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Washington Cares: Other States Should Too

EVELYN WYNN[†]

The United States is facing a growing challenge in financing long-term care as the population ages and the demand for these services continues to grow. The cost of long-term care can be exorbitant, with many individuals and families struggling to afford the care they need. The baby boomer generation and their families are facing the challenges of aging, which will be exacerbated by a lack of funding for long-term care. Given unmarketable private insurance policies and Medicaid's spend down strategy, among other issues, the United States needs a feasible financing solution for long-term care.

In response to this challenge, Washington state has created Washington Cares Fund ("WA Cares"), a unique benefits program which provides qualifying Washingtonians with a benefit used to purchase long-term care services. The program is funded through a payroll tax equal to 0.58 percent of certain employees' wages, and those eligible can access care costing up to $36,500—adjusted annually for inflation—over their lifetime. While the program is more affordable and equitable than other current options, some argue that the benefit is insufficient, and there are concerns about the program's solvency and legality. Despite these criticisms, programs like WA Cares are innovative and necessary solutions to the increasingly daunting long-term care financing crisis. Other states should examine the program and consider whether a progressive social insurance benefit could be a possible solution to their own long-term care financing goals. This Note explores the strengths and weaknesses of WA Cares and similar efforts made in other states to raise funding for long-term care.

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INTRODUCTION

The United States has fallen far behind in creating a legitimate financing mechanism for long-term care services and support ("LTSS"). Seven in ten people in the United States will need LTSS at some point in their lives,[1] but the majority have no plan for long-term care and underestimate the costs of care.[2] It is expected that by the year 2060, ninety-five million Americans will be age sixty-five and older—twice the amount in 2018.[3] Moreover, it is estimated that 15.1 million of this population will have severe LTSS needs.[4] Yet the United States continues to provide less support than other high-income countries.[5] One study estimates that only 8 percent of all health care expenditure is spent on long-term care.[6] While other developed countries created long-term care systems decades ago,[7] the United States has failed to develop a system that works for the American people. Instead, the financial burden of LTSS is carried by individual U.S. families.

In fact, in a 2020 report by the National Council on Aging and University of Massachusetts Boston researchers, LTSS costs have been described as "the single largest financial risk fac[ing] . . . [seniors] and their families."[8] Sadly, this depiction is reasonable because LTSS costs are expensive and become more costly each year. In 2021, the median annual costs of care in the U.S. were $108,405 for a private room in a nursing home, $54,000 for an assisted living facility, and $61,776 for a home health aide.[9] In California alone, nursing home

1. Michelle Cottle, *Getting Old Is a Crisis More and More Americans Can't Afford*, N.Y. TIMES (Aug. 9, 2021), https://www.nytimes.com/2021/08/09/opinion/aging-nursing-home-medicare.html.

2. *Id.*

3. Mark Mather, Linda A. Jacobsen & Kelvin M. Pollard, *Aging in the United States*, 70 POPULATION BULL., Dec. 2015, at 2–3, https://www.prb.org/wp-content/uploads/2019/07/population-bulletin-2015-70-2-aging-us.pdf.

4. Puja Upadhyay & Janet Weiner, *Long-Term Care Financing in the United States*, 23 ISSUE BRIEF: LEONARD DAVIS INST. HEALTH ECON., Sept. 2019, at 2 https://ldi.upenn.edu/wp-content/uploads/archive/pdf/LDI%20Issue%20Brief%202019%20Vol.%2023%20No.%201_7_0.pdf.

5. Celli Horstman, Evan D. Gumas & Gretchen Jacobson, *U.S. and Global Approaches to Financing Long-Term Care: Understanding the Patchwork*, COMMONWEALTH FUND (Feb. 16, 2023), https://www.commonwealthfund.org/publications/issue-briefs/2023/feb/us-global-financing-long-term-care-patchwork.

6. *Id.*

7. *Id.*; *see also* Benjamin W. Veghte, *Designing Universal Long-Term Services and Supports Programs: Lessons from Germany and Other Countries*, NAT'L ACAD. OF SOC. INS. 3 (2021), https://www.nasi.org/wp-content/uploads/2021/06/NASI_LTSSProgramsAbroad.pdf ("The Netherlands was the first country to introduce a social insurance program for LTSS, in 1968, and Germany introduced its program in 1995.").

8. Lauren Popham, Susan Silberman, Liz Berke, Jane Tavares & Marc Cohen, *The 80%: The True Scope of Financial Insecurity in Retirement*, NAT'L COUNCIL ON AGING & LEADINGAGE LTSS CTR. @UMASS BOSTON (2020), https://www.ehdoc.org/wp-content/uploads/2021/02/2020-FWP-DG02_The80_Issue-Brief_4-24.pdf.

9. Priya Chidambaram & Alice Burns, *10 Things About Long-Term Services and Supports (LTSS)*, KFF (Sept. 15, 2022), https://www.kff.org/medicaid/issue-brief/10-things-about-long-term-services-and-supports-ltss.

rates have increased and will continue to increase at an average rate of 5 percent each year.[10]

Due to rising rates of care and financial insecurity, most elders[11] in the U.S. turn to Medicare and Medicaid for assistance. However, Medicare only covers acute conditions,[12] and Medicaid only provides LTSS for short-term illnesses for those who do not qualify for Medicare.[13] Additionally, Medicaid beneficiaries are subject to strict income requirements and eligibility rules which vary between states but usually limit beneficiaries to $2,000 in financial assets.[14] This forces many within the middle class to employ the "spend down" method[15] and liquidate their assets to meet these stringent eligibility requirements, meaning that they may never pass on the generational wealth that they have spent their entire lives building. The wealthiest can afford the high costs of care and the poorest qualify for federal safety-net insurance, but "[t]he dilemma is particularly vexing for those in the economic middle [class]."[16] Not wanting to liquidate their assets, but also not being able to afford the care they need, much of the middle class is forced to rely on informal caregiving or unpaid caregiving from a family member or friend.

Though the American culture of aging has always depended on family caregivers to provide LTSS care for our elders to some extent,[17] the projection of costs[18] and the growing elder population could severely disrupt the American

10. *Long Term Care Insurance*, CAL. DEP'T OF INS. (Jan. 2014), http://www.insurance.ca.gov/01-consumers/105-type/95-guides/05-health/01-ltc/ltc-insurance.cfm.

11. Steve Syre, *Older Adults Facing Growing Insecurity in Retirement*, LEADINGAGE LTSS CTR. @UMASS BOSTON (June 11, 2020), https://www.ltsscenter.org/older-adults-facing-growing-financial-insecurity-in-retirement ("80% of households with adults age 60 and over–or 32 million households–are struggling financially today or are at risk of falling into economic insecurity as they age. This trend worsened over time. Nine of every 10 older households experienced decreases in income and net value between 2014 and 2016, the most recent periods for which data was available.").

12. *Overview of Medi-Cal for Long Term Care*, CAL. ADVOCS. FOR NURSING HOME REFORM (Apr. 11, 2023), http://www.canhr.org/factsheets/medi-cal_fs/html/fs_medcal_overview.htm ("[T]he average stay in a nursing home under Medicare is usually less than 24 days.").

13. David C. Grabowski, *Medicare and Medicaid: Conflicting Incentives for Long-Term Care*, 85 MILBANK Q. 579, 581 (2007) ("Medicare's benefits include inpatient and outpatient hospital stays, physicians' fees, prescription drugs, diagnostic laboratory fees, and other professional medical services. Medicare, however, covers only limited long-term care services, such as skilled nursing facility (SNF) care and skilled home health care for enrollees who meet various conditions.").

14. MaryBeth Musumeci, Priya Chidambaram & Molly O'Malley Watts, *Medicaid Financial Eligibility for Seniors and People with Disabilities: Findings from a 50-State Survey*, KFF (June 14, 2019), https://www.kff.org/report-section/medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-findings-from-a-50-state-survey-issue-brief.

15. Horstman, Gumas & Johnson, *supra* note 5.

16. Christopher Rowland, *Senior Care Is Crushingly Expensive. Boomers Aren't Ready.*, WASH. POST (Mar. 20, 2023, 11:04 AM), https://www.washingtonpost.com/business/2023/03/18/senior-care-costs-too-high.

17. *See generally* COMM. ON FAM. CAREGIVING FOR OLDER ADULTS, NAT'L ACADS. OF SCIS., ENG'G, & MED., FAMILIES CARING FOR AN AGING AMERICA (Richard Shultz & Jill Eden eds., 2016) (discussing the nature of family caregiving and the effectiveness of programs designed to support family caregiving).

18. RICHARD W. JOHNSON & JUDITH DEY, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., LONG-TERM SERVICES AND SUPPORTS FOR OLDER AMERICANS: RISKS

economy if LTSS financing methods are not reimagined. An "estimated 22 to 26 million American adults currently provide care for family members or friends,"[19] and over half of them work full-time jobs.[20] The impact of the decision to both care for another *and* keep a job is financially devastating for many American families, with 69 percent of caregivers reporting a "change in their employment due to caregiving," including cutting back hours, taking a leave of absence, and receiving late warnings about performance and attendance.[21] Simultaneously, low productivity as a result of caregiving duties cost U.S. businesses an estimated $17.1 to $33 billion annually.[22]

Unpaid caregivers are also subject to disparities and veiled pressures of societal norms. An overwhelming seventy percent of unpaid caregivers experience at least one mental health impact, including anxiety, depression, suicidal ideation,[23] and loneliness.[24] Female caregivers, often incorrectly viewed by society as natural caregivers,[25] make up 66 percent of the unpaid caregiver population,[26] spending up to 50 percent more time providing care than male caregivers.[27] Working female caregivers are disproportionately affected economically as they are more likely than males to take fewer demanding jobs or give up working entirely as a result of prioritizing their caregiving responsibilities.[28] Minorities such as Blacks and Hispanics have significantly less median per capita savings[29] and are more likely to rely on unpaid informal caregivers than agency providers.[30] These statistics point to unpaid caregiving and a lack of LTSS funding as sources of hurt and profound struggle for minorities and women.

AND FINANCING 1 (2022), https://aspe.hhs.gov/sites/default/files/documents/08b8b7825f7bc12d2c79261fd7641c88/ltss-risks-financing-2022.pdf ("On average, an American turning 65 today will incur $120,900 in future LTSS costs, measured in today's dollars.").

19. Paula Span, *The Quiet Cost of Family Caregiving*, N.Y. TIMES (Sept. 7, 2022), https://www.nytimes.com/2022/09/04/science/elderly-work-caregiving.html.

20. *Caregiver Statistics: Work and Caregiving*, FAM. CAREGIVER ALL. (2016), https://www.caregiver.org/resource/caregiver-statistics-work-and-caregiving.

21. *Id.* ("39% of caregivers leave their job to have more time to care for a loved one.").

22. *Id.*

23. *The Surprising Metrics of Unpaid Caregivers*, CNN (June 15, 2022), https://www.cnn.com/videos/tv/2022/06/15/alexandra-drane-life-itself-wellness.cnn (Alexandra Drane presents at the Life Itself Conference).

24. *See* Span, *supra* note 19.

25. *Women and Disability: Women and Care*, SYRACUSE UNIV.: CTR. ON HUM. POL'Y, https://thechp.syr.edu/women-and-disability-women-and-care (last visited Mar. 14, 2024).

26. *Women and Caregiving: Facts and Figures*, NAT'L CTR. ON CAREGIVING AT FAM. CAREGIVER ALL. (May 2003), https://www.caregiver.org/resource/women-and-caregiving-facts-and-figures.

27. *Id.*

28. *Caregiver Statistics: Work and Caregiving*, FAM. CAREGIVER ALL. (2016), https://www.caregiver.org/resource/caregiver-statistics-work-and-caregiving ("Female caregivers are more likely than males to make alternate work arrangements: taking a less demanding job (16% females vs. 6% males), giving up work entirely (12% females vs. 3% males) . . . .").

