

### The Child Welfare and Education Gap

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*Given the overlapping interests between child welfare and education, one might expect federal laws and policies in these two areas to work in tandem. But in the United States, they have not. With food, nutrition, and early childhood programs among the few exceptions, welfare and education laws have largely been embodied in separate statutes and administered by different agencies. Since their advent and evolution from the 1900s to the present, welfare laws have become increasingly and predominantly concerned with regulating mothers and families, while education laws have become increasingly and predominantly concerned with regulating teachers and schools. Neither area of law has prioritized children as its direct beneficiaries. This Article argues that this misdirected attention is responsible for why these two areas remain disconnected: both welfare and education laws have ignored the immediate needs of children, while focusing instead on regulating the institutions surrounding them. If children were placed at the center of public benefits, the importance of linking adequate child welfare and education systems would become more obvious, as it has been for the food, nutrition, and early childhood programs that buck this trend. After analyzing the gap between these two areas of law, this Article proposes a reconceptualization and unification of child welfare and education laws and policies to better serve socioeconomically disadvantaged children and their families.*

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## INTRODUCTION

In theory, child welfare<sup>1</sup> and education<sup>2</sup> are inextricably linked.<sup>3</sup> Ensuring that children have access to educational opportunities is crucial to their welfare,

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1. Unless otherwise specified, I refer to “child welfare” throughout this Article as a general term consistent with the broad definition by the U.S. Department of Health and Human Services’ Children’s Bureau: “a continuum of services designed to ensure that children are safe and that families have the necessary support to care for their children successfully.” Child Welfare Info. Gateway, *What Is Child Welfare? A Guide for Educators*, CHILD. BUREAU/ADMIN. ON CHILD. YOUTH & FAMS. 1 (Aug. 2012), [http://www.childwelfare.gov/pubPDFs/cw\\_educators.pdf](http://www.childwelfare.gov/pubPDFs/cw_educators.pdf) [<http://perma.cc/4RUF-8TGN>]. Child welfare therefore includes direct subsidies for low-income families with children, food and nutrition programs, and child protective services. This is intended to be more expansive than “child welfare” as used in Title IV-B of the Social Security Act, which primarily focuses on services to preserve safe home environments and protect children from neglect, abuse, and exploitation.

and ensuring that children have access to nurturing environments is crucial to their educational achievement. More specifically, when socioeconomically disadvantaged children do not receive an adequate education, they are unlikely to reach economic self-sufficiency and emerge from the cycles of poverty that plague the welfare system.<sup>4</sup> At the same time, socioeconomic status and academic performance are highly correlated; children from low-income families are more likely to have lower levels of academic performance.<sup>5</sup> Court cases

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2. Unless otherwise specified, I refer to “education” throughout this Article as a general term for pre-primary, primary, and secondary public schooling, and learning opportunities for children under the age of eighteen.
  3. See, e.g., Robert H. Mugge, *Education and AFDC*, 2 WELFARE REV. 1, 4 (1964) (“The lack of education may itself result, directly or indirectly, from the same circumstances which have led, directly or indirectly, to the need for assistance. Thus, a person’s mental or physical incapacity may have formerly discouraged long school attendance, and the same condition now places him in marginal economic circumstances.”).
  4. See, e.g., CLIVE R. BELFIELD & HENRY M. LEVIN, *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 1-18* (2007) (observing that inadequate education reduces potential tax revenues and raises public expenditures on crime prevention, healthcare, and public assistance); RUSSELL W. RUMBERGER, *DROPPING OUT: WHY STUDENTS DROP OUT OF HIGH SCHOOL AND WHAT CAN BE DONE ABOUT IT 1-19* (2011) (observing that high school dropouts are less likely to find a job and earn a living wage, and more likely to be poor and to suffer from a variety of adverse health outcomes); Andrea Paterson, *Between Helping the Child and Punishing the Mother: Homelessness Among AFDC Families*, 12 HARV. WOMEN’S L.J. 237, 255 (1989) (“[S]ociety pays the greatest price when . . . children do not receive an adequate education. Now more than ever, an adequate education is the prerequisite to economic self-sufficiency.”). According to the U.S. Department of Labor’s Bureau of Labor Statistics, an individual with a bachelor’s degree in 2016 earned on average more than double that of an individual who did not graduate high school. The unemployment rate for an individual who did not graduate high school (7.4%) was nearly three times more than an individual who has a bachelor’s degree (2.7%). Bureau of Labor Statistics, *Employment Projections*, U.S. DEP’T LABOR (Oct. 24, 2017), [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm) [<http://perma.cc/F3WW-5YPF>].
  5. See, e.g., Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY AND THE UNCERTAIN LIFE CHANCES OF LOW-INCOME CHILDREN* 91, 91-116 (Richard Murnane & Greg Duncan eds., 2011) (discussing the increasing achievement gap between children from high- and low-income families); *Developing Early Literacy: Report of the National Early Literacy Panel: A Scientific Synthesis of Early Literacy Development and Implications for Intervention*, NAT’L CTR. FOR FAMILY LITERACY 1 (2008), <http://www.nichd.nih.gov/publications/pubs/documents/NELPReport09.pdf> [<http://perma.cc/N3ZL>] [<http://perma.cc/N3ZL-WEMT>] (observing how low-income families fare even worse than the national average of 37% of U.S. fourth graders failing to achieve basic reading levels).

brought under the Fourteenth Amendment's Equal Protection Clause also illustrate these theoretical and practical connections between poverty and education.<sup>6</sup>

Given the close ties between child welfare and education, one might expect federal laws and policies in these areas to work in tandem. But in the United States, they have not. With a few exceptions, welfare and education laws have primarily been embodied in separate statutes, are administered by different agencies, and rest on different theories concerning recipients, institutions, and methods of remedying poverty. For the most part, landmark developments in welfare and education emerged in the twentieth century at two different momentous points in United States history. The former began with the Great Depression and New Deal in the 1930s and 1940s. The latter started with the U.S. Supreme Court's decision in *Brown v. Board of Education*, the subsequent Civil Rights Movement in the 1950s and 1960s, and President Lyndon B. Johnson's "Great Society" programs in the 1960s. Interestingly, although many welfare and education laws aim to serve the same population—socioeconomically disadvantaged children and their families—the communication within and connection between the major laws in each of these areas are quite limited. They have developed almost entirely separately, and today, they continue to operate almost completely independently.

Scattered among these laws are several discrete exceptions to this disconnect. A few nutrition and early childhood programs bridge child welfare and education concerns in unique, innovative ways. Programs started through the National School Lunch Act and the Child Nutrition Act of 1966 provide public subsidies to ensure that students are well-fed and able to learn. Head Start created a system of resources and services to reduce the learning gap for low-income children before they enter public education. These programs have bucked the trend by considering the intersections of welfare and education. They provide direct benefits to address the immediate needs of disadvantaged children. Yet these examples remain the exception rather than the norm. Although important, these laws supplement, rather than steer, landmark welfare and education laws, such as the Social Security Act of 1935, the Elementary and Secondary Education Act of 1964, and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Instead, these major welfare and education laws remained disconnected, with both focusing on indirect assistance by regulating other entities linked to children. Welfare laws centered on the regulation of mothers and families—namely, how to sanction undesirable parental behaviors, such as having chil-

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6. For instance, in *Plyler v. Doe*, 457 U.S. 202 (1982), the Court considered whether children could be denied public education because of their undocumented immigrant status. The Court struck down such a denial as a violation of the Equal Protection Clause, observing that education is necessary for individuals to become "self-reliant and self-sufficient participants in society," and that "[t]he inability to read and write will handicap the individual deprived of a basic education each and every day of his life." *Id.* at 222.

dren out of wedlock or remaining unemployed.<sup>7</sup> Education laws, meanwhile, centered on the regulation and sanctioning of teachers and schools for not meeting certain educational standards.<sup>8</sup> But neither area of law prioritized ensuring that children receive the resources to which they are entitled under these laws. Instead, they have focused only on punishing those who supposedly mismanage resources. Although these regulations could at most benefit children indirectly, and despite considerable uncertainty whether these sanctions do in fact help children, lawmakers have continued to prioritize these regulations over the provision of direct benefits. Meanwhile, child welfare laws remain disconnected from public schools and their work to teach the country's most disadvantaged students, and education laws remain disconnected from the impoverished families and neighborhoods in which many students spend their time outside of school.

The extent of this lack of coordination is considerable. There are few efforts to determine what set of universal entitlements children should receive and how to optimize child welfare and education benefits. Child welfare agencies and schools distribute these respective benefits, but they have few legal obligations to know or adjust benefits administered by the other entity. If a child welfare agency has denied to a child's family benefits that are necessary for that child's subsistence, there is no guarantee that the school will be informed, nor does the school have a duty to provide extra support. The reverse is also true: if a school is failing to meet its obligations, there is no mechanism for a social worker or welfare administrator to step in to ensure that the best interests of the child are met. Such a haphazard system stands in stark contrast to robust welfare systems in many other developed countries, such as those in Scandinavia.<sup>9</sup>

This lack of coordination persists against a backdrop of enormous need. According to the U.S. Census Bureau, as of 2016, about 18% of children under the age of eighteen (13.3 million) live in families below the federal poverty

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7. See *infra* Part I.

8. See *infra* Part II.

9. See, e.g., GØSTA ESPING-ANDERSEN, *THREE WORLDS OF WELFARE CAPITALISM* 9-34 (1990) (describing three main types of welfare states among developed countries, including social democratic countries focused on universal programs connecting welfare and education policies to advance equality of the highest standards, rather than minimal needs); PETER A. HALL & DAVID SOSKICE, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* 1-68 (2001) (contrasting liberal market economies and coordinated market economies, with the latter characterized by greater coordination among employers, schools, government, and other institutions). An analysis of the different systems is beyond the scope of this Article, and the United States would likely not be able to adopt wholesale any particular system from another country because of its distinct economic and political features. Nevertheless, it is worth noting that coordination is not foreign, and is in fact central, to many other developed countries.

threshold.<sup>10</sup> Children represent 23% of the total population, but 32.6% of individuals in poverty.<sup>11</sup> And as of 2013, low-income students comprised a majority of children attending public schools.<sup>12</sup> Hampered by poverty, these children face considerable educational challenges.<sup>13</sup> As just a few examples, studies report that before entering kindergarten, the average cognitive scores of preschool-age children in the lowest socioeconomic quintile are 60% below those of children in the highest socioeconomic quintile.<sup>14</sup> Third graders from low-income families with less educated parents know about 4,000 words, three times fewer than the 12,000 words for middle-income families with well-educated parents.<sup>15</sup> And just 12% of dependent family members in the lowest family income quartile attained a bachelor's degree by age 24, compared to 58% in the highest quartile—a 46% gap.<sup>16</sup> While the immediate needs of low-income children, including adequate access to food, nutrition, shelter, and educational opportunities are palpable, coordinated efforts between child welfare and education are not.

This Article describes and critiques the systemic disconnect between federal welfare and education laws in the United States. A considerable amount of

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10. Jessica L. Semega, Kayla R. Fontenot & Melissa A. Kollar, *Income and Poverty in the United States: 2016*, U.S. CENSUS BUREAU 14 (Sept. 2017), <http://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf> [<http://perma.cc/DKW7-QAQP>].
  11. *Id.*
  12. *Research Bulletin: A New Majority: Low Income Students Now a Majority in the Nation's Public Schools*, SOUTHERN EDUC. FOUND. (Jan. 2015), <http://www.southerneducation.org/getattachment/4ac62e27-5260-47a5-9d02-14896ec3a531/A-New-Majority-2015-Update-Low-Income-Students-Now.aspx> [<http://perma.cc/6YJC-4E2F>] (addressing data collected by the National Center for Education Statistics).
  13. For a compiled list of studies documenting the negative effects of poverty and low socioeconomic status on educational opportunities and outcomes, see *Education & Socioeconomic Status*, AM. PSYCHOL. ASS'N, <http://www.apa.org/pi/ses/resources/publications/education.aspx> [<http://perma.cc/LC4Z-PT8L>] (last visited Mar. 21, 2018).
  14. Lisa Klein & Jane Knitzer, *Promoting Effective Early Learning: What Every Policy-maker and Educator Should Know*, NAT'L CTR. FOR CHILD. POVERTY 2 (Jan. 2007), [http://www.nccp.org/publications/pdf/text\\_695.pdf](http://www.nccp.org/publications/pdf/text_695.pdf) [<http://perma.cc/3GLL-WFEP>].
  15. *Id.*
  16. Margaret Cahalan et al., *Indicators of Higher Education Equity in the United States: 2017 Historical Trend Report*, PELL INST. FOR STUDY OPPORTUNITY HIGHER EDUC. 76-77 (2017), [http://www.ahead-penn.org/sites/default/files/Indicators\\_of\\_Higher\\_Education\\_Equity\\_2017.pdf](http://www.ahead-penn.org/sites/default/files/Indicators_of_Higher_Education_Equity_2017.pdf) [<http://perma.cc/JT8Q-GNLZ>] (providing estimates using data from the Current Population Survey for 2015, in which 12% of dependent family members in the lowest family income quartile had attained a bachelor's degree by age 24, 20% in the second quartile, 35% in the third quartile, and 58% in the highest quartile).

scholarship has described the breadth of child welfare and education laws and policies, as well as their shortcomings in supporting the populations they aim to serve. Some scholars have acknowledged the historical disconnect in passing,<sup>17</sup> but most, mirroring the laws and policies themselves, have focused on one but not both of these areas together. Welfare scholars have expressed concerns over certain aspects of welfare laws that can be particularly problematic to families, such as the recoupment of overpayments.<sup>18</sup> Education scholars have expressed concerns over the lack of educational resources to serve socioeconomically disadvantaged children and families.<sup>19</sup> But for the most part, neither set of scholars has turned to the other for understanding how the system does not—but could—work together as a whole. A related, underdeveloped area is the role and feasibility of direct benefits to children.

Proposing a more coordinated effort requires first establishing why the gap between these two areas persists. I first argue that the disconnect between child welfare and education laws originates from the two areas' lack of focus on the immediate needs of the very population they seek to serve: the children themselves. Welfare laws have focused on regulating mothers and families. Education laws have focused on regulating teachers and schools. Because of this misalignment, the impetus to connect child welfare and education laws—namely, the ability to best serve children in need and ensure they receive resources to survive and thrive—has been foregone. Its void has been filled instead by an obsession in legislatures and government bureaucracies with issues such as welfare eligibility for mothers with out-of-wedlock children or average test scores of schools, while neglecting the immediate needs of children. I consequently argue that programs that provide direct benefits to children, as modeled by national

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17. See, e.g., Mugege, *supra* note 3, at 1 (“(1) How do past levels of education relate to assistance being received at the present time? In other words, how much education was received by the adult recipients, nearly all of whom have, presumably, already completed their formal educations? (2) To what extent are the child recipients of public assistance being educated?”); Robert D. Reischauer, *Welfare Reform: Will Consensus Be Enough?*, 5 BROOKINGS REV. 3, 5 (1987) (“A decade ago educational policy was barely considered in reports on federal welfare policy. Conservatives believed that educational issues should be left to state and local governments, while liberals regarded such concerns as irrelevant to discussions of income support policy.”).
  18. See, e.g., Margaret Howard, *Recoupment of Overpayments in AFDC: Misguided Policy and Misread Statute*, 75 N.W. U. L. REV. 635, 637, 682-84 (1980) (arguing that recoupment should be barred for several reasons, including its contravention of the purposes of Aid to Families with Dependent Children to help needy children, to strengthen the family unit, and to encourage self-support).
  19. See, e.g., JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 1-7* (1991) (documenting and analyzing the socioeconomic and racial disparities of children in public schools, particularly from the vantage point of education litigation and desegregation).

food, nutrition, and early childhood programs, should be central in federal welfare and education laws, rather than mere offshoots or exceptions.

In Part I, I begin by exploring the history of child welfare laws, including the now-defunct Aid to Families with Dependent Children program created by the Social Security Act of 1935 and the Temporary Assistance for Needy Families program established by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>20</sup> I show how child welfare laws increasingly focused on the regulation of mothers and families, rather than addressing the immediate welfare and educational needs of children. In Part II, I show how the same flaw pervades education laws, in which policymakers focused on how to regulate teachers and schools, including the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965 (and subsequent amendments, including the No Child Left Behind Act of 2001), the Equal Educational Opportunities Act of 1973, and the Individuals with Disabilities Education Act of 1990. Additionally, by comparing the history and provisions of these statutes, I illustrate how the two, despite their similar conceptual and practical foundations, have been formulated and are widely administered separately from each other. In Part III, I discuss a few notable exceptions, including federal food, nutrition, and early childhood programs, which have bucked the trend by coordinating welfare and education interests and the provision of direct benefits to disadvantaged children. Finally, in Part IV, I argue that major welfare and education laws should more closely model these exceptions and coordinate by focusing on children's immediate needs.

