying About the Future of Remote Work*, MCKINSEY & CO. (Apr. 1, 2021), <https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/what-employees-are-saying-about-the-future-of-remote-work> [https://perma.cc/3KHW-86VG].

5. See North, *supra* note 2.

6. See *infra* Part II.

7. See Stephen L. Carter, *Religious Freedom as if Family Matters*, 78 U. DET. MERCY L. REV. 1, 4 (2000).

is besieged by persistent underfunding, teacher shortages, passionate—even violent—backlash to instructional content, and attempts at privatization.<sup>8</sup> All of these developments have led to record-low enrollment in public schools, further imperiling the prospect of public education. Childcare facilities are similarly facing shrinking enrollment and staff shortages, making it hard to operate in an increasingly competitive economic climate.<sup>9</sup> Indeed, more than half of families with young children live in a childcare desert where childcare options are limited or nonexistent.<sup>10</sup> And even where care options are available, they are often financially out of reach.<sup>11</sup>

In many ways, the pandemic laid bare both the importance of both institutions in American life, as well as their precarity. During the pandemic, many childcare providers closed and many school districts were forced to limit the availability of in-person instruction.<sup>12</sup> As a consequence of these closures, families experienced new challenges balancing work and childcare responsibilities. The crisis made clear the degree to which childcare functions as part of our economic infrastructure. But less obviously, it also made clear the degree to which education functions as a form of childcare. Beyond losing an

8. See Moriah Balingit, *Shortages of Staff and Equipment Continue To Plague Schools, New Data Shows*, WASH. POST (Dec. 6, 2022, 12:01 AM), <https://www.washingtonpost.com/education/2022/12/06/teacher-supply-shortage-free-lunch/> [<https://perma.cc/R3EH-P2EY> (dark archive)] (noting that almost half of the nation's public schools were facing teacher shortages and had difficulty buying supplies due to inflation); Edward Graham, *Who Is Behind the Attacks on Educators and Public Schools?*, NEA NEWS (Dec. 14, 2021), <https://www.nea.org/advocating-for-change/new-from-nea/who-behind-attacks-educators-and-public-schools> [<https://perma.cc/3KRT-5T8U>] (noting that conservative groups protesting discussions on race in the classroom sent death threats to educators and forced their way into school board meetings across the nation); Valerie Strauss, *Privatization of Public Education Gaining Ground, Report Says*, WASH. POST (Apr. 18, 2022, 10:29 AM), <https://www.washingtonpost.com/education/2022/04/18/privatization-of-public-education-gaining-ground/> [<https://perma.cc/WE99-UWRJ> (dark archive)] (“The movement to privatize public education is gaining ground in the United States at a time when traditional public school districts are facing some of the most severe challenges ever.”). For a discussion of the ways in which privatization efforts surged amidst the pandemic, see Melissa Murray & Caitlin Millat, *Pandemics, Privatization, and the Family*, 96 N.Y.U. L. REV. ONLINE 106, 135–41 (2021).

9. See *infra* notes 136–38 and accompanying text.

10. See Rasheed Malik, Katie Hamm, Won F. Lee, Elizabeth E. Davis & Aaron Sojourner, *The Coronavirus Will Make Child Care Deserts Worse and Exacerbate Inequality*, CTR. FOR AM. PROGRESS (June 22, 2020), <https://www.americanprogress.org/article/coronavirus-will-make-child-care-deserts-worse-exacerbate-inequality/> [<https://perma.cc/NP3C-D94H>]. A childcare desert is defined as “a census tract with more than three children under age five for every licensed childcare slot.” *Id.*

11. See Jason DeParle, *When Child Care Costs Twice as Much as the Mortgage*, N.Y. TIMES (Oct. 9, 2021), <https://www.nytimes.com/2021/10/09/us/politics/child-care-costs-wages-legislation.html> [<https://perma.cc/U5KT-NLHL> (staff-uploaded, dark archive)].

12. See, e.g., Anna North, *The Coronavirus Will Cause a Child Care Crisis in America*, VOX (Mar. 10, 2020, 4:00 PM), <https://www.vox.com/2020/3/10/21171807/coronavirus-schools-closed-closing-covid-19-kids> [<https://perma.cc/96TY-UMYG>]; Steven Jessen-Howard & Simon Workman, *Coronavirus Pandemic Could Lead to Permanent Loss of Nearly 4.5 Million Child Care Slots*, CTR. FOR AM. PROGRESS (Apr. 24, 2020), <https://www.americanprogress.org/article/coronavirus-pandemic-lead-permanent-loss-nearly-4-5-million-child-care-slots/> [<https://perma.cc/L9DZ-6FLU>].

effective vehicle for teaching children reading, math, and history, the loss of in-person schooling meant the loss of reliable, free childcare and community support for parents. In this way, the pandemic offers a new dimension to the divide between education and care.

This Article suggests that the long-held approach to education and childcare can, and indeed must, be reevaluated in post-pandemic America. Part I discusses the ways in which family dependency has historically been privatized, highlighting traditional models of dependency and the ways in which the family has stepped in to assume the mantle of childcare. Part II surfaces the development of public education as a core state function and an inadvertent care subsidy, tracing the unification of education and childcare in the trope of the Republican Mother to the disaggregation of these two functions in the rise of the common school movement. Part II also explores the ways in which the COVID-19 pandemic laid bare the artificial siloing of childcare and public education. Part III considers the future of education, childcare, and each institution's relationships to each other, the state, and the family. This Article then briefly concludes, arguing that the pandemic offers a unique opportunity to reconsider not only the contours of public education and care, but also the collaborative space they together occupy in the project of raising American children.

### I. MAKING CARE "PRIVATE"

In American society, the family historically has formed as a means of privatizing dependency. Indeed, the American state has long afforded protection to a "private realm of family life which the state cannot enter."<sup>13</sup> But in addition to providing the family with the freedom and privacy to self-govern, the state also has vested the family with the responsibility to provide care for its members.<sup>14</sup> As this part explains, the American welfare state has historically relied heavily on the family to accommodate dependency, with little public support for shouldering the burden of care.

#### A. *Models of Dependency*

The state structures for accommodating dependency and care within society typically lie between two extremes, with one end "ensuring collectively that the needs of those who cannot care for themselves are met," and the other

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13. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); see *Troxel v. Granville*, 530 U.S. 57, 68 (2000) ("[T]here will normally be no reason for the State to inject itself into the private realm of the family.").

14. Murray & Millat, *supra* note 8, at 113. For a discussion of the family's position in the American liberal welfare state, see *id.* at 113–16.

assigning this responsibility to private parties or institutions.<sup>15</sup> Sociologist Gøsta Esping-Andersen has identified three regimes, or “welfare states,”<sup>16</sup> that exist along this continuum—the social democratic welfare state, the corporatist welfare state, and the liberal welfare state—each defined by their methods for allocating responsibility for care between the state, the market, and the family.<sup>17</sup>

At one end of this continuum, the social democratic welfare state model emphasizes universalism, or the “decommodification of social rights” as a means of providing a class-blind standard of living for all citizens through direct government engagement.<sup>18</sup> In this model, exemplified by countries like the Netherlands and much of Scandinavia, the state is central to accommodating dependency and the costs of “familyhood” through direct assistance and public subsidy.<sup>19</sup>

Somewhere in the middle of the continuum is the corporatist welfare state, which focuses on preserving an order in which rights are correlated with “class and status.”<sup>20</sup> In this model, seen in Western European countries, the market and the family are primary actors in providing care. Importantly, however, the market holds no special appeal as an agent in social provision. Even as the market furnishes vehicles for accommodating dependency, the state is “perfectly ready to displace the market as a provider of welfare.”<sup>21</sup>

At the other end of the continuum is the “liberal welfare state” model exemplified by countries such as the United States. In this model, the market is a central player in the provision of care. In the liberal welfare state, citizens are “primarily . . . individual market actors.”<sup>22</sup> The state bears little to no role in accommodating dependency, but instead assigns most of the responsibility

15. See *id.* at 114 (citing Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1992 (2018)).

16. Caitlyn Collins defines “welfare states” as “interventions by the state in civil society to alter social and market forces.” CAITLYN COLLINS, MAKING MOTHERHOOD WORK: HOW WOMEN MANAGE CAREERS AND CAREGIVING 2 (2019). Collins, for example, has articulated four such welfare-state regimes, including social democratic, familialist, conservative, and liberal. *Id.* at 15–16.

17. See GØSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM 26–28 (1990).

18. *Id.* at 27–28.

19. See *id.* at 141 (observing that one of the goals of this model is to “square the dilemmas of having children and working”).

20. *Id.* at 27.

21. *Id.*

22. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1122 (2019) (quoting John Myles, *How To Design a ‘Liberal’ Welfare State: A Comparison of Canada and the United States*, 32 SOC. POL’Y & ADMIN. 341, 344 (1998)). Indeed, under this model, in the United States, the “strong expectation . . . is that families will go it alone.” Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 220 (2017) [hereinafter Eichner, *The Privatized American Family*].

for care—from reproduction to death—to the family.<sup>23</sup> Accordingly, families are expected to shoulder these caregiving responsibilities—and the financial burden that they entail—independently through the market participation of their members.<sup>24</sup> And to the extent the state offers subsidies to accommodate dependency, they are typically quite meager, and tend to ratify market distributions through their connection to an individual’s earnings, income, and workforce or military participation.<sup>25</sup>

### B. *The Family as Childcare*

The ethos of the American liberal welfare state translates into little social policy that supports or subsidizes the project of caregiving. Instead, the responsibility and burdens of caregiving reside entirely with the family and its members. As Caitlyn Collins explains, the United States is “one of the few nations with no mention of the word ‘family’ in its constitution”; it has no federal body specifically dedicated to family issues, or explicit national family policy.<sup>26</sup> Instead, the provision of care has been delegated to individual families.<sup>27</sup> And, as Nancy E. Dowd has described, any economic supports for families are framed as a “system of temporary support”—that is, a stop-gap measure en route to a permanent, family-funded standard of living.<sup>28</sup>

It is perhaps unsurprising, then, that there is—and historically has been—almost no formal public infrastructure to support childcare.<sup>29</sup> Indeed, as the COVID-19 pandemic made clear, the absence of caregiving support is, as Naomi Cahn and Linda McClain have explained, one of the many “cracks in

23. Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 84 (2016); see also Stolzenberg, *supra* note 15, at 1992 (observing that U.S. policy “requires American families to bear most of the costs of social reproduction”).

