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Don't Tax the Kids: Supporting Preschool Education Through Property Tax Exemptions

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DON'T TAX THE KIDS: SUPPORTING PRESCHOOL EDUCATION THROUGH PROPERTY TAX EXEMPTIONS

Mark A. Paige* & Todd A. DeMitchell**

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We long ago decided an educated public was an outcome worth the shared expense of providing public schools. Today, research points to preschool as a key public investment for the future. We should embrace early education as an integral entry point for a lifetime of learning and make sure that we put in place all of the elements required to get the best return on our investment—including a stable and effective financing system.

Richard Kasmin, National Institute for Early Childhood Education¹

INTRODUCTION

In 2011, preschools² in Camden, New Jersey, received an unpleasant surprise in the mail from that city's assessor: a property tax bill.³ A property tax bill is always unpleasant, but usually never a surprise.⁴ However, in this case, the city's decision to tax reversed its past practice of exempting preschools from taxation. For decades, Camden granted preschools tax relief under a state statute that prohibits taxation of

1. Richard Kasmin, *Why the Source of Preschool Funding Matters*, NAT'L INST. FOR EARLY EDUC. RES. (Sept. 2, 2016), <http://nieer.org/2016/09/02/why-the-source-of-preschool-funding-matters>.

2. The term "preschools" broadly include facilities that provide some form of early childhood programming, services, or interventions for children. It should be noted that within social science literature concerning "preschools" various terms such as "early childhood programming," "childcare" and "preschools" are used frequently and interchangeably. *See, e.g.*, W. STEVEN BARNETT, NAT'L INST. FOR EARLY EDUC. RES., *PRESCHOOL EDUCATION AND ITS LASTING EFFECTS: RESEARCH AND POLICY IMPLICATIONS* (2008), http://nepc.colorado.edu/files/PB-Barnett-EARLY-ED_FINAL.pdf (using the term "preschools" as all-encompassing to include center-based programs, private child care, and state run public programs, such as Head Start); SIMON WORKMAN & REBECCA ULLRICH, CTR. FOR AM. PROGRESS, *QUALITY 101: IDENTIFYING THE CORE COMPONENTS OF A HIGH-QUALITY EARLY CHILDHOOD PROGRAM* (Feb. 13, 2017), <https://cdn.americanprogress.org/content/uploads/2017/02/10063958/QualityEarlyChildhood101-brief.pdf> (interchanging the terms high quality "early childhood programs," "early childhood education," "early learning programs," and "child care options"); CTR. ON THE DEVELOPING CHILD AT HARV. UNIV., *FROM BEST PRACTICES TO BREAKTHROUGH IMPACTS: A SCIENCE BASED APPROACH TO BUILDING A MORE PROMISING FUTURE FOR YOUNG CHILDREN AND FAMILIES* (2016), <http://developingchild.harvard.edu/resources/from-best-practices-to-breakthrough-impacts/>; Nonie Lesaux & Stephanie Jones, *Vouch for Early Learners*, U.S. NEWS & WORLD REPORT, (June 14, 2017, 9:35 AM), <https://www.usnews.com/opinion/op-ed/articles/2017-06-14/expand-school-vouchers-for-early-education> (referring readers to a report on "very high quality preschools" that examines programs for "early child care" and "youth development").

3. Associated Press, *Camden to Require Nonprofit Day Care Centers to Pay Property Taxes*, NJ.COM (Mar. 1, 2011, 9:26 AM), http://www.nj.com/news/index.ssf/2011/03/camden_to_ask_nonprofit_day_ca.html.

4. As has been famously said, "'tis impossible to be sure of anything but Death and Taxes[.]" CHRISTOPHER BULLOCK, *THE COBLER OF PRESTON* (1716).

“schools.”⁵ But, in 2011, the Camden assessor declared it was a “mistake” to classify preschools as “schools” and “wrong” *not to bill* the preschools.⁶

The tax threatened the preschools’ existence.⁷ Like its counterparts nationwide, preschools in Camden operate with “razor-thin margins” between expenses and revenue.⁸ Local property tax exemptions are an important government subsidy⁹ that ensures preschools’ survival.¹⁰ Without the tax relief, many would shut their doors or, at the least, reduce the resources devoted to programming and staffing. One Camden preschool director framed the vital link between the exemption and her center best when she noted that her center does not make a profit, reduces rates for low income families, provides a service “just like schools” and, given all of that, could not “afford the taxes.”¹¹

The situation in Camden illustrates a real and looming threat to the viability and quality of preschools nationwide.¹² All fifty states have exemption statutes resembling New Jersey’s¹³ in that they do not expressly define preschools as “schools” or “educational institutions,” leaving preschools exposed to the whims of a tax assessor on any given year.¹⁴ Because exemption decisions at the municipal level are primarily

5. N.J. STAT. ANN. § 54:4-3.6 (West 2017) (exempting from property taxation all buildings used for “schools”).

6. Associated Press, *supra* note 3.

7. *Id.*

8. Brett Nelson, *The Fundamentals of Running a Child Care Center*, FORBES (Apr. 5, 2007, 6:00 AM), https://www.forbes.com/2007/04/04/bright-horizons-fundamentals-ent-manag-e-cx_bn_0405fundchildcarelander.html (noting that centers run on “razor-thin margins” and to succeed need economies of scale).

9. EVELYN BRODY, *Legal Theories of Tax Exemption: A Sovereignty Perspective*, in PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD 149 (Evelyn Brody ed., 2002) (describing the use of exemptions as a government subsidy).

10. Evelyn Brody, *All Charities are Property-Tax Exempt, but Some Charities are More Exempt than Others*, 44 NEW ENG. L. REV. 621, 623 (2010) (citing concerns by non-profit directors that exemption denials will increase costs on non-profits).

11. Associated Press, *supra* note 3.

12. See, e.g., Erik Hawkins, *Great Bay Kids Lobbies for Tax-Exempt Status*, SEACOASTONLINE.COM: EXETER NEWS LETTER (July 12, 2016, 5:59 PM), <http://www.seacoastonline.com/news/20160712/great-bay-kids-lobbies-for-tax-exempt-status> (detailing account of town in New Hampshire’s decision to deny tax exempt for preschool); Scott Russell, *Clarity Sought on Tax Exemptions for Nonprofits*, MINNPOST (Mar. 10, 2008), <https://www.minnpost.com/politics-policy/2008/03/clarity-sought-tax-exemptions-nonprofits> (noting the Minnesota supreme court’s decision to deny tax exempt status to preschool). See also *Property, Sales and other Taxes*, NATIONAL COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/trends-policy-issues/property-sales-and-other-taxes> (noting the general trend of municipalities to attempt to revoke property tax exempt status for nonprofit institutions).

13. See also Brody, *supra* note 10, at 672–732 (providing an appendix of all fifty state exemption provisions, none of which expressly exclude “preschools”).

14. As a general rule, state statutes use the terms “school” and/or property used for

driven by local political considerations (*i.e.*, a pressure to keep taxes low), municipalities are incentivized to tax, rather than exempt, wherever possible.¹⁵ That's what happened in Camden. Camden is surely not alone as municipalities are faced with pressures to increase revenues to provide necessary public services and taxpayer calls to keep taxes low. As cities deny exemptions, what emerges is a piecemeal approach to supporting a valuable foundation for children that varies from community to community. Property wealthy towns (who can likely afford to shoulder an exemption) will be able to support and sustain early education opportunities, while property poor towns (who need to tax more) will force their local preschools to leave or curtail services. Therefore, states must address this in a systematic manner for benefit of all of its citizens.

