



2006

Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement

Eloise Pasachoff
Georgetown University Law Center

Georgetown Public Law and Legal Theory Research Paper No. 11-127

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/693>
<http://ssrn.com/abstract=1944271>

111 Penn St. L. Rev. 351 (2006)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Administrative Law Commons](#), [Education Policy Commons](#), and the [Public Policy Commons](#)

Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement

Eloise Pasachoff*

In early 2003, the Bush administration proposed and Congress considered two types of highly controversial structural reform to Head Start, the federal program that since 1965 has provided early education and comprehensive health and social services to low-income preschoolers and their families.¹ First, the proposal would begin funding Head Start through federal block grants to the states rather than through direct federal grants to local agencies.² Second, the proposal would shift oversight of Head Start at the federal level from the Department of Health and Human Services (HHS) to the Department of Education (ED).³ Variations on these two proposals have been offered many times since Head Start was created, and each time Head Start advocates have successfully lobbied against them.⁴ This time is no different: neither the version of the reauthorization bill approved by the House in September 2005 nor the version of the bill currently awaiting consideration by the

* Law Clerk to the Hon. Robert A. Katzmann, United States Court of Appeals for the Second Circuit, 2005-2006; Law Clerk to the Hon. Jed S. Rakoff, United States District Court for the Southern District of New York, 2004-2005. J.D. Harvard Law School, 2004; M.P.A. Kennedy School of Government, 2004; M.A. Yale University, 1998; A.B. Harvard College, 1995. The Hewlett Fellowship in Law and Negotiation provided research support for this project. Many thanks to Martha Minow, Frank Sander, Bob Bordone, and the many professionals in the fields of Head Start, early education, and consensus building who took time away from their own work to be interviewed for this project. The views here represented are my own, and the responsibility for any errors lies with me.

1. See Press Release, U.S. Dep't of Health and Human Servs., President Bush's Plan to Prepare Children for Kindergarten (Feb. 3, 2003), *available at* <http://www.hhs.gov/news/press/2003pres/20030203.html> [hereinafter Press Release, DHHS].

2. See *id.*

3. See *id.*

4. See *infra* Section I.

Senate contains either of these structural reforms.⁵

That these proposed reforms are no longer under active consideration has been held out as a victory by Head Start advocates, led by the National Head Start Association (NHSA) and joined by a variety of other advocacy organizations. This article questions that conclusion, and instead argues that Head Start advocates would do well to reconsider their long-held opposition to both changes. Much of the opposition to these changes stems from reflexive reaction and a history of mistrust instead of dispassionate policy analysis. The policy needs and doctrinal context that led to the original structure of the program—for example, the need to bypass racist state governors who were willing to close down school systems to avoid integration, in an environment of almost limitless federal authority to create civil rights legislation—are increasingly out of place in today's world. In fact, Head Start is now an outlier with respect to other social welfare and education programs, which are largely funded by the federal government through block grants to the states; educational authorities are now turning towards comprehensive service delivery models that are the hallmark of Head Start programs; and the Supreme Court has sharply curtailed the atmospherics of limitless federal power in which context Head Start was created.⁶

This article proceeds in four parts. Section I traces the history of the conflict over proposals to change Head Start's funding and organizational structure. I conclude that the dispute cannot easily be reduced to partisan politics and that the substance of the opposition has changed very little over the years, even though the particular proposals for structural change have been quite different. Section II examines the policy and doctrinal changes relevant to Head Start over the last forty years, arguing that the needs and expectations of the 1965 program have a very different resonance in the new millennium. Section III considers why the advocates have been so resistant to structural change, given these changed circumstances. The literature on negotiation theory and practice offers a helpful lens through which to analyze the problem, especially in the literature's distinction between positions—the particular and opposing outcomes to which each side stakes a claim—and interests—the underlying reasons why each side finds its desired outcome appealing. I explore the benefits of paying attention to interests over positions, the perils of focusing on narrow positions, and the barriers to an interest-based process. Finally, Section IV proposes a way forward, offering an inclusive and participatory consensus-based process

5. See *infra* notes 86-95, 137-38 and accompanying text.

6. See *infra* Section II.

to help the parties consider and respond to the underlying interests behind their positions. The article concludes that an honest assessment of the role of Head Start in the country's early childhood education and care movement could lead to structural experimentation that would benefit all concerned.

To view the absence of the proposals for structural change in the current versions of the reauthorization bill as a victory, or to view the proposals themselves as no longer relevant, would be short-sighted. History suggests both that the proposals will come around again and that the battle over the proposals has repercussions for the rest of the debate over reauthorization, and indeed for the success of Head Start itself. It is therefore important to understand the most recent battle in its historical context and to explore ways to change the dynamics of the debate. Attention to the context of this conflict through the lens of negotiation theory and practice has the potential to do more for Head Start and the field of early childhood education and care in general than the apocalyptic, limited terms of this current round of battles would suggest.

I. Background to the Current Conflict: Disputes over Head Start's Funding and Organizational Structure, 1965 to the Present

A. *Funding Structure: Federal-Local or Block Grant to the States?*

The Economic Opportunity Act of 1964 created the federal Office of Economic Opportunity (OEO), ushering in President Johnson's War on Poverty, a series of federal initiatives designed to attack poverty at its roots.⁷ Head Start opened in the summer of 1965 as one of these initiatives, having moved from idea to implementation in little more than six months.⁸ The federal government provided funding directly to the local organizations that would run Head Start centers, bypassing state and local government, largely because Head Start's founders believed that these lower levels of government were impediments rather than aids in solving the problems of poverty, especially where minorities were concerned.⁹ The founders were reluctant to let anti-poverty funding flow through the hands of racist state officials who had closed or threatened to

7. See EDWARD ZIGLER & SUSAN MUENCHOW, HEAD START: THE INSIDE STORY OF AMERICA'S MOST SUCCESSFUL EDUCATIONAL EXPERIMENT 2 (1992); Edward Zigler & Karen Anderson, *An Idea Whose Time Had Come: The Intellectual and Political Climate for Head Start*, in PROJECT HEAD START: A LEGACY OF THE WAR ON POVERTY 3, 5 (Edward Zigler & Jeannette Valentine, eds., 1979).

8. See ZIGLER & MUENCHOW, *supra* note 7, at 7-55, for a description of this planning period.

9. See, e.g., Carolyn Harmon & Edward J. Hanley, *Administrative Aspects of the Head Start Program* in PROJECT HEAD START, *supra* note 7, at 379, 385.

close public school systems rather than integrate them.¹⁰ Additionally, the founders wanted to root Head Start directly in local communities to underscore the importance of individual and community empowerment, one of the missions of the War on Poverty.¹¹

The funding structure of the program has changed very little since 1965. There are currently ten regional offices of the federal agency that runs Head Start, and grant applications and renewals go through the regional office assigned to that applicant or grantee.¹² The federal government provides eighty percent of the total funding for the program, with a twenty percent match covered by the grantee.¹³ A grantee may operate its own Head Start program directly, or it may entrust the operation of a program to a delegate agency.¹⁴ In the 2005 fiscal year, the last year for which complete figures are available, Head Start served just over 900,000 children in almost 50,000 classrooms through 1,604 grantees, with a total budget of \$6.8 billion dollars.¹⁵

This funding structure stands in contrast to that of Community Action Programs, another War on Poverty initiative, which are funded through the Community Services Block Grant directly to the states, which then disburse the funding to grantees themselves.¹⁶ Much federal funding for elementary and secondary education runs the same way, through the state departments of education.¹⁷ Federal funding for child care programs, a much newer endeavor that dates only to 1990, similarly moves through the Child Care and Development Block Grant to state administrators.¹⁸ Despite numerous efforts over the years to change the funding structure of Head Start to parallel the block grant structure that is

10. See, e.g., JEFFREY A. RAFFEL, *HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE* 31-35, 104-05, 270-72 (1998); KENNETH J. MEIER, JOSEPH STEWART, JR., & ROBERT E. ENGLAND, *RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION* 46-47 (1989), for more on the story of state governmental official response to school desegregation.

11. See Zigler & Anderson, *supra* note 7, at 6.

12. See, e.g., VALORA WASHINGTON & URA JEAN OYEMADE BAILEY, *PROJECT HEAD START: MODELS AND STRATEGIES FOR THE TWENTY-FIRST CENTURY* 26-31 (1995).

13. *Id.* at 31.

14. See Harmon & Hanley, *supra* note 9, at 380, for a useful chart.

15. See Head Start Bureau, *Head Start Program Fact Sheet* (Mar. 2006), available at <http://www.acf.hhs.gov/programs/hsb/research/2006.htm>. While the number of children served has not quite doubled since the program opened in 1965 with half a million children, funding has increased almost seventy-fold, from \$96 million in 1965. See WASHINGTON & BAILEY, *supra* note 12, at 106-07, 115. This disproportionate increase of funding as compared to children reveals that, in the debate over whether to serve more children with fewer services or fewer children with more services, the latter view has prevailed. See *id.*

16. See Community Services Block Grant, 42 U.S.C. §§ 9901, 9904 (2006).

17. See, e.g., Elementary and Secondary Education Block Grant, 20 U.S.C. §§ 3801-3876 (2006).

18. See Child Care and Development Block Grant, 42 U.S.C. § 9801 (2006).

common in other social service and education programs, the federal-local structure of Head Start has remained unchanged from its 1965 conception.¹⁹

A useful way of understanding these two types of funding structures is to contrast what Harmon and Hanley call “the classical accountability model” with “the recipient-participant model.”²⁰ In the classical accountability model, funding and policy direction flow from the federal government to state and local governments through formulas linked to state demographics; each layer of government is accountable to the one above it.²¹ There is generally a uniform program design and a focus on monitoring individual programs to make sure they comply with that design.²² This model is expected to achieve accountability through public officials who represent the entire citizenry.²³ This is the model that matches the block grant structure. In contrast, in the recipient-participant model, federal funding is directed to local organizations outside the government.²⁴ Policy and direction are shared between the federal government and these local bodies, and funds are disbursed based on the assessed needs of recipients rather than on strict demographic formulas.²⁵ Program recipients are connected to policymaking decisions, and program variance rather than uniformity is expected.²⁶ Accountability is achieved through monitoring compliance with local needs and decisions, on the theory that recipient satisfaction indicates acceptable use of government funds.²⁷ It is an overstatement to identify Head Start as a program purely in the recipient-participant vein, since the federal government has directed policy and set requirements from the start.²⁸ But more than the classical accountability model, the recipient-participant model matches the funding structure of Head Start as originally conceived.²⁹

While the War on Poverty generally and Head Start in particular were geared towards this latter model, the model had its detractors from the start.³⁰ Efforts to change Head Start’s funding structure to match the classical accountability model began almost immediately. In 1968, a

19. See *infra* Section II.A for more on the growing predominance of block grants in policy areas connected to Head Start.

20. Harmon & Hanley, *supra* note 9, at 383-85.

21. *Id.* at 383.

22. *Id.*

23. *Id.* at 384.

24. *Id.*

25. *Id.*

26. Harmon & Hanley, *supra* note 9, at 384.

27. *Id.*

28. *Id.* at 386.

29. *Id.*

30. See *id.* at 385.

congressional effort to block grant Head Start almost succeeded when the Senate passed an amendment that would have reallocated money earmarked for Head Start to the states, requiring only that the money be used to support early childhood programs.³¹ When Richard Orton, the federal administrator of Head Start, learned of a similar proposal about to be introduced in the House, he triggered a national telephone campaign to Congress with calls opposing the amendment.³² The amendment was never introduced in the House, and the Senate proposal went nowhere.³³

In 1970, Nixon administration officials began floating the idea of block granting Head Start as part of the President's New Federalism initiative.³⁴ Donald Rumsfeld, then the head of the Office of Economic Opportunity (and from 2001 to 2006 President George W. Bush's Secretary of Defense), prepared a memo for senior administration officials arguing that federal grant programs were inefficiently run and recommending that the Office of Management and Budget (OMB) move to decentralize such programs in the next budget cycle.³⁵ As a federal grant program that dealt only with individual grantees rather than the states, the federal-local structure of Head Start seemed in jeopardy, if not all of Head Start itself. When Nixon's new administrator for Head Start, Edward Zigler, had one of his first meetings with OMB representatives, he was shocked to read a proposal for Head Start's future: "Phase out one-third of Head Start the first year, one-third the second year, and eliminate the entire program the third."³⁶ OMB's decentralization of federal programs, likely to include Head Start, was thus linked to dismantling Head Start entirely. Further, the timing of these proposals coincided with the release of the first formal evaluation of Head Start, which concluded that Head Start participation had no lasting cognitive effect on children.³⁷ The longstanding suspicion of Head Start advocates

31. See ZIGLER & MUENCHOW, *supra* note 7, at 175.

32. *Id.*

33. *Id.*

34. *Id.* at 81. See generally TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 19-92 (1998), for more on President Nixon's New Federalism initiative.

35. ZIGLER & MUENCHOW, *supra* note 7, at 81. OMB is the executive branch agency that prepares the president's budget proposals and coordinates policy among the other agencies. See Office of Mgmt. & Budget, <http://www.whitehouse.gov/omb/organization/role.html> (last visited Oct. 21, 2006).

36. ZIGLER & MUENCHOW, *supra* note 7, at 80.

37. *Id.* at 65-72; PROJECT HEAD START, *supra* note 7, at 391. See, e.g., *Debate II: Does Head Start Work?*, in EDWARD ZIGLER & SALLY J. STYFCO, THE HEAD START DEBATES 111-278 (2004); *Part V: Evaluation of the Head Start Program*, in PROJECT HEAD START, *supra* note 7, at 399-507, for more on the evaluation of Head Start, including critiques of the methodology used in this first evaluation and discussions of later, more nuanced evaluations. See also WASHINGTON & BAILEY, *supra* note 12, at 124-135.

that any proposal to decentralize Head Start is connected to ending it because it does not work likely stems from this confluence of events.

This potential decentralization/phase-out of Head Start did not go any further, in part due to three separate strategies to counter it. First, Zigler embarked on a campaign to promote and publicize Head Start's strengths and to attribute this positive view of Head Start to the presidential administration itself.³⁸ Second, Zigler worked on solving the administrative problems that made Head Start vulnerable to accurate criticism.³⁹ Finally, on-the-ground activism by Head Start parents, of which Zigler was occasionally a target as part of the Nixon administration, may have helped keep the program in place. Therefore, Nixon's gesture towards decentralizing Head Start did not get far.

At the same time, however, a fight was brewing in Congress over how to expand Head Start into a broader vision of national child care, a battle in which Head Start's funding structure played a major role. The proposed solution was the Comprehensive Child Development Act of 1971.⁴⁰ This Act, which stated explicitly that it was intended to lay the groundwork for universal child care, would have created a national network of federally funded child care centers, for which Head Start would serve as the model; defined federal standards for the quality of care; and provided federal funds to purchase child care facilities and to train caregivers.⁴¹ Although both the House and Senate versions of the bill were introduced by Democrats, the bills gained the cosponsorship of a wide number of prominent Republicans and received wide bipartisan support.⁴² The key difference between the House and Senate versions of the bills, and the difference that ultimately spelled the Act's doom, was the contrast between funding structures.⁴³ The Senate version would have maintained the federal-local funding structure of the Head Start model, thus retaining federal control, on the theory that this structure would distribute the most money to the programs themselves.⁴⁴ A coalition of Head Start, child care, and civil rights advocates emphasized that they could support only a bill with this funding structure.⁴⁵ In contrast, the House version would have created a system of "prime sponsorship," where states and cities with populations of over 500,000 could have been the direct recipients of federal money and could then

38. ZIGLER & MUENCHOW, *supra* note 7, at 82-85.

39. *Id.* at 89-94; Harmon & Hanley, *supra* note 9, at 392-94.

40. ZIGLER & MUENCHOW, *supra* note 7, at 123-24.

41. *Id.*

42. *Id.* at 124-28, 136.

43. *Id.* at 127-28, 137-38.

44. *Id.* at 138.

45. *Id.* at 138, 143.

have disbursed funding locally, both to streamline administrative oversight and because Republicans in the House had indicated that they would be willing to go along with only this funding structure.⁴⁶

The Nixon administration would have supported the House limit of 500,000, and it has been suggested that it might even have supported the 100,000 limit that was in place when the bill made it out of subcommittee.⁴⁷ But a floor amendment to reduce the limit to a population of 10,000 for prime sponsorship went too far, as did the House and Senate conference committee's ultimate reduction of the prime sponsorship population requirement to 5,000.⁴⁸ While both the Senate and the House passed the bill, bipartisan support had largely evaporated, and President Nixon ultimately vetoed the bill with a ringing condemnation of federal involvement in child care—condemnation that he may not have actually felt but that seemed politically expedient, once Republican support for the bill had disappeared.⁴⁹ That the question of funding structure brought down this major piece of legislation that had seemed like it would easily become law points to the salience of the disagreement.

The Nixon administration's interest in block granting Head Start was piqued again briefly in 1974, through contact made by Jimmy Carter, then the governor of Georgia. That year, pursuant to congressional legislation, OMB published a circular that explained a new opportunity for states to help coordinate their federally funded social service programs, an opportunity that exemplified the decentralized approach defining Nixon's New Federalism.⁵⁰ Carter wrote to OMB requesting authority under this circular to control Georgia's Head Start programs.⁵¹ Internal maneuvering by Head Start's federal administrators, who were advocates of the federal-local structure, resulted in a swift rejection of this request.⁵² When Governor Carter became President Carter, he made no further attempt to turn over control of Head Start to the states.⁵³

After President Reagan took office in 1980, his administration began to discuss block granting Head Start.⁵⁴ Proponents of block granting—including, this time, Head Start's new federal administrators—felt that it was inefficient for the federal government to

46. ZIGLER & MUENCHOW, *supra* note 7, at 137.

47. *Id.* at 141-43.

48. *Id.* at 144-45.

49. *Id.* at 146-47.

50. *Id.*

51. *Id.*

52. ZIGLER & MUENCHOW, *supra* note 7, at 176-77.

53. *See id.* at 178-84 (describing President Carter's efforts to restructure Head Start).