24. Stolzenberg, *supra* note 15, at 1992 (quoting Eichner, *The Privatized American Family*, *supra* note 22, at 214); see also MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 34 (2010) (describing the legal approach to families in the United States as one that views dependency as “properly confined within families, where the autonomous adults who head these families will properly manage it”).

25. Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 26 (2014).

26. COLLINS, *supra* note 16, at 2.

27. Nancy E. Dowd has documented the ways in which this outsourcing of care to the family results in “highly unequal” care outcomes for children. See Nancy E. Dowd, *Children’s Equality Rights: Every Child’s Right To Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1377–86 (2020).

28. *Id.* at 1385.

29. And traditionally, measures that have been deployed were intended to have temporary effect and also relied on traditional gender roles: women in the sphere of domestic duties of childbearing and childrearing, men as breadwinners and the external protectors of the home. See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 102–17 (2002) [hereinafter Murray, *Whatever Happened to G.I. Jane?*] (discussing various World War II-era interventions).



our systems.”<sup>30</sup> Absent state support for childcare, families must navigate economic, structural, and logistical barriers to cobble together a patchwork system of care sufficient to meet their needs. And in constructing these independent structures of care, families must engage in their own individual, often fraught, calculations—balancing economic constraints, surging childcare costs, professional obligations, transportation, and time expended to locate quality childcare options.<sup>31</sup>

These constraints also exist against a backdrop of law and policy that both informs and complicates purported “choices” about childcare options. As many commentators have observed, the U.S. government never has demonstrated a commitment to providing early childhood, prenatal, or reproductive health care, issuing resources related to child nutrition, or otherwise funding children’s needs, particularly in early childhood.<sup>32</sup> And even when the state crafts policies designed to facilitate caregiving, these “subsidies” may be laden with particular normative preferences. As Meredith Johnson Harbach explains, through a potent combination of tax policies that express a preference for parental childcare, public assistance and welfare policies that provide two-parent families a greater range of childcare choices, and family leave policies that prioritize parents’ ability to participate in childrearing and care, the state makes clear its desire to ration childcare work according to marital status and class.<sup>33</sup> Far from offering neutral subsidies aimed at providing families with more childcare options and choices, these policies “channel[] some parents into the home and homemaking, and others in the market.”<sup>34</sup> And often, these policy preferences are underlaid with normative assumptions that assign responsibility for caregiving to the women within the family.

The state’s laissez-faire approach to funding, resourcing and providing childcare has long reflected its preference for “mothercare” and its rejection of an “other-than-mother” provision of care.<sup>35</sup> Indeed, in the rare circumstances in which the state has historically intervened to provide funding for care, it has

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30. Naomi R. Cahn & Linda C. McClain, *Gendered Complications of COVID-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 45 (2021).

31. See Meredith Johnson Harbach, *Outsourcing Childcare*, 24 YALE J.L. & FEMINISM 254, 264 (2012).

32. See, e.g., Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 827–33 (2009) (discussing “four major disconnects between U.S. policy and the needs of both children and women”: (1) healthcare during prenatal and early childhood; (2) childcare and early childhood education; (3) lack of paid maternity and paternity leave; and (4) child nutrition).

33. See Harbach, *supra* note 31, at 285–97.

34. *Id.* at 296.

35. Abby J. Cohen, *A Brief History of Federal Financing for Child Care in the United States*, 6 FUTURE CHILDREN 26, 27–28 (1996).

done so anemically, deploying childcare resources as a gap-filler to solve other social and economic problems, such as a diminished workforce.<sup>36</sup>

### C. *Subsidizing Care and Facilitating Work*

#### 1. The Founding and the Nineteenth Century

From the Founding through the nineteenth century, privatized familial caregiving was clearly the norm. Nonfamilial caregiving support was limited and available only in circumstances where families were obviously floundering and failing in their efforts to privatize dependency through their workforce participation.<sup>37</sup> Accordingly, during this period, extrafamilial support for caregiving often took the form of philanthropic and charitable interventions aimed at supporting the poor, minorities, and immigrant citizens in their quest for economic self-sufficiency and workforce participation.<sup>38</sup> For example, in the late nineteenth century, a loose federation of philanthropic “day nurseries” emerged to support poor mothers in working outside of the home.<sup>39</sup>

During this period, subsidization of extrafamilial caregiving options remained *privatized*—funded and organized by philanthropic and charitable organizations. The state would not become involved in subsidizing caregiving until the early twentieth century, when state governments—and later the federal government—began offering mothers’, or widows’, pensions.<sup>40</sup> The relationship between these subsidies and workforce participation was clear: mothers’ and widows’ pensions were consciously constructed as subsidies to fill the void created by the absence, whether through abandonment or death, of the family’s male breadwinner.<sup>41</sup>

#### 2. The Great Depression and World War II

By the onset of the Great Depression, most states had some version of a widows’ benefits program.<sup>42</sup> But critically, eligibility for these programs reflected the state’s interest in preserving a particular normative vision of

36. *Id.* at 28; see also Murray, *Whatever Happened to G.I. Jane?*, *supra* note 29, at 108–16 (discussing the ways in which World War II-era interventions from the state were meant to fill gaps in the workforce filled by the mobilization of male workers into the armed forces).

37. See Sonya Michel, *The History of Child Care in the U.S.*, SOC. WELFARE HIST. PROJECT (2011), <https://socialwelfare.library.vcu.edu/programs/child-care-the-american-history/> [<https://perma.cc/2E7U-CKP6>] [hereinafter Michel, *The History of Child Care*].

38. *Id.*

39. *Id.*

40. *Id.* (noting that mothers’ and widows’ pensions gained popular support in the early 1900s because they “did nothing to challenge conventional gender roles”).

41. *Id.*

42. *Id.*

motherhood and womanhood.<sup>43</sup> The programs typically were reserved for “worthy” mothers—those who had been widowed or abandoned by their husbands.<sup>44</sup> Unmarried mothers were presumptively ineligible on moral grounds.<sup>45</sup> Similarly, the eligibility criteria also reflected ingrained racial and class hierarchies. Highly restrictive eligibility criteria excluded many Black women and poor women,<sup>46</sup> forcing many working-class women, and especially women of color, to seek work that could accommodate their caregiving responsibilities.<sup>47</sup> And critically, when state mothers’ pensions migrated to the federal level as part of the Social Security Act of 1935, the restrictive criteria that rendered unmarried mothers and Black women essentially ineligible were also incorporated into the federal program.<sup>48</sup>

If the Great Depression altered the American economic landscape and prompted a more robust regulatory climate, it did little to meaningfully shift the understanding of privatized, family-based caregiving. Indeed, during the Great Depression, the caregiving crisis worsened as philanthropic organizations shuttered their day nurseries in the face of declining charitable donations.<sup>49</sup> As part of the New Deal economic relief efforts, the Works Progress Administration developed a loose network of “emergency nursery schools.”<sup>50</sup> But this intervention was not figured as a boon for extrafamilial caregiving—instead, the state policy goal was to return unemployed (mostly women) teachers back to the workforce by creating new jobs that they could assume.<sup>51</sup> But while the advent of emergency nursery schools could have accomplished two policy goals—job creation and caregiving support—it ultimately failed as World War II spurred competition for workers.

As the war effort intensified, and teachers left to take up defense-related jobs, many schools were forced to shutter.<sup>52</sup> Congressional attempts to convert the remaining schools into childcare facilities to serve working mothers also flatlined amidst bureaucratic red tape and public ambivalence about the

43. *See id.*

44. *See* THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 467 (1995).

45. *See id.*

46. Michel, *The History of Child Care*, *supra* note 37.

47. *See* Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J.L. & FEMINISM 99, 108 (1989). These work opportunities included, for example, taking in boarders, working in homes, and working seasonally. *Id.*

48. *See* Martha F. Davis, *The New Paternalism: War on Poverty or War on Women?*, 1 GEO. J. ON FIGHTING POVERTY 88, 89 (1993); *see also* Murray, *Whatever Happened to G.I. Jane?*, *supra* note 29, at 99–101 (describing the gendered origins of the Social Security Act of 1935).

49. Michel, *The History of Child Care*, *supra* note 37.

50. *Id.*

51. *Id.*

52. *Id.*

prospect of the increasing ranks of working mothers.<sup>53</sup> Likewise, legislative relief like the Lanham Act and various congressional attempts at public childcare options also sputtered in the face of public resistance.<sup>54</sup> Those programs that did launch typically provided little to no relief for persistent childcare needs.<sup>55</sup>

### 3. Postwar America

After the disruption and chaos of World War II, the nuclear family recentered itself in American life as women returned to the home—and marriages that were organized around specific gender roles. Couples wed early, and often moved to the suburbs and built homes;<sup>56</sup> and unsurprisingly, birth rates spiked.<sup>57</sup> This lifestyle emphasized a single-income household in a form of “domestic containment,”<sup>58</sup> as women stepped back from pursuits of higher education and employment.<sup>59</sup> This hostility to working mothers eliminated any advantages women had experienced in the war years.<sup>60</sup> And women who wished to continue working outside the home were often forced to do so at a meager wage in jobs requiring lower-level skills.<sup>61</sup>

After World War II, Congress passed the first iteration of the child tax credit, explicitly aimed at supporting families with care responsibilities for the purpose of “permit[ting] the taxpayer to hold gainful employment.”<sup>62</sup> And in the 1960s, Congress, in two welfare reform bills, explicitly linked federal support for childcare to policies intended to encourage poor and low-income women to enter training programs and earn employment.<sup>63</sup>

Over the next decade, as women moved into the paid workplace in large numbers, questions about the relationship between the family and the market—and how women could manage caretaking responsibilities and also enter the

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53. *Id.*

54. *See id.*

55. *Id.*

56. *Postwar Gender Roles and Women in American Politics*, U.S. HOUSE REPRESENTATIVES (2007), <https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/Changing-Guard/Identity/> [<https://perma.cc/LMJ9-FD9L>] [hereinafter *Postwar Gender Roles*].