29. Loren Saulsberry, *Medicare Beneficiaries of Color More Likely to Rely on Unpaid Informal Caregivers for Home Health*, COMMONWEALTH FUND (Jan. 18, 2023), https://www.commonwealthfund.org/blog/2023/medicare-beneficiaries-color-more-likely-rely-unpaid-informal-caregivers-home-health.

30. *Id.*

While many elderly people in need of care are fortunate enough to have family and friends support them, what about those who lack necessary support? "An estimated 6.6 percent of American adults aged 55 and older have no living spouse or biological children"[31] to turn to. This trend is growing as divorce rates rise and more individuals decide against having children.[32] Further, the stay-at-home caregiver has basically disappeared from today's society since more women are entering the workforce than ever before—with less than ten percent having a stay-at-home caregiver today.[33] Current long-term care ("LTC") insurance policies and federal programs do not capture the needs of those navigating health declines on their own and the devastating finances that are required.[34]

In 2016, the LTC Financing Collaborative recommended the creation of a universal public insurance program and major improvements to LTSS benefits.[35] However, the most recent attempts to fund LTSS benefits by the federal government, including the Community Living Assistance Services and Supports ("CLASS") Plan and President Biden's proposed bill, have been unsuccessful.[36] The serious gap in care has encouraged some states to take the initiative in making long-term care more affordable for aging populations, so their families will no longer have to rely on loans, family members, or fundraising sites like GoFundMe for help.[37]

In the absence of a comprehensive federal program tailored to address long-term care financing concerns, states have an opportunity to create legislation to finance long-term care for their constituents. Washington state has enacted a social insurance program known as the Washington Cares Fund ("WA Cares") to target long-term care financing for all Washington employees. For many Washingtonians, WA Cares is a flexible and affordable program that offers a better alternative to long-term care financing than federal programs or private insurance. However, the program faces funding concerns, constitutional challenges, and a lack of public support.

This Note explores the rising costs of long-term care and the benefits and challenges of WA Cares, as well as efforts by other states to create similar legislation in advocating for state social insurance programs as a form of funding long-term care in the United States. Part I outlines the growing need for long-

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31. Paula Span, *Who Will Care for 'Kinless' Seniors?*, N.Y. TIMES (June 20, 2023), https://www.nytimes.com/2022/12/03/health/elderly-living-alone.html.

32. *Id.*

33. Kosta Yepifantsev, *The Universal Need for Universal Long-Term Care with Ben Veghte*, YOUTUBE (Mar. 14, 2023), https://www.youtube.com/watch?v=avcH8NX_lVw&ab_channel=KostaYepifantsev.

34. *Id.*

35. *A Consensus Framework for Long-Term Care Financing Reform*, LONG-TERM CARE FIN. COLLABORATIVE (Feb. 2016), https://convergencepolicy.org/wp-content/uploads/2022/11/LTCFC-FINAL-REPORT-Feb-2016.pdf.

36. Eduardo Porter, *Biden Takes on Sagging Safety Net with Plan to Fix Long-Term Care*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/business/economy/home-care-biden.html.

37. *See* Rowland, *supra* note 16.

term care financing. Part I also discusses the market failure of the private long-term care insurance industry and scrutinizes federal programs such as Medicare, Medicaid, CLASS, as well as recent efforts made by President Biden's Administration. Part II explains the details of WA Cares, including the bill's legislative history. Additionally, Part II discusses the successes and drawbacks of the program, including recent court decisions which question the program's constitutionality under state law. Finally, Part III looks at efforts made by other states to introduce similar legislation and discusses how Washington state's approach can best be replicated by other states.

I. BACKGROUND

For many Americans, aging and death can be challenging and emotionally devastating experiences. The impact of long-term care on work, finances, and family relationships can be significant, particularly when considering the change in lifestyle and the need for dependency that can arise. As the population continues to live longer, the challenge of aging with dignity, independence, and choice becomes increasingly difficult. Government restrictions compound the issue, making the need for a new approach to financing long-term care in the U.S. more pressing than ever before. Unfortunately, many individuals, including those over forty years old, have not planned adequately for the possibility of long-term care, nor have they educated themselves on the associated challenges. A majority of adults mistakenly assume that they will be able to care for themselves, failing to consider the level of care required and its financial implications.

The lack of knowledge about long-term care coverage under government benefit programs has resulted in various misperceptions. Many Americans mistakenly believe that Social Security, Medicare, and/or Medicaid will cover the costs of long-term care services and support ("LTSS"), but these programs all have limitations in terms of coverage. In reality, the typical American household has less than $50,000 saved for retirement in their 401ks or IRAs[38] which is often insufficient to cover the costs of long-term care. As a result, many individuals spend their life savings in a matter of months, depending on the level of care required. Despite past attempts to create a successful LTSS financing method and current financing solutions within social healthcare programs, there is still a gap in coverage that needs to be addressed with a new approach to financing long-term care in the United States.

A. LONG-TERM CARE INSURANCE IS NEARLY UNMARKETABLE IN THE UNITED STATES

Long-term care private insurance is designed to help individuals pay for the high costs of long-term care services. Investing in long-term care insurance

38. *See* Yepifantsev, *supra* note 33.

seems straightforward. Unlike automobile or house insurance, some amount of long-term care is almost inevitable, and long-term care benefits are likely to be used.[39] Despite this reality, long-term care private insurance has struggled to gain traction and has become nearly unmarketable in the United States due to a variety of factors, including high costs, complex and discriminatory policies, and a small market.

The high cost of long-term care services means that insurance companies must charge high premiums to cover the risk of providing coverage. The average premium costs $2,700 per year, but the average age at which people purchase private long-term care insurance is age sixty.[40] Many people are simply unable or unwilling to pay the high premiums required to purchase long-term care private insurance.[41] This is particularly true for older adults, who are both more likely to need long-term care services and more likely to be on a fixed income.[42] Another contributing factor to the high cost of long-term care services is that individuals must continue paying past retirement or until they need care, thus, only about 7 to 10 percent of individuals are able to afford long-term care private insurance.[43] The historical increase in rates and policy cancellations has further exacerbated this issue. Insurance companies are known to increase premiums or cancel policies after customers have paid in for over a decade.[44]

Private insurance companies strive to make a profit, which often leads to the sale of policies to individuals who are less likely to require LTSS[45] and issues of adverse selection.[46] Consequently, those with pre-existing medical conditions or a history of certain ailments may be subjected to higher premiums or denied coverage.[47] Persons with disabilities or chronic illnesses who are more prone to requiring LTSS, may be disproportionately impacted by the underwriting process.[48] Moreover, certain policies may contain exclusions for specific conditions or types of care, which can disproportionately affect certain populations.[49] Insurance companies are also aware of the fact that certain

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39. Kosta Yepifantsev, *What Is Long-Term Care Insurance and Who Needs It with Kelly Augspurger*, YOUTUBE (Sept. 27, 2022), https://www.youtube.com/watch?v=JnmYGGmBAIU&ab_channel=KostaYepifantsev.

40. *See* Yepifantsev, *supra* note 33.

41. *Id.*

42. *Id.*

43. *Id.*

44. Tara Siegel Bernard, *Your Long Term Care Insurance Rate Spiked. Now What?*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/23/your-money/long-term-care-insurance-prices.html.

45. *See* Yepifantsev, *supra* note 33.

46. Lawrence A. Frolik, *Private Long-Term Care Insurance: Not the Solution to the High Cost of Long-Term Care for the Elderly*, 23 ELDER L.J. 371, 394 (2016).

47. *Id.* at 394–95.

48. Portia Y. Cornell, David C. Graboswki, Marc Cohen, Xiaomei Shi & David G. Stevenson, *Medical Underwriting in Long-Term Care Insurance: Market Conditions Limit Options for Higher-Risk Consumers*, 35 HEALTH AFFS. 1494, 1501 (2016), https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2015.1133 ("[U]nderwriting may make it more difficult for minorities than for whites to buy long-term care insurance at any price.").

49. *Id.*

populations undoubtedly require more care than others. For example, insurance companies charge women more than men[50] since women live longer than men and are more likely to utilize benefits.[51]

Long-term care insurance policies also include terms and provisions that are difficult to understand.[52] Insurance policies can vary widely in terms of coverage, exclusions, and other terms and conditions. Many policies include the trigger fee, also known as a "waiting period" or "elimination period."[53] This is a provision in a long-term care insurance policy that specifies the length of time a policyholder must pay for their own care before the insurance benefits begin.[54] The waiting period can be a significant financial burden, especially if the policyholder does not have adequate savings or sources of income. Consequently, there is a possibility that policyholders may never trigger the plan they have been diligently contributing to over the years. Provisions like trigger fees can make it challenging for consumers to make informed decisions about which policies to purchase and equally challenging for insurance companies to market their products effectively.

The U.S. has implemented several measures over the years to encourage people to purchase long-term care private insurance, including tax incentives, partnership programs,[55] and other marketing initiatives.[56] Despite these incentives, the market for long-term care private insurance is still relatively

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50. Ann Carrns, *Long-Term Care Insurance Priced by Gender*, N.Y. TIMES (Feb. 20, 2014), https://www.nytimes.com/2014/02/12/your-money/long-term-care-insurance-priced-by-gender.html (finding that in 2014, a woman could expect to pay 30% or more than a man of the same age and health for a long-term care insurance policy).

51. ASH KALRA, ASSEMB., ASSEMB. AGING & LONG-TERM CARE COMM., BACKGROUND PAPER: INFORMATIONAL HEARING ON FIN. LONG-TERM CARE SERVICES AND SUPPORTS, at 3 (Cal. 2017), https://altc.assembly.ca.gov/sites/altc.assembly.ca.gov/files/9.21%20Final%20Background%20Paper.pdf ("Average total lifetime LTSS spending for older women is also double that for men ($182,000 versus $91,000). Low-income women are mostly likely to need high levels of care.").

52. John F. Wasik, *Long-Term Care Insurance Can Baffle, with Complex Policies and Costs*, N.Y. TIMES (Dec. 18, 2015), https://www.nytimes.com/2015/12/19/your-money/long-term-care-insurance-can-baffle-with-complex-policies-and-costs.html.

53. *Receiving Long-Term Care Insurance Benefits*, ADMIN. FOR CMTY. LIVING (Feb. 18, 2020), https://acl.gov/ltc/costs-and-who-pays/what-is-long-term-care-insurance/receiving-long-term-care-insurance-benefits.

54. *Id.*

55. Frolik, *supra* note 46, at 400 n.201 ("To encourage the purchase of [Long-Term Care Insurance] and so reduce the cost to Medicaid of paying for LTC in nursing homes, federal law permits states to participate in the Partnership Program and not impose eligibility for Medicaid or impose estate recovery on an amount equal to the benefits paid by LTCI.").

56. Howard Gleckman, *Long-Term Care Financing Reform: Lessons from the U.S. and Abroad*, URB. INST. 18–20 (2010), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_fund_report_2010_feb_1368_gleckman_longterm_care_financing_reform_lessons_us_abroad.pdf.

small,[57] and is mainly comprised of wealthy individuals.[58] Many adults remain too reluctant to purchase policies due to the high cost and the complexity of the insurance policies to expand the market for private long-term care insurance.[59]

B. BOTH MEDICARE AND MEDICAID FAIL TO ADEQUATELY ADDRESS LONG-TERM CARE FINANCING IN THE UNITED STATES

By 2030, the youngest baby boomers will be eligible for Medicare, which will put Medicare's annual acute care costs around $259.8 billion dollars.[60] Congressman Wilbur Mills, the former chairman of the House Ways and Means Committee, predicted the rising costs of health care for the baby boomer generation as early as 1965,[61] when Medicare was first signed into law by President Lyndon B. Johnson.[62] Though President Johnson considered providing long-term care during the creation of Medicare, Mills argued that retiring baby boomers should be the states' problem instead.[63] However, until now, states' solutions to long-term care financing primarily rely on Medicaid, a state administered health insurance program meant for those with an income of less than 138 percent of the Federal Poverty Level.[64] The current state of Medicaid and Medicare in the United States reveals significant gaps and limitations in addressing the long-term care financing needs of the population, including misconceptions about Medicare coverage, challenges in accessing home health services, biased reimbursement rates incentivizing profit-driven practices in nursing homes, and complex eligibility requirements, among others. Both Medicare and Medicaid currently fail to adequately address long term care financing in the United States.