54. *Id.* at 194.

run so many local programs and that turning the program over to the states might enable them to serve more children with no budget increase.⁵⁵ Streamlining Head Start's thick book of program regulations would also fit in with the President's move towards federal deregulation.⁵⁶ The President was expected to propose incorporating Head Start's funding into the Community Services Block Grant—although the earmarked funding for Head Start would be consequently cut by \$130 million.⁵⁷ When some members of Congress who opposed block granting learned about this proposal, however, they leaked it to the press, who responded negatively,⁵⁸ and the Reagan administration eventually received over 5,000 letters opposing block grants.⁵⁹ Responding to these pressures, the administration never made a formal proposal to Congress to revise Head Start's formal funding structure.⁶⁰

By the mid-1980s, Head Start had entered what would be a relatively long period of structural stability, and the program enjoyed strong bipartisan support.⁶¹ In 1988, both the Democratic and Republican candidates for president campaigned on the issue of who supported Head Start more strongly, and both parties proposed to extend Head Start services to all eligible children.⁶² Congress's reauthorization of Head Start in 1990 included a major boost in Head Start's budget.⁶³ The program continued to expand under President Clinton with no sign of anything but a commitment to maintaining Head Start as a federal-local program.⁶⁴ After the congressional election of 1994 turned control over Congress to the Republicans, and devolving federal welfare programs to the states emerged as an important item on the agenda, Head Start was briefly on the list for consolidation with other low-income social service programs into a block grant.⁶⁵ However, the proposal to include Head Start did not go very far.⁶⁶ By the time President George

55. *Id.* Cf. text at *supra* note 15.

56. WASHINGTON & BAILEY, *supra* note 12, at 106. See CONLAN, *supra* note 34, at 93-212, for an overview of President Reagan's plans for and implementation of federal deregulation (which was also connected to cutting federal funds).

57. ZIGLER & MUENCHOW, *supra* note 7, at 195.

58. *Id.* at 194-95.

59. WASHINGTON & BAILEY, *supra* note 12, at 106.

60. ZIGLER & MUENCHOW, *supra* note 7, at 195-99.

61. See, e.g., Judith A. Chafel & Heather L. Sugioka, *Head Start: A Decade of Challenge and Change*, in THE HEAD START DEBATES, *supra* note 37, at 309-13 (describing bipartisan efforts to increase funding for Head Start without proposals for major structural change).

62. *Id.* at 210.

63. WASHINGTON & BAILEY, *supra* note 12, at 107-08.

64. See Chafel & Sugioka, *supra* note 61.

65. CONLAN, *supra* note 34, at 280.

66. *Id.*

W. Bush took office in 2001, Head Start was serving just over 850,000 children with a budget of almost \$5.3 billion, in the same federal-local structure that it had since its inception.⁶⁷ The latest iteration of the block grant wars was about to emerge.

President Bush made clear from the early days of his presidential campaign his interest in significantly changing the structure of Head Start.⁶⁸ When he finally released his proposal in February 2003 to turn over control of Head Start to interested states and to move Head Start's federal administration from HHS to the ED, no one was surprised. The block grant element of President Bush's proposal would have allowed any state to submit an application to the Secretaries of both HHS and ED for state "coordinat[ion of] preschool programs including Head Start."⁶⁹ The applications would include

a plan outlining how [states] will: work with the public school system to develop goals for all preschool programs in the state; identify guidelines that preschool programs can use to achieve these goals; devise an accountability system to determine whether children are achieving the goals; provide professional development for preschool teachers and administrators; and help parents provide support for children to succeed in kindergarten. In addition, states must describe how they will maintain the range of child development goals of Head Start, including the provision of social, parental, and health services in their Head Start programs.⁷⁰

The President's proposal offered two central rationales for turning over control of Head Start to the states. First, state control would better allow the state to integrate Head Start with its other programs serving low-income children and families, especially child care and other prekindergarten programs. This would promote efficiency and better programmatic management and oversight.⁷¹ Second, especially after President Bush's education initiative No Child Left Behind (NCLB), states should have the responsibility for the first step of education because states are ultimately held responsible for the education of their children.⁷²

The day after the President's proposal was announced, the NHSA issued its own press release opposing the plan, saying the changes would

67. Head Start Bureau, Head Start Program Fact Sheet, *supra* note 15.

68. See Edward Zigler, Editorial, *The Wrong Read on Head Start*, N.Y. TIMES, Dec. 23, 2000, at A19.

69. Press Release, DHHS, *supra* note 1.

70. *Id.*

71. *Id.*

72. *Id.*

destroy the program.⁷³ Although the Bush proposal itself never actually used the term “block grant,” the NHSA invoked the term as implicit in state control.⁷⁴ Block granting, said the NHSA, would result in a devastating loss of the comprehensive nature of the program. The NHSA argued that state-run child care and prekindergarten programs do not have the family-centered, whole-child approach that the Head Start program does, so the unique nature of Head Start would be compromised.⁷⁵ The NHSA further argued that shifting this important program to the states during a time of budget crises is not a wise move because there would be too much temptation either to use too much money in overhead or to serve too many children not as well.⁷⁶ They pointed to a recent study finding that federal dollars are eight times more likely than state dollars to target disadvantaged children, exactly the population served by Head Start.⁷⁷ Further, they noted that Head Start services provided to Indian tribes and to the families of seasonal and migrant workers would be “in great jeopardy” under a structure that gave control to the states.⁷⁸ Finally, the NHSA demonstrated a lack of trust of the motives for block granting the program, saying that the real goal of the block granting initiative was Head Start’s ultimate destruction.⁷⁹

As the House and Senate began discussions on Head Start’s reauthorization, the NHSA began an intensive lobbying campaign opposing the President’s proposals.⁸⁰ One representative noted that his office had never received as much feedback from his constituents as he had on this bill.⁸¹ The NHSA also sought the support of the press, hoping to use widespread media coverage around the country to its advantage. On July 25, 2003, in a dramatic late-night session, the House of Representatives passed by one vote a much narrower version of the administration’s proposal; instead of block grants available to all fifty states, the House version would create a pilot program limited to eight

73. NHSA, Legislative Alert: President Announces Plan to Move Head Start to Department of Education, Says States Should Get Chance to Run Programs: NHSA Calls For Immediate Action! (Feb. 4, 2003), <http://www.nhsa.org/members/advocacy/legislative%5Falert/advocacy%5Fleg%5Falert%5F02042003.htm> [hereinafter NHSA, Legislative Alert].

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. NHSA, Legislative Alert, *supra* note 73.

80. *Id.* See also ZIGLER & MUENCHOW, *supra* note 7, at 175; PROJECT HEAD START, *supra* note 7, at 130.

81. School Readiness Act of 2003, H.R. 2210, 108th Cong. (2003). See Bill Swindell & Kate Schuler, *Scaled-Back Head Start Bill a Squeaker Win for GOP*, CQ WEEKLY, Jul. 26, 2003, at 1895.

states.⁸²

Advocates saw in this narrow House victory an opportunity to shut down the proposal in the Senate, and several senators were quoted immediately after the House vote saying they would reject any attempt to block grant Head Start.⁸³ By the time the Senate began to consider its version of the reauthorization bill, even the House's proposed pilot program of state control had disappeared. On October 29, 2003, the Senate Health, Education, Labor and Pensions (HELP) Committee, which oversees Head Start, voted unanimously across party lines for draft legislation that rejected any attempt to block grant the program.⁸⁴ The Senate version included instead a proposal to create 200 "centers of excellence," which would help states coordinate their preschool services, including Head Start.⁸⁵ While the NHSA eventually accepted the basic concept of the centers of excellence, it continued to object to any involvement of state governors in assessing which Head Start grantees have merit.⁸⁶ On May 23, 2005, the Senate HELP Committee favorably reported a bill that included the centers of excellence, and the bill was placed on the Senate Legislative Calendar on August 31, 2005.⁸⁷

In the meantime, the House sponsor of the original bill with the controversial pilot program provision expressed some willingness to drop that aspect if necessary to move forward.⁸⁸ Following through on that suggestion, the House sponsor introduced a new bill on May 5, 2005, excluding this proposal.⁸⁹ The House Committee on Education and the Workforce favorably reported this bill on June 16, 2005, and the bill passed the full House by a vote of 231 to 184 on September 22, 2005.⁹⁰

82. See Swindell & Schuler, *supra* note 81, at 1895. The vote was delayed from a previously scheduled July 18 vote because Republican leadership had known that many of the bill's supporters would be absent on that day. *Id.* The July 25th vote was obtained only after then-Majority Leader Tom DeLay sent for a House member who had been injured several days before in a car accident and was on bedrest, and it was after midnight when the final vote was cast. *Id.*

83. *Id.*

84. See Bill Swindell, *Party Differences Over Head Start Belie Unanimous Vote in Senate Committee*, CQ WEEKLY, Nov. 1, 2003, at 2706.

85. *Id.*

86. NHSA, *Position Paper: Our View of the U.S. Senate Head Start Reauthorization Bill*, S. 1940, Apr. 7, 2004, at 3-4, available at http://www.nhsa.org/research/research_re_res_articles.htm.

87. See S. REP. NO. 109-131, at 4, 37-38 (2005); see also Head Start Improvements for School Readiness Act, S. 1107, 109th Cong. (2005), <http://thomas.loc.gov/> (last accessed Oct. 23, 2006), to search for the bill's status.

88. See Swindell, *supra* note 84, at 2706.

89. Bill Swindell, *2005 Legislative Summary: Head Start Reauthorization*, CQ WEEKLY, Jan. 2, 2006, at 33 [hereinafter Swindell, *2005 Legislative Summary*]; see also School Readiness Act of 2005, H.R. 2123, 109th Cong. (2005), <http://thomas.loc.gov/> (last accessed Oct. 23, 2006), to search for the bill's status.

90. See H.R. 2123, 109th Cong. (2005), <http://thomas.loc.gov/> (last accessed Oct.

With House insistence on the pilot program gone, reconciliation between the House and Senate versions of the bill seems more likely, and a reauthorized Head Start may, after three years of debate, finally be on the horizon.⁹¹

With the story of the block grant wars thus brought up to date, it is important to note the effect that history had on the NHSA's response to President Bush's proposal, which differed from previous attempts to block grant Head Start in several key respects. First, while the 1968 proposal to block grant Head Start would have folded the program's funding into a general grant to the states with no specifics beyond a requirement that the money be used for early childhood education,⁹² President Bush's proposal would have required states to submit for approval detailed plans of how they would spend the money.⁹³ The proposal would additionally have required that the state plans provide "at a minimum, the same coverage to serve at least as many Head Start eligible" children as under the current system, "including social, family, and health services," a requirement that differs from previous attempts to water down the program.⁹⁴ Further, in contrast to the Reagan proposal, which was linked both to budget cuts and the ultimate deregulation of the program,⁹⁵ the Bush proposal and its House counterpart required states to match their federal funds by at least fifty percent, with no mention of budget cuts, and to "generally meet or exceed" current federal standards.⁹⁶ This proposal thus had certain safeguards that were lacking in previous proposals. It is certainly possible that the proposals for state control would weaken Head Start's mandate, but the response of the advocates relied on old arguments that had worked to shut down block grants before without differentiating this proposal from earlier attempts. While neither side mentioned the history of the block grant wars, it is easy to see how advocates traced the roots of this proposal to earlier versions and saw danger ahead.

Yet it is also possible to see how advocates may have overstated the issue. As later parts of this article demonstrate, it is possible to imagine more state involvement in Head Start programs in ways that support rather than undercut the program's objectives. In particular, as some impartial policy analysts observed at the time, a narrow, short-term pilot

23, 2006), to search for the bill's status.

91. See Swindell, *2005 Legislative Summary*, *supra* note 89. While other differences between the House and Senate bills still require resolution, the absence of the block grant proposal in the House version removes a crucial stumbling block. See *id.*

92. See ZIGLER & MUENCHOW, *supra* note 7, at 175.

93. See Press Release, DHHS, *supra* note 1.

94. *Id.*

95. ZIGLER & MUENCHOW, *supra* note 7, at 194-95.

96. Press Release, DHHS, *supra* note 1; Swindell & Schuler, *supra* note 81 at 1895.

program for more state control, such as that proposed in the first House bill, could have been a relatively low-risk way to explore whether different structures could benefit program participants.⁹⁷ Before examining this possibility further, I turn to the second major structural change proposed by the Bush administration: moving federal oversight of the program from the Department of Health and Human Services to the Department of Education.

B. Organizational Structure: Department of Health and Human Services or Department of Education?

Since neither HHS nor ED existed in its current form when Head Start was created, the formal aspect of this debate is relatively new. However, the central dispute that lies behind it—whether Head Start should be a narrowly tailored education program or a broad-based comprehensive social service program—has a long history.

Head Start originated in the Office of Economic Opportunity (OEO) as the brainchild of that office's director, Sargent Shriver, and the team of professionals he pulled together to create the program.⁹⁸ Shriver and his team designed Head Start as a comprehensive program, providing much more than a preschool program to ease poor children's transition to school.⁹⁹ The fourteen-person planning committee put in place in December 1964 contained only two early childhood educators among its physicians, clinical and research psychologists, and academics and university administrators in the fields of nursing, social work, and education.¹⁰⁰ Only one of the committee's original seven recommendations for Head Start focused on developing academic skills; the other six focused on physical and mental health, emotional and social development, and parent and family involvement and integration.¹⁰¹ The committee purposely avoided defining Head Start as an educational

97. See Ron Haskins & Isabel Sawhill, *The Future of Head Start*, Policy Brief No. 27 (Brookings Inst. 2003) (recommending that Congress create a five-state pilot program).

98. PROJECT HEAD START, *supra* note 7, at 36, 114-16; see also SCOTT STOSSEL, *SARGE: THE LIFE AND TIMES OF SARGENT SHRIVER* 417-21 (2004).

99. See PROJECT HEAD START, *supra* note 7, at 73. See II: *The Preschool-Education Component of Head Start*, in PROJECT HEAD START, *supra* note 7, at 153-228; III: *Head Start as a Comprehensive Developmental Program*, in PROJECT HEAD START, *supra* note 7, at 229-336, for more on the educational components and comprehensive components of Head Start.

100. ZIGLER & MUENCHOW, *supra* note 7 at 8, 18, 42. See PROJECT HEAD START, *supra* note 7, at 72-114, for individual reminiscences from the members of this planning committee.

101. PROJECT HEAD START, *supra* note 7, at 137; ZIGLER & MUENCHOW, *supra* note 7, at 18-19.

program and linking Head Start to the school system, which they saw as enforcing racial segregation and traditional patterns of economic power, as well as lacking in the comprehensive effort they believed to be key to conquering poverty.¹⁰² The committee called for Head Start to remain in the OEO only until it demonstrated its effectiveness, at which time it should be moved to a cabinet-level department.¹⁰³

While the planning committee had focused on developing Head Start as a comprehensive program, Head Start ended up being publicized as a program designed primarily to bolster poor children's IQs, in part because this was easy for the public and politicians to understand and support.¹⁰⁴ This initial focus on IQ scores likely contributed to early congressional attempts to transfer Head Start to the Office of Education, over the strenuous objections of Head Start's federal administrators.¹⁰⁵ An early version of this congressional effort took place in 1967, though the sponsoring senator stressed the problems with Head Start's current fiscal management rather than any benefit that would come from running the program through the school systems.¹⁰⁶ That attempt, like most that would follow, never made it out of committee, and Head Start remained in the OEO.¹⁰⁷

Shortly after President Nixon took office, he announced his intention to move Head Start to the Department of Health, Education, and Welfare (HEW), the predecessor agency of both HHS and ED.¹⁰⁸ Some took this proposal as a sign of President Nixon's approval of the program, since only successful programs were supposed to move out of the OEO, and since Nixon had expressed distaste for many OEO programs.¹⁰⁹ The administration created a new agency in HEW, the Office of Child Development (OCD), in which Head Start was placed.¹¹⁰

102. ZIGLER & MUENCHOW, *supra* note 7, at 174. This interest in distancing Head Start from the public school system was not unanimous among Head Start's founders; Shriver, who had been the head of the Chicago school board for five years, hoped that Head Start would bring poor, minority parents into the school system. *Id.* See also PROJECT HEAD START, *supra* note 7, at 57; Stossel, *supra* note 98, at 420, for Shriver's reminiscences.

103. See PROJECT HEAD START, *supra* note 7, at 381.

104. See, e.g., ZIGLER & MUENCHOW, *supra* note 7, at 26.

105. See PROJECT HEAD START, *supra* note 7, at 130.

106. See ZIGLER & MUENCHOW, *supra* note 7, at 175; PROJECT HEAD START, *supra* note 7, at 130.

107. See ZIGLER & MUENCHOW, *supra* note 7, at 175; PROJECT HEAD START, *supra* note 7, at 130.

108. WASHINGTON & BAILEY, *supra* note 12, at 26; ZIGLER & MUENCHOW, *supra* note 7, at 74-75.

109. WASHINGTON & BAILEY, *supra* note 12, at 26; ZIGLER & MUENCHOW, *supra* note 7, at 74-75.

110. ZIGLER & MUENCHOW, *supra* note 7, at 74; WASHINGTON & BAILEY, *supra* note 12, at 27.

The director of OCD joined the commissioner of education and commissioner of social and rehabilitative services in reporting directly to the HEW secretary, a much higher status for Head Start than if Head Start's director had been folded into the Office of Education.¹¹¹ The placement of Head Start in OCD rather than the Office of Education also acknowledged the program's comprehensive focus.

When President Carter took office in 1977, he gave OCD a new name: the Administration for Children, Youth, and Families (ACYF).¹¹² This name change was not the only change on the horizon for Head Start in the Carter administration. President Carter had campaigned on the promise of creating a separate cabinet-level Department of Education and had been elected with strong support from the education lobby.¹¹³ When President Carter began considering which programs from HEW he would propose to move to the new ED, Head Start was originally on the list.¹¹⁴ OMB proposed, in fact, that almost all social welfare programs with any educational component should move to a new Department of Education and Human Development, which would link education with comprehensive services, including job training, delinquency prevention, and Head Start.¹¹⁵ HEW's jurisdiction would remain limited to Aid to Families with Dependent Children, Medicare and Medicaid, and Social Security.¹¹⁶ However, OMB cautioned that Head Start should be moved only if other human development programs joined it in the ED; otherwise Head Start would run the risk of becoming a narrowly focused education program itself.¹¹⁷ The original vision for the new Education Department, then, was to use a wide variety of programs to transform education into a broad-based community endeavor, with Head Start as a model. President Carter accepted this OMB vision and approved the transfer of Head Start.¹¹⁸

Despite strong congressional support for the new department,¹¹⁹ a major political stumbling block for the ED turned out to be the inclusion of Head Start on its list of proposed programs. Recalling the original reasons why Head Start had not been linked to the school system in

111. ZIGLER & MUENCHOW, *supra* note 7, at 86.

112. WASHINGTON & BAILEY, *supra* note 12, at 27.

113. ZIGLER & MUENCHOW, *supra* note 7, at 178.

114. *Id.* at 179-84.

115. *Id.* at 179.

116. *Id.*

117. *Id.*

118. *Id.* at 183 (noting that President "Carter's first elected position had been to a school board. He did not see anything wrong with elected officials administering Head Start programs.").

119. ZIGLER & MUENCHOW, *supra* note 7, at 183. See also D.T. STALLINGS, CTR. FOR CHILD AND FAMILY POLICY, A BRIEF HISTORY OF THE U.S. DEPARTMENT OF EDUCATION, 1979-2002 at 5 (Duke Univ. 2002).