#### I. THE CHILD WELFARE SYSTEM AND THE REGULATION OF FAMILIES

The child welfare system consists of many areas of law and policy, including assistance to families with dependent children, child protective services, laws preventing child abuse, and programs preventing juvenile delinquency.<sup>21</sup> This Part explores the development of the child welfare system as encompassing all of these services. The discussion focuses in particular on assistance to families with dependent children, given the considerable amount of effort and attention that welfare policymakers and scholars have afforded to such programs over the years. Chief among these programs has been Aid to Families with Dependent Children, which was implemented in 1935 and replaced with the Personal Responsibility and Work Opportunity Reconciliation Act in 1996. The recurring theme throughout this history is a strong emphasis on regulating mothers and

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20. History offers insights into how to structure welfare systems in the future. See, e.g., Mary Ann Mason, *The Burden of History Haunts Current Welfare Reform*, 7 HASTINGS WOMEN'S L.J. 339, 343 (1996) ("How does an awareness of these unique historical themes contribute to the resolution of current heated disputes regarding the future of welfare? . . . To my mind, history can help illuminate future paths in large part by exposing the restrictions on our perceptions that have been fixed by the past.").

21. See *supra* note 1.

families to the detriment of educational investments that ensure the subsistence and self-sufficiency of these families, including their children.

Indeed, beginning in the 1930s, the federal government pursued a multitude of federal laws and policies that were enacted and revised with an almost exclusive focus on how to regulate families. This trend has been consistent in times of both economic growth and hardship, regardless of whether Democratic or Republican majorities controlled the federal government. Eligibility criteria restricted benefits to certain families and incentivized particular economic or marital decisions within low-income households. Mostly missing from these discussions and policies has been an answer to how children can be protected when sanctions restrict their access to benefits. Relatedly, so far, there has been a lack of focus on how to best ensure these children have the opportunity to achieve a minimal level of subsistence, attend schools, and someday rise above the impoverished conditions to which they have been born.

A. *Origins of Federal Child Welfare Programs*

At the outset, it is worth noting that embedded in the history of child welfare in the United States is a centuries-old notion that viewed children predominantly as economic assets to fuel the country's economic productivity.<sup>22</sup> A sense of the vulnerability of children and the concept of the "best interests of the child" were relatively unknown and are much more recent phenomena coinciding with the decreased essentiality of agricultural labor.<sup>23</sup> It is perhaps not surprising then that child welfare programs developed without a central focus on the welfare of children, even though economic productivity and ensuring the welfare of children are not in tension but rather go hand in hand.

Indeed, before the Great Depression, the federal government had a minor role in child welfare.<sup>24</sup> In 1909, President Theodore Roosevelt led a White House Conference on the Care of Dependent Children, which emphasized the importance of home life for children and recommended financial assistance to promote appropriate homes.<sup>25</sup> The conference also catalyzed the eventual Aid to Dependent Children program (later renamed Aid to Families with Dependent

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22. Mason, *supra* note 20, at 342 ("American sentimentality regarding children is recent, primarily a twentieth century phenomenon. Until the second half of the nineteenth century, children were treated by society primarily as economic assets. Children could work, and this was a labor hungry nation." (footnotes omitted)).

23. *Id.* at 343 ("Only when agricultural labor became less essential and the working population moved from farms to factories did America develop a sentimental attitude toward our children.").

24. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 452-53 (2008) ("[T]he federal government, prior to 1935, . . . played an insignificant role in child welfare policy and funding.").

25. Irene Lurie, *Major Changes in the Structure of the AFDC Program Since 1935*, 59 CORNELL L. REV. 825, 826 (1974).

Children (AFDC) in 1962).<sup>26</sup> Moreover, the conference's message mobilized children's organizations, women's organizations, parent-teacher associations, labor unions, and other advocacy groups to push for mothers' pensions within state legislatures.<sup>27</sup> In line with these efforts, the federal government created the Children's Bureau, the first federal agency dedicated to the welfare of children, in 1912.<sup>28</sup> Between 1921 and 1929, Congress provided federal subsidies for mothers and babies through the Sheppard-Towner Act.<sup>29</sup> By 1920, legislatures in forty-one states had enacted mothers' pension laws; by the end of 1931, every state had such a program, except for Georgia and South Carolina.<sup>30</sup>

During the same period, social reformers and proponents of child labor laws pushed to keep children out of factories and other harsh work environments.<sup>31</sup> Many states enacted child maltreatment reporting laws, and child welfare authorities increasingly investigated reports of child abuse and neglect.<sup>32</sup> The first juvenile court was set up in 1899; by 1919, every state but three had juvenile courts.<sup>33</sup> These courts were originally concerned with delinquent children, though they also had jurisdiction over cases of abused and neglected children.<sup>34</sup> But even as these early developments coincided with the beginning of a trend toward increased federal involvement in education,<sup>35</sup> these programs were separate from any vision of ensuring these children would have access to educational opportunities to keep them from delinquency and help them overcome their abusive pasts.

#### B. Federal Child Welfare Programs of the Early 1900s: Selective Support

Federal welfare programs to support children ramped up during the New Deal's response to the Great Depression. In particular, Congress enacted the Social Security Act of 1935 and the Aid to Dependent Children program (later

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26. Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 472 (1987-88).

27. Lurie, *supra* note 25, at 826. Mothers' pensions, as a general term, refer to government subsidies for low-income mothers with dependent children.

28. *See infra* Part III.C.

29. Myers, *supra* note 24, at 452-53.

30. Lurie, *supra* note 25, at 826.

31. Jill Duerr Berrick, *From Mother's Duty to Personal Responsibility: The Evolution of AFDC*, 7 HASTINGS WOMEN'S L.J. 257, 265 (1996).

32. *Id.* at 266.

33. Myers, *supra* note 24, at 452.

34. *Id.*

35. *See infra* Part II.

AFDC),<sup>36</sup> to reflect the inclusion of mothers and fathers in two-parent families for cash grant benefits.<sup>37</sup> The initial program focused on allowing mothers to be released from employment so that they could be devoted primarily to the care of their children, produce “contributing citizens,” and “shelter children from the harsh realities and adverse influences of the outside world.”<sup>38</sup> To work outside of the home and generate an income attracted public skepticism because it supposedly meant neglecting duties as a mother.<sup>39</sup> The Social Security Act of 1935 included four programs providing grants-in-aid to states to support: (1) dependent children; (2) transportation, hospitalization, and convalescent care for handicapped children; (3) additional local services for dependent and handicapped children; and (4) maternal and child health services.<sup>40</sup> But beyond these grant programs, there was not much attention directed at these children’s education or their future sustainability. Even the impetus of the New Deal offered a minimal level of support relative to the systems of other countries.<sup>41</sup> Rather, the focus remained on the regulation of these children’s mothers and families. Several developments illustrate this reality.

First, only some mothers—and by extension, their children—could receive benefits. A practice of categorizing the poor as either morally blameless and thus the “deserving poor,” or the “unworthy poor,” became widespread, and persists today.<sup>42</sup> In particular, mothers who had children out of wedlock were considered “amoral or unfit” and were denied benefits.<sup>43</sup> This practice ignored the inherent unfairness of depriving children of benefits for no reason other than their parents or other family members’ supposed indiscretions and the disapproval of others.<sup>44</sup> There is an obvious unfairness to the children who are

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36. Myers, *supra* note 24, at 453.

37. Berrick, *supra* note 31, at 259.

38. *Id.* at 260.

39. *Id.* at 261-62 (“A curious but consistent theme in welfare policy during the early years was the emphasis on earning eligibility through work. Work, however, was considered synonymous to women’s duty as mother. Work that might generate an income outside of AFDC was viewed with public skepticism and reduced the moral character of the woman.”).

40. *Social Security History: Fifty Years Ago*, SOC. SECURITY ADMIN., <http://www.ssa.gov/history/50ed.html> [<http://perma.cc/3R6K-B7DQ>] (last access on Mar. 21, 2018).

41. Mason, *supra* note 20, at 340 (“[W]hile European countries, beginning in the 1920s and stretching into the post-World War II era, rapidly developed social welfare states with universal entitlements, America, even under the New Deal, took only the smallest of steps by introducing Social Security.”).

42. Handler, *supra* note 26, at 470.

43. Berrick, *supra* note 31, at 260.

44. Fred C. Doolittle, *State-Imposed Nonfinancial Eligibility Conditions in AFDC: Confusion in Supreme Court Decisions and a Need for Congressional Clarification*, 19

caught in this battle when they are not responsible for the circumstances in which they were born. The U.S. Supreme Court accordingly moved toward recognizing illegitimacy as a suspect classification and held in several decisions that the Constitution prohibited discrimination against children born out of wedlock.<sup>45</sup> Since then, statutes generally no longer formally discriminate against children born out of wedlock, and most states provide some level of protection to ensure that these children have the same legal rights as other children. Stigmas and stereotypes, however, persist.<sup>46</sup>

Second, AFDC did not guarantee any specific minimum subsistence benefit.<sup>47</sup> Even for those eligible, AFDC payments could be quite minimal: initially, \$18 per month for the first child and \$12 per month for each additional child.<sup>48</sup> The general idea among policymakers was that mothers should not be disincentivized from taking support from another source, such as a husband.<sup>49</sup> Meanwhile, although statistics from the 1960s showed that AFDC recipient children tended to be of elementary school age and that school attendance among them was high, these statistics also suggested that AFDC children were increasingly behind their grade level and potentially not receiving the help needed to keep up with their peers.<sup>50</sup> These children from low-income families therefore appeared to be already falling behind in school even at these early ages, and child welfare interventions could have, but for the most part did not, acknowledge this disparity. AFDC mothers were also considerably less-educated, with only 16% completing high school compared to 53% of women in the general population between twenty to fifty-four years of age.<sup>51</sup> Early reports raised the idea that public schools needed to take more responsibility for supporting the learning and retention of the students most in need,<sup>52</sup> but there appeared to be few

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HARV. J. LEGIS. 1, 4 (1982) (“In the United States, public assistance is not available to all poor people. Instead, society attempts to define a subset of the poor who are not ‘morally responsible’ for their poverty.”).

45. See Barbara F. Altman, *The Social Services Amendments of 1974: Constitutionality of Conditioning AFDC Grant Eligibility on Disclosure of Paternity of Illegitimate Child*, 64 GEO. L.J. 947, 962 (1976).
46. See Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346-50 (2011).
47. Paterson, *supra* note 4, at 241 (“AFDC families have no right to and do not receive a minimum subsistence benefit.”).
48. MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 316 (1988); Berrick, *supra* note 31, at 261.
49. HARRELL R. RODGERS, JR., *POOR WOMEN, POOR FAMILIES: THE ECONOMIC PLIGHT OF AMERICA’S FEMALE HEADED HOUSEHOLDS* 76 (1990); Berrick, *supra* note 31, at 262.
50. Mugge, *supra* note 3, at 7-14.
51. *Id.* at 1-2.
52. *Id.* at 14.

efforts to pursue partnerships and collaboration between public schools and welfare agencies.

These concerns only worsened as AFDC's costs and rolls increased significantly over the next few decades. Black and never-married women began to comprise larger and larger proportions of these rolls, and by 1960, about three million women and children were collecting benefits from AFDC. This number continued to rise rapidly, and by the mid-1990s, over fifteen million women and children were enrolled.<sup>53</sup> The population receiving AFDC had changed considerably from its initial, mostly widowed population. AFDC beneficiaries were now increasingly those who were divorced, separated, or never married.<sup>54</sup> Beneficiaries also became more diverse as courts struck down requirements that only mothers who maintained "suitable homes" would be eligible for benefits. Infused with racial undertones and stereotypes, the requirements had given local officials discretion to limit assistance only to "gilt-edged widows," predominantly white women whom the officials identified as supposedly living up to the highest moral standards.<sup>55</sup> Removing the requirements therefore allowed more black and Hispanic families to join the welfare rolls.<sup>56</sup> At the federal level, AFDC expenditures increased from \$5 billion in 1975 to \$12.7 billion in 1992.<sup>57</sup>

Not by any coincidence, this period also rolled out the first set of federal work requirements for AFDC mothers.<sup>58</sup> Racial discrimination and discrimination against unwed mothers were widespread, and many feared that AFDC would encourage idleness and sexual immorality.<sup>59</sup> During these decades, the popular perception of "women on welfare . . . transformed from worthy mothers into women of sexually deviant behavior."<sup>60</sup> Scholars documented radio and newspaper coverage featuring racist and misogynistic overtures, including referring to poor black and Hispanic families as "maggots," and one woman saying, "I didn't breed them, I don't want to feed them."<sup>61</sup>

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53. Berrick, *supra* note 31, at 261.

54. *Id.* at 263.

55. KENNETH J. NEUBECK & NOEL A. CAZENAIVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR* 44-45 (2001).

56. *Id.*; Berrick, *supra* note 31, at 264.

57. Janelle T. Calhoun, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 *MERCER L. REV.* 921, 923-24 (1995); Catherine Wimberly, Note, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 *STAN. L. REV.* 729, 736 (2000).

58. Handler, *supra* note 26, at 489 ("Not coincidentally, the mid-1960s witnessed the start of federal work requirements for AFDC mothers.").

59. *Id.* at 488.

60. Berrick, *supra* note 31, at 264.

61. JONATHAN KOZOL, *AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION* 128 (1995).

More specifically, as AFDC caseloads expanded through the 1960s and 1970s, Congress amended the Social Security Act to establish more incentives for recipients to take up employment.<sup>62</sup> Called the Work Incentive (WIN) Program, the amendments gave welfare agencies considerable leeway on whom to refer to the program, and many were deemed not appropriate due to childcare responsibilities and poor health.<sup>63</sup> Disappointed in the program, Congress then enacted the Talmadge Amendment of 1971,<sup>64</sup> which required all AFDC mothers, apart from those with children under six years of age or those with eligible health exceptions, to “register for manpower services, training, and employment as provided by regulations of the Secretary of Labor.”<sup>65</sup> This turned out to be about 1.2 million mothers.<sup>66</sup> Eventually, “motherhood became divorced from the concept of work entirely,”<sup>67</sup> and motherhood was “[n]o longer a natural duty,” but rather “a privilege.”<sup>68</sup> The administration of AFDC also became increasingly bureaucratic and rule-bound as the federal government issued a flood of regulations limiting areas where states previously had discretion, and the federal and state governments both increased efforts on quality control.<sup>69</sup> Although social attitudes toward the elderly poor improved, they did not get better for poor, female-headed households. These households were continuously stigmatized and relegated to grant-in-aid programs where state and local governments determined basic financial eligibility, benefit levels, and the overall administration of benefits.<sup>70</sup>

In theory, a question about a child’s paternity or dispute over child support obligations only affected the eligibility of the mother to receive benefits, not the child’s.<sup>71</sup> The child’s benefits were supposed to continue through protective payments to a third party. But in practice, this setup deprived both the mother and the child of benefits.<sup>72</sup> A Connecticut State Welfare Department regulation, for instance, denied welfare benefits to mothers who refused to disclose the child’s paternity; a federal court enjoined the regulation because it imposed an

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62. Lurie, *supra* note 25, at 833.

63. *Id.* at 833-34.

64. Act of Dec. 28, 1971, Pub. L. No. 92-223, 85 Stat. 802, 805-06 (1971) (codified at scattered sections of 42 U.S.C. (1976)).

65. 42 U.S.C. § 602(a)(19) (1976); *see also* Lurie, *supra* note 25, at 834 (discussing the provision).

66. Lurie, *supra* note 25, at 834.

67. Berrick, *supra* note 31, at 269.

68. *Id.* at 270.

69. Handler, *supra* note 26, at 481-83.

70. *Id.* at 483.

71. Altman, *supra* note 45, at 960.

72. *Id.* at 960 n.81 (describing cases where courts recognized that denying benefits to mothers essentially meant lessening the flow of benefits to the child).

additional eligibility requirement not sanctioned by the statute.<sup>73</sup> The state attempted to change the regulation to terminate only the mother's AFDC payment, but the court found the new regulation to be no different because both regulations reduced the level of assistance a family, including the child, could receive.<sup>74</sup>

Yet states continued to implement full-family sanctions that stripped entire families of their benefits if the parents did not comply with particular conditions.<sup>75</sup> Indeed, although AFDC primarily consisted of federal funds provided on a matching fund basis, the program itself was designed to be primarily administered at the state level.<sup>76</sup> And ostensibly as a means of rationing limited resources, many states constricted eligibility or failed to adjust benefits for inflation, both of which limited the benefits available to children.<sup>77</sup> Only a small number qualified for the program, and "[t]he *excluded* were forced to get along as best they could: they worked, their children worked, and they were hungry and miserable along with the rest of the poor."<sup>78</sup> Formally, the Social Security Act provided that states must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness."<sup>79</sup> But families denied assistance often had limited legal avenues for recourse,<sup>80</sup> and for those who could mount a challenge, only some, but not all, court decisions were favorable.