57. Kelly Kenneally, *New Report Examines Medicaid's Critical Role in Providing Long-Term Care Coverage for Older Americans: Report Offers Policy Solutions To Address Unpredictable and Potentially Catastrophic Costs Of Long-Term Care*, PR NEWSWIRE (Oct. 14, 2020, 10:00 AM), https://www.prnewswire.com/news-releases/new-report-examines-medicaids-critical-role-in-providing-long-term-care-coverage-for-older-americans-301151704.html ("Long-term care insurance surged in popularity in the 1990s, but insurance companies exited the market in large numbers in the 2000s. The number of insurers selling long-term care policies shrank from over 100 in the 1990s to less than 15, currently covering only seven million Americans.").

58. *See also* Shu-Chuan Jennifer Yeh, Wen Chun Wang, Hsueh-Chih Chou & Shih-Hua Sarah Chen, *Private Long-Term Care Insurance Decision: The Role of Income, Risk Propensity, Personality, and Life Experience*, 9 HEALTHCARE 1, 1–3 (Jan 19, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7835807/pdf/healthcare-09-00102.pdf.

59. *See* Alexander Sammon, *The Collapse of Long-Term Care Insurance,* AM. PROSPECT (Oct. 20, 2020), https://prospect.org/familycare/the-collapse-of-long-term-care-insurance.

60. *The Baby Boomer Effect and Controlling Health Care Costs*, UNIV. S. CAL. PRICE (Nov. 17, 2023), https://healthadministrationdegree.usc.edu/blog/the-baby-boomer-effect-and-controlling-health-care-costs.

61. Porter, *supra* note 36.

62. *Medicare Signed into Law*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Medicare_Signed_Into_Law.htm (last visited Mar. 14, 2024).

63. *Id.*

64. *Program Eligibility by Federal Poverty Level for 2023*, COVERED CAL. (Oct. 2022), https://www.coveredca.com/pdfs/FPL-chart.pdf [https://web.archive.org/web/20230322170220/https://www.coveredca.com/pdfs/FPL-chart.pdf].

Thirty-seven percent of people think that Medicare will cover their long-term care costs[65] and are unaware of what is actually covered under Medicare. Persons with work history age sixty-five and older and many disabled people under sixty-five receiving social security disability insurance ("SSDI") qualify for Medicare.[66] Medicare does not cover custodial care or non-medical care.[67] For the most part, assistance by a caregiver with activities of daily living ("ADLs"), which include bathing and dressing, is not covered under Medicare. Medicare Part A does include home health services,[68] but there are some challenges to receiving this type of short-term care. So long as a health care professional and a Medicare-certified home health agency determine that the beneficiary is homebound and needs skilled services, homebound recipients have access to up to twenty-eight hours a week of hands-on personal care, including assistance with ADLs.[69] However, many Medicare-certified agencies do not provide the amount or duration of home health aide required, and most agencies do not offer home health aide services at all.[70]

Medicare Part A strictly covers acute or short-term care of up to one hundred days in a skilled nursing facility, but it will only cover in full the first twenty days for short-term nursing home care if the individual is first admitted into the hospital for three days and not just under observation.[71] After the first twenty days, the next eighty days are paid for by Medicare subject to a daily coinsurance amount of $200 which must be paid for by the resident.[72] Beneficiaries must switch to private pay, accept premature discharge, or try to qualify for Medicaid if they no longer require skilled nursing services on a daily basis.[73] Due to these limitations, most beneficiaries do not receive the full hundred days of Medicare coverage and the average Medicare-funded stay in a nursing home lasts less than thirty days.[74] Medicare does not cover assisted living or adult day care.[75]

65. Ron Lieber, *Ignore Long-Term Care Planning at Your Peril*, N.Y. TIMES (Nov. 4, 2010), https://www.nytimes.com/2010/11/05/business/businessspecial5/05CARE.html.

66. Eric Carlson, *25 Common Nursing Home Problems – & How to Resolve Them*, JUST. IN AGING 6 (Jan. 2023), https://www.justiceinaging.org/wp-content/uploads/2019/01/25-Common-Nursing-Home-Problems-and-How-to-Resolve-Them_Final.pdf.

67. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., MEDICARE & YOU 2023: THE OFFICIAL U.S. GOVERNMENT MEDICARE HANDBOOK 28 (2022) https://www.medicare.gov/publications/10050-Medicare-and-You.pdf [https://web.archive.org/web/20230314212538/https://www.medicare.gov/publications/10050-Medicare-and-You.pdf].

68. *Id.* at 44.

69. *Id.*

70. *Medicare Coverage for Home Health Aide Care*, NAT'L CTR. ON L. & ELDER RTS. 2 (Aug. 2021), https://web.archive.org/web/20210805205440/https://ncler.acl.gov/getattachment/Resources/Practice-Tips/Medicare-Coverage-for-Home-Health-Aide-Care-(1).pdf.aspx.

71. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 67, at 29.

72. *Id.*

73. Carlson, *supra* note 66, at 36–37.

74. *Id.* at 7–8.

75. *Id.* at 33.

The reimbursement rates of Medicare and Medicaid incentivize bias in nursing homes, prompting them to prioritize financial gain at the expense of quality patient care. Some nursing homes will discharge Medicare-funded residents after the first few weeks of stay to make room for new Medicare residents with high payment rates.[76] Though under federal law, eviction should not be carried out if it compromises the safety of the resident,[77] some residents are forced to live in homeless shelters or poor-quality motels, or face eviction.[78] Residents are also discriminated against based on whether their stay is Medicare-funded or Medicaid-funded[79] as Medicare pays at least $600 more per day than Medicaid for residents in a nursing home[80] and many nursing homes choose to cater to whoever is most profitable at the time. Medicaid-eligible residents can also be subject to second-class treatment with residents claiming that they "cannot receive physical therapy, one-on-one attention, or hands-on assistance with eating,"[81] which are all typically guaranteed services.

Unlike Medicare, Medicaid eligibility is based on income and asset limits, meaning that it is essentially a safety-net health care program for those under sixty-five or disabled[82] who cannot otherwise afford health care.[83] Long-term care is one of the primary benefits of Medicaid, and it can cover a variety of services and supports including nursing home care, home health care, personal care services, assisted living facility services, and adult day care services. The eligibility requirements for Medicaid vary depending on the state, as Medicaid is jointly funded by the federal and state governments, and each state operates its own program. However, there are some general eligibility requirements that apply to most states.

For most states, the income limit for Medicaid eligibility is 138 percent of the Federal Poverty Level, which is currently around $20,121 per year for an individual.[84] Medicaid also limits the amount of assets an individual can own and still be eligible for the program. It is typically around $2,000 for an individual, with higher limits for couples. Some individuals above the income limits and desperately in need of LTSS will lower their countable income levels to meet these limits, though there are some complicated restrictions set by

76. *Id.* at 39.

77. *Id.* at 26.

78. Jessica Silver-Greenberg & Amy Julia Harris, *'They Just Dumped Him Like Trash': Nursing Homes Evict Vulnerable Residents*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/06/21/business/nursing-homes-evictions-discharges-coronavirus.html.

79. *Id.*

80. *Id.*

81. Carlson, *supra* note 66, at 10.

82. In California, those who are pregnant, in a nursing home or intermediate care home, under the age of 21 or a refugee living in the U.S. temporarily are also eligible. *Medicaid Eligibility & Requirements in California*, HEALTH FOR CAL. INS. CTR., https://www.healthforcalifornia.com/covered-california/health-insurance-companies/medi-cal/eligibility-requirements (last visited Mar. 14, 2024). Many states include other groups in addition to those who are over 65 and/or disabled.

83. Carlson, *supra* note 66, at 7.

84. COVERED CAL., *supra* note 64.

Medicaid. These restrictions differ by state and also marital status and include various nuances and intricacies. "Medicaid spend-down"[85] strategies can allow individuals to deduct some medical expenses from their income, effectively reducing their income to Medicaid eligibility levels.[86] This may include hospital bills, doctor visits, prescription drugs, and some insurance premiums.[87]

Similarly, each state has varying asset limits. However, not all assets count towards the limit. Some states offer special programs or waivers which make individuals eligible for Medicaid even if their income or assets exceed the limits. Non-countable assets include a primary home[88], one vehicle, life insurance policies, and personal items. To meet the asset limit, some states allow the use of special needs trusts for disabled individuals.[89] However, they are subject to severe restrictions.[90] In most states, persons above the asset limit may be encouraged to spend down their assets to meet the limit.[91] Moreover, most irrevocable trusts and gifts must be created or bestowed far back enough to not violate Medicaid's "look-back" period.[92]

The "look-back" period for Medicaid is the interval of time that Medicaid reviews to determine whether an individual has transferred assets for less than fair market value during that period in order to qualify for Medicaid. The look-back period can vary by state, ranging from thirty to sixty months prior to the date of the individual's Medicaid application.[93] Some states may have additional rules or exemptions that affect the look-back period. The penalties for transferring assets during the look-back period are designed to discourage individuals from giving away their assets to qualify for Medicaid. However,

85. "Medicaid spend-down" has many names, including Share of Cost, Medically Needy Pathway, Excess Income, Surplus Income or Spend Down. *Spending Down Assets to Become Medicaid Eligible for Nursing Home / Long Term Care*, AM. COUNCIL ON AGING (Jan. 26, 2024), https://www.medicaidplanningassistance.org/medicaid-spend-down.

86. *Id.*

87. *Id.*

88. Ron Lieber, *The Ethics of Adjusting Your Assets to Qualify for Medicaid,* N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/your-money/estate-planning/the-ethics-of-adjusting-your-assets-to-qualify-for-medicaid.html ("c."); *see also* AM. COUNCIL ON AGING, *supra* note 85.

89. *See* Kevin Urbatsch, *Special Needs Trusts: How to Keep Your Win From Becoming Your Client's Loss*, PLAINTIFF MAG. 1–2 (2008), https://www.urblaw.com/wp-content/uploads/2019/05/snt-article-plaintiff-magazine.pdf.

90. *Id.* at 1 ("First-party SNTs are statutorily created 'safe harbor' trusts. Therefore, every first-party SNT must stricly comply with a myriad of federal, state, administrative and judicial rules and regulations defining them.").

91. Lieber, *supra* note 88. Families must spend down by paying the fair market value of their assets and not gift their assets due to the "look-back" period.

92. AM. COUNCIL ON AGING, *supra* note 85.

93. *How Medicaid Planning Trusts Protect Assets and Homes from Estate Recovery*, AM. COUNCIL ON AGING (Jan. 5, 2023), https://www.medicaidplanningassistance.org/asset-protection-trusts.

these provisions are complex and can make it difficult to navigate the program without an attorney or other professional.[94]

Home and Community Based Services ("HCBS") are Medicaid programs that provide healthcare and support services to eligible individuals in their homes and communities. HCBS programs offer a package of services and supports and are meant for Medicaid beneficiaries who prefer to remain at home but require the level of daily care found in institutions like nursing homes. The programs vary by state[95] but typically include personal care, assisted living, adult day care, transportation, and home-delivered meals, among other services.[96] HCBS programs are designed to provide flexible and person-centered care which can significantly help individuals live with greater independence and dignity, while also reducing healthcare costs.