1965—the school system’s perceived racism, inattention to traditionally under-served children, and reluctance to provide comprehensive and family services—advocates such as the Children’s Defense Fund threatened to campaign against the department on civil rights grounds, a response that would have been politically devastating for the legislation.¹²⁰ In response to claims that Head Start would serve as a model for a revitalized and broad-based education system, advocates asked rhetorically how tiny little Head Start could transform the entire education system.¹²¹ The NHSA and parents lobbied legislators and staff against moving Head Start to the new department, emphasizing the school system’s inability to deal adequately with the poor and minority children served by Head Start.¹²² The advocates prevailed, and in the final bill, the ED contained almost none of the human development programs that had originally been slated for it.¹²³ The current debate about whether moving Head Start to the ED will result in the loss of its comprehensive focus is thus directly related to the Head Start advocates’ 1977 campaign to keep the ED from being a comprehensive agency; had the ED been created with the broad-based mandate that President Carter intended, Head Start would seem a natural program to unfold under its auspices.

No attempt was made to move Head Start to the ED under the next three presidential administrations, but the proposal was part of the current President Bush’s original reform plan.¹²⁴ It is true that the press release that announced President Bush’s proposal for restructuring Head Start never explicitly mentioned completely moving oversight of Head Start from HHS to ED; in fact, the only mention of ED is in the shared administration of state applications between the secretaries of HHS and ED, which at least on its face suggests that some part of the program’s administration would remain with HHS.¹²⁵ However, the move to the

120. ZIGLER & MUENCHOW, *supra* note 7, at 173-74, 183-85. Civil rights leaders such as Coretta Scott King, Vernon Jordan, Joseph Lowery, and Jesse Jackson also advocated that Head Start be left out of the new ED, comparing this fight to the battle against segregation. *See id.* at 181.

121. U.S. DEP’T OF HEALTH AND HUMAN SERVS., ACYF, HEAD START IN THE 1980’S: REVIEW AND RECOMMENDATIONS 25 (1980) (quoting Marian Wright Edelman as saying that it is foolish to assume “that a \$735 million program will create the bureaucratic leverage to reform a \$17 billion department supporting a \$90 billion public school system”).

122. ZIGLER & MUENCHOW, *supra* note 7, at 185-86.

123. *Id.* at 186.

124. *See supra* notes 54-64 and accompanying text (describing President Reagan’s sole proposal for structural change of Head Start and indicating that the mid-1980s through 2000 were years of structural stability for the program); *see also* Press Release, DHHS, *supra* note 1.

125. Press Release, DHHS, *supra* note 1.

ED was widely acknowledged to be part of President Bush's mission, and administration officials linked state success in early education programs like Head Start to the President's education initiative, NCLB.¹²⁶ Officials also emphasized the President's interest in strongly emphasizing literacy skills in Head Start programs, proposing that Head Start children face a standardized test to assess the quality of the program in teaching these skills.¹²⁷

The Head Start community responded to this element of the President's proposal negatively: "President Announces Plan to Move Head Start to Department of Education. . . . NHSA calls for Immediate Action!"¹²⁸ The NHSA voiced its displeasure with the transfer to the ED in now-familiar terms: School programs have never focused on comprehensive services the way that Head Start has, and moving Head Start to the ED would be devastating for this element of the program.¹²⁹ While over thirty states have preschool programs, the NHSA said, "only six required on site case workers to be available, and half did not provide regular vision, health, and mental health screenings."¹³⁰ The NHSA also pointed out that the school system does not involve parents in the same way Head Start does, and expressed skepticism that it ever could.¹³¹

When the House took up consideration of the President's proposal in the spring of 2003, intense lobbying against the idea of transferring Head Start to the ED led it to be dropped from the bill on which the House actually voted in July 2003.¹³² The Senate bill never even included this element of the proposal.¹³³ Why was this proposal so easily dropped from consideration while the transfer to the states had more traction? There is no obvious constituency that supports transferring Head Start to the ED. Education advocacy organizations that might have stepped behind it have bigger concerns on their horizon, including compliance with NCLB, and may not want to expend financial and political capital on a matter that does not centrally concern them. Further, the fact that some school systems are already running Head Start

126. See Valerie Strauss & Amy Goldstein, *Head Start Changeover Proposed; More State Control, Literacy Focus Cited*, WASH. POST, Feb. 1, 2003, at A1; Jill S. Gross, *Changing Head Start: Some Say Revamping Preschool Program Could Threaten Mix of Teaching, Services*, BOSTON GLOBE, Feb. 16, 2003, at C1.

127. See David Pierson, *Testing Expands to Kids in Head Start*, L.A. TIMES, Feb. 6, 2003, at 16; Valerie Strauss, *Head Start Teachers Resist New Training; Sessions on Literacy Pushed by Bush*, WASH. POST, Nov. 16, 2002, at A3.

128. NHSA, Legislative Alert, *supra* note 73.

129. See *id.*

130. *Id.*

131. *Id.*; see also Meredith May, *Overhaul of Head Start worries some children's advocates*, S.F. CHRONICLE, Feb. 27, 2003, at A3.

132. Swindell & Schuler, *supra* note 81.

133. Swindell, *supra* note 84.

programs indicates that the education community does not need the transfer of Head Start to the ED to become involved. In contrast, the transfer of Head Start from federal government control to the states fits with a broader ideological preference for state control, a preference with a large constituency.

Because the Senate proposal for state centers of excellence remains a viable legislative possibility,¹³⁴ the proposed transfer of Head Start to the ED has, even more than some added form of state involvement, died in this round of reauthorization. Still, from a policy perspective—considering without prejudice the value of linking Head Start to schools incorporating comprehensive services into educational programs—it is not at all clear that keeping Head Start completely separate from the ED is best.

C. Party-Line Politics and the Current Context

It is tempting to reduce the block grant debates to partisan politics. According to this view, the Head Start block grant wars rehearse a familiar dispute between the Democrats, who support Head Start's origin in the War on Poverty, and the Republicans, who think the federal government should get out of the business of running social service programs.¹³⁵ Indeed, there are some aspects to this charge that are realistic. For example, in the long-standing dispute over whether Head Start actually works, it is more often Republicans rather than Democrats who express doubt or suggest eliminating the program entirely.¹³⁶ There is no love lost between the Head Start community and Republican Vice President Dick Cheney, who voted to cut Head Start when he was a legislator in the 1980s,¹³⁷ or Donald Rumsfeld, who was behind Nixon proposals to restructure and/or eliminate Head Start.¹³⁸ More specifically, the reauthorization bill that passed the House in July 2003 was generally split along party lines, with no Democrats voting for it.¹³⁹

134. See *supra* notes 84-87 and accompanying text.

135. See, e.g., Susan Milligan, *Bush Budget Would Overhaul Great Society*, BOSTON GLOBE, Feb. 9, 2003, at A1; Nancy Pelosi, House Democratic Leader, Republicans Dismantle Head Start, Undermining Aspirations of Working Parents, *available at* http://www.democraticleader.house.gov/issues/education/head_start.cfm.

136. See, e.g., WASHINGTON & BAILEY, *supra* note 12, at 14, 35, 125-35; PROJECT HEAD START, *supra* note 7, at 399-514; Darcy Ann Olsen, *It's Time to Stop Head Start*, HUMAN EVENTS, Sept. 1, 2000, <http://www.cato.org/research/education/articles/stopheadstart.html> (last accessed Aug. 20, 2006); Swindell & Schuler, *supra* note 81, at 1895.

137. Jim Provance, *Cheney Goes on Defensive Over Old Head Start Vote*, PITTSBURGH POST-GAZETTE, Aug. 11, 2000, at A-13.

138. ZIGLER & MUENCHOW, *supra* note 7, at 81.

139. Swindell & Schuler, *supra* note 81, at 1895.

However, such a view is neither entirely accurate nor ultimately helpful. For example, President Bush did not have unanimous support from conservative legislators for restructuring Head Start.¹⁴⁰ In contrast, the Senate committee voted unanimously across party lines in support of its bill in November 2003.¹⁴¹ Moreover, Head Start has long enjoyed wide bipartisan support from presidents and legislators alike.¹⁴² Proposals to restructure Head Start have always come from both parties, from Republican President Nixon's attempt to block grant Head Start to Democratic President Carter's attempt to move it to the ED. Moving beyond Head Start to other controversies around federal as opposed to state control, it was the first President Bush, a Republican, who signed into law the Child Care and Development Block Grant of 1990, the first major federal initiative for child care since the failed Comprehensive Child Development Act of 1971—a law that firmly linked the federal government to supporting early care and education.¹⁴³ It was Democratic President Clinton who signed into law one of the most controversial block grant moves of the last two decades—the end of the federal welfare entitlement program in favor of time-limited block grants to the states.¹⁴⁴ And while the current President Bush's NCLB is structured as a block grant, it represents a major increase in federal involvement in education, something quite different from what, for example, President Reagan would have thought appropriate.¹⁴⁵ NCLB itself crosses party lines both in support and disdain; it was passed with the strong support of congressional Democrats, and yet now faces strong criticism for its alleged underfunding and overly stringent requirements from state governors and legislators of both parties.¹⁴⁶

Finally, the idea that the federal government support is linked firmly and inextricably to progressive policies while state support is linked to conservative policies may be rooted more in historical happenstance—it

140. NHSA, Legislative Alert, *supra* note 73.

141. See Swindell, *supra* note 84.

142. See, e.g., Sarah Glazer, *Head Start: Does the much-touted program really deliver?* CQ RESEARCHER, Apr. 9, 1993, at 1. See also ZIGLER & MUENCHOW, *supra* note 7, at 121-22, 210-11.

143. See CONLAN, *supra* note 34, at 222-23.

144. See *id.* at 290-91.

145. Contrast, for example, the detailed requirements of NCLB, to which the ED has devoted an entire website, www.ed.gov/nclb, with President Reagan's stated desire to disestablish that Department. See STALLINGS, *supra* note 119, at 4.

146. See, e.g., Ronnie Lynn, *'No Child' rebellion picking up momentum*, THE SALT LAKE TRIBUNE, Feb. 5, 2004, at A1; Eric Kelderman, *State republicans assail Bush education law*, STATELINE.ORG, Jan. 28, 2004, available at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15546>; Betsy Hammond, *Oregon considers challenging No Child Left Behind law*, THE OREGONIAN, Nov. 26, 2003, at A1.

was FDR's federal New Deal that overcame the Depression, while the argument for states' rights has sometimes been linked to white supremacy—than anything required by the structure of federalism itself. If the federal government provides a floor beneath which states may not descend, there is no reason to assume that states will always provide fewer resources than the federal government would.

Reducing the disputes over the structure of Head Start to party-line politics therefore ultimately obscures real policy questions and makes unbiased reconsideration of program structure difficult. It is important to recognize the long, contentious history of these disputes. But it is also important to consider whether substantive arguments from 1965 or 1975 still hold sway. The Head Start advocates seem to have won their current battles against structural reform, but will the victory be anything but pyrrhic? Further, how does this decades-long history affect political relationships crucial to improving the program in ways the advocates want? The next two sections attempt to answer these questions, first by exploring policy and doctrinal changes that have reshaped the field in the decades since Head Start was created, and next by exploring procedural barriers to policy change.

II. Policy Changes and Doctrinal Developments Relevant to Head Start, 1965 to the Present

A. Policy Changes

1. Early Childhood Education and Care

When Head Start was created in 1965, preschool and formal child care programs for children five years old and under were rare. Labor force participation of women with children was low; in 1960, only one-fifth of mothers with children under the age of six worked outside the home.¹⁴⁷ Additionally, matching the one-worker, two-parent family structure that was then typical, the government expected mothers receiving welfare to stay at home caring for their children; welfare reform was only just beginning to connect welfare recipients to work outside the home.¹⁴⁸ Child development research was just starting to focus on the important role that environmental factors in the first few

147. Sheila B. Kamerman & Shirley Gatenio, *Overview of the Current Policy Context*, in *EARLY CHILDHOOD EDUCATION & CARE IN THE USA* 7 (Debby Cryer & Richard M. Clifford, eds., 2003). See also WILLIAM T. GORMLEY, JR., *EVERYBODY'S CHILDREN: CHILD CARE AS A PUBLIC PROBLEM* 16-19 (Brookings Inst. 1995).

148. ALFRED J. KAHN & SHEILA B. KAMERMAN, *CHILD CARE: FACING THE HARD CHOICES* 122-25 (Auburn House 1987).

years of a child's life would play in that child's future academic and social development.¹⁴⁹ What few preschool programs there were generally served as enrichment programs for the middle class.¹⁵⁰ Previous federal attention to child care issues had arisen only in the context of wartime, as federally-sponsored day care centers allowed women to work outside the home when the male labor force was off in battle; the last federal initiative for child care, the Lanham Act, had expired at the end of World War II.¹⁵¹ States had never developed any formal child care programs, although states had eventually assimilated kindergartens, which had started as private charity-based organizations, into the public schools.¹⁵² In this context, Head Start stood out as an innovative program, unique in its field.

Today, that field has changed.¹⁵³ By 1996, over sixty percent of mothers with children under six worked outside the home,¹⁵⁴ making the need for formal child care common. The controversial 1996 change in the welfare laws now requires that even women with infants work outside the home to receive benefits, again increasing the need for child care.¹⁵⁵ Single-parent families have also increased, and heads of these households are likely to work full time and need child care.¹⁵⁶ Private day care centers have exploded in number.¹⁵⁷ A 1999 study reported that forty-six percent of three-year-olds and seventy percent of four-year-olds received some type of center-based care that year.¹⁵⁸ Infants and toddlers are also increasingly served by child care; in 1995, fifty-four percent of two-year-olds, fifty percent of one-year-olds, and forty-five percent of children under one were served by some type of nonparental child care arrangement, primarily through nonrelative care outside the child's

149. Zigler & Anderson, *supra* note 7, at 6-11.

150. Kamerman & Gatenio, *supra* note 147, at 5.

151. *Id.*; ABBIE GORDON KLEIN, THE DEBATE OVER CHILD CARE, 1969-1990: A SOCIOHISTORICAL ANALYSIS 59-60 at n.1 (1992).

152. See KLEIN, *supra* note 151, at 261-320 (discussing the history of controversies surrounding kindergarten and their parallel to contemporary controversies surrounding child care).

153. See generally GERALDINE YOUNG, MINDING THE CHILDREN: CHILD CARE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT (1995), for more on the history of these developments; see also KLEIN, *supra* note 151; JAMES L. HYMES, JR., EARLY CHILDHOOD EDUCATION: TWENTY YEARS IN REVIEW (1991); KAHN & KAMERMAN, *supra* note 148.

154. Kamerman & Gatenio, *supra* note 147, at 7-8.

155. *Id.* at 8-9. See *infra* Section II.A.2 for more on the 1996 welfare reauthorization.

156. Kamerman & Gatenio, *supra* note 147, at 7-8.

157. GORMLEY, *supra* note 147, at 44, 68 (1995); KAHN & KAMERMAN, *supra* note 148, at 108.

158. Anne W. Mitchell, *Education for All Young Children: The Role of States and the Federal Government in Promoting Prekindergarten and Kindergarten* 4 (Found. for Child Dev. Working Paper Series 2001).

home.¹⁵⁹ Child development research on the importance of the birth to five years has had a ripple effect through American society, leading to the growth of an entire industry to support young children's early development. Child care and development are thus increasingly seen as a broad-based societal need and a common reality, not only of poor families but of all families, and developmentally appropriate activities are expected of quality care.¹⁶⁰

Over time, families have come to rely on both federal and state involvement in the provision or regulation of these services. At the federal level, a wide variety of programs exist, none of which were in place when Head Start was created. Most centrally, the Child Care and Development Fund (CCDF), overseen by the Child Care Bureau in HHS's Administration for Children and Families (ACF), provides states with a block grant to subsidize child care for parents whose income is less than eighty-five percent of the state's median income.¹⁶¹ In fiscal year 2006, CCDF—including mandatory, matching, and discretionary funds—was funded at \$4.9 billion.¹⁶² ACF, along with state welfare agencies, also administers Temporary Assistance for Needy Family (TANF), which is the block grant that replaced the federal provision of welfare and which is another major source of federal funding for child care.¹⁶³ Estimates for state child care expenditures through TANF were at \$2.2 billion in 2001.¹⁶⁴ The Social Services Block Grant is a smaller source of federal child care money that ACF administers, providing \$165 million for child care in 2000.¹⁶⁵

Outside HHS, the Child and Adult Care Food Program, run by the U.S. Department of Agriculture's Food and Nutrition Service, provides funding for state agencies to subsidize meals and snacks in licensed child care programs, worth \$1.74 billion in fiscal year 2001.¹⁶⁶ Additionally, the ED administers grants to state education agencies to provide early intervention services for infants and toddlers with disabilities, over \$400

159. Kamerman & Gatenio, *supra* note 147, at 17, tbl. 1.4.

160. See, e.g., GORMLEY, *supra* note 147, at 25-32.

161. Kamerman & Gatenio, *supra* note 147, at 18. See Julianne C. Johnson, *The Role of Government in Early Care and Education: Who Decides?* in CONTINUING ISSUES IN EARLY CHILDHOOD EDUCATION 10-11, 18-22 (Carol Seefeldt & Alice Galper, eds., 2d ed. 1998), for more on the history of CCDF. See also CHILDREN'S DEFENSE FUND, A FRAGILE FOUNDATION: STATE CHILD CARE ASSISTANCE POLICIES viii-ix, 2-3 (2001).

162. Child Care Bureau, Fiscal Year 2006 Federal Child Care Appropriations, <http://www.acf.dhhs.gov/programs/ccb/policy1/misc/approp02.htm> (last visited Aug. 20, 2006).

163. W.S. Barnett & L. Masse, *Funding Issues for Early Childhood Education and Care Programs*, in EARLY CHILDHOOD EDUCATION, *supra* note 147, at 146-47.

164. *Id.* at 147.