While it is true that education is a state responsibility,¹⁶ that responsibility begins with the age of compulsory attendance. Yet preschools focus on the education of the child prior to the start of compulsory education and thus typically are not part of the constitutionally mandated education the state is required to provide. However, that does not mean that the state has no interest in the education of young children. For example, a 2016 study found that preschool programs have long-term positive impact on student outcomes. The study concluded, “[t]he research literature is increasingly documenting that experiences during childhood can profoundly influence later-life outcomes, and that interventions during childhood can generate cost-effective improvements in life circumstances.”¹⁷ Supporting quality preschool experiences¹⁸ for the children of the community is good public policy. Early investments reap long-term benefits.

This Article argues that state governments should ensure preschools' exemption eligibility and remove any ambiguity that has arisen under the

“educational purposes” leaving the ultimate determination to courts as to whether a preschool satisfies these terms. Compare ALA. CODE § 40-9-1 (2017) (exempting from taxation property used for “schools”) with ALASKA STAT. § 29.45.030(a)(3) (2017) (requiring exemption property used for “educational purposes”). Evelyn Brody, *The States' Growing Use of a Quid-Pro-Quo Rationale for the Charity Property Tax Exemption*, 56 THE EXEMPT ORG. TAX REV. 269, 282 (June 2007) (observing that nonprofit day care providers claim for exemption depends on “the vagaries” in a state’s education category of exemption).

15. See BRODY, *supra* note 9, at XIII (writing that “[t]he decision to relieve specific property from a general tax burden is inherently and primarily political.).

16. Education is considered a federal interest, a state responsibility, and local function.

17. Lauren Bauer & Diane Whitmore Schanzenbach, *The Long-Term Impact of the Head Start Program*, HAMILTON PROJECT 5 (Aug. 19, 2016), http://www.hamiltonproject.org/assets/files/long_term_impact_of_head_start_program.pdf.

18. The focus of the Article’s argument is on developing and supporting quality preschool programs. Although the research is somewhat mixed when all preschool programs are aggregated, research points to a few important findings: (1) ordinary daycare has the smallest effect on a child’s learning and development, and (2) high quality preschool programs are associated with larger gains in cognitive and language abilities. See BARNETT, *supra* note 2, at 5–6.

current statutory terms common to most states. First, government subsidization of early education is a wise public policy choice; the benefits of quality early education programs generally exceed their costs, reducing the burden on taxpayers.¹⁹ This not only preserves sound investments of government resources, but also ensures policy coherence among the various levels of government.²⁰ Third, quite apart from the public policy reasons above, preschools play a vital role in local economies by providing jobs and allowing parents to return to the workforce. Without the exemption, many preschools might close (or certainly be dissuaded from opening), and many local economies would suffer.

This Article addresses a gap in the current literature on early education policy. To date, the early education discussions have focused on the benefits of such programs and features of highly successful programs. To be sure, this is significant work and calls for more investments in early education. But the literature has not yet addressed the significance and potential threat of local political forces on these developing policy goals and existing government support to preschools. Thus, this Article makes an important contribution as it assesses these issues in the context of property tax exemptions.

This Article proceeds in four parts in addition to this introduction. Part I outlines the benefits of early education to society and the taxpayer. Part II discusses the exemptions' legal framework, their role as a government subsidy, and local political influences on exemptions. Part III examines several important court cases where preschools sought a court relief from local officials' influence over exemption denials. Part IV sets forth a number of recommendations to preserve exemptions for preschools.

I. PUBLIC POLICY RATIONALE SUPPORTING GOVERNMENT INVESTMENT IN EARLY EDUCATION

A. *General Benefits of High-Quality Early Education Programming*

Preschools deliver numerous benefits to a community. These are both

19. These benefits, as noted, include reduced costs for special education and increased graduation rates. *See infra* Part I.A.

20. *See, e.g.*, ALBERTA M. SBRAGIA, DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT 9–10 (1996) (describing the “politics of circumvention” as the practice of how local government officials use discretionary autonomy in “creative ways” to circumvent state governments”); *see generally* DEIL S. WRIGHT, UNDERSTANDING INTERGOVERNMENTAL RELATIONS (1978) (noting local government officials pursue local interests and exploit areas where institutional arrangements permit them to maneuver).

short- and long-term and accrue to many stakeholders.²¹ Individual student opportunities are expanded in the form of improved school readiness and employment opportunities later in life.²² Communities enjoy an increase in workers entering and staying in the workforce and expanded earning potential, among others.²³ The benefits persist over time. One study estimated statistically significant reduction in crime, gains in labor income, and enhanced educational attainment for participants in high-quality early education programs.²⁴

In particular, public school systems reap the benefits of preschool education. Children (including infants) that attend preschools enter the public schools “ready to learn” and student outcomes are improved.²⁵ Preschool can reduce rates of grade repetition over time and increase high school graduation rates.²⁶ A study that analyzed preschool programs over a twenty-five year period concluded they produced an immediate effect of a half (.50) standard deviation on cognitive development which amounts to the equivalent of seven or eight points on an IQ test.²⁷ In context, such gains cut in half the “school readiness gap between children in poverty and the national average.”²⁸ A five-year longitudinal study of The Opportunity Project (TOP) programs found that TOP students, kindergarten through fourth grade children, measured significantly higher on emotional maturity and competent social interactions than the control group students, among other positive outcomes.²⁹ These skills carry into life.

Preschool education reduces demand for special education services. In one study, researchers concluded that the likelihood of being placed in special education reduced substantially for students attending quality preschools.³⁰ For instance, one full-day, full year program for infants to

21. See BARNETT, *supra* note 2, at 1.

22. See Jorge Luis Garcia et al., *The Life-cycle Benefits of an Influential Early Childhood Program* 21–22 (Human Capital & Econ. Opportunity Glob. Working Grp., Working Paper No. 2016-035), https://econresearch.uchicago.edu/sites/econresearch.uchicago.edu/files/Garcia_Hec_kman_Leaf_etal_2016_life-cycle-benefits-ecp_r1.pdf.

23. *Id.* at 23–24.

24. *Id.* at 4.

25. BARNETT, *supra* note 2, at 5; Linda Bakken et al., *Early Childhood Education: the Long-Term Benefits*, 31 J. RES. IN CHILDHOOD EDUC. 255, 255 (2017) (writing, “[c]hild development experts indicate it is during these years that children develop linguistic, cognitive, social, emotional, and regulatory skills that predict their later functioning in many domains.”). See Garcia et al., *supra* note 22, at 21–22.

26. See, e.g., BARNETT, *supra* note 2, at 17.

27. *Id.* at 5.

28. *Id.*

29. Bakken et al., *supra* note 25, at 266–67.

30. See, e.g., JULIA B. ISAACS, BROOKINGS INSTITUTE, IMPACTS OF EARLY CHILDHOOD PROGRAMS 18, (Sept. 6, 2008), https://www.brookings.edu/wp-content/uploads/2016/06/09_early_programs_isaacs.pdf (concluding that in two studies monitoring the impact of early

kindergarteners reduced special education placement rates from 48% to 25%, among others.³¹

To be sure, preschool programs vary in quality according to a number of factors. The quality of the teacher in a program has a high degree of impact on the overall quality of a program and outcome.³² Background education and continued training (especially in the rapidly developing area of brain science),³³ physical environment (*i.e.*, structures, outside space to play), access to age appropriate materials, (*e.g.*, infants require different resources and opportunities than three- year olds to maximize their development at crucial stages) impact program outcomes.³⁴

Structure and programming affects preschool quality. Student-teacher ratios, for example, impact benefits and outcomes.³⁵ The length of a program (*e.g.*, all year, extended summer time) is important.³⁶ Involvement of family members and the integration of activities for parents can contribute to program quality.³⁷ In sum, the research is well developed and points clearly to significant benefits when children attend quality preschools.

B. Early Education Programming Produces Positive Benefit-Cost Ratio

Quite apart from the public good provided by preschools, they can reduce the burden on taxpayers by reducing the need for other government services. The costs and benefits of high-quality early education programs have been monetized in numerous studies.³⁸ One cost-benefit analysis concluded that for every dollar spent on one high-quality early education program, the return was \$7.30, representing a

education on special education the placement rates fell “dramatically”).