There were a few victories for low-income families. In 1968, the U.S. Supreme Court struck down regulations that denied AFDC payments to a family if the mother "cohabits" a home with a single or married able-bodied man.<sup>81</sup> The Court focused on the state's stated justification for denying benefits, namely its interest in discouraging immoral actions and illegitimacy, and found this to be contrary to the Social Security Act. The Court reasoned that "Congress has determined that immorality and illegitimacy should be dealt with through rehabil-

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73. Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969) (mem.).

74. Doe v. Harder, 310 F. Supp. 302, 303 (D. Conn. 1970) (per curiam).

75. See *infra* note 118 and accompanying text.

76. 42 U.S.C. §§ 601-10 (1970).

77. See Michael E. Armev, *What Remains of Federal AFDC Standards After Jefferson v. Hackney*, 48 IND. L.J. 281, 281 (1973); Marion Buckley, *Eliminating the Per-Child Allotment in the AFDC Program*, 13 L. & INEQ. 169, 212 (1994).

78. Handler, *supra* note 26, at 476.

79. 42 U.S.C. § 602(a)(4) (1964).

80. During this era when local regulations were increasing, scholars lamented the lack of lawyers and legal services to determine where welfare reform was needed or to assist individual clients who cannot afford representation. See Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1257 (1965).

81. King v. Smith, 392 U.S. 309, 311-12 (1968).

itative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC.”<sup>82</sup> Justice Douglas, concurring, drew upon another case decided that same term, holding that the Fourteenth Amendment’s Equal Protection Clause prohibited illegitimate children from being denied any benefits they would otherwise be entitled to as legitimate children.<sup>83</sup> He reasoned that the Equal Protection Clause would also apply here, where “the immorality of the mother has no rational connection with the need of her children under any welfare program.”<sup>84</sup>

Similarly, many states required welfare recipients to establish one year of residency to be eligible for AFDC assistance until 1969,<sup>85</sup> before the U.S. Supreme Court struck down those requirements.<sup>86</sup> But the Court did not base its decision on the protection of children. Rather, the Court declared that all citizens had a constitutional right to interstate travel and focused on how the states had not met the strict scrutiny standard to provide a compelling state interest for its restriction.<sup>87</sup> Very little was said about the effect of such requirements on families and children. The most charitable language observed that there was no reason to consider a mother less deserving because she had moved to another state, perhaps to take advantage of potentially better educational facilities.<sup>88</sup>

Yet, in *Dandridge v. Williams*,<sup>89</sup> the Court upheld Maryland’s system of setting a maximum limit to benefits for families even when they had more children. The Court found that the system neither violated the Social Security Act nor the Equal Protection Clause. Consequently, children in larger families received less overall benefits in states like Maryland that approved such a regulation. But this impact did not sway the Court nor the states that enacted such regulations. Citing “cooperative federalism,” the Court reasoned that “the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds” and found no

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82. *Id.* at 325.

83. *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (“Why should the illegitimate child be denied rights merely because of his birth out of wedlock? . . . Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother.”).

84. *King*, 392 U.S. at 336 (Douglas, J., concurring).

85. *Lurie*, *supra* note 25, at 829-30. The Social Security Act of 1935 had a statutory prohibition against states requiring residents living in a state for more than one year before applying for AFDC assistance. One year was effectively the maximum any state could require.

86. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

87. *Id.* at 630.

88. *Id.* at 632 (“[A] mother [who considers the level of a State’s public assistance to relocate] is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities.”).

89. 397 U.S. 471 (1970).

statutory violation in choosing this system.<sup>90</sup> The Court also found no constitutional violation after considering Maryland's system under rational basis review, a test that had been used for the regulation of state businesses and industries. The Court recognized that the adoption of the test here could be problematic as "[t]he administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings."<sup>91</sup> But the Court nevertheless applied the test, analogizing to state legislation restricting the availability of employment opportunities.<sup>92</sup> At no point did the Court analyze what this might mean for the individual children who would be harmed by such a regulation. Additionally, Congress had considered but ultimately rejected a proposal for the AFDC to provide "for meeting all the need . . . of eligible individuals."<sup>93</sup> In *Rosado v. Wyman*, the Court factored in Congress's rejection of this language to indicate that the AFDC did not require meeting this threshold of "full need."<sup>94</sup>

These decisions adopted highly deferential standards recognizing significant state-level discretion and rational basis review to evaluate the adequacy of AFDC benefits, rather than ensuring that the immediate needs of children were met, let alone their education and broader development. Again, much of this result was likely due to the moral lens through which many policymakers and individuals saw the families to which these children belonged. As some scholars have noted, "[s]ocial welfare programs are moral programs. Welfare programs are one way by which society controls inappropriate, 'deviant' behavior. Welfare programs, therefore, are structured differently depending on the category of recipients for which the program was designed."<sup>95</sup> In short, the increasing work requirements and the delegation to local governments to establish their own regulations reflected the way society saw poor mothers and their children. In particular, AFDC changed not because "attitudes towards the working mother . . . changed—poor mothers have *always* had to work—but rather because large numbers of the formerly *excluded* poor mothers (the black unmarrieds), the undeserving poor, . . . [were] let into the program."<sup>96</sup> The increasingly stringent work requirements and local government regulations channeled a certain disrespect for the needs of these recipients.<sup>97</sup>

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90. *Id.* at 478-83.

91. *Id.* at 485.

92. *Id.*

93. H.R. 5710, 90th Cong., 1st Sess. § 202 (1967).

94. 397 U.S. 397, 412-15 (1970); see also Michael E.K. Mpras, *Legal Rights of AFDC Recipients After Rosado v. Wyman and Dandridge v. Williams*, 21 AM. U. L. REV. 207, 217 (1971).

95. Handler, *supra* note 26, at 460.

96. *Id.*

97. See, e.g., *id.* at 516 ("Increasing the work requirements for AFDC recipients and delegating administration to states makes stunningly clear our social and political attitudes towards poor mothers and their children.").

Because of this disconnect between welfare programs and the needs of children, and with the increasing stresses of a declining economy, AFDC in the 1960s onwards began “to resemble General Relief.”<sup>98</sup> General Relief refers to programs where “welfare agencies use work requirements and sanctions to deter applicants from applying and to reduce the rolls through computer-driven, automatic sanctioning.”<sup>99</sup> States implemented these conditions regardless of the result they might have on the children who faced the unenviable situation of either having their mothers removed from their homes to work or removed from eligibility lists because they would not or could not work. These programs did not afford attention to how education and other investments for children could help them escape poverty.

Relatedly, in the area of child protection,<sup>100</sup> Congress in the 1970s and 1980s authorized federal funds for training, multidisciplinary centers, and demonstration projects to bolster state responses to physical abuse, neglect, and sexual abuse through the Child Abuse Prevention and Treatment Act of 1974.<sup>101</sup> A few years later, Congress enacted the Adoption Assistance and Child Welfare Act of 1980, which pushed for family preservation by mandating that states make “reasonable efforts” to avoid removing children from abusive parents, and, even where removal was necessary, to make “reasonable efforts” to reunite families.<sup>102</sup> A Child Saving Movement organized around the concept that the government had a right and duty to intervene to save children from delinquency. The Movement originally supported removing children from poor households, but it later supported preserving these families when the alternatives proved even harsher on the children.<sup>103</sup> Although relatively more focused on the needs of children, there was still little discussion of avenues to ensure the continuity of schooling and maintaining a stable education for these children, who could be transferred from school to school during transitions between households.

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98. Handler, *supra* note 26, at 520. “General Relief” programs are local, public programs that generally provide temporary cash assistance to eligible impoverished adults who do not have dependents and who do not qualify for other federal or state-funded cash aid programs. They have been characterized as programs for the “undeserving poor” and the “first line of defense against all of the known and supposed evils of the indiscriminate outdoor relief of poverty—indolence, vagrancy, begging, crime, and delinquency. The stereotypical General Relief applicant is the bum, the male malingerer, the tramp.” *Id.* at 483.

99. *Id.* at 520.

100. See, e.g., Myers, *supra* note 24 (documenting three eras in the “history of child protection”).

101. Pub. L. No. 93-247, 88 Stat. 4 (1974).

102. Pub. L. No. 96-272, 94 Stat. 500 (1980).

103. Handler, *supra* note 26, at 470-71.

C. *Modern Federal Child Welfare Programs: Prioritizing Work Over Education*

Neither the Carter Administration (which separated mothers based on their employability) nor the Reagan Administration (which implemented a simple administered work test or a market work requirement) was particularly sensitive to AFDC recipients. Like their predecessors, few programs expressed concerns about the need for coordination with education efforts for AFDC children.<sup>104</sup> These administrations and their successors continued the lack of focus on the formative nature of education and the importance of self-sufficiency through schooling, as evidenced in the increasing de-emphasis on educational opportunities for welfare recipients. These developments coincided with the ongoing movement to require mothers to work, where already limited options to pursue educational advancement to meet work requirements became increasingly difficult and discouraged at the federal level.

Beginning in the 1980s, welfare scholars identified several emerging, unifying themes in debates over welfare policies and reform. One scholar, for instance, recognized five: (1) responsibility, the reciprocal exchange of recipients becoming self-sufficient and society providing the services to make that possible;<sup>105</sup> (2) work, an efficient way to cut welfare costs and promote self-sufficiency;<sup>106</sup> (3) family, or the strong disapproval of out-of-wedlock births and failures of noncustodial parents to support their children;<sup>107</sup> (4) education, or the understanding “that the failure of the educational system contributes significantly to welfare dependency;”<sup>108</sup> and (5) state discretion to implement and manage their own education, training, and employment programs for welfare recipients.<sup>109</sup> But while possibly unifying aspirations, these themes did not reflect reality. And even though there was consensus on the major elements, significant disagreement on the nuances followed. Some, like education, remained almost completely aspirational.

Indeed, the pressure to work only increased. Even under AFDC, welfare recipients could attend courses at basic or remedial educational institutions in

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104. *Id.* at 521-22.

105. Reischauer, *supra* note 17, at 4 (“Recipients should fulfill their family responsibilities and strive to become self-sufficient. In return, society should provide adequate income and offer the support services, training, and employment opportunities to help recipients meet their obligations.”).

106. *Id.* at 5-6.

107. *Id.* at 6.

108. *Id.* at 6-7.

109. *Id.* at 7. There are limits to this state discretion, which has generally been known to be greater in terms of determinations of need and level of benefits and less in terms of regulations on eligibility. See Frank S. Bloch, *Cooperative Federalism and the Role of Litigation in the Development of Federal AFDC Eligibility Policy*, 1979 WIS. L. REV. 1, 2.

lieu of employment to fulfill eligibility requirements. The Family Support Act of 1988 (FSA) narrowed these options by launching the Job Opportunities and Basic Skills Training (JOBS) program, which established work requirements for mothers with children over the age of six.<sup>110</sup> As scholars noted, the “ostensible goal . . . [was] to provide AFDC mothers with opportunities for educational and employment-related advancement, while the actual purpose [was] to nudge them out of the home and into the labor market.”<sup>111</sup> At the time, some scholars lauded the FSA for its emphasis on educational programs, but support for strictly educational programs has since dissipated.<sup>112</sup>

Debates continued into the 1990s, with some calling for an expansion of support and others for more conditions on accessing benefits. Those advocating for expansions pushed for continuing education and job-training opportunities and warned against punishing children.<sup>113</sup> Senator Ted Kennedy reportedly lamented that “there is a right way and a wrong way to reform welfare. Punishing children is the wrong way. . . . [The proposed bill being debated] continues to be legislative child abuse. . . .”<sup>114</sup> Yet over Senator Kennedy and others’ objections, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which replaced the AFDC program with a Temporary Assistance for Needy Families (TANF) block grant and reaffirmed the emphasis on “work first.”<sup>115</sup> The Act stated that its goals were to (1) “provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives,” (2) “end the dependence of needy parents on government benefits by promoting job preparation, work, and mar-

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110. Pub. L. No. 100-485, 102 Stat. 2342 (1988).

111. Berrick, *supra* note 31, at 270.

112. Handler, *supra* note 26, at 504 (“The FSA’s emphasis on education is new. If implemented, it could result in significant changes at the state level.” (footnotes omitted)).

113. See, e.g., Dorothy Gilliam, *Wrong Way to Reform Welfare*, WASH. POST (Dec. 11, 1993), <http://www.washingtonpost.com/archive/local/1993/12/11/wrong-way-to-reform-welfare/d645d064-4e5d-4fb6-a5de-d693d013e555> [<http://perma.cc/P3XB-DAFF>] (“Why not, instead, exploit the current momentum for welfare reform by offering more continuing education and job-training opportunities for people who want meaningful work? That way reform would help them and their children, not punish them because they had the bad luck to be born disadvantaged and poor.”).

114. 104 CONG. REC. S19, 101-02 (daily ed. Dec. 21, 1995) (statement of Sen. Kennedy).

115. Janice Y. Law, Comment, *Changing Welfare “As We Know It” One More Time: Assuring Basic Skills and Postsecondary Education Access for TANF Recipients*, 48 SANTA CLARA L. REV. 243, 249 (2008); see also Amy Brown, *Work First: How to Implement an Employment-Focused Approach to Welfare Reform*, MANPOWER DEMONSTRATION RES. CORP. (Mar. 1997), [www.wkkf.org/~media/7C7CC462522F40FABD3701D8F12F8BF6.ashx](http://www.wkkf.org/~media/7C7CC462522F40FABD3701D8F12F8BF6.ashx) [<http://perma.cc/872V-9D8C>].

riage,” (3) “prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies,” and (4) “encourage the formation and maintenance of two-parent families.”<sup>116</sup> The Act also expressly stated Congress’s preference for states to “assign the highest priority to requiring adults in 2-parent families and adults in single-parent families that include older preschool or school-age children to be engaged in work activities.”<sup>117</sup> Congress also authorized states to have more leeway in adopting full-family sanctions when parents violated particular work requirements and other conditions for eligibility such as showing up for a redetermination interview.<sup>118</sup>

Around the same period, a movement toward collecting child support in lieu of providing welfare benefits also embodied the concept of regulating families, even if at the expense of the child. The 1984 Child Support Amendments required states to adopt laws to mandate the withholding of child support obligations from the salaries of delinquent noncustodial parents and to establish statewide standards for child support.<sup>119</sup> Yet it remained unclear how helpful these programs could be when many of these absent fathers only had small earnings to contribute in the first place.<sup>120</sup> Perhaps also tellingly, since the beginning of the establishment of child support laws in the 1800s, courts factored in the father’s independence and financial integrity, but not the mother’s independence and financial integrity or any of the child’s interests, such as maintaining the same standard of living as before the separation.<sup>121</sup>

The Child Support Recovery Act of 1992 (CSRA) doubled down on finding delinquent fathers and deterring noncustodial fathers from becoming delinquent.<sup>122</sup> In addition to pushing back against fathers’ independence and financial integrity, the CSRA eschewed federal responsibilities to care for single mothers by searching for alternatives to financial support.<sup>123</sup> According to the legislative history of the CSRA, some proponents of the Act reasoned that “needy children would benefit financially and emotionally from receiving child support from their noncustodial parent in lieu of the government” and that enforced payments would reduce AFDC and food stamp welfare rolls.<sup>124</sup> But these

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116. 42 U.S.C. § 601(a) (2012).

117. 42 U.S.C. § 607(g) (2012).

118. Dan Bloom & Don Winstead, *Sanctions and Welfare Reform*, BROOKINGS INST. (Jan. 1, 2002), <http://www.brookings.edu/research/sanctions-and-welfare-reform> [<http://perma.cc/48CD-2ZHS>].

119. Handler, *supra* note 26, at 510 (referring to Pub L. No. 98-378, §§ 6, 18).

120. *Id.* at 511.

121. Wimberly, *supra* note 57, at 733.

122. *Id.* at 729-30.

123. *Id.* at 737.

124. *Id.* at 738.

“get tough” policies only helped the custodial mothers who were already the least vulnerable financially, and they did little to assist the larger number of single-mother households—and their children—apart from coercing them to take up the traditional nuclear family structure.<sup>125</sup>

In 2006, for the first time, the federal government expressly eliminated postsecondary education in welfare programs, leaving at most only basic skills programs, if a state even offered any program at all.<sup>126</sup> As some scholars criticized, the outright prohibition of “welfare recipients from participating in postsecondary education programs and limiting basic skills education . . . contravenes decades of research illustrating the relationship between education, increased earnings, and sustainable employment.”<sup>127</sup> And again, the education disparities for welfare recipients under the new program have been real: close to half of TANF recipients lack a high school diploma.<sup>128</sup> Low-skilled welfare recipients have been stuck with lower-paying, less stable jobs, and their lack of skills and education has reduced the likelihood of finding better job opportunities or leaving the welfare rolls.<sup>129</sup> Proponents of more educational opportunities have not necessarily advised doing away with any work requirements. Rather, they have advocated additionally creating opportunities for welfare recipients to pursue options promoting self-sufficiency, including postsecondary and basic skills education.<sup>130</sup> In other words, as the welfare and education systems were and are currently designed, not only are parents of young children required to work, but they are also left with fewer opportunities to escape their impoverished conditions. And still, they must leave behind their children, who, in many cases, do not have any parent to care for them at home.