165. Kamerman & Gatenio, *supra* note 147, at 21.

166. *Id.*

million in fiscal year 2006, and special education and related services for preschool-aged children with disabilities, over \$381 million in fiscal year 2006.¹⁶⁷ The ED also supports preschool programs through its state funding for high-poverty school districts, amounting to approximately \$200 million in 2002, and coordinates a variety of smaller competitive grant programs for preschool-aged children.¹⁶⁸ Finally, the Child and Dependent Care Tax Credit, overseen by the Department of Treasury's Internal Revenue Service, allows a family's personal income tax to be reduced on a sliding scale by a certain percentage of eligible expenses towards child care.¹⁶⁹ In 2000, the tax credit was valued at approximately \$3 billion and was used by more than six million families.¹⁷⁰

Four structural points from this review of federal programs are relevant for our purposes. First, Head Start is no longer unique in providing federal resources for preschool-aged children and their families. It is true that Head Start is the only program that serves exactly the population that it does in exactly the way that it does, but this fact does not necessarily lead to the idea that its structure is the only possible way to achieve its aims. Second, all of the major programs that are not tax relief are funded as block grants to the states, whether through human service agencies or education agencies. The block grants contain clearly specified program requirements, with the federal government permitting the states to use federal funds only within strict guidelines.¹⁷¹ Any requirement that could be enforced by a federal-local structure could thus also be written into the structure of a block grant. Third, Indian tribes and U.S. territories are not left out of the block grant structure to the states, a fear that the NHSA voiced if Head Start were turned over to the

167. *Id.* at 21-22; Barnett & Masse, *supra* note 163, at 149-50; Child Care Bureau, Fiscal Year 2006 Federal Child Care Appropriations, *supra* note 162.

168. Child Care Bureau, Fiscal Year 2006 Federal Child Care Appropriations, *supra* note 162; see also Danielle Ewen, Jennifer Mezey, & Hannah Matthews, Ctr. for Law & Social Policy, *Missed Opportunities? The Possibilities and Challenges of Funding High-Quality Preschool through Title I of the No Child Left Behind Act* (Mar. 2005).

169. Kamerman & Gatenio, *supra* note 147, at 20; Johnson, *supra* note 161, at 10.

170. Kamerman & Gatenio, *supra* note 147, at 20. Another tax relief program that supports private spending on child care is the Dependent Care Assistance Program, which allows eligible taxpayers to deduct a certain amount of their child care expenses from their taxable income. Employers must elect to provide this type of account to their employees. See Barnett & Masse, *supra* note 163, at 148; NAT'L WOMEN'S LAW CTR., CREDIT WHERE CREDIT IS DUE: USING TAX BREAKS TO HELP PAY FOR CHILD AND DEPENDENT CARE 5 (2002).

171. The Child Care block grant, in particular, is detailed in its requirements. See GORMLEY, *supra* note 147, at 122-23. It is true, however, that federal policy has been to allow the states a wide degree of flexibility in setting program aims. See Kamerman & Gatenio, *supra* note 147, at 24.

states.¹⁷² For example, the Child Care and Development Fund provides money directly to tribes.¹⁷³ Finally, the ED is already involved with federal child care moneys. Although HHS's Child Care Bureau clearly plays a larger role, the alleged great divide between ED and HHS may not be so great.

The states themselves have devoted growing amounts of funds to early care and education services since Head Start was founded, and especially since the passage of the 1990 federal Child Care and Development Block Grant.¹⁷⁴ All fifty states now offer some form of kindergarten, generally serving five- and six-year-olds, and attendance is increasingly mandatory.¹⁷⁵ Since 1991, states have almost tripled their financial funding for prekindergarten programs, reaching almost \$1.9 billion in 2000, and forty-two states now run some type of prekindergarten program.¹⁷⁶ Since federal child care money requires that states use it to "supplement, not supplant" already available state dollars,¹⁷⁷ the overall amount of money for child care has increased over the period that these federal funds have been offered.¹⁷⁸ Further, more federal money becomes available as states increase the use of state funds, and although not all states can budget enough child care dollars to obtain the federal maximum, some do.¹⁷⁹ Interestingly, seventeen states use their own funds to expand Head Start programs; three other states use the federal Head Start program standards in their own non-Head Start programs.¹⁸⁰ While none of these state services are available to every eligible child—whether funded at the federal or state level, all early care and education, including Head Start, is underfunded, and threatened in times of cutting budgets¹⁸¹—the growth in state provision of services,

172. See *supra* note 78 and accompanying text.

173. See, e.g., Child Care Bureau, Reporting Requirements for Child Care and Development Fund (CCDF) Grantees, <http://www.acf.hhs.gov/programs/ccbf/report/index.htm> (last visited Aug. 20, 2006) (listing resources and requirements for tribal grantees).

174. See Kamerman & Gatenio, *supra* note 147, at 22-24; Barnett & Masse, *supra* note 163, at 151-53; CHILDREN'S DEFENSE FUND, A FRAGILE FOUNDATION, *supra* note 161; CHILDREN'S DEFENSE FUND, STATE DEVELOPMENTS IN CHILD CARE, EARLY EDUCATION, AND SCHOOL-AGE CARE 2001; Mitchell, *supra* note 158, for more on the development of state attention to early care and education.

175. EDUCATION COMMISSION OF THE STATES, STATE NOTES KINDERGARTEN: STATE STATUTES REGARDING KINDERGARTEN (Aug. 2003).

176. Kamerman & Gatenio, *supra* note 147, at 23.

177. Child Care Bureau, Fiscal Year 2006 Federal Child Care Appropriations, *supra* note 162.

178. Kamerman & Gatenio, *supra* note 147, at 24.

179. Johnson, *supra* note 161, at 12.

180. Mitchell, *supra* note 158, at 15, App. 1 2-5.

181. CHILDREN'S DEFENSE FUND, LOW-INCOME FAMILIES BEAR THE BURDEN OF STATE CHILD CARE CUTBACKS (2002); CHILDREN'S DEFENSE FUND, A FRAGILE FOUNDATION,

vouchers or subsidies to parents, and reimbursement to child care providers has significantly changed the shape of the field in the last decade.

Federal Head Start policy has grown to accommodate the explosion of the field of early childhood education and care. Since 1990, the federal Head Start Bureau has funded Head Start—State Collaboration Offices to promote coordination of state programs that serve this age group.¹⁸² The collaboration office in each state is located in a different office, including a special state executive branch office for children, a state department of education, a state department of social services, and a governor's office.¹⁸³ The existence of these collaboration offices cuts both ways in the argument over whether federal-local or state control is better. On the one hand, the fact that the offices exist might suggest that states need greater control over funding and policy to better coordinate their efforts, while on the other hand, the fact that the offices exist might suggest that no more state control or coordination than what is already in place is needed. Either way, though, the rhetoric about the states being unable to run effective programs for needy children is belied. Further, that the collaboration offices are located in so many different administrative agencies also cuts both ways in the argument over whether HHS or ED must run Head Start: on the one hand, it might suggest that the particular agency that governs these services is less important than the services that are being coordinated and provided, while on the other hand, it might suggest that the state agency is unimportant only if the federal agency is providing oversight to the issues in a way that only HHS can. Either way, the different types of state agencies underscore the high extent to which the issues that concern Head Start are strongly embedded throughout state policy.

Beyond the existing programs at the federal and state level, a vast network of think-tanks, university research programs, and advocacy organizations have spearheaded a national debate about the potentials for a full-scale provision of early education and care.¹⁸⁴ Many researchers and advocates have developed proposals for providing quality early

supra note 161, at viii.

182. See Head Start Bureau, *The Head Start—State Collaboration Offices* (2006), <http://www.acf.hhs.gov/programs/hsb/contacts/statecollab1.htm> (last visited Aug. 20, 2006).

183. See Head Start Bureau, *Head Start—State Collaboration Offices* (2003), <http://www.acf.hhs.gov/programs/hsb/contacts/statecollab.htm> (last visited Aug. 20, 2006).

184. See The Nat'l Ctr. for Children in Poverty (Columbia Univ. Mailman School of Public Health), *available at* <http://www.nccp.org/>; The Children's Defense Fund, *available at* <http://www.childrensdefense.org/>; The Nat'l Child Care Info. Ctr., *available at* www.nccic.org, for a sampling of different types of organizations.

education and care to every child in the country, noting that the current approach is too fragmented.¹⁸⁵ Some of these proposals advocate linking Head Start with other programs for a seamless delivery system.¹⁸⁶ No one suggests that the current patchwork of programs provides enough quality education and care to enough children and families. In part, the problem is related to underfunding; despite the array of federal and state programs designed to provide financial support for child care, families still pay around seventy percent of the country's total child care expenses,¹⁸⁷ which for low-income families can be twenty-five percent or more of their budgets,¹⁸⁸ and which also is a high fixed cost even for middle class families.¹⁸⁹ Even Head Start, which is free for those enrolled, is funded at a level that reaches only around one-third of all children who are otherwise eligible for it.¹⁹⁰ In part, the problem is related to quality; Head Start remains one of the few widespread programs with strict standards for quality and accountability, and many programs are not as well crafted.¹⁹¹ Still, the explosion of attention to the field completely changes the context in which Head Start finds itself, making a reexamination of its structure appropriate.

2. Health, Welfare, and Work

An important aspect of Head Start is the program's role in providing health services for the children under its care.¹⁹² This health component of Head Start is one that advocates fear will disappear if the program

185. See, e.g., Kamerman & Gatenio, *supra* note 147, at 6; GORMLEY, *supra* note 147, at 166-91; DAVID M. BLAU, *THE CHILD CARE PROBLEM: AN ECONOMIC ANALYSIS* 216-231 (2001); Gwen Morgan, *A Head Start for All Children*, in *THE HEAD START DEBATES*, *supra* note 37, at 363-77.

186. See, e.g., MATIA FINN-STEVENSON & EDWARD ZIGLER, *SCHOOLS OF THE 21ST CENTURY: LINKING CHILD CARE AND EDUCATION* 113-16 (1999). That Edward Zigler, a former member of the planning committee for Head Start and an early administrator of the federal Head Start office, advocates such linkages is noteworthy.

187. Kamerman & Gatenio, *supra* note 147, at 18. See also CHILDREN'S DEFENSE FUND, *A FRAGILE FOUNDATION*, *supra* note 161, at ix-x.

188. SUZANNE W. HELBURN & BARBARA R. BERGMANN, *AMERICA'S CHILD CARE PROBLEM: THE WAY OUT 2* (2002).

189. *Id.* at 4; see also GORMLEY, *supra* note 147, at 25.

190. See Johnson, *supra* note 161, at 9.

191. See HELBURN & BERGMANN, *supra* note 188, at 55-85.

192. See A. Frederick North, Jr., *Health Services in Head Start*, in *PROJECT HEAD START*, *supra* note 7, at 231; Donald J. Cohen, Albert J. Solnit, & Paul Wohlford, *Mental Health Services in Head Start*, in *PROJECT HEAD START*, *supra* note 7, at 259, for more on Head Start's historical connection to health services. See Robert W. O'Brien, David B. Connell, & James Griffin, *Head Start's Efforts to Improve Child Health*, in *THE HEAD START DEBATES*, *supra* note 37, at 161-78; Jane Knitzer, *The Challenge of Mental Health in Head Start: Making the Vision Real*, in *THE HEAD START DEBATES*, *supra* note 37, at 179-92, for more on Head Start's contemporary connection to health services.

shifts either to the states or to the ED.¹⁹³ While no one could look at the system of health care in the United States and be satisfied with its equity, availability, or cost, it is nonetheless true that the field of health care for poor children has changed dramatically since Head Start began.

Created in 1965, the same year as Head Start, Medicaid is the major program that pays for health care for poor children.¹⁹⁴ Medicaid is jointly funded by the federal government and the states.¹⁹⁵ The primary Medicaid program that reaches poor children is the Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) service, a program with which Head Start has long partnered.¹⁹⁶ Through EPSDT, covered children receive such benefits as physical exams, immunizations, laboratory tests, health education, and vision, dental, and hearing services.¹⁹⁷ States set the exact parameters of eligibility for this program.¹⁹⁸

The State Children's Health Insurance Program (SCHIP), a more recent program, was created in 1997 to cover children in low-income families whose income exceeds the Medicaid cutoff but who still cannot buy private health insurance on their own.¹⁹⁹ Another federal-state partnership, SCHIP is designed the way one version of the Head Start block grant proposal might work; there are certain federal minimum requirements that individual state plans must meet, but states have a wide variety of ways of designing their plans.²⁰⁰ Nothing about these programs requires linkage with Head Start as it is currently structured. While budget cuts at the state level are a source of strong concern to many advocates,²⁰¹ budgets at the federal level are not immune to cuts.

193. NHA, Legislative Alert, *supra* note 73.

194. See ELICIA J. HERZ, CONG. RESEARCH SERV., MEDICAID: A PRIMER CRS-2 to 5 (2005), available at http://opencrs.cdt.org/rpts/RL33202_20051222.pdf.

195. See 42 U.S.C. § 1396a(a)(2) (2006).

196. See 42 U.S.C. § 1396a(a)(43) (2006); see also PROJECT HEAD START, *supra* note 7, at 149.

197. See 42 U.S.C. § 1396a(a)(43) (2006).

198. See generally 42 U.S.C. § 1396(a) (2006).

199. See Lisa Dubay, Genevieve Kenney, & Jennifer Haley, *Children's Participation in Medicaid and SCHIP: Early in the SCHIP Era*, NEW FEDERALISM NATIONAL SURVEY OF AMERICA'S FAMILIES, Series B, No. B-40 (Urban Inst. Mar. 2002); 42 U.S.C. § 1397aa(a) (2006) (describing purpose of program).

200. See 42 U.S.C. § 1397bb (2006) (describing general requirements for state child health plans under this program).

201. See, e.g., Leighton Ku & Sashi Nimalendran, CTR. ON BUDGET & POLICY PRIORITIES, LOSING OUT: STATES ARE CUTTING 1.2 TO 1.6 MILLION LOW-INCOME PEOPLE FROM MEDICAID, SCHIP AND OTHER STATE HEALTH INSURANCE PROGRAMS (2003), available at <http://www.cbpp.org/12-22-03health.htm>; Donna Cohen Ross & Laura Cox, CTR. ON BUDGET & POLICY PRIORITIES, OUT IN THE COLD: ENROLLMENT FREEZES IN SIX STATE CHILDREN'S HEALTH INSURANCE PROGRAMS WITHHOLD COVERAGE FROM ELIGIBLE CHILDREN (2004), available at <http://www.cbpp.org/12-22-03health2.htm>; Margo Edmunds, Martha Teitelbaum, & Cassy Gleason, CHILDREN'S DEFENSE FUND, ALL OVER

The real issue is coalition building to ensure full funding, not whether the program is funded at the state or federal level.

It would be hard to discuss the funding structure of major social service programs without mentioning the 1996 battles over welfare reform, in which welfare was converted from a federal entitlement program into a block grant to the states.²⁰² The population of families receiving welfare overlaps with the population of families served by Head Start,²⁰³ so poor families and their advocates have a vested stake in both programs. Indeed, many of the opponents to block granting Head Start were also opponents of the 1996 welfare reform.²⁰⁴ The 1996 legislation imposed time limits of a maximum five years in a recipient's lifetime,²⁰⁵ as well as new and heavier work requirements.²⁰⁶ The legislation also contained major budget cuts.²⁰⁷ While any in-depth analysis of this policy change lies far beyond the scope of this article, it is worth emphasizing that the most controversial elements of the reform—the imposition of time limits and the decrease in federal funding—could have been achieved through the regular process of reauthorization and appropriation without transforming welfare into block grants. These changes happened to accompany the devolution of welfare to a block grant, but they were neither necessary elements of a block grant nor impossible to achieve through a federal program.

As a final note on changes in welfare and work policies since 1965, it is important to mention the Earned Income Tax Credit (EITC).²⁰⁸ First begun in 1975 and sharply expanded in the 1990s, the EITC provides a wage supplement directly to low-income workers to increase their incentive to move off welfare and into work.²⁰⁹ Currently, the EITC is one of the three largest federal programs to support poor families and is worth \$30 billion annually,²¹⁰ which is more than all federal money spent

THE MAP: A PROGRESS REPORT ON THE STATE CHILDREN'S HEALTH INSURANCE PROGRAM (CHIP) (2000).

202. A vast literature on this topic exists. See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 300-34 (1996); CONLAN, *supra* note 34, at 272-92; PETER EDELMAN, *SEARCHING FOR AMERICA'S HEART: RFK AND THE RENEWAL OF HOPE* 119-43 (2001), for three different discussions ranging from the academic to the personal.

203. See, e.g., KAHN & KAMERMAN, *supra* note 148, at 135.

204. See KATZ, *supra* note 202, at 330.

205. Sheila R. Zedlewski & Jennifer Holland, *HOW MUCH DO WELFARE RECIPIENTS KNOW ABOUT TIME LIMITS?* (Urban Inst. 2003), available at http://www.urban.org/uploadedpdf/310904_snapshots3_no15.pdf.

206. KATZ, *supra* note 202, at 331; CONLAN, *supra* note 34, at 289.

207. KATZ, *supra* note 202, at 331; CONLAN, *supra* note 34, at 290.

208. See REBECCA M. BLANK, *IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY* 111-14 (1997).

209. See *id.* at 112-13.

210. Leonard E. Burman & Deborah I. Kobes, *Tax Facts: EITC Reaches More*

on Head Start and child care combined.²¹¹ Recent studies demonstrate that the EITC is the most successful of all income support programs at reaching low-income families with children.²¹² Some scholars explicitly refer to the EITC as “a form of child care support,”²¹³ and suggest that expanding the EITC might be a good way to get more money into the child care system rather than directly funding child care either as a block grant or a federal program.²¹⁴ The EITC thus represents another major change in the structure of welfare and work that affects the broad policy context in which today’s Head Start finds itself.

3. The Education System and Traditionally Under-Served Populations

Advocates for Head Start object to transferring federal oversight of the program to the ED for two primary reasons: first, the school system has historically not met the needs of poor, minority children, and second, the school system does not provide the type of comprehensive services, from health care to parent involvement, that are the hallmark of Head Start.²¹⁵ Changes on both of these fronts require rethinking.

The realities of racial segregation in the school system (and beyond) in 1965 when Head Start was created are stark and disturbing to recall. Head Start’s originators were understandably reluctant to root massive amounts of federal money through states where governors vociferously defied federal desegregation orders²¹⁶ or through public school systems that would rather close than admit black children.²¹⁷ Yet while the contemporary system of public education in the United States is far from perfect, it is clear that the current system in no way parallels the reality

Eligible Families Than TANF, Food Stamps (Tax Policy Ctr., Urban Inst. & Brookings Inst., Mar. 17, 2003), available at http://www.urban.org/uploadedpdf/1000467_EITC_reaches.pdf.

211. Calculated by adding appropriations for Head Start (*see* Head Start Program Fact Sheet, *supra* note 15) and child care programs (*see* Child Care Bureau, Fiscal Year 2006 Federal Child Care Appropriations, *supra* note 162).

212. Burman & Kobes, *supra* note 210.

213. GORMLEY, *supra* note 147, at 47.

214. BLAU, *supra* note 185, at 67, 213.

215. *See supra* notes 73-79, 128-131 and accompanying text.

216. *See generally* UNDERSTANDING THE LITTLE ROCK CRISIS: AN EXERCISE IN REMEMBRANCE AND RECONCILIATION (Elizabeth Jacoway, C. Fred Williams, eds., 1999) (opposition of Arkansas governor to desegregation); *see also* RAFFEL, *supra* note 10, at 34 (Virginia), 158 (Alabama).