31. *Id.*

32. See WORKMAN & ULLRICH, *supra* note 2, at 4 (noting the value of a “well-trained and highly skilled” teacher).

33. *Id.* at 3–4.

34. *Id.* at 4.

35. See, *e.g.*, ISAACS, *supra* note 30, at 5, 7, 18, 2021 (summarizing the research on several significant early education programs’ teacher-student ratios).

36. *Id.*

37. *Id.* at 20 (noting, in part, that the three most well-regarded programs have a “clarity of focus on the way in which the program and its teachers would interact with children and families” and also have a parent involvement component).

38. See, *e.g.*, *InBrief: Early Childhood Program Effectiveness*, CTR. ON THE DEVELOPING CHILD HARV. U. 2 (2007), <http://developingchild.harvard.edu/resources/inbrief-early-childhood-program-effectiveness/> (estimating that the returns for every dollar invested produces savings in the range of \$4.00 to \$9.00 as measured in reduced crime, welfare, educational remediation, and increased tax revenues on higher incomes, among others). See also BARNETT, *supra* note 2, at 17 (concluding that the benefits of cost-benefit analysis of the three most intensive early education programs “[a]ll find that the benefits substantially exceed costs”); ISAACS, *supra* note 30, at 2 (noting the cost-benefits of three of the most well-regarded early education programs).

13.7% return on investment on an annual basis.³⁹ This return was statistically significant, even after accounting for numerous variables that could have impacted the estimate.⁴⁰ The reduction in demand for special education, similarly, reduces costs in this area thereby providing direct relief to local taxpayers who support public schools.

To be sure, quality preschools are not cheap. One of the most intensive preschool programs (the Abecedarian Project) averages a cost of \$42,871 for three years.⁴¹ The High Scope/Perry Preschool, which enrolled academically at-risk children from the ages of three to four, averaged a cost of \$14,830 for a two-year program.⁴² The Chicago Child Parent Center program, which provided half-day, center-based preschools over two years, averaged a cost of \$6,913 per child.⁴³ However, while the costs are high, program benefits are higher. Indeed, one of the costliest high-quality programs delivered the greatest return on investment.⁴⁴ Taken together, taxpayer funds spent on preschools are wise. As one researcher has noted, preschools “not only achieve important educational goals, *but are sound public investments*.”⁴⁵

To be fair, the most comprehensive cost-benefit analyses have been applied only to a few well-established programs. Arguably, this calls into question any generalizability of early education in terms of benefits. While recognizing the limitations of these studies, significant evidence exists that supports the benefits of other early education programs, outside from the most studied preschools.⁴⁶ However, experts recognize that many early education programs—to fully realize their potential—require more research-based practices and research, especially for low-income populations.⁴⁷ That said, researchers have found significant cost-

39. Garcia et al., *supra* note 22, at 1.

40. *Id.* at 54 (concluding that “[t]hese estimates are statistically significant, even after accounting for sampling variation, serial correlation, and prediction error”).

41. ISAACS, *supra* note 30, at 18. These costs are based on 2003 value. *See id.* at 18–21 n.1. Thus, it is likely that the costs in actual dollars today would be higher, though this would not change the cost-benefit analysis.

42. *Id.* at 18.

43. *Id.*

44. Garcia et al., *supra* note 22, at 54 (noting that the benefits of one highly successful program arose notwithstanding the fact that the program was much more expensive than others due to the extent of services and length of program).

45. BARNETT, *supra* note 2, at 17 (emphasis added).

46. *See, e.g.*, STEVE AOS, ET AL., WASH. ST. INST. FOR PUB. POL’Y, BENEFITS AND COSTS OF PREVENTION AND EARLY INTERVENTION PROGRAMS FOR YOUTH (Sept. 17, 2004), http://www.wsipp.wa.gov/ReportFile/881/Wsipp_Benefits-and-Costs-of-Prevention-and-Early-Intervention-Programs-for-Youth_Summary-Report.pdf (noting that well implemented programs, in general, can achieve cost savings).

47. *See, e.g.*, NONIE K. LESAux & STEPHANIE M. JONES, *Introduction* to NONIE K. LESAux ET AL., *THE LEADING EDGE OF EARLY CHILDHOOD EDUC.* 1–2 (Nonie K. Lesaux & Stephanie M. Jones eds., Harvard Univ. Press 2016) (generalizing that “[t]he central role of early education in

benefits in education programs that are well-designed and implemented early, generally.⁴⁸

C. Federal & State Policymakers Emphasis on Early Education

Federal and state education policymakers recognize the potential impact of early education and have focused on supplying resources and support to increase their availability and capacity. In 2016, for example, the federal government launched a “Preschool for All Program” to expand high-quality preschool opportunities to low to moderate income four-year-olds.⁴⁹ This grant program expanded enrollment for 28,000 children in eighteen states.⁵⁰ The federal government also created a conditional grant program known as the Race to the Top Early Learning Challenge. This competitive grant program awarded money to states who adopted certain standards of quality relative to early learning programs, including those targeted for infants.⁵¹ Federal efforts to improve preschool education is evident in Every Student Succeeds Act (ESSA) the Congressional reauthorization of the Elementary and Secondary Education Act (ESEA of 1965).⁵²

Similarly, state policymakers have increased investments in preschool early education. From 2015 to 2016, state funding for preschool rose approximately 8%, or \$564 million.⁵³ In 2002, approximately 14% of the nation’s four-year-olds were enrolled in state run preschools.⁵⁴ However, by 2016, that number was 32%.⁵⁵ Many states have also added new

a young child’s life has never been clearer for the individual or for society”); Bakken et al., *supra* note 25, at 256 (writing, “This growing body of research points to the conclusion that children who live in poverty and attend a quality preschool program experience long-lasting primary and secondary positive effects.”).

48. See AOS ET AL., *supra* note 46, at 1 (noting the benefits in programs that are “blue chip”).

49. U.S. DEP’T OF EDUC., OBAMA ADMINISTRATION INVESTMENTS IN EARLY LEARNING HAVE LED TO THOUSANDS MORE CHILDREN ENROLLED IN HIGH-QUALITY PRESCHOOL (Sept. 15, 2016), <https://www.ed.gov/news/press-releases/obama-administration-investments-early-learnin-g-have-led-thousands-more-children-enrolled-high-quality-preschool>.

50. *Id.*

51. U.S. DEP’T OF EDUC., RACE TO THE TOP EARLY LEARNING CHALLENGES PROGRAM DESCRIPTION, (Nov. 29, 2016, 7:50 AM), <https://www2.ed.gov/programs/racetothetop-early-learningchallenge/index.html>.

52. U.S. DEPT. OF EDUC., NON-REGULATORY GUIDANCE IN THE EVERY STUDENT SUCCEEDS ACT 4, (Oct. 2016), <https://www2.ed.gov/policy/elsec/leg/essa/essaelguidance10202016.pdf>.

53. W. STEVE BARNETT ET AL., NAT’L INST. FOR EARLY EDUC. RES. RUTGERS, THE STATE OF PRESCHOOL 2016: STATE PRESCHOOL YEARBOOK 7 (Sept. 15, 2017), http://nieer.org/wp-content/uploads/2017/09/Full_State_of_Preschool_2016_9.15.17_compressed.pdf [hereinafter BARNETT YEARBOOK].