The long-term care services provided by Medicaid are not free. Recipients are expected to repay the government for nursing facility services, HCBS, and related hospital and prescription drug services through estate recovery.[97] Since the Medicaid Estate Recovery Program was signed into law in 1993,[98] it is mandatory for "states [to] seize houses and other assets after those recipients die in order to satisfy the debt."[99] Many states go to exaggerated lengths to collect from Medicaid's long-term care recipients, which include pre-death liens, interest on past-due debts, and limitations on the number of hardship waivers granted.[100] Since Medicaid is a program meant for the lower and middle classes, the estate collections on its recipients usually recover very little, accounting for less than one percent of Medicaid's total nursing home costs in 2003.[101] Estate recovery hardly covers Medicaid costs and, instead, destroys the chance of passing wealth down to the working and middle class,[102] "perpetuating cycles

94. Lieber, *supra* note 88 ("To get within those limits, lawyers may encourage gifts to family members (though if they are within five years of a Medicaid application, there can be penalties), annuity purchases, trusts of various sorts and a certain type of long-term care insurance that can shield some assets from the Medicaid calculation once you've made a claim.").

95. Porter, *supra* note 36 ("In Pennsylvania, Medicaid pays $50,300 a year per recipient of home or community-based care, on average. In New York, it pays $65,600. In contrast, Medicaid pays $15,500 per recipient in Mississippi, and $21,300 in Iowa.").

96. *Medicaid Eligibility for Medicare Beneficiaries Who Need Long-Term Care in the Home or Community*, MEDICARE INTERACTIVE, https://www.medicareinteractive.org/get-answers/cost-saving-programs-for-people-with-medicare/medicare-and-medicaid/medicaid-eligibility-for-medicare-beneficiaries-who-need-long-term-care-in-the-home-or-community (last visited Mar. 14, 2024).

97. *Medicaid Eligibility*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.medicaid.gov/medicaid/eligibility/index.html (last visited Mar. 14, 2024).

98. Rachel Corbett, *Medicaid's Dark Secret*, ATLANTIC (Sept. 23, 2019, 12:45 PM), https://www.theatlantic.com/magazine/archive/2019/10/when-medicaid-takes-everything-you-own/596671.

99. *Id.*

100. *Id.*

101. *Id.* ("Massachusetts . . . recovered an average of $16,442 per estate in 2003, in total offsetting a little more than 1 percent of its long-term care costs that year . . . . In Kentucky, by contrast, the average amount collected from an estate was $93; the state recovered just 0.25 percent of its long-term care costs.").

102. *Id.*

of poverty and pushing displaced families back into the welfare system."[103] As the U.S. population ages, it is essential to address these shortcomings and develop new policies that provide comprehensive long-term care coverage for all Americans.

C. CLASS: A Failed Attempt to Implement A Federal Social Insurance Benefit

The Community Living Assistance Services and Supports ("CLASS") Plan was a voluntary social insurance program introduced in 2009 under President Obama's Affordable Care Act. Its aim was to support the middle class and help people in need of LTSS, including home care, adult day care, or a stay in a nursing home. CLASS was financed through monthly premiums paid by voluntary payroll deductions, and its benefits would have offset the LTSS costs of Medicaid. CLASS had a five-year vesting period and a lifetime benefit for individuals unable to perform at least two ADLs without assistance.[104]

In many ways, the program's goals and structure are like WA Cares. CLASS was not designed to replace the need for long-term care coverage. Instead, it was meant to be a modest benefit that could be used in conjunction with private insurance to supplement coverage.[105] Benefits were paid in cash and could be used to purchase a wide range of services, such as supporting family caregivers or obtaining assistive devices "without having to navigate complex government regulations or limitations in private insurance contracts."[106] Similar to WA Cares, health status would not be considered during the underwriting process; however, unlike WA Cares, age would factor in,[107] with older buyers paying higher premiums than younger buyers. The plan would have covered around $50 to $100 of care per day, depending on the numbers of ADLs an individual required assistance with.[108] Participation in CLASS was voluntary, with all workers being enrolled automatically but having the ability to opt out.[109]

However, as we will see again with WA Cares, opt-out provisions were problematic, as young and healthy consumers would have no interest in buying into the plan. Essentially, CLASS would have become another option too similar to private insurance to survive and address long-term care financing issues, making it unsustainable. The guaranteed revenue stream would also have made it more likely that providers, such as nursing homes and home health agencies,

103. *Id.*
104. Gleckman, *supra* note 56, at 18–21.
105. *Id.* at 21–22.
106. *Id.* at 22.
107. *Id.*
108. Mark R. Meiners, *Connecting the Long-Term Care and CLASS Act Insurance Programs*, CTR. FOR HEALTH CARE STRATEGIES (2011), https://www.sandiegocounty.gov/hhsa/programs/ais/ltcip/media/Policy_Brief_-_Long_Term_Care_Partnership_and_CLASS.pdf.
109. Gleckman, *supra* note 56, at 21.

would raise prices.[110] In 2011, after nineteen months of work, CLASS was shut down over viability and solvency issues.[111] The program's administrator said that the plan would not be financially solvent and self-sustaining for seventy-five years[112] due to adverse selection, the same issues found in private insurance policies.[113] Republicans opposed the CLASS Act even more than the Affordable Care Act, and even some Democrats opposed it, believing it was too weak and would not effectively address the growing need for LTSS in the United States.

D. RECENT FEDERAL ATTEMPTS TO FUND LTSS

President Biden has made various efforts to enhance LTSS financing in the United States. One such instance was in March 2021 when he unveiled the Americans Jobs Plan. This plan included $400 billion in funding for Home and Community-Based Care Services ("HCBS"), with the aim of expanding access to Medicaid HCBS services.[114] The funding would help elderly and disabled individuals remain in their homes and avoid institutional care. It also would have provided twelve weeks of paid family leave annually, plus tax credits to offset caregiving expenses and Social Security credits for time family caregivers spend out of the labor force.[115] While the plan excluded nursing homes, the allocated funds were projected to be quickly utilized as the plan's primary objective was to raise the wages of care workers to meet the growing demand of LTSS.[116] However, opponents of the plan believe that the allocation of funds leaves out the middle class. They also argue that there must be a better approach to the financing crisis than simply allocating more funds to Medicaid.[117] Republican opposition thwarted its passage, with Mitch McConnell describing the White House plan as a "liberal wish list."[118]

Another notable initiative was the Build Back Better Act, which contained provisions for financing long-term care. The proposed legislation provided

110. *Id.* at 23.

111. Letter from Kathleen Sebelius, Sec'y of Health & Hum. Servs., U.S. Dep't of Health & Hum. Servs., to John A. Boehner, Speaker of the H.R. (Oct. 14, 2011), https://www.kff.org/wp-content/uploads/sites/2/2011/10/boehner-.pdf.

112. *Id.*

113. Gleckman, *supra* note 56, at 23, 25.

114. Porter, *supra* note 36.

115. Span, *supra* note 19.

116. Porter, *supra* note 36 ("In 2019, the typical wage of the 3.5 million home health aides and personal care aides was $12.15 an hour. They make less than janitors and telemarketers, less than workers in food processing plants or on farms.").

117. *Id.* ("820,000 people were on states' waiting lists in 2018, with an average wait of more than three years.").

118. Ricardo Alonso-Zaldivar, *Biden's Ambitious Expansion of Long-Term Care Sparks Debate*, PHILA. TRIB. (Apr. 9, 2021), https://www.phillytrib.com/bidens-ambitious-expansion-of-long-term-care-sparks-debate/article_1ce208ea-4255-53b1-ab5a-a88318b00431.html.

significant investments in HCBS[119] and support for long-term care facilities and workers. Specifically, the legislation allocated $150 billion in funding for HCBS-based care services through Medicaid.[120] This funding would have expanded access to services like personal care, meal preparation, and transportation. Additionally, the Build Back Better Act included funding to improve the quality of care in long-term care[121] facilities, including nursing homes and assisted living facilities. Although the House of Representatives passed the bill in November 2021, it never cleared the Senate.

Despite the pushback from the Republican party, the Biden administration continues to name long-term care financing as a key policy concern. The budget proposal for 2024, released in March 2023, includes investing $150 billion over the next ten years to improve and expand Medicaid HCBS.[122] Among other initiatives, the funds for 2024 would increase eligibility rates for states that have opted not to expand Medicaid under the Affordable Care Act, reduce waiting lists for long-term care, and establish a comprehensive paid family and medical leave program.[123] However, many believe that these efforts should be directed instead at adopting universal LTSS insurance financing by mandatory federal income tax surcharges.[124]

Numerous politicians have put forward a range of financing initiatives for LTSS at the federal level. In 2018, the House Energy and Committee Chair, Frank Pallone, a long-time advocate for healthcare reform, proposed the Medicare Long-Term Care Services and Supports Act. The Act would have established a public benefit within Medicare for LTSS.[125] New York Representative Thomas Suozzi introduced legislation in 2021 to establish a

119. Cynthia Cox, Robin Rudowitz, Juliette Cubanski, Karen Pollitz, MaryBeth Musumeci, Usha Ranji, Michelle Long, Meredith Freed & Tricia Neuman, *Potential Costs and Impact of Health Provisions in the Build Back Better Act*, KFF (Nov. 23, 2021), https://www.kff.org/health-costs/issue-brief/potential-costs-and-impact-of-health-provisions-in-the-build-back-better-act ("[T]he Build Back Better Act would create the HCBS Improvement Program, which would provide a permanent 6 percentage point increase in federal Medicaid matching funds for HCBS.").

120. *Id.*

121. Nursing Home Improvement and Accountability Act, S. 2694, 117th Cong. (as introduced in Senate, Aug. 10, 2021). Among its many aims, the bill sought to grant funding for wage benefit enhancement to staff who care for resident, improve and develop training and career development opportunities, expand staffing for care of residents, and prohibit pre-dispute arbitration agreements for residents. *Id.*

122. OFF. OF MGMT & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2024 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/budget_fy2024.pdf.

123. Marci Phillips, *Biden's 2024 Budget Preserves Benefits and Supports Services for Older Adults*, NAT'L COUNCIL ON AGING (Mar. 20, 2023) https://www.ncoa.org/article/biden-2024-budget-preserves-benefits-and-supports-services-for-older-adults.

124. Zachary Anderson, Note, *Solving America's Long-Term Care Financing Crisis: Financing Universal Long-Term Care Insurance with a Mandatory Federal Income Surcharge That Increases with Age*, 25 ELDER L.J. 473, 502 (2017); Amy Baxter, *LTC Financing Proposal Prioritizes Home Care*, HOME HEALTH CARE NEWS (Feb. 22, 2016), https://homehealthcarenews.com/2016/02/ltc-financing-proposal-prioritizes-home-care.

125. Press Release, Frank Pallone, Jr., Congressman, Pallone Unveils Proposal for Medicare Long-Term Care Benefit (May 2, 2018), https://pallone.house.gov/media/press-releases/pallone-unveils-proposal-medicare-long-term-care-benefit.

federal LTSS financing called the Well-Being Insurance for Seniors to be at Home Act (the "WISH Act"), in which workers and employers would each contribute 0.3 percent of wages to a LTC trust fund.[126] Unfortunately, the high costs of providing such insurance, lack of political will, and the complexity of America's healthcare system made it difficult for policymakers to create a viable public alternative at the federal level. State-sponsored long-term care insurance options provide another avenue for individuals to plan for their long-term care needs and reduce the burden on the Medicaid program.