57. William M. Wiecek, “*America in the Post-War Years: Transition and Transformation*,” 50 SYRACUSE L. REV. 1203, 1215 (2000).

58. ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA 16–36* (2008) (exploring the post-World War II “domestic containment” lifestyle in the context of the Cold War).

59. *Postwar Gender Roles*, *supra* note 56.

60. Wiecek, *supra* note 57, at 1212–14.

61. *Id.* at 1214.

62. Michel, *The History of Child Care*, *supra* note 37.

63. *Id.*

labor force—percolated.<sup>64</sup> Though feminist activists worked to achieve universal childcare policies,<sup>65</sup> President Richard Nixon famously vetoed the proposal. As a result, for the next three decades, federal support for childcare was channeled through policies aimed at getting low-income family members into the workforce.<sup>66</sup> In the absence of a public caregiving infrastructure, the for-profit childcare industry surged over the next twenty years.<sup>67</sup> This saw the rise of corporate- and employer-sponsored childcare options aimed, as ever, at easing access to the workforce.<sup>68</sup>

Today, federal and state childcare support, to the extent these efforts survived the Nixon era, continues to be available only to a very small subset of eligible families. For example, due to persistent underfunding and restrictive criteria, only one in seven children are eligible for the Child Care and Development Fund, the primary public funding source for childcare.<sup>69</sup> And many families in need of support are not even eligible for public programs. For example, a family of three with an annual income of \$32,580 or more would not qualify for assistance in many states.<sup>70</sup> Further, administrative failures plague efforts to expand public access to caregiving subsidies. Millions of children are income-eligible for state-subsidized daycare, but do not qualify because of system failures. As of the early 2000s, just thirty-nine percent of children with working mothers were in licensed home or daycare facilities; the rest were cared for by an extended network of family and friends.<sup>71</sup> And as of 2018, more than half of American families with young children live in a childcare desert,

64. Maxine Eichner, *The Family and the Market—Redux*, 13 THEORETICAL INQUIRIES L. 97, 98 (2012) [hereinafter Eichner, *The Family and the Market*]; see also Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1280–81 (1983) (describing how, in the 1970s, “for the first time, large numbers of upper-middle-class women chose to do waged work”).

65. See generally Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966-1974*, 28 LAW & HIST. REV. 577 (2010) (describing the liberal feminist arguments advanced in favor of universal childcare).

66. Michel, *The History of Child Care*, *supra* note 37.

67. See *id.*

68. See Sonya Michel, *A Tale of Two States: Race, Gender, and Public/Private Welfare Provision in Postwar America*, 9 YALE J.L. & FEMINISM 123, 138 (1997). Ironically, difficulty accessing childcare resources is one of the leading factors requiring women to leave the workforce. See Theresa Glennon, Alexis Fennell, Kaylin Hawkins & Madison McNulty, *Shelter from the Storm: Human Rights Protections for Single-Mother Families in the Time of COVID-19*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 635, 653 (2021).

69. Simon Workman, *The True Cost of High-Quality Child Care Across the United States*, CTR. FOR AM. PROGRESS (June 28, 2021), <https://www.americanprogress.org/article/true-cost-high-quality-child-care-across-united-states/> [https://perma.cc/C5JP-VLSG].

70. *Id.* As Barbara Bennett Woodhouse explains, “There are several federally funded programs in place to make day care more affordable, but they are chronically underfunded and difficult to access.” Woodhouse, *supra* note 32, at 839.

71. See *id.* at 838 (citing ROBERT C. FELLMETH, CHILD RIGHTS & REMEDIES 330–43 (2d ed. 2006)).

meaning that there may be three or more children under age five for every licensed childcare slot.<sup>72</sup>

Accordingly, high-quality childcare remains out of reach for many, if not most, families.<sup>73</sup> Day care expenses can exceed the cost of in-state college tuition or rent.<sup>74</sup> Indeed, families living below the poverty line who pay for childcare spend, on average, a third of their annual income on such services.<sup>75</sup> And in all of this, the state remains a virtual non-entity in supporting caregiving. It offers no system for providing or subsidizing early childcare education, for regulating or ensuring access to childcare programming, or for supporting paid caregiving.<sup>76</sup>

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As this part makes clear, consistent with the liberal welfare state model, the American state has intervened or demonstrated interest in the project of caregiving only as a catalyst for workforce participation or when the market-family model fails.<sup>77</sup> As Maxine Eichner has explained, the American childcare model “moves women into the market precisely by withdrawing state protection of family activities from market forces,” and entrenching the presumption that “every adult should be part of the paid labor market.”<sup>78</sup>

To be sure, this limited support cannot be fairly characterized as an unqualified subsidy for caregiving. The state’s meager efforts to support caregiving are often predicated on highly restrictive qualification criteria, rely on chronically underfunded resource streams, and are subject to dismantling at legislative whims. And perhaps unsurprisingly, childcare has increasingly occupied space in the private marketplace, whether left as the province of families or as a commodifiable service. In this way, as Maxine Eichner has explained, today, “our law and public policy are premised on the view that families should shoulder their own financial weight.”<sup>79</sup>

72. Malik et al., *supra* note 10.

73. See Sara Sternberg Greene, *Working To Fail*, 27 DUKE J. GENDER L. & POL’Y 167, 173–75 (2020), for a cogent discussion of the many difficulties facing low-income families who are attempting to navigate childcare options.

74. See Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed Out Mom*, 105 GEO. L.J. 1323, 1326 (2017); see also Eichner, *The Privatized American Family*, *supra* note 22, at 240 (noting that for a four-year-old, the average childcare cost exceeds tuition in nineteen states).

75. Michael Madowitz, Alex Rowell & Katie Hamm, *Calculating the Hidden Cost of Interrupting a Career for Child Care*, CTR. FOR AM. PROGRESS (June 21, 2016), <https://www.americanprogress.org/article/calculating-the-hidden-cost-of-interrupting-a-career-for-child-care/> [<https://perma.cc/7465-3ARY>].

76. Eichner, *The Family and the Market—Redux*, *supra* note 64, at 109.

77. See Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 843 (2002) (“When it comes to assigning caretaking responsibilities, employers look to government and families, government looks to families and employers, men in families look to women, and women too often just stop looking.”).

78. Eichner, *The Family and the Market—Redux*, *supra* note 64, at 107.

79. Eichner, *The Privatized American Family*, *supra* note 22, at 214.

Many have also noted the ways in which childcare is one of several institutions historically classified as “private.” Those advancing the theory of “separate spheres,”<sup>80</sup> for example, argue that the “special solicitude” afforded to the private realm of family life, alongside doctrines of family liberty, has all but walled private childcare decisions from the public sphere—and the state’s intervention.<sup>81</sup> In this way, it is not only that the state has turned away from the project of childcare, but also that the project itself, and the private values undergirding it, is resistant to the state. Others have described the ways in which siloing childcare as a “private” matter has had negative consequences for women in particular<sup>82</sup> and especially for women of color.<sup>83</sup>

While childcare has increasingly been further absorbed into the private sphere—occupying space in both the family and the market—education has increasingly migrated into the public space. As the following part explains, once understood as coextensive with caregiving and housed within the family, education has become the province of the state, where it has been deployed to serve state interests in the cultivation of future citizens.

## II. MAKING EDUCATION “PUBLIC”

The American state historically has had little interest in supporting the project of caregiving. It has, however, especially over the past century, provided one significant subsidy to the family: public education. As this part explains, while public education was once closely connected to the idea of childcare and childrearing, and housed within the family, the institutions of public education and care have, over time, been disaggregated—with more responsibility assumed by the state for providing education. And questions about the purpose of education—from who should provide it, to the values it should inculcate, and its ultimate societal goals—too have evolved over the course of American life. This part traces the shift from family-provided education, as exemplified in the trope of the “Republican Mother,” through the rise of the common school and the more recently held view that education is a core state function.

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80. See generally MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983) (discussing the complex equality theory and how it espouses a “separate sphere” for family life).

81. See, e.g., Meredith Johnson Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659, 664–65.

82. See generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (discussing how the current state of privatized childcare does not consider the best interests of women).

83. See, e.g., Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1621 (2001) (discussing how the “onerous price exacted from poor black families for public assistance demonstrates the need for fundamental change in our philosophy of care”).