Most recently, the Trump Administration has proposed even more stringent work requirements and cuts to social welfare programs aimed at low-

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125. *Id.* at 766 (“[T]he CSRA has only aided custodial mothers who are the least vulnerable financially . . . [and] is susceptible to . . . coercing women, particularly lower-income women, into embracing the traditional nuclear family structure . . . [while being] unlikely to assist the large number of single-mother households in any positive way.”).

126. Reauthorization of the Temporary Assistance for Needy Families Program, 71 Fed. Reg. 37,454, 37,460 (June 29, 2006) (codified at 45 C.F.R. § 261); *see also* Law, *supra* note 115, at 245-46 (discussing this change).

127. Law, *supra* note 115, at 257; *see also, e.g.*, Karin Martinson & Julie Strawn, *Built To Last: Why Skills Matter for Long-Run Success in Welfare Reform*, CTR. FOR L. & SOC. POL’Y (2003), <http://www.clasp.org/resources-and-publications/files/0119.pdf> [<http://perma.cc/W2N3-K9PA>] (describing the importance of educational opportunities and skills for welfare recipients).

128. *See, e.g.*, Law, *supra* note 115, at 243-44 (discussing the importance of education for mobility and opportunity).

129. *Id.* at 260-62.

130. *See, e.g., id.* at 257, 278.

income children.<sup>131</sup> The proposed budget for 2018 would cut the TANF block grant by 10%, from \$16.5 billion to \$14.9 billion. These cuts compound what has already decreased in value after TANF's block grant was frozen at \$16.5 billion since 1996 with no adjustment for inflation. Today, approximately twenty-three of every hundred poor families with children receive cash benefits through TANF (roughly 2.7 million individuals), down from sixty-eight of every hundred poor families in 1996 under AFDC.<sup>132</sup> Mick Mulvaney, while Director of the Office of Management and Budget, explained that some of the cuts to welfare were due to a lack of “demonstrable evidence [that] they’re actually helping results, helping kids do better in school,”<sup>133</sup> despite research suggesting that these programs have proved beneficial.<sup>134</sup> Mulvaney did not suggest an alternative for how to improve educational outcomes for these children. Rather, the cuts are based on the premise that welfare programs should be contingent solely on educational gains, even when those gains might only be possible with the support of these programs in the first place. This premise builds on the same trend of using conditional welfare programs to regulate families, even when that regulation may be wholly disconnected from the goal of improving these families’ access to education and sustainable progress.

## II. THE EDUCATION SYSTEM AND THE REGULATION OF SCHOOLS

The U.S. federal education system has exhibited a similar myopia about the immediate needs of children. For the last few decades, the system prioritized the

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131. See Caitlin Dewey & Tracy Jan, *Trump to Poor Americans: Get to Work or Lose Your Benefits*, WASH. POST (May 22, 2017), <http://www.washingtonpost.com/news/wonk/wp/2017/05/22/trump-to-poor-americans-get-to-work-or-lose-your-benefits/> [<http://perma.cc/DL2X-N5B9>].
132. *Budget of the U.S. Government: A New Foundation for American Greatness, Fiscal Year 2018*, OFFICE MGMT. & BUDGET (May 23, 2017), <http://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf> [<http://perma.cc/YH6S-8ERG>]; Tazra Mitchell, *President Trump’s Budget Cuts TANF Despite Stated Goal to Reduce Poverty, Boost Work*, CTR. ON BUDGET & POL’Y PRIORITIES (May 24, 2017, 11:15 AM), <http://www.cbpp.org/blog/president-trumps-budget-cuts-tanf-despite-stated-goal-to-reduce-poverty-boost-work> [<http://perma.cc/VEF2-QJ6H>]; *TANF: Total Number of Recipients, Fiscal and Calendar Year 2016*, ADMIN. FOR CHILD. & FAMS. (Apr. 18, 2017), [http://www.acf.hhs.gov/sites/default/files/ofa/2016\\_recipient\\_tan.pdf](http://www.acf.hhs.gov/sites/default/files/ofa/2016_recipient_tan.pdf) [<http://perma.cc/WHL7-CQCJ>].
133. Louis Nelson, *Mulvaney: Proposed Cuts to Meals on Wheels Are Compassionate to Taxpayers*, POLITICO (Mar. 16, 2017), <http://www.politico.com/story/2017/03/mick-mulvaney-donald-trump-budget-meals-on-wheels-236144> [<http://perma.cc/C8ZG-LQDN>].
134. See, e.g., Linda Qiu, *Fact Check: Budget Director’s Claims that Programs Don’t Work*, N.Y. TIMES (Mar. 17, 2017), <http://www.nytimes.com/2017/03/17/us/politics/fact-check-mick-mulvaney-trump-budget-director.html> [<http://perma.cc/SJ42-2ALA>].

regulation of struggling schools in hopes of improving conditions for the low-income children who disproportionately attend these schools. In recent years, federal laws required public schools throughout the country to meet certain criteria marking adequate yearly progress, regardless of where they are located and the circumstances of the children they serve. These laws fueled extensive standardized testing, sanctions, and school closings with little regard to what happens to the low-income children who are left to attend supposedly failing schools and who have nowhere to go when their schools close. Along these lines, this Part aims to show how major federal education laws and policies have not acted in tandem with the aforementioned welfare laws and policies. Similar to the welfare system, which concentrated on regulating mothers and families, attention in education law and policy has focused on regulating teachers and schools, rather than providing direct benefits to address immediate needs.

The U.S. Constitution does not expressly mention education, and the allocations of authority for education between state and federal governments are not immediately clear.<sup>135</sup> Yet since the nation's founding, the general understanding based on interpretations of the Tenth Amendment is that education is an area reserved primarily to state and local governments.<sup>136</sup> Education and school funding are mostly paid through local property taxes and state revenue streams. Accordingly, a significant amount of control remains at this local level.<sup>137</sup> Federal funding, meanwhile, constitutes only about ten percent of K-12 education spending, and the U.S. Department of Education recognizes that “[e]ducation is primarily a State and local responsibility in the United States.”<sup>138</sup>

Yet the 15,000 school districts overseeing roughly 90,000 public schools across the fifty states engage with a variety of standards established at the local, state, and federal levels.<sup>139</sup> These school districts are governed by a regulatory scheme that is as multi-faceted as it is multi-layered, including local ordinances,

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135. See Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 129 (2006) (“A cursory examination reveals that efforts to find unambiguous boundaries demarcating the policy spheres for federal, state, and local actors in the education sector will likely generate more questions than answers.”).

136. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

137. Heise, *supra* note 135, at 134.

138. *The Federal Role in Education*, U.S. DEP'T EDUC. (May 25, 2017), <http://www2.ed.gov/about/overview/fed/role.html> [<http://perma.cc/U73Z-2QX8>]. The U.S. Department of Education also recognizes that “[i]t is States and communities, as well as public and private organizations of all kinds, that establish schools and colleges, develop curricula, and determine requirements for enrollment and graduation.” *Id.*

139. PAUL MANNA, *SCHOOL'S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA 3* (2006) (“The nation's fifty states have created nearly 15,000 school districts to oversee roughly 90,000 public schools.”).

state constitutions, and federal statutes. Most of these federal statutes have not outright mandated states to change their policies. Instead, they have mostly originated from the federal government's exercise of the U.S. Constitution's Spending Clause, through which Congress can encourage states to follow guidelines as a condition to receive federal funds.<sup>140</sup> The U.S. Supreme Court has held that "Congress may offer funds to the States, and may condition those offers on compliance with specified conditions" and that "[t]hese offers may well induce the States to adopt policies that the Federal Government itself could not impose."<sup>141</sup>

#### A. *Origins of Federal Education Programs*

Without any federal laws mandating the creation of schools, local initiatives led by educators and activists built most of the public high schools in the United States beginning in the early nineteenth century.<sup>142</sup> In the 1860s, the federal government began providing specific land grants and cash disbursements for states to create post-secondary education systems. State and local governments valued these resources because they otherwise did not have sufficient resources to create their own institutions. The Morrill Land-Grant Colleges Act of 1862 was particularly significant in establishing some of the first and largest public universities, which provided novel access to higher education for children from all backgrounds.<sup>143</sup> Although the federal government allocated these funds to support workers in practical fields and skills, their long-term effect was to establish institutions of higher education, which quickly gained an elite status.<sup>144</sup>

Following a similar trajectory, educators in the early 1900s had begun to move toward a primary and secondary school curriculum that more directly

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140. See, e.g., Heise, *supra* note 135, at 125 ("The [No Child Left Behind] Act, while coercive, is not unconstitutionally coercive as it imposes only an opportunity cost on states willing to forego federal funding.").

141. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); see also South Dakota v. Dole, 483 U.S. 203, 211 (1987) (holding that the provision of federal highway assistance funds on the condition of states adopting a minimum drinking age to be constitutional and that arrangements like this one do not violate the Constitution as long as they are not so coercive at which "pressure turns into compulsion"); United States v. Butler, 297 U.S. 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.").

142. See WILLIAM J. REESE, THE ORIGINS OF THE AMERICAN HIGH SCHOOL xiii-xiv (1995).

143. See CLARK KERR, THE USES OF THE UNIVERSITY 46-48 (1963); Hal E. Hansen, Caps and Gowns: Historical Reflections on the Institutions that Shaped Learning for and at Work in Germany and the United States, 1800-1945, at 403 (1997) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with University of Wisconsin-Madison).

144. *Id.* at 454-57.

met the practical needs of students. Liberal reformers advanced three priorities: integrating youth into occupational, political, familial, and other adult roles; giving each individual a chance in society; and fostering the psychic and moral development of the individual.<sup>145</sup> Many reformers embraced vocational education programs and coordinated with professional groups and companies to provide training for students.<sup>146</sup> And motivated by skill shortages in industry and trades, German and other international competition, and rising youth unemployment, Congress enacted the National Vocational Education Act in 1917 to provide federal grants for all-day schools, continuation schools, and evening vocational schools—all entities that many policymakers believed would have been too expensive for individual states to manage.<sup>147</sup> But these early attempts, including the Act, were unable to sustain a system of vocational education or focus on students' practical needs.<sup>148</sup>

Rather than supporting the immediate needs and overall welfare of students, schools became hierarchical. First, the increased concentration of resources among a set of elite institutions, declining admission rates, and an increased focus on test performance fueled competition in higher education.<sup>149</sup> The schema of elementary school, secondary school, and post-secondary school in turn responded by prioritizing the needs of post-secondary education.<sup>150</sup> In fact, in 1918, the National Education Association (NEA) published a report through the Commission on the Reorganization of Secondary Education pushing for the enrollment of all students in post-secondary education.<sup>151</sup> The report strongly opposed having separate vocational education; instead, it aspired to link vocation and social-civic education together under a single, general curriculum.

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145. SAMUEL BOWLES & HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE* 21 (1976).

146. Hansen, *supra* note 143, at 455-56.

147. *Id.* at 473-74.

148. *Id.* at 492.

149. See, e.g., Gordon C. Winston, *Subsidies, Hierarchy and Peers: The Awkward Economics of Higher Education*, 13 J. ECON. PERSP. 13, 27-29, 33-34 (1999) (recognizing competition and hierarchy among higher education institutions in terms of the resources they receive and in turn selectivity and quality); Anemona Hartocollis, *Greater Competition for College Places Means Higher Anxiety, Too*, N.Y. TIMES (Apr. 20, 2016), <http://www.nytimes.com/2016/04/21/us/greater-competition-for-college-places-means-higher-anxiety-too.html> [<http://perma.cc/GH6V-TK9C>] (describing record numbers of applications and declining admission rates).

150. Hansen, *supra* note 143, at 457-58.

151. *Id.* at 460.

B. *Rise of Federal Education Requirements and Regulations*

But arguably the most significant jump in the federal government’s role in education came with the U.S. Supreme Court’s landmark decision in *Brown v. Board of Education*.<sup>152</sup> Although *Brown* interpreted a constitutional provision—the Fourteenth Amendment’s Equal Protection Clause—the decision established the history and framework that informed the drafting of virtually every subsequent federal education statute. *Brown* markedly expanded the federal government’s role in protecting a right to education, declaring that “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>153</sup>

*Brown* achieved several major milestones. First, the decision was an enormous victory for the civil rights movement and its goal to end segregation.<sup>154</sup> The Court, in a unanimous opinion, held that all public schools in the country would need to be desegregated under the principle that “[s]eparate educational facilities are inherently unequal,”<sup>155</sup> in effect overturning the Court’s previous decision in *Plessy v. Ferguson*.<sup>156</sup> The federal courts then became responsible for monitoring compliance with the Court’s decision.<sup>157</sup> The Court subsequently explored this role to review and mandate efforts to rectify *de jure* segregation and its limitations to compel other remedies where the trial court had found only *de facto* segregation.<sup>158</sup> These advances were critical for energizing the civil rights movement and placed courts at the center of education reform efforts in the decades after *Brown*.

*Brown* also marked an enormous shift in what a federal government could mandate for states and local schools to follow in the name of protecting children around the country. Without expressly saying so, *Brown* established one of the first national education standards applicable to *all* students, no matter their

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152. 347 U.S. 483 (1954).

153. *Id.* at 493.

154. See, e.g., *School Desegregation and Equal Educational Opportunity*, LEADERSHIP CONF., <http://archives.civilrights.org/resources/civilrights101/desegregation.html> [<http://perma.cc/ZB56-RFZW>] (last visited Mar. 21, 2018).

155. *Brown*, 347 U.S. at 495.

156. 163 U.S. 537 (1896).

157. See, e.g., Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 *FORDHAM L. REV.* 345, 366 (1994) (“[J]udicial oversight of civil rights in public schools increased markedly after the Supreme Court’s seminal *Brown v. Board of Education* decision in 1954.” (footnote omitted)).

158. See *Milliken v. Bradley*, 418 U.S. 717 (1974); *Milliken v. Bradley*, 433 U.S. 267 (1977).

race or socioeconomic status. The Court's willingness to take up an education policy issue across all states was unprecedented and profound, not only for the civil rights movement, but for the right to desegregated education in particular. In turn, *Brown* created a national obligation for courts, and the federal government more broadly, to monitor whether students were being granted that right. Such is the iconic image of the Little Rock Nine, who were escorted into an integrated school by the U.S. Army after the governor and the state had failed to secure their entry.<sup>159</sup>

Indeed, *Brown* led to concerted legal efforts in the 1960s and 1970s to enforce its mandate in schools and states that supported segregation or had taken no action to end it. The U.S. Department of Justice, along with private litigants, including the National Association for the Advancement of Colored People, brought lawsuits against several school districts across the country to enforce *Brown's* mandate. Accordingly, the era included several prominent Court decisions, which held that there was not only a negative duty to not segregate, but also an affirmative duty to integrate.<sup>160</sup> Although there have been some successes, the whole story has not been so positive, with some of these successes short-lived, desegregation orders continuing decades later, and many schools more segregated than before.<sup>161</sup>

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159. See Ben Cosgrove, *Brave Hearts: Remembering the Little Rock Nine*, TIME (Sept. 23, 2012), <http://www.time.com/3874341/little-rock-nine-1957-photos> [<http://perma.cc/QE8S-PG8D>].

160. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971) (upholding city busing efforts as an appropriate remedy to integrate schools even where the lack of racial mixing was due to unintentional de facto segregation of neighborhoods rather than de jure segregation); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-41 (1968) (holding that freedom of choice plans were insufficient for integration as mandated by *Brown* and therefore unconstitutional).