54. *Id.*

55. *Id.*

program standards aimed at improving the quality of preschools.⁵⁶ To be sure, resource commitment varies by state. Lawmakers in California recently entertained substantially increasing their investment in preschool education to guarantee preschools access for every child in that state⁵⁷ while still others offer no government support for four-year-old early education programs.⁵⁸

Even some city governments, recognizing the long-term cost-savings realized in public schools, have increased investment in preschool education, especially for children from low income families. In April, New York City mayor Bill de Blasio announced a plan to provide all three-year-olds in the city with full day preschool.⁵⁹ The proposal stemmed from the Mayor's successful expansion of universal pre-kindergarten for the city's four-year-old population.⁶⁰ Other cities have embarked on similar efforts.⁶¹ In sum, many policymakers at various government levels recognize the benefits and cost-savings from a preschool education. Indeed, there has been a clear pivot in this area, especially as research continues to emerge demonstrating improved outcomes for children.

D. Resources as Major Obstacle to Preschool Access and Development

Yet considerable gaps remain to maximize preschools' benefits. These include things such as: increasing the quality and training of the early education workforce, disseminating the latest developments on brain research that can inform practice in preschools, ensuring that low and moderate income families can afford high quality preschools beginning at very early ages, and leveraging technology and media as tools for learning.⁶²

Cost remains the biggest obstacle, however, in maintaining and ultimately improving early education opportunities.⁶³ Preschools require

56. *Id.*

57. Sonali Kohli, *The Plan to Get Every California Kid into Preschool*, L.A. TIMES (Apr. 13, 2016, 2:00 AM), <http://www.latimes.com/local/education/la-me-edu-preschool-plan-20160412-snap.htmlstory.html>.

58. See, e.g., BARNETT YEARBOOK, *supra* note 53, at 26 (noting spending amounts from all state which includes several, such as New Hampshire, that spend no money on state supported preschool programs).

59. Eric Westervelt, *The Research Argument for NYC's Preschool Plan for 3-Year-Olds*, NAT'L PUB. RADIO (Apr. 25, 2017, 3:39 PM), <http://www.npr.org/sections/ed/2017/04/25/525594764/the-research-argument-for-nycs-preschool-plan-for-3-year-olds>.

60. *Id.*

61. Lillian Mongeau, *What Boston's Preschools Get Right*, ATLANTIC (Aug. 2, 2016), <https://www.theatlantic.com/education/archive/2016/08/what-bostons-preschools-get-right/493952/>.

62. LESAUX & JONES, *supra* note 47, at 34.

63. See BARNETT YEARBOOK, *supra* note 53.

significant subsidization to remain affordable while simultaneously maintaining quality. This is especially true for families in poverty who would not have the individual resources to support such a program. Funding sources are spasmodic and subject to the economy and political will; states vary in their level of direct financial support. A steady stream and commitment of funding remains a particular problem as early education providers seek to improve and expand.

The high cost of preschools must be juxtaposed against local municipalities' ability to remove existing subsidies by denying property tax exemptions. At this very moment, policymakers are recognizing that more resources are needed for preschools; local taxing authorities have discretion—and some, like Camden, attempt to use it to remove a vital financial line for existing preschools. This represents a threat to a once stable and necessary source of funding. Certainly, removal of any existing government subsidization is a step in the wrong direction that only exacerbates cost issues.

The conflict presents a classic point of intergovernmental tension common to public policy. In this case, local taxing officials have sufficient discretionary authority to determine exemption eligibility for “educational institutions” and, therefore, may be able to undercut policy agendas initiated at state government.⁶⁴ In order to more fully understand this tension and its origins, the legal, policy and political influences with respect to property tax exemptions are explored in the following Part.

II. EXEMPTIONS: LEGAL AND POLICY FOUNDATIONS AND POLITICAL INFLUENCE

A. *Legal Foundation*

Property tax exemptions⁶⁵ are creatures of state statute, state constitution, or both. All states afford an exemption for the property of non-profit “schools” or “educational institutions” (*i.e.*, not schools with government-owned property) either by one or both of these means.⁶⁶

64. SBRAGIA, *supra* note 20, at 3 (describing generally a theory of how local actors can leverage their power to undercut state and federal policies).

65. As a general rule, property tax exemptions fall under three (3) categories: religious, charitable, and educational. In some instances, educational exemptions have been discussed by courts and legislatures in the context of state law provisions concerning charitable institutions. See Brody, *supra* note 10 (focusing on educational institutions which are the largest exemption).

66. Alabama is one state whereby an exemption can arise by state constitution, statute, or both. By way of constitution, the state exempts from taxation “property devoted exclusively to religious, educational or charitable purposes.” ALA. CONST. art. IV, § 91, further explained by *Thomas v. Ala. Mun. Elec. Auth.*, 432 So. 2d 470 (Ala. 1983). By way of state statute, Alabama has further prescribed the exemption. ALA. CODE § 40-9-1 (2017) (stating the exemption does not

Apart from these general terms, many states do not provide additional directives regarding what exactly an “educational institution” or “school” is for purposes of exemption. Thus, the exact legislative intent of an exemption is open to interpretation by local assessors and ultimately, the courts. As one scholar in the area notes, these broad “encompassing descriptions . . . [leave] refinement to the courts.”⁶⁷ Put another way, courts must discern whether the legislature intended to include preschools as schools for purposes of exemption, a subject addressed in another Part of this Article.

B. Policy Foundations

Non-profit property tax exemptions are a policy tool which governments use to subsidize certain quasi-public institutions or objectives.⁶⁸ Governments can leverage exemptions to encourage activities viewed as important for the greater good⁶⁹ or government objectives⁷⁰ and do so without government involvement. In exchange for undertaking that service or providing that benefit, the government confers a tax benefit to the organization. Effectively, an exemption is a *quid pro quo* between the entity receiving the tax relief and the government. The Supreme Court has stated “the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.”⁷¹ Exemptions have a long history in this country,⁷² and all fifty states carve out property tax exemptions, including ones for educational organizations.⁷³

Exemptions are an appealing policy tool for several reasons. In some instances, direct government support (e.g., through the typical state budget process) may not be politically possible because the program or constituency served lacks political capital.⁷⁴ Day-care centers and other

apply in instances where the educational institution rents its property “for business purposes,” even if the income derived from the rent is used exclusively for educational purposes). For a comprehensive review of each state’s treatment of educational institutions, see Brody, *supra* note 10, at 671–732.

67. William R. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, 53 TEMP. L.Q. 291, 327 (1980).

68. JOHN D. COLOMBO & MARK A. HALL, *THE CHARITABLE TAX EXEMPTION* 45 (1995).

69. Ginsberg, *supra* note 67, at 292 (noting that “[t]he tax exemption of real property used by nonprofit organizations to further their public benefit activities reflects a broadly based public policy in support of this sector of our society”).

70. *Id.*

71. *Bob Jones Univ. v. United States*, 461 U.S. 574, 590–91 (1983).

72. John D. Colombo, *Why is Harvard Tax-Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 844 (1993).

73. See Brody, *supra* note 10, at 671–732 (compiling all states’ property tax exemptions).

74. See Ginsberg, *supra* note 67, at 292.

important public service providers (e.g., foster-care centers, adoption agencies, mental health facilities, etc.) are often owned and operated by private nonprofit organizations whose constituencies lack political power to gain direct funding.⁷⁵ The high costs associated with some of these services compounds the difficulties with political support thus making direct support through a state budget unpredictable, at best.

Exemptions encourage private actors to meet a public need that most *for-profit* entities in the private sector avoid. This is particularly relevant in the preschool industry that, as noted, operates within tight margins, has high failure rates and, therefore, is an unappealing business model because of the high-risks.⁷⁶ Thus, exemptions play an important role in allowing nonprofits to engage in early education that might otherwise go unmet.⁷⁷

Exemptions afford some degree of government control over nonprofit and private activities without overt regulation. States frequently use exemptions to promote behavior consistent with public policy objectives⁷⁸ with minimal transaction costs,⁷⁹ and allow a private party to “complement or expedite” governmental programs.⁸⁰ Conversely, they can also discourage activity inconsistent with state policy goals.⁸¹ In this regard, governments can act as a “hidden hand” in the marketplace.