A. *The “Republican Mother”*

From the nation’s founding, men and women occupied separate spheres: women occupied the private, domestic sphere of the familial home, while men existed in the public, political sphere.<sup>84</sup> But women nonetheless were expected to serve the public good through their private roles as wives and mothers. Critically, from the Founding period forward, the family was viewed an essential pillar for the transmission of American values. Mothers, in particular, played a crucial role in this project of transmitting republican values. As Linda Kerber has explained, at the Founding, the trope of the “Republican Mother” emerged to describe and entrench the normative ideal of a dutiful wife and mother charged with rearing her children with the moral and political values necessary for the perpetuation of republican government.<sup>85</sup> Indeed, to ensure men could “get on with the business of running the nation’s government,” women were tasked with maintaining the country’s moral center—and rearing the next generation of citizens.<sup>86</sup> In this way, republican mothers were responsible for integrating civic virtues or “political values” into the home.<sup>87</sup>

Critically, the primary aim of republican mothers was to prepare their children for the demands of citizenship: to “mold[] the nation’s young into virtuous republicans and competent burghers.”<sup>88</sup> A republican mother’s public and private roles effectively combined caregiving and education. She was charged with dedicating herself to the “nurture of public-spirited male citizens,” and also, through instruction in core skills and values, to “guarantee[ing] the steady infusion of virtue into the Republic.”<sup>89</sup> On this account, the family and the home operated as “schools of republican virtue” led by virtuous republican mothers.<sup>90</sup>

84. See generally KATHRYN KISH SKLAR, *CATHARINE BEECHER: A STUDY IN AMERICAN DOMESTICITY* (1976) (discussing how women were historically excluded from the political sphere).

85. LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* (1980) (exploring women’s role during the American Revolution and their participation in politics and society).

86. See generally Linda Kelly, *Republican Mothers, Bastards’ Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images*, 51 *HASTINGS L.J.* 557, 562 (2000). Previously, “[i]n the spirit of coverture,” women were often cast as “devious, sexually voracious, emotionally inconstant, or physically and intellectual inferior.” *Id.*

87. KERBER, *supra* note 85, at 11. As Margaret A. Baldwin explains, tropes like the “Republican Mother” effectively “framed maternity as a public obligation for white women, who were to populate and, in teaching children, to moralize the nation’s citizenry.” Margaret A. Baldwin, *Public Women and the Feminist State*, 20 *HARV. WOMEN’S L.J.* 47, 110 (1997).

88. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 8 (G. Edward White ed., 1985).

89. KERBER, *supra* note 85, at 11.

90. Mary Lyndon Shanley, *Public Values and Private Lives: Cott, Davis, and Hartog on the History of Marriage Law in the United States*, 27 *LAW & SOC. INQUIRY* 923, 926 (2002). More modern theories of the “Republican Mother” center the idea of “maternal citizenship,” which similarly positions the



The Republican Mother trope offers insight into the early relationship between childcare and education, as women were tasked both with childrearing and with inculcating civic virtue, enlightened rationality, and discipline in their charges.<sup>91</sup> Importantly, at the Founding, the “separate spheres” ideology meant that the role of inculcating virtue was understood to be beyond the state’s remit. Instead, motherhood was “discussed almost as if it were a fourth branch of government, a device that ensured social control in the gentlest possible way.”<sup>92</sup> Importantly, the prospect of state-provided education was largely stigmatized—a service reserved for those who lacked the social support of family, church, and community, the primary purveyors of Founding-era education.<sup>93</sup>

The emergence of the Republican Mother trope is perhaps unsurprising when considered alongside the American state’s historical positioning of the family as a site of value creation and moral development.<sup>94</sup> The state has a significant interest in regulating, largely through state recognition, familial institutions that maximize production of the “right” kind of citizen, and in doing so to implicitly and explicitly encourage the kinds of familial formations that facilitate those outcomes.<sup>95</sup> In this way, the established family—recognized by the state, but operating beyond state control—is a site of domestication and discipline, one that discourages corrosive nonconformity and maximizes allegiance to prevailing civic norms.<sup>96</sup>

Accordingly, at the Founding, caregiving and education were in many ways understood to be fused and coextensive—both tools to be deployed for the purpose of inculcating desired community values.<sup>97</sup> And critically, both public functions were effectively privatized within the home and family. Over time, however, this vision of unified care and education shifted as the two functions were disaggregated and education migrated from family supervision to state supervision. As the following section describes, by the early nineteenth century,

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family, “and mothering in particular, as the school of responsibility and virtue.” Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 364–65 (1994).

91. See Emily Field Van Tassel, *Judicial Patriarchy and Republican Family Law*, 74 GEO. L.J. 1553, 1560–61 (1986) (reviewing GROSSBERG, *supra* note 88).

92. Stephen A. Conrad, *The Rhetorical Constitution of “Civil Society” at the Founding: One Lawyer’s Anxious Vision*, 72 IND. L.J. 335, 355 (1997) (quoting KERBER, *supra* note 85, at 283).

93. See Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 877–78, 879 n.42 (2018) (describing the advent of the common school movement and noting how, prior to the acceptance of common-school ideology, state-sponsored education was reserved solely for “paupers”).

94. See Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1251 (2010).

95. See *id.*

96. See *id.* at 1266–67 (describing the ways in which, under the Court’s view, some degree of safe pluralism can enhance democracy, but familial pluralism outside traditional models is often considered less amenable to democratic life).

97. As Barbara Fedders explains, “[T]he church and the family were the primary instruments of education in the colonies.” Fedders, *supra* note 93, at 877.

many American elites had embraced the view that education was a powerful state tool in the production of capable citizens—and in inculcating the state’s preferred normative agenda.<sup>98</sup>

B. *The “Common School” Movement*

If the Republican Mother was the vessel that served the state’s needs for moral virtue and value inculcation in the Founding Era, by the nineteenth century, a new player would emerge to reshape the relationship between education and the republic: the common school.<sup>99</sup> Horace Mann, the founder of the common school movement, believed in free, public schooling that would bring children from all socioeconomic backgrounds together to learn academic and character skills.<sup>100</sup> The goals of the common school included many aims that previously had been delegated to the family, and mothers, in particular. The common school was charged with providing instruction in American culture and values, moral training, discipline, and patriotism.<sup>101</sup> As Mann explained, public schooling was necessary to fill gaps that previously had been filled by the family, namely the provision of skills “sufficient to qualify each citizen for the civil and social duties” that democratic government demanded.<sup>102</sup> As education scholar Lawrence Cremin explains:

The republican style in American education was compounded of four fundamental beliefs: that education was crucial to the vitality of the Republic; that a proper republican education consisted of the diffusion of knowledge, the nurturance of virtue (including patriotic civility) and the cultivation of learning; that schools and colleges were the best agencies [to fulfill these aims] . . . ; and that the most effective means of obtaining the requisite number and kind of schools and colleges was through some system tied to the polity.<sup>103</sup>

98. See Noah Feldman, *Non-sectarianism Reconsidered*, 18 J.L. & POL. 65, 72 (2002).

99. See CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, at 5–12 (Eric Foner ed., 1983).

100. Of course, Mann also believed that morality and religion were inextricably tied: as he wrote, it was an “eternal and immutable truth” that morals could never be obtained without religion, and accordingly espoused the idea that “both on abstract and [] practical grounds,” religious education was “indispensable to the[] highest welfare” of children. HORACE MANN, *TWELFTH ANNUAL REPORT OF THE BOARD OF EDUCATION TOGETHER WITH THE TWELFTH ANNUAL REPORT OF THE SECRETARY OF THE BOARD* 98–113 (1849).

101. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL’Y REV. 169, 174 (1996); KAESTLE, *supra* note 99, at 116.

102. THE MASSACHUSETTS SYSTEM OF COMMON SCHOOLS; BEING AN ENLARGED AND REVISED EDITION OF THE TENTH ANNUAL REPORT OF THE FIRST SECRETARY OF THE MASSACHUSETTS BOARD OF EDUCATION 17 (1849).

103. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876*, at 148 (1st ed., 1980).

Horace Mann’s “common school” model soon bore fruit. Mann and other common-school activists advocated for education as a critical tool for advancing individual student outcomes, and in safeguarding republican government. Indeed, by the early twentieth century, every state in the union had adopted compulsory attendance laws and enacted universal public schooling options.<sup>104</sup> And as a direct result of the common school movement, most state legislatures created centralized infrastructures to govern public education and codified legal protections for the state’s provision of education.<sup>105</sup>

But while the common school movement facilitated the transition from home-based education to state-provided education, other factors also played a role in the shift from the “Republican Mother” to the common school. As one example, the immigrant wave of the nineteenth century spurred nationalist and nativist impulses that “led to a fervor for compulsory schooling.”<sup>106</sup> Indeed, as immigrants brought “foreign religions”—namely, Catholicism and Judaism—to American shores, state after state enacted compulsory schooling laws that purportedly followed Mann’s common-school model, but in reality often served as a means of forcibly assimilating immigrant children into Protestant beliefs.<sup>107</sup> In this vein, many states established public schools explicitly to eradicate these foreign faiths,<sup>108</sup> or to prevent what many Protestant Americans viewed as impending moral decay.<sup>109</sup> While common-school advocates had argued for compulsory education, “no state paid serious attention . . . until the great wave of immigrants was upon them.”<sup>110</sup> And in some states, those supporting public school expansion had explicitly racist motives: North Carolina Governor Charles Aycock, for example, advocated for a form of universal education that would serve in practice to “disenfranchise” Black North Carolinians.<sup>111</sup> Though this vision of “universal education” purported to include Black citizens as beneficiaries, in practice, it instead deployed public education as a tool to

104. Fedders, *supra* note 93, at 879 & n.43 (noting, however, this was in many states exclusively reserved for white children).

105. See Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 123–25 (2013) (discussing how administrative infrastructures emerged amidst the common school movement).

106. Carter, *supra* note 7, at 4.

107. *Id.*

108. *Id.* at 4–5; see also Joshua E. Weishart, *Democratizing Education Rights*, 29 WM. & MARY BILL RTS. J. 1, 47 (2020) (noting the ways in which “bigoted and divisive ‘nativist sentiments’” drove the development of the common school). As Carter explains, “it is no accident” that the first Massachusetts law requiring educational attendance arose as the Know-Nothing Party, which required its members to swear never to vote for any non-American born or Roman Catholic citizen, was gaining political power. Carter, *supra* note 7, at 5.