II. WASHINGTON'S APPROACH: WA CARES FUND

A. THE BASICS OF WA CARES[127]

Consistent with the nationwide pattern, Washington state has been experiencing a steady increase in its elderly population, which has resulted in a proportional rise in the number of individuals in need care and constitute a significant portion of overall spending. In 2015, the state legislature passed a bill which mandated the Department of Social and Health Services to conduct an independent feasibility study of options to make LTSS affordable for Washingtonians.[128] To fulfill this mandate, an actuarial firm was commissioned to explore possible solutions, focusing on two options: (1) a public long-term care insurance program funded by workers via payroll deductions (like WA Cares), and (2) a public-private reinsurance or risk-sharing model. After consulting with various stakeholders, the firm determined that the first option was the only viable approach since relying on the private insurance market would not reach "a broad and affordable solution."[129]

A long-term care social insurance program is a government-funded program that provides financial protection to individuals who require long-term care services. Individuals pay into the system through taxes or premiums, and, in return, they are eligible to receive long-term care services when needed. By spreading the cost of care across a large pool of individuals, long-term social insurance programs aim to ensure that everyone has access to care they need, regardless of their ability to pay. Only a handful of countries, including

126. WISH Act, H.R. 4289, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/4289/text?q=%7B%22search%22:%5B%22WISH+Act%22%5D%7D&r=1&s=1.

127. *See* Long-Term Services and Supports Trust Program, WASH. REV. CODE § 50B.04 (2019). Note that the basics of WA Cares described in this section include the amendments to the program made after 2019, which are described in Part II, Section D.

128. Laurie Jinkins, *First in the Nation: Washington State's Long-Term Care Trust Act*, 98 MILBANK Q. (Mar. 2020), https://www.milbank.org/quarterly/articles/first-in-the-nationwashington-states-long-term-care-trust-act. This study was mandated by the Department of Social and Health Services through its Aging and Long-Term Support Administration. *Id.*

129. WASH. DEP'T. OF SOC. & HEALTH SERVS., REPORT TO THE LEGISLATURE: 2018 FEASIBILITY STUDY OF POLICY OPTIONS TO FINANCE LONG-TERM SERVICES AND SUPPORTS IN THE STATE OF WASHINGTON: UPDATE TO ORIGINAL STUDY A-8 (Oct. 1, 2018), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=WA%20LTSS%202018%20Feasibility%20Study_83c07ada-0ba4-4797-8798-3fec9e582043.pdf.

Germany, the Netherlands, Luxembourg, Japan, and South Korea have an LTSS social insurance system.[130] These systems are unique and are viewed as the most successful LTSS financing methods because they expand the pool of recipients of long-term care services, the diversity of benefits, and the supply in the private sector.[131]

Unsurprisingly, these existing systems, specifically Germany's, were a large source of inspiration to the director of WA Cares, Benjamin Veghte.[132] Germany's system, which also inspired both Japan and South Korea's LTSS social insurance systems, is seen as the "paradigmatic model"[133] of LTSS social insurance "because it provides robust benefits at a modest cost."[134] In 2019, Washington state passed the Long-Term Services and Supports Trust Act, now known as the WA Cares Fund, the first universal LTSS social insurance program in the United States. The program was designed to provide a way for Washingtonians to pay for long-term care services without having to deplete their life savings or rely solely on Medicaid.[135] WA Cares is similar to Social Security and Medicare Part A, as it essentially takes the model of Medicare and implements it for long-term care.[136] Workers will begin contributing in July 2023 and those eligible can claim benefits beginning in July 2026.

Social insurance programs are designed to be funded either entirely or partially through contributions by participants, including workers, employers, and sometimes even retirees.[137] In Washington, such contributions are funded *only* by employers through a payroll tax that amounts to 0.58 percent of wages, or $25 a month for the typical worker in Washington.[138] This contribution rate prioritizes sustainable financing as it is much lower than rates implemented in other countries,[139] primarily due to substantial income inequality.[140] The contribution rate is designed to be super progressive with no cap, which means that high earners will pay more in premiums than those with lower incomes. This design ensures that the burden of financing the program is equitably

130. Seok-Hwan Lee, Yongho Chon, & Yun-Young Kim, *Comparative Analysis of Long-Term Care in OECD Countries: Focusing on Long-Term Care Financing Type*, 11 HEALTHCARE, 2 (2023) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9858923/pdf/healthcare-11-00206.pdf.

131. *Id.* n.8.

132. Veghte, *supra* note 7, at 2–3.

133. *Id.* at 4; Yepifantsev, *supra* note 33.

134. Veghte, *supra* note 7, at 4.

135. WASH. DEP'T. OF SOC. & HEALTH SERVS, *supra* note 129, at A-5.

136. Yepifantsev, *supra* note 33.

137. Veghte, *supra* note 7, at 16–17.

138. Yepifantsev, *supra* note 33.

139. In contrast, Germany's payroll tax is 3.05 percent on earned income, split between employers and employees up to a cap of $70,751. The Netherlands is funded by a contributory and pensioner payroll tax of 9.65 percent on earned income up to a cap of $43,307. Veghte, *supra* note 7, at 6, 8, 12–13.

140. *Id.* at 12. Universal-comprehensive systems in other countries typically have minimal co-payments, meaning people don't have to pay much out-of-pocket for care. However, in many social insurance programs and France's hybrid approach, there are limits to the benefits provided, and families have to contribute a significant amount towards the costs of care. *Id.*

distributed.[141] Washington state policymakers determined that their residents would be willing to pay this payroll tax contribution at a level considered affordable for most of their population.[142]

The benefit was designed to be modest, with a maximum lifetime benefit of $36,500 per person. The benefit is expected to keep up with inflation,[143] which makes it a valuable investment for many Washingtonians. WA Cares provides a foundation to meet LTSS costs and functions similarly to social security in that the foundation is sourced by a payroll tax.[144] Because the costs of long-term care can vary widely depending on the individual's needs, the program offers a middle ground that can help protect people from catastrophic expenses. [145] The program is not intended to address all long-term care needs, and individuals are free to purchase private insurance if they so choose.[146] In fact, the introduction of WA Cares is expected to foster greater competition in the private insurance market, leading to more adaptable and better insurance policies.[147]

Washington state residents who work at least five-hundred hours a year and have paid the payroll tax for either ten years without interruption of five consecutive years, or three years within the last six, are eligible for the WA Cares Fund.[148] Federal employees who work in Washington do not contribute to the fund, and employees of tribal businesses only contribute if their tribe has opted in. Self-employed individuals may choose to participate, but it is not mandatory.[149] The benefits become available when the worker or retiree requires assistance with three or more activities of daily living ("ADLs"), which are defined more broadly by the state than by private long-term care insurance policies.[150] The benefits are paid directly to service providers or family caregivers, as long as they receive minimal levels of training, and do not count as income for determining eligibility for Medicaid or other state safety-net programs.[151]

141. *Id.* at 12–13.

142. Wash. Health All., *An Interview with Benjamin Veghte, Director of the New WA Cares Fund*, YOUTUBE (Sept. 24, 2021), https://www.youtube.com/watch?v=yVjt7hubWjI.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *WA Cares Fund Toolkit: Frequently Asked Questions*, WA CARES FUND, https://wacaresfund.wa.gov/sites/default/files/2023-04/WA-Cares-Toolkit-FAQ.pdf (last visited Mar. 14, 2024).

148. Long-Term Services and Supports Trust Program, WASH. REV. CODE § 50B.04 (2019).

149. *Self-Employed Elective Coverage*, WA CARES FUND, https://wacaresfund.wa.gov/self-employed-opt-in (last visited Mar. 14, 2024).

150. *See* WASH. ADMIN. CODE § 388-106-0010 (2023).

151. Howard Gleckman, *What You Need to Know About Washington State's Public Long-Term Care Insurance Program*, FORBES (May 15, 2019, 2:04 PM), https://www.forbes.com/sites/howardgleckman/2019/05/15/what-you-need-to-know-about-washington-states-public-long-term-care-insurance-program/?sh=109ed00d2cdc.

Workers in Washington state who purchased private long-term care insurance before the November 1, 2021, opt-out deadline were able to apply for an exemption from the WA Cares program.[152] Once a worker opts out of the WA Cares program, it is permanent, which means that they cannot re-enroll in the state program and cannot collect the benefit in their lifetime.[153] Some workers may be eligible for optional exemptions based on their situation, such as workers whose permanent address is outside Washington, temporary workers on a non-immigrant visa, and spouses or registered domestic partners of active-duty service members of the U.S. armed forces.[154] Additionally, veterans with 70 percent or higher service-connected disabilities can choose to opt out of the program permanently.[155] The opt-out option forced many to consider their long-term care needs and take steps to obtain insurance.[156]

WA Cares is characterized by universal, affordable, and flexible features that differentiate it from private long-term care insurance policies. Notably, the program does not discriminate against individuals with pre-existing conditions, and gender-based premiums are not imposed,[157] a common feature in private long-term care insurance. By avoiding the process of underwriting, claims adjusting, lobbying, and seeking profit, the program provides more consumer choice and flexibility.[158] Services and supports covered by the benefit include professional care at home, an assisted living facility, an adult family home or a nursing home, training and support for family members who provide care, and much more.[159] Moreover, it signifies a shift from the welfare-based Medicaid system to universal or near-universal coverage and provides a stable funding source for LTSS. The program's non-inclusion in Medicaid or Medicare eligibility[160] further expands access to care and benefits to a broader population without income or asset-based exclusions. Lastly, WA Cares's introduction of new revenue into the industry incentivizes new businesses to form and innovate,

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152. *Exemptions*, WA CARES FUND, https://wacaresfund.wa.gov/how-it-works/exemptions (last visited Mar. 14, 2024).

153. *WA Cares Exemptions: Next Steps After Approval*, WA CARES FUND, https://live-dshs-wacaresfund.pantheonsite.io/sites/default/files/2023-06/Steps%20after%20exemption.pdf (last visited Mar. 14, 2024).

154. *Exemptions*, *supra* note 152.

155. *About the WA Cares Fund: Why Does the Fund Exist?*, WA CARES FUND, https://wacaresfund.wa.gov/about-the-wa-cares-fund/#:~:text=Veterans%20with%20a%2070%25%20or,Fund%20starting%20January%201%2C%202023 (last visited Mar. 14, 2024).

156. Elizabeth Hovde, *Update on Number of People Opting Out of State's Long-Term Care Program*, WASH. POL'Y CTR. (June 15, 2022), https://www.washingtonpolicy.org/publications/detail/update-on-number-of-people-opting-out-of-states-long-term-care-program.

157. WA Cares Fund, *WA Cares Basics: What Workers Need to Know*, YOUTUBE (Jan. 18, 2023), https://www.youtube.com/watch?v=qnBJRzO6ntM&t=2988s&ab_channel=WACaresFund.

158. Wash. Health All., *supra* note 142.

159. Full list includes: adaptive equipment and technology, home safety evaluations, home-delivered meals, care transition coordination, memory care, environmental modifications, personal emergency response system, transportation, dementia supports, and education. *Benefit Coverage*, WA CARES FUND, https://wacaresfund.wa.gov/wa-cares-benefits (last visited Mar. 14, 2024).

160. WASH. REV. CODE § 50B.04.150 (2019).

potentially transforming the way care is delivered.[161] Predictions suggest that affordable supplemental policies may emerge as the private market adjusts to the program's requirements.[162]

B. Lack of Public Support and Portrayals in the Media

While WA Cares has received a positive response from a large number of people, concerns have been raised regarding funding issues, perceived lack of value, and overall dissatisfaction with having to pay payroll taxes. These concerns have played a significant role in shaping the legislation, prompting meaningful revisions to address them.[163] While not all concerns have been fully resolved, the statute is continuously evolving in response to public feedback conveyed to the LTSS Trust Commission, the responsible oversight body for WA Cares.

One of the biggest concerns about WA Cares is the assertion that the program is insolvent or on a trajectory to be insolvent.[164] One particular factor that has contributed to this perception is the acceptance of a floor amendment by the Senate which allowed for a one-time opt-out provision.[165] Because the tax is progressive, the opt-out provision incentivized affluent individuals to purchase private insurance. Although the market adapted quickly with state employers offering workers the opportunity to purchase private plans, the demand for long-term care policies skyrocketed in the summer preceding the deadline, prompting insurance companies to halt sales temporarily in the state.[166] Approximately 473,000 workers, representing 13 percent of the state's workforce, opted out of the program.[167]

Despite the departure of these workers, 3.1 million workers will begin paying into the program in July, out of 3.6 million total.[168] Furthermore, the

161. Yepifantsev, *supra* note 33.

162. *Id.* This is seen in countries like France and Germany in which private insurance has grown remarkably, but the scale in these countries is small and not universalized. Seok-Hwan Lee et al., *supra* note 130, at 2.