217. *See, e.g.,* RAFFEL, *supra* note 10, at 158 (1998) (detailing Virginia legislative sessions devoted to figuring out ways to stop integration, including shutting down school systems and providing money for white children to attend private schools); ZIGLER & MUENCHOW, *supra* note 7, at 182 (describing refusal of Lee County, Alabama to sell an empty public school building to a Head Start program so that the building could be sold to a white-only private school).

of 1965. Decades of reforms within the educational establishment have focused, albeit with varying degrees of success, on rooting out economic and racial inequities. From the high school completion rate²¹⁸ to enrollment in college preparatory classes²¹⁹ to college attendance,²²⁰ there is evidence of the improved status of minority students. To be sure, the American school system remains plagued by inequality; recent studies report that schools are now re-segregating (although not by government fiat),²²¹ and minority students are overrepresented in the country's special education population²²² and lower tracks of ability-grouped systems.²²³ Scholars, activists, and policy-makers rightly focus on these problems of inequity. Yet the focus on what the system still needs to achieve should not ignore the progress that has been made over the last few decades.

Further, to say today that Head Start must remain separate from the school system is ultimately to condemn the school system. This is certainly not an implausible argument, but it is worth examining the full implications of such an argument, were Head Start advocates to make it more explicitly. Taking the argument to one ultimate conclusion would be to say that it is actually appropriate that schools re-segregate so that attention can be devoted to each sector of the population; in fact, the federal government should open and fund schools for minority children, and/or poor children, of every age level, since the state and local systems

218. See, e.g., EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES, VOLUME I: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 73 (Dec. 1996) (indicating that high school completion rates for 18 to 24-year-olds increased by ten percentage points for black students from 1973 to 1994, from 66.8% to 77.0%, while rate for white students remained effectively constant at approximately 83.0%; however, completion rate for Hispanics remained essentially fixed around 55% over that twenty-year period).

219. See *id.* at 129 (indicating that, over ten-year period in the 1980s, percentage of blacks in sophomore year of high school enrolled in college preparatory classes increased from 26.9% to 40.9%, roughly equivalent with white enrollment at 42%, while enrollment of Hispanic students increased 24.6% to 35.1%; during same period, vocational enrollment declined for blacks from 34.1% to 6.2%, for Hispanics from 29.2% to 9.9%, and for whites from 17.6% to 6.3%).

220. See William G. Bowen, Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 9-10 (1998) (noting that percentage of black students aged 25 to 29 with college degrees rose from 5.4% to 15.4% between 1960 and 1995, while percentage of Hispanics older than 25 with a college degree rose from 4.5% in 1970 to 9.2% in 1995).

221. See generally GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS (The Civil Rights Project, Harvard Univ., 1999); GARY ORFIELD, SUSAN E. EATON, & THE HARVARD PROJECT ON SCHOOL DESEGREGATION, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION (1996).

222. See, e.g., HERBERT GROSSMAN, ENDING DISCRIMINATION IN SPECIAL EDUCATION (2d. ed. 2002).

223. See, e.g., TOM LOVELESS, THE TRACKING WARS: STATE REFORM MEETS SCHOOL POLICY 2-3, 14 (1999).

still seem to be failing them. Alternatively, to take the argument in a different direction, rejecting the public school system for private school vouchers is the appropriate solution. The voucher movement is closely connected to this idea of the failure of the public school system, especially for poor and minority students, and vouchers are indeed popular among many low-income and African American communities.²²⁴ It is not inconceivable that Head Start advocates intend to make either of these arguments, but this potential interest in radical federal reconfiguration on the one hand or entirely abandoning a failing school system on the other remains, at most, unspoken.²²⁵

It is also important to note that about one-third of Head Start's population are white children.²²⁶ Thus, the issue is the ability of the public schools to serve not only poor minority children but poor children, period. But in this area, too, the education system has made great strides over the last forty years. The 1965 Elementary and Secondary Education Act, passed the same year as Head Start, created Title I, a dedicated funding stream targeted to serve poor children and high-poverty schools.²²⁷ States have also increasingly directed their own funds to such students.²²⁸ After the Supreme Court held that there was no federal constitutional right to education and, therefore, no requirement to equalize funding between poor and wealthy school districts,²²⁹ advocates

224. See, e.g., RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 121-22 (2001).

225. Since resegregation of public schools is an issue of concern when considering the ability of the public school system to serve minority children, it is worth noting that Head Start programs, located as they often are in residentially segregated communities, are often just as racially segregated as the public schools. The historical role of socioeconomic integration in Head Start programs is additionally interesting to consider in light of this reality. One charge frequently levied against the school system is that socioeconomic segregation limits its ultimate success. See generally, KAHLENBERG, *supra* note 224. But Head Start has from its conception been conceived of as a purposely socioeconomically segregated program. There were some early attempts to integrate some percentage of paying middle class children on a sliding scale, but federal policy shifted away from this. See ZIGLER & MUENCHOW, *supra* note 7, at 126-31. Advocates in fact insisted that Head Start remain limited to poor children, another controversy that helped doom the 1971 Child Development Act to failure. *Id.* Contrasting *de facto* racial segregation and *de jure* economic segregation in Head Start programs with Head Start advocates' dismay at such segregation in the public school system, it becomes apparent that the Head Start community has an ambivalent relationship towards different types of segregation.

226. Head Start Bureau, Head Start Program Fact Sheet, *supra* note 15.

227. See, e.g., John F. Jennings, *Title I: Its Legislative History and Its Promise*, in *TITLE I: COMPENSATORY EDUCATION AT THE CROSSROADS* 1-24 (Geoffrey D. Borman, Samuel C. Stringfield, & Robert E. Slavin, eds., 2001).

228. Kevin Carey, *CTR. ON BUDGET & POLICY PRIORITIES, STATE POVERTY-BASED EDUCATION FUNDING: A SURVEY OF CURRENT PROGRAMS AND OPTIONS FOR IMPROVEMENT* (2002), available at <http://www.cbpp.org/11-7-02sfp.pdf>.

229. See *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

for school equity turned to state-level litigation, which has resulted in completely revised funding systems in many states (although, again, inequities remain).²³⁰ Finally, NCLB comes (at least in rhetoric) as close to mandating equal education in the public schools as anything ever has, requiring, among other things, that districts provide demographic analysis of student test scores so that averages will not hide the lower performance of (and lack of attention paid to) traditionally under-served groups.²³¹ While hardly perfect, the school system has devoted considerable effort and has made significant improvement in its ability to serve poor children.

As for the argument that the school system is unable to offer the family and comprehensive services that Head Start programs prize, this, too, is belied by on-the-ground changes since Head Start was created. Health and social services have become increasingly entrenched in the public schools.²³² In particular, special education programs funded through the ED include a provision for “related services,” through which special education students are entitled to various health services that will support their educational needs, and also include mandates for parent involvement.²³³ In implementing the Individuals with Disabilities Education Act (IDEA)—whose predecessor, the Education for All Handicapped Children Act, postdates Head Start by a decade²³⁴—the ED

230. See, e.g., Paul Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE 34-71 (Helen F. Ladd, Rosemary Chalk, & Janet S. Hansen, eds., 1999).

231. See, e.g., OFFICE OF THE UNDER SEC’Y, U.S. DEP’T OF EDUC., NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 9, 14, 18, 23 (2002), <http://www.ed.gov/admins/lead/account/nclbreference/reference.pdf>.

232. See, e.g., David Tyack, *Health and Social Services in Public Schools: Historical Perspectives*, 2 THE FUTURE OF CHILDREN 19 (1992), reprinted in MARK G. YUDOF, DAVID L. KIRP, BETSY LEVIN, & RACHEL F. MORAN, EDUCATIONAL POLICY AND THE LAW 758, 761 (Dan Alpert, Tangelique Williams & Stephanie Keough-Hedges eds., Wadsworth Group 4th ed. 2002) (noting sharp increase in percentage of non-instructional support staff providing social and health services and sharp decline in percentage of teachers when compared to all school employees in the period between 1950 and 1986);

233. See 20 U.S.C. § 1401(22) (2006) (defining related services); 20 U.S.C. § 1414(d)(1)(B) (2006) (including parents as part of the team that crafts each child’s Individualized Education Program).

234. See UNITED STATES COMM’N ON CIVIL RIGHTS, EQUAL EDUC. OPPORTUNITY AND NONDISCRIMINATION FOR STUDENTS WITH DISABILITIES: FEDERAL ENFORCEMENT OF SECTION 504 31-40 (1996), http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/24/1e/99.pdf, for more on the legislative history of these acts. Note that the special education laws started as a federal program when the states were seen as not doing enough for children with disabilities, but that this federal block grant has leveraged great sums of state and local money to serve these children. See Barnett & Masse, *supra* note 163, at 161; see also PAUL T. HILL & ELLEN L. MARKS, FEDERAL INFLUENCE OVER STATE AND LOCAL GOVERNMENT: THE CASE OF NONDISCRIMINATION IN EDUCATION (1982).

has already demonstrated that it can go beyond a narrow classroom focus to the human services that support those classrooms. Additionally, many school reformers call for a more wide-scale integration of education and human services, and point to many successful models around the country.²³⁵ Title I has also increasingly required schools to involve parents in their children's education.²³⁶ While Head Start advocates are correct that Head Start mandates and provides family and comprehensive services in a way that every individual school and school system does not, it is an exaggeration to say that such provision is either impossible or could not be done well.

Even assuming that Head Start serves poor and minority children and provides comprehensive services better and more thoroughly than the school system currently does, there remains the argument that under the helm of the ED, Head Start could serve as a model in all of these areas. In the heat of opposition to proposals for structural change, Head Start advocates have long dismissed this idea, finding laughable the idea that tiny Head Start could provoke broader programmatic change, as opposed to being swallowed and co-opted by the larger department.²³⁷ At other times, however, distant from such controversies, some advocates and early Head Start leaders have expressed the point of view that Head Start has served as a role model or instigated change in the school system by its very presence. For example, Julius Richmond, the first director of Head Start, has asserted that Head Start's low teacher-pupil ratio created pressure on elementary schools in low-income neighborhoods to adopt similarly low ratios.²³⁸ Edward Zigler has stated that Head Start's inclusion of children with disabilities in its program influenced the special education legislation that followed a decade later, especially in its mandate of comprehensive services for children age three to five.²³⁹ If federal legislation shifting Head Start into the ED retained a focus on comprehensive services, or required that school systems in general provide those services, such requirements are likely to be met. The real issue is how the specific legislation governing Head

235. See, e.g., J. Levy & W. Shepardson, *A Look at Current School-linked Service Efforts*, in 2 *THE FUTURE OF CHILDREN* 44 (Spring 1992), reprinted in *EDUCATIONAL POLICY*, *supra* note 232; FINN-STEVENSON & ZIGLER, *supra* note 186; Donna Cohen Ross & Meg Booth, Ctr. on Budget and Policy Priorities, *Health Coverage Programs: Schools are Part of the Equation* (2001), available at <http://www.centeronbudget.org/10-1-01health2.pdf>.

236. See Jerome V. D'Agostino, Larry V. Hedges, Kenneth K. Wong, & Geoffrey D. Borman, *Title I Parent Involvement Programs: Effects on Parenting Practices and Student Achievement*, in *TITLE I: COMPENSATORY EDUCATION*, *supra* note 227, at 117-36.

237. See *HEAD START IN THE 1980's*, *supra* note 121; NHSA, *Legislative Alert*, *supra* note 73.

238. *PROJECT HEAD START*, *supra* note 7, at 124.

239. *ZIGLER & MUENCHOW*, *supra* note 7, at 164.

Start would be crafted, not which federal agency has oversight authority.

One relative—and, in this context, ironic—constant in the educational system since Head Start's creation has been a strong connection between Head Start and local school systems. In the first summer, eighty percent of agencies that sponsored Head Start programs were schools, and in the 1990s, despite the rhetoric of mistrust, nearly a third were.²⁴⁰ Zigler writes that “collaborative efforts between Head Start and the schools are on the rise,” noting that, “[w]ith more minorities in leadership positions in the schools, Head Start may have less to fear from school sponsorship today than it did a decade ago.”²⁴¹ While Zigler concludes that Head Start is better able to collaborate effectively with school systems only if it remains outside the educational establishment,²⁴² it is simply no longer clear that this is the best way forward, given the changes in the education system since 1965.

B. Doctrinal Developments

It is not only the policy context that has changed since Head Start was created; the doctrinal context in which federal civil rights legislation is created has changed dramatically as well. In the 1960s, Congress played an expansive role in passing civil rights legislation, both by developing spending programs designed to promote equity and equality²⁴³ and by requiring anti-discriminatory behavior.²⁴⁴ This expansive role of Congress was supported by the Supreme Court, which consistently upheld challenges to civil rights legislation.²⁴⁵ More broadly, the Supreme Court continually affirmed the importance of the federal judiciary in civil rights by approving longstanding federal court control over desegregation cases,²⁴⁶ rooting the rights of the poor and minorities in the federal constitution,²⁴⁷ and expanding the role of the

240. *Id.* at 174.

241. *Id.* at 189.

242. *Id.* at 190.

243. *See, e.g.*, JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY 1900-1994* 26-98 (Harvard Univ. Press 1994).

244. *See, e.g.*, Civil Rights Act of 1964, tit. VI, codified at 42 U.S.C. §§ 2000(d) *et seq.* & tit. VII, codified at 42 U.S.C. §§ 2000(e) *et seq.*

245. *See, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261-62 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (both upholding the Civil Rights Act of 1964).

246. *See, e.g.*, *Green v. County School Bd.*, 391 U.S. 430, 439 (1968) (stating that “the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed”).

247. *See, e.g.*, *Thompson v. Shapiro*, 394 U.S. 618, 641-42 (1969) (striking down state welfare law that imposed one-year waiting period before new resident could receive welfare benefits on the grounds that it violated the right to travel implicit in the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment); *Gideon v.*

Supreme Court to specify these rights in detail that came close to legislating.²⁴⁸ The executive branch of the federal government was also powerful in its involvement with civil rights. For example, President Kennedy and President Johnson issued important Executive Orders that mandated either anti-discrimination or affirmative action, which remained undisturbed by the federal judiciary.²⁴⁹

At the time of Head Start's inception, then, the primary place for a proactive governmental response to civil rights lay in the federal government. While Head Start is an anti-poverty program rather than anti-discrimination legislation, Head Start was created as part of the civil rights movement of the 1960s. Thus, it is important to see that its structure was designed within the standard framework of a now-defunct era. For over the last decade, the Supreme Court has restricted Congress's constitutional authority to enact civil rights legislation under two of its main sources of power—Section 5 of the Fourteenth Amendment²⁵⁰ and the Commerce Clause²⁵¹—a move that has resulted in turning over power to the states at almost every turn.²⁵² These restrictions collectively frame the atmospherics in which any discussion of the allocation of federal or state power takes place.

As a practical matter, neither of these restrictions directly affects Head Start's existence, stemming as the program does from Congress's

Wainwright, 372 U.S. 335, 343-45 (1963) (holding that the Sixth Amendment requires that counsel must be provided for a criminal defendant who is too poor to hire his own lawyer); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954) (holding that the Fourteenth Amendment's Equal Protection Clause forbids "separate but equal" educational facilities for black and white students); *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954) (holding that Fifth Amendment's Due Process Clause incorporates Equal Protection guarantee of the Fourteenth Amendment, extending the protection against racial discrimination by the federal government).

248. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (crafting specific requirements for police interrogation of criminal suspects, rooted in the Fifth Amendment's protection against self-incrimination).

249. See, e.g., Exec. Order No. 11, 246, 3 C.F.R. 339 (1964-1965) (mandating anti-discriminatory hiring in federal agencies and establishing "affirmative action" requirements for federal contractors); Exec. Order No. 11, 063, 3 C.F.R. 652 (1959-1963) (requiring federal agencies to prevent discrimination in federally supported housing).

250. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article," including the Due Process Clause and the Equal Protection Clause. U.S. CONST. amend. XIV, § 5. See *City of Boerne v. P.F. Flores*, 521 U.S. 507, 535-37 (1997) (striking down the Religious Freedom Restoration Act as invalid Section 5 legislation and limiting scope of Section 5 authority).

251. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes. . . ." U.S. CONST. art. I, § 8. See *United States v. Morrison*, 529 U.S. 598, 608-12 (2000) (striking down the Violence Against Women Act as invalid Commerce Clause legislation and limiting scope of Commerce Clause authority).

252. See, e.g., JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (Univ. of Cal. Press 2002).

spending power,²⁵³ the contours of which have not changed greatly since Head Start's creation. Congress may use its spending power only to support "the general welfare," but courts should defer to Congress's interpretation of this goal; any conditions Congress imposes on acceptance of the funding should be imposed unambiguously and must be generally related to the federal interest.²⁵⁴ Additionally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."²⁵⁵ In other words, the conditions must be substantively as well as procedurally constitutional. Finally, the conditions imposed must not, in comparison to the amount of money offered, become coercive.²⁵⁶ It is unlikely that Head Start's existence, whether funded as a federal program or a block grant to the states, would face a serious challenge under any of these prongs. But even though Head Start as a spending program is not directly threatened by retreats in Commerce Clause and Section 5 doctrine, it is clear that the heady time of broad congressional power to enact federal civil rights legislation is gone.

What may affect Head Start and its compatriots in spending programs is a parallel line of Supreme Court cases expanding states' immunity from suit under the Eleventh Amendment. While Head Start advocates do not explicitly mention this fear in the debates over block granting Head Start, there may be cause for concern that transferring Head Start to the states would result in no way to enforce the program's terms, given this immunity. Here, ironically, there may be an opportunity to use this line of otherwise troublesome cases to benefit Head Start participants.

Eleventh Amendment doctrine provides that suits may not be brought against unconsenting states.²⁵⁷ The *Ex Parte Young* doctrine has created a legal fiction that allows state officers to be sued as a way of getting at state action,²⁵⁸ but this legal fiction allows only suits for prospective—i.e. injunctive—relief.²⁵⁹ No *Ex Parte Young* suit for retrospective or compensatory relief is available.²⁶⁰ In the last few decades, Congress passed legislation rooted in either the Commerce

253. "The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8.

254. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987).

255. *Id.* at 208.

256. *Id.* at 211.

257. Literally, the Eleventh Amendment provides a state immunity only from suit by a citizen of another state, but this immunity has been extended even against suits by an individual state's own citizens. See *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

258. *Ex Parte Young*, 209 U.S. 123, 167-68 (1908).

259. *Edelman v. Jordan*, 415 U.S. 651, 675-76 (1974).