109. Friedman & Solow, *supra* note 105, at 122.

110. Carter, *supra* note 7, at 5.

111. H. LEON PRATHER, *RESURGENT POLITICS AND EDUCATIONAL PROGRESSIVISM IN THE NEW SOUTH: NORTH CAROLINA, 1890-1913*, at 11 (1979).

control racial unrest, funnel Black students into industrial education, and reinforce racial hierarchy.<sup>112</sup>

Cases like *Meyer v. Nebraska*<sup>113</sup> and *Pierce v. Society of Sisters*<sup>114</sup> in particular make clear nativist support for formal public education.<sup>115</sup> In *Meyer*, the Court struck down a Nebraska statute criminalizing the teaching of any subject in any language other than English in any school, or the teaching of languages other than English below the eighth grade.<sup>116</sup> The statute's adoption was animated by fears that children raised in foreign households speaking another language as their mother tongue would develop into unreliable citizens.<sup>117</sup> *Pierce* involved a challenge to Oregon's Compulsory Education Act, which had been enacted as part of a ballot initiative campaign endorsed by nativist groups, including the Ku Klux Klan.<sup>118</sup> Under the terms of the Act, parents who failed to enroll their children in public schools were subject to criminal sanctions.<sup>119</sup> Again, the perceived threat was parochial schools, Catholicism, and the perceived corrosive impact of immigration on national culture and character.

In striking down the challenged statutes in *Meyer* and *Pierce*, the Supreme Court adverted to the privatization of care within the family. It was the province and duty of parents to raise their children in the manner of their choosing. But meaningfully, the state did not discredit the nativist impulses that had animated the statutes—or that undergirded some of the interest in public education.<sup>120</sup> Indeed, for the *Meyer* Court, Nebraska's "desire . . . to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters [wa]s easy to appreciate."<sup>121</sup> Education was a means of cultivating a common democratic culture and vernacular. The state had simply gone too far, intruding on the prerogative of parents to have a say in their child's educational upbringing.

Still, despite the nod to parental rights, nothing in *Meyer* questioned the common school's role in providing basic education to the nation's youth. As the

112. See Jeff Lingwall, *Educational Gerrymanders: Creating Unequal School Districts in North Carolina*, 40 N.C. CENT. L. REV. 1, 14–16 (2017).

113. 262 U.S. 390 (1923).

114. 268 U.S. 510 (1925).

115. *Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 534–35.

116. *Meyer*, 262 U.S. at 397, 400.

117. The statute, popularly known as the "Foreign Language Statute," was enacted after World War I amid a wave of anti-German hysteria. See Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 450 n.239 (1999). The statute was part of the "100 percent Americanism" campaign, a nationwide pro-American movement that identified and celebrated the "beliefs and actions of patriotic Americans." Mark Kessler, *Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger*, 27 LAW & SOC'Y REV. 559, 574 (1993).

118. *Pierce*, 268 U.S. at 530–31.

119. *Id.* at 529–33.

120. *Meyer*, 262 U.S. at 402.

121. *Id.*

*Meyer* Court acknowledged, the decision did not undermine “[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . [and] to prescribe a curriculum for institutions which it supports.”<sup>122</sup> Indeed, in both *Meyer* and *Pierce*, the Court acknowledged public education’s role as a crucible for democracy—a theme that subsequent Courts would echo, lauding public education as “a most vital civic institution for the preservation of a democratic system of government,”<sup>123</sup> “the very foundation of good citizenship,”<sup>124</sup> and the “nursery of democracy.”<sup>125</sup>

In this way, public education over time emerged as an important conduit both for imparting democratic values and for respecting national civic traditions—and for assimilating citizens into American systems and values.<sup>126</sup> It had become, in the eyes of the state, the “primary vehicle for transmitting ‘the values on which our society rests.’”<sup>127</sup>

Of course, the state’s professed values may shift and expand over time. While public education historically has been lauded as the state’s “engine of democracy,” it also serves to promote economic efficiency—a value that also serves the state, though in meaningfully different ways.<sup>128</sup> As historian Jonathan Zimmerman notes, “school” was made accessible to the broader public as a “civic service,” a notion rooted in the view that an educated population is best equipped to serve the state and its economic production.<sup>129</sup>

This is all to say that, since the Founding era, education has always been viewed as serving the state, whether as an engine of democracy or as a vehicle for cultivating individual productivity. From the Republican Mother to the common school to the present, public education has long served crucial state interests.

What has changed over this trajectory is the location of education and our understanding of its function and its relationship to the state, the family, and individuals. The relocation of education from the family’s home to the state’s classrooms represents a profound shift in our understanding of education and care. Under the aegis of the “Republican Mother,” “care” and “education” were coextensive. During this period, to care for one’s children *was* to supervise and

122. *Id.*

123. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

124. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

125. For a discussion of the ways in which the Supreme Court has enumerated the relationship between education and democracy, and the Court’s failure to follow through on these promises, see generally Caitlin Millat, *The Education-Democracy Nexus and Educational Subordination*, 111 GEO. L.J. 529 (2023) [hereinafter Millat, *The Education-Democracy Nexus*].

126. Ristroph & Murray, *supra* note 94, at 1263–64.

127. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)).

128. Joshua Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 963 (2016).

129. Bryce Covert, *School Is (Whisper It) a Form of Child Care*, N.Y. TIMES (Oct. 13, 2020), <https://www.nytimes.com/2020/10/13/opinion/coronavirus-schools-child-care-centers.html> [https://perma.cc/Y5Q3-DKXD (dark archive)].

oversee their education as part of the inculcation of common values that were crucial to their development as citizens. Together, the common school movement's understanding of education as a means of social mobility, coupled with anxieties that, in the hands of immigrants, the family and home were no longer reliable sources of values inculcation, prompted a shift toward state assumption of responsibility for education. Accordingly, today, education remains a core state function, while care remains a core family function.

As the following section explains, this shift has had significant and lasting effects on the structures of—and relationship between—education and childcare. These stark differences are evident not only in the state's role in each institution, but also in the way in which education and care are integrated into, protected by, and perceived in American society. As the following part maintains, childcare has instead been redefined by its relationship to education—and how it fills gaps in educational offerings.

### III. THE RELATIONSHIP BETWEEN CARE AND EDUCATION

The rise of the common school, and its concomitant disaggregation of education from care, has effectively siloed our understanding of caregiving and education as two distinct functions. However, as this part maintains, a disruptive event, like the COVID-19 pandemic, lays bare the relationship between these two siloed regimes.

The pandemic prompted a massive educational crisis—the effects of which linger to this day. The pandemic forced 1.4 billion students worldwide out of classrooms and into remote options over the course of the pandemic as schools shut their doors to in-person instruction.<sup>130</sup> By the end of 2020, schools in all fifty states shifted to remote learning, for periods as long as a year, in an attempt to curb the pandemic's spread.<sup>131</sup> These impacts, of course, had profoundly unequal implications: districts, schools, and families with means were able to deftly fill educational gaps with private options, while others were subject to the oft-shifting whims of the state.<sup>132</sup> Only one in three public school districts

130. Elin Martínez, *A Generation of Children Impacted by COVID-19 School Closures*, HUM. RTS. WATCH (Mar. 9, 2022, 12:00 PM), <https://www.hrw.org/news/2022/03/09/generation-children-impacted-covid-19-school-closures> [https://perma.cc/7MWW-LRJK].

131. See *Pandemic Data Tracking*, CTR. FOR REINVENTING PUB. EDUC. (2023), <https://crpe.org/pandemic-learning/tracking-district-actions/> [https://perma.cc/4UDA-9CLB].

132. See Murray & Millat, *supra* note 8, at 136–41 (discussing the ways in which wealthy actors were able to, as some examples, decamp to private schools, outsource remote instruction to private teachers or “pods,” or leverage familial resources and expertise to troubleshoot safety concerns and develop reopening plans). On the other side of the spectrum, as one example, in Nevada's Clark County School District, the sixth-largest district in the country, students as late as two months into school closures were getting no remote instruction and instead were handed paper packets to self-educate. See Travis Pillow & Bree Dusseault, *Analysis: For Hundreds of Thousands of Kids at Some of America's Biggest*

even required teachers to provide remote instruction or measure student progress, while affluent school districts were twice as likely to demand, and provide support for, real-time instruction.<sup>133</sup> And the full extent of the pandemic's impact on the education system has yet to be realized. There remains a persistent and catastrophic teacher shortage;<sup>134</sup> students have experienced and continue to experience significant and damaging learning loss;<sup>135</sup> and public-school enrollment is cratering.<sup>136</sup>

But if the pandemic prompted an educational crisis, it also revealed and exacerbated a *caregiving* crisis. Like schools, caregiving programs were effectively shuttered during the pandemic. Hundreds of thousands of childcare workers lost or left their jobs as the pandemic spread, exacerbating childcare availability in a landscape already plagued by significant “child care deserts”

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*School Districts, There's Still No Consistent Plan for Remote Learning Nearly Two Months into the Pandemic*, THE 74 (May 13, 2020), <https://www.the74million.org/article/analysis-for-hundreds-of-thousands-of-kids-at-some-of-americas-biggest-school-districts-theres-still-no-consistent-plan-for-remote-learning-nearly-2-months-into-the-pandemic/> [<https://perma.cc/P4XM-E49N>].

133. CTR. FOR REINVENTING PUB. EDUC., 2020–2021: THE STATE OF SCHOOL REOPENING (2021), <https://docs.google.com/presentation/d/e/2PACX-1vSd4QYHtn373iN1gzSQyzHXUZJWuqPSi6EV6vGPqBAQ3sIw7MgcBUwFYTC8sETW-m0l41w7m1TTQG2R/pub?start=false&loop=false&delayms=3000&slide=id.p1> [<https://perma.cc/3QP3-MZH5>].