161. As court supervision and a source of funding came to a halt, there were few efforts toward further integration and in many instances, relapses back to segregation. See generally MARTHA MINOW, *IN BROWN'S WAKE* (2010) (describing the impact and limitations of *Brown*). Desegregation cases continue in the circuits, but most are continuations of cases that were under a desegregation order rather than new or pending litigation. See, e.g., *United States v. Meriwether Cty.*, 171 F.3d 1333, 1338-41 (11th Cir. 1999) (holding that the district had achieved unitary status in student assignment); *Morgan v. Nucci*, 831 F.2d 313, 317-26 (1st Cir. 1987) (holding that the district had not yet achieved unitary status in student assignment); *United States v. Lawrence Cty. Sch. Dist.*, 799 F.2d 1031, 1047-49 (5th Cir. 1986) (holding that the district had achieved partial unitary status in student assignment). Today, many schools are even more racially segregated than they were forty years ago, with many education policymakers and reformers since abandoning their mission for integration. See Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POL'Y INST. (Aug. 27, 2013), <http://www.epi.org/publication/unfinished-march-public-school-segregation> [<http://perma.cc/QT8L-CD4A>]; Valerie Strauss, Report: Public Schools More Segregated Now than 40 Years Ago, WASH. POST (Aug. 29, 2013), <http://www.washingtonpost.com/news/answer-sheet/wp/2013/08/29/>

But the ruling against segregation did not protect against the discrimination based on race—or any other condition—students faced in schools. In recognizing the need to protect students, policymakers therefore looked elsewhere to solidify the protections begun under *Brown*. The efforts around *Brown* inspired Congress in the 1960s and 1970s to enact federal statutes that would protect minority students in hopes that they would have the necessary remedies to prevent and respond to discrimination. For a time, it looked promising that federal education laws could work from the vantage point of protecting all children, at least insofar as public discrimination was concerned.

More specifically, the Civil Rights Act of 1964 (and Titles IV and VI in particular), and other statutes formulated later based on its language and goals, including Title IX of the Education Amendments of 1972, the Equal Educational Opportunities Act of 1973, the Rehabilitation Act of 1975, the Individuals with Disabilities Education Act of 1990, and the Americans with Disabilities Act of 1990, set forth prohibitions against discrimination in schools and other institutions receiving federal funding. That movement helped spur arguably the closest major federal education law to coordinate directly with child welfare.

In 1965, Congress passed and President Lyndon B. Johnson signed into law, as part of his “War on Poverty” campaign, the original Elementary and Secondary Education Act (ESEA). Considered “the federal government’s single largest educational aid program and ostensibly . . . designed to assist disadvantaged students,”<sup>162</sup> the ESEA created the first ever means to send federal funds (often called Title I funds) directly to the communities and schools with the highest concentrations of poverty. Through these federal funds, the ESEA bound schools to Title VI, which prohibits discrimination “on the ground of race, color, or national origin . . . to any program or activity receiving Federal financial assistance.”<sup>163</sup> In addition to Title I funding, the ESEA also created other federal grants to support local education agencies. These programs aimed to leverage federal funds through voluntary, opt-in conditions to support low-income communities in need of particular assistance. Fifty years later, the ESEA is still remembered as “carving out a role for the federal government in educating the nation’s poorest children.”<sup>164</sup>

Yet the subsequent decades of the ESEA focused on battles over the federal government’s regulation of teachers and schools, rather than supporting comprehensive programs focused on students’ immediate, multi-faceted needs in-

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report-public-schools-more-segregated-now-than-40-years-ago [http://perma.cc/5AHN-XRZ3].

162. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004).
163. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2012)).
164. Alyson Klein, *ESEA’s 50-Year Legacy a Blend of Idealism, Policy Tensions*, EDUC. WEEK (Mar. 31, 2015), <http://www.edweek.org/ew/articles/2015/04/01/eseas-50-year-legacy-a-blend-of-idealism.html> [http://perma.cc/L3VV-HPV5].

cluding their basic welfare. Embodying the start to that trend, the U.S. Supreme Court decided *San Antonio Independent School District v. Rodriguez*, which concerned inequities in school funding due to uneven property taxes across localities.<sup>165</sup> While coming short of deciding whether there is a minimal right to education,<sup>166</sup> *Rodriguez* ultimately denied an Equal Protection Clause challenge to unequal school funding by reasoning that “where only relative differences in spending levels are involved,” and where the system does not fail “to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process,” there is no equal protection violation. Perhaps unsurprisingly, inequalities were widening and have widened since the Court’s decision in *Rodriguez*: poorer families are disproportionately likely to attend lower quality schools.<sup>167</sup> Yet the Court fixated on more abstract equality and liberty considerations, rather than highlighting the suffering of these low-income children and calling for a minimal level of education adequacy at the federal level.

Indeed, the Court later held in *Plyler v. Doe* that a state could not deny free public education to undocumented immigrants where it offered public education to other students.<sup>168</sup> Although a victory for disadvantaged children, the Court did not focus on their minimum level of subsistence nor the importance of education toward the welfare of many students who would otherwise be denied an education.<sup>169</sup> Rather, the Court based its reasoning on democratic and social efficiency grounds, explaining that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.”<sup>170</sup> Although the decision did recognize the children as “victims” of this

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165. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

166. *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (“As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”). Some scholars have argued that there is indeed such a constitutional right to education. See, e.g., Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 110-48 (2013) (arguing there is a federal right to a minimally adequate education); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332-341 (2006) (arguing that the Citizenship Clause of the Fourteenth Amendment guarantees a meaningful floor for educational opportunity).

167. See, e.g., DOUGLAS HODGSON, *THE HUMAN RIGHT TO EDUCATION* 16 (1998) (“The effect of the *Rodriguez* decision has been that children from poorer families disproportionately attend schools that struggle to meet minimal educational standards.”).

168. *Plyler v. Doe*, 457 U.S. 202 (1982).

169. *Id.*

170. *Id.* at 221.

deprivation, most of the opinion devoted attention to the effects of illiterate children on the country and “the progress of our Nation.”<sup>171</sup> Ensuring every child an adequate education under the U.S. Constitution was not showing much promise, prompting litigants to turn to state constitutions and state courts.<sup>172</sup>

C. *Modern Federal Education Programs: Prioritizing Testing Over Students*

In sum, the federal government’s early involvement with public K-12 education addressed vulnerable populations of students from particular racial, socioeconomic, or learning disability backgrounds, beginning with *Brown* and continuing with the intersecting Civil Rights Act and the ESEA.<sup>173</sup> These early interventions showed promise for coordination between child welfare and education laws. But coinciding with the Court’s decision in *Rodriguez*, federal involvement became increasingly preoccupied with federal standards of education and the accountability of schools. Several changes sparked this shift. In 1983, the U.S. Department of Education’s National Committee on Excellence in Education released a now-famous study, *A Nation at Risk: The Imperative for Education Reform*, which suggested that the quality of schools and achievement among students in the United States were in peril.<sup>174</sup> The report spurred discussion of a national education policy centered on testing and minimum competency levels.<sup>175</sup> Within a few years of the report, scholars and journalists record-

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171. *Id.* at 223-24.

172. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 259 (1999) (“After . . . [*Rodriguez*] held that school funding inequities did not violate the U.S. Constitution, litigants directed their attention to state courts and raised claims under both equal protection and education provisions in state constitutions.”). The state litigation efforts in turn have had varied success. Between 1989 and 2005, education adequacy plaintiffs won more than seventy-five percent of adequacy challenges in state courts brought across the United States. That number has since dropped, with some attributing this to the courts’ unease with deciding these cases. See Robynn K. Sturm & Julia A. Simon-Kerr, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 85 (2010).

173. Heise, *supra* note 135, at 127 (“Historically, the federal government’s intersection with public K-12 schools focused on either specific types of schools, such as those predominately serving children from low-income households, or discrete sub-populations of students, such as those with qualifying disabilities. [The No Child Left Behind Act], by contrast, impacts all participating states and schools.”).

174. Nat’l Comm’n on Excellence in Educ., *A Nation at Risk: The Imperative for Education Reform*, U.S. DEP’T EDUC. (Apr. 1983), <http://www2.ed.gov/pubs/NatAtRisk/index.html> [<http://perma.cc/PY5G-BLWQ>].

175. See, e.g., Heise, *supra* note 157, at 346 (“The *Nation At Risk* report helped alert the public to the need for educational reform and provided initiative for federal leadership.”); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX.

ed that “nearly all fifty states had adopted some version of comprehensive standards.”<sup>176</sup> Most of these efforts surrounded statewide assessment programs to measure student achievement.<sup>177</sup>

Although the new standards ostensibly centered on building an effective education for the twenty-first century, the system also introduced explicit and implicit sanctions for students and teachers. Failing to meet standards could mean losing the right to go to college or losing one’s job.<sup>178</sup> A national Education Summit followed the report,<sup>179</sup> which in turn prompted Congress to launch the Goals 2000: Educate America Act.<sup>180</sup> The Act further expanded the role of the federal government in education by creating the National Education Standards and Improvement Council (NESIC) and leading to the introduction of the No Child Left Behind (NCLB) Act.<sup>181</sup>

Democrats and Republicans alike backed the enactment of NCLB<sup>182</sup> as “perhaps the most important federal education law in our nation’s history.”<sup>183</sup>

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L. REV. 1223, 1226-27 (2008) (“The [standards and testing] movement traces back to the 1983 publication of *A Nation at Risk*, which warned in ominous terms that public schools were being flooded by a ‘rising tide of mediocrity.’”); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV L. & SOC. CHANGE 183, 207 (2003) (“At the national level . . . concerns crystallized in numerous reports on the parlous state of U.S. education. Among these, the most influential was *A Nation at Risk*, by the President’s National Commission on Excellence in Education.”).

176. Liebman & Sabel, *supra* note 175, at 208.

177. See *Changing Course: A 50-State Survey of Reform Measures*, EDUC. WEEK 11 (Feb. 6, 1985).

178. Liebman & Sabel, *supra* note 175, at 209 (“[T]he resulting standards and tests focused on individual teachers and pupils, with the aim of creating incentives, mainly negative . . . . Students who failed the tests could lose their right to matriculate, graduate or attend state colleges; teachers who did so could lose their jobs.”).

179. See Heise, *supra* note 157, at 347 (“The Education Summit can be described fairly as historic, because at no other time in this country’s history have the president and governors met to establish a set of national educational goals and to reallocate educational policy responsibilities among the federal, state, and local governments.”).

180. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.).

181. Heise, *supra* note 157, at 348 (“*Goals 2000* will increase the federalization—shift in control from state and local governments to the federal government—of American educational policy.”).

182. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301-7941 (2006)) [hereinafter NCLB]. The Act passed the U.S. House of Representatives by a vote of 384-45, and the U.S. Senate by a vote of 91-8.

For many years, NCLB struggled with the enduring question of whether “it is prudent to permit the federal government to exercise critical education policy influence beyond the extent of its financial contribution to states and local school districts.”<sup>184</sup> NCLB could have centered on direct benefits to ensure children reached a basic set of standards regardless of socioeconomic status.<sup>185</sup> Instead, NCLB centered on an unprecedented system of accountability obsessed with testing whether schools, rather than students, reach certain achievement levels.<sup>186</sup>

Formally a reauthorization of the ESEA, the stated purpose of NCLB was “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”<sup>187</sup> These relatively uncontroversial words prefaced an act that transformed the federal system of education in the United States and generated fierce debate among those vying for state versus federal control. The provisions of NCLB were ambitious and consisted of multiple goals, including providing high-quality accountability systems, meeting the needs of the low-achieving children in the nation’s highest-poverty schools, and promoting school-wide reform. NCLB required states to establish academic standards for all schools, test students within their schools, and employ highly qualified teachers who have demonstrated competence in the subjects they teach.<sup>188</sup> Because of NCLB, all states “established academic standards that describe what students are expected to know and be able to do at various stages in their K-12 education.”<sup>189</sup>

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183. Ryan, *supra* note 162, at 932.

184. Heise, *supra* note 135, at 129.

185. James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1705 (2003) (“[T]he NCLB emphatically specifies that American citizenship entails not just the privilege of access to public schools on formally equal terms but also the privilege of an adequate education.”).

186. See, e.g., James Taylor, Jennifer O’Day & Kerstin Carlson Le Floch, *State and Local Implementation of the No Child Left Behind Act: Volume IX—Accountability Under NCLB: Final Report*, U.S. DEP’T EDUC. xix-xxv (Jan. 2010), <http://files.eric.ed.gov/fulltext/ED508912.pdf> [<http://perma.cc/6Q3R-PRMD>]; Regina Ramsey James, *How to Mend a Broken Act: Recapturing Those Left Behind by No Child Left Behind*, 45 GONZ. L. REV. 683, 688 (2010) (“The Act requires each State to implement statewide accountability systems for all public schools and their students, to define education standards, and to establish a system of assessments for measuring whether students have met those standards.”).

187. See NCLB, *supra* note 182, § 1001.

188. See *id.* §§ 1111, 1119, 1111(b)(2)(C)(v), 11116; see also Ryan, *supra* note 162, at 933.

189. Ryan, *supra* note 175, at 1223.

Particularly key to NCLB was the requirement of schools to meet and document what NCLB termed adequate yearly progress (AYP). To be defined more specifically by each state, AYP represented a certain amount of annual improvement that each Title I school and district must achieve. NCLB required each state to determine AYP based on a set of federal standards that are “sufficiently rigorous” and “link progress primarily to performance on the State’s final assessment,” as well as “dropout, retention, and attendance rates.”<sup>190</sup> Yet these accountability measures did not take into account all of the factors that could be interfering with students’ abilities to learn and perform up to standards, including the number of low-income children served in particular districts and the effects of poverty on their ability to learn. Moreover, they did not attempt to coordinate with the aforementioned laws on child welfare; rather, the accountability measures focused on regulating the school rather than meeting the immediate needs of the student. NCLB’s AYP requirements established an ultimatum that by 2014 “all students in each group . . . will meet or exceed the State’s proficient level of academic achievement on the State assessments.”<sup>191</sup> NCLB also established intermediate goals of progress that had to be met every two years.

The threatened consequences for noncompliance were severe. For failure to meet AYP, “the Secretary may withhold funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements.”<sup>192</sup> For every year of noncompliance, schools faced further requirements, including providing students the right to transfer to another school and eventually restructuring or closing the school altogether. And many schools did not make AYP. During the 2007-08 school year, the last year in which all states reported data on AYP, 35.1% of schools did not meet AYP, up from 28.8% the year before.<sup>193</sup> Even two years after NCLB’s original enactment, it was already evident that many schools would not meet the score thresholds.<sup>194</sup> Many schools’ ratings were downgraded as they faced possible sanctions, including the

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190. *Guidance on Standards, Assessments, and Accountability: Adequate Yearly Progress*, U.S. DEP’T EDUC. (Apr. 2, 2009), [http://www2.ed.gov/policy/elsec/guid/standardsassessment/guidance\\_pg5.html](http://www2.ed.gov/policy/elsec/guid/standardsassessment/guidance_pg5.html) [<http://perma.cc/9EBX-GBZX>] (providing guidance on 34 CFR 200.3, a U.S. Department of Education regulation promulgated under NCLB, *supra* note 182, § 1111(b)(2)).

191. NCLB, *supra* note 182, § 1111(b)(2)(F).

192. *Id.* § 1111(g)(2).

193. *ED Data Express: Data About Elementary & Secondary Schools in the U.S.*, U.S. DEP’T EDUC., <http://eddataexpress.ed.gov/data-elements.cfm> [<http://perma.cc/7LU4-8L8J>] (last visited Jan. 10, 2018).

194. See DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL* 93-116 (2010); Diana Jean Schemo, *Failing Schools Strain to Meet U.S. Standard*, N.Y. TIMES (Oct. 16, 2007), <http://www.nytimes.com/2007/10/16/education/16child.html> [<http://perma.cc/5E3H-YNGZ>].

risk and reality of being shut down.<sup>195</sup> Absent in this discussion was what would happen to the children in these supposedly failing schools, especially when these schools would be denied funding or closed. In theory, the idea was that students would find another, better school, or that the schools would naturally improve as a result of the fear of sanctions, but neither of these proved to be true.<sup>196</sup>

With schools and states unable to meet AYP, the Bush and Obama Administrations relied on waivers, which allowed states to offer their own plans to improve their system and thereby bypass reporting requirements for AYP. But these waivers provided little assurance for how conditions would ultimately be rectified and where the federal government's responsibilities lay in ensuring those corrections. Indeed, scholars remarked that, although NCLB established "detailed obligations for schools and districts to report their performance and progress," the Act "fail[ed] to establish in any corresponding detail the federal government's own responsibilities to monitor and foster these developments and to sanction [local education agencies] that [did] not meet their obligation to improve educational outcomes."<sup>197</sup> The Bush Administration found "itself on the political defensive and . . . granting an ever-increasing number of waiver requests."<sup>198</sup>

The Obama Administration continued flexibility policies to give schools more time to meet AYP if they created workable plans that were likely to lead to that progress. The U.S. Department of Education has managed the program and invited each state's education agency "to request flexibility regarding specific requirements of the [ESEA], as amended by the [NCLB] in exchange for rigorous and comprehensive State-developed plans designed to improve educational outcomes for all students, close achievement gaps, increase equity, and improve the quality of instruction."<sup>199</sup> The Secretary's regulations "served mainly to relax, not stiffen, [NCLB's] monitoring and enforcement mechanisms."<sup>200</sup>

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195. Schemo, *supra* note 194.