260. *Id.*

Clause or the Civil War Amendments²⁶¹ attempting to abrogate this immunity.²⁶² Congressional abrogation of state immunity would allow suits directly against the states and permit suits for damages as well as injunctive relief. In 1996, however, the Supreme Court rejected congressional attempts to use its Commerce Clause (and other Article I) powers to abrogate state immunity,²⁶³ a conclusion that has been given more force in ensuing cases.²⁶⁴

However, congressionally forced abrogation is not the only path to permitting suits against the states. As the current doctrine stands, while Congress may unilaterally abrogate state immunity only under the Civil War Amendments, states may choose to waive their immunity by consenting to suit.²⁶⁵ This waiver must be explicit and unambiguously clear; no constructive waiver or implied consent is acceptable.²⁶⁶ While there is some thought that this element of the doctrine may be in flux, given the Court's cutbacks in other types of congressional power, Congress may currently require a state to waive its immunity as a condition attached to its spending power.²⁶⁷ If Congress were to recast Head Start as a block grant with an explicit requirement that a state accepting these funds would waive its Eleventh Amendment immunity from suit, program beneficiaries might benefit from an increased ability to enforce the program's terms as well as an ability to receive damages if the program is not fully implemented.

261. The Thirteenth, Fourteenth, and Fifteenth Amendments collectively constitute the Civil War Amendments.

262. See *Alden v. Maine*, 527 U.S. 706, 744 (1999) (noting recent vintage of congressional attempts to abrogate sovereign immunity).

263. See *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999). Congress may, however, abrogate state immunity under the Civil War Amendments, which the Supreme Court held altered the federal-state relation from the allocation of power in the original core of the constitution. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-57 (1976).

264. See, e.g., *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that Congress cannot abrogate state immunity from suit in state court any more than it could in federal court under Article I powers); see also *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 768-69 (2002) (holding that Congress cannot abrogate state immunity from suit under Article I powers in federal administrative agencies). But see *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 1005 (2006) (holding that Bankruptcy Clause of Article I precludes states from asserting sovereign immunity defense).

265. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999).

266. *Id.* at 680 (overruling *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964)).

267. See Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 167-215 (2002) (characterizing breadth of spending power as "paradoxical" in light of the Court's other cutbacks of congressional power in favor of the states, but arguing that this breadth is appropriate in the structure of federalism that the Court has been fashioning).

The IDEA provides one model of what such a restructuring could look like. First, the IDEA contains a sovereign immunity provision, stating explicitly that states “shall not be immune under the 11th Amendment to the Constitution of the United States from suit in Federal court for a violation of this title.”²⁶⁸ Second, the IDEA frames its requirements as an individual entitlement—in this case, to a free and appropriate public education for students with disabilities—not simply a set of activities that states must perform.²⁶⁹ Indeed, the right to a free and appropriate public education is so strong that school districts may, in certain instances, be required to pay for a child’s education at private school when the public school is not meeting that child’s needs.²⁷⁰ Third, the IDEA contains a mechanism for individual enforcement, first through state administrative hearings, with recourse to a federal lawsuit for review of the administrative decision.²⁷¹ It might be possible for Head Start advocates to support block grant legislation that framed the program’s services as an entitlement with individual enforcement available.²⁷²

Advocates have assumed that block granting Head Start would automatically lead to a loss of accountability without considering whether restructuring the legislation could result in an improvement in accountability. It is true that banking on a waiver of sovereign immunity is not without risk, as the breadth of permissible conditions attached to

268. 20 U.S.C. § 1403(a) (2006). While the Courts of Appeal are in general agreement that this provision acts as a waiver, it has been noted that the provision is actually listed in the statute as an “abrogation” and that there is no specific reference to conditioning waiver on receipt of federal funds. *See, e.g., A.W. v. Jersey City Pub. Sch.*, 341 F.3d 234, 244-55 (3d Cir. 2003). A similar provision in a revised Head Start statute should take this cautionary observation seriously and “include terms . . . providing that states expressly agree to a waiver of Eleventh Amendment immunity as a condition for [receiving] funding.” *Id.* at 250 n.13.

269. 20 U.S.C. § 1400(d) (2006). *See Barnett & Masse, supra* note 163, at 161, for another articulation of the benefits of offering Head Start-like services as an entitlement.

270. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13-14 (1993); *Sch. Comm. of the Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369 (1985).

271. 20 U.S.C. § 1415(f)-(i) (2006).

272. Interestingly, litigation on the Medicaid EPSDT program—which has long been tied to Head Start, *see supra* note 196 and surrounding text—has sometimes taken the structure of individual enforcement through § 1983 suits against a state deemed to have waived its sovereign immunity. *See, e.g., Westside Mothers v. Haveman*, 289 F.3d 852, 860-63 (6th Cir. 2002); *see also Zietlow, supra* note 267, at n.23 (summarizing cases decided both for and against the plaintiff). Head Start advocates should thus be familiar with the benefits of this type of enforcement. However, because the Supreme Court has made it increasingly difficult to use § 1983 to enforce spending clause statutes, *see, e.g., Sasha Samberg-Champion, Note, How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 COLUM. L. REV. 1838, 1867-86 (2003), a mechanism like that provided in the IDEA, as opposed to reliance on § 1983, would be preferable for a revised Head Start statute intending to provide a private right of action.

spending clause authority is uncertain, particularly with the recent turnover on the Supreme Court.²⁷³ Yet there would still be ways to mitigate the risk through carefully drafted legislation. For example, notwithstanding the provision on sovereign immunity in the IDEA, the most frequent defendants are the local school districts, avoiding the problem of state immunity entirely.²⁷⁴ The same could be true in a re-imagined Head Start context if the statute made the most relevant defendants the local service providers. Regardless of the Supreme Court's eventual treatment of a waiver of sovereign immunity as a permissible use of spending clause authority, then, individual recipients of Head Start services would still have some constitutionally available defendant to sue. In any event, this proposal for individual enforcement of a right to Head Start services is only one example of how the seemingly restrictive current doctrine might be used to Head Start's benefit. Advocates should seek out other ways to use the evolving doctrine as best they can, rather than refuse to explore its possibilities because it is not all they hoped for.

The changes in social welfare policies and doctrinal allocation of governmental power described above indicate that it is reasonable to examine whether Head Start's basic structure remains the best way to organize an early intervention program for poor children so that health, education, and welfare outcomes reach a certain level. Yet it is impossible to consider policy changes absent the political structure in which they are embedded. As a political issue, however, the question changes: if a reconsideration of Head Start's structure would be reasonable and potentially even beneficial to program participants but politics keeps it from happening, how can the process move forward? The next two sections consider how negotiation theory and practice can not only shed light on the current dynamics but also help put in place such a process.

273. See Baker & Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 461, 503 (2003) (arguing, even before Chief Justice Roberts and Justice Alito joined the Court, that a Congress that attempted to use the spending power to get around the substantive limitations on its power either to regulate or enforce rights against the states could and should lead the Supreme Court to revise the spending doctrine).

274. See, e.g., U.S. Dep't of Ed., Office of Special Education and Rehabilitative Services, Office of Special Education Programs, *Part B Procedural Safeguards Notice*, at 17-33 (describing for parents the process of filing a complaint alleging the school district's failure to provide a free and appropriate public education to their child, and indicating that the usual parties are the parents and the school district), available at <http://www.ed.gov/policy/speced/guid/idea/modelform-safeguards.pdf>.

III. Moving Forward: Opportunities and Barriers Behind an Interest-Based Process

A. *What is an Interest-Based Process?*

Distinguishing between positional bargaining and interest-based bargaining is one of the most basic premises of contemporary negotiation scholarship.²⁷⁵ In positional bargaining, the parties frame their goals as outcomes, immediately visible results that will make it clear who “won.”²⁷⁶ In interest-based bargaining, by contrast, the parties dig beneath their initial positions to discover the basic interests behind them, to build a better relationship through better communication, and, ideally, to come up with a solution that better meets both parties’ needs and that is therefore ultimately more sustainable.²⁷⁷

It is helpful to frame the current Head Start reauthorization debates according to this paradigm. For example, here, the position of the Head Start advocates is that the program must remain funded in a federal-local stream and must remain under the supervisory authority of HHS. The diametrically opposed position of the administration and the House sponsors, at least originally, seems to have been that a block-grant trial and more integration with the ED is preferable to the current structure.

It is harder from the outside of a controversy to determine what the parties’ interests are, since the answers to these questions will not always be immediately obvious. Now, however, for the purpose of demonstrating the importance of discovering the interests that lie behind the articulated positions, we can identify at least two different levels of potential interests for each set of parties in the dispute over Head Start’s structure. At one level, the rhetoric that accompanies the parties’ position statements indicates some interests.²⁷⁸ Advocates want to make sure that children receive comprehensive health services, and they want parents to be involved in the program. They want to make sure that the neediest children and families will be served. They want to make sure that teachers are highly qualified. And they want programs all across the country to serve kids equally well. They want these things because they feel that children receiving them “are less likely to have to repeat grades; end up in jail; and are more likely to complete high school, college, and

275. See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 3-14, 40-55 (Penguin Books 1991), for the classic statement of this framework.

276. See *id.* at 3-14.

277. See *id.* at 40-55.

278. Cf. NHSA, Legislative Alert, *supra* note 73 with Press Release, DHHS, *supra* note 1.

have greater earning potential than children not able to participate in the program.”²⁷⁹ Because they feel that the federal government and HHS can best meet those interests, they want control of the program to remain where it is.

The administration and House sponsors articulate other interests. They want a greater emphasis on school readiness in Head Start programs to better prepare poor children for success in school. They want preschool programs to be better coordinated with each other and with the K-12 school system. They want these things because they feel that poor children will demonstrate “improved performance in school” if they experience them.²⁸⁰ Because they feel that states and the federal education department can best reach these results, they advocate changing control of the program.

At this level, both parties identify some interests that lie behind their positions; they just assume that there is a one-to-one overlap between interests and positions, whereas in actuality there is no particular reason why any one structure is the only way to meet those interests. There is also a reasonable amount of overlap between the articulated interests of each side. Both parties, for example, want to ensure the success of poor children in school and later life; they just differ in how to define and reach these goals. Because parties too often focus on their differences to their detriment, it is important to note similarities when they appear—not to pretend that everybody agrees but because it is often possible to reach agreement that satisfies the shared interests while accepting the differences as another part of the solution.²⁸¹

At another level, the interests of the parties may be a step removed from the actual substance of the debate. Perhaps the Head Start advocates in 2003 had an interest in defeating Republicans in the 2004 elections, and so did not want to participate in an act of bipartisanship if it would help President Bush’s chances of re-election. Perhaps they are interested in their standing in the broader advocacy community; having protested against these particular changes for so long, they may not wish to back down now. The administration and House sponsors too may have been thinking about the 2004 election cycle. The President, with an interest in being known as the education president, may wish to connect Head Start to his signature NCLB to help this image. The President may

279. NHTSA, Legislative Alert, *supra* note 73.

280. Press Release, DHHS, *supra* note 1.

281. See John Forester, *Dealing with Deep Value Differences*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 463, 479-87 (Lawrence Susskind, Sarah McKearnan, & Jennifer Thomas-Larmer, eds., 1999) (describing conflict between citizens and organizations in the state of Colorado en route to reaching agreement about how to spend federal money for HIV/AIDS funding).

also want to bolster his reputation with those who believe that government closer to the people is best, and turning over control of Head Start to the states may help counter the impression of the federalization of education that NCLB gives. Further, for both the advocates and the administration, the symbolic signaling of their relative strength and support may matter as much as the substance of the debate itself.

Whether or not these actually are real interests of the parties, it is important to note that there is nothing in interest-based bargaining that need be politically naïve. This is not an issue of effective hardball tactics versus mushy, touchy-feely ones. From business deals to policymaking, from international treaties to agreements between individuals, interest-based bargaining can be sophisticated and successful. Paying attention to the parties' interests at all levels, from the most public-minded to the most self-serving, allows discussion of a broader variety of options that may better meet those interests than an either-or strategy will. Interest-based bargaining offers the opportunity to pay attention to the substance behind the rhetoric.

B. Why is an Interest-Based Process Important Here?

This article argues that the reauthorization debate over Head Start's structure, while rooted in the interests of 1965, has lost this original framework of interest-based bargaining and shifted to a less helpful positional bargaining stance. Because the policy and legal context has changed over the last forty years such that the expressed positions are no longer the only way to achieve the underlying interests, there is value to be created by thinking about ways to restructure the program. A more useful strategy would focus on the parties' actual interests, which may be better served by exploring a multiplicity of options with possibilities for joint gain.

But even if advocates do not accept the argument that there is value to be created in changing the program's structure, there is still a strong possibility that nominal victories will actually be long-term losses. Consider, for example, the advocates' claimed success in thwarting the most recent round of proposed structural reforms, joining a long line of examples in which an unyielding party reached his or her goal. Especially in cases of perceived moral value—which, given the civil rights context in which Head Start was created, advocates use to frame the debate—refusal to give an inch may seem like the best way forward.²⁸² However, it is important to fix the cycle of antagonism between the advocates and their perceived opponents in the

282. See *id.* at 463-65 (examining the basis for this belief).

administration and House because there are ways their perceived opponents can have the last word even if nominally the advocates appear successful.

For example, within a month of the Senate committee's vote to reject the restructuring elements of the House and administration's proposals, some House Republicans asked the General Accounting Office (GAO)²⁸³ to investigate fraud and mismanagement in Head Start centers across the country.²⁸⁴ Commenting on this request to the GAO, one Brookings Institution fellow said, "If you can trash the old system, then people are more willing to try something new. . . . The welfare queen played a role in welfare reform from beginning to end."²⁸⁵ Indeed, when the GAO released its report, it found an abundance of fiscal improprieties in Head Start programs,²⁸⁶ a result that the House members who requested the report treated as a scandal and an outrage.²⁸⁷ While the NHSA questioned both the scope of the GAO's findings and the spin of the House members,²⁸⁸ the bill that passed the House in fall 2005 was "refocused" to address the issue of program mismanagement.²⁸⁹ It is speculation that the request for the GAO report was connected to the advocates' opposition to restructuring Head Start, but certainly the House sponsors seem to have had the last word on something the advocates dislike. Further, if the GAO report lays groundwork for a programmatic retreat, any victory for the advocates in thwarting the attempts to restructure Head Start will have been pyrrhic indeed.

The advocates' opponents may also be able to accomplish their objectives even without the statutory structural changes they originally wanted. In the fall of 2003, the Bush administration, acting through HHS, began to implement a standardized test to four- and five-year-olds in Head Start programs, moving towards the education focus the

283. On July 7, 2004, the GAO's name changed from the General Accounting Office to the Government Accountability Office. See GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004).

284. Diana Jean Schemo, *Republicans Urge Inquiry on Head Start*, N.Y. TIMES, Nov. 26, 2003, at A22.

285. *Id.*

286. See United States Gov't Accountability Office, *Head Start: Comprehensive Approach to Identifying and Addressing Risks Could Help Prevent Grantee Financial Management Weaknesses*, at 3-4 (February 2005), available at <http://www.gao.gov/new.items/d05176.pdf>; Greg Winter, *Government is Criticized on Oversight of Head Start*, N.Y. TIMES, Mar. 18, 2005, at A10.

287. See U.S. House Education & the Workforce Committee News Update, *Independent GAO Report Criticizes Financial Controls in Head Start Program; Says Reforms are Needed to Prevent Financial Abuses that Cheat Children, Taxpayers, and Honest Grantees*, Mar. 18, 2005, available at http://www.house.gov/ed_workforce/press/press109/first/03mar/headstart031805.htm.

288. See Winter, *supra* note 286.

289. See Swindell, *2005 Legislative Summary*, *supra* note 89.

administration wished the program to have, to the continued outcry of the Head Start advocates.²⁹⁰ Moreover, the advocates object to the current Senate bill because it jeopardizes Head Start's longstanding commitment to parent participation,²⁹¹ and they say that the flat funding of the program in fiscal year 2007 is nothing less than the "slow-motion demise" of the program.²⁹² Advocates would thus do better by focusing on their interest in maintaining Head Start's character as a well-funded comprehensive program rather than their position that Head Start must remain outside the ED. An example from a previous iteration of the block grant wars provides a similar caution. After advocates succeeded in derailing the Reagan administration's exploration of block granting Head Start in 1982, the administration was able to accomplish many of its deregulatory objectives without formal legislation simply by reallocating funds provided for federal oversight to the grantees themselves.²⁹³ It is not opposition to the block grant per se but their actual interests in some kind of federal oversight and programmatic standards that advocates should voice.

In this vein, it is worth recalling Zigler's caution that, to their detriment, child care advocates' "vision of the perfect frequently becomes the enemy of the good."²⁹⁴ It was the insistence on a federal-local delivery that led to the downfall of the 1971 Comprehensive Child Development Act.²⁹⁵ Twenty years later, when the next federal child care bill finally became law, it was funded much more minimally, designed much less comprehensively, and structured as a block grant to the states, matching much less closely the expressed interests of the advocates in the debates over the 1971 legislation.²⁹⁶ Here, too, the advocates' vision of a perfect Head Start, fought for legislatively and temporarily won, may backfire. What if governors and state education associations start to lobby for the funding that now goes to Head Start? What if the rise in state-level organizing for prekindergarten programs

290. See NHSA, *Issue Brief: Head Start National Reporting System*, available at <http://www.nhsa.org/download/advocacy/fact/HSNRS.pdf>.

291. See NHSA, *Keep Head Start Alive and Well: Key Messages on Senate Head Start Bill* (Dec. 2005), available at http://www.nhsa.org/download/advocacy/Senate_Bill.pdf.

292. Press Release, NHSA, "Slow-Motion Demise" of Head Start Seen if Congress Fails to Add \$234 Million to Undo Destructive 2006 Budget Cuts (Apr. 11, 2006), available at http://www.nhsa.org/press/News_Archived/index_news_041106.htm; see also Press Release, NHSA, Head Start "Downward Spiral" Seen in Growing Number of Program Closures and Painful Cutbacks in Service (June 22, 2006), available at http://www.nhsa.org/press/News_Archived/index_news_062206.htm.

293. ZIGLER & MUENCHOW, *supra* note 7, at 198.

294. *Id.* at 135.

295. See *supra* notes 41-49 and accompanying text.

296. See *supra* note 161 and accompanying text.

weakens Head Start's independence?²⁹⁷ There is an opportunity now to rethink alliances and build relationships to expand Head Start-like services for more children, and advocates should not miss the opportunity by fighting old wars. Viewing any reauthorization that rejects the block grant plan and the move to the ED as a complete victory for Head Start advocates is therefore dangerously shortsighted.

C. *Barriers to an Interest-Based Process*

If an interest-based process really would be better, whether for value creation or problem avoidance, what is preventing interest-based bargaining from taking place in the Head Start reauthorization context? Scholarship on conflict resolution helps identify how a common set of barriers prevents parties from reaching a negotiated agreement that would be better for both sides.