134. Giulia Heyward, *Substitute Teachers Never Got Much Respect, but Now They Are in Demand*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/11/us/substitute-teachers-demand.html> [<https://perma.cc/RK95-8NJC> (dark archive)].

135. By one estimate, the average student will have lost half a year of reading instruction and a full year of math learning as a result of the pandemic. See CTR. FOR REINVENTING PUB. EDUC., *supra* note 133. And importantly, these losses were most acutely felt by low-income students of color: these students' learning losses during the pandemic effectively reversed the progress K–12 education for low-income minority students had made over the past two decades. See David Leonhardt, *'Not Good for Learning'*, N.Y. TIMES (May 5, 2022), <https://www.nytimes.com/2022/05/05/briefing/school-closures-covid-learning-loss.html> [<https://perma.cc/3W9F-46Z6> (dark archive)]. This compounded various ways in which the pandemic was most acutely felt by low-income children of color, including that they were disproportionately likely to contract, be hospitalized, or die as a result of COVID-19; lose a parent to COVID-19; or experience economic, food, or housing insecurity as a result of COVID-19. OFF. FOR C.R., DEP'T OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS 11–12 (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/6FHH-K654>].

136. Lisa Chu & Bree Dusseault, *Analysis: Data From 100 Large Urban Districts Show Half Facing Shortages in Key Positions. Fixing That Will Mean Rethinking Teaching & Working in Schools*, THE 74 (Mar. 23, 2022), <https://www.the74million.org/article/chu-dusseault-half-of-100-large-urban-districts-have-serious-staffing-shortages-fixing-that-means-rethinking-teaching-and-working-in-schools/> [<https://perma.cc/S3EL-UJ9H>]; see also Christine Pitts & Alvin Makori, *Enrollment Drops, Staff Shortages Cause Budget Whiplash for Top School Districts*, THE 74 (July 19, 2022), <https://www.the74million.org/article/enrollment-drops-staff-shortages-cause-budget-whiplash-for-top-school-districts/> [<https://perma.cc/J69F-ZC4D>] (noting that more than half of large districts are being forced to deploy pandemic relief funding, among other measures, to incentivize staff to stay, as they face significant staff reductions and school closures due to lost enrollment).

with limited or no care options.<sup>137</sup> Two-thirds of Americans were forced to revamp their childcare arrangements due to the pandemic, and a significant majority had not found a permanent solution to their childcare needs within the first year of the pandemic.<sup>138</sup> And the crisis of caregiving, of course, had an economic dimension. The childcare issues that arose simply in the first year of the pandemic resulted in billions in estimated annual losses for state economies.<sup>139</sup>

The response to the collapse of these twin pillars—private childcare and public education—is instructive. Of course, families felt an immediate impact when private childcare options rapidly closed during the pandemic. Nearly fifteen percent of families lost a job or reduced their work hours to fill childcare gaps.<sup>140</sup> But for many, the shift from in-person public education to remote, home-based education was felt even more acutely. It was not just that the absence of in-person instruction resulted in learning loss and diminished student instructional outcomes. Instead, many families experienced the shift from in-person school to home-based instruction as a *loss of childcare*, or, more particularly, a relocation of the care dimensions of education, a simultaneous increase to private burdens and loss of an expected care subsidy. As many observed, losing access to the schoolhouse and teachers meant that families had to step in to provide some aspect of instructional content—an unexpected return to Republican Motherhood—all while shouldering their own job responsibilities. But as importantly, the loss of in-person instruction also meant losing access to reliable day-to-day caregiving support, community services, and resources.<sup>141</sup> In this way, the pandemic made clear that public education was not simply about instructing children in reading, writing, and arithmetic—instead, the availability of school from morning to afternoon, and all of the supports that

137. Kelley Griffin, *Wake-Up Call for Child Care as Pandemic Exposes Troubled System*, NAT'L CONF. ST. LEGISLATURES (Jan. 17, 2022), <https://www.ncsl.org/research/education/wake-up-call-for-child-care-as-pandemic-exposes-troubled-system-magazine2022.aspx> [<https://perma.cc/7WS4-BUXL>].

138. U.S. CHAMBER OF COM. FOUND., *PIECING TOGETHER SOLUTIONS: THE IMPORTANCE OF CHILDCARE TO U.S. FAMILIES & BUSINESSES* 6 (2020), [https://www.uschamberfoundation.org/sites/default/files/EarlyEd\\_Minis\\_Report6\\_121420\\_Final.pdf](https://www.uschamberfoundation.org/sites/default/files/EarlyEd_Minis_Report6_121420_Final.pdf) [<https://perma.cc/C4NQ-7HRE>].

139. *Id.* at 4.

140. Jess Carson & Marybeth J. Mattingly, *Covid-19 Didn't Create a Child Care Crisis, but Hastened and Inflamed It*, UNIV. N.H. CARSEY SCH. PUB. POL'Y (Aug. 24, 2020), <https://scholars.unh.edu/cgi/viewcontent.cgi?article=1414&context=carsey> [<https://perma.cc/ZQ8F-CM9K>].

141. See generally David K. Gibson, *What the Pandemic Has Revealed About the Role of Schools*, ASPEN INST. (Sept 8, 2020), <https://www.aspeninstitute.org/blog-posts/what-the-pandemic-has-revealed-about-the-role-of-schools/> [<https://perma.cc/3YGQ-A4GJ>] (describing pandemic-era revelations about the role of education in community, including that educators and school staff are often society's most important caregivers outside the home, offer shelter from emotional, housing, health, and food insecurities, and provide structure and routine).



education provides, was a crucial part of the scaffolding on which families relied to provide care and support the workplace productivity of adult members.

But even as the pandemic revealed the relationship between education and caregiving, importantly, the response to the systemic shutdowns of private care and public education diverged. As a structural matter, the state was necessarily involved in whether, when, and how to keep educational facilities open. Local, state, and federal actors, for example, debated in the education context whether and how to reintroduce children into in-person schooling or to keep instruction remote, how to safely set up classrooms to prevent disease transmission, and how to institute or roll back mask and vaccination policies.<sup>142</sup> In the childcare context, however, these concerns—and decisions—were entirely private, leading to an uneven and unpredictable landscape.<sup>143</sup>

Indeed, many childcare facilities remained open during much of the pandemic; in states like Connecticut, for example, daycare facilities could make decisions about whether they wanted to stay on the “front lines” or to shut their doors. And while Connecticut Governor Ned Lamont ordered the full closure of public schools, he simultaneously urged municipal leaders to allow childcare facilities to remain open.<sup>144</sup> In Texas, after Governor Greg Abbott issued a stay-at-home order in response to the pandemic, only a quarter of private childcare operations closed; Governor Abbott lifted the order for all childcare facilities a

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142. See, e.g., *Debate Continues To Swirl About Return to In-Person Classes for All Public School Students This Fall*, CBS N.Y. (July 20, 2021), <https://www.cbsnews.com/newyork/news/new-york-city-schools-fall-2021-virtual-learning-in-person-classes/> [<https://perma.cc/KYN2-FH2Z>] (noting that the former mayor of New York City, Bill de Blasio, fully supported a return to in-person instruction while the City Council Education Committee wanted the Department of Education to “offer a fall remote option”); Holly Yan, *The Debate Over Reopening Schools Is Fierce and Divisive. Here’s Where People on Different Sides of the Issue Are Coming from*, CNN (Mar. 12, 2021, 5:16 AM), <https://www.cnn.com/2021/03/12/us/school-reopening-debate-opinions> [<https://perma.cc/Z9ZR-WCHJ>] (noting that a local school superintendent of Los Angeles Unified School District wanted to delay returning to in-person instruction to allow time for school staff to receive the vaccine, despite push back from teachers unions in the city); Cheyenne Haslett, *School Debate Rages on, Despite CDC Effort To Set Federal Benchmarks*, ABC (Feb. 18, 2021, 5:34 PM), <https://abcnews.go.com/Politics/school-debate-rages-cdc-effort-set-federal-benchmarks/story?id=75971483> [<https://perma.cc/H2YS-R2S5>] (explaining how many schools “have charted their own path forward since fall in the absence of a clear federal standard on what it means to reopen a classroom safely”).

143. See generally Anya Kamenetz, *What Parents Can Learn from Child Care Centers That Stayed Open During Lockdowns*, NPR (June 24, 2020, 7:01 AM), <https://www.npr.org/2020/06/24/882316641/what-parents-can-learn-from-child-care-centers-that-stayed-open-during-lockdowns> [<https://perma.cc/5GEG-PGBP>]. As we have previously written, however, in certain localities, pandemic-era solutions were navigated through hybrid public-private efforts. See Murray & Millat, *supra* note 8, at 128–35.

144. Jacqueline Rabe Thomas, *Can Daycares Stay Open During the COVID-19 Crisis? Connecticut Says Yes*, CONN. MIRROR (Mar. 27, 2020, 5:00 AM), <https://ctmirror.org/2020/03/27/can-daycares-stay-open-during-the-covid-19-crisis-connecticut-says-yes/> [<https://perma.cc/9KYD-MHBY>].

month later, as schools stayed shut.<sup>145</sup> In this way, though the safety risks were theoretically equivalent at childcare facilities and schools, regimes of “public” and “private” imposed fundamentally different calculations, responsibilities, and burdens on educational and childcare industries—even as they served the same children.<sup>146</sup>

Exacerbating this uneven landscape, in some jurisdictions, core educational services were recharacterized from public functions to private amenities available for a fee. For example, in Texas, Vermont, Maryland, Massachusetts, and New York, as schools shuttered, private educational/childcare programs emerged to provide, for a fee, “support for virtual learning assignments” and “work sessions”—features that, of course, sound suspiciously like school.<sup>147</sup> Recognizing the difficulties that many parents were experiencing balancing work alongside their new responsibilities leading struggling home school operations, market solutions flourished, providing (for a price) an answer to the diminished public education landscape.