163. *See generally* Long-Term Servs. & Supports Tr. Comm'n, LTSS Trust Commission Recommendations Report: RCW 50B.04.030 (4) (2023), https://wacaresfund.wa.gov/sites/default/files/2023-04/2023%20LTSS%20Trust%20Commission%20Recommendations%20Report.pdf.

164. Lawrence Wilson, *WA Cares Called Insolvent, Unfair, and Unnecessary by Local Think Tank*, Ctr. Square (July 28, 2022), https://www.thecentersquare.com/washington/article_9c73b032-0ec4-11ed-932c-b71079fe12ba.html.

165. Chris Wright, *State Agencies Begin Implementing Improvements to WA Cares Fund*, Medium (Jan. 27, 2022), https://dshswa.medium.com/state-agencies-begin-implementing-improvements-to-wa-cares-fund-2e9c27673ba7.

166. *Thousands Apply for Exemption from Washington's Long Term Care Tax*, Wash. Exam'r (Oct. 15, 2021, 4:00 PM), https://www.washingtonexaminer.com/politics/thousands-apply-for-exemption-from-washingtons-long-term-care-tax.

167. Rachel La Corte, *Delay of Washington's Long-Term Care Program Signed into Law*, KIRO7 (Jan. 27, 2022, 4:39 PM), https://www.kiro7.com/news/local/delay-washingtons-long-term-care-program-signed-into-law/QN2SAB45ABFRBCGID3TUHNJLPA.

168. Michelle Andrews, *Washington State Retools First-in-the-Nation Long-Term Care Benefit*, KFF Health News (Apr. 18, 2022), https://kffhealthnews.org/news/article/washington-state-retools-first-in-the-nation-long-term-care-benefit.

Office of the State Actuary has projected that the program will remain fully funded through 2075, assuming the 0.58 percent tax remains constant.[169] The state is also considering authorizing the investment of a portion of reserves in private stocks and bonds, which could boost expected yields.[170] Critics of the program's solvency fail to account for the significant savings it offers to the state Medicaid program, which is projected to save around ten percent of Medicaid's costs.[171] Taking into account these savings, the WA Cares program will be funded through 2097.[172] The financial balance of the program is reviewed every two years, similar to the Social Security Administration, and future legislatures can make adjustments as necessary based on economic conditions or wage growth.[173]

Although there are eerie similarities between WA Cares and the abandoned CLASS program, which was ultimately abandoned due to solvency issues, WA Cares differs from CLASS in several ways. WA Cares is a *mandatory* payroll tax that every employee (except those doing very part-time work) must pay, whereas CLASS was voluntary. The voluntary nature of CLASS meant that the issue of adverse selection was particularly concerning, with costs projected up to $3,000 per month in worst case scenarios.[174] Additionally, the WA Cares benefit is a lifetime maximum of $36,500, whereas the CLASS benefit would have been about $50 per day for life. Finally, premiums for CLASS would have been relatively high—$125 to $400 per month—but WA Cares only requires an expected average of $300 per year from the average Washingtonian.

Some critics have dismissed WA Cares as a worthless benefit, arguing that the $36,500 lifetime benefit is insufficient, especially given that LTC in WA costs $5,200 per month for assisted living, $13,000 per month for nursing home care, and $360 to $420 per day for skilled nursing.[175] However, this criticism overlooks the fact that the program was designed as a short-term solution rather

169. Laurel Demkovich, *With Opt-Out Deadline Looming, Washington's Long Term Care Benefit and Tax Draws Praise, Criticism*, SPOKESMAN-REV. (Aug. 29, 2021), https://www.spokesman.com/stories/2021/aug/29/with-opt-out-deadline-looming-washingtons-long-ter ("In 2076, the report found only 71% of full benefits would be paid out. In 2086, 77% of full benefits could be paid, and in 2096, 85% of full benefits could be paid.").

170. Henry J. Aaron, *The Future of WA Cares: A Response to Warshawsky*, BROOKINGS (June 22, 2022), https://www.brookings.edu/research/the-future-of-wa-cares-a-response-to-warshawsky.

171. *Id.*

172. *Id.* "[T]he program has the potential to save the state Medicaid program $898 million between 2051 and 2053." Abby Wargo, *Judge Won't Pick a Victor in Wash. Benefits Program Battle*, LAW360 (May 18, 2022, 2:57 PM), https://www.law360.com/articles/1494555/judge-won-t-pick-a-victor-in-wash-benefits-program-battle.

173. Aaron, *supra* note 170.

174. Joe Caldwell & Howard Beflin, *Beyond the CLASS Act: The Future of Long-Term Care Financing Reform*, 24 PUB. POL'Y & AGING REP. 50, 52 (2014), https://heller.brandeis.edu/community-living-policy/images/pdfpublications/2014marchbeyondtheclassact.pdf.

175. *SLD Solutions Offering Last Remaining Long-Term Care Policy in Washington: November 1 Deadline for Washington Residents to Purchase Long-Term Care Insurance Nears*, PR NEWSWIRE (Sept. 29, 2021), https://www.prnewswire.com/news-releases/sld-solutions-offering-last-remaining-long-term-care-policy-in-washington-301387528.html.

than a comprehensive long-term care plan. The plan provides state residents with financial backing sufficient for short institutional stays or for roughly one year of in-home assistance.[176] According to Representative Nicole Macri, a member of the LTSS Trust Commission, this benefit amount works in Washington as opposed to other states because Washington has built a long-term care system that is "heavily tilted towards home care" over the last two decades.[177] She adds that while many other states may only have nursing homes as an option, $36,500 could buy around one year of high quality home care in Washington.[178]

Taxes are a complex and polarizing issue in American politics, and WA Cares has not been immune to this reality. Unlike Medicare, which created a universal risk pool, the opt-out period of WA Cares has created a financial incentive for insurance companies to market to individuals and "cherry pick" them out of the program, leading to negative sentiments.[179] Furthermore, the overall dissatisfaction with having to pay payroll taxes has prompted many to believe that existing healthcare programs, such as Medicaid and Medicare, should just be adapted to include more long term care coverage or that people should purchase private insurance.[180]

WA Cares has also sparked discussions about various conceptual issues. For instance, the benefit may create a false sense of coverage, as people assume they are fully protected without realizing the limitations of the benefit.[181] Moreover, though democratic initiatives created the program, some say that WA Cares embodies a patriarchal approach, which clashes with the individualistic trends of modern society.[182] To opponents, WA Cares represents a different type of insurance that individuals did not explicitly ask for, leading to concerns about personal autonomy. Additionally, there is apprehension about individuals paying into the program throughout their lives without ever needing the benefit. But isn't providing coverage for unexpected events a fundamental aspect of insurance?[183] One thing everyone can agree on is that WA Cares has raised awareness about long-term care needs and the importance of addressing them.

176. Aaron, *supra* note 170.

177. Interview with Nicole Macri, Wash. State Rep., in S.F., Cal. (Mar. 14, 2023) ("[Washington has] tens of thousands of home care workers in this state. They're well trained, they're organized, they're unionized, and in many other states they don't that. They don't have high quality home care.").

178. *Id.*

179. Wash. Health All., *supra* note 142.

180. Mark J. Warshawsky, *The Second Failed Attempt at Public Insurance for Long-Term Services and Supports*, HEALTH AFFS. (Feb. 3, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220131.939312.

181. Elizabeth Hovde, *Why the State Should Repeal the Long-Term-Care Payroll Tax in Washington*, VANCOUVER BUS. J. (Feb. 7, 2023), https://www.vbjusa.com/opinion/op-ed/why-the-state-should-repeal-the-long-term-care-payroll-tax-in-washington.

182. Abigail Marsh, *Could a More Individualistic World Also Be a More Altruistic One?*, NPR (Feb. 5, 2018, 3:11 PM), https://www.npr.org/sections/13.7/2018/02/05/581873428/could-a-more-individualistic-world-also-be-a-more-altruistic-one#:~:text=As%20the%20researchers%20reported%20in,shift%20toward%20white%2Dcollar%20jobs.

183. Wash. Health All., *supra* note 142.

These concerns and perceptions expressed by the public highlight the need for ongoing dialogue and adaptation to address the diverse perspectives surrounding WA Cares.

C. Constitutional Challenges and Judicial Scrutiny

There has only been one significant legal challenge to WA Cares thus far—*Pacific Bells, LLC v. Inslee*.[184] The class action lawsuit was filed by a group of employers and workers challenging the enforceability of the act establishing the WA Cares program. The lawsuit claimed that the program violated the Employee Retirement Income Security Act (ERISA) and federal and state law governing employee benefit plans.[185] Specifically, the complaint alleged that the original version of the WA Cares bill in 2019 violated federal age discrimination laws, as it required older employees who planned to retire within the next decade to pay premiums without ever being eligible to receive the corresponding benefit.[186] Furthermore, the complaint asserted that the opt-out provision was deemed illusory due to the insufficient time provided for workers to secure private insurance.[187] This timing constraint effectively coerced them into participating in the program, constituting a violation of ERISA.[188]

The complaint claimed that the federal court had subject matter jurisdiction due to federal question[189] (i.e., ERISA). However, the case was ultimately thrown out because the court determined that it lacked subject matter jurisdiction. The program is not established or maintained by an employer and/or employee organization, and therefore is not governed or preempted by ERISA.[190] Additionally, the Tax Injunction Act prevented federal courts from interfering, as WA Cares is a state tax and not within federal jurisdiction.[191] As a result, only state courts have jurisdiction to rule on WA Cares, which means that state constitutionality issues can still be brought up against the program. United States District Judge Thomas S. Zilly of the Western District of Washington in *Pacific Bells* suggested that the plaintiffs may challenge WA Cares as a violation of Article VII, Section I of the Washington Constitution, which requires all taxes to be uniform on the same class of property or subjects within the territorial limits of the taxing authority.[192]

184. 600 F. Supp. 3d 1149 (W.D. Wash. 2022).

185. ERISA Complaint–Class Action Complaint for Declaratory Relief, Fiduciary Breach, and Restitution of Amounts Wrongfully Withheld at 2-3, Pac. Bells, LLC v. Inslee, No. 2:21-cv-01515 (W.D. Wash. Nov. 9, 2021).

186. *Id.* at 2, 7.

187. Wargo, *supra* note 172.

188. *Id.*

189. ERISA Complaint–Class Action Complaint for Declaratory Relief, *supra* note 185, at 3.

190. Liz J. Deckman & Kira J. Johal, *Class Action Lawsuit Filed Against Washington State's Long Term Cares Act – Dismissed!*, SEYFARTH (Apr. 28, 2022), https://www.seyfarth.com/news-insights/class-action-lawsuit-filed-against-washington-states-long-term-cares-act-dismissed.html.

191. Wargo, *supra* note 172.

192. Pac. Bells, LLC v. Inslee, 600 F. Supp. 3d 1149, 1164 n.22 (W.D. Wash. 2022).

In response to the suggestion from the Honorable Judge Zilly, attorneys at Davis Wright Tremaine, the law firm representing the plaintiffs in *Pacific Bells*, undertook efforts to identify viable state claims. Initially, the attorneys held the belief that the opt-out provision exempting four-hundred thousand individuals permanently, and the 2019 statute exempting two-hundred thousand individuals and approximately two-hundred thirty self-employed individuals, might potentially violate the state's uniformity clause.[193] In January 2023, the law firm was waiting on the federal district court's decision in *Quinn v. State*,[194] a separate then-pending case in which the primary issue revolved around the characterization of a tax.[195] However, the holding of *Quinn*[196] suggests that WA Cares does not violate the uniformity clause of the Washington State Constitution because it is not an income tax.[197] Moreover, the tax is levied uniformly on all employees in the State of Washington who are not covered by a private long-term care insurance policy.[198] This includes all employees regardless of their income, occupation, or place of employment, suggesting that the tax is uniform. Thus, while other challenges to the WA Cares program may arise in the future, it is unlikely that the program would be found to violate the uniformity clause of the Washington State Constitution.