196. See, e.g., RAVITCH, *supra* note 194, at 100 ("When offered a chance to leave their failing school and to attend a supposedly better school in another part of town, less than 5 percent—and in some cases, less than 1 percent—of students actually sought to transfer."); *id.* at 104-05 ("To date, there is no substantial body of evidence that demonstrates that low-performing schools can be turned around by . . . [NCLB] remedies . . . . Converting a 'failing' school to a charter school or . . . to private management offers no certainty that the school will be transformed into a successful school.").

197. Liebman & Sabel, *supra* note 185, at 1724.

198. Heise, *supra* note 135, at 127.

199. *ESEA Flexibility*, U.S. DEP'T EDUC. (May 12, 2016), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [<http://perma.cc/Y6Z3-8BLH>].

200. Liebman & Sabel, *supra* note 175, at 286-87.

With these waivers, and because there was no private right of action to enforce the law, NCLB standards and sanctions were not in fact enforced.<sup>201</sup>

Another development during this period was the Obama Administration's launch of the Race to the Top program (RTT), part of the \$4.35 billion federal allocated by the American Recovery and Reinvestment Act of 2009 (ARRA). The ARRA's focus on education included the purpose to lay "the foundation for education reform by supporting investments in innovative strategies that are most likely to lead to improved results for students, long-term gains in school and school system capacity, and increased productivity and effectiveness."<sup>202</sup> Unprecedented in its design, RTT invited states to apply for grants to encourage and reward states that are (1) "creating the conditions for education innovation and reform"; (2) "achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers"; and (3) "implementing ambitious plans in four core education reform areas," with those areas consisting of preparing students to succeed in college and the workplace, using data systems to measure student growth and success, training effective teachers and principals, and "turning around our lowest-achieving schools."<sup>203</sup>

Given a pot of money not large enough to cover all of the forty states that applied,<sup>204</sup> RTT was a competition over who could design the most effective education standards. The U.S. Department of Education reviewed states' policies and allocated points in six areas: (1) state success factors, (2) standards and assessments, (3) data systems to support instruction, (4) great teachers and leaders, (5) turning around the lowest-achieving schools, and (6) general factors (including making education funding a priority and ensuring successful conditions for high-performing charter and other innovative schools). An additional competitive preference priority emphasized studies in science, technology, engineering, and mathematics (commonly known as STEM).<sup>205</sup> Although envisioned as an anti-poverty measure, its lack of reach and competitive grant design did not appear to be, and ultimately could not be, a systematic response to the education needs of students around the country.

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201. As of December 2015, the NCLB standards and sanctions have been superseded with the enactment of the Every Student Succeeds Act. *See infra* notes 209-11 and accompanying text.

202. *Race to the Top: Executive Summary*, U.S. DEP'T EDUC. 2 (Nov. 2009) [hereinafter *Race to the Top*], <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf> [<http://perma.cc/C2JD-J38V>].

203. *Id.*

204. *See* Michele McNeil, *All but 10 States Throw Hats into Race to Top Ring*, EDUC. WEEK (Jan. 19, 2010), [http://www.edweek.org/ew/articles/2010/01/20/19rtt\\_ep.h29.html](http://www.edweek.org/ew/articles/2010/01/20/19rtt_ep.h29.html) [<http://perma.cc/KN2Z-5PSA>].

205. *Race to the Top*, *supra* note 202, at 4.

Initial supporters and critics alike found this era of standards, with NCLB leading the charge, to be overly ambitious both in its federal expansion and expectations for adequacy, and many, including initial supporters, began to criticize the failings of the system.<sup>206</sup> Common among criticisms were NCLB's promise of specific results that it could never deliver, as well as its singular focus on testing despite the multi-layered concerns fueling educational inequality.<sup>207</sup> Others specifically criticized AYP and the threat of sanctions, which some education scholars criticized as "arbitrary and unrealistic."<sup>208</sup> In other words, NCLB raised deep concerns about how its unreasonable expectations, testing regime, and sanctions would translate to benefits for the many low-income, disadvantaged children discussed in Part I.

In light of this criticism, Congress enacted the Every Student Succeeds Act (ESSA) in December 2015. The ESSA repealed many parts of NCLB's accountability standards and prioritized returning accountability and enforcement over education to the states. Although expressly devoted to "every student succeed[ing]" and reaching every child "regardless of race, income, background, [or] the zip code where they live,"<sup>209</sup> the details on its implementation remain murky. In April 2017, the Trump Administration released an executive order recognizing that "the policy of the executive branch [is] to protect and preserve State and local control over the curriculum, program of instruction, administration, and personnel of educational institutions, schools, and school systems" and tasked the Secretary of Education with determining whether Department of Education regulations and guidance comply with the ESSA and other federal laws prohibiting the Department from controlling areas subject to state and local control.<sup>210</sup> Critics have lamented that there is little accountability under the ESSA to ensure that states will create meaningful systems to address low-quality schools and their disproportionate enrollment of low-income and minority students.<sup>211</sup>

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206. See, e.g., Ryan, *supra* note 162, at 944 (arguing that NCLB produces perverse incentives and unintended consequences of actually lowering academic standards, increasing the achievement gap, and deterring needed candidates from entering the teaching profession).

207. See, e.g., James, *supra* note 186, at 683-84.

208. Ryan, *supra* note 162, at 934.

209. Office of the Press Sec'y, *Remarks by the President at Every Student Succeeds Act Signing Ceremony*, WHITE HOUSE (Dec. 10, 2015), <http://obamawhitehouse.archives.gov/the-press-office/2015/12/10/remarks-president-every-student-succeeds-act-signing-ceremony> [<http://perma.cc/UUL6-MMKX>].

210. *Enforcing Statutory Prohibitions on Federal Control of Education*, Exec. Order No. 13,791, 82 Fed. Reg. 20,427 (May 1, 2017).

211. See, e.g., Alan Singer, *Will Every Student Succeed? Not with This New Law*, HUFFINGTON POST (Dec. 6, 2015, 6:50 AM), [http://www.huffingtonpost.com/alan-singer/will-every-student-succeed\\_b\\_8730956.html](http://www.huffingtonpost.com/alan-singer/will-every-student-succeed_b_8730956.html) [<http://perma.cc/8ZXX-U6VP>].

As the debate continues to focus on who should be held accountable for what portions of education laws and policies, there remains little discussion about guaranteeing that the most vulnerable children receive welfare and educational support to help them move beyond the obstacles they face. Rather, the latest developments only continue what has over the last few decades been a movement away from possible coordination between child welfare and education. That coordination could have been possible in the 1960s with the War on Poverty, but the country has mostly taken a different turn regarding discussions about direct guarantees to ensure that low-income children in impoverished communities have access to a quality education.

Furthermore, the commitment to education for mothers has also receded over time.<sup>212</sup> Education reform began under the notion that “our public schools have failed and that vast numbers of young people are growing up without basic math or reading skills.”<sup>213</sup> Although there are nationwide efforts to establish requirements for teenage, welfare mothers to graduate from high school (e.g., “Learnfare”) and to improve competency standards, these efforts have predominantly focused on high school and may end up not offering much for the “educationally disadvantaged.”<sup>214</sup> Scholars criticized these programs for ignoring the concerns that these students are already so disadvantaged due to poverty, cultural obstacles, and linguistic differences by the time they reach high school.<sup>215</sup> High competency requirements, they fear, will just pressure disadvantaged students to drop out.<sup>216</sup> Mothers have therefore not fared much better than their children in gaining access to a quality education, and it is unclear how the programs that are marketed as potentially helpful to mothers and parents more generally are in fact reaching their children and their needs.

### III. CLOSING THE GAP: A COORDINATED SYSTEM OF CHILD WELFARE AND EDUCATION

Although landmark federal welfare and education laws primarily developed independently and prioritized regulating families and schools rather than providing direct assistance to address the immediate needs of children, some federal programs did develop during the same period and bucked the trend. These federal food, nutrition, and early childhood programs are notable exceptions, and they provide a model for how the major federal laws on welfare and education could have been—and could still be—structured.

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212. See discussion *supra* Section I.C.

213. Handler, *supra* note 26, at 512.

214. *Id.* at 513.

215. *Id.*

216. *Id.* at 514.

A. *Federal Food and Nutrition Programs*

In 1946, with support from the Truman Administration, Congress enacted the National School Lunch Act. The Act established a program providing low-cost or free school lunch meals to low-income children through subsidies to schools.<sup>217</sup> Making the connections between child welfare and education explicit, the law expressly recognized Congress's intent "as a measure of national security, to safeguard the health and well-being of the Nation's children . . . by assisting the States, through grants-in-aid and other means, in providing an adequate supply of food."<sup>218</sup> Today, the federal government has institutionalized the program to provide reduced-price and free lunch to low-income children across the country. National statistics and school records have in turn used the number of students eligible for these lunches as a proxy, albeit not a perfect one nor a substitute, for measuring the socioeconomic statuses and relative poverty of students served by a school.<sup>219</sup>

Stemming from the success of the National School Lunch Act, the Kennedy Administration introduced a food stamp pilot program by executive order in 1961 following initial concepts of food programs in earlier decades.<sup>220</sup> Congress then enacted the Food Stamp Act of 1964, which institutionalized a national program known today as the Supplemental Nutrition Assistance Program (SNAP), and the Child Nutrition Act of 1966.<sup>221</sup> Managed by the U.S. Department of Agriculture, the food stamp program provides subsidies for low-income families to purchase a minimal level of food necessary for nutritious, low-cost meals.<sup>222</sup> Legislation in subsequent decades updated and continued to reform the program, with participation fluctuating as some reforms expanded access and others reduced eligibility.<sup>223</sup>

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217. Gordon W. Gunderson, Food & Nutrition Serv., *National School Lunch Act*, U.S. DEP'T AGRIC. (Feb. 24, 2017), [http://www.fns.usda.gov/nslp/history\\_5](http://www.fns.usda.gov/nslp/history_5) [<http://perma.cc/6NQS-NSYP>].

218. National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 231 (1946).

219. See, e.g., Tom Snyder & Lauren Musu-Gillette, *Free or Reduced Price Lunch: A Proxy for Poverty?*, NCES BLOG (Apr. 16, 2015), <http://nces.ed.gov/blogs/nces/post/free-or-reduced-price-lunch-a-proxy-for-poverty> [<http://perma.cc/WRM3-CLZD>].

220. Providing for an Expanded Program of Food Distribution to Needy Families, Exec. Order No. 10,914, 26 Fed. Reg. 639 (Jan. 24, 1961); see Food & Nutrition Serv., *Supplemental Nutrition Assistance Program: A Short History of SNAP*, U.S. DEP'T AGRIC. (Nov. 28, 2017), <http://www.fns.usda.gov/snap/short-history-snap> [<http://perma.cc/2ZX7-B4ER>].

221. Food & Nutrition Serv., *supra* note 220; Gunderson, *supra* note 217.

222. Food & Nutrition Serv., *Supplemental Nutrition Assistance Program: Facts About SNAP*, U.S. DEP'T AGRIC. (Sept. 13, 2017), <http://www.fns.usda.gov/snap/facts-about-snap> [<http://perma.cc/WYX8-HKY8>].

223. *Id.*

The Child Nutrition Act, in turn, addressed the nutritional needs of children by providing subsidies to schools. The Act observed “the demonstrated relationship between food and good nutrition and the capacity of children to develop and learn . . . based on the years of cumulative successful experience under the National School Lunch Program.”<sup>224</sup> It institutionalized the Special Milk Program (which had started reimbursing schools for milk served to their students in 1954) and provided states with food subsidies transferred to public primary and secondary schools, public nursery schools, child-care centers, settlement houses, and summer camps.<sup>225</sup> The Act also required states to prioritize “schools drawing attendance from areas in which poor economic conditions exist” and “schools in which a substantial proportion of the children enrolled must travel long distances daily.”<sup>226</sup>

Congress also instituted the School Breakfast Program in 1968 (first as a two-year pilot and later permanently in 1975).<sup>227</sup> The program provides federal subsidies for low-cost or free nutritious breakfasts in public schools, non-profit schools, and child care institutions. The Special Food Service Program for Children, begun in 1968, with a separate Summer Food Service Program authorized in 1975, provides federal subsidies to fund nutritious meals for children when school is not in session.<sup>228</sup> During the same period, what is now the Child and Adult Care Food Program began providing federal subsidies to fund nutritious meals for child and adult care institutions and day care homes.<sup>229</sup> Congress amended the Child Nutrition Act in 1974 to include a Special Supplemental Nutrition Program for Women, Infants, and Children (now known as “WIC” since the Healthy Meals for Healthy Americans Act of 1994) providing subsidies specifically for low-income pregnant and post-partum women, infants, and

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224. 42 U.S.C. § 1771 (2012); Gordon W. Gunderson, Food & Nutrition Serv., *National School Lunch Program (NSLP): Child Nutrition Act of 1966*, U.S. DEP’T AGRIC. (Apr. 25, 2017), [http://www.fns.usda.gov/nslp/history\\_6](http://www.fns.usda.gov/nslp/history_6) [<http://perma.cc/VGU5-7Y5E>].
225. Food & Nutrition Serv., *Special Milk Program (SMP)*, U.S. DEP’T AGRIC. (Nov. 7, 2016), <http://www.fns.usda.gov/smp/special-milk-program> [<http://perma.cc/8CTH-7M7K>]; Gunderson, *supra* note 224.
226. 42 U.S.C. § 1773(c) (2012).
227. Food & Nutrition Serv., *School Breakfast Program (SBP): Program History*, U.S. DEP’T AGRIC. (July 26, 2013), <http://www.fns.usda.gov/sbp/program-history> [<http://perma.cc/6STU-GA9F>].
228. Food & Nutrition Serv., *Summer Food Service Program (SFSP): Program History*, U.S. DEP’T AGRIC. (July 19, 2017), <http://www.fns.usda.gov/sfsp/program-history> [<http://perma.cc/5G7H-5UM7>].
229. Food & Nutrition Serv., *Child and Adult Care Food Program (CACFP)*, U.S. DEP’T AGRIC. (Mar. 29, 2017), <http://www.fns.usda.gov/cacfp/child-and-adult-care-food-program> [<http://perma.cc/8253-2GJD>].

children up to age five who are at nutritional risk.<sup>230</sup> In 2010, the Healthy, Hunger-Free Kids Act reauthorized funding and consolidated policies for the National School Lunch program, the School Breakfast Program, WIC, the Summer Food Service Program, and the Child and Adult Care Food Program, which are all managed through the U.S. Department of Agriculture.<sup>231</sup>

Lawmakers formulated these initiatives as welfare programs with a mind toward children's well-being and nourishment to support educational success.<sup>232</sup> Not by coincidence, these programs prioritized direct subsidies to children and reducing hunger that could interfere with their education. These programs built upon a multitude of studies suggesting that hunger and food insecurity hamper positive school behavior, learning, and academic performance.<sup>233</sup> Studies on the specific effects of the Child Nutrition Act have been more inconclusive about long-term benefits, but they suggest that, at least in the short term, the provision of breakfast emotionally benefits children and enhances their capacity to work on school tasks.<sup>234</sup> Linking research with a commitment to meeting the immediate needs of children so that they can learn, these food programs present one model for how caring for the general welfare of children can be connected with caring for their education.<sup>235</sup>

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230. Food & Nutrition Serv., *Women, Infants and Children (WIC): About WIC-WIC's Mission*, U.S. DEP'T AGRIC. (Sept. 28, 2017), <http://www.fns.usda.gov/wic/about-wic-wics-mission> [<http://perma.cc/885U-ZSQP>].
231. Food & Nutrition Serv., *School Meals: Healthy Hunger-Free Kids Act*, U.S. DEP'T AGRIC. (Oct. 5, 2017), <http://www.fns.usda.gov/school-meals/healthy-hunger-free-kids-act> [<http://perma.cc/3XZW-47YZ>].
232. The strong emphasis among these programs for food and nutrition relative to other education, health, and welfare concerns is noteworthy. Such a focus in society and within the government may reflect general intuitions and psychological studies suggesting that hunger, and physiological needs more generally, must first be met before they can function and address other needs, such as learning and self-exploration. See, e.g., Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCHOLOGICAL REV. 370, 372-75, 386 (1943) (proposing a "hierarchy of basic needs" with physiological needs, such as food, coming first).
233. See, e.g., Diana F. Jyoti, Edward A. Frongillo & Sonya J. Jones, *Food Insecurity Affects School Children's Academic Performance, Weight Gain, and Social Skills*, 135 J. NUTRITION 2831, 2835-38 (2005); Robert C. Whitaker, Shannon M. Phillips & Sean M. Orzol, *Food Insecurity and the Risks of Depression and Anxiety in Mothers and Behavior Problems in Their Preschool-Aged Children*, 118 PEDIATRICS 859, 866-67 (2006).
234. Ernesto Pollitt, Mitchell Gersovitz & Marita Gargiulo, *Educational Benefits of the United States School Feeding Program: A Critical Review of the Literature*, 68 AMER. J. PUB. HEALTH 477, 481 (1978).
235. See Laura Ariane Miller, *Head Start: A Moving Target*, 5 YALE L. & POL'Y REV. 322, 322-24, 341-44 (1986) (recognizing that Head Start's advantage is its structure defying any one categorization as primarily "an education program, an antipoverty

B. *Federal Early Childhood Programs*

Another example of coordination between federal welfare and education is Head Start, a program conceived as an education program with a focus on the overall welfare of the child. Head Start started in the early years of the ESEA as a federal grant program and signature part of President Johnson's War on Poverty. Federal officials brought together experts including Dr. Robert Cooke, a pediatrician at Johns Hopkins University, and Dr. Edward Zigler, a professor of psychology and director of the Child Study Center at Yale University, who recognized the importance of a comprehensive child development program to support disadvantaged preschool children.<sup>236</sup> In their report, the experts emphasized that successful programs to address child poverty must be "comprehensive, involving activities generally associated with the fields of health, social services, and education."<sup>237</sup> Similarly, as echoed by the Office of Head Start in discussing the initial vision of the program, "[p]art of the government's thinking on poverty was influenced by new research on the effects of poverty, as well as on the impacts of education. This research indicated an obligation to help disadvantaged groups, compensating for inequality in social or economic conditions."<sup>238</sup> The program therefore recognized the linkages between welfare and education, along with the immediate emotional, social, health, nutritional, and psychological needs of children from low-income families, at its core.