These developments are perhaps unsurprising given the ways in which, over the past century, ideas of “education” and “childcare” have developed into separate silos. The provision of public education, which, as discussed above, theoretically bears significant benefits for the state, has long been considered the state’s single significant subsidy and investment in childrearing.<sup>148</sup> And while there are well-documented and significant gaps in educational resourcing both within the United States and between the country and its global peers,<sup>149</sup> the United States invests hundreds of billions of dollars in federal funding annually in public education.<sup>150</sup> As a matter of public opinion, there is also significant support for the state’s involvement in education; for the better part

145. Emily Hernandez & Kalley Huang, *Families Are Desperate for Child Care, but Providers Face a “Roller Coaster” Trying To Survive*, TEX. TRIBUNE (Mar. 15, 2022, 5:00 AM), <https://www.texastribune.org/2022/03/15/coronavirus-texas-child-care-closed-pandemic/> [https://perma.cc/5U9G-GEUK].

146. Elliot Haspel, *Why Are Child Care Programs Open When Schools Are Not?*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/04/parenting/schools-day-care-children-divide.html> [https://perma.cc/Y2QV-D45N (dark archive)] [hereinafter Haspel, *Why Are Child Care Programs Open When Schools Are Not?*] (“The duality of the conversations around child care programs and public schools is rooted in a perceived gap between what ‘care’ and ‘education’ mean. That gap has set the two sectors on different paths of funding, governance and professional power.”).

147. Covert, *supra* note 129.

148. See Murray & Millat, *supra* note 8, at 128–35.

149. Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (June 15, 2022), <https://educationdata.org/public-education-spending-statistics> [https://perma.cc/BGB5-F6ND] (noting that public education spending in the United States falls short of global benchmarks and lags behind economic growth).

150. *Id.* Education funding in the United States relies primarily, however, on state and local resources; in some cases, nearly ninety percent of school funding comes from these sources. Sylvia Allegretto, Emma García & Elaine Weiss, *Public Education Funding in the U.S. Needs an Overhaul*, ECON. POL’Y INST. (July 12, 2022), <https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/> [https://perma.cc/U4Z8-FBSJ].

of a century, the vast majority of American citizens have over time consistently expressed their approval for robust funding, support for, and regulation of public education.<sup>151</sup>

At the same time, the privatization of childcare outside the education system through the market reinforces the idea that providing this care is beyond the state's reach or responsibility.<sup>152</sup> Unlike its global peers, for example, the United States has little to no infrastructure for access to care or early childhood education.<sup>153</sup> Indeed, the United States lags behind its global competitors in virtually every metric when it comes to preschool and care.<sup>154</sup> And, as ever, the state generally only subsidizes early childhood education for lower-income families via vouchers or other private programs—assistance often difficult to qualify for, secure, or maintain.<sup>155</sup> The pandemic made clearer still the state's thin commitment to childcare outside of public education. For example, while Congress allocated some fifty billion dollars in 2020 to keep the childcare industry afloat amidst the pandemic's spread, this amount paled in comparison

151. Beth E. Schueler & Martin R. West, *Sticker Shock: How Information Affects Citizen Support for Public School Funding*, 80 PUB. OP. Q. 90, 92 (2016) (“Surveys routinely suggest that there is broad support among Americans for increasing spending on public education.”); Tim Walker, *Poll: Majority of Public Wants Greater Federal Support for Education*, NAT’L EDUC. ASS’N (Aug. 25, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/poll-majority-public-wants-greater-federal-support-education> [<https://perma.cc/L5ZX-GRR2>] (“[A] strong majority [of Americans] say they want the federal government to take on [a] more active role in helping school districts hire and retain quality teachers, make college more affordable, and fight discrimination in school.”).

152. See Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL’Y REV. 459, 468–69 (2019) [hereinafter Harbach, *Childcare, Vulnerability, and Resilience*] (attributing the United States’ persistent coding of childcare as private to the intersection of models of liberal and neoliberal theories).

153. *Id.* at 468–69, 468 & n.30 (noting how most other members of the Organization for Economic Co-operation and Development (“OECD”) offer various iterations of universal access to early childhood education and care). To the extent state or local entities have created or expanded publicly funded care programs, they are far from universal, serving, for example, only seventeen percent of eligible three-year-olds nationwide. See Sarah Carr, *The Racist and Sexist Roots of Child Care in America Explain Why the System Is in Shambles*, HECHINGER REP. (Oct. 26, 2021), <https://hechingerreport.org/the-racist-and-sexist-roots-of-child-care-in-america-explain-why-the-system-is-in-shambles/> [<https://perma.cc/8M67-VGPR>].

154. Juliana Herman, Sasha Post & Scott O’Halloran, *The United States Is Far Behind Other Countries on Pre-K*, CTR. FOR AM. PROGRESS (May 2, 2013), <https://www.americanprogress.org/article/the-united-states-is-far-behind-other-countries-on-pre-k/> [<https://perma.cc/UY9F-Q9DY>].

155. See Claire Cain Miller, *How Other Nations Pay for Child Care. The U.S. Is an Outlier*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/10/06/upshot/child-care-biden.html> [<https://perma.cc/6Y3R-WCBE>] (noting that fewer than one in six eligible children qualify for subsidies like Early Head Start or childcare grants, and that for many, the only support for early childhood education comes from tax credits).

to that given to other industries: the CARES Act gave more to Delta Air Lines than the entire childcare industry combined.<sup>156</sup>

COVID-19 laid bare the cracks in healthcare access, wavering trust in science and government, and deep racial and class inequities. But just as importantly, it also exposed the state's role in the separation of education and care, a role that took on new meaning as citizens experienced the loss of public education resources not solely as a crisis of education, but also a crisis of care. As the pandemic surged, this dichotomy became more puzzling: as childcare remained separated from larger public educational entities, families were forced to navigate not one but two labyrinthine systems to construct an already difficult patchwork of care.

This persistent bifurcation of public education and private care is understandable considered against the backdrop of the state's vested interest in public education—and its relegation of care responsibilities to the private family. But perhaps the pandemic offers an opportunity to redefine the relationship not only between education and care, but also between each institution and the state. As the following part describes, insights—and urgency—gleaned from the pandemic perhaps provide the chance to expand our imaginations of education, childrearing, and the provision of care in the modern American state.

#### IV. EDUCATION AS CHILDCARE

As the previous parts suggest, the state has historically little interest in the project of caregiving. Instead, it has provided “care” almost exclusively in the form of one massive subsidy, a benefit that in fact works to distance itself from the traditional provenance of care: the provision of public education. And the state has done so deliberately, recognizing the external benefits that flow to it from the provision of public education—and the ways in which it could outsource other forms of care entirely to the family and the market.<sup>157</sup>

This has produced a largely bifurcated system in which public education and private childcare operate not together but, instead, merely *alongside* one another, rarely in conversation or harmony.<sup>158</sup> In practice, the impact is hard-felt: families must patch gaps in care unfilled by public education with a hodgepodge of private options that are unevenly and inequitably distributed. And as the pandemic demonstrated, when the state's sole subsidy, public education, is removed from the equation, the impact is felt more dramatically

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156. Claire Suddath, *How Child Care Became the Most Broken Business in America*, BLOOMBERG (Nov. 18, 2021, 5:00 AM), <https://www.bloomberg.com/news/features/2021-11-18/biden-s-build-back-better-wants-to-save-america-s-child-care-business> [<https://perma.cc/N24U-EAVM> (dark archive)].

157. *See supra* Part II.

158. *See supra* Part II.

still.<sup>159</sup> What, then, would result from an attempt to unite these institutions—not to prioritize private care or public education, but instead, to prioritize both as tools in a partnership between the family and the state?

To be clear, this Article does not purport in its limited pages to prescribe whether, or how, childcare should be subsumed as a responsibility of the state. Many others before us have tread this path, offering a variety of proposals, models, and other prescriptions that would recenter public support of the franchise of care. Meredith Johnson Harbach, for example, has advocated for a public childcare model that would position the state as central to the provision of care in the United States.<sup>160</sup> Under this model, the state would assist in regulating, providing access via subsidy to, directly supporting parents in facilitating use of, and monitoring childcare institutions.<sup>161</sup> Linda McClain has similarly argued for the recognition of care as a public value, one that, like education, has vital importance to key civic ideals including democratic governance and citizenship.<sup>162</sup> Others contend that the government should entirely subsidize access to childcare, subsuming the private system into the public ambit of the state.<sup>163</sup> And for their part, many political actors have voiced their own support for universal childcare or increased state assistance in supporting access to childcare and early childhood education.<sup>164</sup>

Our prescription is simpler still. The pandemic has provided a singular opportunity to reflect not only on the ways in which our privatized system of childcare and public system of education have variously succeeded and failed, but critically, to also reflect on how these institutions, taken together, have *been failed* by virtue of their operation in separate cultural, political, legal, and economic silos. We suggest in this way that the pandemic has given us a window

159. See *supra* Part III.

160. See generally Harbach, *Childcare, Vulnerability, and Resilience*, *supra* note 152, at 504–15 (also noting that law, policy, and scholarship have also yet to recognize and account for a new childcare reality that sees the private childcare industry as a market failure).

161. *Id.*

162. See generally Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673 (2001) (arguing for more support for families in caring for family members).

163. See generally Grover J. Whitehurst, *Why the Federal Government Should Subsidize Childcare and How To Pay for It*, ECON. STUD. BROOKINGS (Mar. 9, 2017), [https://www.brookings.edu/wp-content/uploads/2017/03/es\\_20170309\\_whitehurst\\_evidence\\_speaks3.pdf](https://www.brookings.edu/wp-content/uploads/2017/03/es_20170309_whitehurst_evidence_speaks3.pdf) [<https://perma.cc/ZT6L-8PZL>].