WA Cares survived this challenge, but opponents of the program have continued to pursue other legal initiatives. Republican representatives in the Washington legislature have introduced multiple "repeal the tax" bills,[199] none of which have passed. A referendum was filed in 2021 to allow workers to opt-out of the program at any time and for any reason, making the program completely optional, [200] but the proposed initiative fell short on the three-hundred twenty-five "signatures it needed to qualify for the November 2022 statewide ballot."[201] The attorney general of Idaho also filed a cease-and-desist order that Idaho residents working in Washington be exempted from the

193. Richard Birmingham & Christine C. Hawkins, *Who Is Caring for WA Cares? Part 2: Benefit or Burden?*, DAVIS WRIGHT TREMAINE (Jan. 31, 2023), https://www.dwt.com/blogs/employment-labor-and-benefits/2023/01/wa-care-long-term-services.

194. Quinn v. Dep't of Revenue, 526 P.3d 1 (Wash. 2023).

195. Birmingham & Hawkins, supra note 193.

196. The law firm was depending on the outcome of *Quinn*, in which the state argued that a 2022 capital gains tax was an excise tax rather than an income tax. *Id.* The Washington Supreme Court held that the capital gains tax was appropriately characterized as an excise tax because it is levied on the sale or exchange of capital assets. *Quinn*, 526 P.3d at 6–7.

197. *Id.*

198. WASH REV. CODE ANN. § 50B.04.085 (2019).

199. S.B. 5965, 67th Leg., 2022 Reg. Sess. (Wash. 2022); H.B. 1011, 68th Leg., 2023 Reg. Sess. (Wash. 2023).

200. Drew Mikkelsen, *Initiative Could Change Washington's Controversial Long-Term Care Fund*, KING 5 (Nov. 1, 2021, 6:19 PM), https://www.king5.com/article/news/local/initiative-could-change-washingtons-controversial-long-term-care-fund/281-0ba61beb-61dc-4736-bb83-0332a15551e1.

201. Amanda Zhou, *Proposed Washington Ballot Iinitiative Challenging WA Cares Long-Term Care Program Fails to Gather Enough Signatures*, SEATTLE TIMES (Dec. 30, 2021, 7:49 PM), https://www.seattletimes.com/seattle-news/politics/proposed-washington-ballot-initiative-challenging-wa-cares-long-term-care-program-fails-to-gather-enough-signatures.

program.[202] Seattle-based Amazon, Microsoft, and Alaska Airlines, along with forty local chambers of commerce, requested Governor Jay Inslee to delay the implementation of the law.[203] All of these concerns have resulted in delays and changes to WA Cares.

D. Changes to the Bill Since 2019

Since its passage in 2019, the WA Cares Act has undergone several changes. Much of the concerns raised by Washingtonians, including certain inequities created by the original bill, have been addressed through legislation. In 2022, Governor Jay Inslee signed two bills, House Bill 1732 and House Bill 1733, which make changes to the WA Cares Fund. House Bill 1732 enables near-retirees to qualify for partial benefits[204] and delays the WA Cares fund by eighteen months, pushing back its start date from 2022 to July 2023.[205] House Bill 1733 allows certain individuals, such as veterans with disabilities, spouses and registered domestic partners of military service members, workers on temporary nonimmigrant visas, and employees who work in WA but live in a different state, to opt out of WA Cares.[206] Additionally, individuals whose disability onset occurred before age eighteen will now be eligible for program benefits.[207] These changes aim to improve the WA Cares Fund and address some of the concerns expressed by residents of Washington state.

One significant issue that remains to be addressed within the legislation pertains to portability concerns associated with WA Cares. Questions arise regarding what happens if an individual wishes to retire or relocate outside of Washington state, especially if they have been contributing to the fund. Presently, the program requires beneficiaries to reside within the state of Washington,[208] and neither of the recently passed House Bills addressing the statute have tackled these specific questions. Nicole Macri admitted that portability issues are shortcomings that have been accurately portrayed in the media, but unlike cash benefits, WA Cares is a service benefit–a difference

202. Elizabeth Hovde, *Commentary: A List of Trouble for Washington State's Long-Term Care Law*, REFLECTOR (Nov. 15, 2021, 5:26 PM), https://www.thereflector.com/stories/commentary-a-list-of-trouble-for-washington-states-long-term-care-law,278704.

203. Ted O'Neil, *Washington State Long Term Care Tax Facing Challenges*, CTR. SQUARE (Nov. 2, 2021), https://www.thecentersquare.com/washington/article_ac86c8e6-3c02-11ec-8a99-530f2330aefc.html.

204. Those near retirement earn 10% of the full benefit amount for each year they work at least 500 hours. *Benefits for Near-Retirees*, WA CARES FUND, https://wacaresfund.wa.gov/news/benefits-near-retirees#:~:text=Anyone%20born%20before%20January%201,hours%20per%20week%20on%20average) (last visited Mar. 14, 2024).

205. H.B. 1732, 67th Leg., 2022 Reg. Sess. (Wash. 2022).

206. Wright, *supra* note 165.

207. CHRISTOPHER GIESE, ALLEN SCHMITZ, ANNIE GUNNLAUGSSON & EVAN POLLOCK, OFFICE OF THE STATE ACTUARY, 2022 WA CARES FUND ACTUARIAL STUDY 5 (2022).

208. LONG-TERM SERVS. & SUPPORTS TR. COMM'N, *supra* note 163, at 5.

which makes portability much trickier than paid family leave.[209] Still, the LTSS Trust Commission has acknowledged the challenges related to portability and has proposed recommendations addressing these concerns.

The LTSS Trust Commission has released several recommended solutions to the portability issue. Firstly, individuals who have contributed for a minimum of one year and subsequently relocate out of state should have the option to choose portable benefits coverage.[210] They would continue paying premiums until their retirement age, ensuring the continuity of their coverage.[211] To enhance coordination with LTSS providers across different states, the Commission suggests granting flexibility to the Department of Social and Health Services and the Health Care Authority to determine the most cost-effective and feasible approaches.[212] Effective resolution of the portability challenges in the WA Cares program necessitates careful cost management, well-timed nationwide implementation, and strategic evaluation of alternative benefit structures and cross-state coordination.[213] Although the LTSS trust commission has issued recommendations addressing portability issues, the legislature has not yet considered these recommendations as the recent legislative session focused primarily on housing issues.[214] As a result, further discussions and adjustments to the program will be postponed until the next legislative session.[215]

WA Cares Act has undergone several amendments since its passage in 2019, reflecting the responsiveness of lawmakers to the concerns of Washingtonians and their commitment to improving the program. The signing of House Bill 1732 and 1733 marks significant steps towards addressing issues related to inequities and expanding eligibility criteria for certain groups. Yet, the future of the WA Cares program remains uncertain. Additionally, portability concerns must be addressed by the legislature, and solvency issues beyond 2075 need to be resolved to ensure the program's long-term viability and sustainability. Continued dialogue, collaboration, and evaluation will be necessary to address remaining challenges in the years to come. As more states adopt programs like WA Cares, portability issues may become easier to navigate.

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209. Interview with Nicole Macri, *supra* note 177 ("Rep. Nicole Macri, D-Seattle, said lawmakers are considering the WA Cares Fund's recommendations on portability, though it is not as simple as just offering a cash benefit without considering actuarial formulas."); Seattle Times Ed. Bd., *WA Cares to Go into Effect in July with Flaws Legislature Refused to Fix*, SEATTLE TIMES (May 8, 2023, 3:00 PM), https://www.seattletimes.com/opinion/editorials/wa-cares-to-go-into-effect-in-july-with-flaws-legislature-refused-to-fix.

210. LONG-TERM SERVS. & SUPPORTS TR. COMM'N, *supra* note 163, at 6.

211. *Id.*

212. *Id.* at 8.

213. *Id.* at 5–9.

214. Amanda Zhou, *What to Know About WA Cares Payroll Tax as Premiums Are Set to Resume*, SEATTLE TIMES (May 15, 2023, 6:00 AM), https://www.seattletimes.com/seattle-news/politics/what-to-know-about-wa-cares-payroll-tax-as-premiums-are-set-to-resume.

215. *Id.*

III. WA CARES OUTSIDE OF WASHINGTON

Many states have implemented initiatives for long-term care to provide support and assistance to individuals in need of long-term care services. One such program is the Program of All-Inclusive Care for the Elderly ("PACE"), which offers comprehensive long-term care services to eligible individuals in their homes and communities.[216] PACE Long-Term Care Partnership Programs[217] are designed to provide asset protection against Medicaid spend-down requirements through the purchase of long-term care insurance policies. State Health Insurance Assistance Programs ("SHIPs")[218] play a crucial role in providing information and assistance to individuals with Medicare and their families regarding long-term care financing options. Similarly, HICAP, which is partially funded by federal grant funding for SHIPs,[219] offers free Medicare counseling from volunteer counselors and educational presentations to Medicare beneficiaries.[220]

While the initiatives play a significant role in ensuring that families can access essential long-term care services and supports ("LTSS"), the increasing demand for a consistent and foreseeable funding source for LTSS has prompted several states to consider the implementation of a long-term care social insurance program as a viable solution to address various LTSS requirements. Implementing a state benefit can help ensure equity in the payment for care and services and ensure that access to care is not limited by income.[221] Additionally, it can incentivize the promotion of home and community-based care, which is often more cost-effective and preferable for individuals and families.[222] A state benefit could also address the workforce shortage in the LTSS industry by providing funding for workforce training and support programs.[223] In light of these benefits, several states, including California, Illinois, Michigan,

216. *See generally* Kris Chana, *All Inclusive Care for Seniors (PACE) Program*, YOUTUBE (June 25, 2021), https://www.youtube.com/watch?v=HHv5wmaEZY0 (discussing eligibility requirements, typical PACE participants, service and benefits, and funding, among other topics surrounding PACE). PACE provides coverage for all needed preventative, primary, acute and long-term care services including "prescription drugs, doctor care, transportation, home care, checkups, hospital visits, and even nursing home stays whenever necessary." *Quick Facts About Programs of All-Inclusive Care for the Elderly (PACE)*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 2008), https://www.cms.gov/Medicare/Health-Plans/pace/downloads/externalfactsheet.pdf.

217. *See generally* ALEXIS AHLSTROM, EMILY CLEMENTS & ANNE TUMLINSON, THE LONG-TERM CARE PARTNERSHIP PROGRAM: ISSUES AND OPTIONS (2004), https://www.brookings.edu/wp-content/uploads/2016/06/200412retirement.pdf (discussing the LTC Partnership Program's history, objectives, and future questions to further implement the program's goals).

218. *State Health Insurance Assistance Program (SHIP)*, ADMIN. FOR CMTY. LIVING (Nov. 6, 2023), https://acl.gov/programs/connecting-people-services/state-health-insurance-assistance-program-ship.

219. BRIANNA ENSSLIN JANOSKI, MODERNIZING CALIFORNIA'S HEALTH INSURANCE COUNSELING & ADVOCACY PROGRAM (HICAP): STRATEGY RECOMMENDATIONS 6 (2021), https://atiadvisory.com/wp-content/uploads/2021/12/Modernizing-Californias-HICAP-Strategy-Recommendations.pdf.

220. *HICAP*, CAL. HEALTH ADVOCS., https://cahealthadvocates.org/hicap/ (last visited Mar. 14, 2024).

221. Veghte, *supra* note 7, at 11.

222. Interview with Nicole Macri, *supra* note 177.

223. Wash. Health All., *supra* note 142.

Vermont,[224] and New York[225] are considering implementing long-term care financing plans similar to WA Cares.