The first program launched in the summer of 1965 with 560,000 children enrolled that year.<sup>239</sup> By 2015, after decades of reauthorizations and expansions, Head Start celebrated its fiftieth anniversary with thirty-four million children having participated in the program, and nearly one million children and pregnant women enrolled in 2016.<sup>240</sup> The program has collaborated with other federal programs, such as the Medicaid Early and Period Screening, Diagnosis, and Treatment Program to provide comprehensive prevention and treatment ser-

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program, or a family support program" but rather by "capitaliz[ing] on a comprehensive multiservice approach").

236. Office of Head Start, *History of Head Start*, U.S. DEP'T HEALTH & HUM. SERV. (Jan. 8, 2018), <http://www.acf.hhs.gov/ohs/about/history-of-head-start> [http://perma.cc/5VVD-SJJW].
237. Robert Cooke et al., *Recommendations for a Head Start Program*, U.S. DEP'T HEALTH, EDUC. & WELFARE (Feb. 19, 1965), <http://eclkc.ohs.acf.hhs.gov/sites/default/files/pdf/cooke-report.pdf> [http://perma.cc/AB5E-NBPP].
238. Office of Head Start, *supra* note 236.
239. EDWARD ZIGLER & SALLY J. STYFCO, *THE HIDDEN HISTORY OF HEAD START* 57 (2010).
240. Office of Head Start, *Head Start Program Facts: Fiscal Year 2016*, U.S. DEP'T HEALTH & HUM. SERV. (Oct. 31, 2017), <http://eclkc.ohs.acf.hhs.gov/sites/default/files/pdf/hs-program-fact-sheet-2016.pdf> [http://perma.cc/48HV-B3D7].

vices including dental, mental health, and developmental services.<sup>241</sup> Recognizing that child development and school readiness start as early as birth, Congress launched an Early Head Start in 1995 for families with children from birth to age three.<sup>242</sup> Since their inception, the success of these programs has relied on an appreciation for the immediate needs of children and the importance of connecting their welfare to education.

*C. Additional Examples of Federal Child Welfare and Education Coordination*

Apart from these signature programs, there are a few other discrete examples of coordination between welfare and education. One example is the work of the Children’s Bureau, an office of the U.S. Department of Health and Human Services’ Administration for Children and Families. Founded in 1912 during the Taft Administration, the Children’s Bureau became what it deemed “the first national government agency in the world to focus solely on the needs of children.”<sup>243</sup> From its inception and throughout the last century, the Bureau’s tasks have included efforts “to safeguard the physical and mental health of mothers and their infants,” “ensure every child’s right to an appropriate education,” “protect children from abuse and neglect,” and “find permanent families for those who cannot safely return to their own homes.”<sup>244</sup> Its work intersected child welfare and education with a mind toward the security and development of the child as a whole. Yet the Children’s Bureau is only a subset of the U.S. Department of Health and Human Services, and the wider agency’s focus is broader and does not encompass the traditional education portfolio. The Eisenhower Administration had in 1953 founded one central cabinet-level department—the U.S. Department of Health, Education, and Welfare—managing national policies for both welfare and education. But in 1979, consistent with the splintering discussed by this Article, this unification ended with the renaming of this Department as the U.S. Department of Health and Human Services and the creation of a new agency, the U.S. Department of Education.

Another example is the provision of specific services and reimbursements for school health services within Medicaid. In 2015, the Centers for Medicare and Medicaid Services issued guidance exempting schools from the “free care

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241. Office of Head Start, *Head Start Timeline*, U.S. DEP’T HEALTH & HUM. SERV. (Jan. 4, 2018), <http://eclkc.ohs.acf.hhs.gov/about-us/news/head-start-timeline> [<http://perma.cc/2P9E-MFMN>].

242. Office of Head Start, *supra* note 236; Office of Head Start, *Early Head Start Programs*, U.S. DEP’T HEALTH & HUM. SERV. (Feb. 9, 2016), <http://eclkc.ohs.acf.hhs.gov/hslc/tta-system/ehsnrc/about-ehs#about> [<http://perma.cc/HL9N-HE4T>].

243. CHILD. BUREAU, U.S. DEP’T HEALTH & HUM. SERV., *THE CHILDREN’S BUREAU LEGACY: ENSURING THE RIGHT TO CHILDHOOD* 4 (2012).

244. *Id.* at 8.

policy,” which had previously disallowed Medicaid reimbursements for services provided to Medicaid-enrolled students if they provided those same services free to other students.<sup>245</sup> The change enlarged the reimbursements schools could receive for health services provided to students, such as immunizations, mental health care, and screenings for conditions like asthma.<sup>246</sup> The guidance recognized health services as part of accessing a free appropriate public education as required under federal education laws.<sup>247</sup> As one advocate explained, “[l]ow-income and minority students are at increased risk of health issues that can hinder their learning,” and increased Medicaid funding would permit “school health services [to] provide better care for the students who need it the most . . . [and] help more students be healthy and ready to learn.”<sup>248</sup>

Together, these programs show that federal coordination is possible. Real benefits from coordinating welfare and education laws and policies exist. But again, the programs discussed in this Part are specific examples and exceptions rather than the norm. They have operated more as offshoots and discrete programs of larger landmark legislations such as those discussed in Parts I and II, and their missions and goals have not filtered out to their larger counterparts. For those larger landmark laws, the coordination of major welfare and education programs remains few and far between.

#### IV. REUNITING CHILD WELFARE AND EDUCATION LAWS

The exceptions discussed in Part III should serve as models for welfare and education laws, rather than remain on their periphery. As discussed in the Introduction, and as is now appreciable from the analysis in Parts I and II and demonstrated in Part III, the synergies between child welfare and education are numerous, and the questions they raise are contiguous. The link between these two areas stems from a focus on children and regarding their welfare and education as paramount. Studies have suggested, for instance, that high-school dropouts and people with low academic achievement are at higher risk of bearing out-of-wedlock children or becoming divorced.<sup>249</sup> Mothers who do not have

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245. Letter from Centers for Medicare & Medicaid Services to State Medicaid Director, Re: Medicaid Payment for Services Provided without Charge (Free Care) (Dec. 15, 2014), <http://www.medicaid.gov/federal-policy-guidance/downloads/smd-medicaid-payment-for-services-provided-without-charge-free-care.pdf> [<http://perma.cc/RNB7-NADT>].

246. Evie Blad, *Schools Can Bill Medicaid for More Services, Feds Say*, EDUC. WEEK (Jan. 6, 2015), <http://www.edweek.org/ew/articles/2015/01/07/schools-can-bill-medicaid-for-more-services.html> [<http://perma.cc/ZAQ9-A66E>].

247. Letter from Centers for Medicare & Medicaid Services to State Medicaid Director, *supra* note 245, at 3 (“Under this guidance, we also would not consider schools to be legally liable third parties to the extent that they are acting to ensure that students receive needed medical services to access a free appropriate public education consistent with section 504 of the Rehabilitation Act of 1973.”).

248. Blad, *supra* note 246.

249. Reischauer, *supra* note 17, at 5-6.

many marketable skills for employers are more likely to access welfare support.<sup>250</sup> But if children are supposedly at the heart of welfare and education,<sup>251</sup> the preceding three Parts have attempted to suggest that they have not been prioritized in either area.

What has been prioritized across major welfare and education laws is indirect assistance through regulations of the institutions surrounding children, in lieu of direct benefits to address their immediate needs. In both welfare and education, the motivation for these regulations appears to be incentivizing “good” behavior and discouraging “bad” behavior, which in theory eventually translates into benefits to the child. For instance, AFDC sanctions focused on creating a “proper family,” which supposedly benefits the child by encouraging good family behavior and minimizing moral misdeeds that could destroy home environments. NCLB sanctions focused on compelling schools to meet AYP, which supposedly benefits children through more sound curricula for school and college readiness and minimizing school and teacher ineffectiveness.

But whether sanctions have in fact had these intended positive effects remains unconfirmed at best. The effects of sanctions have been a challenging question to resolve because of the difficulty of measuring how much the threat of sanctions encourages positive behaviors. The extent to which full family sanctions, which withhold all of the aid a family would otherwise receive, work more effectively than partial family sanctions, which withhold some of the aid, also remains unknown.<sup>252</sup> There does, however, appear to be some consensus that sanctions tend to fall disproportionately on recipients with lower levels of education and those who face multiple barriers to employment, including physical and mental health problems. Studies on the outcomes of those who leave welfare, often called leaver studies, suggest that those who were sanctioned have lower employment rates and incomes than those who left welfare for other reasons.<sup>253</sup> And many studies suggest concerns about the overall hardship to the families of welfare recipients facing sanctions.<sup>254</sup>

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250. *Id.* at 5.

251. Mason, *supra* note 20, at 344 (“Concern for children may be the only common ground in our current debate. The most successful rhetoric in this latest round of welfare talks focuses on the[ir] needs. . . . [Notwithstanding disapproval of] unwed mothers and . . . racist thoughts about the cause of their need, . . . no one wants to see children starve.”).

252. Bloom & Winstead, *supra* note 118 (“Despite strong views on both sides, at this point there is not enough solid evidence to draw firm conclusions about the relative effectiveness of full-family and partial sanctions.”).

253. *See, e.g., id.* (“[S]anctioned clients have lower levels of education and are more likely than other recipients to face barriers to employment such as physical and mental health problems.”).

254. *See, e.g.,* Richard C. Fording, Sanford F. Schram & Joe Soss, *Do Welfare Sanctions Help or Hurt the Poor? Estimating the Causal Effect of Sanctioning on Earnings*, 87 SOC. SERV. REV. 641, 668-72 (2013) (finding that sanctioning has a statistically significant negative effect on earnings among TANF recipients and may therefore

The same uncertainty pervaded NCLB's provisions for schools to make AYP or face sanctions. Here, however, there was also some room for consensus: after several years, individuals across the political spectrum denounced these provisions, which were recently repealed in the ESSA.<sup>255</sup> There is some evidence that schools with the capacity to improve did improve with the threat of sanctions, but the general understanding is that for the schools that were educating struggling students, the punishments only made conditions worse.<sup>256</sup> Students were supposedly offered the right to transfer to a better school, but NCLB did little to address the needs of the schools that these students left behind, along with the students who were not able to leave. As one education reporter observed, "[i]t was more punishment than panacea. Schools often sank deeper into the quicksand."<sup>257</sup>

Even assuming these programs did succeed in their longer-term intended effects to encourage positive behaviors and limit negative ones, they do not resolve the immediate needs that children in dysfunctional families or schools face in the meantime. By the time some of these programs have their intended effects on families and schools, many children and students are so far behind that interventions no longer work.<sup>258</sup> It is difficult to justify these programs for

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undermine the program's goals to reduce welfare use and improve earnings among severely disadvantaged families); Ariel Kalil, Kristin S. Seefeldt & Hui-chen Wang, *Sanctions and Material Hardship Under TANF*, 76 SOC. SERV. REV. 642, 658-59 (2002) (finding that "being sanctioned is associated with an increased likelihood of encountering hardship and expecting to encounter economic hardship in the near future"); Anita Larson, Shweta Singh & Crystal Lewis, *Sanctions and Education Outcomes for Children in TANF Families*, 32 CHILD & YOUTH SERV. 180, 180 (2011) (finding probable connections between factors contributing to challenges in employment, parenting, and school engagement of children in TANF families).

255. See, e.g., Lyndsey Layton, *Obama Signs New K-12 Education Law that Ends No Child Left Behind*, WASH. POST (Dec. 10, 2015), [http://www.washingtonpost.com/local/education/obama-signs-new-k-12-education-law-that-ends-no-child-left-behind/2015/12/10/c9e58d7c-9f51-11e5-a3c5-c77f2cc5a43c\\_story.html](http://www.washingtonpost.com/local/education/obama-signs-new-k-12-education-law-that-ends-no-child-left-behind/2015/12/10/c9e58d7c-9f51-11e5-a3c5-c77f2cc5a43c_story.html) [http://perma.cc/Q6E8-LYGH] ("No Child Left Behind was . . . created with strong bipartisan support, but over time its test-based accountability became widely seen as overly punitive and unrealistic.").

256. See, e.g., Cory Turner, *No Child Left Behind: What Worked, What Didn't*, NPR (Oct. 27, 2015), <http://www.npr.org/sections/ed/2015/10/27/443110755/no-child-left-behind-what-worked-what-didnt> [http://perma.cc/SC7Y-PZ38].

257. *Id.*

258. See, e.g., Handler, *supra* note 26, at 513 (discussing findings from HENRY M. LEVIN, *EDUCATIONAL REFORM FOR DISADVANTAGED STUDENTS: AN EMERGING CRISIS* 3-39 (1986), including that "a major shortcoming of . . . [high school reforms] is that they have little to offer the 'educationally disadvantaged' student. These students are so educationally handicapped by the time they reach high school that the proposed reforms can do little to help . . . and much, in fact, that might harm them.").

their uncertain benefits when they operate at the expense and neglect of the immediate needs of low-income children, if not also their parents. The policy battle over whether sanctions in fact work is too removed from the children's daily needs. Meanwhile, the studies on direct benefits and coordinated efforts, such as the food, nutrition, and early childhood programs, are not unequivocally positive, but they at least offer short-term benefits and do not risk the same type of deprivation that sanctions-based policies do.

Moreover, these sanction-based policies also run the risk of being counterproductive and in fact harmful to the very goals they set out to achieve. For example, when children are too hungry to learn, it is hard to imagine that they can focus on school work.<sup>259</sup> That simple concept is not resolved by sanctioning families or schools who serve these students. Furthermore, the emphasis on the "proper" family for many years distracted from promoting self-sufficiency.<sup>260</sup> Rather than explore how families could regain self-sufficiency, federal policies targeted their moral behavior. Similarly, the work requirements that followed also did not address other obstacles, such as the lack of prerequisite skills or mental health, rather than just a lack of interest or laziness, in pursuing employment.

And so far, this critique has presumed that the federal laws and policies were designed with a well thought-out, calculated approach to long-term gains and are able to reconcile the short-term expenses to achieve them. As Parts I, II and III illustrated, these laws and policies have not been supported by such a unified vision, and certainly not one that has embodied the full security and development of the child. Here is, after all, where the problems lie. In welfare, especially after the New Deal, mothers were expected to work, and states were unsympathetic to calls from advocacy groups, such as the Children's Bureau, which called upon states to improve their programs and discourage work so that mothers could stay at home and care for their children.<sup>261</sup> These expectations only worsened: "Whereas sixty years ago efforts were taken to ensure women's duties as good mothers, today's emphasis lies in ensuring their productivity."<sup>262</sup> In other words, in today's world, "the status symbols have been reversed. Now, the working mother is privileged, and the welfare mother is told to work, to become independent, to become worthy."<sup>263</sup> In education, what was at first a concerted effort to support children in low-income schools

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259. See, e.g., *Too Hungry to Learn: Food Insecurity and School Readiness*, CHILDREN'S HEALTHWATCH (Sept. 3, 2013), [http://childrenshealthwatch.org/wp-content/uploads/toohungrytolearn\\_report.pdf](http://childrenshealthwatch.org/wp-content/uploads/toohungrytolearn_report.pdf) [<http://perma.cc/Q8HD-J79A>].

260. Paterson, *supra* note 4, at 245 ("Yet any efforts to force AFDC parents into economic self-sufficiency—and to create a vision of the AFDC system as a transitional bridge to self-sufficiency—were counteracted by efforts to enforce the vision of the 'proper' family as a patriarchy.").