164. Bernie Sanders, for example, campaigned on this platform. *Bernie Sanders on Education*, FEELTHEBERN.ORG, <http://www.feelthebern.org/bernie-sanders-on-education/> [<https://perma.cc/3AJK-KEQM>]. President Barack Obama, in his 2015 State of the Union address, offered his own proposal for universal health care, calling it a “must-have” and “national economic priority,” and rejecting classifications of childcare as a “side issue, or a woman’s issue.” President Barack H. Obama, *Address Before a Joint Session of the Congress on the State of the Union 3* (Jan. 20, 2015) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015> [<https://perma.cc/LFU7-DY57>]).

not only to reimagine childcare and education, but to reimagine the spectrum between them—and the connection between this spectrum and the state. Put differently, we argue that care and education can, should, and must be considered important domains to what Meredith Johnson Harbach has described as the “geology” of childhood,<sup>165</sup> and that the pandemic has presented a chance to examine how to bring these domains together.

For a variety of reasons, some have long resisted the idea of collapsing “education” into a subset of “care,” or treating public education and private childcare as connected enterprises. A common refrain is that educators are not babysitters, but rather are trained professionals,<sup>166</sup> and that conflating care and education does a disservice to education as a craft. Another: that public education ought at a normative level to have different aims than other types of care, given the public- and state-facing goals of education, and therefore should operate unbound by considerations of care (and vice-versa).<sup>167</sup> And during the pandemic, some teachers pushed back against the idea that it was their responsibility to put themselves and their families at risk solely to serve a caretaking purpose.<sup>168</sup> But we do not seek here to equate traditional forms of education and childcare. Instead, the goal is to reimagine both institutions through the recognition that they are both, always and necessarily, in conversation with one another.

Importantly, those on both sides of the aisle already have shown an interest in using reflections taken from the pandemic period to rethink early childhood education, the provision of care, and the subsidy of public education in America. For example, some on the Right have proposed that post-pandemic policy should center early childhood education and care as “primarily . . . the domain of families and communities,” but that policies should target private options

165. Harbach, *Childcare, Vulnerability, and Resilience*, *supra* note 152, at 499 (“Childcare constitutes part of the ‘geology’ or ‘ecology’ of childhood—sites that present the perils of vulnerability but also the promise of resilience.”).

166. *See, e.g.*, Lorene Edmonson, *Early Childhood Education Is Not Babysitting*, ORLANDO SENTINEL (July 1, 2021, 5:30 AM), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-early-childhood-education-not-babysitting-20210630-7f3lx7npp5ggznvsb7wgr37rfe-story.html> [<https://perma.cc/58TM-GQYK>] (“In high-quality early childhood centers, teachers are selected based on ambitious standards and educational qualifications. These teachers have often taken courses on child development, health and nutrition. These qualified professionals help to provide children the early tools they need to succeed in school.”).

167. *See* Covert, *supra* note 129 (“We have long drawn a sharp distinction where there shouldn’t be one. School is, first and foremost, about education. But it is also a safe place for parents to send their children while they’re at work.”); Haspel, *Why Are Child Care Programs Open When Schools Are Not?*, *supra* note 146 (noting that public education leaders argue that “the driving force for education is education,” not childcare).

168. *See generally* Elvia Díaz, *Gov. Doug Ducey Ordered Schools To Open on Aug. 17 So Teachers Can Babysit, Too*, ARIZ. REPUBLIC (July 24, 2020, 3:20 PM), <https://www.azcentral.com/story/opinion/oped/elviadiaz/2020/07/22/dont-expose-teachers-covid-19-babysit/5490477002/> [<https://perma.cc/BB2A-962B>].

like Universal Savings Accounts, homeschooling, 529 Savings Accounts, and vouchers rather than being funneled through options like Head Start.<sup>169</sup> And similarly, they have argued that the state should reduce barriers to informal quasi-private childcare arrangements, such as parent cooperatives and in-home licensed childcare facilities.<sup>170</sup>

Others, largely aligned with the Left, have suggested various ways to begin the project of unifying public education and childcare. Some argue, for example, for increased school district support in locating and offering childcare for school-aged children.<sup>171</sup> The Center for American Progress, for its part, has suggested the creation of a nine-to-five school day to align public education with parents' schedules and childcare needs, with several hours of that extended schedule spent on extracurricular activities provided by schools.<sup>172</sup> Still others advocate for legislation and policy reform that would recognize both public education and childcare as partners in American care infrastructure.<sup>173</sup> Some states have even explicitly engaged in exploring the relationship between public education and caregiving. Virginia, for example, saw a boost in funding for care programs focused on educational outcomes and development, with the explicit goal of academically preparing students for kindergarten.<sup>174</sup> New Mexico has expanded its subsidy system to offer free childcare to all low- and middle-income families.<sup>175</sup> And Washington, D.C., recently passed legislation that moved childcare providers toward pay parity with elementary school teachers, funding stopgap measures to supplement their pay until the legislation took effect.<sup>176</sup>

On this account, actions taken in the wake of the pandemic have the potential to reshape not just public education or childcare, but the ways in which

169. See RACHEL GRESZLER & LINDSEY M. BURKE, HERITAGE FOUND., *RETHINKING EARLY CHILDHOOD EDUCATION AND CHILDCARE IN THE COVID-19 ERA* 13 (2020), <https://www.heritage.org/sites/default/files/2020-09/BG3533.pdf> [https://perma.cc/796T-KZTC].

170. See *id.* at 18–19.

171. Covert, *supra* note 129.

172. Catherine Brown, Ulrich Boser & Perpetual Baffour, *Workin' 9 to 5: How School Schedules Make Life Harder for Working Parents*, CTR. FOR AM. PROGRESS (Oct. 11, 2016), <https://www.americanprogress.org/article/workin-9-to-5-2/> [https://perma.cc/3U6K-8FYN].

173. See, e.g., Press Release, Ja-Rei Wang, Caring Across Generations, *New Report Finds Care Infrastructure Critical for Equitable Economic Recovery* (Sept. 1, 2020), <https://caringacross.org/news/new-report-finds-care-infrastructure-critical-for-equitable-economic-recovery/> [https://perma.cc/563C-9ZXB].

174. Kate Masters, *Virginia Is Changing Expectations for Child Care Providers To Put Focus on Early Education*, VA. MERCURY (June 18, 2021, 12:02 AM), <https://www.virginiamercury.com/2021/06/18/virginia-is-changing-expectations-for-child-care-providers-to-put-focus-on-early-education/> [https://perma.cc/SL4S-YND8].

175. Elliot Haspel, *America's Child-Care Equilibrium Has Shattered*, ATLANTIC (July 23, 2022), <https://www.theatlantic.com/family/archive/2022/07/us-childcare-programs-expensive-underfunded/670927/> [https://perma.cc/6TU4-ZWFJ (dark archive)].

176. *Id.*

these institutions interact and the state's interest in this partnership. This is especially important when considered against the backdrop of the current political and social climate, one in which the boundaries between public and private are increasingly blurred<sup>177</sup>—particularly when it comes to the care and education of children.<sup>178</sup> As one example, the rise of a revitalized “parents’ rights” movement in education, whose concerns range from questions about the regulation of curricular content to discussion of sexual, racial, and gender identity, well illustrates this dynamic.<sup>179</sup> In this way, families, teachers, and students alike already have begun conversations which undoubtedly will shift the private spheres of the family and the public sphere of education vis-à-vis the state.

That public education and childcare have long operated in silos is unsurprising given the history of both institutions—and their involvement with the state—in American society. But importantly, we have an opportunity to reexamine the existence and contours of these silos at what may well be a watershed moment in education and childcare policy.

#### CONCLUSION

Novelist Arundhati Roy has written that times of pandemic and plague have historically “forced humans to break with the past and imagine their world anew.”<sup>180</sup> As she writes:

[The pandemic] is a portal, a gateway between one world and the next. We can choose to walk through it, dragging the carcasses of our prejudice and hatred, our avarice, our data banks and dead ideas, our dead rivers and smoky skies behind us. Or we can walk through lightly, with little luggage, ready to imagine another world. And ready to fight for it.<sup>181</sup>

This Article suggests that we do exactly that: stretch our imaginations about our society's infrastructure of care. As the pandemic revealed, the long-siloed institutions of private childcare and public education are both in critical danger—a state of play that existed well before the pandemic stepped in to hasten the decline.

177. See, e.g., Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, HOUS. L. REV. (forthcoming 2023) (on file with the North Carolina Law Review) (arguing that the Supreme Court's recent decisions on abortion, guns, and religious prayer have reconfigured the public-private dichotomy).

178. See generally Covert, *supra* note 129; Haspel, *Why Are Child Care Programs Open When Schools Are Not?*, *supra* note 146; see also *supra* notes 150–59 and accompanying text.

179. For a discussion of the modern parents' rights movement, see generally Millat, *The Education-Democracy Nexus*, *supra* note 125.

180. Arundhati Roy, *Arundhati Roy: 'The Pandemic Is a Portal'*, FIN. TIMES (Apr. 3, 2020), <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca> [<https://perma.cc/VT23-4XWT>].

181. *Id.*



And perhaps less obviously, the pandemic revealed that the distance between these institutions is perhaps not so wide as once thought. The pandemic illustrated that schools operate not only as centers of academic instruction but also as centers of care, community pillars that provide emotional, physical, psychological and structural support to children and families. And critically, the pandemic also laid bare the ways in which childcare operates as a central force in economic and social infrastructure. In this way, the pandemic made clear how traditional notions of “education” and “care” do not, and cannot, capture the ways in which each institution actually interacts with society—and with each other—in modern America. On this account, the pandemic offers a timely opportunity to evaluate the long-held “separate spheres” approach to education and childcare, and the space they together occupy in the project of raising American children.