To be sure, these exemptions have been criticized. For instance, only property-owning entities, especially those who are “property-wealthy,” benefit from exemptions, excluding entities that rent space.⁸² Exemptions encourage “overinvestment” in high-end property to maximize the benefit amount.⁸³ As a corollary, some agencies may be housed in affluent areas, away from constituents that might most benefit from affordable services.⁸⁴

Importantly, local officials perceive property tax exemptions as unfair. Indeed, exemptions do come at a cost (*i.e.*, local property tax revenue that is borne by municipal budgets). This, of course,

75. *Id.*

76. Indeed, because of these tight margins, the threat of losing exemptions makes them all that more important to the very existence of some preschools.

77. Ginsberg, *supra* note 67, at 293.

78. *See, e.g.,* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 599 (1997) (Scalia, J., dissenting) (noting that exemptions have properly been denied where the organizations do not provide substantial public benefits when viewed against the state’s public policy).

79. *See* BRODY, *supra* note 9, at 150.

80. Ginsberg, *supra* note 67, at 293.

81. *Cf. id.*

82. BRODY, *supra* note 9, at 150.

83. *Id.*

84. States generally limit the exemption to non-profits. Some have criticized this limitation. *Id.* at 149.

understandably contributes to a hostile view of property tax exemptions from locally elected officials who must provide certain services to the exempt organization (*e.g.*, fire and police, among others) without the revenue stream that most residents and businesses supply through property taxes. This concern is most prevalent in states (many in the Northeast) that rely heavily on local property tax revenue. Consequently, as discussed in the next Part, local officials channel tools to resist the use of exemptions.

C. Local Political Influences on Exemption Implementation

Local government officials have considerable discretion at the development and implementation processes associated with exemptions on a case-by-case basis.⁸⁵ When an entity seeks an exemption local officials initially determine *who* is a qualifying entity for tax exemption purposes under the state statute. Municipalities exercise discretion in determining whether a particular institution falls within the precisely worded description of the statutory exemption. For example, the decision as to whether a preschool is a “school” or “educational institution” determines exempt status. That’s exactly what happened in Camden⁸⁶ as noted above and others.⁸⁷

Local political forces strongly influence exemption decisions.⁸⁸ As one commentator has stated, if all politics are local, exemptions stand for the principle that all property tax exemption politics are local.⁸⁹ Local decisions reflect “subjective reactions, value judgments, media coverage, social developments, and cultural trends.”⁹⁰ Commentators have documented a steady trend of increased calls to end exemptions⁹¹ as local governments seek to tap new sources for revenue and avoid increasing taxes on the non-exempt.⁹² These political factors create a “rich medium for dispute” over the applicability of exemptions.⁹³ Wittingly or not, the result can be a “politics of circumvention,” creating an incoherence

85. *See, e.g.*, Brody, *supra* note 10, at 625 (describing the considerable power of an assessor in making a decision regarding exemption eligibility).

86. *See id.*

87. *See, e.g.*, *In re Chapel Hill Day Care Ctr.*, 551 S.E.2d 172, 176 (N.C. Ct. App. 2001).

88. *See* Brody, *supra* note 10, at 623.

89. *See* BRODY, *supra* note 9, at XIII (commenting that “the decision to relieve specific property from a general tax burden is inherently and primarily political”).

90. *See* Joan M. Youngman, *The Politics of Property-Tax Debate: Political Issues in PROPERTY-TAX EXEMPTIONS FOR CHARITIES* 23, 23 (Evelyn Brody ed., 2012).

91. *See* Ginsberg, *supra* note 67, at 295.

92. *See* SHAWN SEBASTIAN & KARL KUMODZI, CTR. FOR POPULAR DEMOCRACY, *PROGRESSIVE POLICIES FOR RAISING MUNICIPAL REVENUE* 12 (2015), http://localprogress.org/wp-content/uploads/2013/09/Municipal-Revenue_CPD_040815.pdf.

93. *See* Youngman, *supra* note 90, at 23–24.

between policy intent and application.⁹⁴ Put another way, local officials use levers to disrupt state policies inconsistent with their immediate interests.

On the most granular level, local control is concentrated in a somewhat obscure municipal officer: the local assessor. As a matter of process and law, locally elected officials defer to the judgment of an assessor with respect to whether an institution is, in fact, one of those institutions the legislature intended to qualify for tax relief. In the case of “educational” institutions or other seeking exempt status (*e.g.*, charities), their definition and interpretation is “key.”⁹⁵

Yet assessors are ill-equipped to pass judgment as to what constitutes an “educational institution.” Assessors have a limited understanding of education; nothing in their training would give them the knowledge base to confidently assess this question. Despite a lack of training or expertise in this area, assessors are tasked with determining whether preschools have educational qualities or promote the advancement of knowledge.⁹⁶ Moreover, the assessor’s initial determination carries substantial weight in hearings or court proceedings.⁹⁷ Notwithstanding these limitations, assessors can be aggressive gatekeepers in exerting their authority.⁹⁸

Underlying this decision of how to interpret what constitutes a school may be the realization that education “is commonly the largest expenditure of municipalities.”⁹⁹ Education already consumes most of a local budget and as more educational entities achieve exempt status, revenues decrease. While laying off public school teachers and closing schools is a political conflict, the addition, or at least the maintenance of property assessed valuations is prized by many in the community.

The essential point, for purposes of understanding these localized influences is this: while legislatures may employ exemptions as a tax policy tool in the name of the public good, locally elected officials must, by default, implement such exemptions. In this way, and given the political nature of property tax issues, they can exercise a significant

94. See SBAGIA, *supra* note 20, at 9–10 (describing how local government actors can use the levers available to frustrate policy from other government entities).

95. See Brody, *supra* note 10, at 625.

96. See generally *In re Chapel Hill Day Care Ctr.*, 551 S.E.2d 172, 176 (N.C. Ct. App. 2001).

97. *Id.*

98. See, *e.g.*, *Christ The Good Shepherd Lutheran Church of San Jose v. Mathieson*, 146 Cal. Rptr. 321, 322 (Cal. Ct. App. 1978) (overturning an assessor’s refusal to grant exemption if the owner of the property was not the user, even where both ownership and use were for charitable purpose).

99. SEBASTIAN & KUMODZI, *supra* note 92, at 8. For a brief overview of public financing for K-12 and preschool, see RICHARD KASMIN, NAT’L INST. FOR EARLY EDUC. RES., PUBLIC PRE-K FINANCING LANDSCAPE (Sept. 16, 2016), <http://nieer.org/research-report/public-pre-k-financial-landscape>.

amount of power. In the case of preschools, denials frustrate sound public policy efforts aimed at improving early education as a means to both improve and reduce costs of public education. This requires a longer lens of the impact of the decision of preschool exemptions—invest some now or pay more later.

Of course, preschools can appeal an exemption denial from the local assessors.¹⁰⁰ However, as a practical matter, this is difficult. To begin with, the transaction costs are high with respect to litigation. Most preschools do not have the resources to mount adequate challenges, given their difficult financial circumstances.¹⁰¹ Moreover, challenges to administrative decisions, like a tax assessors', face particular procedural hurdles; as a general rule, the legal presumption is against exemption and in favor of taxation.¹⁰² Thus, while preschools can seek relief through the courts, this is generally quite difficult. Court treatment of such requests is discussed below.

III. JUDICIAL ASSESSMENT: PURPOSE AND USE TESTS AND BURDEN-BENEFIT RATIONALES

What follows below is a discussion of how courts have handled exemption eligibility disputes for preschools. In general, courts apply a dual-purpose test to assess whether the organization in question satisfies the state exemption statutes. Additionally, court opinions reflect one of two (or a mix of both) judicial doctrines (burden or benefit theories). Cases dealing directly with preschools are significant because they are controlling in respective state jurisdictions and are persuasive in others. Quite apart from that, they do illustrate how courts struggle to properly understand preschools in exemption contexts.