Though it would be ideal to adopt a program like WA Cares on a national level,[226] other states are looking to WA Cares as a model for their version of a state-run program. In 2019, California established the Long Term Care Insurance Task Force,[227] and the task force is interested in implementing a comprehensive benefit ranging from $36,000 to $144,000 funded by a progressive payroll tax.[228] Minnesota had previously attempted to implement a benefit program similar to WA Cares years ago but the plan was derailed due to the COVID-19 pandemic.[229] In New York, Senate Bill S9082 draws inspiration from WA Cares and proposes a 1 percent payroll tax.[230] Pennsylvania House Bill 2779 also models itself after WA Cares, with an identical premium rate of 0.58 percent.[231] These states recognize the potential of WA Cares and are actively exploring its application to address long-term care challenges within their respective jurisdictions.

A social insurance benefit designed along the lines of WA Cares may not be an entirely flawless solution for addressing long-term care financing in the United States. However, its significant advantage lies in providing families with a valuable opportunity to strategize and plan for the care of their loved ones requiring LTSS. This advantage holds particularly true in rural areas,[232] where individuals in need of care often reside in isolation from other family members. By implementing a benefit akin to WA Cares, families would be afforded

224. *Id.* California has also raised the asset limit for their Medicaid program to $130,000 and as of January 2024, there will be no asset limit for Medicaid in California at all. *Asset Limits: Get Medi-Cal*, DEP'T OF HEALTH CARE SERVS., https://www.dhcs.ca.gov/Get-Medi-Cal/Pages/asset-limits.aspx (last visited Mar. 14, 2024).

225. S.B. S9082, 2021-2022 Legis. Sess. (N.Y. 2022).

226. Yepifantsev, *supra* note 33. ("[It's] easier for private insurance companies to offer supplemental private coverage, . . . easier for people to plan as they move across states, . . . easier for [employers] to offer supplemental employee benefits.").

227. OLIVER WYMAN, CALIFORNIA ASSEMBLY BILL 567 FEASIBILITY REPORT 2 (2022), https://www.insurance.ca.gov/0500-about-us/03-appointments/upload/AB567OliverWymanFeasibilityReport2022.pdf (noting some alternatives to a public long-term care insurance design highlighted in a feasibility report by the task).

228. *California Considers a Statewide Long-Term Care Insurance Program*, KEENAN (Apr. 21, 2023), https://www.keenan.com/Resources/Briefings/Briefings-Detail/california-considers-a-statewide-long-term-care-insurance-program. Unlike WA Cares, the payroll tax would be split between employees and employers and would have a contribution cap and contribution waiver for low-income individuals. *Id.*

229. Interview with Nicole Macri, *supra* note 177; Howard Gleckman, *Minnesota Considers Two New Ways to Pay for Long-Term Care,* HOWARD GLECKMAN (Dec. 14, 2018), https://howardgleckman.com/2018/12/14/minnesota-considers-two-new-ways-to-pay-for-long-term-care.

230. *California Considers*, *supra* note 228. However, if passed, the bill would not give residents time to buy LTC insurance and any employed person who cancels their long-term care insurance must notify the state and pay the payroll tax. *Is a Long Term Care Tax Coming to Your State?*, ACACIA INS. SERVS. (Jan. 2, 2024), https://www.ltcinsuranceconsultants.com/2023/01/03/long-term-care-tax/#:~:text=Following%20Washington%2C%20several%20other%20states,a%20Long%20Term%20Care%20Tax.

231. H.B. 2779, Reg. Sess. 2021-2022 (Pa. 2022).

232. Wash. Health All., *supra* note 142.

additional time and resources to effectively plan for the coming years and make informed decisions regarding the care of their loved ones.

A. Additional Considerations for an Efficient Insurance Benefit

States looking to implement a program like WA Cares should consider several key factors to ensure the program's success and effectiveness. Investing in home and community-based services ("HCBS") forms a critical foundation for such programs, as demonstrated by Washington's well-established home care program.[233] Additionally, creating a long-term care insurance task force or committee is vital to ensure inclusivity and equity in program design, accounting for diverse cultural and income differences. Engaging private researchers and stakeholders, alongside a balanced approach that considers actuarial impacts and financial feasibility is also essential for successful implementation. A particularly challenging factor for other states is coordinating with existing long-term care programs and services, while navigating political challenges. These elements form an integral part of the framework necessary for replicating programs like WA Cares nationwide.

Investing in HCBS is a crucial consideration for states looking to implement a program like WA Cares in the future. Before the creation of WA Cares, Washington had a well-established home care program, offering various services such as adult day care, In-Home Supports and Services ("IHSS"), specialized dementia care, and a long-term care ombudsman program.[234] The state allocated over seventy percent of its Medicaid spending on long-term care to HCBS programs.[235] These existing programs have enabled many families to stay together, promoting independence and enhancing the overall quality of life for individuals in need of long-term care. By investing in HCBS programs, states can leverage existing infrastructures and services to maximize the effectiveness of the benefits provided.[236] Implementing home and community-based programs also fosters a sense of independence and dignity.[237] Additionally, it can help alleviate the strain on institutional care facilities and reduce costs

233. *Services that Help an Adult Remain at Home*, WASH. STATE DEP'T OF SOC. & HEALTH SERVS., https://www.dshs.wa.gov/altsa/home-and-community-services/services-help-adult-remain-home (last visited Nov. 7, 2023).

234. LastWeekTonight, *Long-Term Care: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 11, 2021), https://www.youtube.com/watch?v=2xlol-SNQRU&ab_channel=LastWeekTonight. According to the AARP Public Policy Institute, only five states (i.e., Alaska, California, New Mexico, Oregon, and Washington) currently spend more Medicaid LTSS dollars on HCBS than nursing homes in 2009. GRETCHEN ENGQUIST, CYNDY JOHNSON, ALICE LIND & LINDSAY PALMER BARNETTE, CTR. FOR HEALTH CARE STRATEGIES, INC., MEDICAID-FUNDED LONG-TERM CARE: TOWARD MORE HOME- AND COMMUNITY-BASED OPTIONS 2 (2010).

235. LastWeekTonight, *supra* note 234.

236. Michelle Martin, *The Benefits of Providing LTSS Through Home-and-Community-Based Services*, UNITED HEALTHCARE (June 24, 2021), https://www.uhccommunityandstate.com/content/topic-profiles/ltss/the-benefits-of-providing-ltss-through-home--and-community-based.

237. Elizabeth Edwards, *Health Advocate: Home and Community Based Settings – A Primer*, NAT'L HEALTH L. PROGRAM (Feb. 18, 2014), https://healthlaw.org/resource/health-advocate-home-and-community-based-settings-a-primer.

associated with long-term care services.[238] By investing in these programs, states can effectively meet the needs of their residents while promoting efficient and person-centered care.

Creating a long-term insurance task force or committee is also essential for states considering the implementation of a program like WA Cares. Such task forces can play a crucial role in addressing the diverse cultural and income differences within their populations. Recognizing that one size does not fit all, it is important to develop long-term care programs that are inclusive and equitable, catering to the unique needs of different individuals and communities.[239] States must take into account the economic disparities and cultural differences when designing long-term care programs.[240] By conducting a thorough assessment of their population's needs, including an analysis of existing gaps and challenges in accessing and affording long-term care services, states can tailor their programs accordingly. Task forces should emphasize the importance of attending to the person's overall well-being and preserving their connections within their community to ensure that their proposed social insurance benefit encapsulates and accounts for the needs of as many beneficiaries as possible.

A long-term care insurance task force or committee can also engage private researchers to analyze various factors, such as the feasibility of state-only investment or borrowing against the future to expedite the program's launch.[241] These analyses can help inform decisions regarding the program's timeline and financial sustainability, ensuring that individuals can benefit from the program sooner while maintaining its long-term viability.[242] Furthermore, open dialogue and collaboration with various stakeholders, including caregivers, long-term care providers, advocacy groups, and policymakers, are vital. Engaging these stakeholders will allow for the gathering of diverse perspectives, addressing concerns, and incorporating valuable input into the program's design and implementation. This collaborative approach will foster buy-in, generate support, and enhance the overall effectiveness of the initiative.[243]

A balanced approach which considers the changing elements of the program and their actuarial impacts[244] is also essential to the program's financial feasibility. Decisions regarding the timing of benefits availability and funding are crucial. States should estimate projected costs, identify potential funding sources to ensure the program's sustainability and monitor factors that increase

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238. *Id.*

239. PBS NewsHour, *Solutions for Aging with 'Dignity, Independence and Choice'*, YOUTUBE (Nov. 5, 2013), https://www.youtube.com/watch?v=gJidgN7oZKc&t=4733s.

240. *Id.*

241. *See generally* CHRISTOPHER GIESE ET AL., *supra* note 207. For example, extending the time before benefits become available has proven helpful to decrease premiums, while increasing LTSS accessibility has raised premiums. *Id.*

242. Interview with Nicole Macri, *supra* note 177.

243. *Id.*

244. *Id.*

premiums. For example, extending the time before benefits become available proved helpful in reducing premiums for WA Cares, while increasing the accessibility to the benefit raised premiums.[245] Similarly, there is a trade-off between front-loading the benefit to provide immediate assistance and waiting until sufficient funds are accumulated.[246] The exemption of certain individuals from the program has been a subject of debate in the public.[247] However, many of the creators of WA Cares have argued that implementing the program without exemptions may have been a better approach.[248] States should consider feasibility issues and policy effects on public perception to garner public support and address concerns.

The coordination and integration with existing long-term care programs and services, such as private long-term care insurance, Medicaid, and Medicare is an important consideration for replicating similar programs to WA Cares in other states. By identifying opportunities for collaboration and alignment, states can ensure that the program complements existing services and maximizes the resources available. However, there are challenges associated with combining these measures. One significant challenge is political pushback, as state policymakers may have competing priorities and differing views on the role of government in providing LTSS. Developing the necessary legal and regulatory framework to support the program and overcome these obstacles requires substantial effort and expertise.

By carefully addressing these factors, states can replicate successful programs like WA Cares and provide comprehensive and accessible long-term care support to their residents, promoting well-being and enhancing the overall quality of life. Addressing the evolving needs of their populations will invariably pose ongoing challenges; however, with the successful implementation of WA Cares, states now have a well-defined blueprint to initiate the establishment of a comprehensive statewide long-term care benefit.

CONCLUSION

The United States faces a critical challenge in developing a legitimate financing mechanism to support LTSS. While the private insurance options and federal programs have fallen short in providing comprehensive solutions, the Washington Cares Fund stands as a promising model. The state social insurance program offers a flexible and affordable alternative, targeting long-term care

245. *See generally* CHRISTOPHER GIESE ET AL., *supra* note 207.

246. "Unlike the federal government, state governments can't print money. The federal government can essentially go into debt, huge amounts of debt. And so they basically front funded social security, so people could immediately get the benefit before they had built up the social security trust fund. And what we are doing is saying, 'Give us a few years to build up the trust fund, then we could start to pay out the benefits.' And it's that time period that puts us in a vulnerable position politically because people are like, 'Why are you taking this money?'" Interview with Nicole Macri, *supra* note 177.

247. *See supra* Part II.

248. Interview with Nicole Macri, *supra* note 177; Wash. Health All., *supra* note 142.

financing for all employees in Washington state. The successes of WA Cares provide valuable insight for other states to consider and replicate, as they strive to address the growing need for long-term care financing. By embracing public benefits for long-term care as a fundamental pillar of social policy, alongside retirement and healthcare, states can navigate the complexities and develop sustainable programs. With the guidance provided by WA Cares, policymakers have a roadmap to shape comprehensive and effective long-term care financing solutions that meet the needs of their populations. The implementation of state-level social insurance programs holds immense potential in advancing the overall well-being and quality of life for individuals requiring long-term care across the nation.