Strategic barriers. All negotiations contain a tension between creating value and distributing it.²⁹⁸ When it comes to creating value, parties obtain a benefit from openly sharing their interests and preferences. The standard example to demonstrate this point is the battle over the orange, where two people each insist on taking as large a share of one orange as possible without discussing why either one wants it.²⁹⁹ They finally agree to cut the orange in half. One person throws away the peel and eats the inside of the orange, while the other throws away the inside and uses the peel to flavor a cake. If each had shared his interest in the orange rather than arguing over who would get more, each could have gotten more of what he actually wanted.

When it comes to distributing value, however, sharing information with the other side becomes trickier. If you know what I want, you can exploit this knowledge to get a better deal for yourself, as another common example illustrates.³⁰⁰ If I have ten apples but prefer oranges,

297. See, e.g., Nat'l Sch. Bds. Ass'n, *Head Start Reauthorization* (Mar. 2006) at 2-3, available at <http://www.nsba.org/site/docs/35100/35037.pdf> (urging Congress to strengthen connection between Head Start programs and schools and to allow schools to have a role in the design and evaluation of Head Start programs); Joan E. Schmidt, *NSBA President: A novel idea: aligning federal education laws*, SCHOOL BOARD NEWS, Aug. 2, 2005 ("[i]magin[ing] the potential for improved student achievement if state and local jurisdictions had the ability to create meaningful links between Head Start and K-12 programs" and arguing that "the lack of coherence across federal laws and programs undermines state and local reform efforts").

298. See ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 11-43 (The Belknap Press of Harvard Univ. Press 2000); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 239-42 (1993).

299. See FISHER ET AL., *supra* note 275, at 56-57.

300. See, e.g., Mnookin, *Why Negotiations Fail*, *supra* note 298, at 240-41.

and you have ten oranges and like both apples and oranges equally, we each would be at least as happy by trading fruit on a one-for-one basis. But if you know that I prefer oranges, you may try to trade one orange for two, or three, or ten apples. My disclosure therefore gives you power. This tension between openly sharing information to improve the deal and keeping information back to improve one's own bargaining power is often referred to as the negotiator's dilemma.³⁰¹ Behavior that may be rational to get a bigger piece of the pie for one's self may be irrational for the best overall outcome.³⁰²

The negotiator's dilemma helps explain why Head Start advocates have been unwilling to enter into an interest-based process with congressional decision makers. Taking a hard line against both proposals for structural change permits a uniform, coordinated response. It is much easier to get Senator Kennedy to say "I oppose any effort to block grant Head Start—not in 50 states, not even in one state"³⁰³ than it is to get lobbyists and activists all around the country to articulate a nuanced response about what framework would need to be in place to make state control acceptable. Such a nuanced response might be exploited by block grant proponents to make gaining those controls less possible; if advocates concede that a block grant might be a fine baseline, they might lose bargaining power to implement anything beyond the baseline. The nuanced message might be quoted out of context. Especially if the nuanced message is not delivered in exactly the same way by all the advocates, block grant proponents might feel that the opposition was not unified. Entering into an open discussion about how a block grant or the ED move might be structured in a way that would satisfy the advocates' interests, then, might actually put those interests in jeopardy.

The myth of the fixed pie. The myth of the fixed pie suggests that people tend to see the same pot of money or the same narrow set of issues as the only thing on the table; the only point of the negotiation, in this view, is to divide it.³⁰⁴ This view ignores the possibility that one party may want only the inside of the orange while another may want only the outside, assuming instead that any deal that makes one party more satisfied must automatically lead to the other's dissatisfaction. Here, the Head Start advocates seem to think that the issue of structural control is a win-lose, zero-sum proposition. If proponents of block

301. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 30 (The Free Press 1986); Mnookin, *Why Negotiations Fail*, *supra* note 298, at 240.

302. Mnookin, *Why Negotiations Fail*, *supra* note 298, at 241.

303. Swindell & Schuler, *supra* note 81, at 1895.

304. MAX BAZERMAN, JONATHAN BARON, & KATHERINE SHONK, *YOU CAN'T ENLARGE THE PIE: SIX BARRIERS TO EFFECTIVE GOVERNMENT* 44-65 (2001).

granting want state control, then advocates who have always pushed for federal control must automatically lose. This barrier prevents creative thinking about how to structure the program so that everyone wins.

Principal/Agent tension. The principal is the intended beneficiary of a given negotiation; the agent is the negotiator working on behalf of the principal.³⁰⁵ Principals use agents in negotiations because they provide a lot of benefits: they may have more knowledge, more resources, or greater skills.³⁰⁶ They may also provide strategic advantages, such as being able to bargain harder than the principals themselves would.³⁰⁷ Here, the major Head Start advocacy groups acting as agents certainly provide these advantages to the principals they represent, whether those principals are the local Head Start service providers or the children and family recipients of this service.

However, the disadvantage to using an agent is that the interests of the agent may not be perfectly aligned with those of the principal.³⁰⁸ Here, the advocacy organizations may have a broader ideological commitment to the fight against state control than Head Start participants do, based on a long history of fighting devolution. The advocacy organizations as repeat players may feel that they cannot retreat from their staked-out positions, while the program participants, as one-time players, may feel less bound. Even within the advocacy organizations, younger advocates without the personal history of conflict may be more willing to explore alternatives but may feel that the professional norm on which their future success depends demands that they oppose the restructuring proposals without compromise. Some Head Start service providers might feel that being more closely connected to the schools would be preferable, as salaries for teachers in the public school system can be twice as much as salaries in Head Start programs.³⁰⁹ Meanwhile, some parents might feel that their state might end up doing more for them than the current program does, even if other states might not do such a good job. Further, because parents must deal with twelve years of their children's education, parents might wish for a closer connection between Head Start and schools or have more at stake in using Head Start as leverage to transform the education system. Parents might even rather receive the \$7000 that the government will spend on Head Start

305. MNOOKIN ET AL., *BEYOND WINNING*, *supra* note 298, at 69-91; Mnookin, *Why Negotiations Fail*, *supra* note 298, at 242-43.

306. MNOOKIN ET AL., *BEYOND WINNING*, *supra* note 298, at 71.

307. *Id.* at 71.

308. *Id.* at 75-76.

309. See Eloise Pasachoff, *Head Start Works Because We Do: Head Start Programs, Community Action Agencies, and the Struggle over Unionization*, 38 HARV. C.R.-C.L. L. REV. 247, 253-54 (2003).

for their child as either a direct cash grant or a voucher.³¹⁰ It is easy to see how the interests of Head Start advocates and the interests of program beneficiaries may not always coincide.

Cognitive barriers. Cognitive barriers are related to standard patterns that underlie decision making.³¹¹ For example, research in cognitive psychology suggests that most people are generally risk averse; they would rather take a sure thing than gamble on an unknown, even where the unknown is potentially more beneficial to them.³¹² This research further suggests that people are even more loss averse than they are risk averse and are thus more likely to gamble to avoid a sure loss than to obtain a potential gain.³¹³ Here, advocates feel that the structural changes proposed for Head Start represent a sure loss and are unwilling to gamble on the possibility of any benefit. This response is closely connected to what other research terms “status quo bias”³¹⁴ or “endowment effects,”³¹⁵ where parties tend to prefer something because they already have it, regardless of whether they would prefer it to something else if they did not have it already. On a blank slate, it might make sense to bring state government or the educational establishment more into the mix of providing for poor children, but to do so in the context of a long history of advocates’ opposition to these ideas make these changes unappealing. The history itself thus acts as a barrier here, with each set of conflicts leading in a path-dependent way to the next.

Reactive devaluation. Parties judge proposals not only on their abstract merits but also by the context of the offer and their relationship with the offeror.³¹⁶ Parties are likely to judge a policy proposal as being less favorable when they do not trust its source. Regardless of any potential merit in the block grant/ED proposals, Head Start advocates approached them with doubt and distrust because of a broader discomfort with this president and his allies—among them, Dick Cheney and Donald Rumsfeld, whom the Head Start advocacy community has long seen as unfavorable to Head Start.³¹⁷ It is not that these proposals would

310. See John Hood, *Caveat Emptor: The Head Start Scam*, in THE HEAD START DEBATES, *supra* note 37, at 508-09 (arguing that Head Start spending per child should be converted into grants, vouchers, or tax relief for parents to use at the care provider of their choice); Blau, *supra* note 185, at 67, 213 (2001) (discussing value of wage subsidies over direct support of child care).

311. Mnookin, *Why Negotiations Fail*, *supra* note 298, at 243-46.

312. *Id.* at 243-44; MNOOKIN ET AL., BEYOND WINNING, *supra* note 298, at 161-64.

313. Mnookin, *Why Negotiations Fail*, *supra* note 298, at 244; MNOOKIN ET AL., BEYOND WINNING, *supra* note 298, at 161-64.

314. BAZERMAN, BARON, & SHONK, *supra* note 304, at 7-8.

315. MNOOKIN ET AL., BEYOND WINNING, *supra* note 298, at 164-65.

316. *Id.* at 165-66; Mnookin, *Why Negotiations Fail*, *supra* note 298, at 246-47.

317. See *supra* notes 137-138; cf. ZIGLER & MUENCHOW, *supra* note 7, at 164-65 (quoting Zigler’s analysis of a similar set of doubts with respect to the Nixon

have been welcomed if offered by a Democratic administration, but certainly this element of mistrust frames the debate, along with the connection between previous attempts at block granting the program and cutting it and broader civil rights resistance to states' rights and state control of anti-poverty programs.

*Identity and emotional barriers.*³¹⁸ Psychological realities that make individual negotiations or personal conversations difficult are no less applicable to a public policy dispute such as the Head Start reauthorization, where taking a stand on an issue means identifying with a certain set of priorities that define an identity. Here, there would be a lot at stake in the advocates' identity if they now went along with the block grant or ED proposal after decades of fighting both. Are they being duped now?³¹⁹ Were they being irrational before? They might perceive that it would be very difficult for them to explain their change of heart to the millions of Head Start families and providers who have followed their lead through many administrations. Staying with their hard line position gives them no need to save face and allows them to remain easily allied with their advocate colleagues, who take a similarly hard line.

Strong emotion plays into this conflict, as well.³²⁰ Head Start advocates fervently believe in the power of the program. They tell personal success stories behind Head Start to bring faces to the numbers. When they hear that politicians want to change the program, they hear that they are not currently being successful and they feel anger and resentment. They rely on using emotional attachment to the program to build their powerful grass-roots campaigns that bring phone calls, letters, and personal visits to members of Congress supporting Head Start. These emotions have contributed to the success of their lobbying campaigns for decades but may limit their inclination to analyze policy proposals dispassionately.

Slippery slope barriers. Negotiation on a small issue that might in the abstract be acceptable is often rejected because of the fear that its existence is but a slippery slope to disaster.³²¹ Such a barrier is in play here. The President's proposal to make state control available to all fifty states was limited in the first House bill to a trial program with eight

administration's offerings).

318. See generally DOUGLAS STONE, BRUCE PATTON, & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 111-16 (1999).

319. Cf. ZIGLER & MUENCHOW, *supra* note 7, at 82 (noting Zigler's fears that the Nixon administration had "duped" him, as one of Head Start's founders, into coming to Washington to run the program by way of dismantling it).

320. See STONE ET AL., *supra* note 318, at 85-90.

321. See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1029 (2003).

states, but advocates rejected even that small-scale attempt on the grounds that it was merely a prelude to block granting and therefore destroying the program. Advocates have no incentive to make the specifics of a proposed trial program less objectionable because a reasonable trial might lead inexorably to an unreasonable dismantling. The long-term, large-scale view makes a short-term, small-scale proposal untenable.

Structural barriers. Structural barriers consider the way the negotiation process is constructed, including attention to institutional factors.³²² At a basic level, the structure of the legislative process itself may act as a barrier to interest-based policy development. For example, the relevant players—among them Head Start advocates, broader children/family/anti-poverty/civil rights organizations, service providers, education representatives, parents, governors, federal and state legislators—are dispersed and not all coordinated. They have different amounts of power to instigate the agenda.³²³ Some parties care passionately about Head Start reauthorization as their only issue; others care about child welfare more broadly; others see Head Start as fitting into a broader set of anti-poverty policies; others are responsible for winning support from constituents and colleagues on matters relating to international trade, homeland security, and tax reform. It is not only that interests may diverge but also that the amount of intensity that the relevant parties feel about this issue varies. There is therefore no natural impetus to change the way the game works. Further, organizations such as the NHSA, whose only mission is Head Start, may be reluctant to change a familiar process through which they have experienced some success.

This multitude of barriers gives a sense of the difficulties involved in moving beyond the impasse. It should not, however, lead to the conclusion that moving beyond the impasse is impossible. Identifying and analyzing these barriers, as well as paying attention to the deeply rooted history of the conflict, lay the foundation for a way forward. The next section builds on this foundation to offer one potential framework for an interest-based process.

322. See ROBERT H. MNOOKIN, LEE ROSS, KENNETH J. ARROW, BARRIERS TO CONFLICT RESOLUTION 6-7, 19-23 (1995).

323. See JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 197-99 (2d ed. 1995).

IV. Putting an Interest-Based Process in Place

A. *The Role of Consensus Building in Public Policy Disputes*

Before articulating the steps for an interest-based process in the Head Start dispute, it is important to acknowledge respectfully the advocates' concerns about engaging in a conversation about the program's structure. Advocates understandably feel that such a conversation has the potential to harm vulnerable groups, and the suggestions that follow—indeed, the analysis that precedes—is not intended to belittle these concerns. Rather, these suggestions attempt to provide safeguards for these concerns while developing a process that moves beyond the current stalemate.

The process that I propose is based on a form of dispute resolution called consensus building. Consensus building seeks to involve all of the relevant parties in making decisions to better address the parties' interests and to reach agreements that have broad-based support and are thus more sustainable. In consensus building, different stakeholder groups come together to develop and reach agreement on an ongoing plan in which all will participate.³²⁴ Differences are not ignored; the process just assumes that differences on some, even many, issues need not stymie agreement on others. Unlike traditional committee-based or legislative decision making, where the outcome is often developed by one party or set of parties and then delivered to another, and where agreement is generally reached by majority-rules voting, consensus-building processes focus on developing outcomes collectively and reaching agreement by consensus. Consensus building avoids the adversarial process associated with traditional legislating and lobbying, which often misses opportunities to create value because the parties are locked into an either-or battle, and which does little to improve the parties' working relationships. It is especially useful in highly politicized situations where changing the dynamic of the parties' relationship is a key part of the way forward.

There is a growing movement in public policy-making towards using consensus-building processes as a way of resolving large-scale multi-stakeholder disputes. A variety of nonprofit organizations provide resources to governments that want to engage in such processes,

324. See generally LAWRENCE SUSSKIND, SARAH MCKEARNAN, & JENNIFER THOMAS-LARMER, *THE CONSENSUS BUILDING HANDBOOK* (1999). The process I outline in the next section is based especially on chapters 1 (Choosing Appropriate Consensus Building Techniques and Strategies) and 2 (Conducting A Conflict Assessment). See KINGDON, *supra* note 323, at 159-61, for more on the importance of consensus building in policy decisions.

including the Consensus Building Institute, based in Massachusetts, which focuses on environmental issues,³²⁵ the Keystone Center, based in Colorado, whose projects feature environmental issues as well as energy policy,³²⁶ the National Policy Consensus Center and its affiliate, the Policy Consensus Initiative, which work mostly on the issues of health care, sustainability, transportation, and watersheds,³²⁷ and the Consensus Council, Inc., based in North Dakota, which works on issues ranging from economic development to the environment to human services.³²⁸ Some states have commissioned their own official consensus organizations; the Montana Consensus Council,³²⁹ started in 1994 by executive order of the governor, is the most prominent, and eight other states also have executive orders promoting forms of alternative dispute resolution, including consensus building, as important mechanisms for problem solving.³³⁰ Inspired by the success of these state-level and non-profit organizations, in 2001 a bipartisan task force framed an outline for the U.S. Consensus Council, which Congress would commission to address issues that Congress and the White House feel would benefit from such a process, especially deadlocked, contentious issues.³³¹ In the summer of 2003, the Senate Governmental Affairs committee unanimously approved a bill supporting the Council, and the Council took a step closer to implementation.³³² The variety and success of the projects facilitated by these organizations should provide encouragement for those who may initially be suspicious about the prospects of such a process.³³³

325. See The Consensus Bldg. Inst., Introduction, <http://www.cbuilt.org/consensus/index.html> (last visited Aug. 20, 2006).

326. See The Keystone Ctr., About Us, http://keystone.org/general_section/index.html (last visited Aug. 20, 2006).

327. See Policy Consensus Initiative, <http://www.policyconsensus.org/> (last visited Aug. 20, 2006).

328. See The Consensus Council, Inc., <http://www.agree.org/> (last visited Aug. 20, 2006).

329. See The Montana Consensus Council, About Us—History and Original Executive Order, <http://mcc.state.mt.us/about/ExecutiveOrder.asp> (last visited Aug. 20, 2006).

330. See Policy Consensus Initiative, Executive Orders, <http://www.policyconsensus.org/tools/executiveorders/index.html> (last visited Aug. 20, 2006).

331. See The United States Consensus Council, <http://www.usconsensuscouncil.org/> (last visited Aug. 20, 2006).

332. *Id.*; United States Consensus Council Act of 2003, S. 908, 108th Cong. (2003).

333. In addition to the project descriptions on the websites listed, see *supra* notes 325-332, the Consensus Building Handbook contains dozens of case studies where consensus building processes were successfully used to resolve public policy problems. See THE CONSENSUS BUILDING HANDBOOK, *supra* note 324, at 85-1086.

B. A Framework for Consensus Building in the Head Start Dispute

1. Starting the Process

Consensus-building processes are generally initiated either by people in leadership positions with a stake in the dispute or by neutral parties who are interested in the resolution of the dispute.³³⁴ What is most important is that the process is initiated in a way that avoids reactive devaluation, where one party will refuse to participate because the instigator of the process seems biased.³³⁵ In the contentious Head Start context, it might be best if a neutral party proposed the process. An independent think tank or a center at an academic institution would be an appropriate convenor, reaching out to ask stakeholders to participate in such a process, or contracting with a professional consensus-building organization to do the same. Alternatively, interested parties in the form of either government players or advocacy groups could initiate the process. If the idea for consensus building were to come from Congress, it could be written into the Head Start legislation, commissioning a report to Congress within a year or so, in time for the next reauthorization. The process might also be initiated by advocates or practitioners who recognize that opportunities for positive change are being missed. Two neutral parties could also initiate the process together, demonstrating stronger institutional support for the process from the start. Any of these possibilities for instigating the process could work. The challenge with all will be to maintain both appearance and reality of interest in a new way of communicating and decision making.