A. Purpose and Use Test

Courts apply a “purpose and use” test to determine exemption eligibility. This test asks if the owning preschool is: (1) organized for an educational *purpose* and (2) *uses* the property for that educational purpose.¹⁰³ The test is easily stated, but raises significant questions when applied. For instance, can a preschool satisfy this prong if, to some degree, it provides “care” for its students? With respect to the use criteria,

100. See *In re Appeal of Totsland Preschool, Inc.*, 636 S.E.2d 292, 294 (N.C. Ct. App. 2006).

101. See Nelson, *supra* note 8.

102. See, e.g., *State v. Kinder-Care Learning Ctrs., Inc.*, 418 So. 2d 859, 861 (Ala. 1982) (noting that exemptions statutes must be strictly construed (citing *Anniston City Land Co. v. State*, 160 Ala. 253 (Ala. 1909))).

103. Ginsberg, *supra* note 67, at 303.

can this prong be satisfied if part of the property is used for arguably non-educational purposes (e.g., portion of a building devoted to a cafeteria, or playground)? If an organization has a purpose that includes, but is not limited to educational, to what extent does the non-educational function destroy its exempt status as an educational institution.

Practically speaking, preschools (like most organizations) have multiple purposes beyond an educational one and they use property to serve those many purposes. One need only look no further than a public school, especially high schools, in which important activities are not strictly educational. For example, facilities for lunch, play spaces, space used for extra-curricular activities, even student parking may not serve a tightly constructed definition of educational purpose.

State “purpose and use” statutes fall into three categories which are variations on the same theme.¹⁰⁴ Some require that both purpose and use be devoted *exclusively* to the education. Others require that the use of property be *primarily* for an exempt purpose. Finally, some impose a less exacting demand that the use be *substantially* for an exempt purpose.¹⁰⁵ Notwithstanding these variations a “rigid” and difficult framework to apply on a case-by-case basis has emerged.¹⁰⁶

For instance, preschools and early education providers frequently have several purposes for their existence. They may exist to provide early education, but *also* to provide custodial care¹⁰⁷ that all children require. These purposes are typically listed in an organization’s Articles of Incorporation filed with the appropriate state agency regulating nonprofits.¹⁰⁸ In jurisdictions that require “exclusive” use, a strict judicial interpretation would surely result in exemption denial.

Courts try to avoid this absurd result. But, in doing so, they must determine if a particular organization seeking exemption was of the nature the legislature intended to exempt. As a result, courts choose between two (or a combination) of judicial theories of legislative intent regarding exemptions. Some courts assess legislative intent along a burden analysis, adopting the view that the legislature intends exemption to flow only if an organization relieves the government of a duty it would otherwise provide. Other courts view intent through a benefit lens, upholding exemptions of the organization provides some benefit to the

104. *Id.*

105. *Id.* at 304.

106. *Id.* at 305.

107. Public schools have long held the status of *in loco parentis* in relation to their students. Similarly, the United States Supreme Court in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) emphasized that the nature of power over students “is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” *Id.* at 655.

108. Ginsberg, *supra* note 67 at 305 (noting that “[o]rganizations intended to achieve a particular purpose . . . usually list several purposes and powers in their founding instruments in order to provide flexibility to meet changed circumstances”).

greater good. Both are discussed below.

B. Burden Theory of Legislative Intent

If a court adopts a “burden” theory of legislative intent, exemptions are justifiable only “in exchange for a public service rendered.”¹⁰⁹ The purpose of the organization and use of the land directly assumes a service or good that government would otherwise be required to provide.¹¹⁰ In this light, the essential question is whether the exemption results in fiscal savings that lessen the burden on the taxpayer.¹¹¹ It also requires that the entity perform a public duty at or below what it would cost for the government to do so.¹¹²

The burden theory is appealing to courts in cases involving educational institutions.¹¹³ In this view, courts assess whether the purpose of the organization assumes the governmental duty of education. This is a convenient analysis because the government responsibilities are clear in state constitutions and statutes. States must offer a free public education to its citizens beginning at a specified age.¹¹⁴ Schooling before or beyond that is not a government duty. Exemption is more likely where government-like schooling occurs with some level of “instructional burden” that would otherwise be performed by the state.¹¹⁵ Numerous jurisdictions adhere to this notion¹¹⁶ and it has served as the grounds in upholding exemptions for private secondary schools¹¹⁷ and private higher education institutions.¹¹⁸

Preschool eligibility for exemption is most threatened where courts

109. Note, *Tax Exemptions of the Property of Educational Institutions*, 6 GEO. WASH. L. REV. 342, 356 (1938).

110. Note, *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, 64 HARV. L. R. 288, 288 (1950) [hereinafter Note Harvard Law Review].

111. Ginsberg, *supra* note 67, at 308.

112. The exact savings is not typically considered as part of a legal analysis and this is a source of criticism of this rationale. *See id.*

113. *Id.* at 328.

114. *See, e.g.*, MASS. GEN. LAWS. ch. 76, § 1 (2016), et seq. (setting the age requirements for public school attendance).

115. Alvin Warren, Jr., *Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut*, 4 CONN. L. REV. 181, 236 (1971).

116. *Id.* at 237 (citations omitted).

117. *Id.*

118. *See, e.g.*, *People ex rel. Clarkson Mem’l Coll. v. Haggett*, 77 N.Y.S.2d 182, 185 (Sup. Ct. St. Lawrence Cty 1948), aff’d, 87 N.Y.S.2d 491 (N.Y. App. Div.), aff’d, 89 N.E.2d 882 (1949) (stating that “school and college properties may be said to receive their rights of tax exemption, not as acts of grace from the sovereign, nor as personal exceptions to the rule that all real property bear its share of the cost of government, but both upon the principle of non-taxation of public places and as a *quid pro quo* for the assumption of a portion of the function of the State”).

have adopted a burden theory.¹¹⁹ Preschool education is generally not a duty of the government and falls outside the scope of compulsory school attendance laws. Because preschools perform a service beyond the scope of the government duty, the taxpayer realizes no immediate savings in the strictest sense.

For example, in *State v. Kinder-Care Learning Centers, Inc.*,¹²⁰ the Supreme Court of Alabama denied an exemption because a preschool did not resemble a typical, government-mandated school.¹²¹ Specifically, the court noted that Kinder-Care did not satisfy the compulsory attendance school laws,¹²² staff members were not “certified teachers as defined by Alabama law,” and the centers were not regulated by the Department of Education, like typical public schools.¹²³ Kinder-Care was not a “school” nor was their purpose or property used for “educational purposes” as those terms were understood in exemption law.¹²⁴

A North Carolina appeals court denied a preschool property tax exemption under a burden theory of legislative intent.¹²⁵ In this case, the preschool did not bear similarities to a government-run school, notwithstanding its undisputed educational features. In this case, the Chapel Hill Day Care Center provided care *and* education for eighty-eight children from 7:30 a.m. to 5:45 p.m., Monday through Friday. It charged tuition that varied by the age of the children and also provided subsidies to defray costs.

To be sure, the school in *In re Chapel Hill Day Care* had educational characteristics. Each child had individualized developmental profiles, teachers created lesson plans, and the center required certain professional qualifications for its teachers.¹²⁶ The center also had attained accreditation from a leading national agency, the National Association for the Education of Young Children (NAEYC).¹²⁷ Chapel Hill argued that these educational features eclipsed any argument that the Center was

119. See Ginsberg, *supra* note 67, at 329 (concluding that “[i]f the burden theory were strictly applied . . . one would assume that a nursery school would not receive exemption in a jurisdiction that did not operate public nursery schools”). As a side note, most localities do not operate public nursery schools; and where there are such schools, attendance is not a right for all but rather is conditioned on other variables, such as income. See also COLOMBO & HALL, *supra* note 68, at 50.