261. Handler, *supra* note 26, at 487.

262. Berrick, *supra* note 31, at 271.

263. Handler, *supra* note 26, at 519.

became an agenda to eradicate failing schools and teachers by threatening the loss of funds, much like eligibility requirements, despite the needs of the students whom these schools and teachers served. Proponents suggested school vouchers and alternative means, such as charter schools, but heartbreaking stories of students trying to escape their public schools have been rife with examples of parents who failed to move their children due to overfilled waiting lists and unlucky lottery numbers.<sup>264</sup>

Any principled and theoretical consensus aside, there has been no unified vision among policymakers to think of children as vulnerable populations in need of support. The supposed policy benefits of relying on regulations to manage institutions like families and schools have rested on shaky foundations, providing little justification for why the immediate needs of children should be neglected. History, in turn, may provide an indication for why the lack of coordination has been permitted to remain. Although education and welfare scholars have studied discrete components of education and welfare in the United States, few have engaged in an interdisciplinary analysis of the shortcomings of both systems. Recognizing the immediate needs of low-income children reveals the importance of welfare and education as parts of the same whole. The laws could be united by focusing on the suffering youth born to disadvantaged circumstances and constrained by poverty and other structural barriers.

Fixing these disconnects therefore starts with erasing some of the traditional stereotypes and misconceptions that have fueled obsessions over regulation relative to direct assistance for children's immediate needs. For instance, many associate AFDC families with child mistreatment because of a correlation between low-income families and mistreatment of children.<sup>265</sup> These types of moralistic determinations distract from the ultimate goal in both welfare and education to serve the interests of children who are born into circumstances outside of their control.<sup>266</sup> Welfare laws serve contradicting goals. One contradiction is rewarding achievement versus promoting equality through charity.<sup>267</sup>

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264. See, e.g., Conor Williams, *What Applying to Charter Schools Showed Me About Inequality*, ATLANTIC (Mar. 20, 2014), <http://www.theatlantic.com/education/archive/2014/03/what-applying-to-charter-schools-showed-me-about-inequality/284530> [<http://perma.cc/C27R-KSAS>].

265. Berrick, *supra* note 31, at 267.

266. See, e.g., Plyler v. Doe, 457 U.S. 202, 220 (1982) (reasoning that undocumented immigrant should not be denied a public education because “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”).

267. John E. Tropman & Alan L. Gordon, *The Welfare Threat: AFDC Coverage and Closeness in the American States*, 57 SOC. F. 697, 697 (1978) (“American society is continually contradictory. . . . [I]t continually supports a contest between values of achievement, and those of equality. . . . [I]t has norms guiding the ways in which individuals might support themselves, and norms . . . on what happens if they don’t . . . [i.e.,] norms of work versus norms of charity.” (citation omitted)).

As some scholars have noted, the AFDC programs featured “twin goals of helping the ‘needy’ child and deterring the formation of ‘improper’ families, so that there would be fewer needy children to help in the future.”<sup>268</sup> As these scholars have explained, “[t]he simple fact is that the child, whom no one would attempt to ‘deter’ or to hold responsible for the actions of his or her parent, is in a direct, dependent relationship with the parent deterred through various schemes of punishment.”<sup>269</sup> Indeed, “[t]here is simply no way to punish or deter the ‘improper’ parent without visiting harm unjustly on the child whose well-being the AFDC system was designed to protect.”<sup>270</sup> Yet few have focused on analyzing the implications of this tradeoff and what it means to have welfare policies that have increasingly, throughout the years, focused on the latter goal of deterrence.<sup>271</sup>

The National School Lunch Act, the Child Nutrition Act, and Head Start demonstrate how this greater appreciation and relatedly, coordination, could be established. Although these programs are subsidy programs providing federal funds, they also recognize a basic minimal level of support that all low-income children should be able to access. They are situated on a more systemic conceptual foundation of what children should be entitled to in terms of benefits, including access to school breakfasts and lunches, nutrition, and preschool. When these laws were developed, they signaled a commitment that any child, regardless of zip code, should be allowed a certain minimum level of subsistence and education.

Other programs at the local and state level also reflect the potential for coordination between welfare and education. One prominent example is the Harlem Children’s Zone (HCZ), a non-profit organization launched to help low-income children in Harlem through a systemic approach that combines educational, social, and medical services for children from birth to college.<sup>272</sup> Garnering national attention, the non-profit organization “meshes [these] services into an interlocking web,” and “drops that web over an entire neighborhood.”<sup>273</sup>

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268. Paterson, *supra* note 4, at 240.

269. *Id.* at 240 n.22.

270. *Id.*

271. *See, e.g., id.* (“The wisdom of such a dual goal system [in AFDC] has yet to be adequately evaluated and will not be evaluated in this Recent Development.”).

272. HARLEM CHILDREN’S ZONE, <http://hcz.org> [<http://perma.cc/H6SE-NTNG>] (last visited Mar. 21, 2018) (describing the organization as “[a] national model for breaking the cycle of poverty”).

273. *See* Paul Tough, *The Harlem Project*, N.Y. TIMES (June 20, 2004), <http://www.nytimes.com/2004/06/20/magazine/the-harlem-project.html> [<http://perma.cc/3CUY-AQNR>]; *see also* PAUL TOUGH, *WHATEVER IT TAKES: GEOFFREY CANADA’S QUEST TO CHANGE HARLEM AND AMERICA* 1-20 (2008) (describing the history of the Harlem Children’s Zone and its vision that education, health, and welfare challenges should and must be tackled at the same time for any particular community of children to be successful).

One HCZ study found that HCZ schools are “effective at increasing the achievement of the poorest minority children,” including closing the black-white achievement gap in mathematics and English language arts among those enrolled in the HCZ’s elementary school by third grade.<sup>274</sup> Inspired by these gains, the U.S. Department of Education launched “Promise Neighborhood” grants under the Obama Administration to replicate this model. Since 2010, over fifty organizations, institutions, and communities have received more than \$300 million in funding to design comprehensive programs to ensure that “all children and youth growing up in Promise Neighborhoods have access to great schools and strong systems of family and community support that will prepare them to attain an excellent education and successfully transition to college and a career.”<sup>275</sup>

Importantly, the HCZ study found that the academic gains could not be attributed to the surrounding community programs, but were instead specifically attributable to child welfare investments such as health services and nutritious meals administered within the school itself.<sup>276</sup> Other scholars have questioned whether the surrounding community programs, which cost a significant amount of money, are in fact necessary.<sup>277</sup> But rather than suggest that community programs are unnecessary, the HCZ study’s findings could also indicate that a community-centered vision of welfare and education is not sufficient, and a higher level of coordination between child welfare and education with the school at the center is necessary. After all, the HCZ study touted many of the community-oriented programs within the school as critical to its success. In any case, there appears to be a consensus that more research is necessary to determine the full effects of community programs, which are difficult to track because of the many entangled variables and metrics for success. Academic

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274. Will Dobbie & Roland G. Fryer, Jr., *Are High-Quality Schools Enough To Increase Achievement Among the Poor? Evidence from the Harlem Children’s Zone*, 3 AMER. ECON. J. APPLIED ECON. 158, 160 (2011).

275. *Programs: Promise Neighborhoods*, U.S. DEP’T EDUC. (Mar. 5, 2018), <http://www2.ed.gov/programs/promiseneighborhoods/index.html> [<http://perma.cc/NC4B-D8QY>].

276. Dobbie & Fryer, *supra* note 274, at 163 (“The schools provide free medical, dental, and mental health services . . . ; student incentives for achievement; nutritious cafeteria meals; support for parents in the food baskets, meals, [and] bus fare . . . . These types of school inputs are consistent with those that argue high-quality schools are enough to close the achievement gap.”).

277. Michelle Croft & Grover J. “Russ” Whitehurst, *Report: The Harlem Children’s Zone, Promise Neighborhoods, and the Broader, Bolder Approach to Education*, BROOKINGS (July 20, 2010), <http://www.brookings.edu/research/the-harlem-childrens-zone-promise-neighborhoods-and-the-broader-bolder-approach-to-education/> [<http://perma.cc/C6VS-2BD7>]; Danielle Hanson, *Assessing the Harlem Children’s Zone*, HERITAGE FOUND. (Mar. 6, 2013), <http://www.heritage.org/education/report/assessing-the-harlem-childrens-zone> [<http://perma.cc/RA5F-HYK4>].

achievement among low-income children is only one measure of progress, and more work is needed to understand which interventions are particularly effective in lifting up both children and families. But this is a question of coordination at *what level* is necessary, rather than a question of whether coordination itself is necessary.

Costs are of course a significant part of and potential limitation to a more coordinated, comprehensive system of addressing children's needs. But establishing greater coordination could actually lead to cost savings in several different ways. First, by tying child welfare and education laws and policies together, the coordination could rid the system of inefficiencies that stem from having two programs that address the same needs, such as free meals in schools for low-income children and subsidies to families to purchase meals for dependents. These programs could therefore focus on increasing the efficiency of delivering benefits and ensuring their effectiveness rather than simply increasing them, thereby allowing a reallocation of current rather than an introduction of new costs. Second, scholars have calculated that the economic returns that are possible from raising academic achievement among children are enormous.<sup>278</sup> Any major short-term costs of providing more coordinated services could lead to even more major long-term returns for children, families, communities, and the country as a whole.

Ultimately, the programs discussed here are but a few examples of the possibilities to rethink the longstanding gap between child welfare and education laws and policies and in turn the type of questions we need to ask to improve the effectiveness in these areas. By focusing on the immediate needs of children, the question becomes less about federal versus state control, and more about the collective responsibility to serve children's interests. What type of resources should all students be entitled to ensure their capacity and readiness to learn? What is the minimal level of adequacy of education to which all students should be entitled to ensure their future self-sufficiency? Welfare and education laws should address these questions directly. The welfare system is already criticized for being increasingly bureaucratic and having a tendency to adopt informal

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278. See, e.g., Dobbie & Fryer, *supra* note 274, at 181 (“The public benefits alone from converting a high school dropout to graduate are more than \$250,000.”); Jorge Luis García, James J. Heckman, Duncan Ermini Leaf & María José Prados, *The Life-Cycle Benefits of an Influential Early Childhood Programs* (Nat'l Bureau of Econ. Research, Working Paper No. 22993, Dec. 2016) (finding substantial beneficial impacts on health, children's future labor incomes, crime, education, and mothers' labor incomes from early childhood programs focused on disadvantaged families), <http://www.nber.org/papers/w22993.pdf> [<http://perma.cc/43LT-BG8W>]; Eric Westervelt, *How Investing in Preschool Beats the Stock Market, Hands Down*, NPR (Dec. 12, 2016, 6:47 AM), <http://www.npr.org/sections/ed/2016/12/12/504867570/how-investing-in-preschool-beats-the-stock-market-hands-down> [<http://perma.cc/48CB-DH7A>] (discussing the García, Heckman, Leaf, & Prados working paper and observing that “there is near universal consensus that high-quality Pre-K programs can have a huge positive impact on the lives of children—especially low-income ones—as well as on the parents and family”).

procedures that end up limiting eligible recipients' ability to access benefits to which they are entitled.<sup>279</sup> If states and welfare agencies wish to, there are many ways to diminish the value of such benefits.<sup>280</sup> By addressing the direct benefits to which all students should be entitled, programs may still be administered differently or expanded upon by states, but the conversation shifts from questions such as eligibility requirements, accountability standards, and the division of responsibilities between states and the federal government to the primary question of what every child needs to survive and thrive. At the very least, where there is still a child suffering and not learning, then the work of local, state, and federal governments is not done.

This conceptual framework would in turn set the foundation for unifying child welfare and education laws and policies. As the Head Start program and some policymakers recognized, there is no adequate welfare system without adequate education, and there is no adequate education system without an adequate welfare system. Such a conceptual framework would encourage more committees to coordinate their efforts to enact legislation covering both grounds, just as committees have done in formulating food and nutrition programs. Today, responsibility over welfare and education laws are scattered in a number of congressional committees, including the House Agriculture Committee; the House Education and Workforce Committee; the Senate Agricultural, Nutrition, and Forestry Committee; and the Senate Health, Education, Labor, and Pensions Committee. Authority over welfare and education policies is therefore dispersed and often not coordinated. The interlocked interests between child welfare and education discussed here suggests such dispersion is counterproductive and unsustainable.

Finally, it is possible that some of this disconnect stems from a reluctance about whether the federal government should be in the business of addressing the immediate needs of children at all, or whether this is a function that is more legitimately entrusted with local and state governments. After all, welfare and education have often been understood as under the purview of local and state governments. Yet the food, nutrition, and early childhood programs suggest that not only is there room for federal involvement, there is appetite and energy for it. These programs have endured over the years as important, celebrated ef-

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279. See, e.g., David A. Super, *Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits*, 113 YALE L.J. 815, 824 (2004) ("Advocates for low-income people long have complained about malfunctioning bureaucracies and the 'barriers' they place in the paths of eligible claimants seeking benefits for which they qualify.").

280. The state could reduce a benefit's value through at least five indirect methods: (1) increasing the transaction costs of applying for or receiving the benefit, (2) enhancing the stigma of receiving the benefit, (3) constraining its use such as by providing the benefit in kind rather than as cash, (4) instituting an eligibility procedure that increases the likelihood for an error leading to denial or termination of the benefit, and (5) offering rewards to those who opt out of the benefit or penalties for those who do claim the benefit. *Id.* at 828-30.

forts to provide a collectivistic, comprehensive program for children across the country. They recognize, through cooperation with local and state governments, the importance of federal involvement for children in need.

Furthermore, the landmark legislation in child welfare and education have not demonstrated an aversion to federal expansion. The Children's Bureau was formed in 1912, with the U.S. Department of Health and Human Services and the U.S. Department of Education created in the following decades. Within the last century, the New Deal, the Great Society, the War on Poverty, No Child Left Behind, and other federal efforts with bipartisan support responded to their times. Each of these initiatives expanded the federal government's role in ensuring the welfare and education of the country's children. As discussed throughout the Article, the federal government increased its role by regulating some of the arguably most local and intimate of entities interacting with children: families and schools. But unfortunately, lawmakers never translated the concept of linking welfare and education, and ensuring the full security and development of the child, into their central approaches or landmark legislation.

That landmark federal welfare and education legislation has not garnered as much support is therefore a function of something beyond simply skepticism about whether the federal government has a role in welfare and education matters. The disconnect stems from a misguided debate that has focused too much on regulating parents and schools, and not enough on the addressing the immediate needs of children. Certainly, providing for those already in need, promoting long-term sustainability, and preventing future need are not easy tasks for any government to juggle. For instance, with regards to AFDC's accessibility to homeless families, one scholar observed, "AFDC policymakers often face the impossible choice of either helping families already homeless—and spending AFDC money inefficiently—or spending money on homelessness prevention—and breaching one of government's basic obligations, protecting children."<sup>281</sup> But this challenge is where the opportunity for synergies between welfare and education policies may be greatest: a unified vision of the two areas may actually reduce the possible trade-offs between each of these tasks. Addressing the immediate welfare and education needs of children may not only help these children in the short-term but also contribute toward their long-term sustainability and prevent future disparities. Child welfare and education interventions together provide the resources and tools necessary for children to survive and thrive. Ending cycles of poverty is not easy, but utilizing the advantages from joining child welfare and education may finally accomplish such a feat for more children in the United States.

#### CONCLUSION

Poverty persists across the United States, and the federal government has increased its involvement over the last century, particularly during times of apparent acute need, such as the New Deal and the War on Poverty eras. But while

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281. Paterson, *supra* note 4, at 254.

suggesting a commitment to provide for the welfare and education of children, the federal government has continued to direct its attention to child welfare and education as separate entities with separate goals. Federal welfare laws have centered on how to set up eligibility for benefits to manage and promote certain behavior from mothers and families. Federal education laws have centered on how to set up adequacy standards to manage and promote certain standards from schools and teachers. These initiatives leave out addressing the immediate needs of the shared populations they seek to serve: the children themselves.

This Article does not seek to propose a profound recommendation. It only asks that children be returned to their position at the center of federal child welfare and education legislation. Reunifying these laws and policies will come naturally and inevitably from a reconceptualization of child welfare and education to focus on children and their immediate needs. The Social Security Act, the Elementary and Secondary Education Act, and legislation and amendments stemming from these landmark laws, are all grounded upon some notion that children have rights to a minimal level of welfare and education. Ensuring that those rights are protected and preserved means eschewing the traditional methods of regulations and sanctions that have stifled the creativity and innovation of too many policymakers, yet have not provided better outcomes for children. Rather, such an aim requires child welfare and education laws and policies to work in tandem. What home environments do students need to learn at school? How can schools provide an education that best enables children to break free from cycles of poverty? More research is needed to address these questions, but one place to start is to truly put the immediate needs of children first and unite these areas of law.