2. Performing a Conflict Assessment

After the process is initiated, the convening group should hire a neutral party to conduct a conflict assessment, reaching out individually to the stakeholders to identify issues of importance; ensure that everyone with a stake is involved; establish that it makes sense to proceed with the process; and determine what specific details will make the process best meet the parties' needs.³³⁶ Conducting a conflict assessment is important for a number of reasons. Without a conflict assessment, important stakeholders might be left out and issues might be missed or framed in a

334. See Susan Carpenter, *Choosing Appropriate Consensus Building Techniques and Strategies*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 324, at 63.

335. See *supra* notes 316-317 and accompanying text.

336. Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting a Conflict Assessment*, in THE CONSENSUS BUILDING HANDBOOK, *supra* note 324, at 99, 100.

way that would prove unhelpful.³³⁷ The conflict assessment avoids the pitfall of trying this new way of interacting but doing it wrong, making relationships more acrimonious.³³⁸ It also helps the parties build trust with the neutral, which can then lead to respect for the process.³³⁹ Finally, the neutral can translate the parties' initial ideas about the process into impartial language, which can avoid an unnecessary battle over framing the issues from the start.³⁴⁰ The conflict assessment plays an important role in making sure first that the process should go forward and then that it does go forward in the most helpful way possible.

While the conflict assessment will produce a more specific list of necessary stakeholders, it is worth emphasizing that the pool of stakeholders should be conceptualized broadly. Given the fragmented way the system of early care and education in this country has developed over the last forty years, and given the potential for more connections among the parties, it is important that, at this moment of reconceptualizing service delivery, the process be very inclusive. A first cut at the relevant stakeholders from within the Head Start community might include the NHSA, the Head Start Bureau, state collaboration offices, executive directors of Head Start programs, teachers and staff in Head Start programs, Head Start parents, and former Head Start children. Perhaps an early leader of Head Start, such as Edward Zigler, could be involved. Additional stakeholders might include representatives from governors' offices, state departments of education, members of the child advocacy and child care communities, early education teachers and researchers, Community Action Program leaders, children's health workers, welfare activists, and human resource directors at a variety of employers, as well as some staff to members of Congress.

Designing the process to involve so many stakeholders attempts to respond to several barriers articulated above. First, involving more people may reduce the principal-agent tension,³⁴¹ as a greater variety of voices may lead to less presentation of the party line and a more honest exploration of potential decisions. Second, the process may also respond to identity/emotion barriers.³⁴² Collaboration with child welfare advocates is already a central part of the Head Start advocates' identity, and this process allows them to expand their collaborative work and allows trust to develop within working groups such that controversial proposals may be discussed collectively. Finally, the inclusion of so

337. *Id.* at 105.

338. *Id.*

339. *Id.* at 104.

340. *Id.*

341. *See supra* notes 305-310 and accompanying text.

342. *See supra* notes 318-320 and accompanying text.

many stakeholders also attempts to respond to reactive devaluation.³⁴³ If the broader advocacy world is involved, there is less of a chance that the Head Start community will feel threatened and refuse to participate, and vice versa.

Note that some reluctance on the part of the stakeholders to participate in the process need not doom it.³⁴⁴ Stakeholders with little experience with consensus building and with a long history of antagonism may feel skeptical about the potential the process holds. Participating in the initial stakeholder interviews can be one way to overcome some of the reluctance; initial participation can also demonstrate to a skeptical party that some success may be reached. Of course, if many major players consistently refuse to participate, the process may not go forward. On the other hand, if the process goes forward anyway, reluctant stakeholders may decide to participate, since their views will not be represented if they do not.

The conflict assessment should result in a report to the convenors and the interviewees describing and analyzing the findings of the assessment and making recommendations about how the consensus-building process should proceed.

3. Structuring the Process

Because structuring the process that the consensus building will follow is something that should be done with the parties, this section only outlines generally what such a process might look like and explains how elements of the process could respond to the barriers to interest-based agreement articulated above.

*Defining the Problem.*³⁴⁵ Instead of a limited, contentious question—such as “Should Head Start be turned over to the states and the Department of Education?”—a broad, open-ended question should frame the process. For example, the participants could be charged with rethinking the current system of early education, care, and health and social services for young children and their families, developing ways that government can facilitate the provision of these services, with a special focus on at-risk children and families but also attending to the needs of children from working- and middle-class families. Framing the problem as broad instead of narrow attempts to respond to the barrier of status quo bias or endowment effects;³⁴⁶ while Head Start advocates may initially be unwilling to agree to any change to their own singled-out

343. See *supra* notes 316-317 and accompanying text.

344. See Susskind & Thomas-Larmer, *supra* note 336, at 119-20.

345. See Carpenter, *supra* note 334, at 76.

346. See *supra* notes 314-315 and accompanying text.

program, they generally agree that the current system is inadequate. A larger question would allow the process to start from the premise that some agreement is possible.

*Articulating Goals and a Potential Outcome.*³⁴⁷ A goal for the outcome of the process is not a substantive result, but an end product of the group's work. A report to Congress presenting the group's findings and recommendations would be one sensible option. So would reports to each state, available to the public at large. These reports, collaboratively agreed upon, would respond to the negotiator's dilemma, the tension between the benefits to and the drawbacks of openly sharing information.³⁴⁸ Since the reports would be consensus documents, nothing can be released that does not have all of the participants' blessing. It will be easier for advocates to share information in small pieces and develop trust in a coordinated working group than to demonstrate anything less than a hard line in uncoordinated lobbying sessions.

*Identifying and Including Participants.*³⁴⁹ Because the number of potential participants is likely too high for there to be open participation, representative participation makes sense, but all potential stakeholders should feel that their voices and interests are being represented in the consensus group. The consensus group should also plan how the representatives will communicate with their constituents.³⁵⁰ For example, the consensus group could create additional advisory boards,³⁵¹ or hold a series of sessions from state to state with open invitations to everyone with an interest and a stake in the matter.

*Logistical Choices and Ground Rules.*³⁵² The group will need to decide, among other things, when the group(s) will meet, over what time period, how often, where, how conversation will proceed both at and in between meetings, and what roles will be assigned to group members. At this theoretical stage, it is impossible to provide many details on what specific decisions should be made. It is worth mentioning, however, that it would be best if the process does not take place entirely in a hotel conference room in Washington, D.C. Instead, the sessions should take place around the country and should ideally involve site visits to programs and agencies.³⁵³

Defining a General Approach to Building Consensus. Practitioners

347. See Carpenter, *supra* note 334, at 77.

348. See *supra* notes 301-304 and accompanying text.

349. See Carpenter, *supra* note 334, at 91-93.

350. See *id.* at 88-89.

351. See *id.* at 86-87.

352. See *id.* at 79-81, 96-97.

353. See *id.* at 86, 97.

distinguish among several types of consensus-building processes: (1) “a conventional problem-solving approach,” where participants frame the problem and come up with solutions; (2) an approach that involves working with a single-text document, where the parties collectively revise a working draft of an agreement document; and (3) “a visioning approach,” where parties move through the questions “What do we have?” “What do we want?” and “How do we get there?”³⁵⁴ The nature of the task at hand—a broad reconceptualizing of the current system of early care and education—suggests that a visioning approach would be most useful. The visioning approach can be thought of as akin to the committee that originated Head Start in 1965, creating something out of nothing by thinking big. The approach also usefully helps participants focus on interests, since behind the question “What do we want?” should always lie a series of questions that ask “Why?” Thinking about the future also gets people away from being trapped in the positions of the present, responding to the myth of the fixed pie.³⁵⁵

*Educating the Parties.*³⁵⁶ This phase of the process puts on the agenda time for parties to listen to each other in the knowledge that each party will have its turn. The first challenge is to focus on interests rather than positions. For Head Start advocates, this will mean focusing not on why state control of Head Start would be bad or why Head Start must not move to the ED but instead on what interests Head Start’s current structure speaks to and why those interests are important in any future system. It will also mean listening to other stakeholders’ interests and trying to find ways in which those interests either overlap or differ in ways that could be usefully linked.³⁵⁷ This phase attempts to respond to the negotiator’s dilemma,³⁵⁸ since sharing interests and information as part of an ongoing conversation in a working group is comparatively low-risk. This phase also responds to loss/risk aversion, status quo bias, and endowment effects,³⁵⁹ because nothing is given up at the outset, and there is no foreordained conclusion that the current structure will be found lacking.

*Developing Options.*³⁶⁰ Depending on how the consensus group is structured, it may be more useful for sub-groups or smaller task forces to generate options around different sets of proposals, or it may be more

354. See *id.* at 77-79.

355. See *supra* note 304 and accompanying text.

356. See Carpenter, *supra* note 334, at 81.

357. See, e.g., LAX & SEBENIUS, *supra* note 301, at 90-106, for more on how to use differences in interests to create joint gain.

358. See *supra* notes 301-304 and accompanying text.

359. See *supra* notes 311-315 and accompanying text.

360. See Carpenter, *supra* note 334, at 81-82.

useful for the group at large to develop these options. This could also be a time to use a single-text document for the parties to revise collaboratively. For example, parties could construct state-level plans for more involvement in Head Start by integrating programs across the state, inserting safeguards and requirements that Head Start advocates would find acceptable. This phase helps overcome the structural barrier of the legislative process because stakeholders need not ultimately support an option they work on generating,³⁶¹ while in contrast, stakeholders with limited input into the legislative process may feel reluctant to engage with disfavored options for fear that they will be seen to agree with them. Option generating also responds to the negotiator's dilemma because its framing as a collaborative discussion rather than a presentation of a position to a final decision maker allows for true brainstorming without sacrificing anything.³⁶²

*Reaching and Implementing Agreements.*³⁶³ Consensus building may use a wide variety of ways of reaching agreement. Participants may make decisions according to an agreed-upon set of criteria; they may reach agreement one issue at a time or develop a series of packages; they may establish priorities and trade among them. After deciding on the method, stakeholders may reach any of a number of actual agreements, from more state coordination with no federal changes to massive federal changes with specific protections in place to ensure that stakeholders' interests are met (for example, that programs continue to have high levels of parent involvement and comprehensive services, to take an issue of importance to Head Start advocates). Developing this series of systems might lead to meeting the interests of the current proponents of major structural reform without actually doing any major federal restructuring, or it might allow major federal restructuring to take place in a way that will be palatable to Head Start advocates. It is impossible to say from the outset; developing the system options is part of the process of reaching agreement.

4. Overcoming Potential Problems

There are no guarantees that this process will work. The parties could refuse to come together or refuse to engage in the process fully. The stakeholders' internal constituencies could feel betrayed and pressure the stakeholders to stick firmly with positions or to drop out of the process. The slippery slope and structural barriers are especially hard

361. See *supra* notes 301-304 and accompanying text.

362. See *id.*

363. See Carpenter, *supra* note 334, at 82-84.

to get around,³⁶⁴ since engaging in a process like this reveals some willingness to change that could be exploited, and since the legislative process—which must eventually be involved if statutory changes are envisioned—allows issues to be traded and coalitions to shift. It is important not to underestimate the potential problems involved with setting up a consensus-building process.

On the other hand, it is also important not to assume that these problems are insurmountable. For example, regardless of whether the process stems from a think tank, academic institution, advocates, or Congress itself, politicians who are proponents of changing Head Start's basic structure may feel able to support this process. A process designed in part to consider changing the structure of government involvement in early education and care might allow proponents of block granting to feel that they have made at least some progress toward their goal. Legislating the existence of this process may put possible structural changes on the table more seriously than they have ever been before. Ever mindful of elections, politicians may support the process to have another accomplishment to point to, especially if protest from the Head Start advocacy community would otherwise hurt them.

It will likely be harder to gain support for this process from Head Start advocates for a host of reasons already discussed. Crafted correctly, however, with a broad set of participants, enough trusted Head Start leaders supporting the process, and a mandate that the process has no pre-ordained conclusion, this process may win support. If it seems like the process stems from Congress as a replacement for mandating a restructured Head Start, advocates may feel that they are on safer ground. Advocates may also realize that successfully derailing proposals for structural reform may not result in a long-term victory, given the number of ways that the effects of structural change can be achieved by going around the normal legislative process. Further, advocates need give nothing up in order to participate in the process; there are no commitments involved in brainstorming; and the idea of consensus-based decision making should alleviate fears of being outvoted, since everyone must agree to the final outcome.

Indeed, notwithstanding potential concerns about opening up discussions regarding structural reform, the recent history of Head Start suggests that Head Start advocates might be willing to participate in such a process. In 1993, the Secretary of HHS formed a diverse and bipartisan Advisory Committee on Head Start Quality and Expansion, bringing together forty-seven individuals from the Head Start community, various government offices, the private sector, and the field

364. See *supra* notes 321-323 and accompanying text.

of children's health and education, tasked with creating a vision for a 21st Century Head Start.³⁶⁵ While not framed as a consensus-building process, the Advisory Committee reached unanimous agreement on a report (that called for, among other things, increased partnerships among all levels of government and across a variety of programs)³⁶⁶ whose conclusions were subsequently reflected in the 1994 Head Start reauthorization.³⁶⁷ Now, a dozen years later, on the other side of welfare reform and the creation of the Child Care and Development Fund, and in the wake of the first presidential and congressional proposals for structural reform since the Reagan administration, advocates may agree that the time is right for another group to convene. In the current climate, much more heated than in 1993, a consensus-building process holds value.

Notwithstanding this logic, advocates may still refuse to participate in a consensus process on the theory that discussing the options behind structural change is one foot in the door to mandating them. Eugene Volokh calls this the "slippery slope inefficiency," where socially optimal outcome A is bypassed because of pressure from advocacy groups who fear that it may lead to undesired outcome B.³⁶⁸ Prof. Volokh suggests that one way around the inefficiency is for each side (assuming there are characterizable sides) to both win and lose something (assuming there are identifiable victories and losses).³⁶⁹ In this way, outcome A is not easily reducible to a victory or loss for either side, requiring legislators to understand the nuances of outcome A rather than reducing it to a bullet-point that makes one side seem politically stronger; the slippage from outcome A to outcome B thus becomes more difficult.³⁷⁰ There might be a way, he says, for opposing interest groups that have continuing relationships with legislators and with each other to find a way to craft mutually satisfactory agreements that avoid these inefficiencies that the voting public could otherwise not.³⁷¹ A consensus-building process would seem to provide such an opportunity. Prof.

365. See *Creating a 21st Century Head Start: Preface*, http://www.acf.hhs.gov/programs/hsb/research/21_century/preface.htm (last accessed Aug. 26, 2006); *Biographical Sketches of Committee Members*, http://www.acf.hhs.gov/programs/hsb/research/21_century/bio_sketches.htm (last accessed Aug. 26, 2006).

366. See *Forging New Partnerships*, http://www.acf.hhs.gov/programs/hsb/research/21_century/partnerships.htm (last accessed Aug. 26, 2006).

367. See *Testimony of Olivia Golden Before the Committee on Education and the Workforce*, U.S. House of Representatives, Apr. 5, 2005, http://www.house.gov/ed_workforce/hearings/109th/fc/headstart040505/golden.htm (last accessed Aug. 27, 2006).

368. See Volokh, *supra* note 321, at 1126.

369. *Id.* at 1126-27.

370. *Id.*

371. *Id.* at 1131-32.

Volokh also suggests that advocacy groups who might reasonably respond to outcome A with an ad hominem attack against its supporters (who also want outcome B) might find their public perception tarnished by this “too partisan or even ill-mannered” attack.³⁷² According to this theory, advocates’ refusal to participate in a consensus-building process that clearly has no mandate to come out a certain way and that is open to broad participation from the Head Start community may be harder to spin as a dangerous step on the slippery slope. Additionally, as to the specifics of any plan the process might create, advocates will be in a better position to ensure that any small-scale trial of structural change has enough safeguards that it will not proceed inexorably to change the entire structure nationwide.

Structural barriers with the legislative process still remain. For example, even if Congress agrees to follow the results of the consensus process, it cannot bind future Congresses to that effect. Nothing guarantees that the consensus agreement produced would not be selected in bits and pieces, when only the whole document represents what the parties feel comfortable with. On the other hand, the broad array of stakeholder participants may lessen the chance that Congress would eventually pass something contrary to the advocates’ interests as expressed in the consensus agreement, since more than simply the Head Start community would likely feel betrayed if Congress bypasses the consensus agreement. This answer is not entirely satisfying, however, and it is clear that some risk may be involved.

My responses to these potential problems are not meant to be glib; certainly these are real concerns. The conflict assessment should pay special attention to them before suggesting that the process continue. Yet despite these potential problems, the process still presents an opportunity for long-term success.

Conclusion

“Every change that we proposed in Head Start met with great resistance at both the federal and local level, but later people came to adopt the idea as their own,” recalls Edward Zigler, thinking about his days running Head Start in the early 1970s.³⁷³ He was speaking in particular about a proposal to serve children with disabilities in Head Start, a proposal that ultimately made it into law over the opposition of some Head Start staff. He goes on to explain why Head Start was more successful at serving disabled children than the public schools were: at the time of the proposal to serve disabled children in Head Start, “the

372. *Id.* at 1127.

373. ZIGLER & MUENCHOW, *supra* note 7, at 163.

schools ha[d] never really been forced to adopt a mainstreaming strategy. But Head Start did not have the option to place children with special needs in a classroom by themselves down the hall.”³⁷⁴

This example demonstrates not that Head Start is necessarily more successful than the schools are at serving this target population but that legislation matters. When legislation required Head Start programs to serve disabled children, they did, and they did it well. Rather than objecting to structural proposals for Head Start, then, advocates should instead think about what their underlying interests are and how the proposals can be crafted to meet them. The example also reminds us that Head Start has been in flux since its creation and that aspects of the program we now take for granted were controversial when they were first introduced. Resistance to large-scale change is natural because it brings the unknown, which especially in certain political climates can feel threatening. But perceiving structural change as only dangerous is a limited view.

The recurring debate over the funding and structure of Head Start is framed too narrowly as an either-or proposition: dismantle Head Start as we know it or maintain its structure and increase its funding. This focus on value distribution misses the opportunity for value creation and keeps the players stuck in a cycle of negative history and unproductive relationships. Analysis of the opportunities for change, the barriers that prevent change, and the potential for an interest-based process helpfully changes the debate. This analysis leads to two observations. First, it would not be impossible to change Head Start’s basic structure in a way that would help, not hurt, its target population, and Head Start advocates should acknowledge this possibility. More importantly, moving from the current mode of combative, positional lobbying, which may undercut the long-term success of the program, to an interest-based consensus—and coalition-building process may again provide better results for the target population.

As the movement for early childhood education and care gains force around the country, a policy window is opening for a strengthened nationally supported system in which Head Start can play an important role.³⁷⁵ Head Start advocates should take the opportunity to imagine the possibilities of a reshaped system, not to fear change.

374. *Id.* at 163-64.

375. See KINGDON, *supra* note 324, at 165-95.