120. 418 So. 2d 859 (Ala. 1982).

121. See *id.* at 861.

122. *Id.* (internal citations omitted).

123. *Id.*

124. *Id.* at 860–61. The court did acknowledge that a great deal of the services at Kinder-Care were educational in nature. *Id.* (noting that “much of what Kinder-Care provides is educational”).

125. See *In re Chapel Hill Day Care Ctr.*, 551 S.E.2d 172, 176 (N.C. Ct. App. 2001).

126. *Id.* at 177.

127. *Id.* at 173.

custodial in nature.¹²⁸

But the court was not persuaded and denied the exemption because it was not sufficiently similar to a public school.¹²⁹ The preschool did not “maintain *regular* school hours, does not assign homework or make-up work and does not issue report cards,”¹³⁰ all characteristics found in typical public, government-run schools.¹³¹ The evidence supported the conclusion that Chapel Hill was not a “traditional school.”¹³² In this light, the educational services are merely incidental to the “custodial” services of the centers, according to the court,¹³³ and therefore fall outside the scope of the legislature’s intent for exemption of educational institutions.¹³⁴

C. Benefit Theory of Legislative Intent

In contrast to the burden theory, some courts have adopted a broader view of legislative intent with respect to educational exemptions using a “benefit theory.” In this light, courts hold that the legislature intended exemption to run to organizations that provide benefit, as opposed to simply reduce government burden. Education is broadly defined¹³⁵ and, in some instances, directly distinguished from “traditional” government run schools. As the Vermont Supreme Court has noted: “In light of . . . longstanding judicial interpretation . . . we can once again justly refuse to hold that the definition of ‘public school’ in [state statute] . . . controls for the purposes of real property taxation under [state statute.]”¹³⁶ The

128. *Id.* at 173–74.

129. *Id.* at 177–78.

130. *Id.* at 178 (emphasis added).

131. The court found persuasive the fact that, at trial in tax court, Chapel Hill’s witness admitted that it did not have these “traditional” features. *See id.* at 177–78.

132. *See id.* at 177.

133. *See id.* at 177–78.

134. The court also noted that the statute at issue did not specifically incorporate “day care facilities” in its definition of educational institutions. *Id.* at 176.

135. *See, e.g.*, CONN. GEN. STAT. § 12-81 (2017); IND. CODE §6-1.1-12-16 (2017). *See also* Wolfeboro Camp Sch., Inc. v. Town of Wolfeboro, 642 A.2d 928 (N.H. 1994) (finding that a camp school was “school” within meaning of exemption statute); Flathead Lake Methodist Camp v. Webb, 399 P.2d 90 (Mont. 1965) (finding that a summer camp run by church is an “educational” institution for exemption purposes).

136. *See, e.g.*, Town of Williston v. Pine Ridge Sch., Inc. 321 A.2d 24, 27–28 (Vt. 1974). *See also* Kurz v. Bd. of Appeals of N. Reading, 167 N.E.2d 627 (Mass. 1960) (definition of “educational use” for zoning issue); People *ex rel* Seminary of Our Lady of Angels v. Barber, 49 N.Y. Sup. Ct. 27, 30 (App. Div. 1868), *aff’d mem.*, 106 N.Y. 669, 13 N.E. 937 (1887) (“[T]he policy of the law has been, in this state from an early day, to encourage, foster, and protect corporate institutions of religious and literary character because religious, moral, and intellectual culture afforded by them were deemed, as they are in fact, *beneficial* to the public . . .”) (emphasis added). *But compare* to Coyne Elec. Sch. v. Paschen, 146 N.E.2d 73, 77 (Ill. 1959) (the education provided must lessen the tax burden by providing training that would otherwise have to be

broader benefit theory accords with the current existing research that highlights the significant benefits preschool education confers.¹³⁷

An excellent example of a court applying the benefit theory arose in *Janesville Day Care Center, Inc. v. Spoden*.¹³⁸ Here, a Wisconsin state court of appeals found the criteria for the education exemption was satisfied and overturned the assessor's initial decision.¹³⁹ In *Janesville* it was beyond dispute that the preschool had numerous educational features which included: a structured instructional curriculum, specific educational programs in "language and cognitive development, music, nature study, and basic math," social, and physical development.¹⁴⁰ Its curriculum was administered by teachers, all of whom obtained post-secondary education in early childhood and satisfied state licensing requirements.¹⁴¹ No one disputed that the children at the center were all capable of "significant learning" in the educational programming areas developed by the day care facility.¹⁴²

The city urged the court to adopt a strict burden theory of legislative intent and deny exemption eligibility.¹⁴³ It argued that none of those services reduced the government's burden and provided relief to the taxpayer.¹⁴⁴ To support this view, it contended that to justify exemption required a demonstration that the provided services were "traditional" or ones that the government typically offered through state run schools at taxpayer expense.¹⁴⁵ A traditional school did not provide naps, diaper changes, and opportunities for play, contended the city.¹⁴⁶ Thus, according to the city, "because the education provided by [the daycare] is not the kind which taxpayers usually pay for, and government does not provide similar preschool education[,] the exemption was not appropriate."¹⁴⁷

But the *Janesville* court sided with the preschool and determined benefit theory of legislative intent applied. It wrote: "[t]he legislature has chosen to lift the property tax burden from entities which fulfill a broad public, rather than private, interest."¹⁴⁸ The court declined to view "education" as compulsory government schooling and wrote:

provided by the government).

137. See *supra* Part I.A.

138. 376 N.W.2d 78 (Wis. 1985).

139. *Id.* at 83.

140. *Id.* at 82.

141. *Id.*

142. *Id.*

143. *Id.* at 83.

144. *Id.*

145. *Id.* at 80.

146. *Id.* at 82.

147. *Id.* at 83.

148. *Id.* at 82.

“educational activities may not be restricted to . . . a formal school setting in ivy-covered halls.”¹⁴⁹ To be sure, the organization must offer education that “benefits the general public directly and *in some way* lessen[s] the burdens of government.”¹⁵⁰ In this case, that standard was met.

The *Janesville* court concluded that, even under a burden view of legislative intent, exemption was appropriate. Preschool education, the court noted, *reduced* the burden to the public education system. Children attending “diverse and challenging preschool experiences” are better prepared for their public education, according to the court.¹⁵¹ This, in turn, “translates into *reduced burden* on the public schools by eliminating the need in many instances for counseling, testing, and speech therapy and by increasing the likelihood of the pupils’ academic success.”¹⁵² Although the benefit does not come in the form of relieving the government of a service it is otherwise required to provide, it is clear that preschools can and do provide fiscal benefits realized later in time.¹⁵³

The *Janesville* court’s analysis is prescient and foreshadows what social science research now reflects.¹⁵⁴ Today, as noted in prior Parts, preschools can deliver significant cost savings to the taxpayer and public good.¹⁵⁵ In this way, the *Janesville* decision echoes the consensus in early education policy that has most recently gained considerable traction.

Both *Chapel Hill* and *Janesville* also reflect the power and capacity of local officials over exemptions. In both cases the assessor’s recommendation as to eligibility was initially determinative (at least in the initial determination). For example, in *Chapel Hill*, the town assessor visited the facility, ultimately concluded it was not a “formal education center” and the court was reluctant to overturn that interpretation.¹⁵⁶ Similarly, the city of Janesville denied eligibility on the basis of opinions of the assessor’s office with respect to the educational qualities of the

149. *Id.* at 83 (citing *Int’l Found. of Emp. Ben. Plans, Inc. v. City of Brookfield*, 290 N.W.2d 720, 726 (Wis. Ct. App. 1980)).

150. *Id.* (emphasis added).

151. *Id.* at 83.

152. *Id.* (emphasis added).

153. *See* Part I.A. *See also* *Croton Cty. Nursery Sch. v. Coulter*, 121 N.Y.S.2d 755, 758 (N.Y. Sup. Ct. Westchester Cty. 1953), *rev’d* 127 N.Y.S.2d 416 (N.Y. App. Div. 1954) (noting that the state had deemed preschools as within the discretion of Boards of Education at the local level). The benefits of early education and preschools are more established now than in 1953 when *Croton* was decided, making the logic in that case stronger today.

154. *See* Garcia et al., *supra* note 22 (concluding that certain preschool programs deliver long term benefits and have considerable cost-benefit ratios).

155. *See supra* Part I.

156. *In re Chapel Hill Day Care Ctr.*, 551 S.E.2d 172, 173 (N.C. Ct. App. 2001) (noting further that, “based on his [assessor’s] analysis, he found that CHDCC was not entitled to a tax exemption”).

center in that case.¹⁵⁷ While the courts in the respective challenges reached different results,¹⁵⁸ both cases demonstrate the influence of an assessor's judgment regarding what constitutes "education."¹⁵⁹ Moreover, as a practical matter, many preschools do not have the resources to afford the high transaction costs of challenging exemption denials from assessor offices.

IV. POSSIBLE SOLUTIONS TO HARMONIZE EXEMPTION LAW AND EARLY EDUCATION POLICY

This Part considers some solutions to the issues presented above.¹⁶⁰ The merits and drawbacks of each are recognized, revealing that all are imperfect alternatives. Indeed, sound public policy, in the end, is guided by the extent to which government choices deliver the greatest possible benefit to the greatest number of people. That analysis is never clear cut and in the case of tax exemptions it can be particularly muddy. However, as exemptions relates to preschools, the benefit-to-cost ratio quite substantially weighs in favor of promoting certain early education programming. At the least it argues that government dollars invested in early education may be a wise investment.

Toward that end, a number of proposals are set forth below in the hope that they will provide a roadmap or at least signposts for state legislatures to stabilize the business environment in which preschools operate by ensuring a property tax exemption. Moreover, as many have noted, complications that arise with regard to exemptions can easily be solved by drafting solutions.¹⁶¹ Regardless, a primary aim of any solution must be to reduce the local taxing authorities' discretion in determining exemption eligibility. Local political concerns drive those decisions and, typically, those offices are poorly prepared to judge what qualifies as

157. *Janesville*, 376 N.W.2d at 82 (noting that the activities that the city's assessors observed non-educational activities, such as "napping, eating, diaper-changing, and playing" during their "brief" visits to the facility).

158. In *Chapel Hill*, the court concluded that the center did not rebut the assessor's opinion. 551 S.E.2d at 173–74. On the other hand, in *Janesville*, the court heard compelling testimony from educators in the public schools that ultimately rebutted the assessor's original assessment. 376 N.W.2d at 82 (concluding that there was "ample evidence" to support the conclusion that the center has "an educational purpose and function" and the custodial services are "incidental").

159. This is significant from a policy perspective—to control the definition in a policy is to control the application of the policy.

160. It should be noted that this Article does not contemplate other possible solutions, such as removing the exemption status of preschools and providing a direct subsidy. To be sure, such proposals have merit but go beyond the scope of this Article.

161. Note Harvard Law Review, *supra* note 110, at 299 (concluding that "[s]ome of the many problems in this field are merely technical in the sense that they may be resolved by careful draftsmanship").

“education” in society.

A. *Explicit Exemption of Preschools*

Legislatures could amend their tax exemption statutes so as to explicitly include “preschools” as “schools” or “educational institutions” for exemption purposes. At first blush, this seems like an easy solution. Some states have designed more specific exemption categories. The legislature in Virginia for example has designated various organizations as charitable and deserving exemption. These include the Boys and Girls Clubs,¹⁶² animal rescue organizations,¹⁶³ Future Farmers of America, and Future Homemakers of America, among others.¹⁶⁴

However, such proposals may be difficult to enact and continue complications with respect to implementation. Conceivably, local officials could continue to make their determination as to what constitutes a “preschool” or “educational institution” worthy of exemption. In addition, such an amendment might face considerable political headwinds and be difficult to pass through the legislature. If preschools were to lobby for specific exemptions, it may result in other interest groups seeking exemptions that could overly complicate passage of a bill. Moreover, it may raise the ire of taxpayers and certain groups who are mobilizing against the practice of exemption for nonprofits.

B. *Use Existing State Agencies to Create Regulatory Guidance*

States could develop regulatory guidance for tax collectors seeking to review exempt status of preschools. In theory, an appropriate state executive agency(ies) could issue guidance with that agency’s conclusion as to what constitutes an exempt eligible preschool. This guidance could come in various forms, but in the end would provide a reference upon which assessors must base any exemption decision. For example, a state department of revenue could collaborate with relevant state agencies, such as its department of early education and/or education to craft specific elements to obtain exemption. Such elements, by way of illustration, might include: accreditation, post-secondary training for teachers, use of recognized curriculum, among others.

There are substantial benefits to this approach. State government agencies with appropriate expertise can collaborate to develop workable standards without having to engage overtly in the political process of legislating. In addition, the administrative costs of this approach are low as states could presumably borrow from preexisting definitions that may

162. VA. CODE ANN. § 58.1-3611 (2014).

163. *Id.* § 58.1-3613.

164. *Id.* § 58.1-3619.

be applicable. In Massachusetts for example, the state Department of Early Education and Child Care specifically defines “early education and care programs.”¹⁶⁵ Notably, it considers early education and care together.

Importantly, this solution would curtail the degree of influence of local, particularized political agendas. In several cases, assessors rest their opinion on the contention that the program provides *custodial care* that outweighs its educational purpose.¹⁶⁶ If assessors must follow or defer to regulatory guidance, they will be foreclosed from viewing preschools through a simple custodial view. This approach places too much credence in an assessors view of what constitutes education and overlooks the important point that, at some level, any preschool involves custodial care, given the young ages of the population served. Indeed, all schools, public or private, have some custodial duty simply as a matter of course. For example, *Vernonia School District 47J v. Acton* held public schools exercise custodial and tutelary power over their students.¹⁶⁷ If public schools exercise custodial power over students, it would be consistent that preschools, as educational institutions, would also exercise custodial power over their students.

CONCLUSION

Property tax exemptions for nonprofit preschools may seem like a relatively obscure area of law and tax policy, but as a practical matter it is quite significant. Exemptions provide a lifeline for their operation, often providing a financial bridge between failure and survival for many preschools. As municipalities try to appease voters with low taxes, they have increasingly become more aggressive in denying property tax exemptions to preschools and nonprofits, in general. But these efforts could not come at a more auspicious moment; indeed, just as local political interests are threatening the existence of many existing

165. MASS. GEN. LAWS ch. 15D, § 1A (2017) (early education and care programs are defined as “a public or privately sponsored non-residential program, which provides for the care and education of school-aged children when not attending school, or infants, toddlers, or preschool children by someone other than members of the child’s family, and which involves and supports the child’s parents or guardians and is appropriate to the development of the child, including: in-home care, homemaker services, family child care homes, group child care homes, large family child care homes, full-day child care centers, part-day preschool programs and nursery schools, private kindergartens, mental health consultation and intervention programs, or temporary shelter care programs and programs which offer night care”).

166. See, e.g., *In re Chapel Hill Day Care Ctr.*, 551 S.E.2d 172, 173 (N.C. Ct. App. 2001) (ruling that the preschool failed to qualify as an educational institution because the assessor had concluded it was custodial in nature, notwithstanding certain apparent educational attributes).

167. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995).

preschools, state and federal policymakers are asking them to do more.

Preservation of the exemption is not a comprehensive approach to tapping the potential of early education program in preschools, by any stretch. More research, development, and resources are required. But the preservation of the exemption is no less significant and, in fact, will help stabilize preschools' viabilities as a more comprehensive effort at improving quality and access continues.